# *Report of the Committee on Legislation*

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

## I. COAL CONVERSION

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

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

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

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

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

## II. THE ENERGY MOBILIZATION BOARD

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

### A. EMB

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

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

#### 1. *Powers of The EMB*

(a) Designation of Priority Energy Project

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

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

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

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

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

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

(b). The Project Decision Schedule

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

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

(c) Environmental Impact Statements

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

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

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

(d) Procedural Streamlining Authority

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

(e) The "No Tilt" Rule

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

(f) The Grandfather Exception

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

(g) Specific Exemptions from Grandfather Authority

The Act specifically identifies and exempts certain categories of laws and

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

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

(h) Procedures for Temporary Suspension

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

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

(i) Substantive Waiver

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

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

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

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

(j) EMB Enforcement of PDS

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

(k) Conclusion re the EMB Power

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

### B. Judicial Review

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

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

### C. Exemption for State Law

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

## III. REGULATORY REFORM

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

The Subcommittee on Administrative Law and Governmental Relations

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

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

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

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

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

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

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

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

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

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

## IV. SYNTHETIC FUELS DEVELOPMENT

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

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

### A. Comparison of Proposals

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

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

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

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