

A BILLION HERE, A BILLION THERE—

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

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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 significant 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 security 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 maintenance 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 environmentally acceptable manner will require financial commitments beyond private capital sources and existing government incentives;⁹ and,

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

²ENERGY INFORMATION ADMINISTRATION, 1979, ANN. REP. at 3. A “quad” is a measurement of energy equal to one quadrillion British thermal units (Btu).

³Other 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.*

⁴2.88 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 Resources*, 96th Cong., 1st Sess. 243 (1979) (testimony of Frank G. Zarb).

⁶Pub. L. No. 96-294, 94 Stat. 611 (1980).

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.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 interruptions and increase the Nation's security by reducing its dependence upon imported oil."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,¹² but, rather, to analyze the statutory language of the Act and to provide some indication of how the statute will be implemented as well as analysis of the problems and opportunities which may arise in that process.

CONCEPTUAL OVERVIEW

The Energy Security Act contains eight titles.¹³ The subject of this article is Title I—Synthetic Fuel, which has two parts. Congress recognized 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 program under the Defense Production Act Amendments of 1980.¹⁴ 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."¹⁵ These authorities will, generally,¹⁶ expire upon the President's determination "that the United States Synthetic Fuels Corporation is established and fully operational consistent with"¹⁷ part B of Title I—the United States Synthetic Fuels Corporation Act of 1980.¹⁸

¹⁰*Id.* § 100(a) (4), 94 Stat. 616.

¹¹*Id.* § 100(b) (1), 94 Stat. 616.

¹²The approach taken in the Energy Security Act to synthetic fuels development was certainly not without substantive controversy. Some informative discussions and analyses of the issues involved can be found in CONGRESSIONAL RESEARCH SERVICE, THE PROS AND CONS OF A CRASH PROGRAM TO COMMERCIALIZE SYNTHETIC FUELS, REPORT PREPARED FOR THE SUBCOMM. ON ENERGY DEVELOPMENT AND APPLICATIONS OF THE HOUSE COMM. ON SCIENCE AND TECHNOLOGY, 96TH CONG., 2D SESS. (Comm. Print 1980); *Costs and Economic Consequences of Synthetic Fuels Proposals: Hearings Before the Subcomm. on Synthetic Fuels of the Senate Comm. on the Budget*, 96th Cong., 1st Sess. (1979); *Synthetic Fuels: Hearings Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. (1979); *Energy Financing Legislation: Hearings before the Senate Committee on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. (1979).

¹³Title I—Synthetic Fuels; Title II—Biomass Energy and Alcohol Fuels; Title III—Energy Targets; Title IV—Renewable 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.

¹⁴Pub. L. No. 96-294, § 101, 94 Stat. 617 (hereinafter, the Energy Security Act public law number is used when reference 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).

¹⁵*Id.* § 305(a) (1) (A), 94 Stat. 619.

¹⁶Specifically, 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 emergency authorities under the Defense Production Act Amendments, discussed *infra.*, do not expire.

¹⁷*Id.* § 305(k)(1), 94 Stat. 623.

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.¹⁹ 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, 1984,²⁰ a comprehensive synthetic fuels production strategy.²¹ Prior to congressional approval of the comprehensive strategy, the funds available to the SFC are limited to \$20 billion²² less whatever sums have been obligated pursuant to the fast start program.²³ After congressional approval, however, the SFC may request additional authorizations of appropriations up to \$68 billion.²⁴ 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."²⁵ 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.²⁶ The magnitude of this endeavor has to be recognized as awesome.²⁷ 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,²⁸ which provides for the "develop-

¹⁹The United States Synthetic Fuels Corporation is scheduled to terminate, by statute, no later than September 30, 1997, and no earlier than September 30, 1992. *Id.* § 191(2), 94 Stat. 681. After September 30, 1992, the Corporation is essentially prohibited from making new financial assistance awards or commitments. *Id.* § 191(1), 94 Stat. 681. Winding up the Corporation's affairs after the date of its termination becomes the responsibility of the Secretary of the Treasury. *Id.* § 193, 94 Stat. 681-82. These dates and provisions are statutory and may, accordingly, be changed by Congress.

²⁰Subject to congressional disapproval, this date may be extended up to one year. *Id.* § 126(d)(1), 94 Stat. 649.

²¹*Id.* § 126(b), 94 Stat. 645.

²²See discussion *infra.*, captioned Authorizations and Appropriations.

²³Pub. L. No. 96-294 § 152(a), 94 Stat. 668.

²⁴*Id.* § 126(c) (11), 94 Stat. 649.

²⁵*Id.* § 125, 94 Stat. 644 (emphasis added). See *id.* § 100(a) (2) and (b) (2) (B), 94 Stat. 616-17.

²⁶See, e.g., 125 CONG. REC. S15867 (daily ed. Nov. 5, 1979) (remarks of Senator Johnston); *Synthetic Fuels Legislation: Hearings on S. 932, S. 1308 and S. 1377, supra* note 5, at 296 (testimony of John M. Deutch); *National Energy Security Corporation: Hearings on H.R. 5045 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 401 (1979) (testimony of Alice M. Rivlin).

²⁷See, e.g., 126 CONG. REC. S7413 (daily ed. June 19, 1980) (remarks of Senator Domenici); SUBCOMM. ON SYNTHETIC FUELS OF THE SENATE COMMITTEE ON THE BUDGET, 96TH CONG., 1ST SESS., REPORT ON SYNTHETIC FUELS (Comm. Print 1979); *Domestic Energy Resources: Hearings on H.R. 3583, H.R. 3976 and H.R. 3977 Before the Subcomm. on Employment Opportunities and the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. (1979); 125 CONG. REC. S16043 (daily ed. Nov. 7, 1979) (remarks of Senator Garn).

²⁸Pub. L. No. 96-294 § 305, 94 Stat. 619.

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.

“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.

Id. § 308(b)(1)(A)-(C), 94 Stat. 631.

“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 for use directly 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 powerplant, 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) (i) 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 a 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.

(ii) 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.

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

³⁰The 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.

³¹*Id.* § 305(a) (1) (B) (i), 94 Stat. 619.

other appropriate federal agencies,³² and "consistent with an orderly transition" to synthetic fuels development under the SFC.³³

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,"³⁴ loan guarantees³⁵ and loans.³⁶ Any one or all of these assistance types are available to persons "participating in a synthetic fuel project."³⁷ Further, loans and loan guarantees may be provided to any fabricator or manufacturer of any component of a synthetic fuel project.³⁸

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 million³⁹ and \$38 million,⁴⁰ respectively, are subject to congressional review and possible disapproval.⁴¹ Purchases of and purchase commitments for synthetic fuels, though they may be made without regard to existing procurement laws,⁴² shall not be made at higher than established ceiling prices⁴³ 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."⁴⁴ Further, purchase commitments and purchases may not be awarded to any person⁴⁵ for more than

³²*Id.* § 305(a) (1) (B) (ii), 94 Stat. 619.

³³*Id.* § 305(a) (1) (B) (iii), 94 Stat. 619.

³⁴*Id.* § 305(b) (1) (A) (i), 94 Stat. 619.

³⁵*Id.* § 305(b) (1) (A) (ii), 94 Stat. 619.

³⁶*Id.* § 305(b) (1) (A) (iii), 94 Stat. 619.

³⁷*Id.* § 305(b) (2) (A), 94 Stat. 619. As used here, "participating" would seem to imply an "equity" interest in the relevant project. See *supra* note 38, discussing the one stated exception to the provision of assistance to "participating" persons only.

³⁸*Id.* § 305(b) (2) (B), 94 Stat. 619. See 126 CONG. REC. S8477 (daily ed. June 26, 1980) (colloquy between Senators Domenici and McClure, intending to limit the applicability of this provision to "only those fabricators and manufacturers who have a firm contractual commitment to supply such components to an actual synthetic fuel project and where such components are fabricated or manufactured exclusively for synthetic fuel projects").

³⁹Pub. L. No. 96-294 § 302, 94 Stat. 618.

⁴⁰*Id.* § 301(e) (1), 94 Stat. 618.

⁴¹*Id.* § 305(b) (3), 94 Stat. 319, 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]." *Id.* The procedures Congress is to follow are self-explanatory.

⁴²*Id.* § 305(c) (1) (A), 94 Stat. 619-20.

⁴³*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. 96-1104, 96th Cong., 2d Sess. 235 (1980) (hereinafter cited as CONF. REP.); 15 U.S.C. § 3301 (1) (Supp. II 1978); S. REP. NO. 95-1126, 95th Cong., 2d Sess. 69 (1978) (Conference Report on the NGPA); 3 CCH 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.

⁴⁴Pub. L. No. 96-294 § 305(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.

⁴⁵"Person" includes "any other person who is substantially controlled by such person (as determined by the Secretary of Energy) . . ." *Id.* § 305(d) (4) (A) (i), 94 Stat. 620.

100,000 barrels per day crude oil equivalent of synthetic fuel,⁴⁶ and such contracts for greater than 75,000 barrels per day are subject to congressional review and disapproval.⁴⁷

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,"⁴⁸ but negotiated contracts are permitted where no, or no acceptable bids are received.⁴⁹ Commitments and purchases must be for fuel from a synthetic fuel project located in the United States.⁵⁰ All such contracts shall provide for review and possible renegotiation within 10 years of initial synthetic fuel production.⁵¹ Further, socioeconomic impacts on communities must be considered,⁵² but formal environmental impact statements are not required in the decision to award financial assistance.⁵³ The Davis-Bacon Act "prevailing wage" standard applies to projects which receive certain awards of assistance.⁵⁴ 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."⁵⁵

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 agency⁵⁶ with merely a consultative role for the Department of Energy (DOE), it is clear from the legislative history⁵⁷ and appropriations acts⁵⁸ that in fact

⁴⁶*Id.*

⁴⁷*Id.* § 305(d) (4) (A) (ii), 94 Stat. 620.

⁴⁸*Id.* § 305(d) (1), 94 Stat. 620.

⁴⁹*Id.* § 305(d) (2), 94 Stat. 620.

⁵⁰*Id.* § 305(d) (4) (B), 94 Stat. 620. 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." CONF. REP. at 190.

⁵¹Pub. L. No. 96-294 § 305(d) (4) (C), 94 Stat. 621. "The conferees interpret [this] provision to provide for renegotiation by mutual consent." CONF. REP. at 190. See also *Synthetic Fuels Commercialization: Hearings on H.R. 4474, H.R. 4499, H.R. 4434, H.R. 4484, H.R. 4588, and H.R. 4594 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 179-80 (1979)* (testimony of John F. O'Leary).

⁵²Pub. L. No. 96-294 § 305(d) (6), 94 Stat. 621.

⁵³*Id.* § 305(h), 94 Stat. 622.

⁵⁴*Id.* § 305(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 conferees 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." CONF. REP. at 192.

⁵⁵Pub. 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]." CONF. REP. at 192.

⁵⁶Pub. 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." CONF. REP. at 189.

⁵⁷126 CONG. REC. S8476 (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. H5691 (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."').

⁵⁸Act of Nov. 27, 1979, Pub. L. No. 96-126, 93 Stat. 954. Where implementation of the alternative fuels produc-

the reverse is true.⁵⁹ 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.⁶⁰ Second, it is also clear that the fast start program is national *defense* oriented.⁶¹ That is, the idea is to develop "mobility synthetic fuels"⁶² to replace DOD conventional fuels.⁶³ Consequently, the section 305 program would appear plainly skewed in favor of liquefaction as opposed to gasification projects.⁶⁴ 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.⁶⁵

A third issue raised involves the ability of DOE to contract for synthetic fuel purchases and commitments "without regard to" procurement law limitations.⁶⁶ This provision was subject to heated debate in Congress,⁶⁷ 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-

tion program funded from a \$19 billion Energy Security Reserve was established in DOE. *Id.*, 93 Stat. 970-71. Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, 94 Stat. 857, where additional funding from the Energy Security Reserve was appropriated to DOE specifically for the fast start synthetic fuels program. *Id.*, 94 Stat. 880-81. H.R. REP. NO. 96-1149, 96th Cong., 2d Sess. 39 (Conference Report to accompany H.R. 7542, Supplemental Appropriations and Rescission Act, 1980).

⁵⁹*Supra* notes 57 and 58. Exec. Order No. 12242, 45 Fed. Reg. 65175-76 (1980); see *Draft Program Solicitation for Proposals for Financial Assistance Under Title I, Part A of the Energy Security Act (Public Law 96-294) for the Development of Synthetic Fuels Under the Defense Production Act* (Dept. of Energy, Aug. 26, 1980) [hereinafter cited as *Draft Solicitation*].

⁶⁰126 CONG. REC. S8476, *supra* note 57; *Draft Solicitation*, *supra* note 59 at App. A, DOD Defense Fuel Supply Center Requirements.

⁶¹125 CONG. REC. H5137 (daily ed. June 26, 1979) (remarks of Rep. Stratton); *Synthetic Fuels Commercialization: Hearings*, *supra* note 51, at 191; *To Extend and Amend the Defense Production Act of 1950: Hearings on H.R. 37 and H.R. 602 Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. *passim* (1979).

⁶²"The Department of Defense . . . should provide the Secretary of Energy as rapidly as possible with its total requirements for mobility synthetic fuels and other alternative fuels by specification and quantity and the rate at which they are required for use in lieu of conventional fuels." CONF. REP. at 189. "Of DOD's energy use, about 85 to 90 percent is for ships, aircraft and other vehicles. That is what we call mobility fuels. That amounted to some 413,000 barrels per day in fiscal year 1978." *To Extend and Amend the Defense Production Act of 1950: Hearings*, *supra* note 61, at 15 (statement of Ruth M. Davis).

⁶³See, e.g., Pub. L. No. 96-294 § 305(a)(1)(A) and (f)(1), 94 Stat. 619 and 621; CONF. REP. at 189-91; 126 CONG. REC. S8476-77 (daily ed. June 26, 1980).

⁶⁴See *Draft Solicitation*, *supra* note 59, at App. A.

⁶⁵Though in one sense considered a part of the fast start program, see Pub. L. No. 96-294 § 195(a) (1) (A) (i) (II), 94 Stat. 682, DOE financial assistance under the Federal Nonnuclear Energy Research and Development Act of 1974 (NNA), 42 U.S.C. §§ 5901 *et seq.* (1976), is plainly *not* as "defense" oriented as the Defense Production Act fast track authorities. Compare *Draft Solicitation*, *supra* note 59 with *Draft Solicitation for Proposals for Financial Assistance Under the [NNA] for the Development of Alternative Fuels* (Dept. of Energy, Aug. 26, 1980) [hereinafter cited as *NNA Draft Solicitation*].

⁶⁶Pub. L. No. 96-294 § 305(c) (A), 94 Stat. 619-20.

⁶⁷125 CONG. REC. 5118, 5121 and 5136 (daily ed. June 26, 1979); *Synthetic Fuels Commercialization: Hearings*, *supra* note 51, at 197-201.

ing, social welfare objectives of government procurement.⁶⁸ 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.⁶⁹ 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) waiver⁷⁰ 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 fuel project.⁷¹ Given section 305's requirement to consider "socioeconomic impacts,"⁷² DOE's likely environmental requirements for responses to assistance solicitations⁷³ 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 statement,⁷⁴ the NEPA waiver is very unlikely to affect adversely environmental interests and simply mitigates duplicative delay in project implementation.⁷⁵

Finally, it is worth noting that Congress has hardly resolved itself to a limited role in the synthetic fuels development process.⁷⁶ In several instances⁷⁷ projects are subject to an added dimension of political review

⁶⁸DOD 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. [§] 2305); "Truth-in-Negotiation Act" (10 U.S.C. [§] 2306); Competition in Negotiated procurement (10 U.S.C. [§] 2306); advance payments (10 U.S.C. [§] 2307); Examination of Records (10 U.S.C. [§] 2313).

2. "Officials Not to Benefit" clause-41 U.S.C. [§] 22.

3. "Covenant Against Contingent Fees" clause-10 U.S.C. [§] 2306(b).

4. "Gratuities" clause-10 U.S.C. [§] 2207.

5. Assignment of Claims Act-31 U.S.C. [§] 203; 41 U.S.C. [§] 15.

6. Maybank Amendment-e.g., third proviso of [§] 824, Pub. L. No. 95-457/1978.

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. Trimble 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).

⁶⁹See Exec. Order No. 12242, *supra* note 59; *Draft Solicitation*, *supra* note 59, at App. B, Terms and Conditions, *NNA Draft Solicitation*, *supra* note 65, at App. B, Terms and Conditions.

⁷⁰Pub. L. No. 96-294 § 305(h), 94 Stat. 622.

⁷¹CONF. REP. at 191; 126 CONG. REC. H8477 (daily ed. June 26, 1980).

⁷²Pub. L. No. 96-294 § 305(d) (6), 94 Stat. 621.

⁷³E.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).

⁷⁴See J. SINOR & S. CULBERSON, OVERVIEW OF SYNTHETIC FUELS POTENTIAL TO 1990, at 31, reprinted in REPORT ON SYNTHETIC FUELS, *supra* note 27, at 149.

⁷⁵CONF. REP. at 191.

⁷⁶Pub. L. No. 96-294 § 307, 94 Stat. 628-31, as well as the appropriations process discussed *infra*.

⁷⁷E.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 comprehensive⁷⁸ and potentially decisive.⁷⁹ 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,⁸⁰ government contractual liability,⁸¹ specifics of federal agency purchases⁸² and valuation of government commitments,⁸³ 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 306,⁸⁴ which is also a part of the fast start authorities as well as a permanent standby program,⁸⁵ merits further explication.

Section 306 provides that the President may, in certain national energy supply shortage circumstances,⁸⁶ undertake synthetic fuels production activities with, *inter alia*, the government as owner of synthetic fuels facilities and projects.⁸⁷ Depending upon the President's determination of the severity of the shortage, congressional review of his actions may or may not be a precondition to the invocation of such authorities,⁸⁸ and, in any event, his determination is not reviewable in court.⁸⁹ 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,⁹⁰ "unless the use of such authority has been authorized by the Congress in an Act hereinafter [post-June 30, 1980] enacted by the Congress."⁹¹ 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 projects⁹² "unless the proposed exercise of authority has been specifically authorized on a project-by-project basis in an Act hereinafter [post-June 30, 1980] enacted by the Congress and funds have been specifically appropriated by the Congress for purposes of exercising such authority."⁹³ If all of the foregoing checks are

⁷⁸*E.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 H5142 (daily ed. June 26, 1979) (remarks by Rep. Ottinger that congressional review will "assure that subsidies do not exceed 100 percent of the costs").

⁷⁹Congress may disapprove any synthetic fuel action subject to its review under Pub. L. No. 96-294 § 307, 94 Stat. 628-31.

⁸⁰*Id.* § 305(j), 94 Stat. 922.

⁸¹*Id.* § 305(g) (1), 94 Stat. 921.

⁸²*Id.* § 305(d) (5), 94 Stat. 921.

⁸³*Id.* § 305(g) (2), 94 Stat. 921-22.

⁸⁴*Id.* § 306, 94 Stat. 623-28.

⁸⁵CONF. REP. at 192. Unlike section 305, section 306 authorities do not "cease to be effective" when the SFC becomes "fully operational." Pub. L. No. 96-294 § 305(k) (1), 94 Stat. 623.

⁸⁶Pub. L. No. 96-294 § 306(a) (1) (A)-(D), 94 Stat. 623.

⁸⁷*Id.* § 306(c) (1) (A) (i)-(vi), 94 Stat. 624.

⁸⁸*Id.* § 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).

⁸⁹*Id.* § 306(a) (3), 94 Stat. 623.

⁹⁰*Id.* § 306(c) (1) (A) (i)-(iv), 94 Stat. 624.

⁹¹*Id.* § 306(c) (6) (A), 94 Stat. 625.

⁹²*Id.* § 306(c) (1) (A) (v) and (vi), 94 Stat. 624.

⁹³*Id.* § 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

⁹⁴Notably, "Part A provides no authorization of appropriations for carrying out the provisions of the section." CONF. REP. at 194.

⁹⁵*Supra* note 85.

⁹⁶There can hardly be much disagreement about whether a 25 percent energy supply shortage would be a calamity of the highest order.

⁹⁷The 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.

¹⁰⁰CONF. REP. at 203.

¹⁰¹Pub. 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(e) 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.¹⁰⁶ 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.¹⁰⁷ Their removal from office may only be for "neglect of duty, or malfeasance in office."¹⁰⁸ The Board must meet at least quarterly and its actions must be effectuated by a majority vote of all Board members.¹⁰⁹ Further, the Board must meet at least semiannually¹¹⁰ with its Advisory Committee of chief officers of several major federal departments,¹¹¹ 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."¹¹² 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.¹¹³

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."¹¹⁴ 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.¹¹⁵ Minutes shall be prepared of "any meeting closed to the public" and shall be made "promptly" available to the public.¹¹⁶ 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.¹¹⁷ The

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 McClure).

¹¹⁰Pub. L. No. 96-294 § 123(c), 94 Stat. 644.

¹¹¹These 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.

¹¹⁴125 CONG. REC. S15858 (daily ed. Nov. 5, 1979) (letter from Senators Ford, Domenici, Jackson and Johnston to Members of the Senate).

¹¹⁵Pub. L. No. 96-294 § 116(f)(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). The subsection is not intended to make 5 U.S.C. 552b applicable to the Corporation. However, in patterning the grounds for the closing of meeting 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 552b of Title 5 serve as precedent for construing the exemptive provisions of subsection 116(f)." CONF. REP. at 204-05.

¹¹⁶Pub. L. No. 96-294 § 116(f)(2), 94 Stat. 636.

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."¹¹⁸ Public access to "any information regarding [the Corporation's] organization, procedures, requirements, and activities"¹¹⁹ is required, with certain Freedom of Information Act-like exemptions from disclosure.¹²⁰

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.¹²¹ 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 Corporation¹²² and the Defense Department must be consulted as to its fuel supply requirements.¹²³ 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"¹²⁴ by it. And, the information requested *must* be provided.¹²⁵

Further, the Corporation's relationship *vis-a-vis* federal and State laws frequently confers or implies a governmental status. With some exceptions,¹²⁶ the Corporation is exempt from federal, State and local taxes.¹²⁷ It is treated as an "agency of the United States" for purposes of the Davis-Bacon Act,¹²⁸ securities laws,¹²⁹ and antitrust laws,¹³⁰ and it is authorized to exercise the sovereign power of eminent domain under certain circumstances.¹³¹

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.¹³² 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

¹¹⁸*Id.* § 118(a), 94 Stat. 638-39.

¹¹⁹*Id.* § 121(a), 94 Stat. 641.

¹²⁰As with the open meeting provisions, *supra* note 115, "Section 117 [sic] does not intend that the Freedom of Information Act (5 U.S.C. 552) be applicable as such to the Corporation. However, in patterning the present exemptions from disclosure to those contained in that statute, the Conferees do intend that the body of law developed in litigation construing the exemptions in 5 U.S.C. 552(b) serve as precedent for construing the exemptive provisions of Section 117 [sic]." CONF. REP. at 208.

¹²¹Pub. L. No. 96-294 § 151, 94 Stat. 667-68.

¹²²*Id.* § 172(b), 94 Stat. 674.

¹²³*Id.* § 172(d)(1), 94 Stat. 674-75.

¹²⁴*Id.* § 172(a), 94 Stat. 674 (emphasis added).

¹²⁵*Id.* The "Corporation shall agree to receive such data under the same terms of confidentiality agreed to by the agency involved." *Id.* Further, the federal criminal statute, "18 U.S.C. [§]1905 dealing with restrictions on disclosure of proprietary information by Federal employees shall apply to employees of the Corporation as if they were employees of a Federal agency." CONF. REP. at 233.

¹²⁶Pub. L. No. 96-294 § 155(a)(1)-(3), 94 Stat. 669-70.

¹²⁷*Id.* § 155(a), 94 Stat. 669.

¹²⁸*Id.* § 175(c), 94 Stat. 676-77.

¹²⁹*Id.* § 175(d), 94 Stat. 677. See generally *National Energy Security Corporation: Hearings*, *supra* note 26, 136-53 (testimony of Philip A. Loomis, Jr.).

¹³⁰Pub. L. No. 96-294 § 175(e), 94 Stat. 677.

¹³¹*Id.* § 171(c), 94 Stat. 674.

¹³²*Id.* § 122, 94 Stat. 641-43. "A major failure of the Senate bill was the total absence of congressional control and oversight over the Corporation. The House conferees recognized this and insisted upon creating an Inspector General responsible for monitoring the Corporation's activities and answerable directly to the Congress." 126 CONG. REC. H5719 (daily ed. June 26, 1980) (remarks of Rep. Dingell).

inconsistent with the provisions of"¹³³ 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. . . ."¹³⁴ In addition, detailed and frequent Corporation audit¹³⁵ and reporting¹³⁶ 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.¹³⁷

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."¹³⁸ 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.¹³⁹

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"¹⁴⁰ 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

¹³³*Id.* § 167(a), 94 Stat. 672 (emphasis added).

¹³⁴*Id.* (emphasis added).

¹³⁵*Id.* § 177(b), 94 Stat. 678.

¹³⁶*Id.* § 177(c)(d) and (e), 94 Stat. 678-79.

¹³⁷E.g., *id.* § 126(c), 94 Stat. 646-49 (regarding the comprehensive strategy); *id.* § 132(a)(3)(B), 94 Stat. 659 (regarding increased loans in excess of certain amounts); *id.* § 133(a)(3)(B), 94 Stat. 660 (regarding excess loan guarantees); and, *id.* § 137(c), 94 Stat. 664 (regarding lease-backs). 126 CONG. REC. H5733 (daily ed. June 26, 1980) (remarks of Rep. Moorhead).

¹³⁸126 CONG. REC. H5720 (daily ed. June 26, 1980) (remarks of Rep. Dingell). See also 126 CONG. REC. H5733 (daily ed. June 26, 1980) (remarks of Rep. Moorhead, characterizing the Corporation as "a new one-of-a-kind Federal entity" and "an independent Federal entity—a sui generis entity").

¹³⁹126 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 . . .").

¹⁴⁰See 125 CONG. REC. S15845 (daily ed. Nov. 5, 1979) (remarks of Senator Jackson).

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 fuel¹⁴¹ 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.¹⁴² This goal is to be pursued by the Corporation through the solicitation of proposals for synthetic fuel projects from the private sector¹⁴³ and through the award of financial assistance to qualified concerns¹⁴⁴ submitting acceptable proposals.¹⁴⁵ If the solicitations process is not fruitful, the Corporation may negotiate financial assistance arrangements for synthetic fuel projects.¹⁴⁶ Only after exhausting these procedures may the Corporation even propose to undertake a synthetic fuels project itself.¹⁴⁷

This general process is guided by a comprehensive synthetic fuel production strategy.¹⁴⁸ 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"¹⁴⁹ and which offers "the potential for achieving the national synthetic fuel production goal . . ."¹⁵⁰ The intent here is to provide the Corporation a wide and diverse experience and data base from which to structure the comprehensive strategy.¹⁵¹

The comprehensive strategy is required to be adopted and submitted to

¹⁴¹*Supra* note 29.

¹⁴²Pub. L. No. 96-294 § 125, 94 Stat. 644. See *Synthetic Fuels Legislation: Hearings*, *supra* note 5, at 239-40, 284-85; *Domestic Energy Policy Act of 1979: Hearings on S. 1371 before the Subcomm. on Energy Regulation of the Senate Energy and Natural Resources Comm.*, 96th Cong., 1st Sess. *passim*; 125 CONG. REC. H5145-51 (daily ed. June 26, 1979); *Synthetic Fuels Commercialization: Hearings*, *supra* note 51, at 184-87.

¹⁴³Pub. L. No. 96-294 § 126(a)(1)(A), 94 Stat. 644.

¹⁴⁴Qualified concern "means a concern which demonstrates to the satisfaction of the Board of Directors evidence of its capability directly or by contract to undertake and complete the design, construction, and operation of a proposed synthetic fuel project." *Id.* § 112(15), 94 Stat. 634.

¹⁴⁵*Id.* § 126(a)(1)(B), 94 Stat. 644.

¹⁴⁶*Id.* § 126(a)(1)(C), 94 Stat. 644.

¹⁴⁷*Id.* § 126(a)(1)(D), 94 Stat. 644-45.

¹⁴⁸*Id.* § 126(b), 94 Stat. 645-46.

¹⁴⁹*Id.* § 126(a)(2)(A)(i), 94 Stat. 645. Consideration is to be given to different types and qualities of coal, shale and tar sands as different "domestic resources." *Id.* § 126(a)(2)(B), 94 Stat. 645.

¹⁵⁰*Id.* § 126(a)(2)(A)(ii), 94 Stat. 645.

¹⁵¹See 125 CONG. REC. S15854 and S15864 (daily ed. Nov. 5, 1979) (remarks of Senator Johnston).

Congress no later than June 30, 1984.¹⁵² Specifically, the strategy is to

- contain the Board's recommendations "on the Corporation's objectives and schedules for their achievement"¹⁵³
- address and emphasize private sector responsibilities necessary to achieve the national synthetic fuel production goals¹⁵⁴
- detail how the Corporation's recommended involvement will be limited and ultimately terminated at a future time certain¹⁵⁵
- include an investment strategy prospectus justifying additional Corporation funding by Congress¹⁵⁶
- review and draw conclusions as to the economic and technological feasibility and environmental effects of projects which received assistance¹⁵⁷
- recommend the specific mix of technologies and resource types which the Corporation will support after congressional approval of the strategy.¹⁵⁸

If the strategy, so submitted, is not approved by a joint resolution of Congress,¹⁵⁹ 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 precedent¹⁶⁰ 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.¹⁶¹ Congress may approve less, in which event the Corporation could, later, seek more¹⁶² 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.¹⁶³ Lastly, given the four to seven years construction time for major synthetic fuel projects and the pace of the present fast start program,¹⁶⁴ 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,¹⁶⁵ 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

¹⁵²Pub. L. No. 96-294 § 126(b)(1)(2), 94 Stat. 645. This deadline may be extended upon the Corporation's request, subject to congressional disapproval. *Id.* § 126(d)(1), 94 Stat. 649.

¹⁵³*Id.* § 126(b)(A), 94 Stat. 645.

¹⁵⁴*Id.* § 126(b)(B), 94 Stat. 645.

¹⁵⁵*Id.* § 126(b)(C), 94 Stat. 645-46.

¹⁵⁶*Id.* § 126(b)(D), 94 Stat. 646.

¹⁵⁷*Id.* § 126(b)(E), 94 Stat. 646.

¹⁵⁸*Id.* § 126(b)(F), 94 Stat. 646.

¹⁵⁹*Id.* § 126(c)(1)(A), 94 Stat. 646.

¹⁶⁰*Id.* § 126(c)(10)(A), 94 Stat. 648.

¹⁶¹*Id.* § 126(c)(11), 94 Stat. 648. Of course, it is also a creature of Congress and may subsequently be changed by Congress.

¹⁶²*Id.* § 126(c)(10)(A), 94 Stat. 648.

¹⁶³*Id.* § 126(d)(3), 94 Stat. 649.

¹⁶⁴*Supra* note 55; see also *Draft Solicitation*, *supra* note 59, at II-2 (preliminarily setting Dec. 1, 1980, as deadline for project assistance proposals).

¹⁶⁵*Supra* note 152.

by appropriate amendments thereto as data from operating synthetic fuel projects become available.¹⁶⁶

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.¹⁶⁷ Proposed solicitations must be submitted to the Advisory Committee for review and comment 30 days prior to solicitation issuance.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 . . ."¹⁶⁹ All solicitations are to be conducted "so as to encourage maximum open and free competition."¹⁷⁰ And, the Board is to set forth its general evaluation criteria in the solicitations themselves.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"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.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.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."¹⁷⁵ Whenever "practicable and provident" financial assistance shall be awarded on the basis of competitive bids,¹⁷⁶ but, upon making certain

¹⁶⁶Pub. L. No. 96-294 § 126(d)(3), 94 Stat. 649.

¹⁶⁷*Id.* § 127(a)(1), 94 Stat. 649.

¹⁶⁸*Id.* § 127(a)(2), 94 Stat. 649.

¹⁶⁹*Id.* § 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.* § 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.* § 179(c), 94 Stat. 680.

¹⁷⁰*Id.* § 127(b), 94 Stat. 650. Any concern may request the Board to issue a solicitation for a "general type" project. *Id.* § 127(c), 94 Stat. 650.

¹⁷¹*Id.* § 127(d), 94 Stat. 650.

¹⁷²*Id.* § 127(f), 94 Stat. 650.

¹⁷³*Cf. NNA Draft Solicitation*, *supra* note 65, at I-3—I-4 (as indicative of the potential value of the government's commitment to a project).

¹⁷⁴Pub. L. No. 96-294 § 131, 94 Stat. 654-58.

¹⁷⁵*Id.* § 131(a), 94 Stat. 654.

¹⁷⁶*Id.*

rather onerous findings¹⁷⁷ and reporting those findings to specified congressional authorities, the Board may negotiate contracts for financial assistance for a project.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.”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.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,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”¹⁸² and “incontestable in the hands of the holder.”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 assistance¹⁸⁴ which satisfies the substantive tech-

¹⁷⁷*Id.* § 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. Compare *id.* § 131(b)(4), 94 Stat. 655 with *id.* § 305(d)(2), 94 Stat. 620.

¹⁷⁸*Id.* § 131(b)(4), 94 Stat. 655.

¹⁷⁹*Id.* § 131(b)(2)(A), 94 Stat. 655.

¹⁸⁰*Id.* § 131(b)(2)(B)(i)-(iii), 94 Stat. 655.

¹⁸¹*Id.* § 131(b)(3)(A)-(B), 94 Stat. 655.

¹⁸²*Id.* § 131(c), 94 Stat. 655.

¹⁸³*Id.* § 131(d), 94 Stat. 655.

¹⁸⁴*Id.* § 131(g), 94 Stat. 656.

nological and other criteria,¹⁸⁵ overall financial assistance limits are imposed.¹⁸⁶ Aggregate financial assistance under Part B¹⁸⁷ shall not "exceed at any one time"¹⁸⁸ 15 percent of the Corporation's "total obligational authority"¹⁸⁹ to any one synthetic fuel project or to any one person.¹⁹⁰ For general fiscal discipline and security, any financial assistance contract "shall specify in dollars the maximum amount of the liability of the Corporation;"¹⁹¹ the Secretary of the Treasury shall be notified by the Corporation of its intent to contract for assistance prior to contract execution;¹⁹² and, contracts for assistance shall include a Treasury certification to the effect that sufficient unencumbered appropriations are available to meet the contractual obligations.¹⁹³

The Corporation's financial assistance awards determinations are also *explicitly* constrained in several respects. Loans cannot be awarded nor joint ventures undertaken unless the Board "determines that neither price guarantees, purchase agreements, nor loan guarantees will adequately support the . . . project or will restrict the available participants for such project."¹⁹⁴ Multiple forms of assistance shall not be awarded unless "required for the

¹⁸⁵*E.g.*, promotion of competition, *id.* § 131(h), 94 Stat. 657.

¹⁸⁶*Id.* § 131(j), 94 Stat. 656.

¹⁸⁷The statutory language reads: "this part," which clearly refers to Part B of Title I, concerning the Corporation's assistance activities. CONG. REP. at 214; 126 CONG. REC. H5719 (daily ed. June 26, 1980) (remarks of Rep. Dingell). Thus, any assistance received by a "project" or "person" under Part A, the fast start program, would be excluded from the calculation of maximum assistance available to such project or person under section 131(j).

¹⁸⁸This phrase is not particularly clear. The Conference Report simply drops the phrase in its description of the section, which could be interpreted as inclined toward meaning an "at any time," absolute assistance ceiling. CONF. REP. at 214. This appears to be the most reasonable interpretation, given considerations of promoting competition in assistance awards and what other little legislative history exists. 126 CONG. REC. H5724 (daily ed. June 26, 1980) (remarks of Rep. Gore).

¹⁸⁹This term 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, plus sums authorized under section 126 and less about \$5 billion authorized under the fast start authorities. The Conference Report also speaks in terms of section 152 when addressing the authorized obligation authority. CONF. REP. at 214. Further, section 195, 94 Stat. 682, *authorizes* to be appropriated \$20 billion to purchase obligations of the Corporation, plus, again, section 126 sums and less fast start program sums. Thus, the term reasonably equates to "total authorization." See 126 CONG. REC. H5724 (daily ed. June 26, 1980) (remarks of Rep. Gore). This interpretation is also consistent with past practice. See the REPORT OF THE PRESIDENT'S COMMISSION ON BUDGET CONCEPTS (1967) at 100, where "obligational authority" is defined as "[a]uthority provided by the Congress to enter into obligations requiring the Federal Government to pay out money. For any year it is equal to new obligational 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.

¹⁹⁰Pub. L. No. 96-294 § 131(j)(1), 94 Stat. 656. "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.

¹⁹¹*Id.* § 131(k)(1), 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. § 152(b)(1)(A)-(E), 94 Stat. 668.

¹⁹²*Id.* § 131(k)(2), 94 Stat. 656.

¹⁹³*Id.* § 131(k)(3), 94 Stat. 656.

¹⁹⁴*Id.* § 131(p), 94 Stat. 657.

viability of the project, and further, . . . the project is necessary to achieve the purposes of [Title I] and the provisions of [Part B].”¹⁹⁵ 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.¹⁹⁶ 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.”¹⁹⁷ 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.”¹⁹⁸

Perhaps one of the Corporation’s most arduous tasks will involve reconciling its minimal capital markets impact objective¹⁹⁹ 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”²⁰⁰ 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.”²⁰¹ If the Corporation is truly a “financier of last resort,”²⁰² 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 thereto, 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

¹⁹⁵*Id.* § 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.

¹⁹⁶*Id.* § 131(t)(1)-(3), 94 Stat. 658.

¹⁹⁷*Id.* § 131(l), 94 Stat. 656.

¹⁹⁸*Id.* § 131(q), 94 Stat. 657 (emphasis added).

¹⁹⁹*Id.*

²⁰⁰*Id.* § 131(r), 94 Stat. 657-58. See generally *Synthetic Fuels Legislation: Hearings*, *supra* note 5, at 239 and 315.

²⁰¹Pub. L. No. 96-294 § 131(r), 94 Stat. 657.

²⁰²See 126 CONG. REC. H5719 (daily ed. June 26, 1980) (remarks of Rep. Dingell).

synthetic fuel project.²⁰³ As a condition precedent to an application for assistance, every applicant must consent to such examinations and reports as the Corporation may require.²⁰⁴ As to recipients of financial assistance, the Corporation shall require such reports and records as it deems necessary, shall have access to such records at all reasonable times, and may prescribe the manner of keeping such records.²⁰⁵ Where loan or loan guarantees are sought, the Corporation may require a share of the profits from the project on a "fair basis."²⁰⁶ Price guarantees and purchase agreements must include provisions for "review and possible renegotiation . . . within ten years from the date of initial production by the synthetic fuel project."²⁰⁷ The Corporation will determine the need for continued assistance at that time.²⁰⁸ Lastly, the Corporation may undertake cost-sharing agreements with assistance applicants to refine the design of proposed projects so as to improve 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-

²⁰³Pub. L. No. 96-294 § 131(e), 94 Stat. 655. The Corporation's financial assistance decisions are not subject to the environmental impact statement requirement of the National Environmental Policy Act of 1969. *Id.* § 175(b), 94 Stat. 676. See generally *id.* Title VII—Acid Precipitation Program and Carbon Dioxide Study, 94 Stat. 770-75; 125 CONG. REC. S16054-57 (daily ed. Nov. 7, 1979) (remarks of Senator Muskie); *Oversight, Synthetic Fuels: Hearings Before the House Comm. on Science and Technology*, 96th Cong., 1st Sess. *passim* (vol. XI 1979).

²⁰⁴Pub. 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." CONF. REP. at 214.

²⁰⁶Pub. L. No. 96-294 § 131(n), 94 Stat. 657.

²⁰⁷*Id.* § 131(s), 94 Stat. 658.

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

²⁰⁹Pub. L. No. 96-294 § 131(u), 94 Stat. 658; such agreements "shall not exceed 1 percent of the preliminary total estimated cost of the . . . project." *Id.* § 131(u)(2), 94 Stat. 658. And, the Corporation may not spend more than one percent of its "total obligational authority" for such agreements. *Id.* § 131(u)(3), 94 Stat. 658. See generally *Oversight, Cost Estimation Techniques for Emerging Synthetic Fuels Technologies: Joint Hearing Before the Subcomm. on Energy Development and Applications of the House Comm. on Science and Technology and the Subcomm. on Oversight and Investigations and the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. *passim* (vol. IX 1979).

²¹⁰Pub. L. No. 96-294 § 132(a)(2)(B), 94 Stat. 658.

²¹¹*Id.* § 132(a)(2)(A), 94 Stat. 658.

²¹²*Id.* § 132(a)(3). 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.

²¹³Pub. L. No. 96-294 § 132(b), 94 Stat. 659.

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."²¹⁴ 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.²¹⁵

Loan guarantees²¹⁶ are limited to 75 percent of the Corporation's initial total estimated project cost,²¹⁷ 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.²¹⁸ 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."²¹⁹ 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.²²⁰ In essence, the loan guarantee is turned into a direct loan from the Corporation.²²¹ 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;²²² fees up to one percent of the amount of assistance may be collected in connection with all other types of financial assistance.²²³

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."²²⁴ However, "no such price guarantee may be based upon a 'cost plus' arrangement

²¹⁴*Id.* "The Conferees 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.

²¹⁵Pub. L. No. 96-294 § 132(d), 94 Stat. 659.

²¹⁶Guarantees may cover principal and interest. *Id.* § 133(a)(1), 94 Stat. 660.

²¹⁷*Id.* § 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).

²¹⁸Pub. L. No. 96-294 § 133(a)(3), 94 Stat. 660. See *supra* note 212.

²¹⁹Pub. L. No. 96-294 § 133(a)(4), 94 Stat. 660.

²²⁰*Id.* § 133(b), 94 Stat. 660-61.

²²¹Generally, 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 *vis-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.

²²²Pub. L. No. 96-294 § 139(b), 94 Stat. 665.

²²³*Id.* § 139(a), 94 Stat. 665.

²²⁴*Id.* § 134, 94 Stat. 661.

or variant thereof."²²⁵ 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."²²⁶ Under certain circumstances, the specified sales price established in any price guarantee may be renegotiated upward.²²⁷

The Corporation is authorized to execute purchase agreements for all or part of the production from a project.²²⁸ 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.²²⁹ 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.²³⁰

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.²³¹

Prior to the approval of a comprehensive synthetic fuels production strategy,²³² the Corporation may enter into joint ventures²³³ for synthetic fuel project modules.²³⁴ 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.

²²⁶Pub. L. No. 96-294 § 134, 94 Stat. 661.

²²⁷*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.*

²²⁸Pub. L. No. 96-294 § 135(a), 94 Stat. 661.

²²⁹*Id.*

²³⁰*Id.* § 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.

²³¹*Id.* § 135(d), 94 Stat. 662.

²³²*Supra* note 159.

²³³Pub. L. No. 96-294 § 136(a), 94 Stat. 662. "The Conferees 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. See *supra* note 180 and accompanying text.

²³⁴Pub. 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 cost²³⁵ 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." CONF. REP. at 223.

²³⁷Pub. L. No. 96-294 § 136(f)(2), 94 Stat. 663.

²³⁸*Id.* § 136(e), 94 Stat. 663.

²³⁹*Id.* § 136(f)(1), 94 Stat. 663.

²⁴⁰CONF. REP. at 224.

²⁴¹Pub. L. No. 96-294 § 137(d)(2), 94 Stat. 664.

²⁴²*Id.* § 137(e), 94 Stat. 664.

²⁴³*Id.* §§ 141-45, 94 Stat. 665-67.

²⁴⁴*Id.* § 142, 94 Stat. 666.

²⁴⁵125 CONG. REC. S15861 (daily ed. Nov. 5, 1979) (remarks of Senator Domenici).

²⁴⁶Pub. L. No. 96-294 § 142(a), 94 Stat. 665.

²⁴⁷*Id.*

the other authorities available to the Corporation and is only authorized during the period when "one-of-a-kind" projects are envisioned.²⁴⁸ 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"²⁴⁹ program within DOE.²⁵⁰ A special "Energy Security Reserve"²⁵¹ fund was established in the United States Treasury and \$19 billion was appropriated to it.²⁵² \$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"²⁵³ pursuant to the Non-nuclear Energy Research and Development Act of 1974 (NNA).²⁵⁴ An additional \$708 million of the \$19 billion was made immediately available to the Energy Secretary "to support preliminary alternative fuels commercialization activities"²⁵⁵ 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 [\$1.5 billion];"²⁵⁶ and
- \$8 million for program management.²⁵⁷

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.²⁵⁸

Thereafter, on June 30, 1980, the Energy Security Act *authorized*²⁵⁹ \$20 billion for the Energy Security Reserve to purchase "notes and other obligations of the Corporation,"²⁶⁰ plus any additional sums authorized under the comprehensive strategy process (the potential \$68 billion), less

²⁴⁸*Id.*; CONF. REP. at 226. Corporation-owned, contractor-operated projects are, simply, "a last resort." 125 CONG. REC. S16099 (daily ed. Nov. 7, 1979) (remarks of Senator Johnston).

²⁴⁹Act of Nov. 27, 1979, Pub. L. No. 96-126, 93 Stat. 970-71.

²⁵⁰*Id.*

²⁵¹*Id.*

²⁵²*Id.* \$1 billion was also appropriated, subject to authorizations, to the "Solar and Conservation Reserve." *Id.*

²⁵³*Id.*

²⁵⁴*Supra* note 65.

²⁵⁵Pub. L. No. 96-126, 93 Stat. 970.

²⁵⁶*Id.*, 93 Stat. 971.

²⁵⁷*Id.*

²⁵⁸*See* discussion and notes *infra* with respect to appropriations under the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, 94 Stat. 857.

²⁵⁹Authorizations customarily precede appropriations.

²⁶⁰Pub. L. No. 96-294 § 195(a)(1)(A), 94 Stat. 682.

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.²⁶¹

Then, on July 8, 1980, the Supplemental Appropriations and Rescissions Act, 1980²⁶² 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;²⁶³
- \$100 million for project feasibility studies;
- \$200 million for cooperative agreements; and,
- \$10 million for program management.²⁶⁴

Upon a "Presidential determination that the Corporation is fully operational and upon a majority vote of the Board,"²⁶⁵ projects or actions initiated by DOE under the alternative fuels production appropriations shall transfer to the Corporation.²⁶⁶

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 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

²⁶¹*Id.*

²⁶²*Supra* note 258.

²⁶³Pub. L. No. 96-304, 94 Stat. 880. The Act uses the word "reserve" here, but it does not specify an aggregate guaranteed indebtedness which would permit leverage. Compare *supra* note 256 and accompanying text. This is explained by the fact that the Corporation simply cannot leverage its funds. Pub. L. No. 96-294 § 152(b); CONF. REP. at 227-28; 126 CONG. REC. H5692 (daily ed. June 26, 1980) (remarks of Rep. Moorhead); 126 CONG. REC. H5719 (daily ed. June 26, 1980) (remarks of Rep. Dingell); 125 CONG. REC. S51848 (daily ed. Nov. 5, 1979) (remarks of Senator Jackson).

²⁶⁴Pub. L. No. 96-304, 94 Stat. 880.

²⁶⁵*Id.*, 94 Stat. 881.

²⁶⁶*Id.* Except "that funds obligated for feasibility studies, cooperative agreements, program management, and projects which do not meet the definition of eligibility for funding as synthetic fuels projects in the Corporation shall remain within the Department of Energy." *Id.*

Given the "dollar-for-dollar" Corporation funding-to-obligations requirement, *supra* note 263, would the Corporation be required to carry the leveraged NNA obligations, *supra* text accompanying note 256, at their \$1.5 billion value? If so, would it not be in the Corporation's interest for the Board not to vote to transfer the NNA funded projects?

for purposes of Title I of the Energy Security Act,²⁶⁷ \$12.212 billion as noted above plus up to \$5.310 billion from the fast start and NNA DOE appropriations.²⁶⁸ 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, 1982.²⁶⁹ And, for the time being at least,²⁷⁰ 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, 1985.²⁷¹

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.

²⁶⁷Pub. L. No. 96-304, 94 Stat. 882.

²⁶⁸*Id.* \$208 million of the previously appropriated NNA funds are not available for transfer to the Corporation.

²⁶⁹*Id.*

²⁷⁰*Supra* note 160 and accompanying text.

²⁷¹*Supra* note 152.