

Report of the Committee on Legislation

I. INTRODUCTION, SUMMARY AND RECOMMENDATIONS

The Federal Energy Bar Association, at its 1980 Annual Meeting, focused upon regulatory reform legislation and the ability of the Bar to provide appropriate, timely, and meaningful responses to the Congress and various Congressional committees. Members of the FEBA adopted a resolution which resulted in the creation of a Task Force within the Committee on Legislation to monitor and report recommendations on regulatory reform legislation as it was then being considered in the Congress.¹

President Carl D. Hobelman appointed the Task Force members and the Committee's analytical efforts were directed immediately to regulatory reform legislative hearings then being conducted before the Senate Governmental Affairs Committee and the House Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations. The Committee on Legislation adopted a work schedule to monitor other areas of legislative interest to the FEBA. Procedural channels were established with various Departments and agencies to coordinate committee work and the interests of various governmental offices.

The Departments and agencies include the Departments of Agriculture, Energy, Interior, and Justice. The agencies include the Council on Environmental Quality, the Environmental Protection Agency, the Federal Energy Regulatory Commission, the Interstate Commerce Commission, and the Nuclear Regulatory Commission. Topics of Committee focus cover: governmental regulation, energy, fuels, and conservation, natural resources, environment, and tax.

As the legislative process became *grounded* during the Presidential and Congressional elections of 1980, the Committee concluded that recommendations for FEBA participation in Congressional hearings would not serve any useful purposes. Accordingly, no legislative recommendations were proffered to the Executive Committee. Legislative activities now being initiated in the 97th Congress may well result in Committee recommendations during the late spring or early summer months. A number of legislative proposals are now surfacing in Committee hearings. They are summarized, *infra*.

On March 27, 1981, the Committee made two recommendations to the FEBA President for consideration at the 1981 Annual Meeting:

- The Committee's charter should be redesignated as the Committee on Governmental Regulation and Legislation.
- The office of Chairman of the redesignated Committee should be included within the membership of the Association's Executive Committee.

The Executive Committee has noticed proposed amendments to the FEBA's Constitution and By-Laws. The Executive Committee's recommendations are set forth in the notice, together with the proposals initiated by the Committee on Legislation.

Experience with the provisions of the Paperwork Reduction Act of 1980, P.L. 96-511, The Regulatory Flexibility Act, P.L. 96-354, Executive Order No. 12291,

¹This April 1981 report of the Committee on Legislation for the year 1979-80 includes a discussion of various regulatory reform legislative proposals.

46 *Fed. Reg.* 13193, Presidential Memorandum dated January 29, 1981, 46 *Fed. Reg.* 11227, and the Vice President's Memorandum of March 25, 1981, "Consolidation of Regulatory Oversight", indicates that a substantial amount of "regulatory reform" type activity can be accomplished through budgetary and other governmental clearance procedures. The results may be different for Executive Departments and Independent regulatory agencies, but the impact of these types of procedures are none the less real. Numerous areas of Association practice are affected.

II. 96TH CONGRESS, 2ND SESSION

Since the Committee's last Annual Report, legislation was enacted in a number of areas of concern to Association members. This activity included the following major topics:

A. Governmental Regulation

1. Paperwork Reduction Act of 1980, P.L. 96-511.

The purpose of the Act is as the title states—to reduce paperwork. The Act is also designed to enhance the economy and efficiency of the national government, as well as the private sector of the economy.

The Office of Management and Budget now includes an Office of Information and Regulatory Affairs. Duties of the office include overall direction of federal information policy, statistical activity, data processing, records management and clearance of new report gathering or paperwork requirements. Requirements of the Federal Reports Act have been changed to strengthen OMB. A federal Information Locator System is established and designed to (1) focus upon and eliminate duplicate federal reporting requirements and (2) facilitate access to reported data now in governmental offices.

2. Regulatory Flexibility Act, P.L. 96-354.

This legislation is designed to tailor regulatory and informational requirements of federal agencies as they are applied to various sizes of businesses or other types of entities subject to regulation. Federal Agencies are required to publish, semi-annually, agendas of anticipated significant rules and regulations. Additionally, the Act requires periodic agency review of rules that have a significant impact upon substantial numbers of smaller entities. The purpose of the review is to see whether such rules should be amended or otherwise rescinded.

3. Federal Trade Commission Improvements Act of 1980, P.L. 96-252.

This legislation includes a legislative veto provision applicable to all newly promulgated rules of the FTC. The legislative veto, in this instance, takes the form of a concurrent resolution of disapproval. Judicial review procedures are included to ensure expedited judicial consideration of constitutional challenges to the use of the veto mechanism.

4. Rejection of Phase II/Incremental Pricing

On the House side, Congress voted to reject the Federal Energy Regulatory Commission's Proposed Phase II Incremental Pricing regulations. The latter regulations were promulgated pursuant to Title II of the Natural Gas Policy Act of 1978, P.L. 95-621. The House acted May 20, 1980.

B. Energy, Fuels and Conservation

1. Energy Security Act, P.L. 96-294.

Title I of this legislation created the United States Synthetic Fuels Corporation, an entity with an initial life of twelve years whose power and authority covers a wide range of actions to encourage synthetic fuel developments. These actions may include grants, loans, purchase agreements, and direct ownership or operation. Resources of the Corporation increase from an initial \$20 billion to \$88 billion in later years. Title I also extended authority granted by the Defense Production Act of 1950.

In addition, Title II of ESA includes provisions directed to the production and utilization of biomass energy and alcohol fuels.

Title III provides for the development of energy targets, which are to be transmitted by the President for Congressional consideration.

Title IV establishes incentives for the use of renewable energy resources. The Act focuses upon the use of cost effective solar energy systems, conservation measures, photovoltaic, and the development of small scale hydroelectric property.

Title V is directed to conservation and the development of solar energy systems, residential energy efficiency programs, energy conservation measures for commercial dwellings and multi-family housing units, weatherization programs, and industrial energy conservation.

Title VI of ESA is directed to the development and utilization of geothermal energy.

Title VII covers the study of acid rain and carbon dioxide effects.

Title VIII provides for filling of the Strategic Petroleum Reserve.

2. Wind Energy Systems Act of 1980, P.L. 96-345.

Under the objectives of this legislation, wind energy conservation systems would provide some 800 megawatts of electric power throughout the nation by 1988. That goal would be supported through research and development, testing and cost sharing. Federal financial assistance takes various forms including grants, loans, federal procurement and cooperative agreements.

3. The Gasohol Competition Act of 1980, P.L. 96-493, and the Omnibus Reconciliation Act of 1980, P.L. 96-499.

These Acts are directed to the domestic production and distribution of alcohol based fuels. The former Act amends the Clayton Act to prohibit discrimination or unreasonable limits on sale of synthetic motor fuels. The latter Act establishes tariff barriers against imported alcohol.

4. Methane Transportation, Research, Development, and Demonstration Act of 1980, P.L. 96-512.

This act is directed to development and commercialization of methane-fueled vehicles. Research development and demonstration programs are provided for.

5. The Ocean Thermal Energy Conservation Research and Development Act, P.L. 96-310, and the Ocean Thermal Energy Conservation Act of 1980, P.L. 96-320.

These Acts are directed to the development of ocean thermal resources. The two Acts seek the commercial development and early application of OTEC systems.

6. Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501.

This legislation obligates the Administrator of the Bonneville Power Administration to develop a regional northwest power planning and conservation program incorporating the Federal Columbia River Power System. The legislation constitutes a major step in coordinating bulk electric power supply planning and supply for an entire geographic region of the nation served by numerous electric systems.

7. Staggers Rail Act of 1980, P.L. 96-448.

This Act is designed to relieve various regulatory requirements of the Interstate Commerce Commission as they apply to rail transportation. Economic decisionmaking may now be conducted by carriers within statutorily prescribed zones or boundaries. Contracts between shippers and carriers are authorized. Accelerated abandonment procedures are authorized. Federal assistance funding for railroad improvement and rehabilitation is provided.

C. Natural Resources

1. Alaska National Interest Lands Conservation Act, P.L. 96-487.

This legislation established a number of ground rules for resource utilization and conservation in Alaska. Within the conservation units are national parks and monuments, park reserves, wilderness areas, wildlife refuges, national forests, wild and scenic rivers and Bureau of Land Management conservation and recreation areas. Governmental and private seismic activities (but no development without Congressional authorization) may be conducted in the William O. Douglas Arctic Wildlife Range for a five-year period. National forest timber harvesting is allowed, as well as mineral resource developments in selected geographic areas.

D. Environmental

1. Comprehensive Environmental Responses, Compensation, and Liability Act of 1980, P.L. 96-510.

This legislation known as the super fund bill establishes a \$1.5 billion fund for cleanup. The fund, to be created over five years, is to be supplied 7/8th's by fees on industrial chemicals and feedstocks and 1/8th by appropriations. The Act is directed to abandoned waste sites, gas well releases or spills of toxic materials that contaminate or pollute land, navigable waters, or ground waters. The legislation does not reach oil spills. Liability remains with those disposing of the covered materials. Under the Act, the Environmental Protection Agency is required to designate 100 top priority cleanup sites. Each state will have at least one site designated for priority cleanup.

2. Clean Water Act Amendments of 1980, P L. 96-483.

This legislation repeals the industrial cost recovery provisions for water treatment facilities and terminates federal grant assistance to municipalities for treatment of industrial wastes after November 15, 1981.

3. Safe Drinking Water Act Amendments of 1980, P.L. 96-502.

This legislation provides a three-year extension of the exemptions from the statutory interim drinking water regulations. The Act deletes natural gas storage from the statutory underground injection control program. The Act provides an alternative method for the states to obtain primary program and enforcement responsibility under the Underground Injection Control Program for injection wells relating to oil and gas activities.

4. Solid Waste Disposal Act Amendments of 1980, P.L. 96-482.

This statute extends RCRA through the 1982 fiscal year. The Act increases penalties for violations of the statute's hazardous waste provisions. Knowingly endangering human life when disposing of hazardous wastes is the basis of a new felony count. The Act suspends, pending further study and Congressional approval, Environmental Protection Agency regulation of oil and gas drilling muds and brines. Additionally, the Act suspends, pending further study, EPA's rules covering other "special wastes". The Act authorizes federal funding for state inventory work on hazardous waste dumps.

E. Tax

1. Crude Oil Windfall Profit Tax Act of 1980, P.L. 96-223.²

This legislation includes a number of features. Generally speaking, the Act imposes a tax upon domestic oil producers and royalty owners. The tax is keyed to

²Enacted April 2, 1980, prior the current FEBA reporting year. The Committee concluded that tax proposals pending in the 97th Congress, 1st Session, raised matters of tax substantive within the general areas of concern to the Association's Committee on Tax Development. For that reason, tax bills in the current Congress were omitted.

revenue earnings between 1980 and 1990. A higher tax rate applies to discovered oil produced by conventional methods in contrast to newly discovered oil produced by more expensive means. The Act divides the tax burden between major oil producers and independent producers. The Act allocates a 25 percent portion of the projected tax revenues to low income families experiencing high energy costs. Solar and other alternative energy resource funding received particular attention in the Act. Residential and business solar tax credits were increased. Residential credits apply at the rate of 40 percent of the first \$10,000 of qualifying equipment. Business credits apply as 15 percent additional credits to the standard 10 percent investment tax credit provisions. Residential qualifying equipment includes active solar water heating, space heating and cooling, wind energy, photovoltaics, and geothermal. Business equipment now includes solar or wind electric generation equipment for heating, cooling or hot water. It may also include ocean thermal equipment for two experimental sites, and solar equipment to provide industrial, agricultural or commercial process heat. Business credits are movable (three-year carry-back and seven-year carry-forward) but are non-refundable. Residential and business credit double dipping is eliminated.

F. Unfinished Legislation

Numerous areas of legislative activity in the 96th Congress, 2nd Session, did not result in complete bills. Of particular interest to FEBA members, the Committee notes the following:

1. Governmental Regulation

- a. Regulatory Reform covered by numerous bills, *e.g.*, S.262, S.755, S.2147, and H.R.3263.
- b. Legislative Veto covered by numerous bills, *e.g.*, S.1945 and H.R. 1776.
- c. Sunset covered by numerous bills, *e.g.*, S.2 and H.R.1700.

2. Energy, Fuels and Conservation

- a. Coal conversion covered by numerous bills, *e.g.*, S.2470 and H.R.6930.

3. Natural Resources

- a. Protection of Agricultural Lands and Reclamation Reform covered in Department of Agriculture and Council on Environmental Quality "National Agricultural Land Study". *See also*, S.14.

4. Environmental

- a. Fast tracking permit authorization covered by numerous bills, *e.g.*, S.1308, H.R.4862 and H.R.4985.
- b. Oil spill liability covered by numerous bills, *e.g.*, S.1480, H.R.85 and H.R.5338.
- c. Clean Air Act covered by numerous bills, *e.g.*, H.R.1150, H.R.7050, and H.R. 8269.

III. 97TH CONGRESS, FIRST SESSION

Carry-over matters from the 96th Congress are now surfacing. The Administration's legislative program has started to emerge. Unfortunately for the life and interest of this Committee and its membership as now constituted, most of the action will follow the submission of this report. The FEBA's 1980-81 year ends in April.

Nonetheless, areas of controversy and legislative interest are now evident. Some Congressional hearings are now in progress and others are to be scheduled in the near future.

The Committee has organized pending legislative matters which it believes should receive the continuing attention of successor Committee members and the Association. The subjects have been grouped under the topical headings employed for the 96th Congress.

A. Governmental Regulation

1. The Regulatory Procedure Act of 1981, H.R.746.

The Regulatory Procedure Act was recently introduced by Congressman Danielson. This bill is made up basically of sections from last year's regulatory reform bill, H.R.3263. It is an omnibus approach to the problem and would make a number of amendments to the Administrative Procedure Act. Most of these amendments would result in further layers of review and delay. These changes would require a regulatory analysis to be conducted by each federal agency prior to issuing a "major rule" which, in brief, would be a rule with an impact on the Nation's economy of \$100,000,000 or more. Through the regulatory analysis, the agency would have to include within its consideration, *inter alia*, the costs and benefits anticipated from the rule. Two other major provisions are included: one relates to provisions for legislative veto of agency rules, and the second concept includes a modified "Bumpers Amendment" which would amend Section 706 of the APA in order that a reviewing court not accord any preference "for or against" agency actions. There are also provisions for employee review boards comprised of three or more agency employees "of any kind" to review initial decisions of presiding employees. The board could generate further separation of functions problems and provide another layer of review before obtaining a final agency rule or order.

Senator Laxalt is presently reported to be seeking sponsors for a similar bill from the standpoint of regulatory analysis, intra-agency review of rules, modified Bumpers, and a provision on venue to preclude "races to the courthouse". This bill is expected to be finalized for introduction during the current month.

There are a number of other regulatory reform bills that have been introduced, but the Danielson bill and the contemplated Laxalt bill seem to be in more prominence at this time.

B. Energy, Fuels and Conservation

1. Fuel Use Act, Oil and Natural Gas Backout Legislation.

At the time of preparation of this report, the schedule of Congressional hearings on the coal conversion features of the Powerplant and Industrial Fuel Use Act of 1978, P.L. 95-620 was not certain. Hearings on the legislation were tentatively scheduled in the Senate for April 22, but it is thought that the Spring recess will move them back closer to the beginning of May. Hearings have not yet been scheduled in the House.

Numerous legislative proposals have been introduced.³ On the House side, bills have been referred to the House Interstate and Foreign Commerce Committee, and on the Senate side to the Energy and Natural Resources Committee.

Essentially, these bills are carryover matters from the 96th Congress. During the last term, the Senate passed S.2470, but the House did not act. Two legislative concepts are presented, although details of the bills vary. One legislative solution would remove those features of the Fuel Use Act that precipitate coal conversion. The second approach is to provide financial resources (basically grants) to cover coal conversion costs and other aspects of environmentally clean fuels.

The 1982 Budget proposal submitted to Congress by the Administration specifies that DOE's fuels conversion program will be zeroed out through "termination of activities under the Fuel Use Act". Abolishment of DOE's fuel conversion program will require Congressional action. The budget does make the Administration's view clear, however. As presently scheduled, Congressional hearings on this subject will take place during the current month.

2. Synthetic Fuels

With the enactment of the Energy Security Act, it appears that current Congressional activity in the synfuels area will tend to focus upon research and development, funding and specific types of technological processes. At the time of completion of this report, hearings had not been set on pending bills.⁴

S.434 is a broad research and development approach to accelerate *in situ* technologies for energy production from underground coal resources and unconventional gas resources. The bill covers activity from R & D through commercialization. The Secretary of DOE would exercise comprehensive program management authority. The bill would set increasing target goals of gas production reaching six Tcf by the year 2000. S.590 would restrict the use of foreign materials in synthetic fuel plants supported by the federal government.

³See, for example, H.R.1031, H.R.1510, H.R.1785, H.R.1893, H.R.2117, H.R.2325, S.40, S.332 and S.410. H.R.1785 would repeal section 301 of the FUA, permitting utilities to burn natural gas. S.40, a companion bill to H.R.1785, would do the same thing as the Moorhead bill. S.332 is almost a carbon copy of S.410.

Section 301 imposes various restrictions upon the use of natural gas in existing powerplants. Existing powerplants are forbidden by section 301 from using natural gas as a fuel after January 1, 1990; until January 1, 1990, existing powerplants are limited in their use of natural gas to the proportion of natural gas used as a fuel during the 1974 through 1976 base period.

⁴See, for example, H.R.1032, H.Cong.Res. 65, S.434 and S.590.

3. Wellhead Pricing

Legislative activity in this area is best typified by two bills, H.R.2019 and H.Cong. Res. 77. The first bill would terminate all wellhead pricing on oil and new natural gas. The second bill would have Congress express opposition to an acceleration of decontrol of natural gas. At the time of completing this report, action had not been scheduled on either bill.

C. Natural Resources

Legislation dealing with land and land controls is expected to center upon the extractive industries. *See*, for example, H.R.396 which is a proposal to amend the surface Mining Control and Reclamation Act of 1977. This bill, dealing with the restoration of land contours, has been referred to the Interior and Insular Affairs Committee of the House.

D. Environmental

Unquestionably, the Clean Air Act, up for renewal this year, will trigger major areas of legislative activity in the 97th Congress. As some indication of the breadth of the forthcoming debate, the report of National Commission on Air Quality released March 2, 1981, contained 109 recommendations. The positions being taken by the various groups and organizations concerned with the Clean Air Act range across a broad spectrum from tightening the Act with special emphasis on acid precipitation to no significant changes to a major overall change in approach.

Numerous specific areas are likely to get attention. This will include the procedural functioning of the Clean Air Act, particularly with respect to state implementation plan review and approval by EPA. Among the substantive issues that will be subject to possible change are the prevention of significant deterioration requirements, non-attainment requirements, new source performance standards and the various deadlines set by the Clean Air Act. Ever the lynch-pin of the Act, national ambient air quality standards seem headed for Congressional review with particular emphasis on changing, eliminating or leaving to the individual states secondary standards and revising the criteria for primary standards. Because of the wide divergence of positions, if significant substantive changes are proposed (as is likely), Congress will be unable to complete the revision process this year.

The Clean Water Act is also up for renewal this year but has been subject to far less posturing by interested groups. Nonetheless, some proposals for significant changes appear probable. Among the likely areas for change are extending the life of National Pollutant Discharge Elimination System permits and extending the current July 1, 1984, deadline for industrial compliance with best available technology control requirements for toxics.

Other major environmental statutes, such as Resource Conservation and Recovery Act, Toxic Substances Control Act and the oil spill superfund, do not have current high visibility for significant Congressional action this year. H.R.85, dealing with the oil spill superfund, was referred to the Merchant Marine, Public

Works and House Ways and Means Committees. H.R.85 is similar to the liability and compensation proposal covering oil spills that passed the House in the 96th Congress. In early April, the Coast Guard and Navigation Subcommittee of the House Merchant Marine Committee approved H.R.85.

S.668, a so-called "fast track," has been introduced by Senator Jackson. At the time of drafting this report, a House counterpart to S.668 had not been introduced. However, legislative interest has been expressed in the House as well as by the Administration.

IV. CONCLUSIONS AND RECOMMENDATIONS

The changing nature of governmental regulation, as it applies to the energy industries and the changing relationship between governmental controls and private sector decisionmaking warrant a re-examination by the FEBA as to the nature and purposes of the Committee on Legislation. Membership concerns expressed at the last Annual Meeting prompted constructive changes in the Committee's duties and responsibilities.

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