1980 Report of the Committee on Regulation Under Part I of the Federal Power Act

I. FEDERAL ENERGY REGULATORY COMMISSION RULE CHANGES

A. Preliminary Permits

In Order No. 54, in Docket No. RM79-23 (October 22, 1979), the Commission revised its requirements for applications for preliminary permits. At the same time, the Commission provided more detailed regulations for amendments to preliminary permits, cancellation of preliminary permits and for the disposition of conflicting applications. Perhaps the most burdensome new requirement is the need, where new dam construction is involved, for a work plan and schedule including descriptions of field studies, tests or other activities that may alter or disturb lands or waters in the vicinity of the proposed project and measures that would be taken to minimize any such disturbance and/or to restore the altered or disturbed areas.

B. Applications for License for Major Projects Utilizing Existing Dams

By Order No. 59, in Docket RM79-36 (November 19, 1979), the Commission revised its regulations for applications for licenses for water power projects utilizing the water power potential of existing dams. The regulations apply to both initial licenses and new licenses with total installed and proposed capacity greater than 2000 horsepower, or 1.5 MW. The Commission has reorganized the application requirements and consolidated requests for information according to related subject matter. The revised regulations became effective January 1, 1980. By Order issued September 5, 1979 in *Central Power and Light Company,* Project No. 2921 the Commission had denied a request to waive the required filing of Exhibits S and W.

C. Small Conduit Hydroelectric Facilities, Docket No. RM79-35

Pursuant to Section 30 of the Federal Power Act (the "Act") (added by Section 213 of the Public Utility Regulatory Policies Act of 1978 (PURPA)), the Commission has adopted regulations providing procedures for exemption on a case-by-case basis of conduit hydroelectric facilities from regulation under Part I of the Federal Power Act. (Order No. 76 (45 Fed. Reg. 28085 (April 28, 1980)) Facilities which may be exempted must be located on non-federal lands and utilize only a man-made conduit operated primarily for distribution of water rather than generation of electricity. To be eligible, a facility must have an installed capacity no greater than 15 megawatts. In issuing the license for *South Carolina Basin Irrigation District,* Project No. 2926 (March 27, 1980), the Commission had granted an exemption, pursuant to Section 30 of the Act from annual charges. The Commission interpreted the phrase "non-Federal lands" broadly to include all lands except those to which the United States holds fee title. Thus, the fact that the United States has an easement for canals and ditches for irrigation purposes

was no bar to exemption. That same definition of non-Federal lands was incorporated in the final rule issued in Docket No. RM79-35.

D. Discontinuation of the Use of Certain FERC Forms, Docket No. RM79-38.

By Order No. 53, issued October 23, 1979, the Commission discontinued the use of certain data collection forms no longer necessary to carry out its regulatory responsibilities. Forms 6 (Initial Cost Statement for Licensed Projects), 7 (Statement of Actual Legitimate Original Cost of Construction) and 9 (Annual Report for Licensees of Privately Owned Major Projects) have been discontinued.

E. Delegation of Authority, Docket No. RM79-59.

By Order No. 38 (44 Fed. Reg. 46449 (August 8, 1979)), the Commission substantially enlarged the list of matters on which the Director of the Office of Electric Power Regulation or his designee is authorized to act.

II. JURISDICTIONAL ISSUES

A. Intermittent Streams

In *Public Service Company of New Mexico,* Docket No. EL79-18 (March 21, 1980), the Commission determined that a license was not required for a project to be built on an intermittent stream. The project would utilize ground water pumped from a mine. The lower reservoir would be located on what was characterized variously as an arroyo, a dry wash, or an unnamed intermittent stream. The usually dry channel was itself a tributary of still other intermittent, "ephemeral" or perennial streams. Relying on *FPC* v. *Union Electric Co.,* 381 U.S. 90, 97 (1965) ("Taum Sauk"), the Commission ruled that the stream in question does not require supervisory power to preserve or improve water commerce, including downstream navigation. Therefore, the Commission found that the arroyo is not a non-navigable stream over which Congress has Commerce Clause jurisdiction, within the meaning of Section 23 (b) of the Federal Power Act. No federal lands were involved.

B. Absence of Post-1935 Construction

In *Pacific Power and Light Company,* Project No. 2672 (March 13, 1980), the Commission dismissed an application on a non-navigable stream because there was no evidence of construction that had increased the project's head, generating capacity or water storage capacity, or otherwise significantly modified the project's pre-1935 design or operation, citing *Project Sound Power and Light Co.* v. *FPC,* 557 F. 2d 1131 (9th Cir. 1977). The finding was reached despite the fact that the powerhouse was reconstructed and the temporary log-boom diversion structure was replaced with a permanent concrete diversion structure. The Commission reached similar

conclusions in *Duke Power Company,* Project No. 2649 (October 22, 1979); *Connecticut Light and Power Company,* Project No. 2673 (December 6, 1979); and *Niagara Mohawk Power Company,* Project No. 2667 (March 26, 1980). In each instance, the Commission found no evidence of navigability and indicated that a license would be required if additional information showed the stream to be navigable.

C. Public Lands and Reservations of the United States

In *Metlakatla Indian Community,* Docket No. EL79-1 (September 28, 1979), the Commission determined that an existing project and a proposed project, both on Annette Island in Alaska, did not require licensing. Having first found the stream involved non-navigable waters of the United States, and that the projects could not affect the interests of interstate or foreign commerce (the projects are not interconnected with any transmission system on the mainland), the Commission addressed the question whether the grandfather clause of Section 23 (a) of the Act would apply. Annette Island had been established as a reservation in 1891 with no reference in the statute to hydroelectric development. The language in the statute specified the set aside of the island simply for the "use of the Indians." A subsequent Supreme Court decision defined the purpose of the reservation broadly as

> to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. [*Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918)]

The Commission then found that hydroelectric projects fell within that broad sweep.

D. Interstate Commerce

In an Order Affirming Initial Decision in *City of Centralia,* Docket No. E-6454, Opinion No. 40 (April 30, 1979), the Commission determined that the Yelm Project on the Nisqually River required a license. The City of Centralia, Washington, receives power for its distribution system both from the project in question and from Bonneville Power Administration (BPA). When generation from the Yelm Project exceeds the City's load requirements, the power is commingled with BPA power. It did not, however, intermingle with power destined for interstate markets. The Commission refused to adopt one of the Administrative Law Judge's grounds, i.e. that the local activity has a "close and substantial link" to interstate commerce. The Judge had found that link resulting from potential disruption in the grid from failure in a generating unit. The Judge had relied on such cases as *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964), and *Wickard* v. *Filburn,* 317 U.S. 111 (1942). The Commission found that the *Heart of Atlanta* and *Wickard* cases did not deal with analogous statutes. The facts, according to the Commission, also did not support such an argument. The Commission did find, however, an effect on interstate commerce to result, first, from the commingling with BPA power and the resulting reduction in "the amount that suppliers to the BPA grid, including out-of-state generators, are required to contribute." Secondly, the electromagnetic unity in the grid is such that

each unit affects the system as a whole. The Commission rejected any suggestions that *FPC* v. *Union Electric Co.*, 381 U.S. 90, rehearing denied, 381 U.S. 956 (1965) ("Taum Sauk"), was not dispositive. Rehearing was denied on June 28, 1979.

E. Navigability

1. *Pyramid Lake Paiute Tribe of Indians* v. *Sierra Pacific Power Company, Docket No. E-9530.* By Opinion No. 61, issued August 10, 1979, the Commission reversed an initial decision and directed the Sierra Pacific Power Company to file an application within six months for a license for certain dams on the Truckee River in California and Nevada. The Commission held that the dams were jurisdictional because logging had occurred historically on the Truckee River. The Commission directed Sierra Pacific to file an application for a license within six months. The Commission denied the Tribe's request for interim relief regarding flows in the Truckee River because the present record was inadequate to decide that issue, but it noted that appropriate conditions regarding flows could be determined in the licensing proceeding.

2. *Green Mountain Power Corporation, Project Nos. 2439, et al.* By order of August 24, 1979, the Director of the Office of Electric Power Regulation dismissed the applications for licenses for these projects after finding that the projects were not jurisdictional. The lack of jurisdiction was based on the facts that the river was not navigable at the points where the projects were located, and there was no evidence of any post-1935 construction.

III. RELICENSING

A. Preference in Relicensing

Last year's report discussed the Commission's efforts in *City of Bountiful, Utah, et al.,* Docket No. EL78-43, to determine whether the preference under Section 7(a) of the Act in favor of "municipalities" also applies in relicensing proceedings under Section 15(a). Oral argument before the Commission was held on February 22, 1980.

B. Net Investment

In a November 26, 1979 Order on Rehearing (Opinion No. 36-A), in *Escondido Mutual Water Company, et al.,* Project No. 176, the Commission determined the "net investment" of the project. There was no disagreement as to the "actual legitimate original cost." After grappling with "outdated" accounting principles, the Commission finally determined as follows:

> . . . if the continuing benefit of the lower product prices of a not-for profit entity is treated is a zero 'fair return' on the investment in that enterprise, and if the depreciation of that entity's assets is treated as accumulated from the 'earnings' of that enterprise, then the depreciation would represent 'earnings in excess of a fair return' within the purview of Section 3 (13) of the Federal Power Act. (Mimeo, at 121).

The Commission, therefore, concluded that the net investment in Project No. 176 was zero. The effective date of the provision issuing a new license was

stayed pursuant to Section 14 (b) of the Federal Power Act for a two-year period to permit Congress to determine whether or not the United States should take over the project.

C. Other Selected Relicensing Actions

1. *Southern California Edison Company,* Projects No. 382 (September 7, 1979)—The Borel Project on the Kern River was relicensed for 30 years, the Commission having reviewed safety concerns. The Commission rejected suggestions for a 20-year study of flow releases, instead giving the licensee one year to develop a minimum flow study plan.

2. *Pacific Gas and Electric Company,* Project No. 178 (September 7, 1979)—For the Kern Canyon Project, also on the Kern River, the Commission required a study of minimum flow releases, as it had in Project No. 382.

3. *Pacific Gas and Electric Company,* Project No. 96 (November 8, 1979)—In relicensing the Kirckhoff Project on the San Joaquin River, the Commission established minimum flow releases and required a preconstruction survey of endangered species for all areas proposed to be disturbed by project construction or operation.

4. *New England Power Company,* Project No. 1904 (June 25, 1979) —The Commission required the submission of a feasibility study for the installation of additional generating capacity as a condition of the relicensing of the Vernon Project on the Connecticut River. Although no new generating capacity was proposed, a termination date of April 30, 2018 was adopted (39 years) to coordinate termination of the license with the downstream Northfield Mountain Project No. 2485. Similar treatment was accorded *New England Power Company,* Project No. 1855 (August 3, 1979).

5. *New England Power Company,* Project No. 1892 (December 10, 1979)—The Commission required the licensee to enter into an agreement with the Corps of Engineers for coordination of the project's operation in the interest of flood control and navigation. A feasibility study for installing additional generating capacity was required. As with Project No. 1904, *supra,* the license term was made consistent with expiration of the license for the Northfield Mountain Project No. 2485.

6. *Pennsylvania Electric Company,* Project No. 309 (June 29, 1979)—The Commission rejected a proposal for federal takeover "solely for the purpose of supplying project power to Allegheny [Electric Cooperative]." The Commission found that Allegheny could have filed a competing application.

7. *South Carolina Public Service Authority,* Project No. 199 (May 9, 1979)—In relicensing the Santee-Cooper Project, the Commission found that lands within existing residential subdivisions or a proposed development did not need to be retained within the project boundary. The Commission modified an Offer of Settlement that had addressed numerous environmental concerns.

IV. LICENSES

A. Monongahela Power Company, *et al., Project No. 2709*

By Order issued April 17, 1979, the Commission stayed commencement of construction activities at the Davis Power Project after the Corps of Engineers had refused to issue a permit to discharge dredge or fill materials into navigable waters.

B. License Term

In *Idaho Power Company,* Project No. 2777 (June 13, 1979), the Commission reviewed its policy with respect to the effective date for licenses located on U.S. lands and constructed prior to 1938. For this project, and subsequently, initial licenses for constructed projects on U.S. lands will normally be issued for a period ending twenty years from issuance. Such an approach is consistent with the twenty-year period adopted in *Bangor Hydro-Electric Company,* Project No. 2666 (March 29, 1979) (the Medway Project), for a project constructed before 1935 and afterwards operated in navigable waters without the required federal authorization. So as to avoid a license term longer than 50 years (such licenses had been effective January 1, 1938), the license was made effective as of 1949, fifty years before the expiration date. The licensee was, nevertheless, required to pay an amount equivalent to annual charges for the period from January 1, 1938 to the effective date of the license.

This approach was followed in *Green Mountain Power Corporation,* Project No. 2674 (June 29, 1979).

C. Other Selected License Orders

1. *City of Portland, Oregon,* Project No. 282 (March 22, 1979)-The Commission required a pre-construction vegetation survey since the field studies of threatened and endangered plants had been conducted relatively early in the spring. Construction could not commence if an endangered species is found to occupy the proposed location of a powerhouse, intake structure, penstock, substation or appurtenant facility.

2. *Central Maine Power Company,* Project No. 2612 (April 12, 1979)—The Commission found the Dead River, a tributary of the Kennebec River, to be navigable, then issued a major license for a project with no generating or transmission facilities. The project provides storage and flow releases for nine downstream major hydroelectric projects. The project reservoir was also found to be considerably greater than the typical minor project. The fifty-year term of license was made effective from 1948 when construction on the project began.

3. *Maine Hydroelectric Development Corporation,* Project No. 2809 (May 9, 1979)—The Commission issued a minor license for this project located on the Cobbosseecontee River in Gardiner, Maine. The project was constructed in 1900, and the powerhouse was destroyed by fire in 1970. The licensee proposed to repair the project and recommence electric generation. The Commission granted a license term of only 40 years because this is an existing dam with only a moderate amount of proposed redevelopment. This is similar to the Commission's policy of granting a 40 year license term for

relicensing of a project for which the licensee proposes only a moderate amount of redevelopment.

4. *Georgia-Pacific Corporation,* Project No. 2548 (May 10, 1979)-The project has an installed capacity of 7,900 kw, but a Staff study indicated that redevelopment could yield a potential capacity of 11,090 kw. Therefore, the Commission's order required an economic study of the feasibility of installing additional capacity at the project, and indicated that, if the licensee proposed to install additional capacity, then it would entertain an application to accelerate the expiration date and issue a new license with a longer term.

5. *Maine Hydroelectric Development Corporation,* Project No. 2808 (May 18, 1979)—In an order on a motion for reconsideration, the Commission refused to allow the licensee to acquire an interest in land for a time period less than "in perpetuity." A 50-year license to use the lands, with a 50-year option to renew, was found insufficient.

6. *Colorado-Ute Electric Association, Inc.,* Project No. 733 (January 30, 1980)—Since 1974 when the project ceased operating, the reservoir has filled with sediments. The Commission, therefore, approved a program for initial and annual sluicing of sediments. In reporting on the license application, the State Historic Preservation Officer determined that the only property within the impacted area that may possess architectural or historical value is the hydroelectric facility itself, particularly the powerhouse. As a result, the licensee agreed that the powerhouse would not be replaced at this time.

7. *Nebraska Public Power District,* Project No. 2746 (March 21, 1980)—The Commission dismissed an application for the Boyd County Pumped Storage Project because of the applicant's failure to provide adequate evidence in support of the application. The applicant had requested that the application be held in abeyance for up to three years while the need for the project and its economic justification were developed. A new application was found to be superior to a "patched-up version of a long-pending one."

V. PRELIMINARY PERMITS

A. International Generation and Transmission Co., Inc., Project No. 2825

On April 30, 1979, the Director issued a preliminary permit for this proposed pumped storage project which would be located on the Upper Ammonoosuc River in New Hampshire. The applicant proposes to construct a nuclear electric generating plant with an ultimate capacity of 2400 MW in conjunction with the proposed hydroelectric facility.

B. City of Holyoke, Massachusetts, Project Nos. 2863 and 2877.

In an Order Denying Rehearing (September 7, 1979), the Commission reaffirmed its rejection of a preliminary permit. The permit had been for the installation of an additional generating unit at a project not licensed to the City of Holyoke. The City's argument that the unit had not been licensed previously was rejected.

C. SEMINOLE ELECTRIC COOPERATIVE, INC., Project No. 2886 and CITY OF TALLAHASSEE, FLORIDA, Project No. 2891.

The Commission determined that the plans of Tallahassee and Seminole were equally well adapted to develop, conserve and utilize the water resources of the region. Section 7(a) required the issuance of the permit to Tallahassee as a municipality. The plans had differed in that one applicant had suggested a run-of-the-river operation and the other a peaking operation. Seminole had requested a hearing to demonstrate the superiority of its plan, but the Commission denied a hearing on the ground that the detailed studies to be conducted under the permit would be needed to select the better approach. In a footnote, the Commission indicated that it might be possible, in some circumstances, to find one mode of operation clearly superior at the preliminary permit stage, but that was not the case here.

D. TOWN OF VIDALIA, LOUISIANA, Project No. 2909.

On December 14, 1979, the Commission issued a preliminary permit despite advice from the Corps of Engineers that it was undertaking detailed studies of economic feasibility. The Commission's language is instructive:

> We do not believe it would be in the public interest for the Commission to refrain as a general rule from issuing preliminary permits for study of non-federal development of sites under study for Federal development. Awaiting completion of Federal studies, the outcome of which is unknown, then speculative submission to Congress, and Congressional action the nature and timing of which cannot be predicted—before issuing a permit to someone willing to undertake studies despite the risk that Federal development might be authorized—could interfere with the most appropriate and expeditious development of water power resources. (Footnote omitted).

The Commission did acknowledge that a federal study might be so far along that studies under a permit might be superfluous. In *City of Reading,* Project No. 2888 (March 25, 1980), the Commission similarly issued a permit in the face of studies being conducted by the Water and Power Resources Service of the Department of the Interior.

E. TOWN OF WINDSOR, VERMONT, Project No. 2820 and VERMONT ELECTRIC CO-OPERATIVE, INC., Project No. 2855.

On January 30, 1980, the Commission recognized the municipal preference despite arguments from the Cooperative: (1) that it had proposed a specific dam height while Windsor had left that for study; (2) Windsor had not shown it could market power in excess of its own needs; (3) Windsor has not shown it has the ability to finance the necessary studies or development of the project. The fact that Windsor has never been in the business of producing or distributing power was rejected by the Commission to avoid the establishment of a "significant barrier to a state's or municipality's entry into the business of producing hydroelectric power."

VI. ACTIVITIES AT OTHER AGENCIES

A. FEDERAL LAND POLICY MANAGEMENT ACT (FLPMA)

By letter dated March 13, 1980, the Commission responded to proposed regulations issued by the Bureau of Land Management to implement Title

V of FLPMA (Pub. L. 94-579, 90 Stat. 2743). The proposed rules appear at 44 Fed. Reg. 58106 (October 9, 1979). The Commission has argued strenuously that the Federal Power Act authorizes permittees and licensees to utilize Federal lands, that FLPMA did not implicitly or explicitly revoke that authority, and that Congress never intended to establish a "dual and potentially conflicting program to regulate non-federal water power projects located on Federal lands." The Commission's position had been earlier stated in its Opinion and Order on Rehearing in *Escondido Mutual Water Company, et al.,* Project No. 176, Opinion No. 36-A, issued November 26, 1979.

B. National Pollutant Discharge Elimination Permits

In *National Wildlife Federation* v. *Costle,* (D.C. District Court No. 79-0915), the National Wildlife Federation has sought to compel the Enviromental Protection Agency to regulate releases of waters from dams as "discharges" of "pollutants" requiring NPDES permits under § 402 of the Clean Water Act. Trial is now schelduled for early November, 1980. A case involving similar issues with respect to the Richard Russell Dam under construction in South Carolina went to trial in early February.

VII. MISCELLANEOUS

A. Updated Publication on Recreation Facilities at Hydro Projects.

On May 8, 1979, the Commission announced that an updated publication on recreational facilities at hydro projects is available to the public. The publication is entitled "Recreation Opportunities at Hydroelectric Projects Licensed by the Federal Energy Regulatory Commission," and it provides detailed information on more than 600 projects. The publication was last issued in 1970.

B. Hydroelectric Power Evaluation Publication.

On September 10, 1979, the Commission announced the availability of the 1979 edition of its publication, "Hydroelectric Power Evaluation." This report was last published in 1968, and it is designed as a guide for the evaluation of the hydroelectric power aspects of water resource developments. The report describes a method for determining the value of a project's electric power production and capacity, measured in dollars per kilowatt-hour and dollars per kilowatt.

C. Municipal Exemption from Annual Charges

In Opinion No. 78, issued March 18, 1980, in *Sabine River Authority, State of Louisiana, et al.,* Project No. 2305, the Commission adopted a simplified method by which State and municipal licensees may claim the "sold to the public without profit" exemption from the § 10(e) annual charge. The method involves examining sales statistics of the State or municipal's utility customers to determine the percentage of sales which, from the viewpoint of the State or municipal generator, are "without profit." "Without profit" sales include sales to the utility for its own consumption or for resale

to non-profit entities such as co-ops, but no other sales to the utility for resale. In so deciding, the Commission reversed an ALJ decision which would have required applicants, licensees of the Toledo Bend project, to trace the path of their generated power through customer utility systems to determine its actual destination.

Respectively submitted,

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Report of the Committee on Legislation

THIS REPORT OF the Committee on Legislation summarizes pending legislation proposals of interest to the Association on (1) conversion to coal from oil and gas by electric generating companies, (2) creation of an Energy Mobilization Board in an attempt to reduce regulatory delay for authorizations of energy projects, (3) regulatory reform, and (4) synthetic fuels development. Unlike the recent past, there have been no substantive or procedural proposals of major significance enacted during the past year at this writing, although it is anticipated that some of the following may be signed into law in the near future.*

I. COAL CONVERSION

There has been a flurry of legislative activity recently in the area of coal conversion. On March 6, 1980, the Department of Energy sent to Congress specifications for legislation to reduce use of oil and gas by electric utilities. On March 24, Senator Ford introduced S. 2470, which was referred to the Committee on Energy and Natural Resources. On March 26, Representative Staggers introduced H.R. 6930, which was referred to the Committee on Interstate and Foreign Commerce.

The Senate bill would amend the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301 *et seq.* ("FUA"). The House bill would not amend the FUA but would be a separate act entitled the "Powerplant Fuel Conservation Act of 1980." However, the House bill is substantially similar to the Senate bill.

Among the stated purposes of FUA, as proposed to be amended by the Senate bill, would be the reduction of domestic use of petroleum and natural gas in the electric utility sector by at least 400,000 barrels a day by 1985 and by at least 1,000,000 barrels a day by 1990. To implement phase I of the DOE specifications, both bills provide that a total of 107 boiler units at 50 generating facilities would be prohibited from using petroleum or natural gas as a primary energy source effective 90 days after enactment. All of the exemptions already permitted in 42 U.S.C. §§ 8351-54 would be available under the Senate bill and most would be available under the House bill. Utilities not in compliance on December 31, 1985 would thereafter be restricted in their ability to recover fuel costs for the power plant in question through an automatic adjustment clause. For fiscal year 1982, $3.6 billion would be authorized to be appropriated for grants to utilities whose power plants are among those prohibited from using petroleum or natural gas to be applied to capital costs associated with conversion to coal or other alternate fuels, and an aggregate of $400 million would be authorized to be appropriated for grants to be applied to capital costs of the design and installation of advanced sulfur removal systems in existing electric power plants and the construction of coal preparation facilities capable of reducing the sulfur content of coal. In the implementation of phase II of the DOE specifications,

*Editor's note—The Report of the Committee on Legislation was submitted to the Secretary of the FEBA, on May 6, 1980. Major subsequent developments will be noted in footnotes.

approximately $6 billion would be authorized to be appropriated in fiscal year 1982 to provide financial assistance to utilities wishing voluntarily to reduce their use of petroleum and natural gas as primary energy sources in electric power plants.**

II. THE ENERGY MOBILIZATION BOARD

On July 16, 1979, the President announced a number of new energy proposals designed to reduce oil imports by 4.5 million barrels a day by 1990. Among these was a proposal to create an Energy Mobilization Board ("EMB") authorized to establish "fast tracking" schedules for federal, state and local decisionmaking with respect to certain non-nuclear facilities found to be critical to achieving the nation's import reduction goals. The proposed EMB was approved by the Senate on October 4, 1979 with the passage of S. 1308, and by the House on November 11, 1979, with the passage of H.R. 4985, having first adopted the Commerce Committee version (H.R. 4862) as an amendment in the nature of a substitute. A Senate-House conference committee was appointed to consider this legislation, and on April 23, 1980, the Senate-House conferees on S. 1308 as amended, reached final agreement on most contested issues and agreed to file their report.***

A. EMB

As agreed to in conference, the "Priority Energy Project Act of 1980" establishes an Energy Mobilization Board consisting of three members appointed by the President, subject to confirmation by the United States Senate. The Chairman is to serve at the pleasure of the President, while the two regular members will serve staggered two year terms. The Board may also authorize a non-voting representative for each approved project to be appointed by the governor of the affected state.

The principal powers vested in the board are exercised by the Chairman, who has the exclusive decisionmaking authority on most matters, including the Board's enforcement authority. Specific exceptions which require a majority vote of the Board are the decisions (1) to designate a priority energy project, (2) to invoke the grandfather clause, or (3) to recommend a substantive waiver.

1. *Powers of The EMB*

(a) Designation of Priority Energy Project

The powers of the EMB are triggered by the Board's approval of an application for a designation of a priority energy project. Any person or company planning or proposing a non-nuclear facility may petition the EMB

**Editor's note—An amended version of S. 2470 was passed by the Senate on June 24, 1980. However, corresponding legislation introduced in the House died in committee.

***Editor's note—On June 27, 1980, the Conference Report on S. 1308 (called the "Priority Energy Project Act of 1980") was rejected by the House of Representatives, which voted 232 to 131 in favor of a motion to recommit the report to the conference committee. No subsequent agreement was reached by the conferees.

for an order designating it as a priority energy project. Therefore, the first step in the procedure is the submission of the required application.

After the application is filed, the Board must, within five days, publish notice and a description of the filing of the designation request in the Federal Register. Following publication, any interested persons have thirty days to file written comments.

Not later than sixty days after receipt of the application the Board must determine whether the proposed energy facility is of sufficient national interest to be designated a priority energy project; this decision must also be published in the Federal Register. The Act sets forth specific items the Board must consider in making its determination; however, there are several kinds of projects which will receive automatic priority designation. Among these are projects to convert to or construct coal-powered electric generating facilities. Additionally, the Act specifically excludes nuclear facilities and the Alaskan natural gas pipeline project, the latter being covered under the Alaska Natural Gas Transportation Act of 1976.

(b). The Project Decision Schedule

After designation of a proposed energy facility as a priority energy project, the EMB must proceed to establish a Project Decision Schedule containing deadlines for all federal actions. Following publication and specific notification to the governor of any state having jurisdiction over the designated project, both federal and state agencies have thirty days within which to transmit to the EMB a compilation of all significant actions required before a final decision is made, a tentative schedule for completing those actions and information concerning their available agency resources for the completion of those actions.

Within sixty days after the designation decision, the Board must publish in the Federal Register a Project Decision Schedule ("PDS") containing deadlines for all significant agency actions. In establishing the PDS, the Board must consult with the affected federal and state agencies and may grant an informal hearing on the scheduling issues. Although the Board may allow an agency one year to make its decision, the Board's overall project decision schedule should not encompass a period of more than two years. The Board retains the power to revise the schedule or terminate a priority designation.

(c) Environmental Impact Statements

Following the EMB's decision to designate a priority project and prior to the establishment of a Project Decision Schedule, the Council on Environmental Quality ("CEQ") is directed to determine if the National Environmental Policy Act ("NEPA") applies, and if so, to select the lead agency for coordinating compliance with NEPA. If the CEQ fails to make either decision prior to the establishment of the PDS, then the EMB is empowered to make the determination and decision. Additionally, the EMB has the authority to consolidate any environmental impact statement ("EIS") and may, at the federal level, mandate that one EIS be prepared for all federal agencies

involved. Within forty-five days after the establishment of the PDS, and failing to negotiate a cooperative agreement with state and local agencies, the Board is empowered to require substitution of one federal EIS so long as it addresses all issues which state and local law requires.

All of the time schedules with respect to the EIS are designed in order that, two months after the establishment of the PDS, determinations will have been made as to (1) whether an EIS is required, (2) the identification of the lead agency, and (3) whether a single federal EIS will be used.

(d) Procedural Streamlining Authority

In addition to the foregoing powers, the EMB may adopt streamlining procedures for federal agencies on a voluntary or mandatory basis, excluding independent regulatory agencies. The streamlining procedures enumerated by the Act include: (1) the consolidation of federal, state and local proceedings; (2) the elimination of duplication; (3) shortening time periods; (4) substitution of legislative-type hearings for trial-type hearings; (5) use of written submissions; and (6) elimination of initial decisions by administrative law judges. Once adopted, these procedures would apply to that agency's consideration of any action required in connection with any designated priority project. State and local agencies are exempt from mandatory streamlining requirements.

(e) The "No Tilt" Rule

Although the provisions of the Act dealing with the EMB's authority to alter procedural agency rules provoked some controversy, the provisions dealing with its authority to change substantive law understandably provoked the strongest reaction. As a result, it is clear from the provisions included that the conferees, with narrowly defined exceptions, intend that EMB's mandatory powers be limited to procedural matters. The "no tilt" provision expressly states that no EMB decision should influence the basis or conclusion of an agency decision.

(f) The Grandfather Exception

There are two exceptions to the Act's limitation of the EMB's power in procedural matters. Under the so-called grandfather clause, the EMB may suspend any federal, state or local law or regulation enacted after the filing of an application for designation as a priority energy project, or commencement of construction, whichever is earlier, but before commercial operation. As written, this clause appears to apply also to new laws enacted *during* construction which might require redesign or backfitting. It would not apply, however, to laws enacted after the commencement of commercial operation which might require retrofitting.

(g) Specific Exemptions from Grandfather Authority

The Act specifically identifies and exempts certain categories of laws and

regulations from temporary suspension under the grandfather authority. These are as follows:

i. the rights, working conditions, compensation, pensions or hours of employment of employees;
ii. antitrust matters;
iii. criminal laws;
iv. civil rights;
v. securities;
vi. the IRS Code;
vii. the violation of any primary air quality standard established under the Clean Air Act;
viii. any right or rights of any person under the Constitution; and
ix. any interstate compact, any provision of state or local law, or federal contract relating to water rights.

(h) Procedures for Temporary Suspension

After the Board decides to suspend it must go through a process of consultation, notification, publication and informal hearings in the vicinity of the designated project. Following this process, the Board must support any unconditional or conditional suspension with specific findings set forth in the Act. In addition, these ultimate or conclusionary findings must be supported by evidentiary findings and reasons, including a summary of views expressed by those agencies consulted.

Although the Act is liberal in granting standing to those challenging the Board's determinations, the grounds for challenge are limited. The Board's decision may only be challenged on the basis that it operates on a law exempted by the Act, or that its findings are not supported by substantial evidence. A reviewing court cannot overturn the Board's decision unless it finds that the EMB exceeded its statutory authority or that its order is arbitrary and capricious.

(i) Substantive Waiver

In addition to its power to suspend under the grandfather provisions of the Act, the Board may recommend to the President a permanent waiver of any federal law or regulation which is enacted before the designation of a project or commencement of construction, whichever is earlier. However, in addition to the President's approval, both Houses of Congress must affirmatively approve the waiver within 60 days after submission to the President.

In addition to the foregoing, the applicant for a substantive waiver must follow the same procedure required with respect to a suspension under the grandfather provisions, including EMB consultation, notice and hearings. In the event the EMB decides to request a substantive waiver, notice must be published in the Federal Register and time allowed for the filing of comments directly with the President. The President in turn must make specific findings in his recommendations to Congress.

In view of the difficulties to be encountered in this process, it is likely

that consideration of the substantive waiver provisions will be largely academic.

(j) EMB Enforcement of PDS

In the event it appears that a federal, state or local agency will not meet a deadline imposed by the Project Decision Schedule, or if in fact it actually does fail to do so, the Act empowers the EMB to seek court enforcement in a federal district court, with an appeal to the Temporary Emergency Court of Appeals. Of course the EMB may elect to exercise its "bump up" authority to make the decision itself.

(k) Conclusion re the EMB Power

An analysis of the suspension powers vested in the EMB leads to the conclusion that, as a practical matter, these may be more apparent than real and that the benefits resulting from these powers may be more in their threatened use than in their actual use.

B. Judicial Review

The Act is designed to prevent judicial review of each action involved in a project; therefore, judicial review is limited to a simple and expeditious procedure. The first point in the process where a party may petition a court for review is when the EMB exercises its authority under the grandfather or waiver provisions or when a final agency decision is made on the merits of a project. Additionally, the sole grounds for review of an agency decision are denial of due process and violation of that agency's substantive statutory authority.

The Temporary Emergency Court of Appeals has exclusive jurisdiction over appeals from virtually every final agency decision affected by the EMB, with a right to seek a writ of certiorari from the Supreme Court.

C. Exemption for State Law

In addition to the specific exemptions from the jurisdiction of the EMB, the Act also has excluded state laws and regulations governing water rights and siting.

III. REGULATORY REFORM

In the current Congress, a veritable flood of bills has been introduced with titles indicating they were directed to "regulatory reform."* However, the bills receiving the most attention and, therefore, of greatest interest are two Senate bills, S. 262—introduced by Chairman Ribicoff of the Governmental Affairs Committee; and S. 2147—which was drafted by the staff of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure and has been reported to the full Senate Judiciary Committee.

The Subcommittee on Administrative Law and Governmental Relations

*Editor's note—Despite the flood of proposals, no omnibus regulatory reform bill was enacted during this session of Congress.

of the House Judiciary Committee has reported similar legislation, H.R. 3263, to the full House Judiciary Committee.

S. 755, a bill similar to S. 262, was introduced by Senator Ribicoff at the request of the Administration. Because the Governmental Affairs Committee has reported out S. 262, this report will concentrate on S. 262 which is now pending before the Senate Judiciary Committee.

All these bills, S. 262, S. 2147, and H.R. 3263, have one thing in common—they take an "omnibus" approach to regulatory reform. The centerpiece of each bill is the requirement that before issuing a *major rule,* an agency must prepare an "initial economic regulatory analysis" of the proposed rule's economic impact, alternative means of achieving the regulatory objective, and discussion in support of the approach of the proposed rule. After a period for comment, the agency must adopt and promulgate a *final* economic regulatory analysis as part of the record of the rulemaking and supportive of the rule adopted.

A major concern has been the definition of "rule" for purposes of the economic regulatory analysis. As originally proposed, it was the definition of "rule" found in Sec. 551(d) of the Administrative Procedure Act (APA). Thus, rate and certificate proceedings before FERC, if of sufficient dollar impact so as to be a "major rule", would require an "economic regulatory analysis." It was urged by some that this would add further delay to the regulatory approval of energy projects. Some headway has been made toward having the definition modified to eliminate this result.

The three bills would expand the subpoena power of agencies in several ways: (1) permit agencies to designate employees, including all Administrative Law Judges, with power to sign and issue subpoenas; (2) provide civil penalties for failure to comply with a subpoena; (3) place upon the party subpoenaed the obligation to go to court to have the subpoena quashed as not relevant or material; and (4) permit the agency to impose a number of sanctions where the subpoena is not obeyed, such as excluding matters from evidence, striking pleadings and motions and dismissing the proceedings. The granting of such powers of sanction without any court action is unprecedented.

The three bills would permit agencies to appoint employee review boards to review decisions of ALJs or the presiding officer. Such review would constitute final agency action. As initially proposed, the bills provided no standards or qualifications for members of such review boards. Dangers exist because of the inherent difficulties in most agencies of separating the function of senior staff, as supervisors, in setting staff policy in contested cases and the function of reviewing an ALJ's decision. The opportunity for abuse in an agency like FERC is evident.

S. 2147, drafted by the staff of the Senate Judiciary Committee as a clean bill for the Committee, adds two other regulatory requirements: (a) a regulatory flexibility-analysis, the objective of which is to consider imposing different standards or exemptions based on status as small business or small organizations; and (b) a pro-competitive standard—when adopting a rule or regulation, licensing entry, limiting or allocating production or distribution,

or reviewing, approving, rejecting or regulating the terms and conditions of a transaction, the agency must find that the policy or rule being adopted is the "least anti-competitive alternative legally or practically available." This is a broad, new standard for anti-competitive action and seems particularly inapplicable to most regulated companies subject to FERC jurisdiction, in the opinion of the legislative committee.

The current reform legislation, no matter in what form it is finally passed, will add to the paper work of agencies and will add to current delays. Regulatory reform legislation has not been enacted as of the date of this report.

IV. SYNTHETIC FUELS DEVELOPMENT

During 1979, both the Senate and House passed legislation providing government incentives for, and participation in, an ambitious program for development and production of synthetic fuels in the United States. The House bill, H.R. 3930, introduced by Rep. William Moorhead (R. Pa.), was passed on June 26, 1979. The Senate bill, S. 932, introduced by Sen. Jackson (D. Wash.), was passed on November 8, 1979. Because the provisions of the Senate-passed bill were significantly different from the provisions of the earlier House-passed bill, an expanded Conference Committee was appointed. The Committee, consisting of 52 members in all, met for the first time on December 7, 1979.*

As the bills reached the Conference Committee, the Senate-passed bill was considerably broader than the House-passed bill. In addition to the provisions for development of synthetic fuels, the Senate had included titles covering conservation; solar energy development; gasohol; and agricultural, forestry and rural energy. The following outline sets forth the major differences between the Senate and House provisions regarding development of synthetic fuels, as of the beginning of the conference.

A. Comparison of Proposals

1. Administration of Program:	Vests authority in President. Loan guarantee authority may be delegated to DOE, Defense Dept., Tennessee Valley Authority, or other agencies engaged in defense procurement.	Would create a federal synthetic fuels corporation. Chairman and four voting members of board of directors to be appointed for five-year terms by President. Chairman of the Energy Mobilization Board; Sec. of Energy; Sec. of Treasury to be nonvoting members
2. Definition of Synfuels:	Synthetic fuels and synthetic chemical feedstocks defined to cover products from conversion of resources, including coal, shale, tar sands, lignite, peat, solid waste, and heavy oil.	Synthetic fuels defined to include shale, coal, tar sands, heavy oil, biomass, coal and oil mixtures, and magneto-hydrodynamics.

*Editor's note—Ultimately, the conferees issued a report which was passed by both Houses of Congress. The "Energy Security Act," Pub. L. No. 96-294, was signed by the President on June 30, 1980. The Act consists of eight separate titles: Title I—Synthetic Fuel; Title II—Biomass Energy and Alcohol Fuels; Title III—Energy Targets; Title IV—Renewable Energy Initiatives; Title V—Solar Energy and Conservation; Title VI—Geothermal Energy; Title VII—Acid Precipitation Program and Carbon Dioxide Study; Title VIII—Strategic Petroleum Reserve.

3. Goals:	500,000 b/d by 1985 2 million b/d by 1990	Total of 1.5 million b/d by 1995
4. Types of Development Assistance Authorized:	Purchase commitments, loans, loan guarantees, installation of government-owned equipment in private facilities and formation of government corporations to own and operate facilities.	Price guarantees or purchase agreements, loan guarantees, loans joint ventures and synthetic fuels corporation construction projects.
5. Implementation:	President may form corporations to produce and acquire synfuels, subject to congressional review and one-House veto within 60 days.	Corporation may contract directly for up to three projects prior to approval of "comprehensive plan" by Congress. Corporation projects are least preferred form of assistance. Corporation must utilize private sector as much as possible. Must solicit proposals to accomplish project objectives through other forms of assistance prior to using government-owned, company-operated (Goco) facilities.
6. Method of Project Selection:	Sealed competitive bidding for purchase commitments. President may negotiate for purchase contracts if no acceptable bids are received.	Preference to project involving least government assistance and lowest per unit production cost within each technology. Also, preference given to projects in states that have agreed to expedite permitting and licensing.
7. Appropriations:	$3 billion for payment of above-market portion of purchase commitment price.	$20 billion initially for all forms of assistance. Up to $68 billion additional upon approval of comprehensive strategy within five years.
8. Effective Dates:	October 1, 1979.	Initial solicitations within six months of enactment. All contracts must be entered into by September 30, 1990.
9. Termination:	Purchase commitments must be entered into by September 30, 1995 and may apply until 2015. Extends expiration of underlying Defense Production Act authorities to Sept. 30, 1980.	Corporation to terminate September 30, 1995. President may terminate the Corporation at an earlier date but not prior to September 30, 1990.

After some procedural debate regarding the composition of the Conference Committee, the Committee began work, using the Senate's omnibus bill as a basis for discussion. Representative Moorhead, Chairman of the Conference Committee, originally hoped to complete work on the synfuels provisions of the bill before the end of 1979. However, disputes developed almost immediately regarding interim financing for projects during formation of a synthetic fuels corporation, and concerning the feasibility and wisdom of setting sizeable production goals. Finally, in mid-March 1980, the Conference Committee reached tentative agreement on the synfuels provisions of