

Report Of The Committee On Legislation And Regulatory Reform

I. INTRODUCTION

The report of the Committee on Legislation and Regulatory Reform covers legislative developments in the first session and early second session of the 102nd Congress.¹ This Congress has been especially active on energy matters. The Persian Gulf War, the release of the President's National Energy Strategy (NES), and other factors created the impetus for consideration of comprehensive energy legislation.

The report is divided into three parts. The first part describes the comprehensive energy legislation pending before the Congress. The second part describes pending environmental legislation. The third part of the report describes miscellaneous Congressional activity that should be of interest.

II. COMPREHENSIVE ENERGY LEGISLATION

A. *Procedural History*

By the midpoint of the second session of the 102nd Congress, both houses had passed comprehensive energy bills. On February 19, 1992, the Senate passed S. 2166, the National Energy Security Act of 1992, by a margin of 94 to 4. On May 27, 1992, the House of Representatives passed H.R. 776, the Comprehensive National Energy Policy Act, by a margin of 381 to 37.

1. Senate

The vehicle for Senate consideration of comprehensive energy legislation was the National Energy Security Act sponsored by Senators J. Bennett Johnston (D-LA) and Malcolm Wallop (R-WY), the chairman and ranking minority member of the Committee on Energy and Natural Resources. The National Energy Security Act was introduced as S. 341 on February 5, 1991, and was referred to the Committee on Energy and Natural Resources. Between February 26 and May 23, 1991, the Energy Committee considered S. 341, and adopted numerous amendments to the bill and voted to report S. 341 favorably by a margin of 17 to 3.

On June 5, 1991, the Energy Committee reported an original bill, S. 1220, which incorporated the text of S. 341 as amended by the Committee.² Like S. 341, the short title of S. 1220 was the National Energy Security Act of 1991.

On November 1, 1991, the Senate failed to invoke cloture on the motion to proceed to consideration of S. 1220 by a vote of 50 in favor and 44 against.³

1. Due to the unusual level of energy-related activity in the Congress, the Committee's report concentrates on legislative developments that should be of interest to the energy bar. Regulatory developments are likely to be covered in detail by the reports of other committees.

2. S. 1220, 102d Cong., 1st Sess. (1991); S. REP. No. 72, 102d Cong., 1st Sess. (1991).

3. Under Senate Rule XXII, an affirmative vote of three-fifths of the Senators duly chosen and sworn is required to bring debate to a close.

The cloture vote was necessary, because opponents of a number of the bill's provisions threatened a filibuster. The failure to invoke cloture effectively blocked floor consideration of S. 1220.

On January 29, 1992, Senators Johnston and Wallop introduced a revised energy bill, S. 2166, the National Energy Security Act of 1992. As introduced, the new bill was identical to S. 1220 but for the deletion of the following provisions: (1) title III regarding corporate average fuel economy for automobiles and light trucks; (2) subtitle D of title VI regarding used oil energy production; (3) title VII regarding oil and gas leasing in the Arctic National Wildlife Refuge; and (4) Section 14210 regarding the applicability of new source review to existing electric utility steam generating units (the so-called WEPCo issue).

The Senate approved a motion to proceed to consideration of S. 2166 on February 4, 1992. After six days of floor consideration and the disposition of numerous amendments, the Senate on February 19, 1992, passed S. 2166 as amended by a vote of 94 in favor and 4 against.

2. House of Representatives

House consideration of comprehensive energy legislation proceeded at a more deliberate pace. On February 4, 1991, Representative Philip Sharp (D-IN), Chairman of the Energy and Power Subcommittee, introduced five separate energy bills numbered H.R. 776 through H.R. 780. The Energy and Power Subcommittee held a series of hearings and completed markup on October 31, 1991, when the Subcommittee consolidated all of the approved provisions in a single bill, H.R. 776, the Comprehensive National Energy Policy Act. The Committee on Energy and Commerce marked up H.R. 776 on March 11, 1992, and voted that same day to report the bill favorably by a margin of 42 in favor and 1 against. The Committee's report to accompany H.R. 776 was filed on March 30, 1992.⁴

Also on March 30, 1992, eight other committees were granted sequential referral of H.R. 776. These included the Committees on Interior, Science, Merchant Marine, Judiciary, Ways and Means, Government Operations, and Public Works. The Committee on Agriculture received a referral, but declined to exercise its jurisdiction over H.R. 776. The other seven committees held hearings and marked up their respective provisions of H.R. 776 over the next month.

On May 19 and May 20, 1992, the Rules Committee met to determine which of the various committees' amendments to H.R. 776 would be the "base text" of the comprehensive energy legislation when it was brought to the House floor and which amendments to the base text would be in order to be offered on the floor. The House debated and voted on amendments to H.R. 776 and approved it by a vote of 381 to 37 on May 27, 1992.

3. Prerequisites for a Conference

Passage by both houses of Congress of their own versions of comprehensive energy legislation did not create the necessary conditions for a House-

4. H.R. REP. NO. 474, 102d Cong., 1st Sess., pt. 1 (1992).

Senate conference committee to reconcile differences between the two bills. As approved by the House, H.R. 776 included a package of energy tax provisions that had been reported by the Ways and Means Committee. This turned the energy bill into a revenue bill, which under the Constitution can originate only in the House. Therefore, rather than calling up S. 2166 and substituting the text of the House bill, the House adopted its own bill, H.R. 776.

With passage of H.R. 776, a conference committee could not be convened, however, because neither chamber had passed the other chamber's bill. Senate passage of H.R. 776 in a form different from that passed by the House is necessary for there to be a conference. On receipt by the Senate, H.R. 776 was referred to the Committee on Finance which ordered the bill reported on June 16, 1992. The legislation was passed a second time by the full Senate on July 30, 1992, by a vote of 93 to 3.

4. National Energy Strategy Legislation

The President's National Energy Strategy was released on February 20, 1991. Legislation to implement those parts of the NES requiring new statutory authority was introduced in the House and Senate at the request of the President. While S. 570 and H.R. 1301 were not the markup vehicles for the legislation reported by the jurisdictional committees, portions of the Administration's bills were incorporated as parts of the bills reported by the committees. Other comprehensive energy bills that figured in the committees' deliberations included S. 741 and S. 742 introduced on March 21, 1991, by Senator Wirth (D-CO) and H.R. 1543 introduced that same day by Representatives Michel (R-IL) and Lent (R-NY).

B. Holding Company Act Reform and Transmission Access

Proposals to exempt non-utility generators of wholesale electric power from the strictures of the Public Utility Holding Company Act of 1935 (PUHCA)⁵ were part of comprehensive energy legislation under consideration in both Houses of Congress. In the House, PUHCA reform was coupled with proposals to expand Federal Power Act authority to order non-discriminatory access to electric utility transmission grids.

1. Genesis of Wholesale Power Market Structure

Much of the structure of today's electric power industry derives from the expansion and consolidation of holding company empires in the first three decades of this century and PUHCA's disaggregation of, and control over, the holding companies since 1935. PUHCA brought the holding company empires under control by imposing both structural constraints and procedural controls. Structurally, holding companies, defined as a company that "directly or indirectly owns, controls, or holds with power to vote, 10 per

5. Pub. L. No. 74-333, 49 Stat. 803 (1935) (codified as amended at 15 U.S.C.A. § 79 - § 79z-6 (1981 & Supp. 1991)).

centum or more of the outstanding voting securities of a public utility,⁶ were required to "simplify" by divesting holdings that were not "consistent with the operation of an integrated public utility system"⁷ and "reasonably incidental, or economically necessary or appropriate, to the operation of an integrated public utility system."⁸ These structural constraints forced investor-owned electric utilities to organize under one of three basic corporate models:⁹ (a) single integrated corporations; (b) PUHCA-exempt holding companies operating predominantly in one state;¹⁰ or (c) PUHCA-registered, interstate holding companies.¹¹ In addition to these structural requirements, holding companies that failed to qualify for specific exemptions provided by PUHCA¹² were made subject to extensive reporting, accounting, financing, and securities requirements intended to enforce simplification and facilitate regulation by the Securities and Exchange Commission (SEC).¹³

PUHCA remained essentially unchanged for 43 years, until Congress enacted the Public Utilities Regulatory Policies Act of 1978 (PURPA).¹⁴ PURPA spawned a new, yet narrowly circumscribed, class of PUHCA-exempt power wholesalers, known as qualifying facilities or QFs.¹⁵ Emer-

6. 15 U.S.C.A. § 79b(a)(7)(A) (1985). "Public utility" includes electric and natural gas distribution utilities, but excludes natural gas pipelines, water, and telephone companies. *Id.* § 79b(a)(5).

7. *See id.* § 79b(a)(29) (defining integrated public utility system); *id.* § 79k(b) (requiring SEC to simplify registered holding companies into integrated public utility systems).

8. Non-utility business may be retained by a registered holding company only if they are "reasonably incidental or economically necessary or appropriate." *Id.* § 79k(b). The structural constraints were used to "bust the trusts".

9. DEPT. OF ENERGY, "Analysis of Options to Amend the Public Utility Holding Company Act of 1935," NATIONAL ENERGY STRATEGY, Tech. Annex 1, 3 (1991/1992).

10. As of 1991, there were 85 holding companies that were exempt because their utility-related operations were "predominantly intrastate in character and carry on their business substantially in a single State," 15 U.S.C.A. § 79c(a)(1) (1981); 31 were exempt because their holding company assets consisted "predominantly [of] a public utility company whose operations as such do not extend beyond the State in which it is organized and the States contiguous thereto," *id.* § 79c(a)(2). *See* DIV. OF INVESTMENT MANAGEMENT, OFFICE OF PUBLIC UTILITY REGULATION, SEC, *Holding Companies Exempt from the Public Utility Holding Company Act of 1935 under Sections 3(a)(1) and 3(a)(2) Pursuant to Rule 2 Filings or by Order as of Sept. 1, 1991*, FINANCIAL AND CORPORATE REPORTS (1991).

11. Simplification is continuously monitored and enforced under §§ 9 and 10 of PUHCA. Section 9 subjects registered and exempt holding companies to advance SEC review of many types of acquisitions, 15 U.S.C.A. § 79a(b)(1) (1981), and require SEC approval of any acquisition of 5% or more of a public utility company. *Id.* § 79a(a)(2). Governing these pre-acquisition reviews, Section 10 prohibits the SEC from approving any acquisition "unless the Commission finds that such acquisition will. . . tend[] towards the economical and efficient development of an integrated public utility system." *Id.* § 79j(c)(2). As a result of the simplification requirements of PUHCA, there were only nine registered electric utility holding companies left as of December 31, 1990. DIV. OF INVESTMENT MANAGEMENT, OFFICE OF PUBLIC UTILITY REGULATION, SEC, *Holding Companies Registered Under the Public Utility Holding Company Act as of Dec. 30, 1990*, FINANCIAL AND CORPORATE REPORTS (1991).

12. 15 U.S.C.A. § 79c(a) (1981)(specifying five primary bases for exemption); *id.* § 79c(b), (d) (authorizing discretionary exemptions); *see generally* D. Hawes, *Utility Holding Companies*, § 3.04[2]-[5] (Release #3, 1987).

13. *E.g.*, 15 U.S.C.A. §§ 79e(b) (registration statements), § 79f, g (securities transactions).

14. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C.A. §§ 2601-2645 (1985 & Supp. 1992)).

15. Qfs are either "small power production" or "co-generation" facilities. Small power production is the generation of up to 80 megawatts of electricity from biomass, renewable resources (*e.g.*, water, wind,

gence of these non-utility wholesale generators, in turn, spawned pockets of competitive bidding for electric power in many states.¹⁶

The first significant proposal to reform PUHCA emerged in 1989, when Senator J. Bennett Johnston introduced a bill entitled the "Competitive Wholesale Electric Generation Act of 1989."¹⁷ A forerunner to the current legislative proposals, the Johnston bill would have created an exempt category of wholesale generators, referred to as exempt wholesale generators or EWGs, broader than PURPA's limited PUHCA exemption for Qfs. The Johnston bill was not reported by the Committee on Energy and Natural Resources.

2. Pending Reform Proposals

a. Title XV of S. 2166

PUHCA reform was part of S. 2166, the National Energy Security Act of 1992, which was passed by the Senate on February 19, 1992.¹⁸ As introduced, Title XV of S. 2166 was identical to title XV of S. 1220, the National Energy Security Act of 1991, which had been reported by the Senate Committee on Energy and Natural Resources on June 5, 1991. Like the NES legislation, S. 2166 creates a new class of EWGs, owners or operators of eligible facilities used exclusively for wholesale generation,¹⁹ that are legally removed from "electric utility company" status for purposes of Section 2(a)(3) of PUHCA and from being deemed "primarily engaged in the generation or sale of electricity" for purposes of Sections 3(17)(C)(ii) and 3(18)(B)(ii) of the Federal

solar power), or any combination of these resources as a facility's primary (not less than 75%) energy source. 16 U.S.C.A. § 824a-3 (Supp. 1992); 18 C.F.R. §§ 292.204(a), (b) (1991). Co-generation is the generation of an unlimited amount of electric energy concurrently with forms of useful thermal energy. 16 U.S.C.A. § 796(18)(A) (1985). See generally D. Drennan, *Considering the Co-generation Commitment: Do Government Incentives Tip the Scales?*, 1 ENERGY L.J. 297 (1980).

16. See DEPT. OF ENERGY, "Analysis of Options to Amend the Public Utility Holding Company Act of 1935," NATIONAL ENERGY STRATEGY, Tech Annex 1, 14-15 (1991/1992); National Independent Energy Producers, "Bidding for Power; The Emergence of Competitive Bidding in Electric Generation" (March 1990); see also W. Wellford and P. Elston, *Why PUHCA Reform is Likely in the 102nd Congress*, 127 PUB. UTIL. FORT. 24, 25 (1991).

17. S. 406, 101st Cong., 1st Sess., 135 CONG. REC. S1430 (daily ed. Feb. 9, 1989).

18. S. 2166, 102d Cong., 2d Sess., 138 CONG. REC. S607 (daily ed. Jan. 29, 1992).

19. *Id.* § 15101(a). The Committee drafters of S. 1220, which became S. 2166, intended to distinguish an EWG from an "independent power producer" or "IPP", which they define to be a utility or non-utility that owns or operates a wholesale generating facility and that, "because of a lack of market power, is permitted under the Federal Power Act to charge market-determined [as opposed to a cost-of-service] price for electricity that the facility produces." See Memorandum from William Conway, Majority Senior Counsel, to Members of Senate Subcommittee on Water and Power 4 (Mar. 13, 1991). Under this nomenclature, an EWG may or may not be an IPP — *i.e.*, may or may not charge market-determined rates for power. *Id.* at 7. To ensure that all sales by EWGs are, in actual effect, wholesale sales of power, the Senate bill contains a provision barring FERC from approving any rate or charge for a power sale by an EWG where the sale is a "sham wholesale transaction." S. 2166, § 15104. A "sham" is defined as a power sale by an EWG where the purchaser is not a municipal electric system, state power authority, electric power cooperative, or an entity that would not use its own transmission or distribution facilities to deliver the power to an ultimate consumer, *and* the purchaser resales the EWG power to an ultimate consumer. In effect, this provision precludes transactions in which a marketer or broker simply takes title to EWG power for re-conveyance of title to an ultimate consumer, without provision of any other service.

Power Act. Also, like the NES legislation, S. 2166 authorizes any entity, including exempt and registered holding companies, to own or operate an EWG; SEC jurisdiction is preserved only over registered holding company issuances or guarantees of securities to acquire or own an EWG and over certain inter-affiliate contracts.²⁰ Finally, like the NES legislation, S. 2166 would permit "spin-offs" of utility facilities, but only if the State commission having jurisdiction over the retail rates and charges of the facility consents to the transfer of the facility to an EWG status.²¹

In addition to mandating that ownership of an EWG by a registered company be deemed to satisfy PUHCA's "integration" and "economically necessary and appropriate" limitations, S. 2166 directs the SEC not to consider the effects an EWG subsidiary has on a registered company's capitalization or earnings.²²

S. 2166 goes beyond the NES legislation in certain important respects. Significantly, S. 2166 would bar self-dealing in power purchases by a utility from affiliate or associate EWGs unless "every State commission having jurisdiction over the retail rates of [the purchasing] electric utility" approves the power sales agreement.²³

Also noteworthy are the Senate's bill directives to state regulatory authorities. First, S. 2166 codifies the so-called *Pike County*²⁴ doctrine that permits state regulators to evaluate the prudence of power purchase decisions made by their jurisdictional electric utilities and to disallow the cost of those decisions to the extent they were imprudent in the context of other available supply alternatives. Section 15106, however, adds to the *Pike County* doctrine by empowering electric utilities to require local regulators to determine the prudence of a power purchase at the time of purchase and to be bound thereaf-

20. S. 2166, § 15101(g) (1992).

21. S. 2166, § 15101(c) (1992). This consent requirement applies only to the "spin-off" of facilities for which a retail rate or charge was in effect as of the date of enactment. One of the two PUHCA reform bills introduced in the House, H.R. 2825, contains an identical "spin-off" provision. H.R. 2825, 102d Cong., 1st Sess. § 3(2)(B), 137 CONG. REC. H5263 (daily ed. June 27, 1991). For a discussion of H.R. 2825, see *infra* note 54 and accompanying text. In the case of an affiliate of a registered holding company, consent is required from each state commission having jurisdiction over the retail rates and charges of the holding company's affiliate; however, SEC consent is not so required. *Id.*

22. This is of importance to registered holding companies because, under the SEC's regulations, public utility subsidiaries of registered companies retain exemption from extensive securities issuance regulations under Sections 6(a) and 7 of PUHCA, 15 U.S.C.A. §§ 79f(a), 79g (1981), only if such subsidiaries and registered parent holding companies maintain no less than 30% common equity capitalization. See 17 C.F.R. § 250.52(a)(3) (1991); see also *In re Georgia Power Co.*, 45 S.E.C. 610, 614-15 (1974) (discussing SEC decisional precedents on minimum equity capitalization). Since EWGs are almost always financed using non-recourse project financing, with initial equity sometimes as small as 10 to 15 percent, registered holding companies could be precluded from owning EWGs if the EWGs capitalization was imputed to its associated registered holding company.

23. S. 2166, § 15105 (1992).

24. *Pike Cty. Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983).

ter by that regulatory determination.²⁵

Second, S. 2166 broadly codifies the Supreme Court's 1988 decision in *Mississippi Power & Light v. Mississippi ex rel. Moore*,²⁶ by providing that any FERC order establishing the just and reasonable terms of wholesale power sale, purchase or interchange agreements between affiliates of a registered holding company will preempt any different regulatory treatment by state regulators.²⁷

Furthermore, the Senate bill also amends PURPA by prescribing types of state regulation.²⁸ Specifically, Section 15107 of S. 2166 amends PURPA by prescribing criteria that state regulators must consider when acting on a request of a jurisdictional utility to purchase long-term wholesale power. Among the criteria prescribed for state regulatory consideration are the effects of the following on reliability and fair competition: (a) purchased power on the jurisdictional utility's cost of capital and electricity rates; (b) the power seller's use of debt capital on reliability; and (c) the power seller's use of less than thirty-five percent equity capital.²⁹ Peculiarly, state regulators are further directed to evaluate "the impact on consumers arising from the fact that [an EWG] will own the eligible facility" when its contract with the purchasing utility expires.³⁰ The PURPA amendments further require state regulators to implement procedures for granting advance approval of power purchase agreements and also requires, as a pre-condition for approval of any purchase of a long-term power supply, that the seller have adequate access to fuel for the life of the agreement.³¹

25. S. 2166, § 15106 (1992)(amending § 209 of the Federal Power Act, 16 U.S.C.A. § 824h (1985)).

26. 487 U.S. 354 (1988).

27. In effect, regional holdings that generate power at wholesale for sale and resale by operating subsidiaries are subject to federal review only, and escape state review of all but citing decisions. Some have claimed that this creates a regulatory gap in which neither the states nor the FERC effectively oversee investments in wholesale generating facilities by such regional holding companies. Entergy Corporation, the regional holding company whose Grand Gulf nuclear plant was at issue in the *Mississippi* case, together with the Arkansas Public Service Commission and the New Orleans City Council have put forward legislation for developing regional (that is interstate) integrated resource plans under which the costs and risks of regional wholesale generating plants could be conclusively allocated before investments were actually undertaken. This proposal was introduced by Senators Johnston, Bumpers and Pryor as S. 2607, 102d Cong., 2d Sess. (1992), 138 CONG. REC. S5219-5220 (daily ed. April 10, 1992). See C. Curtis, *Maintaining a Proper Balance between Federal and State Authority — Is There a Place for Regional Regulation?* 1 ELEC. J. 28 (1992); J. King, *Regional Integrated Resource Planning: Good Policy, Good Business, Good Sense*, 1 ELEC. J. 34 (1992).

28. S. 2166, § 15107 (1992)(adding new subparagraph (8) to § 111 of PURPA, 16 U.S.C.A. § 2621(d) (1992)).

29. S. 2166, § 15107 (1992)(adding new subparagraph (8)(a)(iii) to § 111 of PURPA, at 16 U.S.C.A. § 2621(d)). This provision suggests that exempt wholesale generators should be required to use more equity financing (*i.e.*, 35%) than the 30% that is required of registered holding companies and their public utility subsidiaries. Compare *id.* with *infra* note 41.

30. S. 2166, § 15107 (1992)(adding new subparagraph (8)(A)(i)(B) § 111 of PURPA, at 16 U.S.C.A. § 2621(d)).

31. *Id.* § 15107 (adding new subparagraph (8)(A) to § 111 of PURPA (codified at 16 U.S.C. § 2601 - 2911 (1985 & Supp. 1992)).

Finally, in connection with what has become known as the "stranded investment" issue, S. 2166 would bar the FERC from approving the rate or charge for an EWG power sale if that sale would result in a state commission barring the utility purchaser from recovering, in retail rates, its investment in the existing generating plant.³² In effect, the "stranded investment" provision may appreciably limit an EWG's ability to compete for existing utility loads.

b. Title VII of H.R. 776

Title VII of the Comprehensive National Energy Policy Act, H.R. 776,³³ combines PUHCA exemptions for certain wholesale power producers with legislation broadly empowering the FERC to order nondiscriminatory access to electric utility transmission facilities.

i. PUHCA Reform

Like the NES legislation and S. 2166, H.R. 776 would create a new class of wholesale power producers referred to as independent power producers rather than EWGs. These wholesale power producers would be exempt from PUHCA's requirements, irrespective of affiliations with electric utilities, exempt holding companies, or registered holding companies. However, unlike the NES legislation and S. 2166, it is the FERC and not the SEC that is empowered by H.R. 776 to determine whether a wholesale generator is entitled to exempt status as an independent power producer.

The House bill is also notably different from the other two bills. The NES legislation and S. 2166 grant exemptions based on the expectation that non-utility generators will aggressively compete for power sales, while H.R. 776 would make that expectation a part of the exemption process. H.R. 776 does so in two steps: (1) by making unlawful any power sale by an independent power producer that would result in "the granting of any undue preference or advantage or would result in any undue prejudice or disadvantage"³⁴; and (2) by directing that, absent proof to the contrary, power sales agreements that result from a competitive process³⁵ shall not be treated as unlawful. In effect, a power sales agreement between an independent power producer and an electric utility purchaser that results from a competitive process would be presumed to be lawful and the burden of proof is shifted to anyone alleging the agreement is unlawful.

H.R. 776 defines "eligible facilities" to be facilities which, wherever

32. *Id.* § 15103.

33. H.R. 776, 102d Cong., 1st Sess. (1992), 137 CONG. REC. H854 (daily ed. Feb. 4, 1991).

34. *Id.* § 725 (adding new § 215(a) to Part II of the Federal Power Act, 16 U.S.C.A. § 824n).

35. Under the House bill, it is State regulatory authorities that establish what is a "competitive process", subject only to rules or regulations to be established by the FERC "to ensure that genuine competition exists." *Id.* § 725 (adding new § 215(c) to Part II of the Federal Power Act 16 U.S.C.A. § 824n).

located, generate wholesale power only.³⁶ H.R. 776, however, differs from S. 2166 in its treatment of “spin-offs.” While S. 2166 would require state commission consent before allowing any “spin-offs,” H.R. 776 would deny eligibility to any “facility which is included (in whole or in part), as of the date of enactment . . . , in the rate base of a State regulated electric utility,” irrespective of State commission consent.³⁷

The House bill is further distinctive in its approach to self-dealing (sales between an exempt independent power producer and an affiliated electric utility). While self-dealing is permitted under the NES legislation and may be permissible under S. 2166 if authorized by relevant state authorities, it would be unlawful under H.R. 776 for a PUHCA-exempt independent power producer to sell power to any electric utility affiliate. This prohibition, however, contains a grandfather provision for power sales for which a rate or charge under Sections 205 or 206 of the Federal Power Act was in existence as of the date of enactment.³⁸ In order to aid enforcement of the self-dealing prohibition, H.R. 776 confers on state regulatory commissions broad authority to review the books and records of exempt sellers, utilities that buy power from exempt generators, and affiliate and associate companies of both buyers and sellers.³⁹

ii. Transmission Access

Most of the non-discriminatory transmission access provisions of H.R. 776 were taken from the stand-alone transmission access bill, H.R. 2224. The transmission provisions of both H.R. 2224 and H.R. 776 purport only to “clarify Federal authority to ensure that transmission service is provided on a nondiscriminatory basis.” However, both bills could create an entirely new line of FERC authority to order mandatory transmission access and codify another line of decisional precedents authorizing the FERC to order voluntary transmission as a condition on utility mergers and requests to sell wholesale electric power at market-based (rather than cost-based) rates and charges.

36. H.R. 776, § 711 (1992)(adding new § 32(a)(2)(A) to PUHCA, 15 U.S.C.A. § 79z-5).

37. *Id.* § 711 (adding new § 32(a)(2)(B) to Title I of PUHCA, 15 U.S.C.A. § 79z-5). This anti “spin-off” provision is problematic to the extent it defines facilities in terms of being included in “rate-base,” rather than in terms of whether the cost of the facility was recovered in regulated rates and charges. “Rate-base” is not a defined term in the proposed legislation, in PUHCA, nor in the Federal Power Act. In regulatory jargon, a facility may be only partially included in rate-base — *i.e.*, the cost basis used to derive a rate or charge for service — to the extent some of its cost was imprudently incurred or some of its capacity is found to be not “used and useful”. As a consequence, under the terminology of the House bill, a single facility could be partially exempt, with the remainder — or “rate-base” portion — not exempt. *Cf. supra* note 31. This possible result was plainly not intended. The explanation of the Committee Print unequivocally states an intention “not to allow so-called ‘hybrid’ facilities, that is facilities that are part IPP and part cost-of-service facilities”. STAFF OF HOUSE SUBCOMM. ON ENERGY AND POWER, 102d Cong., 1st Sess., CHANGES TO THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 AND TRANSMISSION ACCESS UNDER THE FEDERAL POWER ACT 2 (Comm. Print 1991).

38. H.R. 776, § 713(a) (1992)(adding new § 205(g)(3) to the Federal Power Act, 16 U.S.C.A. § 824d).

39. H.R. 776, § 713(b) (1992)(adding new § 201(g) to the Federal Power Act, 16 U.S.C.A. § 824d).

H.R. 776 significantly integrates non-discriminatory transmission access requirements into the PUHCA exemption process. Under the House bill, it would be deemed an act of undue prejudice or disadvantage, and therefore, presumptively unlawful for any electric utility possessing transmission capacity to purchase power from an exempt independent power producer if that purchasing utility "unreasonably" denied or restricted the access of other "potential competing sellers" to its transmission system.⁴⁰ It is noteworthy, however, that the House bill focuses only on potentially competing sellers, while it apparently would not similarly deem unduly preferential or disadvantageous denials of transmission access to other potential purchasers of power. Existing law under the Federal Power Act authorizes any electric utility, geothermal power producer, or federal power marketing agency to apply to the FERC for an order requiring any other electric utility to interconnect with the applicant⁴¹ and to provide wholesale transmission service (including enlargement of capacity) to the applicant, but only where issuance of such a transmission or wheeling order satisfies a number of criteria.⁴²

Under Section 211(c)(1) of the Federal Power Act, the FERC is currently barred from granting a request for wheeling service "unless the Commission determines that such order would reasonably preserve existing competitive relationships."⁴³ In a 1984 order denying a request for a wheeling order that allegedly would have promoted competition, the FERC explained that:

[t]he statute itself in subsection 211(c)(1) prohibits the issuance of wheeling orders that have a significant procompetitive effect. This subsection provides that even if the order would conserve energy, promote efficiency, or improve reliability,⁴⁴ no order may be issued if existing competitive relationships are not reasonably preserved.⁴⁵

H.R. 776 would strike Section 211's limitation on the FERC's authority, replacing it with procedures allowing all generators of wholesale power to apply to the FERC for issuance of orders requiring a "transmitting utility"⁴⁶ to provide interconnection or wheeling.⁴⁷ The FERC, in turn, would have

40. H.R. 776, § 725 (1992)(adding new § 215(b) to Part II of the Federal Power Act, 16 U.S.C.A. § 824n).

41. 16 U.S.C.A. § 824i (1985 & Supp. 1992).

42. *Id.* § 824j. The FERC is not authorized to order transmission of power for retail sale. *Id.* § 824j(c)(4).

43. *Id.* § 824j(c)(1).

44. In addition to preserving existing competitive relationships, existing law requires that any transmission or "wheeling" order must not only preserve, but "improve," the reliability of the electric utility system to which the order applies. *Id.* § 824j(a)(2)(C). While wheeling orders ordinarily will not lessen reliability, provision of the wheeling service could not realistically be expected to *improve* reliability.

45. *Southeastern Power Admin. v. Ky. Utils. Co.*, Op. No. 198-A, 26 F.E.R.C. ¶ 61,127 at 61,323 (1984).

46. H.R. 776, 102nd Cong., 2nd Sess. § 772(1) (1992). The definition of "transmitting utility" is significant because of its breadth. For purposes of the House bill, a "'transmitting utility' means any electric utility or Federal power marketing agency which owns or operates electric power transmission facilities which are use for the sale of electric energy at wholesale."

47. H.R. 776, 102nd Cong., 2nd Sess. § 721 (1992)(amending § 210(a) of the Federal Power Act, 16 U.S.C.A. § 824i(a)) (interconnection); § 722 (amending § 211(a) of the Federal Power Act, 16 U.S.C.A.

affirmative mandates to order a transmitting utility to provide service whenever it finds that the requested transmission, in addition to maintaining reliability, would be in the public interest and do one of the following: (1) conserve energy; (2) promote efficient resource use; (3) promote wholesale electricity competition; (4) enhance environmental protection; or (5) prevent, arrest or abate discriminatory practices that are subject to the jurisdiction of the Commission.⁴⁸ This affirmative mandate is conditioned on three limitations requiring that no transmission order can be issued that would unduly impair reliability, unduly impair service to the customers of the transmitting utility, or "unduly economically disadvantage the customers of the transmitting utility subject to the order."⁴⁹ Utilities subject to transmission orders are entitled to "rates and charges which permit the recovery . . . of all prudent costs incurred in connection with the transmission services and necessary associated services, including an appropriate share of the costs of any enlargement of transmission facilities. . . ."⁵⁰ In addition, H.R. 776 would expressly deny the FERC any Federal Power Act authority to order mandatory transmission that is, in fact or in substance, transmission to an ultimate consumer (retail wheeling).⁵¹

Although barred under existing law from issuing pro-competitive transmission access orders, the FERC has indirectly used other Federal Power Act authority to impose transmission access requirements as the quid pro quo a utility must accede to in order to obtain regulatory authorization or benefit. By adding a new Section 213 to the Federal Power Act, H.R. 776 would partially codify the FERC's decisional precedents imposing "voluntary" transmission access conditions. First, the House bill identifies what are referred to as "covered sales of electric energy," which are essentially all market-based (non-cost-based) sales, except for economy sales, economic dispatch and sales by Qfs.⁵² Under the bill, whenever the FERC issues an order permitting such a market-based sale, the FERC is directed to require the market-based seller (and all of the seller's affiliates located within the service territory affected by the market-based sale) to make wholesale transmission services available.⁵³

H.R. 776 imposes a parallel obligation whenever the FERC issues an order authorizing a merger or consolidation under Section 203 of the Federal Power Act. In the case of mergers or consolidations, the obligation to provide wholesale transmission access extends to the merged or consolidated utilities

§ 824j(a)) (wheeling). The House bill's intended expansion of entities authorized to apply for interconnection orders to include any person "generating electric energy for sale for resale."

48. H.R. 776, 102d Cong., 2d Sess. § 722 (1992)(amending § 211(a) of the Federal Power Act, 16 U.S.C.A. § 824j).

49. H.R. 776, 102d Cong., 2d Sess. § 723(a) (amending § 212(a) of the Federal Power Act, 16 U.S.C.A. § 824k(a)).

50. *Id.* (amending § 212(b) of the Federal Power Act, 16 U.S.C.A. § 824k(b)). The identical pricing provision is contained in H.R. 2825, § 8 (amending § 212(c) of the Federal Power Act, 16 U.S.C.A. § 824k(c)). In both H.R. 776 and H.R. 2825, the FERC is expressly authorized to determine the proportion of a facility expansion that is attributable to a wheeling order.

51. H.R. 776, 102d Cong., 2d Sess., § 723(a) (adding new subsections (g) and (j) to § 212 of the Federal Power Act, 16 U.S.C.A. § 824k).

52. H.R. 776, 102d Cong., 2d Sess. § 723(b) (adding new § 213(a) to the Federal Power Act).

53. *Id.* (adding new § 213(b) to the Federal Power Act).

and all affiliates of those utilities that provide wholesale transmission within the service territory affected by the merger or consolidation.⁵⁴

When it marked up H.R. 776, the Energy and Commerce Committee added a provision that would amend Section 212 of the Federal Power Act⁵⁵ to impose policy "considerations" on wheeling rates intended to protect a transmitting utility's "native load" customers.⁵⁶ The amendment requires that the rates, terms and conditions applicable to "mandatory" or "voluntary" transmission (ordered under new Sections 211 or 213) shall be designed to: (a) compensate native load customers for legitimate and verifiable economic costs of providing the transmission service;⁵⁷ (b) provide the lowest reasonable transmission rates for the transmission service; and (c) prevent the collection of monopoly rents by the transmitting utility and promote the efficient transmission and generation of electricity.⁵⁸ The Amendment's requirements are reportedly based on policy considerations that the FERC prescribed in its Opinion No. 364-A⁵⁹ to govern the availability of rates and charges intended to recover opportunity costs occasioned by the provision of wheeling services.

This amendment is noteworthy in several respects. First, it provides no definition of "native load" whereas the FERC has broadly defined native load.⁶⁰ Second, the amendment requires the FERC to balance all three considerations.⁶¹ Finally, the pricing considerations expressly recognize that the provision of wheeling services may actually result in "benefits" to the transmitting utility's system (e.g., by freeing capacity or eliminating loop flows).

This provision of H.R. 776 is further unique in the information requirements that it prescribes in connection with transmission access and the penalties that it would impose for violations of either its transmission access or PUHCA exemptions requirements. The information requirements are both case-specific and generic. Case-specific are the requirements that a transmitting utility that fails to grant a request must provide transmission service pursuant to certain terms and conditions and, within 30 days of receiving the request, provide the requester with a "written explanation of the reasons why such wholesale transmission services are not being offered in accordance with

54. *Id.* (adding new § 213(b)(2) to the Federal Power Act).

55. H.R. 776, 102d Cong., 2d Sess. § 723(a) (1992) (amending § 212(b) of the Federal Power Act. 16 U.S.C.A. § 824k(1) (1985)).

56. H.R. 776, 102d Cong., 2d Sess. § 723 (amending § 212(b) of the Federal Power Act, 16 U.S.C.A. § 824k(b)).

57. This legislative language departs from FERC's prescriptions in the Northeast Utilities decision, which, *inter alia*, instructed that native load customers of the utility providing transmission service should be "held harmless". 58 F.E.R.C. at 61,203.

58. H.R. 776, 102d Cong., 2d Sess. § 723(b) (1992)(amending § 212(b)(2) of the Federal Power Act, 16 U.S.C.A. § 824k(b)).

59. Opinion No. 364-A, Northeast Utils. Serv. Co., 58 F.E.R.C. ¶ 61,070 (1992); *see also* Pennsylvania Elec. Co., 58 F.E.R.C. ¶ 61,278 at 61,871-75 (1992).

60. Pennsylvania Elec. Co., 58 F.E.R.C. ¶ 61,278 at 61,869, slip op. at 4 n.2 (March 10, 1992); *see also* Opinion No. 363-A, Northeast Utils. Serv. Co., 58 F.E.R.C. ¶ 61,070 at 61,199 nn. 93, 95 (1992).

61. H.R. 776, 102d Cong., 2d Sess. § 723(b) (1992)(amending § 212(b)(2) of the Federal Power Act, 16 U.S.C.A. § 824k(b)(2)). The FERC has prescribed a similar balancing of these considerations. Opinion No. 364-A, Northeast Utils. Serv. Co., 58 F.E.R.C. ¶ 61,070 at 61,203 (1992) ("we will balance these three goals in light of the facts and circumstances presented at the time").

such rates and charges and other conditions.”⁶² Generic is the directive to the FERC to promulgate within one year of enactment a rule requiring all utilities possessing transmission capacity to file annually with the FERC, information on existing and planned transmission capacity, forecast load growth, actual line losses, reliability assessments and whatever other information that the FERC deems related to enforcement of the House bill’s transmission access requirements.⁶³ These information requirements are central to enforcement of the House bill’s transmission access requirements.

H.R. 776 would amend the Federal Power Act by adding new penalties in order to put teeth in the bill’s non-discriminatory access provisions. For adjudicated violations of the non-discriminatory transmission access requirements, H.R. 776 prescribes civil penalties up to \$25,000 per violation per day,⁶⁴ a significant increase over the maximum \$5,000 fine applicable to all violations of Subchapter II of Title II of the Federal Power Act.⁶⁵

C. *Hydroelectric Power*

1. S. 106 and H.R. 649 (“Rock Creek” bills)

S. 106, introduced by Senators Larry Craig (R-ID) and Steve Symms (R-ID) on January 14, 1991, and H.R. 649, introduced by Representatives Richard Stallings (D-ID) and Larry LaRocco (D-ID) on January 24, 1991, are commonly referred to as the “Rock Creek” bills, because they would overturn the U.S. Supreme Court’s “*Rock Creek*” decision.⁶⁶ The Rock Creek legislation would allow the individual states to mandate unilaterally the conditions under which hydropower projects licensed by the FERC are operated.

The legislation would allow each state to set the terms, conditions, and restrictions on the use of waters within its borders at the time it grants water rights to a project. Currently, under the Federal Power Act, while project licensees must comply with state water rights laws, the FERC has exclusive authority to set conditions on the projects it licenses. The U.S. Supreme Court’s decision in *Rock Creek* affirmed the FERC’s decision that states cannot apply conditions which conflict with those imposed by the FERC at federally-licensed hydroelectric power projects.

On March 18, 1992, during mark up of comprehensive energy legislation before the Committee on Energy and Natural Resources, S. 106 was withdrawn from consideration as an amendment to that legislation.

B. *Hydroelectric Power Provisions of Comprehensive Energy Legislation*

1. Senate Bills - S. 341, S. 570, S. 741, S. 1220, and S. 2166

As introduced, the Johnston-Wallop bill, S. 341, the National Energy

62. H.R. 776, 102d Cong., 2d Sess., § 724 (1992)(adding new § 214(a) to Part II of the Federal Power Act, 16 U.S.C.A. § 824m).

63. *Id.* (adding new § 214(b) to Part II of the Federal Power Act, 16 U.S.C.A. § 825m(b)).

64. *Id.*, § 726 (adding new § 316A(b)(1) to Part III of the Federal Power Act, 16 U.S.C.A. § 825o(A)(b)(1)).

65. 16 U.S.C.A. § 825o (1985).

66. *State of California v. F.E.R.C.*, 495 U.S. 490 (1990).

Security Act of 1991, contained two sets of provisions affecting hydropower. First, Subtitle C of Title IV would have amended the FPA and the Clean Water Act (CWA) to streamline the FERC licensing process and to reinforce the FERC's control over the process. Specifically, Section 4201 would have clarified the limits on state authority in issuing "401 certifications" under the CWA for hydro projects. Section 4202 would have consolidated federal authority over the projects in the FERC and exempted projects of 1.5 megawatts or less from federal licensing. Section 4203 required the Secretary of Energy, in consultation with the Secretaries of Interior and the Army, to study opportunities for increasing hydropower production at existing federally-owned or operated facilities. In addition, Section 10003 of the bill would have amended NEPA to designate the FERC as lead agency for NEPA reviews of projects it licenses. It also authorized the FERC, at the option of license applicants, to have third party contractors assist in conducting the reviews.

Both S. 341 and the legislation to implement the NES, S. 570, were referred to the Committee on Energy and Natural Resources, which held hearings on the bills' hydro provisions on February 26, 1991 and marked up these provisions on April 16 and 17, 1991. The Committee amended S. 341 by deleting the CWA provisions, deleting or modifying some of the provisions consolidating authority over projects at the FERC, adopting S. 570's five megawatt limit for the small project exemption, clarifying the applicability of the exemption as to existing projects, and adopting S. 570's consolidated review provisions.

In addition to S. 341 and S. 570, Senator Timothy E. Wirth (D-CO) introduced a comprehensive energy bill, S. 741, which included hydro provisions comparable to the NES legislation's PURPA provisions. Because it included tax provisions, S. 741 was referred to the Senate Finance Committee. The Subcommittee on Energy and Agriculture Taxation held hearings on S. 741, June 13 and 14, 1991.⁶⁷

The hydro provisions of the Johnston-Wallop bill were significantly amended when the bill was considered by the full Senate as S. 2166. Section 5301 of S. 2166 directs the FERC to develop procedures for identifying and performing license-related studies as early as possible in the licensing process. The FERC also must enter memoranda of understanding with certain federal land management agencies concerning submission of license terms and conditions by those agencies to the FERC. Section 5302 directs the FERC to enter memoranda of understanding with "all relevant Federal agencies" for consolidated NEPA reviews. It also allows the FERC, at the election of license applicants, to hire third party contractors to prepare environmental documents for hydro projects, and allows the FERC to permit license applicants to prepare environmental assessments for the projects. Sections 5303, 5304, and 5308 direct the Secretaries of Energy, Interior, and the Army to study opportunities for increasing hydropower production at existing federal water and hydro projects, including opportunities related to energy and water conservation.

67. Senator Wirth also introduced S. 742, a version of his bill without the revenue-related provisions, which was referred to the Committee on Energy and Natural Resources.

The relevant agencies are authorized to proceed with certain conservation and energy improvements. Finally, Sections 5305 and 5306 remove federal licensing jurisdiction over certain projects in Hawaii and Alaska.

2. Hydro Provisions in House Energy Legislation

Other than the Administration's NES bill, the only comprehensive energy bill introduced in the House to contain hydro provisions was H.R. 1543 introduced by the minority leader, Representative Robert Michel (R-IL), and the ranking member of the Energy and Commerce Committee, Representative Norman Lent (R-NY). H.R. 1543 included provisions identical to those in the NES legislation consolidating the FERC authority, exempting projects five megawatts and smaller, requiring the FERC to conduct a consolidated review of projects, and lifting PURPA size caps. H.R. 1543 was referred to multiple committees, and was the subject of hearings before the Subcommittee on Energy and Power of the Committee on Energy and Commerce on April 25 and 30, 1991. H.R. 776, the comprehensive energy bill reported by the Subcommittee on October 31, 1991, did not contain hydropower provisions.

Several notable hydro provisions were added, however, when on March 30, 1992, the Committee on Energy and Commerce reported H.R. 776. Section 1701 of H.R. 776 would require FERC-licensees to pay costs incurred by federal agencies in performing studies and other reviews as part of a hydro project's "annual charges." Additionally, Section 1701 would expand the definition of "fishways" under Section 18 of the FPA, removing FERC constraints on the definition and requiring the FERC to reach agreements with the Secretaries of Commerce and Interior on the definition. Finally, Section 1701(c) and (d) would extend licensing deadlines for two specific projects.

Individual titles of H.R. 776 then were referred to eight other House committees to be considered before May 1, 1992. On April 9, 1992, the Committee on Interior and Insular Affairs reported its version of the energy bill. The House Interior bill would: (1) require right-of-way permits from federal land managers for hydro projects involving public lands or national forests; (2) require approval by the Department of Interior (DOI) to relicense existing dams involving national parks; (3) prohibit construction of new dams involving national parks with only narrow exceptions; (4) prohibit condemnation of State and local park and natural resource lands for use in federally-approved hydro projects; and (5) prevent construction of new projects on river segments designated off-limits in DOI-approved state comprehensive river plans.

3. H.R. 3002 — Fishways

On July 23, 1991, Reps. Jolene Unsoeld (D-WA) and Les AuCoin (D-OR) introduced H.R. 3002, a bill to define the term "fishway" as used in Section 3 of the FPA. The bill would define fishways to include both structural and non-structural measures for safe and timely passage of migratory and non-migratory fish both upstream and downstream from a hydro project. H.R. 3002 was referred to the Committee on Energy and Commerce.

4. H.R. 3976 — State Control

On November 26, 1991, Rep. Peter H. Kostmayer (D-PA) introduced H.R. 3976, a bill to increase state control over FERC-licensed hydroelectric power projects. H.R. 3976 would amend the FPA to prevent FERC licensees from exercising eminent domain under Section 21 of the FPA as to lands or improvements "owned or controlled by a State." H.R. 3976 also would prevent the FERC from issuing a permit, license, or exemption for construction of any project located on waterways where State law prohibits hydro development *or* if the projects would have a "direct and significant adverse effect on aquatic or riparian habitat which is protected under State law." H.R. 3976 was referred to the Committee on Energy and Commerce.

5. General Accounting Office Report on Electricity Regulation: Issues Concerning the Hydroelectric Project Licensing Process

At the request of Representative John Dingell (D-MI), Chairman of the Committee on Energy and Commerce, the General Accounting Office (GAO) examined the following issues: (1) The FERC's review of the financial and economic feasibility of proposed hydroelectric projects during the agency's licensing process; (2) the extent to which speculation is occurring in seeking a license on potential hydropower sites; and (3) the need to amend Section 13 of the FPA to allow licensees more time to arrange financing and commence construction of licensed projects.

The GAO concluded that, while hydropower license speculation "is difficult to define and virtually impossible to measure,"⁶⁸ the data did not suggest widespread speculation. In addition, the GAO concluded that amendment of Section 13 of the FPA was not warranted since few licensees have sought additional time to commence construction and the four year time limit for initiating construction of licensed hydropower projects is intended to limit speculation. Finally, the GAO Report provided Chairman Dingell with the methodology and general processes which the FERC utilizes in performing its economic feasibility analysis in awarding hydroelectric power licenses.

D. Renewable Energy

Legislation under consideration in the 102nd Congress would authorize greatly expanded financial and other support of renewable technology development. S. 2166 would establish a goal that reliance upon renewable energy sources be increased from the present level of approximately eight percent to fourteen percent of total sources by 2010.⁶⁹ The Secretary of Energy would be required to submit a plan to Congress within one year of the bill's enactment detailing methods to achieve this goal. S. 2166 also proposes to expand the duties and responsibilities of the interagency working group for renewable energy, the Committee on Renewable Energy Commerce and Trade, while establishing a parallel and complementary interagency working group for the

68. Report, *Issues Concerning The Hydroelectric Project Licensing Process*, GEN. ACCT. OFF. at 3 (May 10, 1991).

69. 138 CONG. REC. S1981 (daily ed. Feb. 21, 1992).

promotion and export of energy efficient products and technologies, the Committee on Energy Efficiency Commerce and Trade. The Bill directs that special emphasis be given to the export of renewable technologies to developing nations.

S. 2166 further authorizes \$3 million annually for fiscal years 1992-1994 to promote each of seven renewable technologies, \$6 million to export such technologies to developing nations, and \$9 million for a demonstration project of photovoltaic technology. The legislation would streamline licensing requirements for hydropower plants and would authorize providing large scale investors in renewable technologies with subsidized interest rates on bank loans for the purchase or manufacture of such equipment.

S. 2100, the Renewable Energy and Energy Conservation Act of 1992, would extend to the year 2001 and increase to 20 percent the investment tax credit available for investments in solar and geothermal technology. The bill would also establish an innovative renewable energy production credit. The credit would be available for the production of energy from defined renewable technologies and limited to electricity whose production is attributable to the taxpayer and which is sold to third parties. The credit would decline from 2.0 cents per kwh in the early 1990s to 0.3 cents in the year 2001, at which point it would expire.⁷⁰

As passed by the House, H.R. 776, the Comprehensive National Energy Policy Act, also would authorize significant incentives for the expansion of renewable energy technologies. These would include funding for joint ventures to develop specified technologies, a renewable energy production incentive (declining from 2.5 cents in the early 1990s to 0.01 cent in 2002), a study of tax and utility rate establishment rules to assure that they impose no impediments to technology development, a subsidized loan program, a renewable energy park demonstration program, and some trade export incentives.⁷¹

On April 1, 1992, the House Committee on Science, Space and Technology completed its markup of H.R. 4559, the National Energy, Environment and Competitiveness Research Act of 1992.⁷² H.R. 4559 would provide significant new federal financial support for renewable energy technology development. Section 211 would authorize \$1.5 billion to be spent during fiscal years 1993 through 1997 for a "broad and comprehensive program of research, development and demonstration to provide cost-effective options for the generation of electricity from renewable energy sources." Section 211 would establish a goal for meeting at least 15 percent of U.S. electricity needs with renewable technologies by the year 2010.

Sections 201, 206, and 301 would authorize specific additional programs to encourage development of renewable and efficiency technologies in buildings, industrial sites and the utility sector (\$1.4 billion over five years), demonstration projects in federally owned buildings (\$20 million over five years), and

70. 138 CONG. REC. 1231-32 (daily ed. Feb. 6, 1992). Several days of hearings upon the bill have been held by the Subcomm. of Energy Taxation of the Senate Finance Committee.

71. H.R. REP. NO. 776, 138 CONG. REC. 2090 (daily ed. Mar. 30, 1992).

72. STAFF OF HOUSE COMM. ON SCIENCE, SPACE AND TECHNOLOGY, 102D CONG., 2D SESS., NAT'L ENG., AND ENVTL., AND COMPETIVENESS RES. ACT OF 1992 (Comm. Print Mar. 25, 1992).

the development of advanced materials having renewable or efficiency technology applications (\$150 million over five years of which one third is reserved for renewable energy applications). Section 116 would authorize a renewable hydrogen energy program which would include at least one demonstration project of renewable hydrogen production and transport through existing natural gas pipelines. Where appropriate, each of these programs would be subject to the cost sharing requirement which requires between 20 and 50 percent of each project's cost to be contributed by non-federal sources.

Finally, Title VI of H.R. 4559 would authorize and appropriate funds for at least ten additional joint ventures between federal and non-federal entities to expedite commercialization of renewable and efficiency technologies. Several specific technologies are identified in H.R. 4559 as candidates for such joint ventures and an authorization of \$185 million over five years is provided.

E. Natural Gas

The natural gas regulatory initiatives in the NES and in the Senate and House legislation emphasized streamlining existing regulation to facilitate the certification of new interstate pipeline facilities.

1. Natural Gas Provisions of S. 2166

Title XI of S. 2166 contains measures designed to streamline gas pipeline certification procedures and to increase competition among pipelines. Title XI would create optional, abbreviated application procedures for a certificate of public necessity and convenience where pipeline developers are willing to assume the financial risk of building their projects. S. 2166 would also grant local distribution companies (LDCs) protection against new pipelines proposed under these procedures that would displace existing LDC service.

a. Optional Certification Procedures

S. 2166 amends Sections 4, 5, and 7 of the Natural Gas Act (NGA)⁷³ to authorize an optional certificate (OC) procedure for construction and operation of interstate gas pipelines. Essentially, the measure provides for certification without hearing if a project developer is willing to assume the entire financial risk.

A new subparagraph (G) of Section 7(c)(1)⁷⁴ of the NGA directs the FERC to issue a certificate of public necessity and convenience authorizing the construction, operation, and extension of facilities where the new pipeline would not impair the ability of existing pipelines to serve their customers. These OC pipelines could not be subsidized by rates and charges for other FERC jurisdictional services. An OC holder would be prohibited from participating in any proceedings under the NGA to consider competing applications to serve the same market. Further, OC holders would benefit from a presump-

73. 15 U.S.C. §§ 717c, 717d, 717f (1988).

74. 15 U.S.C. § 717f(c)(1) (1988).

tion of reasonableness for rates and charges contained in transportation and sales agreements filed with the FERC. State regulation of an OC pipeline would be preempted and the right of eminent domain would be available to the certificate holder under Section 7(h) of the NGA.⁷⁵

For OC pipelines the existing provisions of Sections 4 and 5 of the NGA regarding challenges to rates and charges would be superseded by a special complaint procedure. Under this procedure, the FERC would be required to consider the petition of any person who has made a bona fide offer to enter a service contract for service on an OC pipeline (or who has entered such an agreement) with respect to rates and charges for service through an OC pipeline. Also, to the extent that the rates and charges of a non-OC pipeline were affected by the rates and charges of an OC pipeline, parties could still mount challenges to the OC pipeline's rates and services under Sections 4 and 5 of the NGA.

b. LDC Bypass Protection

A new Section 7(k) of the NGA would give LDCs the right to protest the construction of an OC pipeline that would displace a LDC's existing sales or transportation service. The bill gives LDCs similar protection against bypass by projects constructed under Section 311 of the Natural Gas Policy Act of 1978 (NGPA).⁷⁶

The FERC is directed to deny the OC application if, in a hearing held within 90 days of a LDC's protest, it determines that the LDC's service would be displaced. The OC applicant would retain the right to pursue its application through traditional Section 7 certification procedures. The Energy Committee's report describes this bypass protection as "procedural" and "not a substantive prohibition on bypass."

c. Amendment of Section 311 of the NGPA

S. 2166 would amend Section 311 of the NGPA to remove the qualification that interstate pipelines providing service under Section 311 may only do so "on behalf of" an LDC or intrastate pipeline (or, in the case of an intrastate pipeline providing Section 311 service, "on behalf of" an interstate pipeline or an LDC served by an interstate pipeline). The amended Section 311 would provide that service thereunder could be provided to "any person."

The amendment to Section 311(a) of the NGPA is intended to overturn the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. FERC*⁷⁷ (the so-called *Hadson* decision). In *Hadson*, the court invalidated the FERC's liberal interpretation that the "on

75. 15 U.S.C. § 717(h) (1988).

76. Natural Gas Policy Act § 311, 15 U.S.C. § 3371 (1988).

77. 899 F.2d 1250 (D.C. Cir. 1990).

behalf of" standard was satisfied if the "on behalf of" entity received "some economic benefit" from the service.

Section 311 currently does not explicitly authorize the construction of facilities to provide Section 311 transportation. The FERC has interpreted Section 311 to allow construction of necessary facilities. S. 2166 would clarify that such construction is permitted. However, the amended Section 311 would provide LDCs with bypass protection similar to that outlined above in the case of OC applications.

d. Restrictions on Natural Gas Imports

As introduced, S. 2166 contained provisions sponsored by Senators Timothy Wirth (D-CO) and Pete Domenici (R-NM) that would impose additional regulatory requirements for natural gas imports. These provisions were adopted by the Committee on Energy and Natural Resources during its markup of the comprehensive energy legislation. As reported, Title XI would transfer jurisdiction over gas imports from the Department of Energy (DOE) to the FERC. In addition, the FERC would be required under Section 3 of the NGA to redress any anti-competitive impacts of imports of natural gas. Finally, Title XI would require a study of the DOE's and the FERC's authority to remedy regulatory advantages conferred on natural gas imports. Senators Wirth and Domenici joined in a floor amendment to strike these provisions. The amendment was adopted by a voice vote.

e. Environmental Compliance

S. 2166 would allow the use of independent contractors to complete environmental impact statements (EIS) and environmental assessments (EA) required under the National Environmental Policy Act of 1969 (NEPA)⁷⁸ for all major pipeline construction projects. The bill would direct the FERC to allow, at the election of an applicant, contractors selected by the FERC and funded by the applicant to prepare an EIS in connection with applications for new pipeline projects.

S. 2166 also directs the FERC to enter memoranda of understanding with other federal agencies to establish procedures for consolidated review to the fullest extent possible under NEPA. The FERC also would be directed at the beginning of the process to meet with the applicant, all other affected federal, state and local agencies, and affected Indian tribes to identify issues and, if the FERC is to be the lead agency, to allocate assignments and establish time frames for preparation of an EIS.

S. 2166 would forbid the FERC from including non-jurisdictional facilities within the scope of its environmental review obligations unless, based on four general criteria, it is demonstrated that the FERC has sufficient control

78. 42 U.S.C. §§ 4321-70a (1988).

and responsibility over such facilities. S. 2166 also directs the FERC to amend its *ex parte* rules to clarify that communications between the FERC's environmental advisory staff and other agencies regarding compliance are not prohibited, provided that there is maintained an accurate public record of the communications.

f. Vehicular Natural Gas

S. 2166 contains several provisions designed to promote the use of vehicular natural gas (VNG) as a fuel for motor vehicles by removing regulatory disincentives to the development of a retail distribution network for VNG. The bill would amend the NGA to ensure that persons who are not otherwise natural gas companies or who are primarily subject to regulation by a state commission will not be subject to NGA jurisdiction solely by reason of their sale or transportation of VNG. The VNG provisions also provide that persons who are not otherwise public utilities may sell or transport VNG without becoming subject to economic regulation pursuant to state laws in effect prior to January 1, 1989. Finally, the bill provides that VNG activities alone will not cause a company to become a gas utility under the Public Utility Holding Company Act or change the status of companies already registered as such.

g. Miscellaneous Provisions

The bill contains several measures designed to streamline the FERC's administrative procedures. S. 2166 would amend Section 4 of the NGA to allow natural gas companies to file rates jointly with the FERC for the sequential transportation of natural gas through their facilities. The FERC would be authorized to prescribe regulations precluding anticompetitive conduct in such circumstances.

S. 2166 would amend Section 7 of the NGA to provide for the automatic granting of unopposed certificate applications sixty days after publication in the Federal Register. Under the new Section 7(c)(1)(d), a certificate application would not be needed for the replacement of existing facilities, where the replacement facilities have substantially equivalent designed capacity and where the cost of the replacement does not exceed \$20 million.

S. 2166 would require the FERC to prepare a report for the Senate Energy and Natural Resources Committee and the House of Representatives on the status of the FERC's program for open-access transportation, the FERC's regulation of the pipeline merchant function, and the FERC's current ratemaking procedures.

Section 19 of the NGA⁷⁹ would be amended to provide that any application for rehearing of a Commission order that is not acted upon within sixty days shall be deemed to be denied. Section 19 would also be amended to

79. 15 U.S.C. § 717r (1988).

reduce the time periods within which parties may seek court review of the FERC's orders from sixty to thirty days. S. 2166 makes corresponding amendments to Section 506 of the NGPA⁸⁰ with respect to orders issued pursuant to the NGPA.

The bill provides limited antitrust relief to independent natural gas producer cooperatives. This measure is intended to benefit small independent gas producers whose volumes of natural gas production may not be readily marketable. These cooperatives (defined as producers whose natural gas production does not exceed 6 million cubic feet per day) shall not be deemed illegal *per se*, but shall be illegal only if the anticompetitive effects substantially outweigh the procompetitive benefits.

h. Floor Amendments

During floor consideration of S. 2166, there were two roll call votes on amendments offered to the natural gas regulatory provisions of the bill. Senator Craig (R-ID) offered an amendment which would amend the optional certificate procedure (Section 11101) to require, for purposes of granting the certificate holder federal eminent domain authority under Section 7(h) of the Natural Gas Act, a separate administrative proceeding for determining whether the particular proposed OC pipeline is in the public convenience and necessity. The Craig amendment was tabled on a vote of 60 to 35.

Senators Metzenbaum (D-OH) and Jeffords (R-VT) offered an amendment to amend Sections 4 and 5 of the NGA to remove the refund floor in Section 4 rate proceedings and to authorize the FERC to order refunds of amounts collected during the pendency of a Section 5 proceeding. The amendment was defeated on a vote of 41 to 57.

2. Natural Gas Provisions of H.R. 776

Many of the natural gas provisions in H.R. 776 parallel those in S. 2166, especially with respect to streamlining natural gas pipeline certification and amending Section 311 of the NGPA. Both bills also contemplate speedier compliance with environmental regulations in the pipeline certification process.

a. Optional Certification Procedures

Like the Senate bill, H.R. 776 would create optional certification procedures for project developers willing to assume the entire financial risk of their pipeline projects. The bill contains similar restrictions on the ability of OC applicants to participate in proceedings involving competing pipelines to prevent delay of those projects.

H.R. 776 would deem negotiated OC rates to be lawful within the meaning of Sections 4 and 5 of the NGA. As with the Senate bill, any party denied

80. 15 U.S.C. § 3416 (1988).

a rate filed with the FERC by an OC holder would be entitled to a hearing by the FERC.

H.R. 776 would, like S. 2166, provide for the automatic approval of uncontested certificate applications and would remove the requirement of a certificate application for the replacement of existing facilities, subject to the same qualifications as S. 2166. H.R. 776 would add a new Section 7(c)(1)(F) of the NGA to provide for the expedited certification of certain priority pipeline projects. The Chairman of the FERC would have discretion to designate certain projects or projects in certain areas as priority projects, which would be subject to expedited notice and comment procedures.

b. LDC Bypass Protection

H.R. 776 would not grant LDCs the procedural right to protest bypass facilities that would be constructed under authority of either the optional certification procedure or the amended Section 311 of the NGPA. However, in the case of a bypass under either the OC procedure or the amended Section 311 of the NGPA, no contract for bypass service would be binding on the buyer until 60 days after notice to the LDC whose service would be bypassed by the new service. Moreover, a company providing the bypass service under either the OC or Section 311 would be prohibited from recovering take-or-pay costs from either the bypassed LDC or any other existing customer, other than the recipient of the new service.

c. Natural Gas Imports

Section 201 of H.R. 776 would amend Section 3 of the NGA⁸¹ expressly to prohibit federal and state regulators from treating importers of Canadian gas differently than domestic producers and distributors. Section 201, added by Representatives Norman Lent (R-NY), Edward Markey (D-MA) and Carlos Moorhead (R-CA), also would prohibit the FERC from considering factors not related directly to a pipeline's transportation function in setting just and reasonable rates under Section 4 of the Natural Gas Act. These provisions were adopted by the Subcommittee on Energy and Power in response to the adoption of the Wirth-Domenici amendment by the Senate Committee on Energy and Natural Resources.

d. Environmental Compliance

H.R. 776 contains provisions to enable independent contractors to perform environmental studies that are similar to those contained in the Senate bill.

81. 15 U.S.C. § 717b (1988).

e. Prorationing

During floor consideration of H.R. 776, the House adopted an amendment sponsored by Representatives Markey and Scheuer (D-NY) that would amend Section 602 of the NGPA to make a distinction between authorized and prohibited types of state regulation of natural gas production. The amendment explicitly authorizes state regulation "which has the substantial purpose or effect of furthering legitimate State interests in resource conservation, the prevention of physical waste, and the protection of correlative rights of producers in a common reservoir," and recognizes that such authorized state regulation may have an "incidental effect" of "restricting production and increasing prices."

The amendment prohibits the states from regulating gas production when such regulation "has the substantial purpose or effect of generally restricting natural gas production and raising the general price level of natural gas." It expressly prohibits: (1) market demand prorationing; (2) statewide prorationing; (3) prorationing between unconnected reservoirs; and (4) prorationing which prevents the purchase of lower-priced natural gas in preference to higher-priced gas. The Senate bill is silent on prorationing. This Section was introduced in response to the recent adoption of prorationing measures in Oklahoma and Texas, and promises to be a controversial issue in the conference committee.

f. Miscellaneous Proposals

H.R. 776 contains measures designed to streamline the FERC's hearing procedures and reduce the time periods in which parties may seek review of the FERC's orders that are essentially similar to those in the Senate bill.

F. Crude Oil Pipeline Regulation

1. Background

Federal regulation of oil pipelines began in 1906 when the Interstate Commerce Act of 1887 (ICA) was amended to include companies engaged in the "transportation of oil. . . by means of pipe lines."⁸² Under the ICA, the Federal Energy Regulatory Commission regulates the interstate transportation of oil and petroleum products (excluding natural and artificial gas) by pipelines that are common carriers.⁸³ In particular, the ICA establishes the FERC's duty to ensure that common carriers provide transportation on reasonable request at just and reasonable rates without undue discrimination against shippers.⁸⁴

Under current FERC practice, proceedings in protested oil pipeline rate

82. Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584.

83. 49 U.S.C. App. § 1 (1988)(repealed). The FERC succeeded to the Interstate Commerce Commission's oil pipeline authority under the Department of Energy Organization Act. 42 U.S.C. §§ 7172-75 (1988).

84. See 49 U.S.C. App. §§ 1-19a (1988) (now repealed).

cases are bifurcated.⁸⁵ Phase I consists of a full evidentiary hearing to determine whether the pipeline has significant market power in any of its geographic markets. Phase II involves the determination of "just and reasonable" cost-based rates. If the pipeline does not possess significant market power as determined in Phase I,⁸⁶ rate making may be "light-handed." Under current law, the Commission still must regulate oil pipeline transportation rates even where the pipeline has little or no market power.

In the early 1980s, declining domestic oil production lowered demand for pipeline capacity and resulted in the retirement of older oil pipelines or the conversion of such pipelines to natural gas transmission.⁸⁷ The late 1980s saw increased utilization of Midwest refineries and an increasing reliance on imports to supply U.S. crude oil demand. These developments caused bottlenecks on existing pipelines, because crude oil pipelines with excess capacity are not situated to transport imports to the Midwest refining region.⁸⁸

Many believe that regulation under the ICA is a deterrent to pipeline construction and compounds the natural barriers to market entry. To remedy this, legislation was introduced in the 102nd Congress to reform oil pipeline regulation.

2. Legislation in the 102nd Congress

Two of the comprehensive energy bills introduced in the House, H.R. 776 and H.R. 1301, included provisions to streamline FERC procedures for regulating oil pipeline rates.⁸⁹ H.R. 776 was passed by the House of Representatives on May 27, 1992.

a. Procedural Reforms

Within one year of enactment of H.R. 776, the FERC would be required to amend its rules of practice and procedure to "minimize the costs and burdens of regulation, promote certainty respecting oil pipeline rates, and expedite resolution of disputes respecting oil pipeline rates by encouraging alternative dispute resolution or other appropriate voluntary means of settle-

85. *Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 F.E.R.C. ¶ 61,473, 62,658-61 (1990). Oil pipeline tariffs are filed with FERC's Oil Pipeline Board. Any protest by a shipper or a competitor can delay the date the tariff rates take effect by as much as seven months, and set any issues raised by the tariff filing for hearing. 49 U.S.C. App. § 15(7) (1988) (repealed). *Cf.* *Buckeye Pipe Line Co., L.P.*, 13 F.E.R.C. ¶ 61,267 (1980) (establishing policy for single day suspension).

86. *Buckeye Pipe Line Co., L.P.*, 44 F.E.R.C. ¶ 61,066, 61,186 (1988).

87. William Quarles and Kris Thiede, "The Coming Crude Pipe Line Crunch; Caused by Locations of Pipeline Away From Refineries," *PIPE LINE INDUSTRY*, Feb. 1991, at 19.

88. *Id.*

89. H.R. 776 was introduced in its original form, without the oil pipeline provisions, on February 4, 1991. On October 31, 1991, Representative Mike Synar offered oil pipeline regulatory reform as an amendment during the subcommittee markup of H.R. 776. This amendment is incorporated in H.R. 776 as "Title XVIII — Oil Pipeline Regulatory Reform."

H.R. 1543, a House Republican energy bill closely patterned on H.R. 1301, contains the identical "Subtitle C — Oil Pipeline Deregulation" found in H.R. 1301. S. 570, the Senate version of the Administration's NES legislation, also contains the same oil pipeline provisions.

ment.”⁹⁰ Specifically, the FERC would be required to: (1) limit standing for protests to “persons who have an identifiable economic interest in the portion of the tariff or filing which is the subject of protest or complaint;” (2) require specificity in and permit responses to protests; and (3) forbid FERC staff from making its own investigations concerning tariff provisions not formally protested, or for 60 days after the participants have indicated they are attempting to settle the controversy.⁹¹

Under H.R. 776, the base rate would be the rate in a filed tariff in effect for 365 consecutive days “prior to, on, or after the date of the enactment of this Act” or a rate approved by the FERC during the same period.⁹² Each base rate would be deemed to be “just and reasonable” within the meaning of the ICA and “shall not be subject to protest, suspension, complaint or investigation” except on the basis of undue discrimination.⁹³ As with procedural reforms, H.R. 776 would leave it to the FERC to simplify its oil pipeline ratemaking methodology within one year of enactment. The statutory standard for such ratemaking reform would be that it must “ensure reasonable pricing flexibility and sufficient revenues for oil pipelines to promote investment and maintain and improve oil pipeline service, and . . . ensure adequate protection for captive shippers.”⁹⁴

b. Administration and Judicial Review

H.R. 776 would specifically authorize the FERC to define terms used in the new law and prescribe any rules it deemed necessary or appropriate. However, the FERC would not have the authority to require the filing of a request for rehearing as a precondition to judicial review. The new law would provide that judicial review may be obtained in the U.S. Court of Appeals for the D.C. Circuit or the U.S. Court of Appeals Circuit in which the principal place of business of the oil pipeline is located.⁹⁵

c. Retention of Common Carrier Obligations and Antitrust Laws

Oil pipelines’ general common carrier obligations would remain in effect under H.R. 776 and the antitrust laws would continue to apply. H.R. 776 would not affect any common carrier obligations under the ICA, except with respect to the establishment of rates under Section 1804.⁹⁶

90. H.R. REP. NO. 102-474, 102d Cong., 2d Sess. 127 (1992). The House Report states that the Trans-Alaska Pipeline (TAPS) would be excluded from the definition of “oil pipeline.” Consequently, H.R. 776 would not apply to TAPS.

91. *Id.* at § 1223(b).

92. H.R. REP. NO. 474, 102d Cong., 2d Sess., 128 (1992).

93. *Id.*

94. *Id.*

95. H.R. REP. NO. 474, 102d Cong., 2d Sess., 128 (1992).

96. *Id.*

G. *Energy Efficiency*

1. Title I of H.R. 776 as Reported by the Committee on Energy and Commerce

H.R. 776 would require states to update their codes to reflect advances in energy efficient construction and modification to existing structures. The DOE would be required to make information available to prospective home buyers regarding energy efficiency.

By the year 2000, federal agencies would be required to incorporate improvements into federal facilities. The DOE would be required to establish a fund to finance these improvements; however, the improvements must pay for themselves in energy savings within ten years.

Like S. 2166, H.R. 776 would establish new standards for incandescent and fluorescent lights, electric motors, utility transformers, shower heads, and heating and cooling systems in commercial buildings. The DOE would be required to develop regulations concerning energy efficiency information on labels for office equipment and lamps.

H.R. 776 would also require state regulators to consider utilities' investments in efficiency as profitable to the same extent as investments in new generating facilities. Factors to be considered in least-cost planning include environmental protection measures and the cost of foreign oil.

2. Amendments Recommended by the House Committee on Public Works

This Committee's interests in the energy legislation were in the area of the management and operation of federal office space. Under their amendment, by 1995, such buildings would be required to reduce energy consumption by 10 percent of 1985 levels. By 2000, consumption must be reduced an additional 10 percent. The deadline for installing efficiency programs that pay for themselves in ten years would be moved from 2000 to 2005.

3. Amendments Recommended by the House Committee on Government Operations

First, federal agencies would be required to hire private contractors to manage energy use in federal facilities. Second, some federal agencies would be required to donate 10 percent of their budgets to a fund to finance efficiency measures in federal facilities and would then be allowed to borrow from the fund.

4. Title VII of S. 2166

S. 2166 would also require federal agencies to install efficiency measures that pay for themselves within ten years. In addition, this bill proposes identical standards for lamps, motors, transformers, plumbing, and air conditioning equipment for commercial buildings. In contrast to H.R. 776, this bill would require the development of a federal building code with national efficiency standards.

H. Alternative Fuel Vehicles

1. S. 2166

S. 2166 contains provisions to spur the development of alternatively fueled vehicles (AFVs). When purchasing new vehicles, private and local government owners of centrally refueled fleets or fleets capable of being centrally refueled, who own at least 50 vehicles in any location nationwide and at least one fleet of twenty or more vehicles in a metropolitan area with a population of 250,000 or more would be required to purchase alternative fuels vehicles on the following schedule: 30 percent in 1998; 50 percent in 1999; and 70 percent in 2000 and thereafter. The Secretary of Energy would be authorized to exempt private fleets from the requirements of the program if the alternative fuels or vehicles were unavailable, or if it was determined that it was economically infeasible to refuel a fleet at a central location. (Private fleet owners would not be required to convert traditional gasoline vehicles to alternative fuels; however, the owners would receive a credit for doing so.) Federal agencies, regardless of the number of vehicles in their fleets or the location of the fleets, would be required, when acquiring fleet vehicles in the years specified, to acquire the following minimum percentages of alternative fuel vehicles: 10 percent in 1995; 15 percent in 1996; 25 percent in 1997; 50 percent in 1998; 75 percent in 1999; and 90 percent in 2000 and thereafter.

S. 2166 includes provisions which would require the Secretary of Energy to report to Congress if the demand for alternative fuels exceeds supply. In such an event, the Secretary would be authorized to mandate fuel providers, which may include LDCs or pipelines, to meet the shortfall. The mandate would become effective if Congress agreed within 60 days.

As detailed in the discussion of the natural gas regulatory provisions, S. 2166 includes provisions intended to resolve ambiguities concerning jurisdiction over vehicular natural gas.

2. H.R. 776

The two cornerstones of H.R. 776's alternative fuel vehicle provisions are: first, a provision that requires specific federal acquisitions of AFVs and, second, a provision that seeks to encourage private use of such vehicles. This second provision would require alternative fuel providers to purchase alternative fuel vehicles.

a. Federal AFV Acquisition

The federal acquisition provision would require the federal government to acquire specific numbers of AFVs. In fiscal years 1993, 1994, and 1995, the government would be required to purchase 5,000, 7,500, and 10,000 light-duty AFVs, respectively. Starting in FY 1996, large federal fleets (those having at least 50 vehicles in cities with populations of at least 250,000) would be required to purchase AFVs representing 25 percent of their new vehicles. In FYs 1997 and 1998, the percentages would increase to 33 percent and 50 percent, respectively. Vehicles to be purchased would include LPG, hydrogen,

and electric vehicles, to the maximum extent practicable, in addition to natural gas vehicles and alcohol vehicles.

b. Private Fleet Provisions

The private fleet provisions would impose particular purchase requirements on "alternative fuel providers," including natural gas distribution and pipeline companies. Starting January 1, 1994, all light-duty vehicles and heavy-duty trucks up to 26,000 pounds, acquired by fuel providers and that are centrally fueled, or capable thereof, would have to be dedicated AFVs. If the alternative fuel provider does not have central refueling, or the capability for it, the vehicles purchased need not be dedicated AFVs, but, nonetheless, would have to run on an alternative fuel at least 50 percent of the time.

A second portion of the private fleet provision would require the DOE to set goals of replacing ten percent of motor fuels used in the United States with "replacement" fuels by the year 2000, increased to thirty percent by 2010. By January 1, 2000, the DOE would have to determine whether the thirty percent goal for 2010 would likely be met. If achievement of such goal was determined to be unlikely, the DOE would be required to implement a fleet program that would require AFVs to represent the following percentages of new light-duty vehicles acquired by fleets: twenty percent in model year 2002; forty percent in 2003; 60 percent in 2004; and 70 percent in 2005 and thereafter. Fleets affected by this provision would be fleets of at least 10 vehicles that are either centrally fueled or capable thereof and that are located in an urban area with a 1990 population of at least 250,000.

c. Other provisions

H.R. 776 also contains a number of other provisions that would encourage the use of AFVs. For instance, H.R. 776 would require the DOE to establish guidelines for states to develop AFV incentive programs. The programs could include incentives for AFVs such as exemptions from high occupancy vehicle traffic restrictions, exemptions from state sales or other taxes, exemption from highway tolls, special parking privileges, and introduction of AFVs in state-owned fleets.

For incentive programs approved by the DOE, federal financial assistance would be available for states to implement the programs. The DOE would also be required to establish a program to provide low-interest loans for fleet operators of AFVs. The loans would be available for the cost of converting vehicles to AFVs or for the incremental cost of factory-built AFVs.

I. Energy Taxes

1. H.R. 776

As passed by the House of Representatives, H.R. 776 contained a number

of tax provisions.⁹⁷ The bill provides independent oil and gas producers and royalty owners with five years of relief from the alternative minimum tax (AMT) provisions enacted as part of the 1986 Tax Reform Act.⁹⁸ Under the 1986 Act, corporations and individuals are required to pay an alternative minimum tax, calculated on a broader income base, but at a lower rate than the regular income tax, when the alternative minimum tax exceeds the amount of tax corporations and individuals would pay after taking exemptions and deductions under the regular income tax.

H.R. 776 would also increase employer-provided, tax exempt, mass-transit assistance from \$21 to \$60 per month. The bill would cap monthly tax-free, employer-provided, parking benefits at \$160. These caps would be adjusted for inflation.

H.R. 776 would exclude 100 percent of the value of utility-provided subsidies for energy conservation measures from residential customers' taxable income, and 65 percent of the value of similar subsidies from commercial or industrial customers' taxable income. The exemption does not apply to payments to or from qualified co-generation facilities or qualifying small power production facilities.

H.R. 776 would allow taxpayers a limited tax deduction for purchasing cars and trucks using alternative fuels or for retrofitting cars and trucks to use alternative fuels. The tax deduction would phase-out by the end of calendar year 2004. The bill also provides a tax deduction for gas station owners installing pumps to service alternatively-fueled vehicles.

The bill would permanently extend, for businesses, the 10 percent energy tax credit for investments in qualified solar and geothermal energy projects. The energy tax credit was scheduled to expire on June 30, 1992.

H.R. 776 would provide 1.5 cents per kilowatt-hour tax credit for utility-scale production of electricity from wind and biomass sources through June 30, 1999. Finally, the bill would increase and standardize existing excise taxes on certain ozone-depleting chemicals, such as chlorofluorocarbons (CFCs), methyl chloroform and carbon tetrachloride.

J. Offshore Oil and Gas Production

Both S. 2166 and H.R. 776 provide for a moratoria on preleasing and leasing activities on portions of the Outer Continental Shelf (OCS), with the Senate bill generally being more selective in its exclusions from leasing. Neither bill, however, would affect present and future leasing off the Texas, Louisiana, Mississippi and Alabama coasts. The House version would not allow preleasing and leasing activities until after January 1, 2002, while the Senate version would prohibit such actions until January 1, 2000.

97. H.R. REP. NO. 474, 102d Cong., 2d Sess., pt. 6 (1992).

98. Pub. L. No. 99-514.

III. ENVIRONMENTAL ISSUES

A. *Air Quality*

The 102nd Congress did not consider legislation proposing immediate modifications to the federal air quality program. The pending comprehensive energy legislation, however, did include requirements for studies, data collection and acceleration of existing programs which may lead to such modifications in the future. The Clean Air Act (CAA) Amendments of 1990 (1990 Amendments)⁹⁹ remained very much a central focus of Congressional air quality attention. That attention, as reflected in several oversight hearings, had two purposes: (1) to evaluate the timeliness and manner of the Amendments implementation; and (2) to evaluate the need for additional legislation.

The 1990 Amendments require the Environmental Protection Agency (EPA) to complete 55 major rulemakings and 30 other guidance actions within the first two years of the Amendments' November, 1990 passage.

EPA's Acid Rain program will implement the 1990 Amendments' national sulfur dioxide (SO₂) emissions cap of 8.95 million tons per year.¹⁰⁰ The centerpiece of this program is the allowance trading system (extensively described in prior FEBA Committee Reports).¹⁰¹ Regulations already issued describe: the system's operation; how auctions and sales of reserved allowances will be conducted; how energy savings from conservation and renewable technologies qualify for additional allowances and implement the independent power producers' written guarantee. EPA's target date for adoption of final rules addressing these subjects was May, 1992. A proposed rule establishing methods for the allocation of allowances to affected sources will not be issued until late Spring, 1992, with final rule adoption targeted for December, 1992.

Additional regulations under preparation to complete the Acid Rain Program will define permitting requirements pursuant to which a source must define its compliance strategy, establish a continuous source monitoring system to enable measurements of compliance with emissions limitations and define penalties for non-compliance. The "opt-in" program for industrial sources and nitrogen oxide (NO_x) limitations will also be the subject of future rulemaking. Various aspects of EPA's implementation of the 1990 Amendments, including its adoption of a presumption favoring low NO_x burners as best available control technology and its ability to adopt regulations controlling hazardous air pollutants on a timely basis, has been the subject of criticism at Congressional oversight hearings.¹⁰²

99. Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990). This legislation was extensively reviewed in two prior FEBA Committee Reports: *Report of the Committee on Legislation and Regulatory Reform*, 12 ENERGY L.J. 153 (1991) and *Report of the Committee on the Environment*, 12 ENERGY L.J. 399 (1991).

100. *Acid Rain Program: Permits, Allowance System, Continuous Emissions Monitoring, and Excess Emissions*, 56 Fed. Reg. 63,002-63,395 (1991) (to be codified at 40 C.F.R. pts. 72, 73, 75 and 77) (proposed Dec. 3, 1991); *Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations*, 56 Fed. Reg. 65,592-65,601 (1991) (to be codified at 40 C.F.R. pt. 73) (proposed Dec. 17, 1991).

101. *Supra* note 144.

102. *Clean Air Act Implementation: Special Rules for Utilities*, Hearings before the Subcommittee on

The FERC has issued a Notice of Proposed Rulemaking (NOPR) to add new balance sheet and income statement accounts to record the acquisition, holding and disposition of the tradeable emission allowances. The NOPR also proposes to adopt a method to value such allowances.¹⁰³ The FERC proposes that utilities use "historical cost" on the basis this is the generally accepted regulatory valuation measure of an intangible asset. The net effect of this may be that many allowances, obtained directly from EPA at no out-of-pocket cost, will be assigned a zero book value. Allowances purchased on the open market will be recorded at their acquisition cost.

Concern was expressed in both the House and Senate during the 102nd Congress over recently announced evidence of more rapid than anticipated ozone depletion and global warming. The Senate adopted an amendment to S. 2166, the National Energy Security Act of 1992, calling upon the EPA to accelerate interim and final phaseout schedules for CFCs and related chemicals damaging to the ozone layer.¹⁰⁴ Complete phaseout is called for "as early as possible," and the EPA is urged to issue regulations expeditiously as required by the 1990 Amendments to eliminate, recapture and recycle ozone destroying substances. Also, the President is urged to seek worldwide phaseout acceleration by international agreement.

Resolutions were introduced in both houses calling upon the President to attend the United Nations Conference on Environment and Development (the Earth Conference) held in Rio de Janeiro in June, 1992.¹⁰⁵ The Conference considered proposed treaties on climate change and protection of biological diversity and was attended by a number of world leaders. Several bills and resolutions were introduced separate from the comprehensive energy legislation, calling for reductions in carbon dioxide (CO₂) emissions beyond those provided by the 1990 Amendments in order to advance global climate control.¹⁰⁶

Concerns over global climate change provided the impetus for several proposals advanced as part of the comprehensive energy legislation. S. 2166 would create the position of Director of Climate Protection within the Department of Energy and would call for further development of a least-cost energy strategy which also limits, to the maximum extent, CO₂ and other greenhouse

Health and the Environment of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. (July 22, 1991); STAFF OF SUBCOMMITTEE ON HEALTH AND ENVIRONMENT OF HOUSE COMMITTEE ON ENERGY AND COMMERCE, 102d Cong., 1st Sess., AN INVESTIGATION OF EPA'S CLEAN AIR "WEPCO" RULE (Comm. Print July 22, 1991); *Implementation of the Clean Air Act Amendments of 1990, Hearings before the Subcomm. on Oversight and Investigations of the House Committee on Energy and Commerce*, 102d Cong., 1st Sess. (November 12, 1991) (statement of the Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations).

103. *Revisions to Uniform Systems of Accounts to Account for Allowances Under the Clean Air Act Amendments*, 56 Fed. Reg. 64,567-64677 (1990) (Notice of Proposed Rulemaking 1991).

104. 138 CONG. REC. S. 1032-34 and S. 1128-38 (daily ed. Feb. 5-6, 1992); S. 2166 (Title XVII), 138 CONG. REC. S. 2041 (daily ed. Feb. 21, 1992). A similar resolution has been introduced in the House. See H. Res. 350, 138 CONG. REC. H219 (daily ed. Feb. 6, 1992).

105. H. Con. Res. 266, S. Con. Res. 87 & 89, 102d Cong., 2d Sess., 138 CONG. REC. H119, S. 535-36 and S. 806-09 (daily ed. Jan. 28 and 31, 1992).

106. H.R. Res. 130, 137 CONG. REC. H2469, 2537 and D1455 (daily ed. April 2, 1991); H.R. 4154 and H.R. 4750, 138 CONG. REC. H287 (daily ed. Feb. 4 and April 2, 1992).

gas emissions. S. 2166 would establish as an explicit goal the stabilization and reduction of CO₂ and other greenhouse emissions, including evaluation of the feasibility of a twenty percent reduction over current levels by 2005 and the establishment of a framework for negotiating global climate stabilization by 1992.¹⁰⁷

The House energy bill, H.R. 776, would direct the DOE to prepare an energy inventory and forecast employing cost and greenhouse gas emission minimizing strategies, several reports evaluating the effectiveness of various policy mechanisms for reducing greenhouse gases, and the establishment of a national accounting system for recording voluntary reductions in such emissions. Eleven methods for voluntary emission reduction are defined in the legislation.¹⁰⁸

B. RCRA Waste Management and Superfund

The Resource Conservation and Recovery Act (RCRA)¹⁰⁹ was first enacted in 1976 and last amended and reauthorized in 1984. The 1984 amendments created a cradle-to-grave management system for hazardous waste and prohibited the improper dumping of such wastes to avoid the creation of more Superfund sites. The 1984 reauthorization expired on September 30, 1988. Since then, authority for the RCRA program has been extended annually in appropriations legislation.

The primary focus of current legislative proposals is solid waste disposal and treatment such as: municipal garbage, landfills, and incinerator ash. EPA statistics show that operating landfills have declined from 20,000 in 1979 to 6,000 today, and that one half of remaining landfills are expected to close by the end of 1991. Due to the reduction in landfill capacity, the costs of both waste disposal and incineration have increased substantially. This has caused a contentious dispute over interstate transport of municipal solid waste (MSW), with importing states seeking, unsuccessfully to date, to ban or to restrict by higher fees this waste importation. The legislative solution being considered is to mandate the adoption of programs designed to reduce the magnitude of the solid waste stream, to recycle as much of that waste as is technologically and economically feasible, and to treat and dispose of that which remains in an ecologically acceptable manner.

RCRA reauthorization legislation has been drafted by the Senate Subcommittee on Environmental Protection of the Committee on Environment and Public Works and by the House Transportation and Hazardous Materials Subcommittee of the Committee on Energy and Commerce. On April 25, 1991, Senator Max Baucus, Subcommittee Chairman, introduced S. 976, the "Resource Conservation and Recovery Act Amendments of 1991."¹¹⁰ On November 22, 1991, Representative Al Swift introduced H.R. 3865, the

107. S. 2166 (tit. I, §§ 1201 to 1203) 102d Cong., 2d Sess., 138 CONG. REC. S1980-81 (daily ed. Feb. 21, 1992).

108. H.R. 776, 102d Cong., 2d Sess. (tit. XVI, §§ 1601 to 1605) (as reported March 30, 1992).

109. 42 U.S.C. § 6901-6992k (1988).

110. S. 976, 102d Cong., 1st Sess., 137 CONG. REC. S5137, 5262-80 (daily ed. April 25, 1991).

"National Waste Reduction, Recycling and Management Act."¹¹¹ The Senate Committee on Environment and Public Works reported S. 976 on June 19, 1992.¹¹² The House Committee on Energy and Commerce reported H.R. 3865 on July 2, 1992. As reported by the committee, H.R. 3865 is a narrowly drawn solid waste bill that was substituted for the text of H.R. 3865 as introduced.

As introduced, S. 976 directs the EPA to expand the public reporting requirements under Section 313 of the Emergency Planning and Community Right-to-Know Act effective for reports submitted beginning in 1996. In simplified terms, present reporting requirements are applicable to facilities using 10,000 pounds or producing 25,000 pounds of specified toxic chemicals in industries within SIC Codes 20 through 39.¹¹³

S. 976 directs the EPA to expand the reporting requirements to not less than seventeen major new industries that employ toxics in amounts comparable to currently reporting industries and to add 250 new chemicals to those reported upon.¹¹⁴ Data reported must include the quantity of toxic chemicals produced, used or discarded in the waste stream, the amount recycled, and source reduction practices used. Reporting companies are further required to develop pollution prevention plans and goals for reducing use of toxic chemicals and total waste generated, and to increase recycling. Under S. 976, companies must publish a plan summary and report their progress to the EPA.

The EPA must then prepare Pollution Prevention Reports and identify industrial categories needing improvement. The EPA is permitted to show that expanded reporting is not appropriate because no industries present the toxics pollution risk of presently covered industries. If the EPA fails to make this showing or to designate additional industries within 48 months after the date of enactment, then the additional reporting requirements are imposed "by operation of law" upon all facilities meeting the statute's standards. Also, if the EPA fails to designate additional chemicals, then, by operation of law, specified additional substances are subjected to the reporting requirements, including "priority pollutants listed under regulations relating to steam electric power point source pollutants under the Federal Water Pollution Control Act," certain hazardous wastes listed under the Solid Waste Disposal Act,¹¹⁵ and chemicals listed under Sections 112 and 602 of the Clean Air Act.¹¹⁶

Both the House and Senate bills establish a "national goal" for MSW recycling. S. 976 establishes a goal of 50 percent (after excluding certain classes of waste) and further establishes specific recovery and utilization percentages for newsprint and packaging material. These latter percentage requirements may be satisfied by recycling, the reuse of packaging, or by reducing the latter's weight. H.R. 3865 contains similar provisions and requires study of the recycling of large household appliances and prohibits the

111. H.R. 3865, 102d Cong., 1st Sess., 137 CONG. REC. H10930 (daily ed. Nov. 22, 1991).

112. S. REP. NO. 301, 102d Cong., 2d Sess. (1992).

113. 42 U.S.C. § 11023 (1991).

114. S. 976, Title II (EPW Staff Draft 3/27/92).

115. 42 U.S.C. § 6901 (1988).

116. 42 U.S.C. §§ 7412, 7671.

use of toxic metals (with certain exceptions) in packaging. Standards for federal procurement of recycled products and for environmental marketing claims are specified.¹¹⁷

To address anticipated landfill capacity shortages, states are directed to identify and project the magnitude and contents of their waste stream, to identify the capacity of existing and planned incineration and landfill facilities, and to establish siting rules for new facilities. New state plans containing the above data must be prepared and filed with the EPA for approval.¹¹⁸ The EPA must publish municipal incinerator ash regulations and may publish similar regulations for other solid wastes requiring special treatment. A permitting system for MSW disposal and recycling facilities is established.¹¹⁹ Subject to grandfathering provisions and maintenance of an approved solid waste plan, MSW disposal facilities must obtain local government approval to accept out of state wastes and may not accept wastes from states without approved plans.

The EPA has opposed adoption of most of the provisions of each bill for being too prescriptive and, not cost effective, and, in some instances, as proposing technically infeasible programs.¹²⁰

Additional RCRA-related legislation, the Federal Facilities Compliance Act of 1991, passed the House of Representatives on June 24, 1991, and the Senate on October 24, 1991.¹²¹ This legislation expressly subjects federal facilities in violation of RCRA to enforcement actions and civil penalties by the EPA and state agencies. Proposals for funding cleanup activities at Department of Energy facilities employed in uranium enrichment and related activities are contained in the pending comprehensive energy legislation.¹²²

C. Clean Water Reauthorization

The Clean Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act (CWA),¹²³ was originally enacted to eliminate the discharge of pollutants by 1985. Under the CWA, the EPA is required to set "effluent limitations" that establish the amount of specific pollutants that may be discharged into waterways by municipal sewage treatment plants and

117. H.R. 3865, 102d Cong., 2d Sess., Title III (Committee Print April 2, 1992); S. 976, Title III (EPW Staff Draft 3/27/92).

118. H.R. 3865, Title I & V (Committee Print April 2, 1992); S. 976, Title IV (EPW Staff Draft 3/27/92).

119. H.R. 3865, Titles I, II, IV, VI & VIII (Comm. Print 1992); S. 976, Title IV (EPW Staff Draft 1992).

120. *Hearings before the Subcomm. on Environmental Protection of the Committee on Environment and Public Works*, 102d Cong., 1st Sess. (Sept. 17, 1991) (Statement of the Hon. William K. Reilly, Administrator, EPA); *Hearings before the Subcomm. on Transportation and Hazardous Materials of the Committee on Energy and Commerce*, 102d Cong., 2d Sess. (March 10, 1992) (Statement of the Hon. Don R. Clay, Asst. Admin., Office of Solid Waste and Emerg. Resp., EPA).

121. H.R. 2194 & S. 596, 137 CONG. REC. H4878-87, S2947-48, S14883-886 and 15138 (daily ed. June 24, Oct. 17 and Oct. 24, 1991).

122. S. 2166 (Title X, Sections 10231 to 10233), 138 CONG. REC. S1978 (daily ed. Feb. 21, 1992); H.R. 776 (Title X, §§ 1001-05) (as reported March 30, 1992).

123. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

industrial operations. Those limits are written into permits which are issued for all municipal and industrial discharges.

The CWA has been amended several times, including significant changes in 1977, 1981, and 1987.¹²⁴ The 1986 bill to reauthorize and amend the CWA became The Water Quality Act of 1987.¹²⁵ The Subcommittee on Water Resources of the House Committee on Public Works and the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works have primary jurisdiction over the Clean Water Act.

1. Wetlands

Section 404 of the CWA regulates the discharge of dredged or fill material in navigable waters, which has been construed as including adjacent wetlands.¹²⁶ Section 404 authorizes the U.S. Army Corps of Engineers or the Environmental Protection Agency to halt construction of projects that threaten wetlands. The regulations issued under Section 404 in 1989 define wetlands.¹²⁷

The Bush Administration has proposed a new wetlands definition which is narrower than the definition in the current regulations.¹²⁸ Among other proposals, the definition of wetlands would be changed. In order to qualify as a wetland, an area would have to remain wet longer and grow a greater number of plants that require saturated soil. Government testing has subsequently shown that, under the newly proposed definition, at least half of the wetlands now covered under the 1989 manual would lose their protection.

On April 20, 1992, the EPA suffered a blow to its authority to regulate wetlands with the decision of *Hoffman Homes, Inc. v. EPA*.¹²⁹ The U.S. Court of Appeals for the Seventh Circuit reversed a decision on an EPA order to fine a developer \$50,000 for filling a small 0.8-acre area determined by the EPA to be an intrastate wetland. The court held that neither the Clean Water Act, nor the Commerce Clause confer jurisdiction on the EPA to regulate isolated, intrastate wetlands.

On April 9, 1992, Representative Larry Combest (R-TX) introduced the Wetlands Delineation Fairness Act.¹³⁰ The Act mandates that any hydrology criteria (the number of days an area must be inundated with water) delineating

124. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Municipal Wastewater Treatment Construction Grants of 1981, Pub. L. No. 97-117, 95 Stat. 1623 (1981); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

125. Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

126. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (affirming the EPA's regulations defining "waters of the United States" as encompassing wetlands adjacent to such waters).

127. 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" (1989) (available from the Superintendent of Documents, Government Printing Office).

128. See 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,446 (1991) (proposed Aug. 14, 1991). In December, 1991, the EPA, Army Corps and Soil Conservation Service proposed to incorporate these changes into the Federal Manual. 56 Fed. Reg. 65,964 (1991).

129. No. 90-3810, 1992 U.S. App. LEXIS 7329 (7th Cir. Apr. 20, 1992).

130. H.R. 4840, 102d Cong., 2d Sess. (1992).

wetlands apply uniformly to all areas, including those exempted under the proposed revisions to the Federal Manual.

2. Non-Point Source Pollution

According to the EPA, one half of the remaining water quality problems in the country are due to non-point source pollution (water run-off from farms, construction sites and urban areas, which is contaminated with fertilizers, pesticides, animal waste and other pollutants). On April 2, 1992, in response to President Bush's January, 1992 directive to federal agencies to review and evaluate their existing regulations,¹³¹ the EPA proposed to consider whether a point/non-point source pollutant trading program would be feasible as a market-based approach to the improvement of water quality across the United States. The program would allow regulated point sources to avoid costly treatment upgrades by paying for reductions in non-point source discharges into the same watershed or waterbody.¹³² The EPA scheduled a two-day open meeting at the end of April to establish trading as a national agenda for federal, state and local water quality control programs.

D. Additional Congressional Actions Affecting the Environment

On March 26, 1992, the House Committee on Science, Space and Technology reported H.R. 3953, the National Electric and Magnetic Fields Research and Public Information Dissemination Act.¹³³ Based on a finding of public concern and the need for scientific research on possible health effects from exposure to power-frequency electric and magnetic fields, H.R. 3953 authorizes the appropriation of \$60 million in fiscal years 1993 to 1997 to fund a research program to be developed by two committees.

The first committee, the National Electric and Magnetic Fields Advisory Committee, composed of eleven persons selected from state regulatory and health agencies, electric utilities, equipment manufacturers and public interest groups. Its purpose would be to define "research priorities." The Electric and Magnetic Fields Interagency Committee, composed of two representatives from each of eight federal agencies, would establish a research agenda from which the advisory committee develops its priorities. On October 1, 1991, the Senate passed S. 533, legislation to create the Department of the Environment. The purpose of elevating the EPA to be the 15th cabinet agency is to increase its visibility and stature vis-a-vis other federal agencies and foreign governments with whom it must negotiate international agreements.¹³⁴

On November 6, 1991, the Senate passed the Indoor Air Quality Act of

131. On Jan. 28, 1992, President Bush directed federal agencies to "set aside a 90-day period to evaluate existing regulations and programs and to identify and accelerate action on initiatives which will eliminate any unnecessary regulatory burden or otherwise promote economic growth." State of the Union Address, Weekly Comp. Pres. Doc. 170, 172 (Feb. 3, 1992).

132. For a discussion of the principles of pollutant trading, See EPA, Office of Water, Incentive Analysis for Clean Water Act Reauthorization: Point Source/Non-point Source Trading for Nutrient Discharge Reductions (1992).

133. H.R. 3953 (Comm. Print March 26, 1992), 138 CONG. REC. D304 (daily ed. March 19, 1992).

134. S. 533, 137 CONG. REC. S13954-13958, 14028-14032 (daily ed. Sept. 30 and Oct. 1, 1991).

1991. This legislation directs that research be undertaken into indoor air quality, that demonstration projects of methods to improve indoor air quality be undertaken and that the EPA prepare a National Indoor Air Quality Response Plan.¹³⁵ On March 10, 1992, the Senate passed the Indoor Radon Abatement Reauthorization Act, authorizing \$19.5 million for a national program of study, public education and testing to determine the public health risk associated with radon gas.¹³⁶

IV. MISCELLANEOUS ENERGY MATTERS

A. Pipeline Safety Legislation

The need to reauthorize the Natural Gas Pipeline Safety Act of 1968 (NGPSA)¹³⁷ prompted the 102nd Congress to address the issue of pipeline safety. On March 19, 1991, Representative Philip Sharp (D-IN), introduced H.R. 1489, the "Pipeline Safety Act of 1991."¹³⁸ This legislation would reauthorize and expand both existing pipeline safety acts, the NGPSA and the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA).¹³⁹

H.R. 1489 would expand the authority of the DOT to include protection of the environment.¹⁴⁰ The DOT's environmental protection responsibility would not intrude upon the environmental responsibilities entrusted to the FERC, the Corps of Engineers or the individual states.¹⁴¹

H.R. 1489 would require the identification of all natural gas pipelines subject to the NGPSA which pass through areas with a high population density.¹⁴² Gas gathering lines and utility distribution systems would be exempt.¹⁴³ Hazardous liquid pipelines would be included in the identification requirement and the DOT would define "high population density" as it is used in current regulations. The bill would also require identification of all hazardous liquid lines, including gas gathering lines, which are located in "environmentally sensitive areas."¹⁴⁴

H.R. 1489 would increase inspection requirements by requiring that all gas and liquid pipelines, located in non-environmentally sensitive and high-density population areas be inspected using "instrumented internal inspection devices" (smart pigs), unless such devices cannot physically operate in such lines or if other methods of inspection can provide an equivalent level of safety.¹⁴⁵ This would be considered the minimum level of inspection required for such pipelines and the DOT would be directed to undertake to develop a smart pig capable of detecting potential seam failures. Pipelines incapable of

135. S. 455, 137 CONG. REC. S16022-16049 (daily ed. Nov. 6, 1991).

136. S. 792, 138 CONG. REC. S2956-2966 (daily ed. March 10, 1992).

137. Natural Gas Pipeline Safety Act, Pub. L. No. 90-481, § 2, 82 Stat. 720 (1968).

138. H.R. 1489, 102d Cong., 1st Sess. (1991).

139. Hazardous Liquid Pipeline Safety Act, Pub. L. No. 96-129, Title II, § 202, 93 Stat. 1003 (1979).

140. H.R. 1489, 102d Cong., 1st Sess., § 2(a)(1) and (2), § 2(b)(1), and § 2(b)(3) (1991).

141. *Id.* at § 15 (1991).

142. *Id.* at § 3(a)(1) and § 3(b)(1) (1991).

143. *Id.* at § 3(a)(2) (1991).

144. *Id.* at § 3(b)(2) (1991).

145. *Id.* at § 4(a)(3) and § 4(b)(3) (1991).

accommodating a smart pig would be required to make modifications to accommodate such pigs within five years. Moreover, the Secretary of Transportation would be empowered to make exceptions to the smart pig requirements.¹⁴⁶

The bill would also require: the DOT to issue regulations mandating the installation of excess flow valves (EFVs) in new or rebuilt natural gas distribution systems;¹⁴⁷ require the DOT to issue minimum operator training requirements for all pipeline operators and dispatchers so that proper reactions will be made to dangerous operating conditions; and require the elimination of current blanket exemptions from regulation of all pipelines operating at twenty percent or less of Specified Maximum Yield Strength.¹⁴⁸

The bill also would: expand existing requirements to inspect all pipelines for proper burial and to report and mark any hazardous conditions, including all offshore pipelines and lines crossing over, under or through navigable waters, if such pipelines could pose a hazard to navigation or public safety;¹⁴⁹ require the DOT to define the term "gathering line" and to identify a class of gathering lines warranting increased safety regulation;¹⁵⁰ raise the level of damage by a pipeline operator which must be reported from the current level of \$5,000 to an amount to be determined by the DOT;¹⁵¹ and narrow the exemption under the Solid Waste Disposal Act¹⁵² for underground storage tanks which are part of a pipeline facility.¹⁵³ H.R. 1489 was reported favorably by the Energy and Commerce Committee¹⁵⁴ and was referred to the Public Works and Transportation Committee.

A Senate bill addressing pipeline safety passed the Senate on October 7, 1991. S. 1583, the "Pipeline Safety Improvement Act of 1991," was introduced by Senator Exon (D-NE) on July 29, 1991. The Act incorporated provisions of two previously introduced bills, S. 1055 (Danforth-R-MO) and S. 1429 (Kasten-R-WIS). S. 1583 contained many of the provisions of H.R. 1489, but did not include any of the provisions regarding smart pigs. With regard to EFVs, S. 1583 would further direct the DOT to establish performance standards.¹⁵⁵ Although H.R. 1489 contained no provisions regarding cast iron pipe, S. 1583 directs the DOT to notify companies with cast iron pipe of the availability of guidelines written by the American Gas Association Gas Piping Technology Committee for the management of cast iron pipe.¹⁵⁶ Finally, whereas H.R. 1489 would give the DOT broad authority to regulate gas transported through customer owned pipelines, S. 1583 merely requires the DOT to conduct a rulemaking to determine to what extent distribution

146. *Id.* at § 4(a)(3) and § 4(b)(3) (1991).

147. *Id.* at § 5 (1991).

148. *Id.* at § 7 (1991).

149. *Id.* at § 10 (1991).

150. *Id.* at § 11 (1991).

151. *Id.* at § 12(a) and (b) (1991).

152. Solid Waste Disposal Act, Pub. L. No. 94-580, § 2, 90 Stat. 2795 (1976).

153. H.R. 1489, 102d Cong., 1st Sess., § 13 (1991).

154. H.R. REP. NO. 247, 102d Cong., 1st Sess. (1991).

155. S. 1583, 102d Cong., 1st Sess., § 7 (1991).

156. *Id.* at § 8 (1991).

companies should be responsible for the outdoor pipelines of its smaller customers.¹⁵⁷

Donald F. Santa, Jr., Chairman
Michael A. Stosser, Vice Chairman

S. Lorraine Cross
David J. Gilmore
Melinda J. Horgan
Karen Anne Malkin
Toni Marie Sutliff
Julia L. White

Mario M. Garza
Walter R. Hall
Mona M. Janopaul
Susan B. Russell
Jeffrey D. Watkiss

157. *Id.* at § 9 (1991).