

Report of Committee On The Environment

SINCE THE DATE of this Committee's last report, there have been many significant developments in environmental law affecting those who produce, transport or consume energy resources. During 1979, the economic regulation of energy resources increasingly has become intertwined with the environmental regulation of those resources. As the price and availability of energy supplies have changed drastically during the past year, the need for an accommodation between national energy policy and environmental policy has become increasingly apparent. In general, the process of balancing energy and environmental objectives has been a common theme underlying many of the major actions of Congress, the courts, the executive branch, and the independent agencies during the past year. Rather than attempting to catalogue each specific issue raised or decided during the past year, this report describes a limited number of major developments of general interest in the areas of legislation, case law, and agency action. The Committee anticipates that the items discussed in this report will have a continuing impact on the development of both the procedural and substantive aspects of the law in this area.

I. LEGISLATION

A. *Energy Mobilization Board*

In response to general dissatisfaction with existing state and federal procedures for securing approval of proposed energy projects, two bills have been introduced to provide an expedited and coordinated process for decisions on proposed non-nuclear energy projects. The two bills, S. 1308 sponsored by Senator Jackson (D. Wash.), and H.R. 4983, sponsored by Congressman Dingell (D. Mich.), would produce a "fast track" for priority energy projects. The House/Senate conferees are currently meeting to consider and resolve the differences between the two bills. The general provisions of the proposed legislation are outlined below.

1. *Creation of the EMB*

Both bills provide for the establishment of an EMB which will be part of the Executive Office of the President. Although the number of EMB members has not been finalized, members of the Board will be appointed by the President, subject to Senate confirmation.

Based on criteria to be established by the Board, the EMB may designate a project as a Priority Energy Project (PEP). The criteria to be used by the EMB will include, *inter alia*, design of the proposal, economic cost/benefit data, environmental and health safety data.

2. *Application Approval Process*

Under the proposed legislation, a request for designation of a PEP must be made by application to the EMB. After notice of the application in the Federal Register, a public comment period will be provided. The EMB

will be required to rule on the application within a fixed time period. The time requirements connected with the foregoing process have not yet been finalized.

3. *Project Decision Schedule*

After a project has been designated as a PEP, the EMB will establish a Project Decision Schedule (PDS). The PDS is a timetable in which all necessary federal, state and local authorizations will be issued. Before establishing a PDS, the EMB must first conduct a hearing in which all federal, state and local agencies involved will be heard. A PDS, issued after hearing, will be binding on all federal, state and local agencies. The PEP and PDS decisions of the EMB will not be subject to § 102(2)(c) of the National Environmental Policy Act of 1969 (no environmental impact statement will be required).

4. *Enforcement*

The options available to the EMB, if a federal, state or local agency does not issue its decision within the time frame established by the PDS, have not been finalized. However, the conferees are actively considering the following options:

- a. Enforcement of the PDS schedule by recourse to a federal district court; or
- b. Substitution of an EMB decision for that of the recalcitrant agency.

5. *Waiver*

The extent of the EMB's power to waive substantive laws has not been resolved. However, whatever waiver the EMB is authorized to make will require concurrence of both the President and the Congress. The mechanism and procedure of such concurrence have not been decided, although the concept has been approved. In general, the scope of the waiver concept has been the subject of much debate. The debate has focused primarily on two questions: whether the Board should have authority to waive both procedural and substantive laws affecting a project; and, whether the waiver power should be more limited, authorizing only exemptions from laws or regulations adopted or implemented after "commencement of construction" of the project.

6. *Judicial Review*

The proposed legislation provides that EMB orders may be appealed to the Temporary Emergency Court of Appeals (TECA). One judge of the TECA panel hearing a particular appeal would be a Federal Circuit Judge from the Circuit in which the project is to be located.

B. *Synthetic Fuels*

As the price for imported crude oil has dramatically risen since the Arab Oil Embargo in 1973, and as the security of this oil has been seriously threatened, the United States has begun to turn its attention to the potential of nonconventional energy sources. These sources include tar sands, shale oil, gasified and liquified coal, and other organic materials such as peat and

biomass. However, the technology needed for the production of fuels from these unconventional sources remains, for the most part, in the research and development stage.

Desiring to speed synthetic fuel development in order to relieve the nation's dependence on foreign oil, and realizing that in many cases the necessary large capital investments are beyond the reach of most private entities, the federal government has begun to play a major role in providing financial incentives for the production of these fuels. Already in place in the Department of Energy is a program established under the Federal Non-Nuclear Energy Research and Development Act (Pub. L. No. 93-577) through which DOE has provided funds for research and development of new energy technologies. Under this program, DOE has provided grants for the design, construction, and demonstration of a variety of technologies for coal gasification, coal liquefaction and shale oil production, among others. In addition, Congress presently is considering the creation of a Synthetic Fuels Corporation to aid in the commercialization of synthetic fuel technologies. Under the legislation presently being considered in conference committee, which was set up to resolve differences between the Senate bill (S. 932) and the House bill (H.R. 3930), the federal government would provide financial incentives in the form of price guarantees, purchase agreements, loans, loan guarantees, and cooperative agreements.

With these government efforts, as well as the efforts undertaken by private entities without government assistance, it is anticipated that substantial production of synthetic fuels will be onstream by 1990. The stated objective of the synthetic fuels legislation now in Conference Committee is to have in place a production capacity of 500,000 barrels per day of oil equivalent in 1987 and two million barrels per day by 1992.

However, a substantial impediment to realizing these goals may be created by environmental constraints. Continuing reliance on fossil fuels, particularly coal, will pose significant environmental risks. For example, there is concern that the continued burning of fossil fuels will increase the level of carbon dioxide in the air. Some scientists believe that this increase could create a so-called "greenhouse effect", increasing the temperatures at the earth's surface and causing dramatic changes in the climate. Other major environmental concerns are centered on the environmental effects of increased coal mining and oil shale production activities and the increased demand for water by synthetic fuel projects. These concerns are particularly strong in the West where vast coal and shale deposits are located and where water supplies already are strained.

On the other hand, the production of synthetic fuels from fossil energy sources is recognized as providing substantial environmental benefits. For example, the production of gases or liquids from biomass, such as farm and timber wastes, sewage, and garbage, will alleviate existing environmental problems of disposal of these materials. In addition, production of methanol from coal, coal gasification and liquefaction, and similar technologies based on coal offer the potential for increased use of coal without the extreme environmental hazards caused by direct coal combustion.

C. *Superfund Concept*

The Administration has introduced legislation to create a six billion dollar "Superfund" to pay for emergency clean-up of oil and hazardous substance spills and clean-up of inactive hazardous waste disposal sites that pose imminent dangers. The Administration plan calls for the Fund to be created over a four-year period. Of the six billion dollar total, four hundred million dollars would be provided by industry fees. The remainder of the Fund would be made up by congressional appropriations, and by recovery of clean-up costs and penalties to be collected from culpable parties.

The Administration's proposal has received a less than enthusiastic response from Congress, although it has served as a model for similar legislation (H.R. 3794, H.R. 4571, H.R. 5790, S. 1480) being considered by both Houses. As envisioned in the proposed legislation, the Superfund would respond to spills of substances designated under § 311 of the Clean Water Act as "hazardous wastes," as that term is defined under § 3001 of the Resource Conservation and Recovery Act of 1976.

Major provisions of the bills introduced on this subject provide for a uniform system of notification, emergency government response, enforcement, liability, and compensation of parties injured by spills of hazardous wastes.

In addition to providing federal and state agencies with funds for clean-up and removal of spills, the Fund also would compensate innocent victims of spills for property damages or the loss of economic livelihood. State and local governments could claim loss of tax revenue for up to one year due to injuries to real or personal property.

The various bills impose strict liability for all costs and damages covered by the Fund. Owners, lessees and operators of inactive or abandoned hazardous waste disposal sites generally would be strictly liable for the cost of any government response covered by the Fund. However, liability would be limited except in cases of willful misconduct, gross negligence, failure to provide notice of a hazardous release, or failure to cooperate or assist in clean-up operations when requested.

II. COURT ACTION

A. *Alabama Power v. EPA*, Case No. 78-1006 (D.C. Cir. Dec. 14, 1979)

On December 14, 1979, six months after the *per curiam* decision, the long-awaited final opinion in *Alabama Power Co. v. Environmental Protection Agency*, was issued. This decision will require major changes in existing EPA regulations and will affect all firms contemplating the construction of new energy facilities or the expansion of existing facilities. The implications of the decision may be especially important in shaping the future growth of the domestic energy industry.

The *Alabama Power* case arose when numerous firms challenged regulations adopted by EPA to implement the prevention of significant deterioration (PSD) provisions of the Clean Air Act Amendments of 1977. The PSD

provisions of the Clean Air Act Amendments were basically designed by Congress to protect clean air areas by controlling construction of significant new or expanded sources of pollution. In *Alabama Power*, the court's most important holdings directly concerned the scope of PSD applicability to new and modified sources.

Under the Clean Air Act Amendments, certain designated sources (including petroleum refining, storage, and transfer facilities) having the "potential to emit" 100 tons per year of any pollutant are subject to complex pre-construction review and pollution control requirements. For other sources, the threshold is 250 tons per year. The EPA had required calculations of potential emissions to be based on the assumption that no pollution controls would be applied. The court overturned this definition of "potential to emit," holding that emission calculations must be made assuming that pollution control equipment would be utilized. This ruling considerably reduces the number of new sources subject to PSD requirements.

With respect to modifications, however, the court's decision should result in a great expansion of PSD applicability. The EPA's regulations on modifications paralleled those for new sources in requiring PSD review only of those modifications which would result in emission increases beyond the 100/250 ton thresholds. The court rejected these regulations, holding that the Clean Air Act Amendments required PSD review of all modifications resulting in *any* new increase in emissions. Thus, expansion of a facility would be subject to PSD review unless the increased emissions resulting from the expansion are offset by emission reductions elsewhere in the plant. However, the court did recognize EPA's ability to set *de minimis* limits on emission increases, below which PSD would not apply.

The court also remanded the EPA's regulations concerning the geographic and pollutant applicability of PSD requirements. The scope of the PSD program was expanded by the court's holding that all pollutants regulated by the Clean Air Act Amendments are subject to PSD. However, the court reduced the geographic coverage of the program by holding that PSD requirements apply only to sources in designated clean air areas.

The court's rulings on many other issues, such as baseline concentration, fugitive emissions, and definition of a source will greatly alter EPA's existing PSD regulations. Additionally, the scope of the court's ruling extends beyond the PSD program to the often parallel provisions of the EPA's non-attainment regulations. The EPA has proposed new PSD regulations in response to *Alabama Power*, and the existing regulations governing PSD applicability have been stayed.

B. *National Wildlife Federation v. EPA*, Civil Action
No. 79-0915 (D.D.C.)

Spurred by a federal district court's decision that an NPDES permit might be required in connection with the construction of a dam in South Carolina, and disappointed by EPA's failure to respond to a rulemaking request that all dams be regulated through the NPDES system, the National Wildlife Federation filed suit in the U.S. District Court for the District

of Columbia in March, 1979 seeking to require EPA to regulate dams under the NPDES program. The central issue to be resolved by the litigation is whether the release of water over a dam spillway or through the turbines of a hydroelectric facility constitutes the "discharge" of a "pollutant" from a "point source."

The National Wildlife Federation contends that such facilities are point sources, which in the course of their operations, discharge water in such a manner that it may contain low dissolved oxygen, sediment or supersaturated gas. The Federation argues that serious water quality problems are associated with such releases.

The Utility Water Act Group (UWAG), and others, have intervened in the litigation and have urged the court to reject the Federation's argument. The UWAG contends that the NPDES program was created to control the "addition of pollutants" from an "external source," and that Congress intended to control water quality problems caused by the impoundment of water with a program designed to regulate the discharge of a pollutant to a water body. The UWAG also argues that when Congress established the NPDES program, there was already in existence a complex, integrated system to regulate the water quality impacts of dams and hydroelectric facilities.

EPA agrees that it cannot require an NPDES permit for discharges from dams.

Discovery ended in February 1980. Although the parties were urged to reach a stipulation regarding the facts, it appears that such a stipulation will not be forthcoming.

C. *United States v. Ward*, 48 U.S.L.W. 3305
(Nov. 6, 1979)

The Supreme Court has agreed to review a Tenth Circuit decision that the Fifth Amendment privilege against self-incrimination precludes the government's use of evidence of an oil spill, obtained from reports filed under the mandatory self-reporting requirements of the Federal Water Pollution Control Act, in assessing civil penalties under § 1321(b)(6) of the Act. *United States v. Ward*, 48 U.S.L.W. 3305 (Nov. 6, 1979). The Supreme Court heard argument on February 26, 1980, and the case is presently awaiting decision.

In this case, the lower court had found that the civil penalties prescribed in the Act are, in reality, criminal in nature, and that compelled reports cannot be used in determining either liability for, or the amount of, civil penalties imposed. *Ward v. Coleman*, 598 F.2d 1187 (10th Cir. 1979).

III. AGENCY ACTION

A. *New Source Performance Standards for Cogenerators*

The Environmental Protection Agency has issued new source performance standards for electric utility steam generating units. The new standards specifically recognize and provide benefits to cogeneration and resource recovery facilities. 44 Fed. Reg. 33579, 33589 (June 11, 1979). The

final standards apply only if the cogeneration facility delivers more than 25 MW of electric power and more than 33% of the steam generator heat input capacity to the utility distribution system. Electric utility steam generating units incorporated into resource recovery facilities are exempt from the sulfur dioxide percentage reduction requirements when less than 25 percent of the heat input is from fossil fuel on a quarterly basis. The EPA stated that its purpose in modifying the proposed rule was the encouragement of these energy technologies. Indicating further concern for cogeneration technologies, the EPA has questioned, in an Advance Notice of Proposed Rulemaking concerning new source performance standards for fossil-fired industrial steam generators, whether enforcement of new standards at cogeneration facilities would present special problems.

B. *FERC Order No. 69*

On February 19, 1980, the Federal Energy Regulatory Commission (FERC) issued Order No. 69 requiring electric utilities to purchase electric power and energy from qualifying cogeneration and small power production facilities (biomass, wind, solar, hydro, waste and other renewable resources) at rates which reflect a utility's avoided (marginal) cost, adjusted by several factors. In the development of Order No. 69, the FERC Staff stated that one reason for authorizing payment of full avoided costs was the statutory intent that, costs being equal, cogeneration and small power production facilities should be constructed to meet load growth and operated to satisfy current electrical requirements.

C. *1979 EPA Regulatory Activity Involving Sulfur Dioxide*

On June 11, 1979, the EPA adopted final rules containing revised New Source Performance Standards ("NSPS") for electric utility steam generating units capable of firing more than 73 MW (250 million Btu/hour) heat input of fossil fuel, and for which construction is commenced after September 18, 1978. 44 Fed. Reg. 33580 *et seq.* (June 11, 1979). Sulfur dioxide standards for solid and solid-derived fuels now limit emissions to 520 ng/J (1.20 lb./million Btu) heat input, and a 90% reduction in potential SO₂ emissions is required at all times, except when emissions are less than 260 ng/J (0.60 lb./million Btu) heat input. When SO₂ emissions are less than 260 ng/J heat input, a 70% reduction in potential emissions is required. The new rules also prescribe NSPS's for gaseous and liquid fuels and anthracite coal.

The EPA recognized that "[t]he principal issue throughout this rule-making has been whether a plant burning low-sulfur coal should be required to achieve the same percentage reduction in potential SO₂ emissions as those burning higher sulfur coal." 44 Fed. Reg. at 33582. The EPA admitted that its solution, which imposes a 90% reduction standard for high-sulfur coal, but only a 70% reduction standard for low-sulfur coal, creates a dichotomy that runs counter to the congressional presumption in favor of a uniform application of the percentage reduction requirement. *See* 44 Fed. Reg. at 33582.

The EPA justified its action mainly on the ground that a 90% standard imposed on low-sulfur coal would retard the development and application of "dry" SO₂ control technology. Further, the EPA at least implied that a 90% standard would impose a hardship on western states. Such a reduction level currently can be accomplished economically only through "wet" scrubbing. This in turn requires large amounts of water, a scarce commodity in the western United States. Also, since most low-sulfur coal is found in the western United States, if scrubbing is required for such coal, the additional costs connected with scrubbers and transportation reduce the markets for such coal in the eastern United States.

The EPA currently is considering a change in the method of determining compliance with sulfure dioxide standards. The new system, based on a statistical probability determination called the Expected Exceedances ("ExEx"), is designed to take into account daily variations in the sulfur content of an industrial plant's coal supply. Such variations are not considered under existing regulations.

On February 6, 1980, the EPA denied petitions from both industry and environmentalists to reconsider its NSPS's for coal-fired electric generating plants. This denial opens the way for judicial review of those standards.

Finally, work continues on the EPA's criteria documents for sulfur oxides and particulates. A preliminary draft of the study, which will cover the overall health and welfare effects of sulfur oxide emissions, was heavily criticized by industry at a November workshop sponsored by the EPA. The agency plans to submit an external review of the sulfur oxides/particulate document to the Clean Air Scientific Advisory Committee in early April, 1980.

D. Proposed EPA Consolidated Permit Regulations

On June 14, 1979, the Environmental Protection Agency proposed a new permitting system, which would consolidate the regulations governing application for, and granting of, permits under a number of EPA programs relevant to energy users and producers. 44 Fed. Reg. 34244 (June 14, 1979). The proposed regulations would integrate program descriptions, state program requirements, and procedures for decision-making in connection with (1) the Hazardous Waste Management Program established under the Resource Conservation and Recovery Act; (2) the Underground Injection Control Program established under the Safe Drinking Water Act; (3) the National Pollutant Discharge Elimination System established under the Clean Water Act; (4) the Dredge or Fill Program, also established under the Clean Water Act, and (5) the Prevention of Significant Deterioration permit program established under the Clean Air Act.

The EPA has stated that it "intends to move in the direction of issuing a single consolidated permit for a facility that requires multiple EPA permits, which would cover all EPA permit requirements for the facility." 44 Fed. Reg. 34245. The proposed rules represent the first step in EPA's effort to consolidate permit programs. In connection with the proposed rules, the

EPA also developed and proposed a new single application form for requesting permits under the consolidated regulations. 44 Fed. Reg. 34346 (June 14, 1979). According to EPA, the consolidated permit regulations are approximately 40 percent shorter than separate regulations for each individual program.

Under the proposed rules, the consolidated general permitting requirements and specific permitting requirements for each program would be set forth in a new Part 122 of 40 C.F.R. General and specific state program requirements would be included in a new Part 123. Finally, new general procedures for decision-making and specific procedures for decision-making in connection with each individual program would be spelled out in a new Part 124.

The EPA asserts the consolidated permit procedure will result in environmental benefits, a reduction in regulatory burdens, increased internal efficiency within EPA, and more uniform and predictable opportunities for public participation. Ideally, the consolidated permit program would eliminate gaps in regulation of waste disposal, and, for facilities presently requiring multiple permits, could reduce the costs and burden associated with compliance. Within EPA, the consolidated regulations could result in elimination of overlaps and inconsistencies among the consolidated programs.

E. *FERC Regulations Implementing the National Environmental Policy Act of 1969*

On August 27, 1979, the FERC issued proposed rules which would replace and elaborate on existing Commission regulations under the National Environmental Policy Act of 1969 (NEPA). *See* 44 Fed. Reg. 50052, *et seq.* (Aug. 27, 1979). The proposed regulations represent an attempt to "reflect the policies and essential procedures of the NEPA regulations promulgated by the Council on Environmental Quality, 40 C.F.R. Parts 1500-1508." 44 Fed. Reg. at 50053.

The CEQ had issued its NEPA regulations on November 28, 1979, to "establish processes which enable federal executive agencies to work together in researching and solving environmental problems and provide for uniform methods of writing environmental impact statements and assessments, receiving comments, developing records of decision, and handling information." 44 Fed. Reg. at 50054. All agencies of the Executive Branch are bound by the CEQ regulations, but independent agencies, such as the FERC, are free to draft regulations of their own. Although the proposed FERC regulations deviate in some respects from the CEQ rules, the Commission has attempted, "[i]n the interests of uniformity, . . . to structure its own regulations as closely as practicable to the essential procedures reflected in the CEQ regulations, while ensuring that its regulations are consistent with its independent regulatory duties and responsibilities." 44 Fed. Reg. at 50053.

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