A BILLION HERE, A BILLION THERE—

A Review and Analysis of Synthetic Fuels Development
Under Title I of the Energy Security Act

Dana C. Contratto*

INTRODUCTION

A billion here, a billion there,
and soon it adds up to real money.¹

In calendar year 1979, the United States imported 19.28 quads of
energy,² including 13.53 quads of crude oil.³ To put these numbers in
perspective, the Nation’s total energy supply was 80.90 quads, and total
consumption was 78.02 quads,⁴ of which 2.75 quads were nuclear power, 15.08
coal, 19.86 natural gas and 37.02 refined petroleum products.⁵ It is clear
from these statistics that crude oil imports continue to play a very signifi-
cant role in the Nation’s energy supply mix—approximately 17 percent of
total supply and 37 percent of refined petroleum products consumed. More
importantly, however, past embargo experiences highlight the national secur-
ity implications of our overdependence on particular sources of imported
energy, not to mention the ongoing balance of payments implications of the
Nation’s outlay for the imported oil bill. These realities were the driving force
behind the recent congressional enactment of Title I of the Energy Security
Act,⁶ concerning synthetic fuels development.

In prefatory language, Congress found and declared that:

• “energy security for the United States is essential to the health of
  the national economy, the well-being of our citizens, and the mainten-
  ance of national security;”⁷

• dependence on foreign energy resources can be reduced by producing
  from domestic sources at least 500,000 barrels of crude oil per day of
  synthetic fuel by 1987 and at least 2,000,000 barrels per day by 1992;⁸

• achieving synthetic fuel production in a timely and enviromentally
  acceptable manner will require financial commitments beyond pri-
  vate capital sources and existing government incentives;⁹ and,

* B.S. Southern Illinois University, J.D. Washington University, Member, District of Columbia Bar, Partner,
Crowell & Maring, Washington, D.C.

¹ The source of this statement has not been definitively ascertained; it is commonly attributed to Senator Everett
Dirksen.

² Energy Information Administration, 1979, Ann. Rep. at 3. A “quad” is a measurement of energy equal to
one quadrillion British thermal units (Btu).

³ Other imported energy consisted of 4.11 quads of refined petroleum products, 1.27 of natural gas and 0.38 of
“other,” which includes bituminous coal, lignite, anthracite, coal coke and hydropower. Id.

⁴ 2.88 quads were exported from the United States, which accounts for the supply/consumption difference. Id.

⁵ Id. Interestingly, “we have separated the rate of growth of energy consumption from GNP growth...” Synthetic
Fuels Legislation: Hearings on S. 932, S. 1308 and S. 1377 Before the Senate Comm. on Energy and Natural


⁷ Id. § 100(a)(1), 94 Stat. 616.

⁸ Id. § 100(a) (2), 94 Stat. 616.

⁹ Id. § 100(a) (3), 94 Stat. 616.
• establishing a Synthetic Fuels Corporation of limited duration to
provide financial assistance in conjunction with private capital sources
for the production of synthetic fuel will facilitate the achievement of
synthetic fuel production.\textsuperscript{10}

Thus, the purposes of Title I of the Act are "to utilize to the fullest extent
the constitutional powers of Congress to improve the Nation's balance of
payments, reduce the threat of economic disruption from oil supply interrup-
tions and increase the Nation's security by reducing its dependence upon
imported oil."\textsuperscript{11}

With this ambitious charge, Congress launched a potentially $88 billion
"real money" incentive program for domestic synthetic fuels development.
It is not the purpose of this article to question the congressional findings,
declarations and purposes,\textsuperscript{12} but, rather, to analyze the statutory language
of the Act and to provide some indication of how the statute will be imple-
mented as well as analysis of the problems and opportunities which may arise
in that process.

CONCEPTUAL OVERVIEW

The Energy Security Act contains eight titles.\textsuperscript{13} The subject of this
article is Title I—Synthetic Fuel, which has two parts. Congress recog-
nized that it would take quite some time for the newly created Synthetic
Fuels Corporation to become operational and, accordingly, provided in Part
A of Title I for the immediate initiation of a "fast start" synthetic fuels pro-
gram under the Defense Production Act Amendments of 1980.\textsuperscript{14} The fast
start program authorizes federal financial assistance in the form of purchase,
price and loan guarantees and loans "to achieve production of synthetic fuel
to meet national defense needs."\textsuperscript{15} These authorities will, generally,\textsuperscript{16} expire
upon the President's determination "that the United States Synthetic Fuels
Corporation is established and fully operational consistent with"\textsuperscript{17} part B
of Title I—the United States Synthetic Fuels Corporation Act of 1980.\textsuperscript{18}

\textsuperscript{10}Id. § 100(k)(4), 94 Stat. 616.
\textsuperscript{11}Id. § 100(b)(1), 94 Stat. 616.
\textsuperscript{12}The approach taken in the Energy Security Act to synthetic fuels development was certainly not without sub-
stantive controversy. Some informative discussions and analyses of the issues involved can be found in CONGRESSIONAL RE-
SEARCH SERVICE, THE PROS AND CONS OF A CRASH PROGRAM TO COMMERCIALIZIE SYNTHETIC FUELS: REPORT PREPARED FOR THE
SUBCOMMITTEE ON ENERGY DEVELOPMENT AND APPLICATIONS OF THE HOUSE COMMITTEE ON SCIENCE AND TECHNOLOGY, 96TH CONG., 2ND SES. (COMM. PRINT 1980), COSTS AND ECONOMIC CONSEQUENCES OF SYNTHETIC FUELS PROPOSALS: HEARINGS BEFORE THE SUBCOMMITTEE ON SYNTHETIC FUELS OF THE SENATE COMMITTEE ON THE BUDGET, 96TH CONG., 1ST SESS. (1979); SYNTHETIC FUELS: HEARINGS BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 96TH CONG., 1ST SESS. (1979); ENERGY FINANCING LEGISLA-
\textsuperscript{13}Title I—Synthetic Fuels; Title II—Biomass Energy and Alcohol Fuels; Title III—Energy Targets; Title IV—Re-
newable Energy Initiatives; Title V—Solar Energy and Energy Conservation; Title VI—Geothermal Energy; Title VII—
Acid Precipitation Program and Carbon Dioxide Study; and, Title VIII—Strategic Petroleum Reserve.
\textsuperscript{14}Pub. L. No. 96-294, § 101, 94 Stat. 617 (hereinafter, the Energy Security Act public law number is used when ref-
ence is to the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061 et seq., as amended by the Defense Production
Act Amendments of 1980, unless otherwise noted).
\textsuperscript{15}Id. § 305(a)(1)(A), 94 Stat. 619.
\textsuperscript{16}Specifically, it is the President's authority to enter into any new contract or commitment which will "cease to be
effective." Id. § 305(k)(1), 94 Stat. 623. Contracts entered into under the fast start program may be renewed and extended
if Congress has appropriated the funds necessary to do so. Id. § 305(k)(2), 94 Stat. 623. Further, the President's emer-
gency authorities under the Defense Production Act Amendments, discussed infra, do not expire.
\textsuperscript{17}Id. § 305(k)(1), 94 Stat. 623.
\textsuperscript{18}Id. § 111, 94 Stat. 633.
Part B is intended to provide the principal implementing authorities by which the federally assisted synthetic fuels program will operate throughout virtually the remainder of this century. Central to this Part is the creation of a Synthetic Fuels Corporation (SFC) with responsibility to carry on federal financial assistance generally as under the fast start phase and to develop and submit to Congress by June 30, 1984, a comprehensive synthetic fuels production strategy. Prior to congressional approval of the comprehensive strategy, the funds available to the SFC are limited to $20 billion less whatever sums have been obligated pursuant to the fast start program. After congressional approval, however, the SFC may request additional authorizations of appropriations up to $68 billion. This funding mechanism effectively establishes a two phase SFC approach to synthetic fuels development with substantially larger amounts of financial assistance not available until as late as 1985 and subject to congressional approval.

The overarching goal of the legislation is to achieve “synthetic fuel production capability” equivalent to at least 500,000 barrels per day of crude oil by 1987 and...2,000,000 barrels per day...by 1992, from domestic resources. It is envisioned that financial assistance under the fast start and SFC phase one authorities would produce ten to twelve one-of-a-kind synthetic fuel production facilities, not “pilot” or “demonstration” plants, and that the SFC phase two effort would replicate upwards of another 40 commercial production plants based upon the experience gained. The magnitude of this endeavor has to be recognized as awesome. While it may conceivably achieve nothing, or fall short of the established goals, the size of the commitment alone ought reasonably to elicit some lasting, positive contributions to the energy supply dilemma. Whether those contributions will on balance “be worth it” is, indeed, the challenge of synthetic fuels development.

THE “FAST START” PROGRAM

The primary statutory authority for the fast start program is new section 305 of the Defense Production Act, which provides for the “develop-
ment of synthetic fuel for use for national defense purposes.”29 The President is directed30 to exercise the section 305 authorities “in consultation” with the Secretary of Energy,31 “through” the Department of Defense and

29 Id. § 305(a) (1) (A), 94 Stat. 619.

30 “Synthetic fuel” is defined as:

(A) any solid, liquid, or gas, or combination thereof which can be used as a substitute for petroleum or natural gas (or any derivatives thereof, including chemical feedstocks) and which is produced by chemical or physical transformation (other than washing, coking, or desulfurizing) of domestic sources of—

(i) coal, including lignite and peat;
(ii) shale;
(iii) tar sands, including those heavy oil resources where—

(I) the cost and the technical and economic risks make extraction and processing of a heavy oil resource uneconomical under applicable pricing and tax policies; and

(II) the costs and risks are comparable to those associated with shale, coal, and tar sand resources (other than heavy oil) qualifying for assistance under section 305 or section 306; and

(iv) water, as a source of hydrogen only through electrolysis.

(B) Such term includes mixtures of coal and combustible liquids, including petroleum.

(C) Such term does not include solids, liquids, or gases, or combinations thereof, derived from biomass, which includes timber, animal and timber waste, municipal and industrial waste, sewage, sludge, oceanic and terrestrial plants, and other organic matter.

30 Id. § 308(b)(1)(A)-(C), 94 Stat. 631.

31 “Synthetic fuel project” is defined as:

(A) any facility using an integrated process or processes at a specific geographic location in the United States for the purpose of commercial production of synthetic fuel. The project may include only—

(i) the facility, including the equipment, plant, machinery, supplies, and other materials associated with the facility, which converts the domestic resource to synthetic fuel;
(ii) the land and mineral rights required directly for use in connection with the facilities for the production of synthetic fuels;

(iii) any facility or equipment to be used in the extraction of a mineral or for direct and exclusively in such conversion;

(I) which—

(aa) is co-located with the conversion facility or is located in the immediate vicinity of the conversion facility; or

(bb) if not co-located or located in the immediate vicinity, is incidental to the project (except in the event of a coal mine where no other reasonable source of coal is available to the project); and

(II) which is necessary to the project; and

(iv) any transportation facility, electric power plant, electric transmission line or other facility—

(i) which is for the exclusive use of the project;

(II) which is incidental to the project; and

(III) which is necessary to the project, except that transportation facilities used to transport synthetic fuel away from the project shall be used exclusively to transport synthetic fuel to a storage facility or pipeline connecting to an existing pipeline or processing facility or area within close proximity of the project.

(B) Such term may also include a project which will result in the replacement of a significant amount of oil and is—

(I) used solely for the production of a mixture of coal and combustible liquids, including petroleum, for direct use as fuel, but shall not include—

(aa) any mineral right; or

(bb) any facility or equipment for extraction of any mineral;

(II) used solely for the commercial production of hydrogen from water through electrolysis; and

(III) a magnetohydrodynamic topping cycle used solely for the commercial production of electricity.

(i) Such a synthetic fuel project using magnetohydrodynamic technology shall only be eligible for guarantees under section 305 or section 306.

(C) For purposes of this paragraph—

(i) the term “exclusive” means for the sole use of the project, except that an incidental by-product might be used for other purposes;

(ii) the term “incidental” means a relatively small portion of the total project cost; and

(iii) the term “necessary” means an integrated part of the project taking into account considerations of economy and efficiency of operation.

30 Id. § 308(b)(2)(A)-(C), 94 Stat. 931-32.

31 The specific words used are “shall take immediate action to,” id. § 305(a) (1) (A), 94 Stat. 619, and “shall exercise the authority granted by this section,” id. § 305(a) (1) (B), 94 Stat. 619. An administration opposed to this approach to synthetic fuels development might find it quite difficult to avoid the affirmative commands set forth here.
other appropriate federal agencies, and "consistent with an orderly transition" to synthetic fuels development under the SFC.

The financial assistance "tools" available to meet the synthetic fuel development objectives of the fast start program include "contract[s] for purchases of, or commitments to purchase, synthetic fuel for Government use for defense needs," loan guarantees and loans. Any one or all of these assistance types are available to persons "participating in a synthetic fuel project." Further, loans and loan guarantees may be provided to any fabricator or manufacturer of any component of a synthetic fuel project.

There are no limits, per se, on the dollar amounts of financial assistance which may be awarded under section 305. Several limiting factors are, however, present. Loans and loan guarantees in excess of $48 million and $38 million, respectively, are subject to congressional review and possible disapproval. Purchases of and purchase commitments for synthetic fuels, though they may be made without regard to existing procurement laws, shall not be made at higher than established ceiling prices unless such synthetic fuel supplies "could not be effectively increased at lower prices or on terms more favorable to the Government or that such commitments or purchases are necessary to assure the availability to the United States of supplies overseas for use for national defense purposes." Further, purchase commitments and purchases may not be awarded to any person for more than

---

237 REVIEW & ANALYSIS

---

2 Id. § 305(a) (1) (B) (ii), 94 Stat. 619.
3 Id. § 305(a) (1) (B) (iii), 94 Stat. 619.
4 Id. § 305(b) (1) (A) (ii), 94 Stat. 619.
5 Id. § 305(b) (1) (A) (iii), 94 Stat. 619.
6 Id. § 305(b) (1) (A) (iv), 94 Stat. 619.
7 Id. § 305(b) (2) (A), 94 Stat. 619.
8 Id. § 305(b) (2) (B), 94 Stat. 619.
9 Id. § 305(c) (1), 94 Stat. 618.
10 Id. § 305(c) (3), 94 Stat. 619. Which invokes the congressional review, approval and disapproval procedures under section 307, 94 Stat. 628-31, with respect to "synthetic fuel actions" taken under the authorities of the Defense Production Act, as amended. A "synthetic fuel action" is specifically defined as "any matter required to be transmitted, or submitted to the Congress in accordance with the procedures of . . . section 307." The procedures Congress is to follow are self-explanatory.
11 Id. § 305(c) (1) (A), 94 Stat. 619-20.
12 Id. § 305(c) (2), 94 Stat. 620. Presumably "established ceiling prices" are prices established by law, such as natural gas prices under the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301 et seq. (Supp. II 1978), or crude oil prices under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. §§ 751 et seq. (1976). These particular laws, however, do not establish ceiling prices with respect to synthetic fuels. H.R. Rep. No. 94-1104, 96th Cong., 2d Sess. 235 (1980) (hereinafter cited as H.R. REP.); 15 U.S.C. § 3301 (1) (Supp. II 1978), S. Rep. No. 95-1126, 95th Cong., 2d Sess. 60 (1978) (Conference Report on the NGPA), E.C. ENERGY MANAGEMENT § 16,062 (1976) (regarding applicability of the EPAA to certain synthetic fuels). Section 305(c) (2) provides for this contingency: "if there are no established ceiling prices, currently prevailing market prices as determined by the Secretary of Energy." Of course, when it comes to production from "one-of-a-kind" synthetic fuels projects where the government is the only "market," the Secretary's task is not an especially easy one. Ultimately the price is likely to be that which "gets the project built." A negotiated price where the Secretary, buyer and project sponsors/sellers arrive at a mutually agreeable figure.
13 Pub. L. 96-294 § 303(c) (2). It seems that this language would indicate that a "negotiated," "meeting-of-the-minds" price, as suggested above, supra note 43, would be permissible, if not called for, where a lesser price would inhibit commercialization of synthetic fuels generally or, perhaps, a particular synthetic fuel production technology.
14 "Person" includes "any other person who is substantially controlled by such person (as determined by the Secretary of Energy)." Id. § 305(a) (4) (A) (i), 94 Stat. 620.
100,000 barrels per day crude oil equivalent of synthetic fuel, and such contracts for greater than 75,000 barrels per day are subject to congressional review and disapproval.

Other important, nonfinancial limitations and conditions are also included under the fast start authorities. Commitments and purchases are to be "made by solicitation of sealed competitive bids," but negotiated contracts are permitted where no, or no acceptable bids are received. Commitments and purchases must be for fuel from a synthetic fuel project located in the United States. All such contracts shall provide for review and possible renegotiation within 10 years of initial synthetic fuel production. Further, socioeconomic impacts on communities must be considered, but formal environmental impact statements are not required in the decision to award financial assistance. The Davis-Bacon Act "prevailing wage" standard applies to projects which receive certain awards of assistance. Finally, the authority to enter into any new contract or commitment under section 305 "shall cease" upon the President’s determination that the SFC is "established and fully operational."

Several interesting issues and consequences flow from the statutory authorities in section 305. First, while the language of the Act indicates that the Department of Defense (DOD) would be the lead fast start agency with merely a consultative role for the Department of Energy (DOE), it is clear from the legislative history and appropriations acts that in fact

---

94 Id.
95 Id. § 305(d) (4) (A) (i), 94 Stat. 620.
96 Id. § 305(d) (f), 94 Stat. 620.
97 Id. § 305(d) (2), 94 Stat. 620.
98 Id. § 305(d) (A) (B), 94 Stat. 629. The statutory language here explicitly refers to a "purchase of or commitment to purchase." There is no similar explicit reference to loans and loan guarantees, however, by definition a "synthetic fuel project" means a facility "at a specific geographic location in the United States." Id. § 308(b) (2) (A), 94 Stat. 631. supra note 25. Accordingly, the Conference Report notes. "In addition, loans and loan guarantees are limited to synthetic fuel projects in the United States." Conr. Rep. at 190.
100 Pub. L. No. 96-294 § 305(d) (6), 94 Stat. 621.
101 Id. § 305(b), 94 Stat. 622.
102 Id. § 303(i), 94 Stat. 622. This section provides that the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq., applies to synthetic fuel projects "funded in whole or in part, by a guarantee or loan entered into pursuant to section 305." The Conferers viewed this as applying Davis-Bacon to "any project assisted by any loan or loan guarantee contract awarded under section 305." However, purchase agreements would not be covered. Conr. Rep. at 192.
103 Pub. L. No. 96-294 § 305(k) (1), 94 Stat. 623. Contracts entered into before this date may be thereafter renewed and extended by the President, but only if Congress has specifically appropriated funds for such purpose. Id. § 305(k) (2), 94 Stat. 623. When and under what circumstances the SFC is "established and fully operational" is unclear. However, the conferees expect that the Corporation will be fully operational within nine months of June 30, 1980, and not later than fifteen months after June 30, 1980." Conr. Rep. at 192.
104 Pub. L. No. 96-294 § 305(a) (1) (B), 94 Stat. 619, states that the section 305 authorities shall be exercised "through" DOD, "in consultation" with DOE. The conferees, however, described DOD’s role as a "consultation requirement." Conr. Rep. at 189.
105 126 Cong. Rec. 88476 (daily ed. June 26, 1980) (Colloquy between Senators Domenici and McClure stating: "I agree that the President should delegate . . . to the Energy Department, since DOE already is aggressively implementing the alternative fuels program . . . Certainly, delegating such line responsibilities to DOD would require DOD to develop a duplicative capability and would slow the interim program significantly . . . Consequently, the best approach to delegation . . . would be to use DOE, with DOD providing overall program requirements and goals."). But see 126 Cong. Rec. H5390 (daily ed. June 26, 1980) (remarks of Rep. Moorhead, stating: "The legislation provides that these authorities be exercised through the Department of Defense in partnership with the Department of Energy . . . I am pleased to inform the House that the [DOD] is prepared to issue the first of a series of requests for synthetic fuel proposals shortly after the President signs the bill.").
106 Act of Nov. 27, 1979, Pub. L. No. 96-126, 93 Stat. 954. Where implementation of the alternative fuels produc-
the reverse is true. DOD's role is basically one of purchaser of synthetic fuel and, accordingly, advisor to DOE with respect to what specific fuels are needed at what time. Second, it is also clear that the fast start program is national defense oriented. That is, the idea is to develop "mobility synthetic fuels" to replace DOD conventional fuels. Consequently, the section 305 program would appear plainly skewed in favor of liquefaction as opposed to gasification projects. As a practical matter, however, this favoritism is not particularly determinative of all projects ultimately chosen to receive financial assistance since only $3 billion of approximately $5 billion available for synthetic fuel production projects is so restricted under the fast start appropriations.

A third issue raised involves the ability of DOE to contract for synthetic fuel purchases and commitments "without regard to" procurement law limitations. This provision was subject to heated debate in Congress, and its meaning still remains clouded. At the least, it would seem to provide some additional flexibility to the federal government to purchase at prices greater than "the lowest bid," yet probably not permit waiver of long-stand-

---


63 See Draft Solicitation, supra note 59, at App. A. Though in one sense considered a part of the fast start program, see Pub. L. No. 96-294 § 305(a)(1)(A) and (0)(1), 94 Stat. 619 and 621. CONF. REP. at 189-91; 126 CONG. REC. S8476-77 (daily ed. June 26, 1980).

ing, social welfare objectives of government procurement. In any event, the
 provision is permissive, and DOE is unlikely to waive at its own initiative any more of the "procurement laws" than is necessary to achieve synthetic
 fuel production objectives. The presence of the government's ability to
 waive such laws, however, could encourage private enterprises to seek waiver
 of particular laws in the assistance award negotiations process which may
 present special costs to a project.

Fourth, the National Environmental Policy Act (NEPA) waiver contained
 in section 305 is quite narrow. The congressional intent is clear that the
 "major federal action" for which NEPA's environmental impact statement
 requirement is not to apply is the governmental decision to provide
 financial assistance to a synthetic fuels project. Given section 305's require-
 ment to consider "socioeconomic impacts," DOE's likely environmental
 requirements for responses to assistance solicitations and the fact that it is almost impossible even to imagine a synthetic fuel production facility
 that would not require some nonfinancial, federal air, water, right-of-
 way, etc. permit which necessitates a NEPA environmental impact state-
 ment, the NEPA waiver is very unlikely to affect adversely environmental
 interests and simply mitigates duplicative delay in project implementation.

Finally, it is worth noting that Congress has hardly resolved itself to
 a limited role in the synthetic fuels development process. In several instances projects are subject to an added dimension of political review

---

68 DOD advised that the following "could be considered as candidates for waiver:"
1. Armed Services Procurement Act provisions related to: preference for formal advertising (10 U.S.C. §§ 2304(a)); negotiation of contracts (10 U.S.C. §§ 2304(a)); conduct of formal advertising (10 U.S.C. §§ 2303);
2. "Truth-in Negotiation Act" (10 U.S.C. §§ 2306); Competition in Negotiated procurement (10 U.S.C. §§ 2306);

We are not aware of any waivers of these statutes under the Defense Production Act in the recent past. Further, we anticipate being able to accomplish any future procurement under Title III of the Act under normal procurement procedures.

Letter from Robert F. Trimp to John D. Dingell, June 25, 1979, reprinted in Synthetic Fuels Commercialization: Hearings, supra note 51, at 201. 125 Cong. Rec. H5151 (intent not "to repeal or otherwise waive laws with respect to labor law protections or small business set-asides or environmental laws or any other laws") and H5152 (intent to waive the Antideficiency Act) (daily ed. June 26, 1979).


Pub. L. No. 96-294 § 305(d) (6), 94 Stat. 621.

E.g., Draft Solicitation, supra note 59, at III-20—III-22 (concerning environmental, regulatory compliance) and IV-4 (establishing "Environmental Acceptability" as an evaluation criterion for project selection).


Pub. L. No. 96-294 § 307, 94 Stat. 628-31, as well as the appropriations process discussed infra.

E.g., id. § 305(b) (3), 94 Stat. 619 (regarding loans and loan guarantees); id. § 305(d) (4) (A) (ii), 94 Stat. 620 (regarding certain purchases or commitments to purchase).
which can be comprehensive and potentially decisive. The point simply is that Congress has not delegated for all time and without special oversight its power to control much of synthetic fuel development.

There are other provisions relevant to the section 305 program, such as water rights, government contractual liability, specifics of federal agency purchases and valuation of government commitments, which are not discussed here. By and large, these are fairly self-explanatory and not critical to an understanding of the assistance process overall. However, section 306, which is also a part of the fast start authorities as well as a permanent standby program, merits further explication.

Section 306 provides that the President may, in certain national energy supply shortage circumstances, undertake synthetic fuels production activities with, inter alia, the government as owner of synthetic fuels facilities and projects. Depending upon the President's determination of the severity of the shortage, congressional review of his actions may or may not be a prerequisite to the invocation of such authorities, and, in any event, his determination is not reviewable in court. The President's specific authority to act pursuant to his shortage determination, is, however, not unbridled. For instance, the President may not use his section 306 authority to contract for purchases or commitments, to issue guarantees, to make loans or to require fuel suppliers to provide synthetic fuel, unless the use of such authority has been authorized by the Congress in an Act hereinafter enacted by the Congress. And, in even more restrictive language, the President may not use his authority to install various facilities in government-owned plants, to install government-owned facilities in private plants or to undertake government synthetic fuel projects unless the proposed exercise of authority has been specifically authorized on a project-by-project basis in an Act hereinafter enacted by the Congress and funds have been specifically appropriated by the Congress for purposes of exercising such authority. If all of the foregoing checks are

---

86E.g., 125 Cong. Rec. H5113 (daily ed. June 26, 1979) (remarks by Rep. Reuss that congressional review will "insure that Congress has a full opportunity to consider environmental and economic aspects") and H5442 (daily ed. June 26, 1979) (remarks by Rep. Ottinger that congressional review will "assure that subsidies do not exceed 100 percent of the costs").


88Id. § 305(j), 94 Stat. 922.

89Id. § 305(g) (1), 94 Stat. 921.

90Id. § 305(d) (5), 94 Stat. 921.

91Id. § 305(g) (2), 94 Stat. 921-22.


95Id. § 306(a) (1) (A) (I)-(iv), 94 Stat. 624.

96Id. § 306(a) (2), 94 Stat. 923 (if the shortage is determined to be greater than 25 percent, the section 306 authorities may be invoked on the date that determination is reported to Congress without regard to the normal section 307, 30 day congressional review period which applies with full force where the shortage is less than 25 percent).

97Id. § 306(a) (3), 94 Stat. 623.

98Id. § 306(c) (1) (A) (I)-(iv), 94 Stat. 624.

99Id. § 306(c) (6) (A), 94 Stat. 625.

100Id. § 306(c) (6) (B), 94 Stat. 625.
satisfied, there may then be government-owned, contractor-constructed and -operated synthetic fuels plants under section 306.94

Since the section 306 authority does not lapse as does section 305 upon the SFC becoming operational,95 it provides an in-place mechanism by which the President could expeditiously propose action in a “true” supply emergency.96 However, the congressional constraints upon the use of section 306 authorities essentially require further legislation by Congress even in such emergency circumstances. Given the potential for abuse,97 these constraints are understandable and appropriate.

UNITED STATES SYNTHETIC FUEL CORPORATION

Part B of Title I of the Energy Security Act establishes the United States Synthetic Fuels Corporation,98 the “entity” through which financial assistance will be provided for the development of synthetic fuel99 production facilities. The structure and nature of the Corporation raise some interesting issues which can affect substantive synthetic fuels financing activities by the Corporation. This article addresses the general outlines of those organizational features and identifies some of the potentially troublesome provisions. The primary focus is on the statutory provisions which are more directly related to the Corporation’s financial assistance activities.

The “Corporation”

The United States Synthetic Fuels Corporation is the congressionally tailored entity which will implement the synthetic fuel project financial assistance provisions under Part B of the Act. Congress expected it “to function much like a private corporate entity such as a bank or other financial institution.”100 However, the Corporation clearly is not a private corporate entity such as a bank and, for that matter, does not even function “much like” one. Certainly it possesses some features of a private corporation, but significant governmental attributes are also present.

The Corporation’s powers are vested in its Board of Directors101 which consists of seven members, including a Chairman,102 who is also the chief executive officer.103 The Chair is a full-time director’s position104 and, as with other full-time directors, shall hold no other salaried positions;105

---

94 Notably, “Part A provides no authorization of appropriations for carrying out the provisions of the section.” Conf. Rep. at 194
95 Supra note 85.
96 There can hardly be much disagreement about whether a 25 percent energy supply shortage would be a calamity of the highest order.
97 The governmental powers with respect to private interests are facially omnipotent. Pub. L. No. 96-294 § 306 (c) (1) (A) (iv) and (v), 94 Stat. 624.
98 Id. § 115(a), 94 Stat. 636.
99 Id. § 112(17), 94 Stat. 635. The definitions of “synthetic fuel” and “synthetic fuel project” are basically the same under both Parts A and B of Title I. Compare supra note 29 with Pub. L. No. 96-294 § 112(17) and (18), 94 Stat. 934-36.
100 Conf. Rep. at 203.
101 Pub. L. No. 96-294 § 116(a) (1), 94 Stat. 636, “except those functions, powers, and duties vested in the Chairman by or pursuant to this part.” E.g., id. §§ 116(a) and 119(a), 94 Stat. 637 and 639.
102 Id. § 116(a) (2), 94 Stat. 636.
103 Id. § 117(a), 94 Stat. 638.
104 Id. § 116(a) (2), 94 Stat. 636.
105 Id. § 116(c), 94 Stat. 637.
directors other than the Chairman may, however, be part-time. Directors are appointed by the President with the advice and consent of the Senate, and no more than four may be from any one political party. Their removal from office may only be for "neglect of duty, or malfeasance in office." The Board must meet at least quarterly and its actions must be effectuated by a majority vote of all Board members. Further, the Board must meet at least semiannually with its Advisory Committee of chief officers of several major federal departments, but, during such meetings, the Advisory Committee members are governed by the conflicts of interest laws of their respective agencies with respect to "meetings with representatives of a private corporation." Finally, there are numerous Corporation "powers" which would normally be expected to exist with a private corporate entity. These include the powers to adopt bylaws and a corporate seal, to make agreements with private and governmental entities, to procure, hold and dispose of real and personal property, to sue and be sued, to hire employees and fix their compensation, to indemnify directors and officers, etc.

Viewed only in light of the foregoing description and excepting, of course, the presidential appointment and dismissal authorities, the SFC could be mistaken for a private corporate entity—an independent, single-purpose management which will be free of the continual policy redirections, priority changes, and bureaucratic and administrative tangles which have defeated the implementation of previous synthetic fuel initiatives. However, Congress did not stop with the description so far presented, nor could it reasonably be expected to do so given the substantial involvement of the public purse in the Corporation’s synthetic fuels development assistance efforts.

Thus, the Corporation’s meetings must be open to the public and preceded by reasonable public notice. Minutes shall be prepared of “any meeting closed to the public” and shall be made “promptly” available to the public. While the Corporation may fix the compensation of individual officers and other categories of employees, government level compensation for comparable positions must be considered and compensation for some SFC positions is subject to review and disapproval by the President.

106 Id. Part-time directors may not hold full-time salaried positions in federal, State or local government. Id.
107 Id. § 116(a)(2), 94 Stat. 636.
108 Id. § 116(b)(3), 94 Stat. 637.
109 Id. § 116(e), 94 Stat. 637. The "conferees intend that the 'majority' be a majority of those members then serving on the Board." 126 CONG. REC. S8478 (daily ed. June 26, 1980) (colloquy between Senators Domenici and McGee).
110 Id. No. 96-294 § 123(c), 94 Stat. 644.
111 These officers are the secretaries of Treasury, Defense, Interior and Energy, the Administrator of the Environmental Protection Agency and the Chairman of the nonexistent Energy Mobilization Board. Id. § 123(b), 94 Stat. 644.
112 Id. § 123(d), 94 Stat. 644.
113 Id. § 171(a), 94 Stat. 673.
115 Pub. L. No. 96-294 § 116(d)(1), 94 Stat. 637. "Meetings may be closed to the public only for reasons described in the section, which reasons are either identical or comparable to provisions which permit agency meetings to be closed by the Government under the provisions of the Sunshine Act (5 U.S.C. 552b) applicable to the Corporation. However, in patterning the grounds for the closing of meetings after those provided by that statute, the Conferees do intend that the body of law developed in litigation construing the exemptions provided in subsection (c) of Section 552(b) of Title 5 serve as precedent for construing the exemptive provisions of subsection 116(f)." CONG. REP. at 204-05.
117 Id. § 117(b)(2), 94 Stat. 638.
financial disclosure provisions of the Ethics in Government Act apply to certain officers and employees of the Corporation and "to the Corporation as if it were a Federal agency." Public access to "any information regarding [the Corporation's] organization, procedures, requirements, and activities" is required, with certain Freedom of Information Act-like exemptions from disclosure.

The Corporation is distinct from a private entity in still more fundamental respects. Of course, a basic distinction is that its capital is raised directly from the United States Treasury. Often, the relationship of the Corporation vis-a-vis Federal agencies is also governmental in character. For example, the Department of Energy may provide technical assistance to the Corporation and the Defense Department must be consulted as to its fuel supply requirements. Moreover, "the Corporation may seek the advice and recommendations of, or information or data maintained by, any Federal department or agency to assist the Corporation in determinations made" by it. And, the information requested must be provided.

Further, the Corporation's relationship vis-a-vis federal and State laws frequently confers or implies a governmental status. With some exceptions, the Corporation is exempt from federal, State and local taxes. It is treated as an "agency of the United States" for purposes of the Davis-Bacon Act, securities laws, and antitrust laws, and it is authorized to exercise the sovereign power of eminent domain under certain circumstances.

Finally, the Corporation functions in the context of very pervasive and significant oversight controls. Congress provided for a Corporation Inspector General, with wide-ranging oversight responsibilities and largely independent of the Board of Directors. And, both the Attorney General and the Comptroller General are authorized to bring enforcement actions against the Corporation if it engages in or adheres to "any action, practices or policies..."
inconsistent with the provisions of Part B and against the Corporation or any other person if either "violate[s] any provision of [Part B] or . . . obstruct[s] or interfere[s] with any activities authorized by [Part B], or . . . refuse[s], fail[s], or neglect[s] to discharge the duties and responsibilities under [Part B], or . . . threaten[s] any such violation. . . ." In addition, detailed and frequent Corporation audit and reporting provisions are included. As if all this were not sufficient oversight control, Congress interposed itself as the ultimate arbiter of numerous decisions made by the Corporation.

The overriding concerns which evolve from this description of the Corporation are twofold. First, what is the legal status of the Corporation, that is, is it a government agency or not? And, more importantly, the second concern, what impact will the various, sometimes governmental, sometimes private corporation attributes have on the Corporation's raison d'être, the achievement of the Act's synthetic fuel production capability goals?

As to the first matter, perhaps the most accurate shorthand description of the status of the Corporation is that it is "an agency in the form of a corporation." Beyond the statutory language mentioned previously concerning the applicability of specific laws to the Corporation, the precise meaning of this shorthand phrase as applied to particular circumstances must, unfortunately, await the development of those circumstances and their disposition through litigation which will inevitably arise as the interests of the Corporation as an agency of the federal government conflict with its interests as a private financial institution charged with achieving development of synthetic fuel production projects.

How the differing and at times conflicting interests of the Corporation will affect its synthetic fuels mission is no less difficult to assess. Through the Corporation, Congress plainly intended to, and did, create something other than a "Government-as-usual" approach to federal stimulation of industrial development. By the same token Congress also placed, in substance, many of the same public accountability constraints on the Corporation as would apply in the usual course to a federal agency. The Corporation's success will, thus, turn in part upon its ability to execute to the fullest potential its synthetic fuels development responsibilities in concert with its public accountability.

---

113Id. § 107(a), 94 Stat. 672 (emphasis added).
114Id. (emphasis added).
115Id. § 177(b), 94 Stat. 678.
116Id. § 177(c)(d) and (e), 94 Stat. 678-79.
119126 Cong. Rec. H5719-21 (daily ed. June 26, 1980) (remarks of Rep. Dingell, highlighting, but not definitively resolving the conflict: compare "Whenever the interest of the Government is sufficiently involved, the courts have disregarded the corporate form and protected those interests. . . ." with "Moreover, it should be emphasized that the Synthetic Fuels Corporation is an entity which is distinct from the Federal Government. . . .").
accountability responsibilities. Ultimately, however, the real measure of its success will depend mainly upon which synthetic fuels projects it supports. And, irrespective of public accountability duties, the Corporation has been vested, as discussed infra, with significant discretionary latitude in its choice of projects and its use of the several authorized financial assistance mechanisms. The accountability “constraints” do not substantively burden this discretion to an undue extent, and, as would be expected, the “success” of the Corporation will rest, in short, with the ability of its Board of Directors to make reasoned, judicious choices among competing projects and technologies.

Synthetic Fuels Development
Under the Corporation

The national synthetic fuel production capability goal is to achieve the equivalent of 500,000 barrels per day of crude oil by 1987 and 2,000,000 barrels per day by 1992 from domestic resources. This goal is to be pursued by the Corporation through the solicitation of proposals for synthetic fuel projects from the private sector and through the award of financial assistance to qualified concerns submitting acceptable proposals. If the solicitations process is not fruitful, the Corporation may negotiate financial assistance arrangements for synthetic fuel projects. Only after exhausting these procedures may the Corporation even propose to undertake a synthetic fuels project itself.

This general process is guided by a comprehensive synthetic fuels production strategy. Pending the Corporation’s proposal of that strategy and Congress’ approval of it, the Corporation is to employ its financial assistance authorities in a manner which incorporates “a technological diversity of processes, methods and techniques for each domestic resource that offers significant potential for use as a synthetic fuel feedstock” and which offers “the potential for achieving the national synthetic fuel production goal.” The intent here is to provide the Corporation a wide and diverse experience and data base from which to structure the comprehensive strategy.

The comprehensive strategy is required to be adopted and submitted to
Congress no later than June 30, 1984. Specifically, the strategy is to:

- contain the Board's recommendations "on the Corporation's objectives and schedules for their achievement";
- address and emphasize private sector responsibilities necessary to achieve the national synthetic fuel production goals;
- detail how the Corporation's recommended involvement will be limited and ultimately terminated at a future time certain;
- include an investment strategy prospectus justifying additional Corporation funding by Congress;
- review and draw conclusions as to the economic and technological feasibility and environmental effects of projects which received assistance;
- recommend the specific mix of technologies and resource types which the Corporation will support after congressional approval of the strategy.

If the strategy, so submitted, is not approved by a joint resolution of Congress, the Corporation, as a practical matter, is "out of business."

Several important points should be noted. First, as mentioned previously, congressional approval of the comprehensive strategy is an absolute condition precedent to the Corporation receiving up to $68 billion in addition to the initial $20 billion authorized funding level. Second, the $68 billion figure is a maximum, a ceiling. Congress may approve less, in which event the Corporation could, later, seek more up to the ceiling amount. Third, once Congress approves the comprehensive strategy, the Board may not "substantially alter" the use of funds under the strategy without congressional approval. Lastly, given the four to seven years construction time for major synthetic fuel projects and the pace of the present fast start program, the ability of the Corporation to submit an explicit, comprehensive strategy, fully responsive to the intent of Congress, by June, 1984 or even a year later, is open to serious question. A reasonable approach to this timing problem may require the Corporation to submit initially something quite less than a "comprehensive" strategy and proceed thereafter.

---

120Pub. L. No. 96-294 § 126(b)(1)(C), 94 Stat. 645. This deadline may be extended upon the Corporation's request, subject to congressional disapproval. Id. § 126(d)(1), 94 Stat. 649.
120Id. § 126(b)(A), 94 Stat. 645.
120Id. § 126(b)(B), 94 Stat. 645.
120Id. § 126(b)(C), 94 Stat. 645-46.
120Id. § 126(b)(D), 94 Stat. 646.
120Id. § 126(b)(E), 94 Stat. 646.
120Id. § 126(b)(F), 94 Stat. 646.
120Id. § 126(c)(1)(A), 94 Stat. 648.
120Id. § 126(c)(1)(A), 94 Stat. 648.
120Id. § 126(c)(11), 94 Stat. 648. Of course, it is also a creature of Congress and may subsequently be changed by Congress.
120Id. § 126(c)(1)(A), 94 Stat. 648.
120Id. § 126(d)(3), 94 Stat. 649.
120Supra note 33; see also Draft Solicitation, supra note 59, at II-2 (preliminarily setting Dec. 1, 1980, as deadline for project assistance proposals).
120Supra note 122.
by appropriate amendments thereto as data from operating synthetic fuel projects become available.\textsuperscript{156}

Whatever the disposition of the comprehensive strategy, the Corporation will, nonetheless, occupy a significant place in synthetic fuels development. Its financial assistance authorities and constraints are the remaining critical components of the Act.

The Corporation is, generally, directed to solicit proposals for the construction and/or operation of synthetic fuel projects.\textsuperscript{167} Proposed solicitations must be submitted to the Advisory Committee for review and comment 30 days prior to solicitation issuance.\textsuperscript{168} By December 31, 1980, the Corporation is directed to make its initial set of solicitations which “encompass a diversity of technologies . . . for each potential domestic resource as well as all of the forms of financial assistance authorized . . . .”\textsuperscript{169} All solicitations are to be conducted “so as to encourage maximum open and free competition.”\textsuperscript{170} And, the Board is to set forth its general evaluation criteria in the solicitations themselves.\textsuperscript{171}

These general requirements and procedures do not appear to favor inherently one type of project over any other. There is, however, a significant statutory feature in this part of the Act that can provide an advantage to a particular project. This is the provision requiring the Corporation to give priority consideration to projects in States which indicate an “intention to expedite all regulatory, licensing, and related government agency activities”\textsuperscript{172} with respect to a project. Given the cost of capital, current inflation rates and finite limits on Corporation assistance, “priority consideration” can be the competitive edge that ultimately permits one project to proceed while others languish.\textsuperscript{173}

In addition to the above solicitation requirements, the Act provides certain rules of general applicability to Corporation financial assistance and specific applicability to particular types of assistance.\textsuperscript{174} The Corporation is authorized to provide financial assistance to a qualified concern “whose proposal is most responsive to a solicitation . . . and is most likely to advance the purposes of [Title I of the Act], including consideration of price and other factors.”\textsuperscript{175} Whenever “practicable and provident” financial assistance shall be awarded on the basis of competitive bids,\textsuperscript{176} but, upon making certain

\textsuperscript{156}Pub. L. No. 96-294 \S 126(a)(3), 94 Stat. 649.
\textsuperscript{157}Id. \S 127(a)(1), 94 Stat. 649.
\textsuperscript{158}Id. \S 127(a)(2), 94 Stat. 649.
\textsuperscript{159}Id. \S 127(a)(3), 94 Stat. 649-50. Under certain findings and subject to congressional disapproval, the Corporation may award financial assistance to two projects in the Western Hemisphere but outside the United States. Id. \S 179, 94 Stat. 679. Not more than $2 billion is authorized for this purpose, and that authorization terminates upon approval of the comprehensive strategy. Id. \S 179(c), 94 Stat. 680.
\textsuperscript{160}Id. \S 127(b), 94 Stat. 650. Any concern may request the Board to issue a solicitation for a “general type” project. Id. \S 127(c), 94 Stat. 650.
\textsuperscript{161}Id. \S 127(d), 94 Stat. 650.
\textsuperscript{162}Id. \S 127(e), 94 Stat. 650.
\textsuperscript{163}Id. \S 131(a), 94 Stat. 654.
\textsuperscript{164}Id. \S 131(a), 94 Stat. 654-58.
rather onerous findings\textsuperscript{177} and reporting those findings to specified congressional authorities, the Board may negotiate contracts for financial assistance for a project.\textsuperscript{178}

With respect to proposals in response to solicitations, the Board is to give preference in selection to those which represent "the least commitment of financial assistance by the Corporation and the lowest unit production cost within a given technological process, taking into account the amount and value of the anticipated synthetic fuel products."\textsuperscript{179} In decreasing order of priority, the least commitment preference requires the Corporation to rank the available assistance types as follows:

1. price guarantees, purchase agreements or loan guarantees;
2. loans; and,
3. joint ventures.\textsuperscript{180}

In addition, the Corporation is to consider the following other relevant factors in awarding assistance:

1. diversity of technologies;
2. potential cost per barrel or unit of production of synthetic fuel from the proposed project;
3. production potential of the technology considering its potential for replication, extent and geographic distribution of the resource and the potential end use; and,
4. potential of the technology for complying with applicable regulatory requirements,\textsuperscript{181} i.e., "licensability."

In many respects, these factors are admittedly imprecise. They do, nevertheless, provide some statutory indicia as to how the Corporation will rank proposed projects. Potential applicants for financial assistance should accordingly recognize these realities and carefully measure any proposed project against them.

Once obtained, financial assistance from the Corporation is impressively sound—"general obligations of the United States backed by its full faith and credit"\textsuperscript{182} and "incontestable in the hands of the holder."\textsuperscript{183} Understandably then, Congress established numerous permissible and mandatory conditions and limits with respect to awards of financial assistance by the Corporation. Again, the delicate congressional balancing of public accountability (financial and otherwise) and synthetic fuels development goals is at work.

Specific "balancing" provisions take many forms. Assuming a properly submitted application for assistance\textsuperscript{184} which satisfies the substantive tech-

\textsuperscript{177}Id. \S 131(b)(4), 94 Stat. 655. The Board must find that the project is "essential" to achievement of the section 125 synthetic fuels production goals and the production strategy requirements of section 126(a) and that competitive bids are "not appropriate." Id. This is quite obviously a more difficult standard to meet than the "no acceptable bids received" standard for negotiated purchases and commitments to purchase under the section 305 fast start program. \textit{Compare id.} \S 131(b)(4), 94 Stat. 655 with id. \S 305(d)(2), 94 Stat. 620.

\textsuperscript{178}Id.

\textsuperscript{179}Id.

\textsuperscript{180}Id.

\textsuperscript{181}Id.

\textsuperscript{182}Id.

\textsuperscript{183}Id.

\textsuperscript{184}Id.

Thus, any assistance received by a "project" or "person," among other modifications to a contract, the fast start program, shall be valued by the Corporation, based upon the Corporation’s estimate of its maximum potential liability.

For any year it is equal to new and continuing sums and less fast start program sums. Thus, the term reasonably equates to "total authority" plus unobligated balances brought forward from prior years. In the context of the Energy Security Act, the issue is far from academic since it does determine the maximum assistance available to a project or person.

Person includes "such person's affiliates and subsidiaries." Id. Also, for purposes of determining compliance with this section, assistance to a project "shall be allocated among the project participants in direct proportion to each person's participation in such project." Id. § 131(j)(2), 94 Stat. 656.

These amounts are computed as follows:

- (A) loans shall be counted at the initial face value of the loan plus such amounts as are subsequently obligated pursuant to section 132(a)(3);
- (B) loan guarantees shall be counted at the initial face value of such loan guarantee (including any amount of interest which is guaranteed under such loan guarantee) plus such amounts as are subsequently obligated pursuant to section 133(a)(3);
- (C) price guarantees and purchase agreements shall be valued by the Corporation as of the date of each such contract based upon the Corporation’s estimate of its maximum potential liability;
- (D) joint ventures and Corporation construction projects shall be valued at the current estimated cost to the Corporation, as determined annually by the Corporation; and
- (E) any increase in the liability of the Corporation pursuant to any amendment or other modification to a contract for a loan, loan guarantee, price guarantee, purchase agreement, joint venture, or Corporation construction project shall be counted.

Id. § 132(b)(1)(A)-(E), 94 Stat. 668.

Id. § 131(k)(1), 94 Stat. 656.

Id. § 131(k)(2), 94 Stat. 656.

Id. § 131(k)(3), 94 Stat. 656.

Id. § 131(p), 94 Stat. 657.

E.g., promotion of competition, id. § 131(h), 94 Stat. 657.

See, e.g., former § 131(j), 84 Stat. 15; 94 Stat. 656.

This phrase is not defined, per se, in the statute. However, section 152, 94 Stat. 669, is entitled “Limitations on Total Amount of Obligational Authority,” and it limits the Corporation to an aggregate $20 billion obligations level. These amounts are computed as follows:

- (A) loans shall be counted at the initial face value of the loan plus such amounts as are subsequently obligated pursuant to section 132(a)(3);
- (B) loan guarantees shall be counted at the initial face value of such loan guarantee (including any amount of interest which is guaranteed under such loan guarantee) plus such amounts as are subsequently obligated pursuant to section 133(a)(3);
- (C) price guarantees and purchase agreements shall be valued by the Corporation as of the date of each such contract based upon the Corporation’s estimate of its maximum potential liability;
- (D) joint ventures and Corporation construction projects shall be valued at the current estimated cost to the Corporation, as determined annually by the Corporation; and
- (E) any increase in the liability of the Corporation pursuant to any amendment or other modification to a contract for a loan, loan guarantee, price guarantee, purchase agreement, joint venture, or Corporation construction project shall be counted.

Id. § 132(b)(1)(A)-(E), 94 Stat. 668.
viability of the project, and further, . . . the project is necessary to achieve the purposes of [Title I] and the provisions of [Part B].” A proposed project’s “need” for financial assistance shall include consideration of tax credits directly associated with the project, financial assistance from federal or State agencies, and potential revenues from non-synthetic fuels project products. Where the project is proposed by a person whose rates are regulated or where the project’s production is to be sold to a person whose rates for use or transportation of such production is regulated, the Corporation may consider whether the relevant regulatory bodies “are likely to issue a ratemaking decision which will protect the financial interests of the investors and the Corporation.” A premise underlying these constraints is that those in the synthetic fuels industry who stand to gain from project financial assistance should only receive the level of assistance necessary to undertake a project and should not be fully insulated from financial risk. Indeed, the Corporation “shall impose such terms and conditions . . . necessary to assure that any investors having an ownership or profit interest in the synthetic fuel project bear a substantial risk of after tax loss in the event of any default or other cancellation of the synthetic fuel project.”

Perhaps one of the Corporation’s most arduous tasks will involve reconciling its minimal capital markets impact objective with its basic synthetic fuels financial assistance objectives, including fair risk-sharing by project equity participants. This dilemma is squarely put in the context of the “credit elsewhere test” which calls upon the Corporation to insure that its assistance in the form of loans, loan guarantees and joint ventures “encourages and supplements, but does not compete with or supplant, any private capital investment which otherwise would be available to a proposed synthetic fuel project on reasonable terms and conditions which would permit such project to be undertaken.” If the Corporation is truly a “financier of last resort,” is there not reason for anxiety about the fundamental soundness of projects which seek its support? And, if the Corporation attempts, through interest rates and other terms and conditions of assistance awards, to mitigate that anxiety or obtain remuneration commensurate there-to, does it not tread closely to providing financial assistance which would otherwise be available from the private sector? It remains to be seen how the Corporation will accommodate these considerations consistent with congressional intentions and without a frontal assault on the credit elsewhere test.

Still other conditions and opportunities arise generally under financial assistance awards. Any contracts for assistance must require development of plans for monitoring environmental and health related emissions from the

---

199Id. § 131(o), 94 Stat. 657. Valuation of multiple assistance awards, supra note 191, shall be “at the maximum potential exposure . . . at any time during the life” of the project. Pub. L. No. 96-294 § 152(b)(3), 94 Stat. 669.
200Id. § 131(l)(1)-(5), 94 Stat. 658.
201Id. § 131(i), 94 Stat. 656.
202Id. § 131(q), 94 Stat. 657 (emphasis added).
203Id.
204Id. § 131(r), 94 Stat. 657-58. See generally Synthetic Fuels Legislation: Hearings, supra note 5, at 239 and 315.
The Corporation may undertake cost-sharing agreements with assistance mechanisms independently. Corporation loans are limited to the accuracy of the preliminary total estimated costs upon which loans and loan guarantees will be based.209

In addition to the foregoing, the Act addresses the several financial assistance mechanisms independently. Corporation loans are limited to the lesser of 49 percent of the project's initial total estimated cost210 or not more than a minority financial position unless the Board determines that the borrower has demonstrated that this limit would prevent the financial viability of the project and additional assistance is necessary, in which case, the Corporation may loan up to 75 percent of the estimated project cost.211 If the total estimated project cost is thereafter determined to exceed the initial estimated cost, the Corporation may lend additional amounts within certain bounds.212 Interest rates on loans are set by the Corporation considering the needs and capacities of the recipient and prevailing public and private rates of interest, but such rates cannot be less than a rate determined by the Secretary of the Treasury for the Corporation.213 No loan shall be made un-

---


204 Pub. L. No. 96-294 § 131(i), 94 Stat. 656.

205 Id. To minimize recordkeeping burdens, the Corporation is expected to utilize to the maximum extent possible records and information which a recipient of assistance is already required to maintain for regulatory and other purposes. Cos. Rep. at 214.


207 Id. § 131(s), 94 Stat. 658.

208 Though not explicitly stated by the conferees with respect to the renegotiation feature here, it is reasonable that the "by mutual consent," Cos. Rep. at 190, clarification with respect to the fast start program would also apply.


211 Id. § 132(a)(2)(A), 94 Stat. 658. The total amount of assistance awarded would be subject to the 15 percent of the Corporation's total obligational authority ceiling. Id. § 131(j), supra notes 186-90; 126 CONG. REC. H5724 (daily ed. June 26, 1980) (remarks of Rep. Gore). However, the section 131(j) ceiling is not necessarily static; after approval of the section 126(b) comprehensive strategy, it may increase from 15 percent of $20 billion to 15 percent of $88 billion depending upon the authorizations approved by Congress.

less the Corporation determines that there is a reasonable prospect of repayment or that the success of the project "will have a substantial value in helping to meet the national synthetic fuel production goal." And, under certain circumstances the Board may forbear the exercise of its rights under a loan agreement where the borrower is unable to meet payments. Loan guarantees are limited to 75 percent of the Corporation's initial total estimated project cost, but, again, additional amounts may be guaranteed with certain bounds, where the total estimated project cost is subsequently determined to exceed the initial estimated cost. In reviewing an applicant's need for a loan guarantee, the Corporation shall consider whether the applicant "otherwise would be unable, exercising prudent business judgment, as determined by the Board . . ., to finance the synthetic fuel project, taking into account among other factors, the availability of debt financing under normal lending criteria based on the assets associated with the project." Loan guarantees may be made to any concern with a partial interest in a synthetic fuels project. And, under certain circumstances where the borrower is unable to meet loan payments, the Corporation may pay the lender under the terms of the guarantee and execute an agreement for repayment directly with the borrower. In essence, the loan guarantee is turned into a direct loan from the Corporation. Lastly, in connection with each loan guarantee, the Corporation must prescribe and collect an annual fee equal to one-half of one percent of the amount of such guarantee; fees up to one percent of the amount of assistance may be collected in connection with all other types of financial assistance.

With respect to price guarantees, the Corporation is authorized to provide "that the price that a concern will receive for all or part of the production from a synthetic fuel project shall not be less than a specified price determined as of the date of execution of the . . . price guarantee." However, "no such price guarantee may be based upon a 'cost plus' arrangement

---

214Id. "The Conferes intend that the substantial value provision not represent a loophole, and that the Corporation weaken its 'reasonable prospect of repayment' criterion as a last resort and for good cause." CONF. REP. at 219.
216Guarantees may cover principal and interest. Ed. § 133(a)(1), 94 Stat. 660.
217Ed. § 133(a)(2), 94 Stat. 660. See also Synthetic Fuels Legislation: Hearings, supra note 5, at 239 (regarding guarantee limits and private sector risk-taking).
219Ed. § 133(b), 94 Stat. 660-61.
220Generally, once Corporation funds are obligated, they are literally "set aside and can never again be used for any other purpose even though these funds may never actually be expended." 126 CONG. REC. H5719 (daily ed. June 26, 1980) (remarks of Rep. Dingell). This is, however, not the case where the Corporation's commitment is "nullified or voided for any reason." Pub. L. No. 96-294 § 152(c), 94 Stat. 669. Where a loan guarantee in essence becomes a loan, there is, thus, a practical question as to whether that metamorphosis should produce a calculation (loan plus loan guarantee) which reduces the funds available to the Corporation and increases the project participants' assistance award out-a-vis the section 131(j) limit. This result would obtain where the Corporation initially provides a loan guarantee and, subsequently, after initial production from the project, the Corporation then provides a price guarantee. 126 CONG. REC. H5719 (daily ed. June 26, 1980) (remarks of Rep. Dingell). The loan guarantee/loan metamorphosis is, however, a different creature. It is more in the nature of an arrangement whereby the Corporation, "in the public interest," exercises its "subrogation rights" prior to default. Accordingly, the arrangement should not elicit the consequences which would be produced by the loan guarantee now/price guarantee later example. See CONF. REP. at 220-21.
221Ed. § 139(b), 94 Stat. 665.
222Ed. § 139(a), 94 Stat. 665.
223Ed. § 134, 94 Stat. 661.
or variant thereof." The "specified sales price" shall be established "at the level which will provide the minimum subsidy . . . necessary to provide an adequate incentive, in light of projected prices of competing fuels and the requirements for economic and financial viability of the synthetic fuel project." Under certain circumstances, the specified sales price established in any price guarantee may be renegotiated upward. The Corporation is authorized to execute purchase agreements for all or part of the production from a project. The specified sales price for such production is not to exceed the estimated prevailing market price as of the date of delivery, as determined by the Secretary of Energy, unless the Corporation finds that a higher price is necessary to insure production and to achieve the purposes of Title I. Each purchase agreement must specifically provide that:

- the synthetic fuel meets the standards for the use for which it is purchased;
- the ordered quantities are timely delivered; and,
- the Corporation may refuse delivery of the synthetic fuel.

The Corporation is further authorized to take delivery of synthetic fuel under a purchase agreement and sell such fuel, after first offering it for sale to DOD, to any nongovernmental person. If no such sale is made, the fuel may be purchased by the federal government at the prevailing market price of whatever fuel it replaces. Prior to the approval of a comprehensive synthetic fuels production strategy, the Corporation may enter into joint ventures for synthetic fuel project modules. The Corporation may only construct and operate a

---

225 Id. "Use of a 'cost of service' pricing mechanism by a concern pursuant to law, or by a regulatory body establishing rates for a regulated concern, shall not be deemed to be a 'cost plus' arrangement or variant thereof." Id. The reasoning underlying this distinction is discussed in detail in the Conference Report. CONF. REP. at 222.

226 Id. Given that renegotiation is intended to support completion or continuation of a project, there would be no basis for renegotiating a price guarantee downward. Id. "In the event that prevailing market prices for synthetic fuels are greater than a price guaranteed by the Corporation, the Corporation should allow the marketplace to operate." CONF. REP. at 221. And, "the price support will phase out if marketplace forces make such support unnecessary." Id.


228 Id.

229 Pub. L. No. 96-294 § 135(b) and (c), 94 Stat. 661-62. Consider the consequences to a synthetic fuel project where the Corporation refuses delivery and no other market exists.

230 Id. § 135(d), 94 Stat. 662.

231 Supra note 159.

232 Pub. L. No. 96-294 § 136(a), 94 Stat. 662. "The Conference intend that the Corporation attempt to limit its financial participation in synthetic fuels projects to price guarantees, purchase agreements, loan guarantees, and loans, but recognize that these incentives may be insufficient to induce private sector participation in demonstrating all of the synthetic fuel technologies which must be demonstrated if the program goals are to be realized." CONF. REP. at 223.

233 See supra note 180 and accompanying text.

234 Pub. L. No. 96-294 § 136(d)(1)(A), 94 Stat. 663 defines such modules as: any facility located in the United States which—

(i) is of a size smaller than a synthetic fuel project;

(ii) will, if successful, demonstrate the technical and economic feasibility of the commercial production of synthetic fuels; and

(iii) can eventually be expanded at the same site into a synthetic fuel project.
module by contract, may not finance more than 60 percent of the total module cost\(^{235}\) and shall be restricted to modules which
a. demonstrate the commercial feasibility of a technology which offers potential for achievement of the national synthetic fuel production goal; and,

b. can be expanded at the same site into a project.\(^{236}\)

The primary responsibility for management of the venture must rest with the private participant, not the Corporation,\(^{237}\) whose status is that of a “limited partner” and financial participant only.\(^{238}\) This status is, nonetheless, not to restrict the Corporation from negotiating a role in management decisions of the venture which the Board “deems appropriate and necessary pursuant to the Corporation’s financial interest in the joint venture.”\(^{239}\) However, Congress did not “intend to suggest . . . that the Corporation must or should attempt to negotiate a role in decision-making or management linked to the Corporation’s level of financial participation in the joint venture.”\(^{240}\) The Corporation must accordingly structure its role carefully, to protect its own interests yet preserve primary management in the private participant.

Evident from the foregoing discussion is a broad and diverse range of financial assistance mechanisms available to the Corporation to encourage and facilitate synthetic fuels development. Throughout the Act, however, Congress assiduously avoided authorizing the Corporation to exercise permanent “control”\(^{241}\) over synthetic fuels projects. Even where control is acquired as a result of default on a loan or loan guarantee, the Corporation must divest such control within five years.\(^{242}\) The Corporation-owned, contractor-operated project is the one notable exception to this congressional policy judgment.\(^{243}\) The Corporation may only undertake a maximum of three such projects prior to congressional approval of the comprehensive synthetic fuels production strategy and may not undertake any new, or expand existing, projects after approval of the comprehensive strategy.\(^{244}\)

The important point from Congress’ perspective is not whether the authority to undertake Corporation-owned projects will ever be exercised, but simply that the power to do so exists. It is the “club in the closet”\(^{245}\) to provide an extra degree of Corporation leverage to encourage the private sector to proceed with what the Board deems necessary synthetic fuel projects.\(^{246}\) For this reason, it is only applicable to “necessary” projects which “would not otherwise be constructed with financial assistance awarded under.”\(^{247}\)

\(^{235}\)Id. § 136(a), 94 Stat. 662.

\(^{236}\)Id. § 136(b), 94 Stat. 662. “It is not contemplated that the Corporation’s participation in the initial contract would ‘carryover’ to a full scale commercial plant, but be restricted to a single commercial scale module for any given projects.” CONG. REP. at 223.


\(^{238}\)Id. § 136(e), 94 Stat. 663. “It is not contemplated that the Corporation’s participation in the initial contract would ‘carryover’ to a full scale commercial plant, but be restricted to a single commercial scale module for any given projects.” CONG. REP. at 223.


\(^{240}\)Id. § 137(e), 94 Stat. 664.

\(^{241}\)Id. §§ 141-45, 94 Stat. 665-67.

\(^{242}\)Id. § 142, 94 Stat. 666.


\(^{244}\)Pub. L. No. 96-294 § 142(a), 94 Stat. 665.
the other authorities available to the Corporation and is only authorized during the period when "one-of-a-kind" projects are envisioned. It is a rather unwieldy "club" which probably will, and should, remain "in the closet," but may serve some useful purpose just being there.

AUTHORIZATIONS AND APPROPRIATIONS

No analysis of synthetic fuels development under the Energy Security Act would be complete without an explanation of precisely what amounts of money are available at what times and under what authorities, that is, the authorization and appropriations process. This process formally began November 27, 1979, when the President signed into law an appropriations bill which provided funds for an "alternative fuels production" program within DOE. A special "Energy Security Reserve" fund was established in the United States Treasury and $19 billion was appropriated to it. $1.5 billion of that amount was made immediately available to the Secretary of Energy "for purchases or production by way of purchase commitments or price guarantees of alternative fuels" pursuant to the Non-nuclear Energy Research and Development Act of 1974 (NNA). An additional $708 million of the $19 billion was made immediately available to the Energy Secretary "to support preliminary alternative fuels commercialization activities" under the NNA as follows:

- $100 million for project development feasibility studies;
- $100 million for cooperative agreements with nonfederal entities;
- not to exceed $500 million as "a reserve to cover any defaults from loan guarantees issued . . . [under the NNA]: Provided, that the indebtedness guaranteed . . . shall not exceed the aggregate of [$.5 billion];" and
- $8 million for program management.

It is especially important to note the leverage permitted here by the three-to-one loan guarantee-to-reserve ratio which is not permitted under subsequent appropriations.

Thereafter, on June 30, 1980, the Energy Security Act authorized $20 billion for the Energy Security Reserve to purchase "notes and other obligations of the Corporation," plus any additional sums authorized under the comprehensive strategy process (the potential $68 billion), less

---

248 Id.
249 Id.
250 Id. $1 billion was also appropriated, subject to authorizations, to the "Solar and Conservation Reserve." Id.
251 Supra note 65.
253 Id., 93 Stat. 971.
254 Id.
255 Id.
257 Authorizations customarily precede appropriations.
such sums up to $3 billion which may be used in the fast start program and up to $2.208 billion which may be used under the NNA.\footnote{Supra note 256.}

Then, on July 8, 1980, the Supplemental Appropriations and Rescissions Act, 1980\footnote{Pub. L. No. 96-304. 94 Stat. 880.} provided final modifications. From the $19 billion previously appropriated to the Energy Security Reserve, an additional $3.313 billion was made available to be expended as follows:

- $3 billion for purchase commitments, price guarantees and a "reserve" to cover defaults on loan guarantees, all under authority of the Title I fast start program;\footnote{Id.}
- $100 million for project feasibility studies;
- $200 million for cooperative agreements; and,
- $10 million for program management.\footnote{Id.}

Upon a "Presidential determination that the Corporation is fully operational and upon a majority vote of the Board,"\footnote{Id.} projects or actions initiated by DOE under the alternative fuels production appropriations shall transfer to the Corporation.\footnote{Id.}

In sum, of the $20 billion seemingly available for synthetic fuels development under Title I of the Energy Security Act, the actual appropriations provide the following results:

- 1.000 billion to the "Solar and Conservation Reserve"
- 1.500 billion for NNA purchase commitments or price guarantees
- .500 billion for NNA reserve against loan guarantees
- .100 billion for NNA feasibility studies
- .100 billion for NNA cooperative agreements
- .008 billion for NNA program management
- 3.000 billion for fast start under Title I
- .100 billion for feasibility studies
- .200 billion for cooperative agreements
- .010 billion for program management
- 1.270 billion for biomass energy and alcohol fuels development under \textit{Title II} of the Energy Security Act
- 12.212 billion minimum remaining for the Corporation's synthetic fuel development activities.

The net result of this is to provide total available funding of $17.522 billion

\footnote{\textit{Id.}'}
for purposes of Title I of the Energy Security Act, $12.212 billion as noted above plus up to $5.310 billion from the fast start and NNA DOE appropriations. Finally, of the $12.212 billion intended for the Corporation, $6 billion is available as of July 8, 1980 and the remainder, $6.212 billion, is not available until June 30, 1982. And, for the time being at least, no more funds will be authorized until the Corporation’s comprehensive strategy is approved, which may not be submitted for congressional approval until as late as June 30, 1985.

In absolute terms, Congress has hardly been stingy, but neither has it been overly lavish given the high costs of commercial synthetic fuels projects and the Act’s formidable production goals. Relative to the annual cost of imported oil, the initial congressional commitment here may fairly be called modest. And, of course, any significant additions to that contribution remain firmly with Congress.

CONCLUSION

A national commitment which “adds up to real money” has been made to synthetic fuels development. An institutional structure and various implementing mechanisms have been created for the application of that money to achieve certain synthetic fuel production goals. Ultimately, the success or failure of the venture rests with the judgments made by those people directly responsible for putting the money, institutional structure and implementing mechanisms to their highest and best use. The opportunity for the creative exercise of discretion to rise to this challenge is clearly present. All that remains is to do it.

\[\text{\textsuperscript{26}Pub. L. No. 96-304, 94 Stat. 882.}\]
\[\text{\textsuperscript{27}Id. 208 million of the previously appropriated NNA funds are not available for transfer to the Corporation.}\]
\[\text{\textsuperscript{28}Id.}\]
\[\text{\textsuperscript{29}Supra note 160 and accompanying text.}\]
\[\text{\textsuperscript{30}Supra note 152.}\]