REPORT OF THE COMMITTEE ON THE ENVIRONMENT

In general, there were fewer major developments in environmental law during 1980 than in 1979. Nevertheless, some important new issues have arisen, especially in the areas of control of hazardous wastes and licensing of hydropower projects.

Rather than attempting to catalogue each specific issue raised during the past year, this report describes several developments of general interest in the areas of legislation, case law and agency action.

I. LEGISLATION

A. Energy Mobilization Board

On July 15, 1979, as part of his draft energy legislation to encourage production of synthetic fuels, and as a complement to the Synthetic Fuels Corporation ("SFC"), President Carter proposed the creation of an Energy Mobilization Board ("EMB"). As proposed, the EMB would have aided developers in overcoming certain legal, regulatory and political obstacles by designating certain non-nuclear projects as "priority energy projects," and putting those projects on a "fast track."

On October 4, 1979, the Senate passed S. 1308 which created a four-member EMB with authority to set deadlines to achieve expedited regulatory decisions by federal, state, and local decision-makers. Upon the failure by those decision-makers to comply with an EMB timetable, the EMB would have the power to make the decision. Under the legislation enacted by the Senate, the EMB was empowered to waive procedural, but not substantive, requirements of *existing* law and regulations. In other provisions in the bill, however, the EMB would have been given power to protect, or "grandfather," projects under construction from future changes in federal, state, and local laws to prevent excessive delay or increases in project costs.

On November 1, 1979, the House passed H.R. 4985, which would have created a five-member EMB with authority similar to that provided by the Senate legislation. The House bill would also have empowered the EMB to waive *existing* substantive requirements of federal law upon the agreement of the President and both houses of Congress. The House version did not contain a separate "grandfather" clause.

The bills went to conference committee to resolve their differences regarding waivers of substantive law and the "grandfather" clause. On June 21, 1980, the conference filed a report favoring a bill creating a three-member EMB vested with power (1) to set expedited deadlines for agencies and to render a decision upon non-compliance with the deadlines; (2) to recommend to the President the suspension, modification or amendment of any federal statute or regulation, with the waiver requiring both Presidential and congressional agreement; and (3) to suspend, modify or annul certain new federal, state or local statutes and regulations applicable to a priority energy project under construction under a "grandfather" clause.

On June 27, 1980, the House sent the bill back to Conference in a 232-131 vote. The rejection of the conference bill was viewed as a major defeat for the Carter Administration. Defeat of the bill was primarily due to apprehension over the substantive waiver provisions. A widespread sentiment also existed in the House that the EMB was itself a bureaucracy that would cause more administrative problems than it would rectify and which, through its own procedures, would be more likely to cause delay than enhance efficiency. Many members of Congress expressed the view that the legislation was unlikely to have made much difference in streamlining governmental regulation of the energy industry. Some environmentalists regarded the House vote as a demonstration of opposition to the broader proposals for synthetic fuels development.

After its defeat, supporters of the bill were at first optimistic that the EMB could be resurrected in conference by strengthening the congressional veto powers over substantive waivers of federal and state environmental requirements and weakening the board's powers. That hope was short-lived, however, and in August 1980, the bill was pronounced dead.

Under the Reagan Administration, which is critical of federal involvement in the synthetic fuels and strongly opposes increasing the federal bureaucracy, the prognosis for the EMB is dim.

B. National Historic Preservation Act and the Archaeological Resources Protection Act

The National Historic Preservation Act of 1966 [16 U.S.C. § 470(f)] has acquired increased importance during 1980. The increased importance of the Act arises from amendments to the NHPA enacted in 1980 [Pub.L. 96-515]. The amendments require that FERC and other agencies *shall*, prior to approving any action which may adversely affect any national historic landmark, undertake planning and actions directed toward minimizing harm to the landmark and afford the Advisory Council on Historic Preservation an opportunity to comment. The draft bill from which the final legislation resulted had a much stronger provision requiring an agency to determine that "no prudent and feasible alternative to such undertaking exists." While this was not retained in the final legislation, the Committee report makes it clear that agencies are still expected to consider prudent and feasible alternatives. It is anticipated that the Advisory Council will provide guidelines to the agencies for dealing with cases in which national historic landmarks may be affected.

The amendments have had an immediate impact on the hydroelectric licensing process at the FERC. Due to the new requirements of the Act, it has become necessary to perform surveys of cultural and historic resources before filing an application for a license, rather than during or after the licensing process.

In addition, the recent Archeological Resources Protection Act of 1979 [16 U.S.C. § 470 (as et seq.)] is now a factor in the hydroelectric licensing process. The Act was proposed to correct deficiencies in the Antiquities Act of 1906. The primary purpose was to institute a permit system for removing archeological materials from public and Indian lands. The new statute requires a permit before any person "may excavate, remove, damage or otherwise alter or deface" any archeological resource located on public lands or Indian lands. No final regulations have

been issued with regard to this new Act, although proposed rules were issued on January 19, 1981 (46 Fed. Reg. 5566). These proposed regulations attempt to implement the two purposes of the Archeological Resources Protection Act, namely to "protect" irreplaceable archeological resources and, secondly, to "increase communication and exchange of information" among authorities to enhance the goal of protection.

II. COURT ACTION

A. Monongahela Power Co. v. Alexander, No. 78-1712 (D.D.C. December 19, 1980)

On December 19, 1980, the United States District for the District of Columbia decided, in *Monongahela Power Co. v. Alexander*, No. 78-1712 (D.D.C. December 19, 1980), that the United States Army Corps of Engineers was without jurisdiction, either to grant or deny a permit for construction of a pumped storage hydroelectric project because the project had been licensed previously by the Federal Energy Regulatory Commission. The court decided that the Commission possesses exclusive jurisdiction over such projects.

The action had been brought by three power companies against the U.S. Army Corps of Engineers seeking injunctive and declarative relief regarding the Corps' denial of their application for a permit for the Davis Pumped Storage Hydroelectric Project. Prior to the Corps' denial, a license to construct and operate the project had been issued by the Federal Power Commission. The Judge described the Court's responsibility as requiring it to repeal the FPC's exclusive authority only if it is positively repugnant to or irreconcilable with the FWPCAA. Given the FPC's substantial environmental responsibilities, it cannot fairly be said that the difference in emphasis and perspective of the FWPCAA rises to a level sufficient to support an implied repeal. Accordingly, an exemption for FPC-licensed projects from the licensing requirements of the FWPCAA must be inferred. Slip op. at 14.

The court reached this result despite the Second Circuit's earlier holding in *Scenic Hudson Preservation Conference v. Callaway*, 499 F.2d. 127 (2d. Cir. 1974). The court relied on the language of the DOE Organization Act which was passed subsequent to the enactment of Section 404 of FWPCAA and the Second Circuit's opinion, and relied on the U.S. Supreme Court's analysis in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976). In that case, the Supreme Court held that exceptions may be inferred to the licensing authority vested by the FWPCAA in the Corps.

The district court's decision in *Monongahela* represents the strongest statement of the primacy of FERC jurisdiction in hydroelectric licensing since the announcement of that principle by the Supreme Court in *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152 (1946). The holding should have an important bearing on other questions of dual jurisdiction involving FERC.

III. AGENCY ACTION

A. Resource Conservation and Recovery Act

During 1980, the Resource Conservation and Recovery Act (RCRA) and its implementing regulations, including those creating the Consolidated Permit

Regulations, became effective. Subchapter C of RCRA creates a "cradle to grave" management system for hazardous waste. The statutory scheme has three basic objectives. The first objective is the collection of information on the size of the hazardous waste problem, including what wastes are being generated, in what quantities, and the location and means of disposal. The second objective is to track hazardous wastes from creation to disposal. The third objective is to ensure that hazardous wastes are disposed of in a manner which will minimize threats to human safety and the environment.

In furtherance of the first objective, Section 3010 of the Act requires all persons who generate, transport, store, treat or dispose of hazardous wastes to notify EPA of this activity within 90 days after the publication of implementing regulations. The due date for this notification was August 18, 1980. Upon receipt of notification, the EPA assigns an identification number. Generators and transporters who produce or handle hazardous waste after the expiration of the 90 day period must notify EPA and receive an identification number prior to initiating such activities. It is illegal to transport, offer transport, store, treat or dispose of hazardous waste without an EPA Identification Number. In addition, there are civil penalties for failure to notify EPA.

The requirements of notification and compliance with RCRA depend upon the identification of wastes as hazardous. RCRA regulates only "solid waste," which is defined in the statute as: "any garbage, refuse, sludge ... or other discarded material, including solid, liquid, semisolid, or contained gaseous material. ..." 42 § 6903(27). EPA has further defined "other material" to include: (1) materials which are discarded; (2) materials which have served their intended purpose and are sometimes discarded; and (3) materials which are incidently generated during manufacturing or mining operations and are sometime discarded. 40 C.F.R. § 261.3. From this broad definition of solid waste, the statute excludes four categories of waste: (1) solid or dissolved materials in domestic sewage; (2) irrigation return flows; (3) industrial discharges which are point sources subject to NPDES permits; and (4) source, special nuclear, or by-product material as defined by the Atomic Energy Act. 42 U.S.C. § 6903(27).

A hazardous waste is defined by the statute as a solid waste which may:

> 1. cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> 2. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

From this general description, the Act requires EPA to identify and list all "hazardous wastes." To accomplish this task, EPA has developed a bifurcated approach, listing some substances and waste streams, and identifying hazardous characteristics by which unlisted wastes are to be analyzed by the regulated public. As a starting point, however, EPA has identified a number of waste streams and generators which are not subject to RCRA. These include: household waste; agricultural waste; mining overburden; fly ash and sludge from the combustion of fossil fuels; drilling fluids, produced wastes, and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal energy; small quantity generators; and wastes which are used, re-used, recycled or reclaimed.

EPA has established four lists of hazardous waste in Subpart D of 40 C.F.R. 261. Two lists identify hazardous wastes from specific and non-specific sources (261.31 and 261.32), and two lists identify pure and impure chemicals (261.33(e) and 261.33(f)). The 261.33(e) chemicals are those deemed to be acutely hazardous, causing death or serious damage in low doses. Hence, not only the chemicals but their containers and spill residues are subject to regulation. In addition, the allowable quantity for the small generator exemption is much lower for those parties handling these substances. The 261.33(f) list is comprised of chemicals which are deemed toxic. These two lists are intended to apply to chemicals discarded in their pure form, either through reduction in inventories or because they are impure. If they are mixed with non-hazardous waste, the mixture must be treated as hazardous, but if they are merely consitutuents of a waste stream (traces in the wastes from other mixing) the waste is not hazardous unless it exhibits a hazardous characteristic.

Subpart C of 40 C.F.R. 261.20 establishes characteristics which cause a waste to be considered hazardous. These characteristics are: ignitability, corrosivity, reactivity and toxicity. A waste is considered "ignitable" if: (a) it is a liquid, other than an aqueous solution containing less than 24% alcohol, with a flash point of less than 140°F; (b) it is a non-liquid which under standard temperature and pressure may ignite and burn so vigorously and persistently that it creates a hazard; (c) it is an ignitable compressed gas as defined by D.O.T.; or, (d) it is an oxidizer as defined by D.O.T.

A material is considered "corrosive" if it is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, or if it is a liquid that corrodes steel at a rate greater than 0.25 inches per year at a test temperature of 130°F.

"Reactive" wastes are those which: (a) are normally unstable and readily undergo violent change without detonating; (b) wastes which react violently with water; (c) wastes which when mixed with water, generate toxic gases, vapors or fumes in a quantity sufficient to endanger human health or the environment; (d) cyanide or sulfide bearing wastes, which, when exposed to pH conditions between 2 and 12.5 can generate toxic gases, vapors or fumes in a quantity sufficient to endanger human health or the environment; (e) wastes capable of detonation or explosive reaction if subject to strong initiating sources or if heated under confinement; (f) wastes capable of detonation or explosive decomposition or reaction at standard temperature and pressure; and, (g) wastes which constitute forbidden explosives, Class A explosives or Class B explosives as defined by D.O.T.

A waste is considered "toxic" if, applying a special extraction procedure developed by EPA, the extract from a representative sample of the waste contains contaminants at a concentration equal to or greater than 100 times the allowable pollutant concentrations set forth under EPA's primary drinking water standards.

In accordance with the statutory goal of tracking wastes, generators who ship hazardous waste off-site are required to prepare a manifest for the waste. The manifest must identify the waste to be shipped, the quantity of the waste, the treatment of disposal facility to receive the waste, and may identify an alternative destination. Upon shipment, the generator must have the transporter sign a copy of the manifest which the generator retains. Within 35 days, the generator must receive a copy of the manifest signed by the TSDF operator. If this copy is not received, the generator must initiate an inquiry to locate the waste and the mani-

fest. If the inquiry does not satisfactorily resolve the issue within 45 days of shipment, the generator must submit an exception report to the EPA.

A generator may store waste at his facility for 90 days without being considered a storer. The generator must, however, store the waste in D.O.T. approved containers and place on each container the date when waste accumulation began. Storage may not exceed 90 days unless the generator has a permit or interim status authorization to operate a storage facility.

To ensure that hazardous wastes are treated, stored, and disposed of in a manner which minimizes risk to the environment, RCRA provides that no person may treat, store or dispose of hazardous waste except in accordance with a RCRA permit. In view of the administrative task involved in issuing permits, however, the Act provides for essentially a constructive permit, called interim status. A facility may qualify for interim status if it meets three statutory criteria: (a) it was in existence on November 19, 1980, (b) notification was sent to EPA on or before August 18, 1980; and (c) Part A of the RCRA permit application was sent to EPA on or before November 19, 1980. Since EPA has not begun to issue RCRA permits (nor does it expect to issue such permits for several years) only those facilities qualifying for interim status may treat, store, or dispose of hazardous wastes. Moreover, facilities having interim status must, as a condition of retention of that status, adhere to the interim status standards.

Part 265 of Title 40 of the Code of Federal Regulations sets forth interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities. These standards impose requirements for waste analysis, security, inspection, personnel training, preparedness and prevention, arrangements with local authorities, contingency plans, groundwater monitoring, closure and post-closure care, financial requirements, and standards for special treatment or disposal systems (*i.e.*, surface impoundments, landfills, incinerators). Compliance with these standards is a condition of interim status. At present, Part 264, describing TSDF standards which will be required in conjunction with a RCRA permit, is substantively identical to Part 265. This similarity is only temporary, however. EPA is currently working on more comprehensive technical standards for Part 264 as part of its Phase II efforts.

In conjunction with the RCRA regulations, the EPA also published regulations establishing the Consolidated Permit Program (40 C.F.R. Part 122, 123 and 124 (45 F.R. 33290 (May 19, 1980)). These regulations consolidate the procedures which govern the processing of permits under: (a) the Hazardous Waste Management Program; (b) the Underground Injection Control Program; (c) the National Pollutant Discharge Elimination System; (d) Section 404 (Dredge or Fill) State Programs; and (e) the Prevention of Significant Deterioration Program. The consolidation permit regulations are divided into three parts. Part 122 sets forth in detail who must apply for a permit; the contents of the application; specific conditions that must be incorporated into permits; when permits may be revised, revoked and reissued, or terminated; and permit duration. Part 123 deals with State programs. It governs the process for obtaining EPA approval of State RCRA, UIC, NPDES and 404 programs, the requirements and administration of State programs, and for withdrawal of EPA program approval. Part 124 outlines the procedures that govern the EPA permit application review process. Some of these procedures are also made applicable to State programs. The regulations include

procedures for public participation, the issuance of draft permit approvals or denials and appeal procedures, including opportunity for hearing.

B. FERC Docket No. RM80-65, Order No. 106, Final Rule: Exemptions For Projects of 5 MW or Less

On November 7, 1980, the Commission issued Order No. 106 in Docket No. RM80-65. Order No. 106 establishes a case-specific procedure for exempting from all or part of Part I of the Federal Power Act any small hydroelectric power project at an existing dam or using a natural water feature involving no impoundment, and having a proposed installed capacity of 5 megawatts or less. The rule implements, in part, Section 408 of the Energy Security Act of 1980 and creates Subpart K of Part 4 of the Commission's regulations. Under the rule, only an entity which has a property interest, such as ownership in fee, leasehold, easement, right-of-way, or an option to obtain such an interest to permit development of the project, may apply for an exemption. The only exception to this ownership interest is when a qualifying project is located competely on federal land and, in that instance, any applicant can request an exemption.

The preference to states and municipalities granted by Section 7 of the Federal Power Act does not apply—states and municipalities are given no special status under the new rule. However, applications for rehearing of Order No. 106 were filed, challenging this and other provisions of the Order. On January 7, 1981, the Commission granted these applications for rehearing "solely for the purpose of affording further time for consideration of the applications."

The general rule of Order No. 106 is that exemption applications filed by project owners will be preferred to license applications if filed within the public notice period prescribed for the permit application—with the following exceptions:

1. Where a nonowner who has held a preliminary permit has filed for a license, the project owner will not obtain an exemption;
2. Where a nonowner license applicant has filed first, the Commission will favor that applicant unless the plans of the subsequent exemption applicant would better develop the water power potential of the project;
3. The nonowner can prevail if it files a license application after the exemption application if the nonowner proposes a development that would render the project significantly better adapted than any exemption application.

Certain environmental requirements, such as NEPA, the Fish & Wildlife Coordination Act, and the Endangered Species Act, will continue to apply to those projects that the Commission exempts from licensing.

The rule allows a project owner to apply for exemption from licensing or from any of the other provisions of Part I of the Act, but application procedures for each of these two kinds of exemption differ. The term of exemptions is not limited—"the Commission has chosen to grant exemptions in perpetuity." If development does not occur under an exemption application, the exemption may be revoked. Construction must be commenced under an exemption within eighteen months, but revocation for non-compliance is not automatic. Exemption

applications can be sought for projects which include federal lands, but the exemption in no way confers any right to use or occupy the federal lands. This authorization must be obtained separately from the relevant federal land management agency.

The 5 megawatt capacity limitation will be applied on an aggregate basis—it will not be applied only to capacity *added* to a project. Also, the Commission will not accept an application for exemption from licensing of only a part of any licensed project. The entire licensed project may be exempted if it is eligible for exemption under the rule.

As for the contents of the exemption application, the new rule indicates that the Commission has attempted to limit the amount of information necessary—the exemption is similar to, but has fewer requirements than, the short-form license application for projects of 1.5 megawatts or less. No transfer authorization is required for transfer of a license, and Section 5 of the FPA specifically prohibits a transfer of a preliminary permit.

Footnotes in the text of the rule indicate that the Commission is currently developing further proposed rules to implement the provisions of Section 408(b) of the Energy Security Act, allowing the Commission to exempt "classes or categories" of projects, thereby obviating any application procedure. The Commission is also considering a rulemaking designed to extend most of the advantages of short-form license applications to licenses for all water power projects at existing dams with a total capacity of 5 megawatts or less. On December 22, 1980, the FERC issued a proposal rulemaking in Docket No. RM81-7, to exempt from the licensing requirements of Part I of the FPA two categories of small hydroelectric power projects.

C. Air Pollution Regulation by EPA

On August 7, 1980, EPA published final regulations which extensively amended both the prevention of significant deterioration (PSD) and nonattainment programs. (See 45 Fed. Reg. 56275; August 7, 1980.) This action was the result of several years of protracted litigation and administrative proceedings which began when numerous firms challenged the PSD regulations adopted by EPA after passage of the 1977 Clean Air Act Amendments. The decision in *Alabama Power Co. v. EPA*, 13 ERC 1993 (D.C. Cir., 1979), forced EPA radically to amend its PSD and companion nonattainment programs. The final regulations will have significant effects on all firms considering the construction of new facilities or the modification of existing ones. The energy industry, because of the difficulties posed by hydrocarbon emissions, will be especially affected.

The calculation of a source's "potential to emit" was one of the major issues in the *Alabama Power* litigation. The court rejected EPA's requirement that potential to emit be calculated assuming no pollution control equipment would be utilized. EPA's response was a proposed definition which permitted the effects of pollution control equipment to be considered in the calculation, but which also required firms to assume that each source would be operated on a continuous basis at maximum design capacity. A storm of protest arose following EPA's proposal, as firms argued that the continuous operation requirement was not realistic and would result in an unwarranted expansion in the number of sources subjected to PSD requirements. EPA accepted these contentions and, under the

final regulations, limitations on hours or types of operation may be considered in calculating potential to emit, so long as such limitations are made part of a federally enforceable permit. This new provision realistically reflects the fact that many facilities are not operated continuously, and will therefore reduce the number of facilities which otherwise would have been subjected to PSD requirements.

EPA's final regulations also specify that PSD and nonattainment requirements apply to all major modifications of existing facilities. The court's decision in *Alabama Power* greatly increased the number of modifications subject to PSD and nonattainment by requiring review any time a modification would result in an increase in pollution. EPA's final regulations temper this increase in applicability somewhat. For example, EPA generally adopted higher *de minimis* limits than those originally proposed. Additionally, EPA has discarded its proposal that all minor sources accumulate every minor emission increase to determine whether, in the aggregate, the series of such changes would be sufficient to require major source treatment. However, EPA has retained the accumulation requirement to determine if a greater than *de minimis* increase would occur at a major source.

Prior to the *Alabama Power* decision, EPA considered all reasonably quantifiable emissions, including fugitive emissions, in PSD determinations. While the court upheld EPA's authority to consider fugitive emissions in PSD threshold determinations, it also held that EPA had failed to take the required procedural steps to properly do so. In response, EPA proposed, in the same rulemaking proceeding as the other revisions of its PSD program, to require fugitive emissions to be considered in PSD threshold determinations for 28 different sources, including petroleum refineries, storage and transfer units. Despite industry protest that this action did not constitute an "adequate rulemaking," EPA has nevertheless issued final regulations implementing this proposal. In a related action, EPA's final regulations also delete the fugitive dust exemption, which means that fugitive dust emissions now will be counted in air quality impact assessments.

EPA's final regulations cover many other issues addressed by the court in *Alabama Power*, such as baseline concentrations, geographic applicability, and, especially, the definition of a source. These regulations will have significant effects for both the long and the short term on energy facility siting and construction. However, the controversy surrounding the PSD and nonattainment programs clearly has not ended with EPA's August, 1980 promulgation of these regulations. Petitions for review challenging many of the provisions adopted by EPA, such as deletion of the fugitive dust exemption, were filed with the District of Columbia Circuit Court of Appeals by several firms and industry groups. At this time, these petitions have been consolidated into one proceeding, with argument scheduled for April or May, 1981. *See Manufacturing Chemist's Association v. EPA*, Case No. 79-1112 (D.C. Cir., filed January 26, 1977).