

Report of the Committee on Environment

I. FEDERAL ENERGY REGULATORY COMMISSION MATTERS

A. Natural Gas

The FERC's new optional expedited certificate (OEC) procedures¹ raise several environmental and procedural issues. Some have argued that the new OEC procedures may conflict with the FERC's obligation as the lead agency in certificate proceedings under the Natural Gas Act (NGA)² to prepare an environmental impact statement (EIS).³ The National Environmental Policy Act of 1969 (NEPA),⁴ where applicable,⁵ "mandates" that the lead agency prepare an EIS that includes "at least a broad, informal cost benefit analysis . . . of the economic, technical⁶ and environmental costs and benefits of a particular action."⁷ In *Great Lakes Gas Transmission Co.*,⁸ the FERC recognized that its review of certificate applications must satisfy these NEPA requirements as well as the requirements of other applicable environmental statutes, irrespective of whether the application seeks conventional NGA certification or an OEC. Soon thereafter, however, the FERC rejected a draft order prepared by its staff that would have confined the availability of OEC's to projects *not* requiring an EIS under NEPA.⁹

OEC procedures either shorten or eliminate altogether the FERC's analysis of *need for* and *alternatives to* a proposed new natural gas service or new

1. OEC's were promulgated in FERC Order No. 436 as alternatives to conventional certificates under section 7 of the Natural Gas Act, 15 U.S.C. § 717f (1982). See Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol, 18 C.F.R. § 157.104 (1987), *vacated and remanded*, *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987). In its pre-enforcement review of appeal of Order No. 436, the Court of Appeals for the District of Columbia Circuit held that the OEC procedures were not ripe for review and thus dismissed challenges to those procedures. *Associated Gas Distribs.*, 824 F.2d at 1033.

2. See Council on Environmental Quality, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. § 1501 (1986) [hereinafter CEQ Guidelines].

3. 42 U.S.C. § 4332(2)(C)(i) (1982).

4. 42 U.S.C. §§ 4321-4341 (1982 & Supp. III 1985).

5. NEPA requires an impact statement on all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1982). NEPA's applicability is established when there are "alleged facts which, if true, show that the proposed project *may* significantly degrade some human environmental factor." *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 597 (9th Cir. 1981) (citations omitted) (emphasis in original); see also *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980) (allegation of significant degradation of some human environmental factor); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973). Virtually all FERC certificates for new pipeline construction constitute major federal actions subject to NEPA requirements.

6. *Great Lakes Gas Transmission Co.*, 37 F.E.R.C. ¶ 61,270, at 61,802 (1986) ("[A]pplications filed under the [OEC] procedures are treated virtually the same as other applications for purposes of ensuring compliance with applicable environmental laws.").

7. *Sierra Club v. Sigler*, 695 F.2d 957, 978 (5th Cir. 1983); *Chelsea Neighborhood Ass'n v. United States Postal Serv.*, 516 F.2d 378, 386 (2d Cir. 1975).

8. *Great Lakes Gas Transmission Co.*, 37 F.E.R.C. ¶ 61,270 (1986).

9. The Staff's proposals were denominated items CP-4 and CP-5 on the FERC's agenda for its July 15, 1987 meeting.

pipeline construction. Analysis of need is circumvented by section 157.104 of new Subpart E of the FERC's regulations.¹⁰ Under that section, an applicant must, *inter alia*, agree to volumetric rates¹¹ and a non-exclusive certificate.¹² In return, the applicant is presumed, subject to rebuttal, to satisfy the requirements of section 7(e) of the NGA,¹³ including the requirement that the "new service is or will be required by the present or future public convenience and necessity."¹⁴ Whether the OEC's general presumption of need satisfies NEPA's mandatory analysis of costs and benefits (including the public convenience and necessity) is questionable.¹⁵

Moreover, because of the requirement that OEC's be *non-exclusive* of alternatives or competing projects, the FERC apparently will not require that an OEC application be analyzed to see if a specific application, among alternatives, is the most effective and efficient way to serve the present and future public convenience and necessity. A comparative analysis of project alternatives has traditionally been required in certificate proceedings because of the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*.¹⁶ In what has become known as the *Ashbacker* doctrine, the Court instructed that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."¹⁷ The courts have ordinarily required the FERC to interpret mutual exclusivity broadly.¹⁸ In Order No. 436, however, the FERC found *Ashbacker* to be inapplicable because OEC's are deemed non-exclusive by reason of the Commission's express willingness to grant multiple competing certificates.¹⁹

10. Order No. 436, 18 C.F.R. § 157.104 (1987).

11. A fee for firm transportation, called a reservation fee, however, is permitted in addition to the volumetric rate. The reservation fee is functionally equivalent to a demand charge. *Id.* § 157.103(d)(3).

12. *Id.* § 157.103(a).

13. 15 U.S.C. § 717f(e) (1982).

14. 18 C.F.R. § 157.104(c)(3) (1987).

15. The authority of the Commission to presume satisfaction of the public interest requirements of section 7(e) where the applicant accedes to the prescribed volumetric rates was upheld by the court in *Associated Gas Distribs.* against challenges that the OEC presumption necessarily risks (1) uneconomic "waste through construction of duplicative facilities and (2) adverse impact on the customers of bypassed LDCs." *Associated Gas Distribs.*, 824 F.2d at 1145.

16. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

17. *Id.* at 333.

18. *See* *Midwestern Gas Transmission Co. v. FPC*, 258 F.2d 660, 669-70 (D.C. Cir. 1958) (holding that NGA requires consolidated, comparative *Ashbacker* hearings even where applications are only potentially exclusive of each other), *vacated and remanded on other grounds*, 358 U.S. 280 (1959) (*per curiam*).

19. Order No. 436, *supra* note 1. The FERC has not yet addressed the possibility that a certificate may be de facto exclusive for economic, environmental, or other reasons. It is not difficult to envision circumstances in which a market could economically support one or only a limited number of pipeline suppliers. Similarly, the environmental impacts of constructing multiple pipelines into a market may in fact be unacceptable and thus a certificate to any one of alternative applicants would be exclusive, irrespective of the FERC's stated willingness to issue multiple certificates. If the FERC were to issue more than one construction certificate for new pipelines in the same area, it is likely that NEPA would require the EIS for each to evaluate the cumulative impacts. *See, e.g.,* *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) ("To ignore the prospective cumulative harm under such circumstances [multiple dumping projects] could be to risk ecological disaster.").

NEPA nevertheless independently requires a comparative analysis of alternatives to a proposed action, including the analysis of a "no action" alternative.²⁰ A comparative analysis of all reasonable "alternatives to a proposed action" has been called the "linchpin" of a NEPA-required EIS.²¹ Whether the FERC's regulatory decision that OEC's are non-exclusive and can therefore circumvent the detailed comparative analysis of alternatives required by NEPA and *Ashbacker* is a question that will surely be answered in OEC proceedings and/or appeals thereof.

Further, the appropriate forum for consideration of environmental issues in an OEC application remains uncertain. The OEC procedures permit a certificate applicant to forgo the hearing otherwise required by section 7 of the NGA (in which public convenience and necessity traditionally have been determined) so long as no protest or intervention "raises a genuine issue of material fact" by rebutting the OEC presumptions.²² Traditionally, however, the FERC has phased its analysis of construction certificate applications. Environmental impacts have been reported in the EIS. Later, the EIS has been considered as one piece of evidence together with other evidence on the issues of need and project alternatives in a hearing conducted pursuant to section 7(e) of the NGA.²³

Given the real possibility that hearings will not be held in many OEC applications, it is unclear where and how, if not in an EIS, the total costs and benefits of (including need for) an OEC certificate will be detailed and evaluated as required by NEPA.

B. *Electric and Hydropower*

1. Electric Consumers Protection Act

1986 saw the passage of the Electric Consumers Protection Act (ECPA)²⁴ which established certain guidelines pertaining to hydropower project licensing and relicensing cases. The new law requires coordination among Federal agencies which have overlapping authority and interests concerning environmental issues.²⁵

The ECPA amends provisions of the Federal Power Act and establishes criteria to be used in the issuance of hydroelectric licenses. It requires the Commission to consider not only the power and development purposes for which licenses are issued but also the purposes of energy conservation, the

20. 42 U.S.C. § 4333(2)(c)(iii) (1982).

21. *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); see also *Greene County Planning Bd. v. FPC*, 559 F.2d 1227, 1232 (2d Cir. 1976) ("The purposes of NEPA are frustrated when consideration of alternatives and collateral effects is unreasonably constricted."), *cert. denied*, 434 U.S. 1086 (1978).

22. 18 C.F.R. § 157.104(b) (1985).

23. This unique approach is arguably not in compliance with the CEQ Guidelines, *supra* note 2, which require that the issues of need and alternatives be evaluated in the EIS together with all other impacts. See 40 C.F.R. §§ 1502.13, 1502.14 (1986). The FERC has long been under an obligation to promulgate regulations implementing the CEQ Guidelines. It finally issued a proposed rule on May 14, 1987. Notice of Proposed Rulemaking, 52 Fed. Reg. 20,314 (1987).

24. Pub. L. No. 99-495, 100 Stat. 1243 (1986).

25. Echeverria, *The Electric Consumers Protection Act of 1986*, 8 ENERGY L.J. 61 (1987).

protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities and the preservation of other aspects of environmental quality. In order to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife affected by the development, operation and management of a project, the Act requires that each license issued include conditions for such protection.

The ECPA also established new procedures, timetables, and standards for relicensing proceedings before the Commission. Existing licensees must now notify the Commission whether they intend to file applications for new licenses at least five years before the expiration of the existing license. Each application for a new license must be filed at least two years prior to the expiration of the existing license.

The ECPA also provides that the Commission must award a new license to an applicant whose proposal is best adapted to serve the public interest. The ECPA does not include a direct preference for either incumbents or municipal applicants. However, in order to protect against project transfers between applicants, Congress provided that "insignificant" differences will not be determinative. The existing licensee's track record is identified as a factor to consider in the award of the license. The ECPA also requires the Commission to establish a deadline for the concurrent submission of final amendments to license applications.

In a recent case, *Kamargo Corp.*,²⁶ the Commission held that it was inappropriate, not in the public interest, and inconsistent with the ECPA to issue preliminary permits with terms that interfered with relicensing of existing hydroelectric projects. A strong dissent was filed by Commissioner Trabandt.²⁷

Section 8(a) of the ECPA amended section 210 of the Public Utilities Regulatory Policies Act of 1978 (PURPA) to create a new section 210(j) which imposes three new environmental requirements before applicants for licenses or exemptions can obtain PURPA benefits for small hydroelectric facilities utilizing new dams or diversions.²⁸ Section 8(a) of the ECPA also imposes a moratorium of approximately two years on the grant of PURPA benefits to projects at new dams or diversions while Congress, with the assistance of the Commission, studies the matter.

Section 8(d) of the ECPA requires the FERC to perform a study to evaluate whether PURPA benefits should continue to be available to facilities of new dams or diversions. The FERC has scheduled scoping sessions to identify the issues to be examined in the study, which is scheduled to be completed in June, 1988. The FERC has indicated that the study will consider: (1) the need for new dams or diversions for power purposes; (2) the environmental

26. *Kamargo Corp.*, 37 F.E.R.C. ¶ 61,281 (1986).

27. *Id.* at 61,844.

28. "[A] 'new dam or diversion' means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or other similar adjustable devices)." Public Utilities Regulatory Policies Act § 210(K), 16 U.S.C.S. § 824(a)(3)(K) (Law. Co-op. Supp. 1987).

impacts of new dams or diversions; (3) the environmental effects of the facilities alone and in combination with other existing or proposed dams or diversions on the same waterway; (4) the intent of Congress to encourage and give priority to the application of PURPA benefits to existing dams and diversions rather than new dams and diversions; and (5) the impact of these dams on the rates paid by electric power consumers.

The ECPA also requires the Commission to establish fees to be paid by applicants for hydroelectric projects required to meet the mandatory terms and conditions set by the National Marine Fisheries Service, the United States Fish and Wildlife Service and state fish and wildlife agencies to protect fish and wildlife resources.

2. Rulemakings

a. Application Reimbursement Obligation for Agency Review

In Docket No. RM87-6-000 issued on March 11, 1987,²⁹ the FERC proposed a new rule requiring applicants for hydroelectric projects to reimburse federal and state fish and wildlife agencies for the cost incurred in setting terms and conditions for licenses and exemptions.³⁰ The proposed rule would allow the National Marine Fisheries Service, the United States Fish and Wildlife Service and state fish and wildlife agencies to be reimbursed for the actual cost of reviews or studies incurred for conduit exemptions, five megawatt exemptions, and applications for licenses at new dams or diversions seeking benefits under section 210 of PURPA.³¹

29. Notice of Proposed Rulemaking, *Fees for Hydroelectric Project Applications to Reimburse Fish and Wildlife Agencies*, IV F.E.R.C. Stats. & Regs. ¶ 32,436, 52 Fed. Reg. 8463 (1987).

30. 52 Fed. Reg. at 8463. "[T]he Commission is proposing to include as reimbursable the reasonable costs incurred by fish and wildlife agencies during pre-filing consultation, as well as the reasonable costs incurred by those agencies after an application is filed." *Id.* at 8465. The Commission believes this provision is necessary because a prospective section 30(c) applicant needs to have some idea of the expenditures it will later have to make for fish and wildlife agency costs prior to the filing of an application. *Id.*

[T]he proposed fee requirements would apply to pending section 30(c) applications filed before the date of ECPA's enactment as well as to section 30(c) applications filed after the date of ECPA's enactment. However, fish and wildlife agencies would only be reimbursed for costs incurred after the date of ECPA's enactment.

The proposed fee requirements would be applicable to all exemption applications. After the moratorium imposed by section 8(e) of ECPA [during which no project may receive PURPA benefits while the study is being undertaken] is lifted, the proposed fee requirements would also apply to: (1) New dam or diversion license applications seeking PURPA benefits filed on or after April 16, 1988; (2) new dam or diversion license applications seeking PURPA benefits filed on or after October 16, 1986, but before April 16, 1988, if the applicant cannot successfully demonstrate that it had committed substantial monetary resources relating to the filing of an acceptable application before October 16, 1986; and (3) pending new dam or diversion license applications seeking PURPA benefits filed before October 16, 1986, if the application is not accepted for filing before October 16, 1989.

Id. at 8467 (footnotes omitted).

31. The regulations provide that "at the time an exemption applicant is notified that its application is accepted for filing, the Commission will circulate the public notice of acceptance for filing of the application to interested agencies." *Id.* at 8464 (footnote omitted). After which, fish and wildlife agencies are required

The Commission is proposing to require fish and wildlife agencies to include a reasonable estimate of all costs they anticipate incurring in connection with a section 30(c) application in their final comments upon the draft application.

In order to reduce the possibility that fish and wildlife agencies may not adequately be compensated for costs incurred in setting mandatory terms and conditions, the Commission is proposing to require that applications be accompanied by a fee in an amount equal to fifty percent of the pre-filing cost estimates provided by fish and wildlife agencies with their final comments upon the draft application. The fee would be offset against the final amount due for fish and wildlife agency costs.

"[T]he Commission is [also] proposing to require fish and wildlife agencies to inform the Commission of the costs that they have incurred in setting the mandatory terms and conditions for a proposed project within forty-five days after the prescribed deadline for filing mandatory terms and conditions."³²

If an applicant withdraws or the Commission rejects an application before the prescribed deadline for fish and wildlife agencies to submit mandatory terms and conditions for the proposed project, the former applicant would be required to reimburse the appropriate fish and wildlife agencies for any reasonable costs incurred prior to the withdrawal or rejection of the application.³³ The Commission also proposes procedures to handle disputes.³⁴

A potential new dam or diversion license applicant is required to inform fish and wildlife agencies at the initial stage of consultation that it intends to seek PURPA benefits. If an applicant decides after filing an application to seek or not to seek PURPA benefits, it must so notify the fish and wildlife agencies. Any consultation costs incurred by fish and wildlife agencies in connection with a new dam or diversion license application that does not seek PURPA benefits would not be reimbursable.

The Commission proposes to deduct all payments that section 30(c) applicants make to the Commission for costs incurred by fish and wildlife

to submit specific mandatory terms and conditions to be included in an exemption within 45 days for conduit exemptions, and 60 days for five megawatt exemptions, and new dam and diversion licenses after the date of issuance of the public notice of acceptance for filing of the exemption application. *Id.*

32. *Id.* at 8465-66.

33. *Id.* at 8466. Each cost statement must be accompanied by supporting documentation itemizing the costs incurred. Upon receipt of such cost statements the Commission will submit an itemized bill to the section 30(c) applicant, setting forth either the amount due or the amount to be refunded to the applicant (to be determined by the amount paid by applicant at the time of filing). *Id.*

34. *Id.* at 8467. An applicant would be allowed to dispute a cost statement it finds unreasonable within 45 days after receipt of a bill. The Commission would assess the reasonableness of any disputed cost statement taking appropriate factors into consideration. If the Commission determines the cost statement is unreasonable, the Commission would provide a 45 day period in which the applicant and the agency may attempt to reach an agreement regarding the reimbursable costs. If no agreement is reached the Commission would determine the reasonable costs incurred by the agency. *Id.*

agencies from the total annual charge assessed against licensees for the costs of administering Part I of the FPA.

b. Hydroelectric

On February 13, 1987, the FERC issued an interim rule in Docket No. RM87-8-000³⁵ amending its regulations governing hydroelectric applicants seeking benefits under section 210 of the PURPA. The interim rule amends the Commission's regulations governing applicants for hydroelectric licenses and exemptions that seek benefits under section 210 of PURPA for projects to be located at a new dam or diversion.

This interim rule implements the new environmental conditions imposed by section 8(a) of ECPA, and implements the exception provision of section 8(b) of that statute. This provision provides four categories of exceptions from the new requirements and from the moratorium.

Projects excepted from the moratorium may qualify for PURPA benefits if they meet or are excepted from each of the three new environmental requirements.

[T]he Commission is implementing all four statutory exceptions from the moratorium and from the new environmental requirements for qualification for PURPA benefits. The Commission is excepting from the moratorium and from all three new requirements any project located at a government dam where non-federal hydroelectric development is permitted, and any project for which an application for license or exemption was filed and accepted before October 16, 1986. The Commission is also excepting from the moratorium, [from] the adverse environmental impacts requirement, and [from] the fish and wildlife conditions requirement . . . any project for which an application for license or exemption was filed before October 16, 1986, and is accepted by the Commission before October 16, 1989.

The fourth exception applies to a project for which an applicant demonstrates, in a petition filed with the Commission, that a substantial commitment of monetary resources was made prior to the enactment of ECPA. The project will be excepted from the moratorium and from the fish and wildlife agency conditions requirement, but not from the adverse environmental effects requirement or the protected rivers requirement. The regulations provide standards and procedures governing petitions claiming a substantial monetary commitment.³⁶

The Commission adopted a fifty percent standard as the "substantial commitment" amount because it believed such a standard reflects the intent of Congress. Fifty percent of the total cost of producing an application accepted for filing has to have been expended or committed to be expended before October 16, 1986.³⁷

"The Commission is requiring that an applicant for license or exemption must either file its application and the commitment of resources petition together or submit with its application a request for an extension of time, not

35. Interim Rule, *Implementation of Newly Enacted Provisions Governing Hydroelectric Applicants Seeking Benefits Under Section 210 of the Public Utilities Regulatory Policies Act of 1978 for Projects Located at a New Dam or Diversion*, III F.E.R.C. Stats. & Regs. ¶ 30,729, 52 Fed. Reg. 5276 (1987).

36. 52 Fed. Reg. at 5278 (footnote omitted).

37. *Id.*

to exceed ninety days, or April 16, 1988, whichever occurs first, in which to file the petition."³⁸ The Commission will not accept a commitment of resources petition before a license or exemption application is filed. "[O]nly when a license or exemption application is filed does it become clear that a developer will in fact proceed with its project."³⁹ The Commission is "allowing those who filed an application for license or exemption on or after October 16, 1986, but before the effective date of this [R]ule, ninety days after the effective date of this [R]ule to file the commitment of resources petition."⁴⁰ The commitment of resources petition must also indicate that the appropriate federal and state agencies have been served. An itemized statement of the total costs expended on the application and a schedule of the costs that were expended or committed to be expended on the application before October 16, 1986 must also be included.⁴¹

c. Clean Water Act Matters

On February 11, 1987, in Docket No. RM85-6-000,⁴² the FERC issued Order No. 464 "amending Part Four of its regulations to define when the certification requirements of section 401(a)(1) of the Clean Water Act (CWA)⁴³ have been waived as a result of a failure of the state or other authorized certifying agency to act [within the time period prescribed by Congress] on a request for certification filed by an applicant for a Commission hydroelectric license."⁴⁴ By its rule, the Commission allowed "certifying agencies one year after the certifying agency's receipt of a request for section 401 water quality certification to grant or deny the license applicant's request for certification."⁴⁵ The Rule also revised section 4.38 of the Commission's regulations⁴⁶ governing the prefiling consultation procedures an applicant for license must follow.⁴⁷ On April 13, 1987, the Commission denied rehearing in Order 464-A.⁴⁸

d. NEPA Implementation

On May 14, 1987, in Docket No. RM87-15-000,⁴⁹ the Commission proposed to revise its regulations governing the collection, evaluation and dissem-

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 5279.

42. Order No. 464, *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, III F.E.R.C. Stats. & Regs. ¶ 30,730, 52 Fed. Reg. 5446 (1987).

43. 33 U.S.C. § 1341(a)(1) (1982).

44. 52 Fed. Reg. at 5446.

45. *Id.*

46. 18 C.F.R. § 4.38 (1986).

47. 52 Fed. Reg. at 5446.

48. Order No. 464-A, 39 F.E.R.C. ¶ 61,021 (1987).

49. Notice of Proposed Rulemaking, *Regulations Implementing the National Environment Policy Act of 1969*, IV F.E.R.C. Stats. & Regs. ¶ 32,442, 52 Fed. Reg. 20,314 (1987).

ination of environmental information by the Commission.⁵⁰ These regulations would replace and elaborate on existing Commission regulations under NEPA and adopt many of the NEPA regulations promulgated by the CEQ.⁵¹

The proposed Rule retains part of the original NOPR issued August 20, 1979, in Docket No. RM79-69, concerning the Environmental Assessment (EA)/Environmental Impact Statement (EIS) process; lead and cooperating agencies; comment procedures; the record of decision in cases requiring an EIS and implementation; and the definition of terms. The proposed Rule would also adopt several interpretive clarifications.⁵²

The Commission also proposed to eliminate duplicative state and local procedures. The Commission intends to apply the statutory provisions under the Federal Power Act (FPA), as amended by the ECPA for the participation by states and specified state agencies in the licensing process and the consideration of specified state comprehensive plans.⁵³

"The proposed regulations . . . would commit the Commission to addressing environmental considerations at appropriate major decision points in its decisionmaking processes."⁵⁴ The relevant environmental documents would be part of the record in rulemaking and would accompany proposed rules. "The documents may also be admissible in evidence in trial-type proceedings."⁵⁵

The Commission also proposed to adopt the "[r]ecord of decision in cases requiring environmental impact statement[s]."⁵⁶ The record of decision is a Commission Order, which memorializes a decision for which an EIS is required. It would contain a statement of the decision and identify alternatives, specifying those which are environmentally preferable and the factors

50. 52 Fed. Reg. at 20,314. In 1979, in Docket No. 79-69 the Commission issued a Notice of Proposed Rulemaking (NOPR) which proposed that the Commission would adopt by reference many CEQ provisions and establish detailed procedures to implement and elaborate on the policies and procedures of the CEQ. Due to the lapse of time and the changes in the Commission regulations since RM79-69 was issued, the Commission repropose the NOPR regarding environmental regulations. In the current NOPR the Commission proposes to adopt or implement most of the CEQ regulations as well as propose provisions that will modify some of the regulations to tailor them to the Commission's proceedings. Notice of Proposed Rulemaking, *Regulations Implementing the National Environmental Policy Act of 1969*, [1977-1981 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 32,034, 44 Fed. Reg. 50,052 (1979).

51. 52 Fed. Reg. at 20,314. The Commission's present practice is to review comments and other available information to determine the cumulative adverse environmental impacts on target resources from the construction and operation of two or more pending hydroelectric projects at sites on a given waterway or in a given basin, and if necessary to perform an Environmental Assessment on those projects to determine whether the licensing action is a major federal action significantly affecting the human environment. Where there is not a reasonable potential of a significant effect on the human environment, the Commission considers the individual projects in accordance with the requirements of NEPA. The Commission did not establish time limits within which it must decide whether an action is a major federal action significantly affecting the quality of human environment.

52. *Id.*

53. *Id.* at 20,315.

54. *Id.* at 20,316.

55. *Id.*

56. *Id.* at 20,317.

balanced in the decisionmaking. Such an order would also state whether all practicable means to avoid or minimize environmental harm from the chosen alternative had been adopted. "[T]he Commission may include a monitoring and enforcement program . . . for any mitigation."⁵⁷

The Commission proposed to adopt the CEQ regulation prohibiting any steps being taken toward the completion of a proposed action which would either foreclose viable alternatives to the proposed action or cause an adverse environmental impact until the EA/EIS process was concluded. The Commission proposed to adopt minimum time periods for decisions on proposed actions—ninety days after publication of notice of a draft EIS and thirty days after publication of notice of a final EIS.⁵⁸

Under the proposed Rule, applications may be dismissed or rejected for reasons including: failure to comply with Commission rules and regulations, failure to provide sufficient information and failure to prosecute the application in a timely manner. Environmental review would not be necessary if an application is rejected because the applicant has not placed a *bona fide* proposal before the Commission which merits environmental analysis. The proposed Rule states that the Commission may deny an application due to nonenvironmental factors, including the fact that a project may be unsafe or uneconomical. Under the Rule, the Commission may also, if appropriate, deny statutory authority to a proposal on the merits. If so, further environmental study would not be warranted.⁵⁹

The Commission's proposed Rule requires an applicant to "submit applications for all related Federal and state approvals as early as possible in the planning process for its project or action."⁶⁰ This was based on the Commission's belief that such a provision would "facilitate early identification and review of environmental problems."⁶¹

The Commission proposed to adopt a regulation which would require an agency to devote substantial treatment to all reasonable alternatives to a proposed project. Under the proposed Rule, a proposed action and alternatives would be presented in one section of the EIS and all alternatives, including the proposed action, would be analyzed together.⁶²

The Commission proposed to implement the CEQ regulations "by establishing classes of actions which normally require an Environmental [sic] Assessment [EA], an Environmental Impact Statement [EIS]," or those in the Categorical Exclusion class.⁶³ Actions not usually the subject of environmental analysis may become so if the Commission or Staff believe such is

57. *Id.*

58. *Id.*

59. *Id.* at 20,318.

60. *Id.* at 20,320.

61. *Id.*

62. *Id.*

63. *Id.* at 20,321.

warranted.⁶⁴

The Commission proposed several additions to the Environmental Assessment class which include the following: blanket certificate holders for gas projects that exceed automatically authorized dollar amounts; construction of LNG peak shaving facilities; exemptions for small hydroelectric power projects of five megawatts or less; and additional project works at licensed projects.⁶⁵

The Commission identified actions or projects that normally are constituted to be federal actions that significantly affect the quality of the human environment. However, if the Commission or Staff determines that a particular project does not require an EIS, an EA may first be prepared to ascertain the need of an EIS.⁶⁶

Various actions and projects of non-federal applicants and many actions or functions performed by the Commission are proposed as not normally constituting major federal actions significantly affecting the quality of the human environment. Environmental review is not foreclosed, however, if unusual circumstances indicate that any of the actions presumed not to cause any significant direct or indirect environmental impact might have such effects.⁶⁷

The proposed Rule provides that environmental study should begin as soon as possible and, in any event, before an application is received by the agency. This would continue existing EA practice.

The Commission proposed adoption of the CEQ Regulations that provide for public participation in the NEPA process. The Commission would follow the procedures for scoping or determining issues to be included in an EIS. Also, the Commission proposes to follow the provisions for public notice, meetings and availability of documents. Under the proposed procedures, the Commission may conduct scoping meetings on EAs and may issue a notice of intent to prepare an EA. The Commission may request comments on an EA once completed.⁶⁸

The Commission also proposed to adopt CEQ provisions relating to "Finding of No Significant Impact on the Basis of an Environmental Assessment" or conclude the analysis with the EA if the analysis shows the action has adverse environmental effects and the action is not approved.⁶⁹

II. DEPARTMENT OF THE INTERIOR MATTERS

On August 1, 1986, the Department of the Interior issued new rules⁷⁰ supplementing the provisions of the Comprehensive Environmental Response,

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 20,323.

68. *Id.* at 20,325.

69. *Id.* at 20,327.

70. Natural Resource Damage Assessments, 51 Fed. Reg. 27,674 (1986) (codified at 43 C.F.R. pt. 11).

Compensation and Liability Act of 1980 (CERCLA),⁷¹ commonly known as the Superfund, which requires cleanup of certain hazardous wastes, releases or oil spills. The Department's new regulations established criteria on how damages to natural resources are to be estimated in Superfund court actions. In *Exxon Corp. v. Hunt*,⁷² the Supreme Court confronted a New Jersey State statute which imposed an excise tax on in-state petroleum and chemical facilities to finance the cleanup of oil spills and hazardous substance releases out of a "spill fund." The Supreme Court in a seven-to-one opinion found that the New Jersey statute was largely preempted by CERCLA.⁷³ The Supreme Court, speaking through Justice Marshall, held that the State program is preempted to the extent that it covers the expenses that are eligible for reimbursement under the Federal statute. Parts of the State's scheme were spared, however. The State tax is not preempted to the extent that revenues generated by it are used to cover expenses ineligible for payment under CERCLA. A preliminary recommendation was provided by the Department of the Interior in December, 1986, to open the Coastal Plain of the Arctic National Wildlife Refuge for full-scale leasing.

III. ENVIRONMENTAL PROTECTION AGENCY MATTERS

A. *Regulatory Developments Regarding the Resource Conservation and Recovery Act of 1976 (RCRA)*

During 1986, the EPA continued implementation of changes in hazardous waste regulation mandated by the Hazardous and Solid Waste Amendments of 1984 (HSWA).⁷⁴ Major regulatory actions are as follows:

1. May 28, 1986 Schedule for Land Disposal

On May 28, 1986, the EPA announced the order and schedule for considering land disposal restrictions for listed hazardous wastes (several time frames are mandated by HSWA).⁷⁵ Pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA), high volume, high intrinsic hazard wastes are to be scheduled first and low volume wastes with lower intrinsic hazard are to be last.⁷⁶

71. 42 U.S.C. §§ 9601-9675 (1982).

72. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

73. The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986), deleted section 114(c) of CERCLA which provided the preclusion language focused upon by the United States Supreme Court in *Exxon Corp. v. Hunt*. States are now free to enact new Superfund taxes to finance the state's share of Superfund clean-up expenses.

74. HSWA, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

75. Schedule for Land Disposal Restrictions, 51 Fed. Reg. 19,300 (1986) (to be codified at 40 C.F.R. pt. 268); see also 42 U.S.C.S. § 6924(g)(4) (Law. Co-op. Supp. 1987).

76. RCRA, 42 U.S.C.S. § 6924(g)(2) (Law. Co-op. Supp. 1987). Listed hazardous wastes to be evaluated by August 8, 1988, are plating and electroplating wastes from nonspecific sources (F007-F009, F019), wood preserving wastes (K001), wastes from the manufacture of explosives (K044-K047) and petroleum refinings wastes (K048-K052), as well as discarded commercial chemical products such as chloroform, formaldehyde, methanol, MEK, carbon tetrachloride and toluene.

Dioxin- and solvent-containing wastes are, by statute, to be considered earlier along with the "California list" of waste (a July 8, 1987 deadline). 42 U.S.C.S. § 6924(d) (Law. Co-op. Supp. 1987). The

2. November 7, 1986 Rule Governing Land Disposal of Certain Hazardous Wastes Which Fall Into the Dioxin- And Solvent-Containing Category

a. General Provisions

The EPA avoided the first HSWA "hammer" by promulgating on November 7, 1986,⁷⁷ the first land disposal rule for certain dioxin- and solvent-containing wastes.⁷⁸

The EPA also finalized in this rule a generic approach for making future land disposal restriction decisions. This framework includes procedures for: (i) setting treatment standards for hazardous wastes, (ii) granting nationwide variances from statutory effective dates, (iii) granting extensions of effective dates on a case-by-case basis, (iv) evaluating petitions for treatment standard variances, and (v) evaluating petitions for relief from disposal restrictions.⁷⁹

California list includes liquids with pH at or below 2.0 and liquids containing free cyanides, PCBs, halogenated organics, and certain metals (arsenic, cadmium, lead, chromium, nickel, mercury, selenium, and thallium).

77. Hazardous Waste Management System; Land Disposal Restrictions, 51 Fed. Reg. 40,572 (1986) (to be codified at 40 C.F.R. pts. 260, 261, 262, 264, 265, 268, 270, 271) (proposed Nov. 7, 1986).

78. Only F001-F005 listed solvent wastes and regulated mixtures of these wastes are affected by the rule. As part of this rule, the EPA adopted, for limited purposes, the Toxicity Characteristic Leaching Procedure (TCLP). The TCLP was proposed at 51 Fed. Reg. 21,648 (1986) (to be codified at 40 C.F.R. pts. 261, 271, 302) (proposed June 13, 1986). It is important to note that the inclusion of the TCLP in the land-ban rule is *only* for purposes of determining whether solvent- and dioxin-containing wastes meet applicable treatment standards. The promulgation of the TCLP in this rule does not mean that the TCLP has been promulgated in final form for purposes of RCRA's toxicity characteristic regulation (40 C.F.R. § 261.24). The Agency does not expect to promulgate the new TCLP for purposes of the toxicity characteristic regulation until sometime in early 1988. See 51 Fed. Reg. at 40,593. The version adopted in the November 7 rule reflects modifications based on comments received to the June 13 proposal. The TCLP will not only be used for determining whether dioxin- and solvent-containing wastes meet applicable treatment standards, but will also be used to determine the toxicity characteristics of any waste stream. The November 7 promulgated treatment standards will also apply to future restrictions on underground injection for these dioxin- and solvent-containing wastes.

79. The final rule did not adopt the risk-based approach "screening levels" initially proposed. The EPA adopted instead an alternative approach that bases treatment standards exclusively on levels achievable by best demonstrated available treatment technologies (BDAT). A treatment technology must be in operation at a full-scale facility to be considered a "demonstrated" treatment technology. Treatment technologies with greater risk than direct land disposal of untreated wastes cannot be considered as BDAT candidates.

Treatment standards are expressed as concentrations in the leachate from a given waste. Disposal prohibitions do not apply only if hazardous waste constituents in the leachate are, without treatment, lower in concentration than the applicable treatment standards. Dilution before or after treatment cannot substitute for adequate treatment. Economic infeasibility of treating waste is not a valid consideration for a company seeking to continue land disposal.

Waste subject to a two-year national variance, or to two, one-year individual extensions of a restriction date may be managed in landfills or surface impoundments at plant sites where owners/operators have complied with minimum technology requirements (double liners and leachate collection systems) for all new units, lateral expansions, and replacements at the plant site. This is a change from the EPA's proposal that interim status units can receive restricted waste only if the units are in compliance with minimum technological requirements. Nationwide extensions of effective restriction dates for a maximum of two years will be granted if insufficient treatment capacity is available nationwide (this was invoked for dioxins and solvents subject to this first rule). Two one-year extensions may be approved if an individual

Petition procedures allow companies to request relief from disposal restrictions at a specific site. The EPA basically restates the statutory standard by requiring petitioners to demonstrate to a "reasonable degree of certainty that there will be no migration of hazardous constituents from the disposal unit . . . for as long as the wastes remain hazardous."⁸⁰

Generators and owners and operators may store restricted wastes up to one year solely for the purpose of accumulating sufficient quantities of wastes to allow for proper treatment, recovery, and disposal. Generators who store restricted wastes beyond ninety days must be permitted or have interim status.⁸¹

b. Specific Dioxin- and Solvent-Containing Waste Requirements in the November 7 Rule

The treatment standards for dioxin-containing waste are based on data which assumes the incineration of this waste at a certain percentage (99.9999%) of destruction removal efficiency. The waste must be treated so that dioxin is below detection limits, which are currently one part per billion. The treatment standards for solvent-containing waste are based on four treatment technologies: incineration, biological treatment, steam stripping, and activated carbon absorption.⁸²

Because of incineration and other treatment capacity shortfalls, the EPA granted a nationwide two-year variance to the land disposal prohibition for all dioxin wastes.⁸³ The variance also included: (i) solvent waste generated by small quantity generators of 100-1000 kg of hazardous waste per month; (ii) solvent waste (except contaminated soil or debris treated elsewhere) generated from any remedial or response action taken under CERCLA or any corrective action taken under RCRA; (iii) solvent-water mixtures containing less than one percent total F001-F005 solvent constituents or containing less than one percent total organic carbon; and (iv) solvent-inorganic sludge mixtures or solvent-contaminated soil (not from a CERCLA cleanup or RCRA corrective action) containing less than one percent total F001-F005 solvent constituents. Only concentrated solvent wastes were immediately restricted from disposal without prior treatment. Contaminated soil and debris generated from CERCLA remedial or response actions or RCRA corrective actions are subject to the land disposal restrictions only after November 8, 1988.⁸⁴

successfully establishes that there is insufficient capacity for his restricted waste. Individuals may request variances from the treatment standards for unique wastes by submitting a petition under 40 C.F.R. § 260.20.

80. 51 Fed. Reg. at 40,605.

81. *Id.* at 40,579.

82. The standards range from 0.05 mg/l to 12.7 mg/l for wastewaters containing spent solvents and from 0.05 mg/l to 5.0 mg/l for all other spent solvent waste.

83. Dioxin-containing waste must be stored until incineration capacity is available. 50 Fed. Reg. 1978 (1985) (to be codified at 40 C.F.R. pts. 261, 264, 265, 270, 775).

84. See 42 U.S.C.S. § 6924(d)(3) (Law. Co-op. Supp. 1987).

3. Subtitle I Underground Tanks: Interim Prohibition

HSWA added a new Subtitle I to the RCRA concerning storage of hazardous substances other than hazardous waste in underground tanks.⁸⁵ This included petroleum and chemical products. An interim prohibition on the installation of unprotected underground tanks became effective on May 8, 1985.⁸⁶

On June 4, 1986, the EPA issued an interpretive rule on the interim prohibition.⁸⁷ Draft guidance discussing methods and technologies for meeting the prescribed interim performance standards will follow.⁸⁸

4. Regulations for Generators of 100-1000 kg Hazardous Waste per Month

Small quantity generators—those generating from 100-1000 kg of non-acutely hazardous waste per month—must now comply with some of the regulations controlling large quantity hazardous waste generators (*i.e.*, more than 1000 kg per month).⁸⁹ Although basic technical requirements are imposed, administrative requirements are reduced. Notably small quantity generators must use the multiple-copy manifest but need not file manifest exception reports.⁹⁰ The manifest certification regarding waste minimization has been modified for this class of generators. Extended on-site accumulation periods without the need for a storage permit is allowed if certain on-site accumulation requirements are met.

5. Closure/Post-Closure and Financial Responsibility Requirement Amendments

The EPA's May 2, 1986 rule⁹¹ amends and substantially clarifies the closure/post-closure and financial responsibility regulations. Incorporation of "partial closure" concerns the situation where one unit at a facility may close

85. 42 U.S.C.S. §§ 6991(1)-(1)(i) (Law. Co-op. Supp. 1987).

86. 42 U.S.C.S. § 6991(b)(g) (Law. Co-op. Supp. 1987).

87. Hazardous Waste; Interpretive Rule on the Interim Prohibition Against Installation of Unprotected Underground Storage Tanks, 51 Fed. Reg. 20,418 (1986) (to be codified at 40 C.F.R. pt. 280).

88. In accordance with RCRA section 9003, the EPA proposed regulations governing leak detection, leak prevention, financial responsibility and corrective action for all underground storage tanks containing regulated substances on April 17, 1987. 52 Fed. Reg. 12,662 (1987) (to be codified at 40 C.F.R. pt. 280). These regulations are expected to be finalized by March, 1988.

89. 51 Fed. Reg. 10,146 (1986) (to be codified at 40 C.F.R. pts. 260, 261, 262, 263, 270 and 271); 51 Fed. Reg. 35,190 (1986) (to be codified at 40 C.F.R. pt. 262). However, the EPA has recently proposed to impose the manifest exception reporting requirement on 100-1000 kg/month generators. See 52 Fed. Reg. 16,158 (1987) (to be codified at 40 C.F.R. pt. 262). Less restrictive requirements apply to conditionally exempt generators, those generating less than 100 kilograms per month. According to final regulations issued March 24, 1986, to be effective September 22, 1986, conditionally Exempt Small Quantity Generators are only required to: (a) identify and label all hazardous waste; (b) dispose of such waste in a hazardous waste facility or at a state approved industrial or municipal land fill; and (c) accumulate no more than 1000 kilograms at any one time.

90. A consent decree lodged in *Environmental Defense Fund v. EPA*, No. 86-1334 (D.C. Cir. 1987) stipulates that within nine months of the date of settlement, the EPA will propose rules adopting a modified exception reporting requirement.

91. 51 Fed. Reg. 16,422 (1986) (to be codified at 40 C.F.R. § 75,100).

while others remain in operation. Such partial closures now trigger requirements previously applicable only to closures of all units at a facility. The EPA does not allow an in-house registered engineer to certify closures, as originally proposed.

6. Corporate Guarantee Liability Coverage Mechanism

To address the hazardous waste insurance crisis, the EPA added a parent corporation corporate guarantee to the existing liability coverage mechanisms (liability insurance, financial test, or a combination of the two).⁹² Other options mentioned in the proposed rule are still under consideration. These include clarifying the scope of coverage and/or lowering the required levels of coverage, authorizing indemnity contracts, authorizing case-specific waivers, and suspending or withdrawing the liability coverage requirements.⁹³

7. Revised Tank Standards

Major revisions to Subpart J hazardous waste tank regulations on July 14, 1986,⁹⁴ address the following areas: tank installation; corrosion protection; structural integrity; leak detection and tank testing; inspections; monitoring; operating controls; leak response procedures; closure and post-closure; and financial responsibility.

All new tanks (including reinstalled tank systems, tank systems converted to hazardous waste use, and tank system components not visible for inspection which have been repaired because of leaks) must have secondary containment and interstitial monitoring. Existing tank systems must also be similarly equipped on a phase-in basis: (1) tanks storing or treating listed dioxin-containing wastes must be retrofitted within two years; (2) all other non-leaking tanks must be retrofitted at fifteen years. Variances are allowed if: (1) alternative design or operation will detect leaks and prevent migration or (2) if a release does occur, there will be no substantial hazard to human health and the environment in the event of a release.

Ninety day accumulation tanks must comply with the revised Subpart J tank requirements, except for certain closure and post-closure requirements. The EPA has requested comment on whether ninety day accumulation tanks need to be permitted.⁹⁵

Currently, the revised standards do not apply to small quantity generators of 100-1000 kg/month that store waste in tank systems for less than the specified accumulation period (180 or 270 days). The EPA, however, has recently proposed to apply the July 14 standards to these 100-1000 kg/month generators.⁹⁶

92. 51 Fed. Reg. 25,350 (1986) (to be codified at 40 C.F.R. pts. 264, 265).

93. 50 Fed. Reg. 33,902 (1985).

94. 51 Fed. Reg. 25,422 (1986), corrected at 51 Fed. Reg. 29,430 (1986). See 42 U.S.C.S. §§ 6924(o)(4), 6924(w) (Law. Co-op. Supp. 1987).

95. 51 Fed. Reg. 25,487 (1986) (to be codified at 40 C.F.R. pt. 262).

96. 51 Fed. Reg. 36,342 (1986).

8. Listing of New Spent Solvents

On February 25, 1986, the EPA amended its listing of spent solvents and still bottoms from spent solvent recovery to include four new solvents: benzene, 2-ethoxyethanol, 1,1,2-trichloroethane, and 2-nitropropane.⁹⁷ Wastes that result from the use of solvent mixtures containing ten percent or more of the listed solvents (before use) are regulated under the RCRA scheme. Solvents are covered by this rule only when they are used for their solvent properties, not when used as reactants or ingredients in the formulation of commercial chemical products.⁹⁸

9. Other Listings

The EPA listed three wastes generated during the production of ethylene dibromide (EDB) and four wastes from the manufacture of ethylenedisithiocarbamic acid (EBDC) and its salts.⁹⁹ The EPA also clarified the listings for spent pickle liquor from steel finishing operations (K062)¹⁰⁰ and wastewater treatment sludges from electroplating operations (F006).¹⁰¹ On August 6, 1986, the EPA published technical corrections for the list of commercial chemical products and to the Appendix VIII list of hazardous constituents.¹⁰²

10. Mining Waste Decision

On July 3, 1986, the EPA determined that regulation of mining waste under RCRA Subtitle C is not appropriate.¹⁰³ The EPA based its decision on the results of its 1985 Report to Congress pursuant to 42 U.S.C. § 6982(p)¹⁰⁴ and on its belief that several aspects of its hazardous waste management standards are "likely to be environmentally unnecessary, technically infeasible, or economically impractical when applied to mining waste." The EPA instead announced its intention to regulate mining waste only as solid waste in an expanded Subtitle D program. The EPA may reexamine the use of Subtitle C authority for these wastes if Subtitle D proves ineffective.

11. Used Oil Decision

On November 19, 1986, the EPA declined to list used oil being recycled as a hazardous waste,¹⁰⁵ following strenuous objection to the EPA's proposal to list all used oils as hazardous.¹⁰⁶ The Agency's "no listing" decision was based on a belief that listing would discourage recycling, ultimately resulting in greater potential harm to human health and the environment.¹⁰⁷ The EPA

97. 51 Fed. Reg. 6537 (1986).

98. *Id.* at 6538.

99. 51 Fed. Reg. 5327 (1986); *see also* 51 Fed. Reg. 37,725 (1986).

100. 51 Fed. Reg. 19,320 (1986); *see also* 51 Fed. Reg. 33,612 (1986).

101. 51 Fed. Reg. 43,350 (1986).

102. 51 Fed. Reg. 28,296 (1986).

103. 51 Fed. Reg. 24,496 (1986).

104. 51 Fed. Reg. 777 (1986).

105. 51 Fed. Reg. 41,800 (1986). *See* 42 U.S.C.S. § 6933(c) (Law. Co-op. Supp. 1987).

106. 50 Fed. Reg. 49,258 (1985).

107. This decision has been appealed. *See infra* note 109.

is looking instead to other used oil management techniques and standards.

12. Organic Leachate Model

On November 13, 1986, the EPA finalized the Organic Leachate Model (OLM),¹⁰⁸ a new test procedure for determining the leaching potential of organic waste constituents,¹⁰⁹ while accounting for the potential degradation of organic species at both landfills and land treatment facilities. The EPA created the OLM by modifying another modeling tool used to evaluate delisting petitions. This second tool, the Vertical and Horizontal Spread Model (VHS), evaluates the potential for groundwater contamination resulting from disposal of inorganic wastes in an unlined municipal landfill.¹¹⁰

B. Resource Conservation and Recovery Act Litigation

1. *American Mining Congress v. EPA*¹¹¹

In 1985, seven trade associations and corporations challenged the EPA's amended definition of solid waste.¹¹² Generally, the petitioners objected to the EPA's RCRA authority to regulate certain recycled or reclaimed materials and products produced from those materials. The petitioners also raised procedural arguments under the Administrative Procedure Act.¹¹³ Oral argument occurred in October, 1986.

The redefinition of solid waste is of particular interest because materials destined for recycling as part of normal industrial processes can now be regulated as solid (and possibly hazardous) waste. Limited exemptions are provided for certain recycled materials used such as: process ingredients to make new products, substitutes for other commercial products, or substitutes for feedstock if the recycled materials are returned to the original process from which they were generated.¹¹⁴ However, these exemptions do not extend to recycled materials disposed of, applied to land, burned for energy recovery, used to produce or contained in a fuel, or accumulated speculatively.¹¹⁵

2. *United Technologies Corp. v. EPA*¹¹⁶

In late 1985, five trade associations and corporations, two states and two environmental groups filed petitions to review the EPA's Final Codification Rule.¹¹⁷ The petitioners challenged various provisions of the rule, the key one being the EPA's fenceline-to-fenceline definition of the term "facility" for pur-

108. 51 Fed. Reg. 41,082 (1986) (to be codified at 40 C.F.R. pt. 261).

109. The EPA's TCLP is the proposed new test procedure for determining the toxicity characteristic of organic constituents. See 51 Fed. Reg. 21,648 (1986) (to be codified at 40 C.F.R. pt. 261).

110. See 50 Fed. Reg. 48,886 (1985) (to be codified at 40 C.F.R. pt. 261).

111. *American Mining Congress v. EPA*, No. 85-1206 (D.C. Cir. 1987).

112. 40 C.F.R. § 261.2 (1986).

113. 5 U.S.C. §§ 500-576 (1982).

114. 40 C.F.R. § 261.2 (1986).

115. *Id.*

116. *United Technologies Corp. v. EPA*, 821 F.2d 714 (D.C. Cir. 1987).

117. 50 Fed. Reg. 28,702 (1985) (to be codified at 40 C.F.R. pts. 260, 261, 262, 264, 265, 266, 270, 271 and 280).

poses of corrective action.¹¹⁸ Petitioners also contended that the EPA violated the Administrative Procedure Act by promulgating a substantive rule without notice and comment.¹¹⁹ Briefs in the case were filed in the summer of 1986; oral argument was heard on April 2, 1987.

Of particular interest was the separate issue raised by sixty-six electric utilities and the Edison Electric Institute. These petitioners asserted that the EPA must exempt fossil fuel combustion waste from any corrective action requirements, in keeping with the special exemption for such waste adopted by Congress in 1980.¹²⁰ The EPA failed to clarify that the 1980 exemption would be reflected in its implementation of the extensive corrective action HSWA provisions. The EPA has argued, in response, that the issue is not ripe for review and, alternatively, that fossil fuel combustion waste is a solid waste subject to the corrective action requirements.

3. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc. (NEPACCO)*¹²¹

In deciding a number of important Superfund issues, the Eighth Circuit focused on section 7003(a) of the RCRA, the section providing for governmental response actions at sites where releases are causing "imminent and substantial endangerment to health or the environment."¹²² The court held: (1) liability under section 7003 is strict and proof of negligence is unnecessary; (2) liability for the government's response costs under section 7003 is not retroactive to time periods prior to 1976; and (3) liable "persons" include individuals, corporations, and corporate officers and employees. In addition, the court determined that a government action for response costs under section 7003 is equitable in nature and, therefore, a jury trial is not available as a matter of right.¹²³

4. Other Litigation

In late 1986, petitions were filed challenging the following EPA decisions: (1) not to list used oil as hazardous;¹²⁴ (2) not to reinterpret the extent of the mining waste exclusion;¹²⁵ (3) the land disposal restriction rule and invocation of a two-year extension for the effective date of land disposal restrictions on dioxin- and solvent-containing waste;¹²⁶ (4) promulgation of substantial groundwater monitoring "requirements" in the TEGD simply as "guidance";¹²⁷ and (5) use of a generic OLM and VHS models in determining leachate potential of organics, and not a more site-specific approach.¹²⁸

118. *United Technologies*, 821 F.2d at 721-22.

119. *Id.* at 723.

120. RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i) (1982).

121. *United States v. NEPACCO, Inc.*, 810 F.2d 726 (8th Cir. 1986).

122. *Id.* at 738.

123. *Id.* at 745, 747-50.

124. *Hazardous Waste Treatment Council v. EPA*, No. 86-1658 (D.C. Cir. filed Dec. 3, 1986).

125. *Hazardous Waste Treatment Council v. EPA*, No. 86-1691 (D.C. Cir. filed Dec. 16, 1986).

126. *Hazardous Waste Treatment Council v. EPA*, No. 86-1657 (D.C. Cir. filed Dec. 3, 1986).

127. *National Solid Waste Mfg. Ass'n. v. EPA*, No. 86-1727 (D.C. Cir. filed Dec. 24, 1986).

128. *Chemical Mfrs. Ass'n v. EPA*, No. 86-1138 (D.C. Cir. filed Feb. 25, 1986).

In *The Potomac Electric Power Co. v. Sachs*¹²⁹ case, the Court of Appeals upheld the State of Maryland's position that The Potomac Electric Power Company's (PEPCO) challenge of the State's regulations governing disposal of polychlorinated biphenyls (PCBs) is barred by the fact that PEPCO is the subject of an on-going State Grand Jury proceeding.¹³⁰

C. *Important Reports, Studies, Guidance Documents and Policies Noticed in the Federal Register*

1. Technical Report: Waste from the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Energy, An Interim Report on Methodology for Data Collection and Analysis

This report profiles the above-referenced industries and describes the methodologies the EPA will use in preparing its Report to Congress required by section 8002(m) of the RCRA concerning the adverse effects, if any, of wastes produced by these industries.¹³¹

2. Subtitle D Non-Hazardous Waste Program Studies

The EPA prepared two documents as part of an extensive data-gathering effort concerning adequacy of the Agency's current Subtitle D solid waste program: *A Survey of Household Hazardous Waste and Related Collection Programs* and *Census of State and Territorial Subtitle D Non-Hazardous Waste Programs*.¹³² On November 18, 1986, the EPA released its *Subtitle D Study Phase I Report*.¹³³ The report summarizes information on characteristics and management practices of non-hazardous wastes, characteristics of Subtitle D disposal facilities and state solid waste regulatory programs as well as recommendations for Phase II of the study.

3. Guidance on Issuing Permits to Facilities Required to Analyze Ground Water for Appendix VIII Constituents.¹³⁴

This interim guidance document addresses technical analysis for Appendix VIII hazardous constituents. It recommends (a) waiving analysis for identified unstable compounds, (b) analysis for the most significant ions produced by ionic compounds, and (c) analysis for specific group members from large or indeterminate groups of chemicals covered by single Appendix VIII listings. Subsequently, a proposed rule sought to narrow the testing requirements for Appendix VIII constituents.¹³⁵

129. *The Potomac Elec. Power Co. v. Sachs*, 802 F.2d 1527 (4th Cir. 1986).

130. *Id.* at 1532.

131. 51 Fed. Reg. 40,251 (1986). Under a consent order in *Alaska Center for the Environment v. Thomas*, the EPA must have completed the Report by August 31, 1987.

132. 51 Fed. Reg. 40,353 (1986).

133. 51 Fed. Reg. 41,646 (1986).

134. 51 Fed. Reg. 5561 (1986).

135. 51 Fed. Reg. 26,632 (1986).

4. Prohibition on the Placement of Bulk Liquid Hazardous Waste in Landfills—Statutory Interpretive Guidance.¹³⁶

This contains the EPA's final interpretations on the prohibition of bulk or non-containerized hazardous waste or free liquids contained in hazardous waste in any landfill (whether or not absorbents have been added).¹³⁷ The scope of the prohibition on absorbents and a methodology for distinguishing chemical stabilization from a treatment practice that relies on absorbents is also detailed in this report.

5. Interim Status Surface Impoundments—Retrofitting Variances.¹³⁸

This document focuses on the four variances under section 3005(j) of the RCRA from requirements to retrofit interim status surface impoundments to meet the minimum technological requirements of section 3004(o)(1)(A).

6. RCRA Ground-Water Monitoring Technical Enforcement Guidance Document (TEGD)¹³⁹

The final TEGD provides detailed guidance for enforcement officials on compliance with the RCRA groundwater monitoring regulations. It will also assist applicants in anticipating the evaluation covering the adequacy of groundwater monitoring systems and permit applications.

7. National RCRA Corrective Action Strategy¹⁴⁰

This draft policy describes how the EPA plans to implement its HSWA corrective action authorities.¹⁴¹ The strategy indicates the EPA's intention to propose a comprehensive regulatory framework defining both procedural and substantive requirements for corrective action in the fall of 1987. Key definitions and concepts are profiled in this document and can be expected to resurface in regulatory form in the proposed regulations.

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136. 51 Fed. Reg. 26,008 (1986).

137. 42 U.S.C.S. § 6924(c)(1) (Law. Co-op. Supp. 1987).

138. 51 Fed. Reg. 26,302 (1986).

139. 51 Fed. Reg. 34,247 (1986).

140. 51 Fed. Reg. 37,608 (1986).

141. 42 U.S.C.S. §§ 6924(u), 6924(v), 6924(h) (Law. Co-op. 1987).

