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PRIORITY ENERGY PROJECT ACT OF 1979

GOVERNMENT

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 4499, H.R. 4573, and H.R. 4862

BILLS TO ESTABLISH A COORDINATED, PROMPT, AND SIMPLIFIED PROCESS FOR FEDERAL APPROVAL OF SIGNIFICANT NONNUCLEAR ENERGY FACILITIES, TO SET FORTH A NATIONAL PROGRAM FOR THE FULL DEVELOPMENT OF ENERGY SUPPLY, AND FOR OTHER PURPOSES

JULY 18 AND 20, 1979

Serial No. 96-107

Printed for the use of the
Committee on Interstate and Foreign Commerce



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

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PRIORITY ENERGY PROJECT ACT OF 1979

WEDNESDAY, JULY 18, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND POWER,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to notice, in room 2220, Rayburn House Office Building, Hon. John D. Dingell, chairman, presiding.

Mr. DINGELL. The subcommittee will come to order.

Over the past months this subcommittee has become increasingly concerned with the pace of governmental approvals for critical energy facilities. There is some evidence that critically important energy initiatives may be unduly delayed by extended procedures at Federal, State, and local levels, although other factors, such as financing problems and institutional barriers, have also contributed to delay and, in some cases, may be the sole cause of the delay. Many of these procedural delays are unnecessary. Often they result from a lack of coordination at the national level as well as the State and local levels.

Today the subcommittee begins consideration of H.R. 4573 and title II of H.R. 4499, the so-called fast track legislation, which also is being considered by the Committee on Interior and Insular Affairs. The Chair notes that President Carter is supporting such legislation and is recommending that an Energy Mobilization Board located in the Executive Office of the President should be established to administer the legislation.

These bills seek to avert these unnecessary procedural delays. They provide a procedure for identifying significant energy projects and then giving those projects a priority so that, at the Federal level at least, the delays will be minimized or avoided entirely. They also encourage expedited schedules at the State and local levels.

It appears that such legislation is needed, although I am concerned that such legislation not undermine environmental, conservation, health, safety, small business, antitrust, labor, and other laws. While the time taken to review projects may appear dilatory to project proponents and beneficiaries, that time often is important to insure adequate consideration of social, economic, and environmental impacts.

The bills do not clearly indicate what laws will be affected by this legislation. Nor do they make it clear the types of projects that should enjoy this priority status. We will want to delve into these matters today and Friday.

The President's proposal to establish a board has merit. However, we will want to examine the details of the proposal to insure that we are not creating just another bureaucracy which could add to the delay. We will certainly want the board to be accountable to Congress and the public and to act in the openness of the day and to meet the requirements which have come to be known as sunshine.

I note that, according to the White House factsheet, the Board could waive procedural requirements of Federal, State, and local laws and even new substantive requirements of law. We will want to understand more precisely what waiver authority the Board must have to be effective.

I distinguish between statutes and agency regulations as well as between substantive and procedural matters. Waiver authority of agency regulations may be appropriate. But waivers of Federal laws by an agency, or even the President, without congressional approval gives me concern. Also, I do not clearly understand how a board could be legally empowered to waive State and local requirements.

My distinguished friend and colleague Congressman Udall, who chairs the Committee on Interior and Insular Affairs, last week noted that our energy problems must not be used as an excuse to make an end run around existing laws. That is sage advice in which I concur.

I believe that fast track legislation must be carefully considered to assure that end runs are not made. The subcommittee must craft a bill that will provide a proper balance between the need for expedition for critical energy projects and the need to protect the public health, safety, and welfare.

The subcommittee plans to mark up on July 23 and 24 these bills and the synfuels bills on which we held hearings a few weeks ago. The markup will include consideration of the President's proposals relative to these bills. Our objective is to move rapidly, but with care, to develop effective legislation for early House consideration.

[Testimony resumes on p. 78.]

[The texts of H.R. 4499, H.R. 4573, and H.R. 4862 follow:]

96TH CONGRESS
1ST SESSION

H. R. 4499

To set forth a national program for the full development of energy supply, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 15, 1979

Mr. DINGELL introduced the following bill; which was referred jointly to the Committees on Interstate and Foreign Commerce and Interior and Insular Affairs

A BILL

To set forth a national program for the full development of energy supply, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 TITLE I—AMENDMENTS TO ENERGY POLICY

4 AND CONSERVATION ACT

5 ENCOURAGEMENT OF DOMESTIC SYNTHETIC FUEL

6 PRODUCTION

7 SECTION 101. (a) Title I of the Energy Policy and Con-
8 servation Act (42 U.S.C. 6201 and following) is amended by
9 adding at the end thereof the following new part:

1 "PART C—SYNTHETIC FUEL PRODUCTION
2 "ENCOURAGEMENT OF DOMESTIC COMMERCIAL
3 SYNTHETIC FUEL PRODUCTION

4 "SEC. 171. (a) In order to encourage the domestic com-
5 mercial development and production of synthetic fuels and
6 synthetic chemical feedstocks and to reduce dependence on
7 foreign supplies of energy resources, it is declared to be a
8 goal of the Nation to have, beginning five years after the date
9 of the enactment of this Act, domestic commercial production
10 of synthetic fuels and synthetic chemical feedstocks at a daily
11 rate equivalent to 500,000 barrels of crude oil.

12 "(b) If the President determines that in the absence of
13 the exercise of authority under this section it would be un-
14 likely that the national goal established under subsection (a)
15 would be attained, the President shall, in accordance with the
16 provisions of this section and other applicable provisions of
17 law—

18 "(1) enter into contracts to purchase or commit to
19 purchase synthetic fuels, synthetic chemical feedstocks,
20 or both, to the extent necessary to assure the attain-
21 ment of that goal, and

22 "(2)(A) provide that such fuels and feedstocks, be
23 used to meet the Government's fuel and chemical feed-
24 stock requirements, to the extent the President deter-
25 mines appropriate, or be transferred to and stored in

1 the Strategic Petroleum Reserve in accordance with
2 the provisions of this Act; or

3 “(B) with respect to such fuels and feedstock as
4 are not to be stored under subparagraph (A), exercise
5 the option under the contract involved not to take de-
6 livery of such fuel or feedstocks, as provided under
7 subsection (c)(4). In the case of any synthetic fuel or
8 synthetic chemical feedstock which is not appropriate
9 for storage in the Strategic Petroleum Reserve, the
10 President may provide for the exchange of such fuel or
11 feedstock for any petroleum product appropriate for
12 storage in such Reserve and may, under paragraph
13 (2)(A), transfer to and store in such Reserve any petro-
14 leum product acquired in such exchange.

15 “(c)(1) Subject to the limitations of this subsection and
16 subsection (f), such contracts to purchase or commit to pur-
17 chase shall be for such quantities, for such periods, and on
18 such terms and conditions, as the President determines will
19 assure attainment of the national goal established in subsec-
20 tion (a).

21 “(2) Any such contract may be entered into only—

22 “(A) before October 1, 1985, and

23 “(B) to the extent provided, without fiscal year
24 limitation, in appropriation Acts enacted after the date
25 of the enactment of this section.

1 “(3)(A) The price at which the President contracts to
2 purchase or commit to purchase under any such contract may
3 not exceed 110 percent of the then current weighted average
4 landed cost of a comparable petroleum-derived fuel or feed-
5 stock imported into the United States, as determined by the
6 Secretary of Energy. The value of any entitlement provided
7 under the regulation under section 4(a) of the Emergency
8 Petroleum Allocation Act of 1973 shall be disregarded for
9 purposes of this paragraph.

10 “(B) For purposes of this section, the President may
11 enter into any contract with a price higher than that provided
12 in subparagraph (A) if and to the extent the President deter-
13 mines, after notice in the Federal Register and opportunity
14 for public comment of not less than sixty days, that the
15 higher purchase price under that contract is necessary in
16 order to attain the national goal established in subsection (a).

17 “(4) Any contract for such purchases or commitments to
18 purchase shall provide that the President would have the
19 right, in accordance with terms and conditions set forth in the
20 contract, to refuse to take delivery of all or a portion of the
21 synthetic fuels and synthetic chemical feedstocks produced
22 under the contract and to pay the producer involved an
23 amount equal to the amount by which the price specified in
24 the contract for the fuel or feedstock involved exceeds the
25 market price (as determined by the Secretary of Energy) for

1 such fuel or feedstocks on the delivery date specified in the
2 contract.

3 “(5)(A) Except as provided in subparagraph (B), any
4 purchase or commitment to purchase synthetic fuels or syn-
5 thetic chemical feedstocks under this section, shall be made
6 by sealed competitive bidding.

7 “(B) In any case in which no such bids are submitted to
8 the President or the President determines that no such bids
9 have been submitted which are acceptable to the President,
10 the President may negotiate contracts for such purchases and
11 commitments to purchase if the President publishes notice in
12 the Federal Register of the intent to do so together with a
13 statement of the reasons for such action.

14 “(6)(A) The President shall exercise the authority under
15 this section in a manner designed to assure (i) that diversified
16 sources of supply of synthetic fuels and synthetic chemical
17 feedstocks are established and maintained in the United
18 States, (ii) that such sources of supply would be reliable in
19 the event of a foreign energy supply interruption, and (iii) to
20 the maximum extent practicable, that supplies from such
21 sources would replace, directly or indirectly, imported crude
22 oil or refined petroleum products.

23 “(B) In no event may any contract be awarded to any
24 person if the quantity of synthetic fuels and synthetic chemi-
25 cal feedstocks contracted for by the President (pursuant to

1 this section or under any other authority) with that person or
2 any affiliate of such person would exceed over any period the
3 daily equivalent of 100,000 barrels of crude oil.

4 “(7) The President may enter into any contract under
5 this section for synthetic fuel or synthetic chemical feedstock
6 only if the President determines that the fuel or feedstock
7 involved are to be produced from facilities—

8 “(A) which are located within the United States,

9 “(B) which have been placed in commercial oper-
10 ation after the date of the enactment of this Act, and

11 “(C) for which no grant, loan, loan guarantee, or
12 other similar financial assistance has been provided
13 that utilizes funds derived from the Treasury.

14 “(d) If deliveries of fuels or feedstocks are stored under
15 subsection (b)(2)(A), the agencies involved shall pay the sup-
16 plier, from funds generally appropriated to such agencies for
17 fuels and feedstocks, for the portion of the contract price
18 which does not exceed the fair market price for the fuel and
19 feedstock involved, as determined by the Secretary of
20 Energy. Any amount owed because of the contract price ex-
21 ceeding the fair market price shall be paid by the President
22 from funds appropriated for such purpose under subsection
23 (h).

1 “(e) The President may contract for such storage, proc-
2 essing, refining, and other related activities as may be re-
3 quired under subsection (b)(2).

4 “(f) Any exercise of authority under this section shall be
5 consistent with applicable environmental, conservation, fuel
6 conversion, and antitrust policies of the United States, and
7 shall not diminish or hamper activities or policies designed to
8 promote the exploration and development of domestic sources
9 of crude oil and natural gas, and the development of other
10 energy resources (including renewable energy resources).

11 “(g) Beginning one year after the effective date of this
12 section, and annually thereafter, the President shall submit a
13 report to the Congress on actions taken under this section,
14 together with recommendations for legislation as the Presi-
15 dent considers appropriate. Each such report shall identify
16 the persons to whom contracts have been awarded under this
17 section, together with information indicating the degree of
18 foreign ownership or control of such person.

19 “(h) There is authorized to be appropriated
20 \$2,000,000,000 to make payments in accordance with sub-
21 sections (c)(4), (d), and (e) for the fiscal year ending Septem-
22 ber 30, 1981. To the extent provided in appropriation Acts,
23 such funds shall remain available until expended.

24 “(i) For the purposes of this section—

1 “(1) The terms ‘synthetic fuels’ and ‘synthetic
2 chemical feedstocks’ mean liquid or solid fuels and
3 chemical feedstocks, respectively, derived from coal,
4 shale, lignite, peat, solid waste, and other minerals or
5 organic materials (other than crude oil, natural gas, or
6 any derivative of either).

7 “(2) The term ‘United States’ means the several
8 States and the District of Columbia.

9 “(3) The term ‘person’ means any individual, cor-
10 poration, partnership, association, or any other group
11 of persons organized for a common business purpose.

12 “(4) The term ‘affiliate’, when used with respect
13 to any person, means any other person who controls, is
14 controlled by, or is under common control with such
15 person.

16 “(5) The crude oil equivalency of any synthetic
17 fuel or synthetic chemical feedstock shall be deter-
18 mined by reference to the quantity of crude oil general-
19 ly required to produce a comparable petroleum-derived
20 fuel or feedstock.”.

21 (b) The table of contents for such Act is amended by
22 inserting after the item relating to section 166 the following:

“PART C—SYNTHETIC FUEL PRODUCTION

“Sec. 171. Encouragement of domestic synthetic fuel production.”.

1 TITLE II—PRIORITY ENERGY PROJECT ACT

2 SEC. 201. This title may be cited as the "Priority
3 Energy Project Act of 1979".

4 PURPOSES

5 SEC. 202. The purposes of this title are—

6 (a) to provide for a coordinated, prompt, and sim-
7 plified process for Federal approval of non-nuclear
8 energy facilities, other than research and demonstration
9 facilities, that are determined to be in the national in-
10 terest;

11 (b) to expedite the Federal approval process with-
12 out expanding or diminishing existing substantive Fed-
13 eral authority over proposed energy facilities and with-
14 out unduly interfering with the present statutory au-
15 thorities and responsibilities of individual Federal agen-
16 cies; and

17 (c) to foster integration of local, State, and Feder-
18 al procedures for permitting, licensing, and approving
19 energy facilities which are determined to be in the na-
20 tional interest.

21 DEFINITIONS

22 SEC. 203. As used in this title the term—

23 (a) "approval" means any permit, license, lease,
24 right-of-way, or other grant issued by an agency of
25 Federal, State, or local government;

1 (b) "atomic energy" means all forms of energy
2 released in the course of nuclear fission or nuclear
3 transformation;

4 (c) "energy facility" means any physical structure,
5 including any equipment, building, mine, well, rig,
6 pipeline, transmission line, processing facility, transpor-
7 tation device, manufacturing facility, or installation
8 which will facilitate energy conservation exploration,
9 development, transportation, production, or commer-
10 cialization of any form of energy other than atomic
11 energy, including, but not limited to, any facility
12 owned or operated in whole or in part by Federal,
13 State, or local government, or any combination thereof;

14 (d) "Federal agency" means an executive agency
15 as defined in section 105 of title 5 of the United States
16 Code;

17 (e) "person" means any individual, cooperative,
18 partnership, corporation, association, consortium, unin-
19 corporated organization, trust estate, or any entity or-
20 ganized for a common business purpose, and any in-
21 strumentality of Federal, State, or local government;

22 (f) "priority energy project" means a project
23 which has been determined by the Secretary of Energy
24 to be in the national interest pursuant to his authority
25 under section 204 of this title;

1 (g) "project" means any plan, proposal, scheme,
2 or undertaking to build, install, or in any other way
3 produce an energy facility;

4 (h) "Secretary" means the Secretary of Energy;
5 and

6 (i) "State" means any of the fifty States, the Dis-
7 trict of Columbia, Puerto Rico, the Virgin Islands,
8 Guam, American Samoa, and the Commonwealth of
9 the Northern Mariana Islands.

10 AUTHORITY TO DESIGNATE PRIORITY ENERGY PROJECTS

11 SEC. 204. The Secretary of Energy is hereby author-
12 ized to designate by order a proposed energy facility as a
13 priority energy project pursuant to the procedures and crite-
14 ria provided in this title.

15 AUTHORITY TO APPLY FOR PRIORITY STATUS

16 SEC. 205. (a) Any person planning or proposing an
17 energy facility may apply to the Secretary of Energy for an
18 order designating such facility as a priority energy project.
19 Such person shall include such detailed information as the
20 Secretary may require by rule concerning such facility to
21 enable the Secretary to make such designation.

22 (b) The Secretary shall publish notice of the filing of the
23 designation request, together with a description thereof in the
24 Federal Register; and interested persons shall be afforded

1 forty-five days thereafter within which to submit written
2 comments for the Secretary's consideration.

3 PROCEDURE AND CRITERIA FOR DESIGNATING PRIORITY
4 ENERGY PROJECTS

5 SEC. 206. Not later than ninety days after receipt of an
6 application authorized under the previous section, the Secre-
7 tary shall determine whether the proposed energy facility is
8 of sufficient national interest to be designated a priority
9 energy project and shall publish his decision in the Federal
10 Register. In making such a determination the Secretary shall
11 consider—

12 (a) the extent to which the facility would reduce
13 the Nation's dependence upon imported oil;

14 (b) the magnitude of any adverse environmental
15 impacts associated with the facility and the existence
16 of alternatives that would have fewer adverse impacts;

17 (c) the extent to which the proposed facility would
18 make use of renewable energy resources;

19 (d) the extent to which the proposed facility would
20 promote energy conservation;

21 (e) the extent to which the proposed facility would
22 contribute to the development of new production or
23 conservation technologies and techniques;

24 (f) the time that would normally be required to
25 obtain all necessary Federal approvals and the adverse

1 impacts that would result from delay in completion of
2 the proposed facility;

3 (g) the degree of specificity in describing the pro-
4 posed facility in the application; and

5 (h) the public comments received concerning such
6 facility.

7 EXTENSION OF DEADLINES

8 SEC. 207. The Secretary may extend the deadline for
9 receiving public comments under section 205(b) the time for
10 ruling on an application for priority energy project status
11 under section 206, and the time for Federal agencies to
12 submit information under section 209 if such application is
13 incomplete or if more time is necessary to afford interested
14 parties a reasonable time to comment.

15 EARLY ACTION REQUIREMENT

16 SEC. 208. The Secretary shall encourage prospective
17 applicants under section 205 to contact the Office established
18 under section 221 and to file applications for any necessary
19 Government actions or approvals with the appropriate agen-
20 cies as soon as possible in order that any eventual action or
21 decision may be expedited. The Secretary shall consider any
22 failure to contact the Office for Priority Energy Projects in a
23 timely fashion in making his determination on an application
24 under section 205.

1 FEDERAL AGENCIES REQUIRED TO SUBMIT INFORMATION

2 SEC. 209. Not later than forty-five days after notice ap-
3 pears in the Federal Register of an order designating a pro-
4 posed energy facility as a priority energy project, any Feder-
5 al agency with authority to grant or deny any approval or to
6 perform any action necessary to the completion of such proj-
7 ect or any part thereof, shall transmit to the Secretary of
8 Energy—

9 (a) a compilation of all significant actions required
10 by such agency before a final decision on any neces-
11 sary approval(s) can be rendered;

12 (b) a compilation of all significant actions required
13 of the applicant before a final decision by such agency
14 can be made;

15 (c) a tentative schedule for completing actions
16 listed in subsections (a) and (b) of this section;

17 (d) all necessary application forms which must be
18 completed by the priority energy project before such
19 approval can be granted; and

20 (e) the amount of funds and personnel available to
21 such agency to conduct such actions and the impact of
22 such schedule on other applications pending before
23 such agency.

1 PROJECT DECISION SCHEDULE ESTABLISHED BY THE
2 SECRETARY

3 SEC. 210. (a) Not later than sixty days after designating
4 a proposed energy facility as a priority energy project, the
5 Secretary, in consultation with the appropriate Federal,
6 State, and local agencies, shall publish in the Federal Regis-
7 ter a Project Decision Schedule containing deadlines for all
8 Federal actions relating to such project. The Project Decision
9 Schedule shall clearly identify the order in which licenses,
10 permits and other Government approvals must be obtained
11 by the priority energy project before such project can be com-
12 pleted. The Project Decision Schedule may also suggest con-
13 current review of applications and joint hearings by agencies
14 of Federal, State, and local governments.

15 (b) The deadlines in the Project Decision Schedule shall
16 be consistent with the deadlines submitted to the Secretary
17 under section 209 unless the Secretary determines that dif-
18 ferent deadlines are essential in order to expedite and coordi-
19 nate Government review.

20 (c) All deadlines in the Project Decision Schedule shall
21 be consistent with the statutory obligations of Federal agen-
22 cies governed by such Schedule.

23 (d) Upon the petition of any agency with authority to
24 approve or disapprove any application, or of any priority
25 energy project, the Secretary may revise any procedure,

1 extend any deadline, or modify in any other way, the Project
2 Decision Schedule at any time prior to completion of such
3 project: *Provided*, That no extension shall be granted unless
4 the Secretary determines that such agency or priority energy
5 project has exercised all due diligence in attempting to
6 comply with the Schedule and that it would be impracticable
7 for the agency to reach a decision or complete the required
8 action within the specified time, taking into consideration the
9 availability of personnel and funds for such purpose.

10 DELEGATION OF DECISION AUTHORITY TO THE

11 PRESIDENT

12 SEC. 211. If a deadline on the Project Decision Sched-
13 ule for a final decision or action by a Federal agency has
14 elapsed and such agency has not made the decision or per-
15 formed the required action, the President may make the deci-
16 sion, or perform the action in lieu of the Federal agency, in
17 accordance with applicable provisions of law. The President
18 shall not make a decision pursuant to this section unless
19 there has been notice and an opportunity for public comment
20 on such decision. The decision of the President pursuant to
21 this section shall be final under applicable provisions of law.

22 EXCEPTIONS TO PROCEDURES REQUIRED BY OTHER

23 LEGISLATION

24 SEC. 212. In circumstances of exceptional national
25 need, the President may establish a deadline for Federal

1 agency action in a Project Decision Schedule that is shorter
2 than the minimum period required by the Secretary: *Pro-*
3 *vided*, That such deadline shall not require a final agency
4 action or decision less than one year after the initial Project
5 Decision Schedule has been published in the Federal Regis-
6 ter.

7 CERTIFICATION OF COMPLETED FEDERAL AGENCY REVIEW

8 SEC. 213. (a) If the Secretary determines that all Fed-
9 eral agency actions and approvals necessary to the comple-
10 tion of a priority energy project have been granted, the Sec-
11 retary shall certify the same to the project. Such certification
12 shall indicate the expiration date of any Federal approvals
13 that have been granted to the project.

14 (b) A certificate issued by the Secretary under subsec-
15 tion (a) of this section shall constitute conclusive evidence in
16 any judicial or executive proceeding that all necessary Feder-
17 al permits have been granted for the duration specified on the
18 certificate.

19 REQUEST FOR STATE COOPERATION AND INFORMATION

20 SEC. 214. (a) The Secretary shall notify the Governor
21 of any State within which any portion of a priority energy
22 project would be located and shall request the Governor to
23 supply—

1 (1) a compilation of significant actions required by
2 the State and local governments before the priority
3 energy project can be completed;

4 (2) a compilation of significant actions required of
5 the applicant before a final decision can be made;

6 (3) a tentative schedule for completing the actions
7 listed in subsection (a) of this section; and

8 (4) all necessary application forms which must be
9 completed by the applicant before such approval can be
10 granted.

11 (b) The Secretary may provide any assistance author-
12 ized by law to assist State and local authorities in complying
13 with requests for cooperation from the Secretary.

14 DECISION SCHEDULES FOR STATE AND LOCAL
15 AUTHORITIES

16 SEC. 215. (a) The Secretary shall transmit to the prior-
17 ity energy project all information received from State and
18 local governments pursuant to requests from the Secretary
19 under section 214.

20 (b) The Secretary, after consultation with State and
21 local authorities, shall propose a voluntary decision schedule
22 to assist State and local authorities in coordinating their ac-
23 tivities with actions by the Federal Government.

24 (c) The Secretary shall keep apprised of the processing
25 of applications for priority energy projects by State and local

1 governments. If the Secretary determines that a priority
2 energy project is being delayed or threatened with delay by
3 the inability or unwillingness of any State or local govern-
4 ment to implement a schedule for timely review and decision,
5 the Secretary shall notify the Governor of such State and
6 transmit to the Congress a statement describing the delay,
7 the causes thereof, and recommending actions to alleviate or
8 prevent the delay.

9 (d) The Secretary may participate or intervene in the
10 proceeding of any State or local agency which permits such
11 participation or intervention in order to request such agency
12 to adopt procedures recommended by the Secretary.

13 DECISION REGARDING PRIORITY ENERGY PROJECT STATUS

14 SEC. 216. A decision of the Secretary granting or deny-
15 ing an order designating a proposed energy facility as a prior-
16 ity energy project or granting or denying an extension under
17 section 207 shall not be subject to judicial review.

18 OTHER ACTION PURSUANT TO THIS ACT

19 SEC. 217. Except as provided in section 216, claims
20 alleging that an action taken pursuant to this title will deny
21 rights under the Constitution of the United States, or that an
22 action is in excess of statutory jurisdiction, authority, or limi-
23 tations, or short of statutory right may be brought not later
24 than the sixtieth day following the date of such action.

1 TIME BAR; JURISDICTION OF THE COURT OF APPEALS

2 SEC. 218. (a) Any claim arising out of action pursuant
3 to this title shall be barred unless a complaint is filed prior to
4 the expiration of the time limits prescribed by section 217.

5 (b) Any such complaint shall be filed in the United
6 States court of appeals for the circuit in which the priority
7 energy project or the most significant portion thereof would
8 be located. Such court shall act as a special court and shall
9 have exclusive original jurisdiction to determine such pro-
10 ceeding in accordance with procedures hereinafter provided,
11 and no other court of the United States, of any State, terri-
12 tory, or possession of the United States, or of the District of
13 Columbia, shall have original jurisdiction of any such claim in
14 any proceeding instituted prior to or on or after the date of
15 enactment of this Act.

16 (c) Any such proceeding shall be assigned for hearing
17 and completed at the earliest possible date, shall, to the
18 greatest extent practicable, take precedence over all other
19 matters pending on the docket of the court at that time, and
20 shall be expedited in every way by such court and such court
21 shall render its decision relative to any claim within ninety
22 days from the date such claim is brought unless such court
23 determines that a longer period of time is required.

1 SUPREME COURT REVIEW

2 SEC. 219. (a) The Supreme Court shall have exclusive
3 jurisdiction to review any interlocutory judgment or order of
4 the court of appeals pursuant to this title and the appellant
5 must file a petition for certiorari or a certification as provided
6 in section 1254 of title 28, United States Code, within fifteen
7 days after the decision of the court of appeals or his appeal
8 shall be barred.

9 (b) Any review by the Supreme Court shall be assigned
10 for hearing and completed at the earliest possible date.

11 OFFICE FOR PRIORITY ENERGY PROJECTS WITHIN THE
12 DEPARTMENT OF ENERGY

13 SEC. 220. The Secretary shall establish an Office for
14 Priority Energy Projects within the Department of Energy
15 which shall assist the Secretary in the performance of his
16 duties under this title.

17 EFFECTIVE DATE

18 SEC. 221. The provisions of this title shall become effec-
19 tive ninety days after the date of enactment of this Act and
20 the provisions of Executive Order 12129 of April 5, 1979,
21 shall terminate.

22 EXPIRATION OF AUTHORITY

23 SEC. 222. The Secretary's authority under section 204
24 shall expire seven years after the date of enactment of this
25 title. Notwithstanding the previous sentence, the provisions

1 of the title shall continue to be applicable to all energy facili-
 2 ties designated as priority energy projects prior to the expira-
 3 tion of the Secretary's authority under section 204.

4 TITLE III—DEPARTMENT OF ENERGY PROJECT 5 AUTHORIZATIONS

6 SEC. 301. Section 408 of the Public Utility Regulatory
 7 Policies Act of 1978 (Public Law 95-617) is amended by
 8 deleting paragraph (1) and inserting in lieu thereof the fol-
 9 lowing new paragraph (1):

10 “(1) ‘small hydroelectric power project’ means
 11 any hydroelectric power project which is located at the
 12 site of any existing dam, which uses the water power
 13 potential of such dam and which has not more than
 14 25,000 kilowatts of installed capacity;”.

15 TITLE IV—ORDERS FOR TRANSFERRING 16 ELECTRIC POWER

17 DEFINITIONS

18 SEC. 401. For the purpose of this title, the term—

19 (a) “Secretary” means the Secretary of Energy;

20 (b) “Commission” means the Federal Energy
 21 Regulatory Commission;

22 (c) “Utility” means any entity which owns or op-
 23 erates electric generation, transmission, or distribution
 24 facilities, regardless of whether it is investor owned,
 25 publicly owned, or cooperatively owned;

1 (d) "Incremental costs" means all operating and
2 maintenance costs, including the replacement cost of
3 fuel, that would not have been otherwise incurred if
4 the utility service had not been furnished; and

5 (e) "Person" means any individual, partnership,
6 corporation, utility, or other entity organized for a
7 common business purpose.

8 AUTHORITY TO ORDER TRANSFERS AND WHEELING TO
9 DISPLACE OIL-FIRED POWER

10 SEC. 402. (a) Notwithstanding any other provision of
11 law, the Secretary shall have the authority to order or renew
12 an order for the generation, delivery, interchange, transmis-
13 sion, distribution, or purchase of electric energy for a period
14 not to exceed thirty days if he finds that such action—

15 (1) will reduce the amount of oil consumed by
16 electric utilities or otherwise conserve energy; and

17 (2) will be in the public interest.

18 (b) No order shall be issued or renewed under subsection
19 (a) unless the Secretary determines that such order—

20 (1) is not likely to result in a reasonably ascer-
21 tainable uncompensated loss for any electric utility;

22 (2) will not unreasonably impair the reliability of
23 any electric utility affected by the order; and

1 (3) will not impair the ability of any electric util-
2 ity affected by the order to render adequate service to
3 its customers.

4 (c) The Secretary may issue or renew an order under
5 subsection (a) upon his own motion or upon complaint, with
6 or without notice, and with or without an opportunity for a
7 hearing by interested parties.

8

COMPENSATION

9 SEC. 403. (a) The Commission, after notice and a hear-
10 ing held either before or after an order under section 402
11 takes effect, shall prescribe the rates for compensation and
12 reimbursement of any electric utility required to generate,
13 deliver, interchange, or transmit electricity under section
14 402.

15 (b) The rates established under subsection (a) shall be
16 the minimum rates which include—

17 (1) for any utility which is required to generate
18 electricity for transfer to another utility—

19 (A) an amount equal to the incremental cost
20 of generating and transmitting power pursuant to
21 the Secretary's order;

22 (B) a reasonable additional fixed amount per
23 kilowatt-hour to cover unquantifiable costs; and

24 (C) a reasonable amount for the use of the
25 utility's generating capacity;

1 (2) for any utility which performs any transmitting
2 or passthrough service—

3 (A) an amount equal to the incremental cost
4 in transmitting power; and

5 (B) a reasonable additional fixed amount per
6 kilowatt-hour to cover unquantifiable costs.

7 (c) No charge shall be made, demanded, or received by
8 any utility for any service provided pursuant to an order au-
9 thorized by section 402 unless such charge is consistent with
10 rates established by the Commission pursuant to this section.

11 (d) Upon application by any utility seeking compensa-
12 tion or reimbursement for services supplies pursuant to an
13 order under section 402, the Commission shall establish rates
14 under subsection (a) on an expedited basis pursuant to proce-
15 dures established for setting rates under the Federal Power
16 Act as amended (16 U.S.C. 791(a) and following).

17 LIMITS ON PERCENTAGE ADDERS

18 SEC. 404. (a) This section applies to all electric rates
19 which are filed or which are required to be filed under the
20 Federal Power Act as amended.

21 (b) For purposes of this section, "percentage adder"
22 means any component of a rate under which component rev-
23 enues are determined as a percentage of the sum of incre-
24 mental or out-of-pocket costs related to fuel, transmission

1 losses, labor, maintenance, gross receipts taxes, startup, and
2 shutdown.

3 (c) In any transaction, no percentage adders may result
4 in an amount of revenue which exceeds—

5 (1) Two mills per kilowatt-hour for any utility
6 which is the source of the electricity; or

7 (2) One mill per kilowatt-hour for any utility
8 which performs only transmitting or passthrough serv-
9 ices.

10 (d) Each public utility—

11 (1) shall revise any rate schedule and tariff filed
12 under this part, to limit any percentage adders in ac-
13 cordance with paragraph (c) of this section; and

14 (2) shall file any other rate or rate change under
15 this part after the date of this section in compliance
16 with paragraph (c) of this section.

17 (e) All rate schedules required to be revised by this sec-
18 tion shall be filed no later than thirty days after the effective
19 date of this section, and shall be effective five days thereafter,
20 subject to subsequent review for compliance with paragraph
21 (c) of this section.

22 ENFORCEMENT

23 SEC. 405. (a) It shall be unlawful for any person to
24 violate any provision of this title or any rule or order under
25 this title.

1 (b)(1) Whenever it appears to the Commission or the
2 Secretary that any person is engaged or about to engage in
3 any act or practice which constitutes or will constitute a vio-
4 lation of any provision of this title, or of any rule or order
5 thereunder, the Commission or Secretary may bring an
6 action in the District Court of the United States for the Dis-
7 trict of Columbia or any other appropriate district court of
8 the United States to enjoin such act or practice and to en-
9 force compliance with this title, or any rule or order
10 thereunder.

11 (2) In any action under paragraph (1), the court shall,
12 upon a proper showing, issue a temporary restraining order
13 or preliminary or permanent injunction without bond. In any
14 such action, the court may also issue a mandatory injunction
15 commanding any person to comply with any applicable provi-
16 sion of law, rule, or order, or ordering such other legal or
17 equitable relief as the court determines appropriate, including
18 refund or restitution.

19 (3)(A) Any person who knowingly violates any provision
20 of this title, or any provision of any rule or order under this
21 title, shall be subject to a civil penalty, which the Commis-
22 sion or Secretary may assess, of not more than \$5,000 for
23 any one violation.

1 (B) For purposes of this paragraph, in the case of con-
2 tinuing violation, each day of violation shall constitute a sep-
3 arate violation.

4 (c)(1) Any person who knowingly and willfully violates
5 any provision of this title shall be subject to—

6 (A) a fine of not more than \$5,000; or

7 (B) imprisonment for not more than two years; or

8 (C) both such fine and such imprisonment.

9 (2) Any person who knowingly and willfully violates any
10 rule or order under this title shall be subject to a fine of not
11 more than \$500 for each violation.

12 (3) For purposes of this subsection, each day of violation
13 shall constitute a separate violation.

14 (4) For purposes of this section, the term “knowingly”,
15 when used with respect to any act or omission by any person,
16 means such person—

17 (A) had actual knowledge; or

18 (B) had constructive knowledge deemed to be pos-
19 sessed by a reasonable individual who acts under simi-
20 lar circumstances.

21 JUDICIAL REVIEW

22 SEC. 406. (a) Any person aggrieved by any order issued
23 by the Secretary pursuant to section 402 may at any time
24 before the ninetieth day after the date of such order file a
25 petition with the United States court of appeals for the circuit

1 wherein such person resides or maintains his principal place
2 of business, for judicial review thereof.

3 (b) Any judicial proceeding pursuant to this section shall
4 be assigned for hearing and completed at the earliest possible
5 date, shall, to the greatest extent practicable, take precedence
6 over all other matters pending on the docket of the
7 court at that time, and shall be expedited in every way by
8 such court and such court shall render its decision relative to
9 any claim within ninety days from the date such claim is
10 brought unless such court determines that a longer period of
11 time is required to satisfy the requirements of the United
12 States Constitution.

13 (c) The judgment of the court affirming or setting aside,
14 in whole or in part, any order under section 402 shall be
15 final, subject to review by the Supreme Court of the United
16 States upon certiorari or certification as provided in section
17 1254 of title 28, United States Code.

18 (d) No court shall have jurisdiction to grant any injunctive
19 relief against the issuance of an order under section 402
20 except in conjunction with a final judgment entered in a case
21 involving such order.

22 SEC. 407. Any person aggrieved by any final rule or
23 order issued pursuant to sections 403 or 404 may obtain judicial
24 review of such rule or order pursuant to the provisions

1 governing judicial review under the Federal Power Act, as
2 amended.

3 TITLE V—GASOHOL

4 PURPOSE

5 SEC. 501. The purpose of this title is to promote the
6 commercial development and use of alcohol blended fuels in
7 the United States.

8 DEFINITIONS

9 SEC. 502. As used in this title the term—

10 (a) "alcohol" means methanol, ethanol, or any
11 other alcohol which is produced from renewable or
12 other resources (including coal and wastes) and which
13 is suitable for use by itself or in combination with other
14 fuels as a motor fuel;

15 (b) "alcohol-blended fuel" means any fuel consist-
16 ing of a mixture of gasoline and alcohol motor fuel;

17 (c) "alcohol motor fuel" means alcohol produced
18 for use as a motor fuel;

19 (d) "commerce" means any trade, traffic transpor-
20 tation, exchange, or other commerce—

21 (1) between any State and any place outside
22 of such State; or,

23 (2) which affects any trade, traffic, transpor-
24 tation, exchange, or other commerce described in
25 subparagraph (1).

1 (e) "motor fuel" means any substance suitable as
2 a fuel for self-propelled vehicles designed primarily for
3 use on public streets, roads, and highways;

4 (f) "refiner" means, for purposes of this title, any
5 person engaged in the refining of crude oil to produce
6 motor fuel, including any affiliate of such person, or
7 any importer of gasoline for use as a motor fuel;

8 (g) "Secretary" means the Secretary of Energy;

9 (h) "United States" means each State of the sev-
10 eral States and the District of Columbia;

11 (i) "ultimate purchaser" means with respect to
12 any item, the first person who purchases that item for
13 purposes other than resale; and

14 (j) "renewable resource" means any substance
15 which is a source of energy, and which is available in
16 an inexhaustible supply in the foreseeable future.

17 PROGRAM

18 SEC. 503. The Secretary shall establish pursuant to this
19 title a program to promote the commercial production and
20 use of alcohol-blended fuels in the United States. The pur-
21 pose of the program shall be to replace gasoline, to the
22 extent practicable, used as a motor fuel with an alcohol-
23 blended fuel containing the maximum percentage of alcohol
24 motor fuel as is economically and technically feasible and

1 energy efficient for use as a motor fuel and consistent with
2 other national policies for the production of food for people.

3

STUDY

4 SEC. 504. (a) The Secretary, in consultation with the
5 Secretary of Transportation, the Secretary of Agriculture,
6 the Secretary of Commerce, and other appropriate agencies,
7 shall conduct a study to determine—

8 (1) the most suitable raw materials, other than
9 petroleum or natural gas, for the production of alcohol
10 motor fuel in an energy efficient manner, taking into
11 consideration the need of such materials for food for
12 people; and

13 (2) the nature of the alcohol motor fuel distribu-
14 tion system and the various production processes, using
15 feedstock other than petroleum and natural gas;
16 that will be necessary for the rapid development of an alcohol
17 motor fuel industry. Such study shall identify ways to encour-
18 age the development of a reliable and energy efficient alcohol
19 motor fuel industry and shall identify the technical, economic,
20 and institutional barriers to such development, and shall in-
21 clude an estimation of the production capacity of alcohol
22 motor fuel needed to implement the provision of this title.

23 (b) The Secretary shall report to the Congress not later
24 than six months after the date of enactment of this title on
25 the results of the study described in subsection (a), together

1 with such legislative recommendations as may be appropriate
2 to further the purpose of this title.

3 PRODUCTION GOALS

4 SEC. 505. The Secretary, by rule, within six months
5 after the completion of the study in section 504, shall set
6 production goals for the production of alcohol motor fuel in
7 the United States in each of the calendar years 1981 through
8 1990. In setting such goals, the Secretary shall take into
9 account the availability of reliable sources of alcohol pro-
10 duced from renewable and other resources and the energy
11 efficiency of methods to produce such alcohol. The production
12 goal for alcohol motor fuel for calendar year 1981 shall be
13 not less than 1 percent by volume of the projected consump-
14 tion of gasoline used as a motor fuel in the United States for
15 that year. The production goal for alcohol motor fuel for cal-
16 endar year 1985 shall be not less than 5 percent by volume
17 of the projected consumption of gasoline used as a motor fuel
18 in the United States for that year. The production goal for
19 alcohol motor fuel for calendar year 1990 shall be not less
20 than 10 percent by volume of the projected consumption of
21 gasoline used as a motor fuel in the United States for that
22 year.

23 ALCOHOL-BLENDED FUEL REQUIREMENTS

24 SEC. 506. (a) The total quantity of gasoline sold annual-
25 ly in commerce in the United States by any refiner for use as

- 1 motor fuel shall contain, on the average, not less than the
 2 percentage alcohol motor fuel by volume set forth for the
 3 calendar years shown in the following table:

Calendar year:	Percentage alcohol motor fuel by volume
1981.....	1 percent.
1982.....	Determined by the Secretary under subsection (b) of this section.
1983.....	Determined by the Secretary under subsection (b) of this section.
1984.....	Determined by the Secretary under subsection (b) of this section.
1985.....	5 percent.
1986.....	Determined by the Secretary under subsection (b) of this section.
1987.....	Determined by the Secretary under subsection (b) of this section.
1988.....	Determined by the Secretary under subsection (b) of this section.
1989.....	Determined by the Secretary under subsection (b) of this section.
1990.....	10 percent.

- 4 (b) Not later than July 1, 1980, the Secretary shall pre-
 5 scribe, by rule, the percentage alcohol motor fuel by volume
 6 required to be contained, on the average, in the total quantity
 7 of gasoline sold annually in commerce in the United States in
 8 calendar years 1982 through 1984 and 1986 through 1989
 9 by any refiner for use as a motor fuel. Such percentage shall
 10 apply to each refiner, and shall be set for each such calendar
 11 year at a level which the Secretary determines (A) is techni-
 12 cally and economically feasible, and (B) will result in steady
 13 progress toward meeting the percentage alcohol motor fuel
 14 by volume required pursuant to this section for calendar year
 15 1990.

- 16 (c) Each refiner shall report annually to the Secretary
 17 the percentage alcohol motor fuel by volume contained on the

1 average in the total quantity of gasoline for use as a motor
2 fuel that refiner sold during the preceding calendar year.

3 ENFORCEMENT BY THE SECRETARY

4 SEC. 507. (a) Any person who violates any requirement
5 of section 506 is subject to a civil penalty of not more than
6 \$1 per gallon for each gallon of fuel sold that is not in com-
7 pliance with section 506. Such penalties shall be assessed by
8 the Secretary.

9 (b)(1) Before issuing an order assessing a civil penalty
10 against any person under this section, the Secretary shall
11 provide to such person notice of the proposed penalty. Such
12 notice shall inform such person of his opportunity to elect
13 within 30 days after the date of such notice to have the pro-
14 cedures to paragraph (3) (in lieu of those of paragraph (2))
15 apply with respect to such assessment.

16 (2)(A) Unless an election is made within thirty calendar
17 days after receipt of notice under paragraph (1) to have para-
18 graph (3) apply with respect to such penalty, the Secretary
19 shall assess the penalty, or order, after a determination of
20 violation has been made on the record after an opportunity
21 for an agency hearing pursuant to section 554 of title 5,
22 United States Code, before a hearing examiner appointed
23 under section 3105 of such title 5. Such assessment order
24 shall include the hearing examiner's findings and the basis for
25 such assessment.

1 (B) Any person against whom a penalty is assessed
2 under this paragraph may, within 60 calendar days after the
3 date of the order of the Secretary assessing such penalty,
4 institute an action in the United States court of appeals for
5 the appropriate judicial circuit for judicial review of such
6 order in accordance with chapter 7 of title 5, United States
7 Code. The court shall have jurisdiction to enter a judgment
8 affirming, modifying or setting aside in whole or in part, the
9 order of the Secretary, or the court may remand the proceed-
10 ing to the Secretary for such further actions as the court may
11 direct.

12 (3)(A) In the case of any civil penalty with respect to
13 which the procedures of this paragraph have been elected,
14 the Secretary shall promptly assess such penalty.

15 (B) If the civil penalty has not been paid within 60 cal-
16 endar days after the assessment order has been made under
17 subparagraph (A), the Secretary shall institute an action in
18 the appropriate district court of the United States for an
19 order affirming the assessment of the civil penalty. The court
20 shall have authority to review de novo the law and the facts
21 involved, and shall have jurisdiction to enter a judgment en-
22 forcing, modifying, and enforcing as so modified, or setting
23 aside in whole or in part such assessment.

24 (C) Any election to have this paragraph apply may not
25 be revoked except with the consent of the Secretary.

1 (4) If any person fails to pay an assessment of a civil
2 penalty after it has become a final and unappealable order
3 under paragraph (2) or after the appropriate district court has
4 entered final judgment in favor of the Secretary under para-
5 graph (3) the Secretary shall recover the amount of such pen-
6 alty in any appropriate district court of the United States. In
7 such action, the validity and appropriateness of such final
8 assessment order or final judgment shall not be subject to
9 review.

10 ALCOHOL DISTILLATION FUEL REQUIREMENTS

11 SEC. 508. (a) Any person constructing a facility to dis-
12 till alcohol for motor fuel use shall use fuel sources which are
13 renewable.

14 (b) The Secretary shall, 6 months after enactment of
15 this title, promulgate, by rule, procedures for certifying that
16 any facility built for alcohol distillation pursuant to this title
17 comply with the following priorities of fuel use:

18 (1) First priority for fuel sources to operate such
19 distillation facilities shall be given to renewable energy
20 resources.

21 (2) Last priority for fuel sources shall be given to
22 petroleum, petroleum derivatives, and natural gas.

23 (c) The Secretary may by waiver authorize the use of
24 subsection (b)(2) fuel sources upon finding that it would be

1 economically or technically infeasible to comply with the re-
2 quirements of subsections (a) and (b), above.

3 PROCEDURES FOR RULEMAKING

4 SEC. 509. Any rulemaking by the Secretary pursuant to
5 this title shall be, unless otherwise provided in this title, in
6 accordance with section 501 of the Department of Energy
7 Organization Act of 1977.

8 AUTHORIZATION OF APPROPRIATIONS

9 SEC. 510. There is authorized to be appropriated to the
10 Secretary to carry out section 505 and section 506 not to
11 exceed \$1,000,000 for fiscal year 1979.

96TH CONGRESS
1ST SESSION

H. R. 4573

To establish a coordinated, prompt, and simplified process for Federal approval of significant nonnuclear energy facilities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 21, 1979

Mr. UDALL introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs and Interstate and Foreign Commerce

A BILL

To establish a coordinated, prompt, and simplified process for Federal approval of significant nonnuclear energy facilities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 PRIORITY ENERGY PROJECT ACT

4 This Act may be cited as the "Priority Energy Project
5 Act of 1979".

6 TITLE I—PURPOSES AND DEFINITIONS

7 PURPOSES

8 SEC. 101. The purposes of this title are—



1 (a) to provide for a coordinated, prompt, and sim-
2 plified process for Federal approval of nonnuclear
3 energy facilities that are determined to be in the na-
4 tional interest;

5 (b) to expedite the Federal approval process with-
6 out expanding or diminishing existing substantive Fed-
7 eral authority over proposed energy facilities and with-
8 out unduly interfering with the present statutory au-
9 thorities and responsibilities of individual Federal agen-
10 cies; and

11 (c) to foster integration of local, State, and Feder-
12 al procedures for permitting, licensing, and approving
13 energy facilities which are determined to be in the na-
14 tional interest.

15 DEFINITIONS

16 SEC. 102. As used in this title the term—

17 (a) “approval” means any permit, license, lease,
18 right-of-way, or other grant issued by an agency of
19 Federal, State, or local government;

20 (b) “atomic energy” means all forms of energy re-
21 leased in the course of nuclear fission of nuclear trans-
22 formation;

23 (c) “energy facility” means any physical structure
24 (other than structures associated with research and de-
25 velopment projects), including any equipment, building,

1 mine, well, rig, pipeline, transmission line, processing
2 facility, transportation device, manufacturing facility,
3 or installation that will facilitate energy conservation
4 exploration, development, transportation, production, or
5 commercialization of any form of energy other than
6 atomic energy, including, but not limited to, any facility
7 owned or operated in whole or in part by Federal,
8 State, or local government, or any combination thereof
9 or any such facility located upon the public lands or
10 which relies substantially upon fuels extracted from the
11 public lands;

12 (d) "Federal agency" means an executive agency
13 as defined in section 105 of title 5 of the United States
14 Code;

15 (e) "person" means any individual, cooperative,
16 partnership, corporation, association, consortium, unincorporated
17 organization, trust estate, or any entity organized for a common
18 business purpose, and any instrumentality of Federal, State, or local
19 government;

20 (f) "priority energy project" means a project
21 which has been determined by the Secretary of Energy
22 to be in the national interest pursuant to his authority
23 under section 204 of this title;

24 (g) "project" means any plan, proposal, scheme,
25 or undertaking to build, install, operate, maintain,

1 repair, replace, expand, or in any other way produce
2 an energy facility;

3 (h) "Secretary" means the Secretary of Energy;

4 (i) "State" means any of the fifty States, the Dis-
5 trict of Columbia, Puerto Rico, the Virgin Islands,
6 Guam, American Samoa, and the Commonwealth of
7 the Northern Mariana Islands; and

8 (j) "Deputy Secretary" means the Deputy Secre-
9 tary of the Department of Energy.

10 TITLE II—PRIORITY PROJECTS

11 AUTHORITY TO DESIGNATE PRIORITY ENERGY PROJECTS

12 SEC. 201. The Secretary of Energy is hereby author-
13 ized to designate a proposed energy facility as a priority
14 energy project pursuant to the procedures and criteria pro-
15 vided in this title, provided that the Secretary may designate
16 no more than six projects as priority energy projects in any
17 calendar year.

18 AUTHORITY TO APPLY FOR PRIORITY STATUS

19 SEC. 202. (a) Any person planning or proposing an
20 energy facility may apply to the Secretary of Energy for an
21 order designating such facility as a priority energy project.

22 (b) The Secretary shall publish notice of the filing of the
23 designation request, together with a description thereof in the
24 Federal Register; and interested persons shall be afforded

1 thirty days thereafter within which to submit written com-
2 ments for the Secretary's consideration.

3 (c) the Deputy Secretary shall transmit copies of the
4 application for designation as a priority energy project, as
5 well as any other information the Deputy Secretary deems
6 relevant, to the appropriate agencies so that those agencies
7 may begin preparation of the requirements specified in sec-
8 tion 206 in the event that the applicant eventually receives
9 designation as a priority energy project.

10 PROCEDURE AND CRITERIA FOR DESIGNATING PRIORITY
11 ENERGY PROJECTS

12 SEC. 203. Not later than forty-five days after receipt of
13 an application authorized under the previous section, the Sec-
14 retary shall determine whether the proposed energy facility is
15 of sufficient national interest to be designated a priority
16 energy project. Upon reaching a determination the Secretary
17 shall publish his decision in the Federal Register and shall
18 notify the applicant and the agencies identified in subsection
19 202(c). In making such a determination the Secretary shall
20 consider—

21 (a) the extent to which the facility would reduce
22 the Nation's dependence upon imported oil;

23 (b) the magnitude of any adverse environmental
24 impacts associated with the facility and the existence
25 of alternatives that would have fewer adverse impacts;

1 (c) the extent to which the proposed facility would
2 make use of renewable energy resources;

3 (d) the extent to which the proposed facility would
4 promote energy conservation;

5 (e) the extent to which the proposed facility would
6 contribute to the development of new production or
7 conservation technologies and techniques;

8 (f) the time that would normally be required to
9 obtain all necessary Federal approvals and the adverse
10 impacts that would result from delay in completion of
11 the proposed facility;

12 (g) the extent to which the applicant is prepared
13 to complete or has already completed the significant
14 actions which the applicant in consultation with the
15 Deputy Secretary anticipate will be identified under
16 section 206 as required from the applicant; and

17 (h) the public comments received concerning such
18 facility.

19 RELATIONS TO NATIONAL ENVIRONMENTAL POLICY ACT

20 SEC. 204. A determination by the Secretary under sec-
21 tion 203 of this title is not a major Federal action within the
22 meaning of section 102(2) of the National Environmental
23 Policy Act of 1969.

EARLY ACTION REQUIREMENT

SEC. 205. The Secretary shall encourage prospective applicants under section 202 to file applications for any necessary Government actions or approvals with the appropriate agencies as soon as possible in order that any eventual action or decision may be expedited. The Secretary shall consider any failure to file such applications in a timely fashion in making his determination on an application under section 203.

FEDERAL AGENCIES REQUIRED TO SUBMIT INFORMATION

SEC. 206. Not later than thirty days after notice appears in the Federal Register of an order designating a proposed energy facility as a priority energy project, any Federal agency with authority to grant or deny any approval or to perform any action necessary to the completion of such project or any part thereof, shall transmit to the Secretary of Energy and to the priority energy project—

(a) a compilation of all significant actions required by such agency before a final decision or any necessary approval(s) can be rendered;

(b) a compilation of all significant actions and information required of the applicant before a final decision by such agency can be made;

1 (c) a tentative schedule for completing actions and
2 obtaining the information listed in subsections (a) and
3 (b) of this section;

4 (d) all necessary application forms that must be
5 completed by the priority energy project before such
6 approval can be granted; and

7 (e) the amounts of funds and personnel available
8 to such agency to conduct such actions and the impact
9 of such schedule on other applications pending before
10 such agency.

11 PROJECT DECISION SCHEDULE ESTABLISHED BY THE
12 SECRETARY

13 SEC. 207. (a) Not later than sixty days after notice ap-
14 pears in the Federal Register of an order designating a pro-
15 posed energy facility as a priority energy project, the Secre-
16 tary, in consultation with the appropriate Federal, State, and
17 local agencies, shall publish in the Federal Register a Project
18 Decision Schedule containing deadlines for all Federal ac-
19 tions relating to such project. The Project Decision Schedule
20 shall clearly identify the order in which licenses, permits, and
21 other Government approvals must be obtained by the priority
22 energy project before such project can be completed. The
23 Project Decision Schedule may also recommend concurrent
24 review of applications and joint hearings by agencies of Fed-
25 eral, State, and local governments.

1 (b) The deadlines in the Project Decision Schedule shall
2 be consistent with the deadlines submitted to the Secretary
3 under section 206 unless the Secretary determines that dif-
4 ferent deadlines are essential in order to expedite and coordi-
5 nate Government review or in order to meet the require-
6 ments of subsection (d) of this section.

7 (c) All deadlines in the Project Decision Schedule shall
8 be consistent with the statutory obligations of Federal agen-
9 cies governed by such Schedule.

10 (d) Except as provided in subsection (c) above and in
11 section 210, no deadline established under this section or ex-
12 tension granted under subsection (e) of this section may result
13 in the total time for agency action exceeding nine months
14 beginning from the date on which notice appears in the Fed-
15 eral Register of an order designating the proposed energy
16 facility as a priority energy project.

17 (e) Notwithstanding any deadline or other provision of
18 Federal law, the deadlines imposed by the Project Decision
19 Schedule shall constitute the lawful decisionmaking deadlines
20 for reviewing applications filed by the priority energy project.

21 (f) Upon the petition of any agency with authority to
22 approve or disapprove any application, or of any priority
23 energy project, the Secretary may review any procedure,
24 extend any deadline, or modify in any other way, the Project
25 Decision Schedule at any time prior to within ninety days

1 after publication of the Project Decision Schedule: *Provided*,
2 That no extension shall be granted unless the Secretary de-
3 termines that such agency or priority energy project has ex-
4 ercised all due diligence in attempting to comply with the
5 Schedule and that it would be impracticable for the agency to
6 reach a decision or complete the required action within the
7 specified time.

8 DELEGATION OF DECISION AUTHORITY TO THE

9 PRESIDENT

10 SEC. 208. If a deadline on the Project Decision Sched-
11 ule for a final decision or action by a Federal agency has
12 elapsed and such agency has not made the decision or per-
13 formed the required action, the President shall make the de-
14 cision or perform the action within sixty days in lieu of the
15 Federal agency. The President shall not make a decision pur-
16 suant to this section unless there has been notice and an
17 opportunity for public comment on such decision. The deci-
18 sion of the President pursuant to this section shall be final.

19 SEC. 209. (a) In the event that a Federal agency or a
20 priority energy project desires an extension of any deadline
21 then the Federal agency may request an extension from the
22 President of not longer than one hundred and twenty days.

23 (b) In making his decision under this section, the Presi-
24 dent is to consider the purposes of this title, the national need
25 for speed in completion of the priority energy project, and

1 such other factors as the President considers relevant. The
2 President shall not grant an extension unless he determines
3 that the agency or the project requesting the extension has
4 exercised all due diligence in attempting to comply with the
5 schedule and that it would be impracticable for the agency to
6 reach a decision or complete the required action within the
7 specified time.

8 (c) The President shall make and shall publish his deci-
9 sion in the Federal Register within thirty days from the re-
10 ceipt of the request for an extension. The decision of the
11 President shall be final.

12 (d) No more than one extension may be granted by the
13 President under this section.

14 CERTIFICATION OF COMPLETED FEDERAL AGENCY REVIEW

15 SEC. 210. (a) If the Secretary determines that all Fed-
16 eral agency actions and approvals necessary to the comple-
17 tion of a priority energy project have been granted, the Sec-
18 retary shall certify the same to the project. Such certification
19 shall indicate the expiration date of any Federal approvals
20 that have been granted to the project.

21 (b) A certificate issued by the Secretary under subsec-
22 tion (a) of this section shall constitute conclusive evidence in
23 any judicial or executive proceeding that all necessary Feder-
24 al permits have been granted for the duration specified on the
25 certificate.

1 STATE COOPERATION AND INFORMATION

2 SEC. 211. (a) The Secretary shall notify the Governor
3 of any State within which any portion of a priority energy
4 project would be located and shall request the Governor to
5 supply—

6 (1) a compilation of significant actions required by
7 the State and local governments before the priority
8 energy project can be completed;

9 (2) a compilation of significant actions required of
10 the applicant before a final decision can be made;

11 (3) a schedule for completing the actions listed in
12 subsection (a) of this section; and

13 (4) all necessary application forms which must be
14 completed by the applicant before such approval can be
15 granted.

16 (b) The Secretary may provide any assistance author-
17 ized by law to assist State and local authorities in complying
18 with requests for cooperation from the Secretary.

19 DECISION SCHEDULES FOR STATE AND LOCAL

20 AUTHORITIES

21 SEC. 212. (a) The Secretary shall transmit to the prior-
22 ity energy project all information received from State and
23 local governments pursuant to requests from the Secretary
24 under section 212.

1 (b) The Secretary, after consultation with State and
2 local authorities, shall propose a decision schedule to assist
3 State and local authorities in coordinating their activities
4 with actions by the Federal Government.

5 (c) The Secretary may participate or intervene in the
6 proceeding of any State or local agency which permits such
7 participation or intervention in order to request such agency
8 to adopt procedures recommended by the Secretary.

9 (d) The Secretary shall keep apprised of the processing
10 of applications for priority energy projects by State and local
11 governments. If the Secretary determines that a priority
12 energy project is being delayed or threatened with delay by
13 the inability or unwillingness of any State or local govern-
14 ment to implement a schedule for timely review and decision,
15 the Secretary shall notify the Governor of such State and
16 transmit to the Congress a statement describing the delay
17 and recommending action to alleviate or prevent the delay.

18 TITLE III—JUDICIAL REVIEW AND

19 MISCELLANEOUS PROVISIONS

20 PRECEDENCE OVER OTHER LAWS

21 SEC. 301. Notwithstanding any other provisions of law,
22 the actions of Federal officers or agencies pursuant to this
23 Act shall not be subject to judicial review except as provided
24 in this title.

1 DECISION REGARDING PRIORITY ENERGY PROJECT STATUS

2 SEC. 302. A decision of the Secretary granting or deny-
3 ing an order designating a proposed energy facility as a prior-
4 ity energy project shall not be subject to judicial review
5 under any law except as required by the Constitution of the
6 United States.

7 OTHER ACTION PURSUANT TO THIS ACT

8 SEC. 303. (a) Except as provided in section 302, claims
9 alleging that an action taken pursuant to this Act will deny
10 rights under the Constitution of the United States, or that an
11 action is in excess of statutory jurisdiction, authority, or limi-
12 tations, or short of statutory right may be brought not later
13 than the sixtieth day following the date of such action, except
14 as required by the Constitution of the United States.

15 (b) For the purposes of this Act, any action by any Fed-
16 eral agency or officer relating to a priority energy project
17 shall constitute an action pursuant to this title.

18 TIME BAR: JURISDICTION OF THE COURTS OF APPEALS

19 SEC. 304. (a) Any claim arising out of action pursuant
20 to this Act shall be barred unless a complaint is filed prior to
21 the expiration of the time limits prescribed by this title.

22 (b) Any such complaint shall be filed in the United
23 States court of appeals for the circuit in which the priority
24 energy project or the most significant portion thereof would
25 be located. Such court shall act as a special court and shall

1 have exclusive original jurisdiction to determine such pro-
2 ceeding in accordance with procedures hereinafter provided,
3 and no other court of the United States, of any State, terri-
4 tory, or possession of the United States, or of the District of
5 Columbia, shall have original jurisdiction of any such claim in
6 any proceeding instituted prior to, or on, or after the date of
7 enactment of this Act.

8 (c) Any such proceeding shall be assigned for hearing
9 and completed at the earliest possible date, shall, to the
10 greatest extent practicable, take precedence over all other
11 matters pending on the docket of the court at that time, and
12 shall be expedited in every way by such court and such court
13 shall render its decision relative to any claim within ninety
14 days from the date such claim is brought unless such court
15 determines that a longer period of time is required to satisfy
16 requirements of the United States Constitution.

17 SUPREME COURT REVIEW

18 SEC. 305. (a) The Supreme Court shall have exclusive
19 authority to review any interlocutory judgment or order of
20 the court of appeals pursuant to this title and the appellant
21 must file a petition for certiorari or a certification as provided
22 in section 1254 of title 28, United States Code within fifteen
23 days after the decision of the court of appeals or his appeal
24 shall be barred.

1 (b) Any review by the Supreme Court shall be assigned
2 for hearing and completed at the earliest possible date.

3 EFFECTIVE DATE

4 SEC. 306. The provisions of this Act shall become effec-
5 tive thirty days after the date of enactment of this Act.

6 EXPIRATION OF AUTHORITY

7 SEC. 307. The Secretary's authority under section 203
8 shall expire seven years after the date of enactment of this
9 Act. Notwithstanding the previous sentence, the provisions of
10 the Act shall continue to be applicable to all energy facilities
11 designated as priority energy projects prior to the expiration
12 of the Secretary's authority under section 203.

96TH CONGRESS
1ST SESSION

H. R. 4862

To set forth a national program for the full development of energy supply, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 19, 1979

Mr. DINGELL introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs and Interstate and Foreign Commerce

A BILL

To set forth a national program for the full development of energy supply, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 TITLE I—AMENDMENTS TO ENERGY POLICY
4 AND CONSERVATION ACT

5 ENCOURAGEMENT OF DOMESTIC SYNTHETIC FUEL
6 PRODUCTION

7 SEC. 101. (a) Title I of the Energy Policy and Conser-
8 vation Act (42 U.S.C. 6201 and following) is amended by
9 adding at the end thereof the following new part:

1 “PART C—SYNTHETIC FUEL PRODUCTION

2 “ENCOURAGEMENT OF DOMESTIC COMMERCIAL

3 SYNTHETIC FUEL PRODUCTION

4 “SEC. 171. (a) In order to encourage the domestic com-
5 mercial development and production of synthetic fuels and
6 synthetic chemical feedstocks and to reduce dependence on
7 foreign supplies of energy resources, it is declared to be a
8 goal of the Nation to have, beginning five years after the date
9 of the enactment of this Act, domestic commercial production
10 of synthetic fuels and synthetic chemical feedstocks at a daily
11 rate equivalent to 500,000 barrels of crude oil.

12 “(b) If the President determines that in the absence of
13 the exercise of authority under this section it would be un-
14 likely that the national goal established under subsection (a)
15 would be attained, the President shall, in accordance with the
16 provisions of this section and other applicable provisions of
17 law—

18 “(1) enter into contracts to purchase or commit to
19 purchase synthetic fuels, synthetic chemical feedstocks,
20 or both, to the extent necessary to assure the attain-
21 ment of that goal, and

22 “(2)(A) provide that such fuels and feedstocks, be
23 used to meet the Government’s fuel and chemical feed-
24 stock requirements, to the extent the President deter-
25 mines appropriate, or be transferred to and stored in

1 the Strategic Petroleum Reserve in accordance with
2 the provisions of this Act; or

3 “(B) with respect to such fuels and feedstock as
4 are not to be stored under subparagraph (A), exercise
5 the option under the contract involved not to take de-
6 livery of such fuel or feedstocks, as provided under
7 subsection (c)(4). In the case of any synthetic fuel or
8 synthetic chemical feedstock which is not appropriate
9 for storage in the Strategic Petroleum Reserve, the
10 President may provide for the exchange of such fuel or
11 feedstock for any petroleum product appropriate for
12 storage in such Reserve and may, under paragraph
13 (2)(A), transfer to and store in such Reserve any petro-
14 leum product acquired in such exchange.

15 “(c)(1) Subject to the limitations of this subsection and
16 subsection (f), such contracts to purchase or commit to pur-
17 chase shall be for such quantities, for such periods, and on
18 such terms and conditions, as the President determines will
19 assure attainment of the national goal established in subsec-
20 tion (a).

21 “(2) Any such contract may be entered into only—

22 “(A) before October 1, 1985, and

23 “(B) to the extent provided, without fiscal year
24 limitation, in appropriation Acts enacted after the date
25 of the enactment of this section.

1 “(3)(A) The price at which the President contracts to
2 purchase or commit to purchase under any such contract may
3 not exceed 110 percent of the then current weighted average
4 landed cost of a comparable petroleum-derived fuel or feed-
5 stock imported into the United States, as determined by the
6 Secretary of Energy. The value of any entitlement provided
7 under the regulation under section 4(a) of the Emergency
8 Petroleum Allocation Act of 1973 shall be disregarded for
9 purposes of this paragraph.

10 “(B) For purposes of this section, the President may
11 enter into any contract with a price higher than that provided
12 in subparagraph (A) if and to the extent the President deter-
13 mines, after notice in the Federal Register and opportunity
14 for public comment of not less than sixty days, that the
15 higher purchase price under that contract is necessary in
16 order to attain the national goal established in subsection (a).

17 “(4) Any contract for such purchases or commitments to
18 purchase shall provide that the President would have the
19 right, in accordance with terms and conditions set forth in the
20 contract, to refuse to take delivery of all or a portion of the
21 synthetic fuels and synthetic chemical feedstocks produced
22 under the contract and to pay the producer involved an
23 amount equal to the amount by which the price specified in
24 the contract for the fuel or feedstock involved exceeds the
25 market price (as determined by the Secretary of Energy) for

1 such fuel or feedstocks on the delivery date specified in the
2 contract.

3 “(5)(A) Except as provided in subparagraph (B), any
4 purchase or commitment to purchase synthetic fuels or syn-
5 thetic chemical feedstocks under this section, shall be made
6 by sealed competitive bidding.

7 “(B) In any case in which no such bids are submitted to
8 the President or the President determines that no such bids
9 have been submitted which are acceptable to the President,
10 the President may negotiate contracts for such purchases and
11 commitments to purchase if the President publishes notice in
12 the Federal Register of the intent to do so together with a
13 statement of the reasons for such action.

14 “(6)(A) The President shall exercise the authority under
15 this section in a manner designed to assure (i) that diversified
16 sources of supply of synthetic fuels and synthetic chemical
17 feedstocks are established and maintained in the United
18 States, (ii) that such sources of supply would be reliable in
19 the event of a foreign energy supply interruption, and (iii) to
20 the maximum extent practicable, that supplies from such
21 sources would replace, directly or indirectly, imported crude
22 oil or refined petroleum products.

23 “(B) In no event may any contract be awarded to any
24 person if the quantity of synthetic fuels and synthetic chemi-
25 cal feedstocks contracted for by the President (pursuant to

6

1 this section or under any other authority) with that person or
2 any affiliate of such person would exceed over any period the
3 daily equivalent of 100,000 barrels of crude oil.

4 “(7) The President may enter into any contract under
5 this section for synthetic fuel or synthetic chemical feedstock
6 only if the President determines that the fuel or feedstock
7 involved are to be produced from facilities—

8 “(A) which are located within the United States,

9 “(B) which have been placed in commercial oper-
10 ation after the date of the enactment of this Act, and

11 “(C) for which no grant, loan, loan guarantee, or
12 other similar financial assistance has been provided
13 that utilizes funds derived from the Treasury.

14 “(d) If deliveries of fuels or feedstocks are stored under
15 subsection (b)(2)(A), the agencies involved shall pay the sup-
16 plier, from funds generally appropriated to such agencies for
17 fuels and feedstocks, for the portion of the contract price
18 which does not exceed the fair market price for the fuel and
19 feedstock involved, as determined by the Secretary of
20 Energy. Any amount owed because of the contract price ex-
21 ceeding the fair market price shall be paid by the President
22 from funds appropriated for such purpose under subsection
23 (h).

1 “(e) The President may contract for such storage, proc-
2 essing, refining, and other related activities as may be re-
3 quired under subsection (b)(2).

4 “(f) Any exercise of authority under this section shall be
5 consistent with applicable environmental, conservation, fuel
6 conversion, and antitrust policies of the United States, and
7 shall not diminish or hamper activities or policies designed to
8 promote the exploration and development of domestic sources
9 of crude oil and natural gas, and the development of other
10 energy resources (including renewable energy resources).

11 “(g) Beginning one year after the effective date of this
12 section, and annually thereafter, the President shall submit a
13 report to the Congress on actions taken under this section,
14 together with recommendations for legislation as the Presi-
15 dent considers appropriate. Each such report shall identify
16 the persons to whom contracts have been awarded under this
17 section, together with information indicating the degree of
18 foreign ownership or control of such person.

19 “(h) There is authorized to be appropriated
20 \$2,000,000,000 to make payments in accordance with sub-
21 sections (c)(4), (d), and (e) for the fiscal year ending Septem-
22 ber 30, 1981. To the extent provided in appropriation Acts,
23 such funds shall remain available until expended.

24 “(i) For the purposes of this section—

1 “(1) The terms ‘synthetic fuels’ and ‘synthetic
2 chemical feedstocks’ mean liquid or solid fuels and
3 chemical feedstocks, respectively, derived from coal,
4 shale, lignite, peat, solid waste, and other minerals or
5 organic materials (other than crude oil, natural gas, or
6 any derivative of either).

7 “(2) The term ‘United States’ means the several
8 States and the District of Columbia.

9 “(3) The term ‘person’ means any individual, cor-
10 poration, partnership, association, or any other group
11 of persons organized for a common business purpose.

12 “(4) The term ‘affiliate’, when used with respect
13 to any person, means any other person who controls, is
14 controlled by, or is under common control with such
15 person.

16 “(5) The crude oil equivalency of any synthetic
17 fuel or synthetic chemical feedstock shall be deter-
18 mined by reference to the quantity of crude oil general-
19 ly required to produce a comparable petroleum-derived
20 fuel or feedstock.”.

21 (b) The table of contents for such Act is amended by
22 inserting after the item relating to section 166 the following:

“PART C—SYNTHETIC FUEL PRODUCTION

“Sec. 171. Encouragement of domestic synthetic fuel production.”.

1 TITLE II—PRIORITY ENERGY PROJECT ACT

2 SEC. 201. This title may be cited as the "Priority
3 Energy Project Act of 1979".

4 PURPOSES

5 SEC. 202. The purposes of this title are—

6 (a) to provide for a coordinated, prompt, and sim-
7 plified process for Federal approval of non-nuclear
8 energy facilities, other than research and demonstration
9 facilities, that are determined to be in the national in-
10 terest;

11 (b) to expedite the Federal approval process with-
12 out expanding or diminishing existing substantive Fed-
13 eral authority over proposed energy facilities and with-
14 out unduly interfering with the present statutory au-
15 thorities and responsibilities of individual Federal agen-
16 cies; and

17 (c) to foster integration of local, State, and Feder-
18 al procedures for permitting, licensing, and approving
19 energy facilities which are determined to be in the na-
20 tional interest.

21 DEFINITIONS

22 SEC. 203. As used in this title the term—

23 (a) "approval" means any permit, license, lease,
24 right-of-way, or other grant issued by an agency of
25 Federal, State, or local government;

1 (b) "atomic energy" means all forms of energy
2 released in the course of nuclear fission or nuclear
3 transformation;

4 (c) "energy facility" means any physical structure,
5 including any equipment, building, mine, well, rig,
6 pipeline, transmission line, processing facility, transpor-
7 tation device, manufacturing facility, or installation
8 which will facilitate energy conservation exploration,
9 development, transportation, production, or commer-
10 cialization of any form of energy other than atomic
11 energy, including, but not limited to, any facility
12 owned or operated in whole or in part by Federal,
13 State, or local government, or any combination thereof;

14 (d) "Federal agency" means an executive agency
15 as defined in section 105 of title 5 of the United States
16 Code;

17 (e) "person" means any individual, cooperative,
18 partnership, corporation, association, consortium, unin-
19 corporated organization, trust estate, or any entity or-
20 ganized for a common business purpose, and any in-
21 strumentality of Federal, State, or local government;

22 (f) "priority energy project" means a project
23 which has been determined by the Secretary of Energy
24 to be in the national interest pursuant to his authority
25 under section 204 of this title;

1 (g) "project" means any plan, proposal, scheme,
2 or undertaking to build, install, or in any other way
3 produce an energy facility;

4 (h) "Secretary" means the Secretary of Energy;
5 and

6 (i) "State" means any of the fifty States, the Dis-
7 trict of Columbia, Puerto Rico, the Virgin Islands,
8 Guam, American Samoa, and the Commonwealth of
9 the Northern Mariana Islands.

10 AUTHORITY TO DESIGNATE PRIORITY ENERGY PROJECTS

11 SEC. 204. The Secretary of Energy is hereby author-
12 ized to designate by order a proposed energy facility as a
13 priority energy project pursuant to the procedures and crite-
14 ria provided in this title.

15 AUTHORITY TO APPLY FOR PRIORITY STATUS

16 SEC. 205. (a) Any person planning or proposing an
17 energy facility may apply to the Secretary of Energy for an
18 order designating such facility as a priority energy project.
19 Such person shall include such detailed information as the
20 Secretary may require by rule concerning such facility to
21 enable the Secretary to make such designation.

22 (b) The Secretary shall publish notice of the filing of the
23 designation request, together with a description thereof in the
24 Federal Register; and interested persons shall be afforded

1 forty-five days thereafter within which to submit written
2 comments for the Secretary's consideration.

3 PROCEDURE AND CRITERIA FOR DESIGNATING PRIORITY
4 ENERGY PROJECTS

5 SEC. 206. Not later than ninety days after receipt of an
6 application authorized under the previous section, the Secre-
7 tary shall determine whether the proposed energy facility is
8 of sufficient national interest to be designated a priority
9 energy project and shall publish his decision in the Federal
10 Register. In making such a determination the Secretary shall
11 consider—

12 (a) the extent to which the facility would reduce
13 the Nation's dependence upon imported oil;

14 (b) the magnitude of any adverse environmental
15 impacts associated with the facility and the existence
16 of alternatives that would have fewer adverse impacts;

17 (c) the extent to which the proposed facility would
18 make use of renewable energy resources;

19 (d) the extent to which the proposed facility would
20 promote energy conservation;

21 (e) the extent to which the proposed facility would
22 contribute to the development of new production or
23 conservation technologies and techniques;

24 (f) the time that would normally be required to
25 obtain all necessary Federal approvals and the adverse

1 impacts that would result from delay in completion of
2 the proposed facility;

3 (g) the degree of specificity in describing the pro-
4 posed facility in the application; and

5 (h) the public comments received concerning such
6 facility.

7 EXTENSION OF DEADLINES

8 SEC. 207. The Secretary may extend the deadline for
9 receiving public comments under section 205(b) the time for
10 ruling on an application for priority energy project status
11 under section 206, and the time for Federal agencies to
12 submit information under section 209 if such application is
13 incomplete or if more time is necessary to afford interested
14 parties a reasonable time to comment.

15 EARLY ACTION REQUIREMENT

16 SEC. 208. The Secretary shall encourage prospective
17 applicants under section 205 to contact the Office established
18 under section 221 and to file applications for any necessary
19 Government actions or approvals with the appropriate agen-
20 cies as soon as possible in order that any eventual action or
21 decision may be expedited. The Secretary shall consider any
22 failure to contact the Office for Priority Energy Projects in a
23 timely fashion in making his determination on an application
24 under section 205.

1 FEDERAL AGENCIES REQUIRED TO SUBMIT INFORMATION

2 SEC. 209. Not later than forty-five days after notice ap-
3 pears in the Federal Register of an order designating a pro-
4 posed energy facility as a priority energy project, any Feder-
5 al agency with authority to grant or deny any approval or to
6 perform any action necessary to the completion of such proj-
7 ect or any part thereof, shall transmit to the Secretary of
8 Energy—

9 (a) a compilation of all significant actions required
10 by such agency before a final decision on any neces-
11 sary approval(s) can be rendered;

12 (b) a compilation of all significant actions required
13 of the applicant before a final decision by such agency
14 can be made;

15 (c) a tentative schedule for completing actions
16 listed in subsections (a) and (b) of this section;

17 (d) all necessary application forms which must be
18 completed by the priority energy project before such
19 approval can be granted; and

20 (e) the amount of funds and personnel available to
21 such agency to conduct such actions and the impact of
22 such schedule on other applications pending before
23 such agency.

1 PROJECT DECISION SCHEDULE ESTABLISHED BY THE
2 SECRETARY

3 SEC. 210. (a) Not later than sixty days after designating
4 a proposed energy facility as a priority energy project, the
5 Secretary, in consultation with the appropriate Federal,
6 State, and local agencies, shall publish in the Federal Regis-
7 ter a Project Decision Schedule containing deadlines for all
8 Federal actions relating to such project. The Project Decision
9 Schedule shall clearly identify the order in which licenses,
10 permits and other Government approvals must be obtained
11 by the priority energy project before such project can be com-
12 pleted. The Project Decision Schedule may also suggest con-
13 current review of applications and joint hearings by agencies
14 of Federal, State, and local governments.

15 (b) The deadlines in the Project Decision Schedule shall
16 be consistent with the deadlines submitted to the Secretary
17 under section 209 unless the Secretary determines that dif-
18 ferent deadlines are essential in order to expedite and coordi-
19 nate Government review.

20 (c) All deadlines in the Project Decision Schedule shall
21 be consistent with the statutory obligations of Federal agen-
22 cies governed by such Schedule.

23 (d) Upon the petition of any agency with authority to
24 approve or disapprove any application, or of any priority
25 energy project, the Secretary may revise any procedure,

1 extend any deadline, or modify in any other way, the Project
2 Decision Schedule at any time prior to completion of such
3 project: *Provided*, That no extension shall be granted unless
4 the Secretary determines that such agency or priority energy
5 project has exercised all due diligence in attempting to
6 comply with the Schedule and that it would be impracticable
7 for the agency to reach a decision or complete the required
8 action within the specified time, taking into consideration the
9 availability of personnel and funds for such purpose.

10 DELEGATION OF DECISION AUTHORITY TO THE

11 PRESIDENT

12 SEC. 211. If a deadline on the Project Decision Sched-
13 ule for a final decision or action by a Federal agency has
14 elapsed and such agency has not made the decision or per-
15 formed the required action, the President may make the deci-
16 sion, or perform the action in lieu of the Federal agency, in
17 accordance with applicable provisions of law. The President
18 shall not make a decision pursuant to this section unless
19 there has been notice and an opportunity for public comment
20 on such decision. The decision of the President pursuant to
21 this section shall be final under applicable provisions of law.

22 EXCEPTIONS TO PROCEDURES REQUIRED BY OTHER

23 LEGISLATION

24 SEC. 212. In circumstances of exceptional national
25 need, the President may establish a deadline for Federal

1 agency action in a Project Decision Schedule that is shorter
2 than the minimum period required by the Secretary: *Pro-*
3 *vided*, That such deadline shall not require a final agency
4 action or decision less than one year after the initial Project
5 Decision Schedule has been published in the Federal
6 Register.

7 CERTIFICATION OF COMPLETED FEDERAL AGENCY REVIEW

8 SEC. 213. (a) If the Secretary determines that all Fed-
9 eral agency actions and approvals necessary to the comple-
10 tion of a priority energy project have been granted, the Sec-
11 retary shall certify the same to the project. Such certification
12 shall indicate the expiration date of any Federal approvals
13 that have been granted to the project.

14 (b) A certificate issued by the Secretary under subsec-
15 tion (a) of this section shall constitute conclusive evidence in
16 any judicial or executive proceeding that all necessary Feder-
17 al permits have been granted for the duration specified on the
18 certificate.

19 REQUEST FOR STATE COOPERATION AND INFORMATION

20 SEC. 214. (a) The Secretary shall notify the Governor
21 of any State within which any portion of a priority energy
22 project would be located and shall request the Governor to
23 supply—

1 (1) a compilation of significant actions required by
2 the State and local governments before the priority
3 energy project can be completed;

4 (2) a compilation of significant actions required of
5 the applicant before a final decision can be made;

6 (3) a tentative schedule for completing the actions
7 listed in subsection (a) of this section; and

8 (4) all necessary application forms which must be
9 completed by the applicant before such approval can be
10 granted.

11 (b) The Secretary may provide any assistance author-
12 ized by law to assist State and local authorities in complying
13 with requests for cooperation from the Secretary.

14 DECISION SCHEDULES FOR STATE AND LOCAL
15 AUTHORITIES

16 SEC. 215. (a) The Secretary shall transmit to the prior-
17 ity energy project all information received from State and
18 local governments pursuant to requests from the Secretary
19 under section 214.

20 (b) The Secretary, after consultation with State and
21 local authorities, shall propose a voluntary decision schedule
22 to assist State and local authorities in coordinating their ac-
23 tivities with actions by the Federal Government.

24 (c) The Secretary shall keep apprised of the processing
25 of applications for priority energy projects by State and local

1 governments. If the Secretary determines that a priority
2 energy project is being delayed or threatened with delay by
3 the inability or unwillingness of any State or local govern-
4 ment to implement a schedule for timely review and decision,
5 the Secretary shall notify the Governor of such State and
6 transmit to the Congress a statement describing the delay,
7 the causes thereof, and recommending actions to alleviate or
8 prevent the delay.

9 (d) The Secretary may participate or intervene in the
10 proceeding of any State or local agency which permits such
11 participation or intervention in order to request such agency
12 to adopt procedures recommended by the Secretary.

13 DECISION REGARDING PRIORITY ENERGY PROJECT STATUS

14 SEC. 216. A decision of the Secretary granting or deny-
15 ing an order designating a proposed energy facility as a prior-
16 ity energy project or granting or denying an extension under
17 section 207 shall not be subject to judicial review.

18 OTHER ACTION PURSUANT TO THIS ACT

19 SEC. 217. Except as provided in section 216, claims
20 alleging that an action taken pursuant to this title will deny
21 rights under the Constitution of the United States, or that an
22 action is in excess of statutory jurisdiction, authority, or limi-
23 tations, or short of statutory right may be brought not later
24 than the sixtieth day following the date of such action.

1 TIME BAR; JURISDICTION OF THE COURT OF APPEALS

2 SEC. 218. (a) Any claim arising out of action pursuant
3 to this title shall be barred unless a complaint is filed prior to
4 the expiration of the time limits prescribed by section 217.

5 (b) Any such complaint shall be filed in the United
6 States court of appeals for the circuit in which the priority
7 energy project or the most significant portion thereof would
8 be located. Such court shall act as a special court and shall
9 have exclusive original jurisdiction to determine such pro-
10 ceeding in accordance with procedures hereinafter provided,
11 and no other court of the United States, of any State, terri-
12 tory, or possession of the United States, or of the District of
13 Columbia, shall have original jurisdiction of any such claim in
14 any proceeding instituted prior to or on or after the date of
15 enactment of this Act.

16 (c) Any such proceeding shall be assigned for hearing
17 and completed at the earliest possible date, shall, to the
18 greatest extent practicable, take precedence over all other
19 matters pending on the docket of the court at that time, and
20 shall be expedited in every way by such court and such court
21 shall render its decision relative to any claim within ninety
22 days from the date such claim is brought unless such court
23 determines that a longer period of time is required.

1 SUPREME COURT REVIEW

2 SEC. 219. (a) The Supreme Court shall have exclusive
3 jurisdiction to review any interlocutory judgment or order of
4 the court of appeals pursuant to this title and the appellant
5 must file a petition for certiorari or a certification as provided
6 in section 1254 of title 28, United States Code, within fifteen
7 days after the decision of the court of appeals or his appeal
8 shall be barred.

9 (b) Any review by the Supreme Court shall be assigned
10 for hearing and completed at the earliest possible date.

11 OFFICE FOR PRIORITY ENERGY PROJECTS WITHIN THE
12 DEPARTMENT OF ENERGY

13 SEC. 220. The Secretary shall establish an Office for
14 Priority Energy Projects within the Department of Energy
15 which shall assist the Secretary in the performance of his
16 duties under this title.

17 EFFECTIVE DATE

18 SEC. 221. The provisions of this title shall become effec-
19 tive ninety days after the date of enactment of this Act and
20 the provisions of Executive Order 12129 of April 5, 1979,
21 shall terminate.

22 EXPIRATION OF AUTHORITY

23 SEC. 222. The Secretary's authority under section 204
24 shall expire seven years after the date of enactment of this
25 title. Notwithstanding the previous sentence, the provisions

- 1 of the title shall continue to be applicable to all energy facili-
- 2 ties designated as priority energy projects prior to the expira-
- 3 tion of the Secretary's authority under section 204.

Mr. DINGELL. The Chair is happy to announce that our first witnesses will be a panel comprising Dr. Carleton Scott, director, Environmental Service Department of Union Oil of California, representing the American Petroleum Institute, and Mr. Chris Farrand, director of corporate planning for Peabody Coal Co. Mr. Farrand is appearing in place of Robert Wallace, vice president of corporate planning.

We welcome you gentlemen today. If you have any associates you wish to be present at the witness table, we will be more than pleased to have them join you. If you will each identify yourself we will recognize you in whatever order you wish.

STATEMENTS OF CARLETON B. SCOTT, DIRECTOR, ENVIRONMENTAL SCIENCES DEPARTMENT, UNION OIL CO. OF CALIFORNIA, ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE; AND CHRIS FARRAND, DIRECTOR, CORPORATE PLANNING, PEABODY COAL CO., ON BEHALF OF THE NATIONAL COAL ASSOCIATION

Mr. SCOTT. My name is Carleton Scott. I am director of the Environmental Sciences Department of the Union Oil Co. of California. I am here to testify on behalf of the American Petroleum Institute, a national trade association representing all segments of the domestic petroleum industry, regarding the so-called fast track priority energy project legislation now before your subcommittee.

Mr. Chairman, we wish to commend you and this subcommittee for the interest you have shown and are showing toward developing sound national energy policies. Particularly, we share with you a very real concern that steps be taken to reduce the often agonizingly long time frame now required to obtain the necessary governmental permits, licenses and approvals for construction and operation of energy facilities.

We believe that remedial action is long overdue, and we will be happy to work with you and the subcommittee staff in finalizing the language of legislation that will help assure expediting the completion of energy projects deemed to be in the national interest.

In that spirit, we would like to offer several suggestions which we feel would make the Priority Energy Project Acts of title II, H.R. 4499 and 4573 even more effective in achieving the stated goal of providing for a coordinated, prompt and simplified process for Federal approval of energy facilities that are determined to be in the national interest.

FEDERAL-STATE-LOCAL GOVERNMENT RELATIONSHIP

Perhaps the most problem-causing area which these proposals address is that of defining the respective roles of Federal, State,

regional and independent quasi-governmental entities in the permitting of energy facilities in the national interest.

We recognize, as does this subcommittee, that the principles of States rights and home rule are deeply ingrained in the public consciousness, and rightfully so. Certainly these principles should be maintained to the maximum extent possible within the framework of attaining the goals of these bills.

The petroleum industry has long supported the general public policy that land-use decisions, other than national-interest decisions, should be made at the most appropriate level of local, county, or State government.

It is unfortunate, however, that some important projects which have essentially received Federal approval have been delayed or terminated by action or inaction at the State, regional, local, or independent agency level despite the clear national interest involved.

With this in mind, we would recommend that the priority energy project legislation reported out of this subcommittee be amended to include language affirming the preeminence of the Federal Government in energy matters that relate to interstate commerce, national interest and national security, as follows:

One, the "Purposes" section of these bills should be rewritten to insure that energy facility siting decisions reside with the level of government authority commensurate with the breadth of interests in a project. Specifically:

(a) Local authorities should continue to have jurisdiction over land-use decisions affecting only that locality, with State monitoring of such decisions and enforcement of compliance with State policies and standards.

(b) State authorities should have ultimate jurisdiction over siting decisions which will impact more than one locality—regional impacts—or which involve matters of statewide concern.

(c) Federal authorities should have primary jurisdiction over multistate or national interest projects and should assist in expeditious and coordinated Federal, State, and local permit procedures and conflict resolution.

Two, it should be made clear that this legislation will be limited in application to only those energy projects affecting interstate commerce, the national security or the national interest.

Three, the definition of "State" should refer to all State and local governments, regional authorities, and special purpose jurisdictional entities.

We believe that inclusion of such language will help to establish the necessary authority for strong Federal oversight of specific non-Federal governmental action or inaction relative to priority energy projects deemed to be in the national interest. It will also include oversight over appropriate regional and independent agencies which have not been specifically included in this proposed legislation or in most past legislation and thus have been exempt from the application of that legislation.

Also, in the area of Federal actions to assure that the States and other governmental bodies do act, if you find it constitutionally possible we would suggest that the language of title II of H.R. 4499 and H.R. 4573 before you might be strengthened by requiring

rather than requesting compliance at the State and subordinate government level in reference to providing the necessary documents, permits and review procedures on a timely basis.

While we find that many States and local governments do act with reasonable speed, it takes action or inaction by only one recalcitrant or indecisive agency among the many involved to cause significant delay. Needless to say, in the case where the governmental units at all levels are in agreement, intervention in the normal handling and processing of licenses and permits would not be required.

We were particularly heartened by President Carter's recognition, in his address to the Nation last Sunday, of the need to cut through the redtape, the delays and endless roadblocks to completing key energy projects and by his assessment that, "We will protect the environment, but when this Nation critically needs a refinery or a pipeline we will build it."

We will necessarily withhold final judgment on his approach to resolving these problems through an Energy Mobilization Board until we have had an opportunity to analyze the establishment, composition, and implementation of that Board. We do concur with the President that the maze of Federal, State, and local regulations has worked against the national interest in creating unwarranted roadblocks to energy facility siting.

In the meantime, however, we would encourage this subcommittee to exercise its legislative judgment in incorporating into the proposals before it language to ensure that necessary energy facilities can be built in a timely and cost-effective manner. An essential element in accomplishing this is the expediting of the permitting process.

ENVIRONMENTAL OFFSETS AND COMPLIANCE

The second area where we feel our experience may be helpful to this subcommittee is that of environmental problems associated with permit acquisitions for energy facilities. We recognize that the petroleum industry—indeed any industry—undertaking the siting and construction of major facilities has a responsibility to do so within the framework of reasonable and necessary environmental considerations. There is little quarrel with the need to install necessary pollution controls but there is serious concern about unjustifiably high ratios of emissions reduction offsets.

Economic cost-benefit analysis plays an important part in corporate decisions to build any energy facility. Unfortunately projects that have been in the national interest have had to be canceled because time delays have rendered them no longer cost-effective.

We feel that it should be understood that there is a financial limit on the offsets that could be demanded during the negotiations or subsequent to those agreements. Every additional cost of such offsets must be passed on to the consumer in the form of higher prices. It is in the public interest, therefore, to permit only those offsets that are truly essential.

Further, it must be recognized that some priority energy projects simply may not be able to find any offsets, and this legislation must take such situations into consideration.

These bills should also recognize that there is no major energy project that does not impose some burden or risk of adverse environmental impacts. Perhaps the criteria for Presidential or Cabinet-level designations of priority energy projects should include a finding that some adverse environmental impacts are acceptable where the national interest in energy facility siting can be served.

Further, the burden of proof in the mitigation of major facility impacts should shift from the applicant to the States when it has been demonstrated by the applicant by a preponderance of evidence that the project will meet all applicable Federal environmental standards and that the real problem is that more stringent State standards pose unreasonable and/or insurmountable roadblocks to the approval of all necessary permits.

Our concern also extends to the problem of the general failure of States to develop and receive Environmental Protection Agency approval of State implementation plans (SIP's) to meet air quality standards by July 1 of this year, as required by law. These plans are to apply to the construction of major new sources, including major energy facilities of national interest.

Under the Clean Air Act, if SIP's are not revised and approved by EPA, EPA could, under certain circumstances, effect a halt in construction of major new sources. Therefore it should be made clear in the language of this legislation that priority energy facilities shall be deemed in compliance with clean air standards when they have complied with the emissions offsets or other requirements agreed upon in the licensing and permitting processes.

TIMETABLES

The public interest benefits from the predictability and effectiveness of a closely monitored and reasonable siting process. Strong Federal jurisdiction over the entire permitting process for national interest projects can help to protect that public interest. In this area we would recommend for your consideration that the timetable could be strengthened by:

One, changing the language in title II of H.R. 4499 and H.R. 4573 dealing with procedure and criteria for designating priority energy projects so that the determining authority may designate a particular project on the basis of any, some or all of the criteria listed in sections 206 (a) through (h) and 203 (a) through (h), respectively. Under these sections as they now read, the law could be interpreted to require that all of these criteria must be met;

Two, clarifying the period of deadline extension, section 207 of H.R. 4499, to make such extensions consistent with the intent of the accelerated time frame of title II. H.R. 4573 has gone far toward achieving an expedited Federal project decision schedule by establishing a 9-month deadline for agency action—with only a 120-day extension allowable—and by the 60-day deadline for Presidential decisionmaking.

Three, requiring, rather than suggesting, concurrent review of applications and joint hearings by agencies of Federal, State and local governments; and

Four, clarifying that the Secretary's priority energy project determination regarding the magnitude of adverse environmental

impacts in sections 206(b) and 203(b), respectively, would be made on the basis of an environmental impact assessment, the scope of which would be limited to that which is necessary to aid the Secretary in his determination but which clearly would not constitute a full environmental impact statement under the terms of the National Environmental Policy Act of 1969.

An important element in the secretarial designation procedure for priority energy projects contained in H.R. 4573 is the provision in section 204 whereby the Secretary's determination does not constitute a major Federal action under the terms of the National Environmental Policy Act of 1969—NEPA.

This element appears to be missing from title II of H.R. 4499. Without such a provision the purpose of an expedited Federal approval process could be completely frustrated before a project designation could occur, because of legal challenges asserting that the Secretary would be required to base his determination on a full environmental impact statement which could take 1 year or more to complete.

If an energy project is found to be in the national interest, it seems reasonable to expect that all levels of government should be interested in expediting the licensing, permitting, and review procedures. However, this has not always been the case in the past.

In fact, the procedures mandated by the many laws enacted to protect the Nation's environmental, historical, cultural, and esthetic values have been used frequently as instruments of delay by those seeking to attain very local objectives or by interest groups intent on stopping all major development. We feel the changes I have mentioned could help correct this problem.

We would suggest, also, that the language of this legislation clearly state that the timetable established should include all necessary permitting and licensing actions—from the initiation of the energy project through its completion. It would be unfortunate if, having attained the starting permits, at some later point in time additional demands could be made that would delay or perhaps terminate the project prior to its completion.

RESOLVING CONFLICTS

Finally, we would like to comment on the proposed method for resolving conflicts among Federal agencies having jurisdiction over actions pertaining to energy projects covered by this legislation and among Federal and non-Federal agencies with similar conflicts.

Preeminence of the Federal Government in decisionmaking on energy matters that relate to interstate commerce, national interest or national security is essential. However, it is important to note that Federal intervention in the normal handling and processing of a majority of energy industry licenses and permits is not anticipated.

The need for further strengthening amendments to these bills is underscored by the results of a recent, although not exhaustive, survey that API conducted of several projects of undeniable national interest that have been canceled or that are now considered uncertain due to excessive permit delays.

The primary finding that we would like to pass on to this committee is that it is not clear that any of these projects could necessarily have been made to happen if the provisions of these bills had been in force even over the last decade.

There are a number of pieces of legislation that have come forward in the last several weeks that contain a variety of concepts that merit your appraisal, including the several Energy Mobilization Board proposals recently introduced. We would urge this subcommittee to sort out the various ideas contained in the legislative proposals and then assemble a bill with the best combination of complementary ingredients.

Resolving conflicts between the Federal and State levels, of course, prevents a difficult and sensitive problem given the constitutional concept of States rights and the public perception of the Federal-State relationship. One possible solution to the problem is the concept of the waiver or preemption of State laws under the aegis of the commerce and national security clauses. Such waiver or preemption would be equally applicable to conflicting Federal laws and regulations as well.

Another approach that might be used to bridge the Federal-State jurisdictional issue would be to have an appeal from an adverse project decision at the State level carried to the appropriate Federal regional council for resolution when a solution is within the power of that group. Early involvement of these Federal regional councils in major energy projects may also be constructive in avoiding potential conflicts.

However, it is not our intention to suggest that these options to reduce legislative and regulatory constraints are the only solutions which the subcommittee should examine. The high level of interest that has been shown by committees of both Houses of Congress has resulted in a number of creative initiatives. They should all be considered in order to glean the best suggestions to achieve a final, workable bill.

CONCLUSION

Mr. Chairman, we feel that a mechanism for expediting procedures connected with the approval and licensing of priority energy projects is essential to the national interest, and again we commend the subcommittee on its thoughtful approach to this problem by its consideration of title II of H.R. 4499 and H.R. 4573. It is our belief that, as the process of approval goes on, there should be open and continuing consultation between the national and State levels of government and that there should be minimal interference with the concept of States rights.

We look forward to working with this subcommittee and its staff in any manner that you feel would be productive and, of course, I will be happy to try to respond to any questions about specifics that you may have at this time.

Mr. DINGELL. Mr. Scott, the committee thanks you for your very helpful testimony and the time and thought that has gone into it. We appreciate your offer of help.

STATEMENT OF CHRIS FARRAND

Mr. FARRAND. For the record my name is Chris Farrand. I am director of Corporate Planning for the Peabody Coal Co. I am appearing today in behalf of the National Coal Association. I would like to make some general comments about our views on this bill and then we have six specific amendments which we would ask the committee to consider.

First, we support the concept embodied in these two bills before the committee today. We believe that the Government must be able to accelerate the process of approval of major energy projects. As we view it, these bills establish a system for exceptions to the normal procedural requirements of the numerous statutes, regulations, and guidelines which, in many cases, constitute a labyrinth for energy project application.

In time, we hope, the myriad laws and regulations themselves might be streamlined and clarified and made consistent so that those agencies administering those laws may process applications in a more timely fashion. In the meantime, however, we believe that the need for legislation such as this is pervasive and urgent and we applaud the sponsors of the bill and the actions of this subcommittee.

At some point in the future it may be argued that, rather than designating certain projects, all projects which have as their effect a reduction in importation of foreign oil should be classified as urgent and given priority consideration. It may come to the point very soon when we will not be considering individual projects on their merits but classes of projects.

With certain amendments that we would suggest and with the follow-on efforts that we urge this committee and other committees of Congress to consider with respect to the basic authorizing legislation, we do urge prompt action on this bill. We believe that the combination of this bill and action by other committees could constitute a framework in which you can approve projects and meet the emergency we now face.

Mr. Chairman, I would offer certain specific amendments for your consideration. The first amendment deals with components of projects. As it is now drafted, both of these bills consider a variety of projects which may be designated as priority by the Secretary but there appears to be no language authorizing the combinations of these projects.

It would seem ironic if a powerplant or a gasification plant were to be approved in accordance with a streamlined procedure only to have the mine which produces coal for that gasification plant or the transportation component or, in fact, the waste material disposal aspect of that project not considered.

We would, therefore, urge an amendment to section 102(c) of H.R. 4573 or 203(c) of H.R. 4499 which provides that any combination of those projects may be considered as priority.

Second, we would urge deletion of the limitation in H.R. 4573 in which only six projects per year may be designated. First, we could argue that classes of projects might eventually have to be considered as priority. Second, the limitation does not recognize the various components of the single energy stream, particularly with advanced technology.

If you separate out the mine, gasification plant, transportation, pipeline, and the disposal process, you may have used four or five of your allowable six priority projects in 1 year.

Finally, we have come, I believe, to a point where there may be seven, eight or a great deal more than six and it would be awkward at best to find arbitrary steps toward limiting projects which could be accelerated in a given year.

Third, we would ask that, under the criteria of projects or the findings that the Secretary may make in section 203 of H.R. 4573, projects which have as their effect reduction of gas consumption in large or major fuel-burning facilities may also be eligible for priority consideration.

We believe that, by not including gas as a consideration, the bill may, in effect, change the purposes or goals established in the Fuel Use Act of 1978. We urge that that category be added to those which may be considered.

Obviously we would agree that reduction in the importation of foreign oil is the primary consideration, but elimination of gas under large-size boilers should not be overlooked.

Fourth, we believe that some changes in the language regarding the National Environmental Policy Act should be made. I agree with Dr. Scott that, in cases where a full environmental impact statement cannot be completed in a timely fashion or on a schedule which complies with the one established by the Secretary, the agencies involved may substitute an environmental analysis review.

This is a procedure commonly used in many agencies today. It would save at least 6 months in the process of going from draft to final environmental impact.

Finally, we are concerned with respect to NEPA that, while H.R. 4573 exempts from NEPA the decision to designate a project, it does not appear to exempt the action to establish a decision schedule. Under some interpretation by the courts, the setting of a decision schedule may also be considered a major Federal decision significantly affecting the human environment and might be subject to court challenge. So we urge consideration of that change.

Fifth, with respect to State and local law, we understand your concern about the constitutional difficulties of possible usurpation of State law and regulation. We would urge as a minimum, however, that those State requirements which have been imposed pursuant to Federal law might be subject to reassumption by the Federal Government.

You are no doubt familiar with certain aspects of the Clean Air Act and the Federal Water Pollution Control Act which specify that States must impose certain requirements that may or may not be more stringent than those required by the Federal Government itself. We feel that it would be an ironic gesture to accelerate the Federal process only to find that a State, in pursuing a Federal law, was not able to act in a timely fashion.

Certainly where there is a national interest involved in a project of significant size, we would urge that those State requirements pursuant to those Federal laws might be rescinded or at least the procedural requirements be assumed by the Federal Government.

We note, as you did in your opening statement, Mr. Chairman, the President's position with regard to the Federal effort to modify or act in lieu of State action on procedural matters. Obviously there is very little difference, when it comes to the State implementation plans, et cetera, between procedural and substantive issues.

We agree that that is possibly a constitutional problem, but nevertheless we would urge the committee to attempt to find a way around that and certainly to provide language withdrawing those requirements imposed pursuant to Federal law.

Finally, Mr. Chairman, with respect to judicial review, we find some difficulty in the provision in H.R. 4499 which requires the appeals court to act within a specified period of time. We would suggest your consideration of other means to get at the judicial review issue, such as limiting the class of litigants which may go to court.

We would also urge, as at least one of these bills has recognized, that the court of jurisdiction should be the court of appeals in the area in which the major components of the project are located.

Mr. Chairman, we would urge the committee to consider and accept these suggestions. We will certainly be happy to work with you and your staff to find appropriate language. We do have some suggestions for some of these amendments in terms of specific language.

I attached to my testimony certain examples of what I would call the real world involving difficulties in our industry in getting such a simple thing as a mine approved. Five years ago it took 3 to 5 months to get a mine permitted and under construction. Today we estimate that under current law it is a minimum of 21 months and an average of 3 years to get a mine approved.

We do not, at this time, consider a mine to be a project of major national significance, yet what we are trying to do is bring on coal mines to fire coal plants, which may in many cases have to buy power generated by imported oil. While at this point it may not be in the category you envision as a priority project, we would urge you not to overlook what appears to be the simple problem of getting some of the basic extractive projects under way. Thank you, Mr. Chairman.

[Testimony resumes on p. 102.]

[Mr. Farrand's prepared statement and attachment follow:]

STATEMENT OF

CHRIS FARRAND
DIRECTOR, CORPORATE PLANNING
PEABODY COAL COMPANY

REPRESENTING THE
NATIONAL COAL ASSOCIATION

ON
H.R. 4499
AND
H.R. 4573

BEFORE THE
ENERGY AND POWER SUBCOMMITTEE
INTERSTATE AND FOREIGN COMMERCE COMMITTEE
HOUSE OF REPRESENTATIVES

July 18, 1979

Mr. Chairman, Members of the Committee.

My name is Chris Farrand. I am Director of Corporate Planning for the Peabody Coal Company of St. Louis, Missouri. Today, I am appearing on behalf of the National Coal Association.

We have been asked to provide testimony on the provisions of H.R. 4499, Title II and H.R. 4573, the Priority Energy Project Act of 1979.

At the outset, I want to say that we in the coal industry are grateful for the opportunity to appear at these hearings and to express our concerns, not only about this legislation, but about the problems which this legislation addresses.

General Comments

Title II of H.R. 4499 and the provisions of H.R. 4573 each establish a coordinated and expedited procedure for gaining federal decisions of energy projects deemed to be of significant national interest.

The bills provide that, based on certain findings, the Secretary of Energy may declare energy projects to be of sufficient national interest to warrant expedited, priority treatment by all the various federal agencies from which approvals must be given. Once designated, such projects must be considered and decisions on approval rendered in accordance with a firm timetable or schedule established by the Secretary.

Title II would also authorize the Secretary to "short circuit" some of the more lengthy procedural requirements

for projects for which there is exceptional national need. In addition, the bills limit, but do not extinguish, rights of judicial review.

Mr. Chairman, the coal industry supports the concept embodied in these bills. We believe that the government must be able to accelerate the processes of approval for major energy projects. The bills basically establish a system for providing exceptions to the normal procedural requirements of the numerous statutes, regulations, and guidelines which constitute a labyrinth for energy project applicants. In time, we would hope that the myriad laws and regulations would themselves be streamlined, clarified, and made consistent, so that the procedural exceptions provided in this bill would no longer be necessary. When these bills are enacted, I would urge the Committee and the Congress to continue dealing with the procedural bottlenecks of existing statutes and regulations, so that all projects, but especially energy projects, can be considered in a timely and efficient manner. In the meantime, however, we believe the need for exceptions to the normal processes is urgent and pervasive, and we applaud the sponsors of these bills.

Mr. Chairman, the idea that certain energy projects might be of special national interest to be given priority treatment strikes us as an understatement. We would contend that any energy project which has as its effect the reduction

of our dependence on imported oil, regardless of its size, should be given such a priority, assuming that the project is economically viable and its environmental consequences are not out of proportion to its benefits.

We believe that the sense of urgency represented in these bills should be more broadly perceived, and that the current situation constitutes an emergency of major national proportions. We are no longer looking at a potential energy crisis; we are in the midst of a crisis. Given the multi-year lead times which these bills now seek to foreshorten, any present delay in processing or approving qualified energy projects, no matter the scope or scale, will compound our difficulties at the time those projects are scheduled to come on line. It is time we began to think of classes of energy projects, rather than individual projects, which are worthy of the special attention contemplated in the bill. It may be argued that all energy projects which have as their effect the reduction of oil imports and/or the advancement of new energy technologies should be automatically considered as priority projects. With some amendments, this legislation, and with the follow-in efforts to improve the overall efficiency of current statutes and regulations, a framework can be established for meeting the emergency we now face,

With these thoughts in mind, we respectfully ask the Committee's consideration of adjustments and clarifications in the two bills, as they were introduced.

It would be to no avail to give priority consideration to a new power plant or other energy project, only to find that the fuel for that plant was unavailable. We believe that the entire energy stream must be considered from the start of the fuel supply to the disposal of any waste from the utilization process.

Additional language in the definitions section would clarify the ability of the Secretary to declare all the interconnected aspects of an energy development as a single project deserving a priority. We would suggest that the phrase "any combination thereof" in Section 102(c) of H.R. 4573 be added to more clearly modify the list of eligible facilities, as well as the various levels of government. The corresponding provision in H.R. 4499 is Section 203(c).

The coal industry strongly objects to the language in Section 201 of H.R. 4573 which provides a limitation of six projects which may be designated in a calendar year. This arbitrary limit does not seem to reflect the scope of the emergency we face -- an emergency in which all projects which reduce dependence on foreign sources of energy may be considered crucial and worthy of priority designation. Moreover, for reasons discussed above, designation of one "project" may not be helpful if dependent components, such as mines or transportation segments do not receive equal treatment. Finally, it would be awkward, at best, to discover seven or eight or even thirty-eight worthy projects in a year and find an

artificial, but nevertheless statutory, limit imposed. We therefore ask deletion of the limitation in Section 201.

We would also suggest that facilities which reduce the nation's dependence on natural gas be given priority along with projects displacing imported oil in Section 203(a) of H.R. 4573. In order to meet the 1990 statutory prohibition on natural gas use in major fuel burning installations, it may be necessary to accelerate approval of new coal-fired units which replace present gas burning facilities. While displacing imported oil must be our primary objective, we must not lose sight of the need to conserve our natural gas supplies for more appropriate uses, as expressed in the Fuel Use Act of 1978.

One of the principal reasons for delay in the approval of major energy projects is the necessity of meeting the procedural aspects of the National Environmental Policy Act (NEPA). I want to say at the outset that we do not propose that the goals expoused in NEPA be ignored or shortchanged in any substantive way. However, we believe that the language of Section 204 of H.R. 4573 should be expanded so that the applications themselves for priority energy projects may not be subject to the full environmental impact statement process. No reference to NEPA is made in Title II of H.R. 4499. We recommend that where preparation of full environmental impact statements would cause delay, an environmental analysis review may be substituted. Such

reviews are commonly used by agencies for actions which might not warrant full impact statements. They are similar to full statements in terms of project description and analysis of the environmental consequences of the proposed project. However, they do not include detailed description of alternatives to the proposed action, and major discussion of the socioeconomic consequences is not always required. But more importantly, there would be no requirement that the statement be published for comment and then republished as a final statement -- a process normally consuming six months or more. We do not believe that the environmental analysis review contemplated here is inconsistent with the original intent of Section 102(2)(c) of NEPA.

Moreover, the designation of the agency responsible for the environmental review is a process often requiring months to consummate. Where full environmental impact statements may be appropriate, we would suggest that lead agency determination be made at the time the decision schedule is established.

Such provisions should be added to H.R. 4499 and H.R. 4573.

One other deficiency in these bills is the apparent lack of authority to accelerate approval of projects under state law and regulation. While we recognize there are the constitutional difficulties in federal usurpation of state authority, we believe that where state requirements are imposed pursuant to authority delegated under federal law, the Federal Government should retain some residual control over the process, particularly where the national interest is involved.

As you are no doubt aware, many of the air and water quality requirements are imposed by the various states in accordance with the federal statutes. In instances where a priority energy project is being subjected to delay by state agencies administering such requirements, the Federal Government should have the ability to reassume the delegated authority when it is deemed to be in the national interest. Whether such action should be taken pursuant to a Presidential or a Secretarial declaration of "emergency" is a matter for constitutional lawyers to resolve. But, it would not seem prudent to foreshorten federal processes only to have continuing delays at the state or local level -- delays which derive from federal law.

While we have not seen the specific proposals, the program outlined by the President appears to contain provisions which permit the Federal Government to override or to render decisions regarding state and local rules where local authorities fail to act. S. 1415, a bill introduced in the Senate by Senator Bentsen, also provides such authority. We believe some overriding authority is necessary, and urge that the bills now before this Committee be amended accordingly.

The issue of judicial review is obviously a key ingredient to any attempt to accelerate final approval of energy projects. We have some concerns about the language in Section 218(c) of H.R. 4499 pertaining to judicial review. Whether Congress can impose time deadlines on the deliberative processes of the

judicial branch appears to be another constitutional question. However, it may be possible to limit the class of persons eligible to file complaints against actions or projects given priority under this legislation. Moreover, if the traditional vehicles for litigation, such as NEPA and some of the more intricate procedural regulations are effectively dealt with by this bill, there may be fewer grounds on which complaints may be filed.

Mr. Chairman, we offer these suggestions in the hope they might make the bill more effective and more responsive to what we perceive is a national emergency.

Five years ago, the process for permitting a new coal mine was relatively simple, consuming perhaps 3 to 5 months.

Today, a surface mine of average size takes a minimum of 21 months to approve, with an average time approaching 3 years. The permitting costs have risen accordingly, and we have yet to see the first new mine approved under the permanent program requirements of the Surface Mining Control and Reclamation Act (SMCRA).

As an example, on November 10, 1977, Peabody applied to the state and the U. S. Geological Survey for a 5-year mine plan permit to extend our existing Big Sky Mine near Forsythe, Montana. Before that application was approved, the interim program under SMCRA became effective, and we were told to reapply.

After submitting an entirely new plan on November 20, 1978, we realized that approval would not come before we had exhausted the coal reserves already permitted. We therefore applied for an extension of the existing permit, amounting to some 29 acres, to allow us to continue mining until the larger 1,200-acre permit could be approved. After curtailing operations on the old permit area to avoid a shutdown, we received a permit for the 29-acre extension. In the meantime, no further action was taken on the 1,200-acre permit application. In March of this year the permanent program under SMCRA was promulgated, and we have now been told to resubmit our application once again. We expect to submit our third application next week. I want to emphasize that this is not a new mine; it is merely an existing operation moving into an adjacent reserve, all of which is part of a long-term coal supply agreement. Nevertheless, after 19 months, we are no closer to approval than we were in 1977. Moreover, if approval does not come by November of this year, we will have exhausted all our permitted coal, including the 29-acre extension, and will be forced to close the operation pending final approval of the permit for the adjacent area.

While this example may be an aberration resulting from the administrative difficulties of implementing a new law, the problem is nevertheless very real at this moment, just as the energy problem addressed by this bill is very real at this moment.

As another example, Peabody has an existing surface mine in the Belleville district of Illinois known as River King Pit #3. It has been in existence for many many years supplying utility customers under long-term contracts. Our plan was to continue mining in an adjacent area containing 1.7 million tons of coal near the Kaskaskia River. We applied to the Corps of Engineers for a Section 404 permit for dredged and fill material in the fall of 1974. Under the procedural provisions of NEPA, an environmental impact statement (EIS) was required. We expect the final EIS to be issued within the next month. The earliest at which we can expect a Corps decision will be August of this year, at which time 57 months will have elapsed since the original application. In the meantime, we had obtained all of the other necessary permits from federal and state agencies. Some of these have had to be reissued because they expired during the time we have been awaiting a Corps decision.

The examples we have given are illustrative of the problems energy project developers face. Ours may not appear to be projects of major national significance, yet for our customers, the alternative to receiving the adequate coal from these mines may be the purchase of replacement power -- power which may derive from oil or gas. In this time of fuel scarcity, it can be concluded that any project for which a delay means more oil or gas consumption, is an emergency project deserving the priority envisioned in these bills.

Mr. Chairman, I would like to submit for the record a list of permit requirements for an average coal mine. This list does not pertain to the requirements of power plants or synthetic fuel plants. Yet, from its length, I think you can discern the complexity of the obstacle facing energy developers.

We, therefore, urge the Committee to act expeditiously to amend the legislation as we have suggested and report them to the full House. We hope the Congress and the Administration, in the prompt consideration of these bills, will give full recognition to the energy emergency in which we now find ourselves.

APPENDIX A

COAL MINE PERMITS OR APPROVALS

At a minimum, between 15 and 20 permits or approvals are required to extend an existing mine or to start a new coal mine under today's regulatory processes. These permits or approvals are issued by a variety of federal, state, and local regulatory agencies. Determination of which ones apply become very site-specific. Typical of the requirements are:

FEDERAL

1. Water Discharge Permits under the National Pollutant Discharge Elimination System (NPDES) from EPA or state if authority delegated.
2. Section 404 of the Federal Water Pollution Control Act, stream dredged and fill as administered by the Corps of Engineers.
3. Air Pollution Permits, including Prevention of Significant Deterioration (PSD) review, and nonattainment, where applicable, from either EPA or appropriate state.
4. National Environmental Policy Act (NEPA).
5. Approval of mining plan by U. S. Geological Survey and/or Office of Surface Mining when federal coal involved.
6. FCC license for radio communications.
7. Filing at the mine of Oil Spill Prevention Plan (EPA requirement).

8. Special Land Use Permit (by BLM or Forest Service) if federal surface involved.
9. Mining and Reclamation Permit under the Surface Mining Control and Reclamation Act to be issued by the Office of Surface Mining or approved state for both federal and non-federal coal.
10. Mine Safety & Health Administration (MSHA) approval for dams over 20 feet in height or 20 acre-feet storage capacity.
11. Department of Treasury, Bureau of Alcohol, Tobacco & Firearms license for storage and use of explosives.
12. Approval from Nuclear Regulatory Commission for hydrology monitoring.

In addition, the following federal laws must be investigated in connection with the development of a coal mine. While specific permits or approvals may not be required, failure to comply with the law and its regulations can stop or delay mining:

1. Antiquities Act of 1906 - 62 weeks, BLM approval
2. Archaeological and Historical Preservation Act - 1964
3. Historic Preservation Act - 1966
4. Bald Eagle Protection Act - 1969
5. Endangered Species Act - 1973
6. Fish & Wildlife Coordination Act - 1934
7. Resource Conservation & Recovery Act - 1976

8. Safe Drinking Water Act - 1977
9. Soil & Water Resources Conservation Act - 1977
10. Multiple Use Sustained Yield Act - 1960
11. National Forest Management Act - 1975
12. Watershed Protection & Flood Prevention Act
13. Federal Seed or Introduced Species Statutes
14. Renewable Natural Resources Act - 1976
15. Migratory Bird Treaty Act - 1918
16. Wild Horses and Burros Act
17. Multiple Mineral Development Act
18. Toxic Substances Control Act

STATE

1. State Air Pollution Permit.
2. State Water Discharge Permit.
3. Noise Abatement Plans.
4. Industrial Siting Act approval.
5. Permit for waste treatment facilities from sanitary installations.
6. Water Treatment Operator's License.
7. Solid Waste Disposal Permit.
8. Surface Mining and Reclamation Permit.
9. Various Construction Permits.

COUNTY OR MUNICIPAL

1. Zoning approvals (county or municipal).
2. Approval by County Commissioners for road crossings or closures.
3. Municipal building codes.

Mr. DINGELL. Thank you, Mr. Farrand. If you will submit to us your suggestions and amendments to the bills they will be appreciated.

Gentlemen, what do you perceive to be the strengths and weaknesses of the Energy Mobilization Board as proposed by the President?

Mr. FARRAND. While we have not seen the specific language of the President's bill, at least factually it would indicate a problem in which State laws—

Mr. DINGELL. Excuse me. All we have is the factsheet, too. So we are proceeding with equal helplessness on this matter.

Mr. FARRAND. I do not pretend to palm myself off as a constitutional expert, but it would appear to be difficult, as you indicated earlier, to have an arm of the executive branch overruling or usurping State law and authority. We would think that a better approach might be that encompassed in S. 1415, Senator Bentsen's bill, in which State procedural requirements may be overridden by the President only if subject to a one-House veto. This would appear to provide some congressional ratification, if you will, of efforts to usurp or override State authority.

Mr. DINGELL. Of course, I am not satisfied that they are not piling constitutional questions on top of constitutional questions.

Mr. FARRAND. One-House veto.

Mr. DINGELL. The one-House veto is under some challenge by the administration. At the same time, the question, then, of overriding the State and local procedural or substantive requirements is at least a peripheral constitutional question. I don't want you to take the comment as hostile.

Mr. FARRAND. Mr. Chairman, I will make one other comment on that. We do believe that it is possible to at least deal with, as I indicated earlier, those rules which the State imposed encouraged by or pursuant to Federal acts. It seems that we can withdraw those authorities granted. It may come to a point where the State governments may not be our major difficulty.

I noted with some interest yesterday the proposal of the State of New York in which they have proposed converting a number of major powerplants from oil to coal as a State plan and set up a list of all of the requirements that the State must do to change it.

There appears to be some sense of unanimity, if I read the proposal correctly, among State agencies having to do with the conversions—the question is whether the Federal Government will go along.

Mr. DINGELL. You raise an interesting question. The question then is: Should not the Board be authorized to waive local and State laws as well as Federal laws or should they waive only the Federal procedural matters? Should they limit themselves to substantive or procedural matters or deal with both?

Mr. FARRAND. In view of what we believe to be the emergency today, I believe they should have the authority if it is possible. If it is, in fact, constitutional, I believe they should have the authority.

Mr. DINGELL. To do what?

Mr. FARRAND. To waive both the substantive and procedural aspects of the State law if it is in the national interest.

Mr. DINGELL. And Federal?

Mr. FARRAND. And Federal. We think at this point, however—let me make myself clear on this point—we basically believe that, if the procedural questions are answered, there will be ample degree of certainty provided in consideration of these, time certainty provided in the consideration of these projects and that we may run into less substantive difficulty.

Mr. DINGELL. Do the bills that are being considered here, H.R. 4573 and H.R. 4499, give ample consideration to expedition of local and State problems?

Mr. SCOTT. In my judgment they do not. I think the main problem is that they might well add to delays already being experienced.

Mr. DINGELL. They might add to delays?

Mr. SCOTT. Yes. I think there is genuine concern of companies preferring not to take advantage of these provisions in order to avoid what they would perceive as additional delays.

Mr. DINGELL. What additional delays would you anticipate?

Mr. SCOTT. That the primary thrust would be the companies would prefer to go the routine permitting way in the hope that they could get their projects permitted quickly only to find out some time later on that they were in trouble and have to turn to the priority energy scheme. It would turn out to be a two-step process rather than single.

I think the way to get around this would be to have some tight time frames in which the State and local governments could perform, and Federal Governments, and, failing the performance, let the Federal Government take over the permitting aspects using the appropriately federally approved State plans such as the SIP's, water plans, land reclamation plans, this sort of thing, following the State's desires in those federally approved plans.

Mr. DINGELL. But using Federal organizations and systems to do this.

Mr. SCOTT. Yes, letting EPA be the permitting authority but very critically following the State plans to do so, and then only when there is an obvious impasse, letting the substantive matters be overridden. I frankly think there would be very few of those occasions.

I touched on one this morning, namely, the absence of offsets for a given project. I think there is one other that could occur and that is if some community says, "I do not want a hazardous waste dump in our neighborhood." These are the kinds of impasses that will be the most difficult and if there is a mobilization board it could step in at that particular point in time.

But I do believe very sincerely that most projects would be expeditiously handled by State and local governments if there was a time frame.

Mr. DINGELL. You are saying then the most important thing is to lay down a clear time frame in which action must be taken by the State government and local government and by the Federal Government.

Mr. SCOTT. Yes, and having an early-on gathering of all agencies to tell the applicant what the ground rules are going to be, what his pollution control requirements are going to be, how the procedures are going to work. This is a most important step because

right now the rules change frequently and the applicant is always trying to modify his stance and come up with new data and the process gets thrown out year after year.

Mr. DINGELL. Do you find that in either of the bills, H.R. 4573 or H.R. 4499?

Mr. SCOTT. We do not find those concepts present, Mr. Chairman.

Mr. FARRAND. Mr. Chairman, I would punctuate that comment with an example. We proposed or sought permission to expand a mine in Montana in November of 1977 and filed an application only to be told 8 months later that the application was no good because they had imposed new regulations in the meantime.

So, we had to withdraw and prepare an entirely new application. That application lay dormant for several months. We finally decided that we had to seek an extension of the existing mining operation, a very small one, a modification, if you will, which we finally got.

In the meantime the failure to act on the large application caused another delay and it was eventually rejected because they changed the rules the second time.

We are now in the midst of preparing our third application. We are no sooner at getting permission to mine that coal than we were 2 years ago. It is an existing mine. This is an application for a permit for the next area of the mine. In fact, if we do not get permission we will have to shut the mine in November because we will have exhausted all of the coal that we now have permitted. It is a problem again of trying to catch a moving train. It is a very real problem.

I would agree with Dr. Scott that some consideration should be given at the beginning of the processes to making certain that the ball game is going to continue under the same rules.

Mr. DINGELL. In other words, you are saying that the application should proceed under the same process under which it was initiated. Is that what you are saying?

Mr. FARRAND. Yes, it is.

Mr. DINGELL. Would you object, let us say, where there is substantive change of law, that you simply be permitted to file an addendum or change rather than having to refile your whole application or how would you suggest that be done? You would there have substantive change of law as opposed to some change in regulation.

Mr. FARRAND. In those cases where a substantive change of law occurs, and we would hope it would not occur within the time frame for decisions envisioned in these bills, yes, we would have to go back and start the clock all over again. As you are no doubt aware, the time between passage of law and the implementation and promulgation of regulations is usually a very long period.

It is during that period of uncertainty that you get into a great deal of difficulty. What we would ask you to consider is that as new laws come on line, that they not affect projects which have been declared as priority and for which applications have already been filed. That is the only way I would see off-hand to avoid the situation you describe.

Mr. DINGELL. Mr. Scott.

Mr. SCOTT. I was only going to add that I do not think we are too concerned about changes in law during the process of getting a plant constructed. I think the big concern is getting various agencies to agree early on. This is of extraordinary importance. It is not happening today and it is causing very serious delays in our ability to produce energy.

Mr. DINGELL. Require the agencies to get together?

Mr. SCOTT. Yes.

Mr. DINGELL. As regards their rules so that where you are affected by the regulations of several agencies you anticipate that they would act jointly at a time early?

Mr. SCOTT. Yes. We need to know what the pollution control requirements are; we need to know what the ground requirements are for handling paper back and forth. At the present time these agencies do not communicate with each other. As a result we get multi-year delays in projects.

Mr. DINGELL. You get whipsawed, do you not, over changes in regulations and rules after you have put the project in place? Let us say you put in place a generating plant to meet certain requirements by EPA. You subsequently find EPA imposes additional rules and regulations and constraints on your plant.

Are you suggesting that EPA should be held to give you a fixed term of period during which you would be permitted to function on the basis of standards laid down at the time you had the application approved?

Mr. SCOTT. I think if there is agreement on pollution control requirements at the beginning of the planning process and the plant gets its authority to construct, it should be allowed to construct with those performance requirements built in place.

Now, it then becomes an existing facility. If at some time the regulations change to require a tightening up, for example, that plant will be treated like any other existing facility and a retrofit requirement may be put in place, the smart manager will see to it that his risk under that kind of situation is minimized by putting in the best controls he can find up front so that he does not face the risk of retrofit sometime down the road.

Mr. DINGELL. I observe the matter we have just been discussing is a little different than the change of rules during the time that the application pends and before the application has been approved and construction has commenced and has been finished.

Mr. SCOTT. That is right.

Mr. DINGELL. Do you want to comment on that difference and what you think ought to be done at this time I have just discussed?

Mr. SCOTT. Probably I can do this by giving an example of a project where certain air monitoring studies are required. The applicant does them. They are accepted. Everything is fine. The paper mill is cranking along. The permits have not yet issued but one agency says, "I think you had better do another study, and another study, another study."

This is the kind of merry-go-round that applicants get into all too frequently. Of course, as the agency thinks of a new pollution control technique or new pollution control device, they ask for another study on that and say maybe you had better modify your application to take this into account.

In the case of heavy oil in California these have gone on for 4 years.

Mr. DINGELL. This is a State matter?

Mr. SCOTT. This is a Federal, State, and local matter combined.

Mr. DINGELL. As regards air pollution?

Mr. SCOTT. Yes.

Mr. DINGELL. You are saying heavy oil with regard to production? Heavy oil as regards consumption or transportation?

Mr. SCOTT. Production from an existing oil field.

Mr. DINGELL. The Chair is going to recognize counsel, Mr. Finnegan, for questions.

Mr. FINNEGAN. Following the questions that the chairman has raised, can you identify the laws that you think are the ones that would have to be considered here? I notice that the bills talk about actions and approvals.

Approvals, is a defined term in this bill but the word "actions" is not. Approvals talk about permit, license, lease, right of way, or other grant issued by an agency of Federal, State, or local government. The question really comes down to what laws are we talking about? Are we just talking about environmental laws? What is encompassed by the term environmental laws? Does it include nuisance laws?

If you attempted to override state laws, it is still possible you would be overriding all the laws. Could a state still preclude the projects from coming in?

Mr. SCOTT. Yes. We see the actions, the laws, falling in two major categories, the siting laws and what we call the broad environmental laws. There is a long list of environmental laws, as you realize. There is always the possibility of somebody saying, "You have to get rid of that toxic waste but don't you dare put that dump in my back yard."

That is a concept that ultimately may require Federal preemption and you say, "Sorry, folks, we have to have a dump some place and we will place it right here." That is an issue that may well have to be resolved with Federal preemption.

Another one that is critical is the simple absence or shortage of emission reduction efforts as required. There have been times when applicants simply cannot find the offsets; they are not there or they cannot get anybody to tell them the offsets. Then you are stuck. The applicant does not know where to turn.

Again, that is an area where preemption may well be a good course to follow. It is a very difficult issue. You are telling somebody in a local area, "I am sorry but the national good demands we do such and such."

Mr. FINNEGAN. Then you are having preemption of a specific situation such as the offset, toxic waste and siting, where you would have a Federal preemption. Isn't it possible even if you go ahead with that preemption and you do grant it, that through other statutes that the State has that they still could prevent the project from going forward?

Mr. SCOTT. Yes.

Mr. FINNEGAN. What have you gained?

Mr. SCOTT. Sometimes we wonder.

Mr. FINNEGAN. We mislead people if we think the bills are going to do all these things and in fact they do not, if the State and local entities have another way to prevent it from taking place.

Mr. SCOTT. That is right. I am sorry I cannot be more helpful except to say, yes, there are serious local concerns. If indeed we are going to have a fast track system somehow we have to find the right mechanism to handle such issues.

Mr. FARRAND. I would add the thought there that some projects which the Federal Government deems as priority may not be doable from a local or State standpoint. We can recognize that. We, as prospective project proposers, have to do our job and go out and win the approval of the State and local people.

If we fail to do that sufficiently—and the Constitution does not allow the Federal Government to override—then for all intents and purposes that project is dead.

Mr. FINNEGAN. Let us take the Federal level. When you talk about approvals and actions, what are we talking about? What laws are we talking about? Are we talking about the Coal Mine Safety Act in the case of coal mines?

Mr. FARRAND. No. I think the one major element as far as my industry is concerned, the matter to be dealt with in the near future, would be relaxation of the State implementation plan. We are not talking about exceeding Federal standards. We are talking about relaxation of those State standards imposed pursuant to the Clean Air Act, which may be more stringent than Federal standards.

Mr. FINNEGAN. The introduced bills do not deal with relaxation of statutes. All they do is provide for procedure.

Mr. FARRAND. As I understand the President's program, they may when legislation comes out, propose an extension of that provision of the Clean Air Act which allows for exemption of the SIP, or State implementation plan, requirement up to 2 years.

The present requirement allows exemptions up to 4 months, which is not ample in a case of powerplants burning oil and having to convert to coal because insufficient oil supplies are available.

Mr. FINNEGAN. Wouldn't that be appropriate for EPA to do that rather than a board?

Mr. FARRAND. The President can do it for a limited period of time under the present law. The present law does not allow him to extend that exemption for a long enough period of time.

Mr. FINNEGAN. If you change that law to allow that to be done, would it not be more appropriate by the President and EPA rather than through a new board?

Mr. FARRAND. Yes. My preference would be to have Congress extend that exemption period so there is no question, to give the flexibility on the basis of statute to allow either the President or the Mobilization Board to make those judgments where they are required.

Mr. FINNEGAN. Going back to these bills, how would these bills help these projects? If you establish a procedure for first designating the project and the first question comes about, what kind of projects are we really talking about? There is a very lengthy set of procedures.

The bill, as I understand it, and I think you just got through mentioning, should include all projects. The bill does include all projects. It seems to me it would be difficult for the Secretary or the Board to consider all the projects within the time frame set forth in the bill and to decide whether it should be a project or how many projects should be designated priority projects.

First there may not be enough information about the project. It does not say that the project has to be actually down the road quite a ways or just a gleam in somebody's eye. How do you deal with this?

Mr. FARRAND. What we are dealing with in this legislation is the functioning of the executive branch, making the executive branch function as one could say Congress intended it to function. There should be no reason why a project of significant size or a simple coal mine takes 3 years to approve.

Now, what we are dealing with here is shortening that period for the current emergency we face.

Mr. FINNEGAN. You are suggesting that you do not designate anything as a priority project?

Mr. FARRAND. That would be my hope. I have spent a great deal of time in the executive branch and I know some of the difficulties there and that is not going to happen, given the present mode of operation and budgetary constraints. My preference would be to design a statute and design a regulation and procedural steps so that all projects which are important can be considered within the time frame envisioned for these exceptions.

Mr. FINNEGAN. What would you call important?

Mr. FARRAND. I would call important any project which provides alternative sources of energy and/or reduces our oil import requirements.

Mr. DINGELL. Rather than saying the President could designate 6 or 12, would we not be better served to lay down the criterion for defining the kind of project we ought to act on?

Mr. FARRAND. I agree with that.

Mr. DINGELL. Isn't that the best way?

Mr. SCOTT. Yes, it would be most important. In fact, it may be essential to have these bills function the way you would like them to, to say up front certain projects will qualify as national interest projects, set the ground rules for them, and then have everybody know at that point in time that all of these will be on a certain fast track schedule with each level of government having time to perform.

If they do not perform, there will be Federal oversight or take-over of the permitting procedures.

Mr. DINGELL. What is the definition of a project like that?

Mr. SCOTT. We tried to touch on that this morning by saying projects affecting international commerce, national security or national interest. That obviously needs to be fleshed out.

Mr. DINGELL. How would we be more specific?

Mr. FARRAND. One consideration might be that projects which displace a threshold quantity of oil or a threshold quantity of gas under a major boiler should be automatically considered. So that when a proposal is made for a major powerplant or gasification plant or liquefaction plant, from the time that that proposal is

announced but before the proposers have prepared detailed application, the executive agencies that have to eventually consider it can gear up their capacity so that they can process it within the time frame envisioned here.

Mr. DINGELL. You have indicated that those kinds of projects should also have some preliminary work done, is that right, in the sense that parties who would be involved inside the Federal Government would commence the coordination process and the State and local governments could figure out what they had to do to eliminate conflicting procedures and standards and substantive requirements and determine within what time limits that could be met. Is that right?

Mr. FARRAND. That is correct. The process should really start before the application is filed and that application should be prepared in cooperation and consultation with all of the agencies involved so that at the time there is a piece of paper which can be considered and both sides are pretty much familiar with the requirements and the constituent components.

Mr. DINGELL. Should it be just one application filed to deal with all these different agencies?

Mr. FARRAND. We would prefer that. I do not know whether that is legal under the current statutes.

Mr. SCOTT. I do not think that is necessary. So long as everybody up front knows that this is a national interest project. All the existing regulatory procedures can go ahead and operate but with certain cutoff times.

Mr. DINGELL. How do we know that this is a national interest project until the application has been filed or until somebody like the President has disposed of it?

Mr. SCOTT. One thing would be to define in the legislation what qualified as a national interest project. Anything that displaces foreign oil or gas is a good first start. I do not think there needs to be any threshold. I think anything that will displace or reduce our reliance on foreign energy ought to be considered.

Mr. DINGELL. If you have a pitcher full of foreign oil, you do not have a project that qualifies, you have to lay down some kind of threshold in terms of volume or other things.

Mr. SCOTT. I would like to give you an example, Mr. Chairman. Let us take the Central Valley of California where we have several hundred independent oil producers. It would be grossly unfair only to allow the major companies to have their oil wells or their—

Mr. DINGELL. I am not quarreling with you on that. I am just trying to figure out what is the bottom line of something that will rise above the level of de minimis. You will agree there is such a thing as de minimis?

Mr. SCOTT. Yes, I will. It is obvious that none of us is prepared to give you a very good answer but I think the issue is that you should not exclude any small project that has a contribution to make.

Mr. DINGELL. You have a definition in H.R. 4573 which says,

Physical structure, including any equipment, building, mine, well, rig, pipeline, transmission line, processing facilities, transportation device, manufacturing facility or installation that will facilitate energy conservation exploration, development, transportation, production, or commercialization of any form of energy other than

atomic energy, including but not limited to, any facility owned or operated in part by Federal, State, or local government, or any combination thereof or any such facility located upon the public lands or which relies substantially upon fuels extracted from the public lands.

What do you think of the definition?

Mr. FARRAND. That is a definition of things, a shopping list from which the Secretary may select. Our point is that if you put a threshold limit, then you should automatically consider or automatically assume that all such projects would be declared priority.

Mr. DINGELL. That takes in almost everything, does it not?

Mr. FARRAND. It is very broad, I agree. Therefore, there is a necessity for putting in a minimum limit, a threshold. I do not think the Federal Government has the capability at this point to consider all of those projects on a so-called fast track.

Mr. SCOTT. Mr. Chairman, if I may, I would like to caution against the risk of excluding a single independent oil producer who might have one or two oil wells, who might want to put in a steam generator. It is not fair to him not to let him get some accelerated procedure.

Mr. DINGELL. You have an energy facility as defined in H.R. 4499 which says,

Any physical structure, including any equipment, building, mine, well, rig, pipeline, transmission line, processing facility, transportation device, manufacturing facility, or installation which will facilitate energy conservation exploration, development, transportation, production or commercialization of any form of energy other than atomic energy, including but not limited to, any facility owned.

And so forth and so on.

It is about the same. We have the same problem, don't we? That covers practically anything.

Mr. SCOTT. Yes, it should cover.

Mr. DINGELL. Let me yield to counsel with regard to procedure and criteria.

Mr. BRAUN. Do you gentlemen have copies of the bill? Will you look at page 12 of H.R. 4499. You will see that the bill provides criteria for the Secretary in considering which of that broad category qualifies. Now in that list (a) to (h), do you agree with the criteria enunciated there or should they be eliminated or alternatively are there some that ought to be added?

Mr. FARRAND. Mr. Braun, I would only say that the language could be revised, as I indicated earlier, to allow them to select, not make individual findings on individual projects but to select in a generic way certain projects of a certain magnitude. That would require I believe an amendment to subsection (a) and also I would add a new subsection (b) which dealt, as I indicated earlier, with displacement of gas in large boilers. Otherwise I have no quarrel with that.

Mr. DINGELL. There is a difference here. Under H.R. 4499, the language read by counsel, we are dealing with a selection on a case-by-case basis as opposed to dealing with it on generic terms that we have been discussing. Now these criteria may not be translatable from one kind of determination to another. Are they or are they not? If they are not what should we do?

Mr. SCOTT. I think it should be on a generic case. It is a terrible risk on a case-by-case basis. You will get too much politics cranked

into it. The major oil companies will be the winners and the little guys will be on the sidelines without any help. That is something we have to guard against.

Mr. FARRAND. Because this bill does not change the substantive requirements of other law, it could be argued that you could incorporate or consider classes of projects as having priority and if, as in subsection (b), the adverse environmental impacts were inconsistent or outweighed the benefits of the project itself, that that would be caught in the downstream consideration by the agencies designated to exercise that review. What you really ought to do here is say, OK, here is a class of projects, anything that will save us 20,000 barrels of oil a day or 5,000 barrels of foreign oil a day is automatically going to be considered. The agency then gears up, this is what we think the number of projects will be, and then we will consider them as they come along, according to a fast-track schedule.

Mr. SCOTT. Another suggestion in this regard is de minimis. That might be having set certain ground rules for significantly good-sized projects, may be another way to handle it may be to say that similar smaller projects can follow the same procedures so that the little guy does not get stepped on inadvertently here.

Mr. DINGELL. Mr. Finnegan.

Mr. FINNEGAN. In terms of the way the bill is constructed for purpose of designating facilities, there is application filed and there is a time frame for designating that facility. You have indicated that there would be some information available to the Secretary for him to designate a facility.

It is done on a facility-by-facility basis. Doesn't that information also have to be provided to the so-called permitting agencies and the agencies that have responsibility for approval or action? Again it is a question of what laws are we talking about? What are those agencies? How do you define those agencies? Do you define them under environmental laws? Do we name EPA as one of the agencies? Or should we name all agencies, the Corps of Engineers?

Mr. FARRAND. All of them which have substantive requirements.

Mr. FINNEGAN. Don't you check that by designating those that would be broadly responsible will be involved in permitting procedures and direct the President to include such others as may be necessarily involved?

Mr. SCOTT. That might work.

Mr. FARRAND. I think, Mr. Finnegan, that the point you are trying to get at may be if you have a generic classification of projects which would automatically be given priority designation, that before the point of time comes when the proposers have a full application, that they know they are going to get fast track consideration. When a project is but a glint in the eye and they can go to agencies and say exactly what we need and establish in their own mind the schedule for developing the application, and then the agency knows when it can expect a priority project application and they can gear up in the budget cycle their own capability to consider the application in accordance with the schedule outlined in this act.

Mr. FINNEGAN. The bill also provides that you set the decision schedule and the agencies are supposed to comply with that sched-

ule. If they don't comply, the President under one bill must make the decision or under the other bill may make the decision. What happens if the decision is not made?

Mr. FARRAND. There are no penalties under either of these bills.

Mr. FINNEGAN. The permit still would not be issued?

Mr. FARRAND. That is correct. I think you either have to consider them denied or approved to make the bill effective.

Mr. FINNEGAN. That would be a rather substantial change in existing law because the bills also say this is done consistent with existing laws.

Mr. DINGELL. Doesn't that raise constitutional questions if you at the end of 1 year say the agency has not acted, that the project is deemed approved or is deemed disapproved?

Mr. FARRAND. It would not if it were deemed disapproved.

Mr. DINGELL. It could be because you are prejudicing the rights of the applicant there.

Mr. FARRAND. No. There would be rights granted by Congress. If Congress said we either give it to you according to this data or not at all—I don't want to get sidetracked here because I wouldn't want that necessarily to be the case.

What we are interested in is an expedited decision, hopefully favorable but not necessarily. I wouldn't want the project to vanish because somebody failed to produce a piece of paper on a day certain.

Mr. SCOTT. I think many of these problems will be resolved if there is a requirement for early on consultation among all the participants. The applicant will know right then and there if he will get through this thing or not.

Mr. DINGELL. That is right.

Mr. FARRAND. Coupled with a moratorium on changes in requirements during the period that the application is being considered.

Mr. FINNEGAN. Isn't it better not to include in the bill an absolute time frame by which something has to take place before a permit is approved because you don't know, at least Congress doesn't know, in advance that something can be done in a year or 2 years? It would be better for the schedule to be set by the executive branch.

Mr. SCOTT. There is a way to resolve that, I think. That is in the early on consultation for each agency that comes up and says, "We have authority over this project" to specify with great clarity what it is it is going to require and what will constitute a complete application. This is a critical issue, complete application. If an applicant knows what he must do to have a complete application, then he knows what he can do or not. It is the issue, is this application really complete, that draws this process out time and again. If you can have this requirement early on, this issue will be a nonissue.

Mr. FINNEGAN. Is that decision made before or after the priority schedule?

Mr. SCOTT. I think the priority could be set up generically. Knowing what he will have to have for a complete application, then there can be an automatic cutoff time on the time allowed for any agency to perform. Most agencies I am familiar with certainly can perform in anywhere from 6 to 12 months, 12 months being on the

long side, once a complete application has been filed. Having established a requirement for a complete application up front, then I think it is a simple matter to set a finite cutoff time of 6 to 12 months out in the future.

Mr. DINGELL. At that point how do you feel with the question of judicial review? Remember you are talking about State and Federal and local authorities? How do you deal with the question of litigation which would prolong the procedures, the fact that this Federal requirement may not address either the constitutional or the statutory rights of an individual within the State affected by State or local action which might then become subject to judicial review under those State or local or statutory constitutional rights?

Mr. SCOTT. I regret I do not know how to answer that question. I am not an attorney. I would not be so foolish to try to come up with an answer.

Mr. DINGELL. You would not be foolish to try. Attorneys might look foolish.

Mr. FARRAND. The only thing you can do is limit it by limiting the classes of possible——

Mr. DINGELL. And limiting the time and limiting the question.

Mr. FARRAND. I am not a lawyer either, so, I am probably off base but there may be a problem of Congress imposing a time frame for judicial review on the judiciary. I think the best you can hope for is to do what you have done in this bill which is to put it in a court of appeals and ask them for expedited consideration. In other words, at that point you have put it in the court of appeals and used moral suasion to get the judiciary to recognize the priority or urgency you have recognized in the designated projects in the first place.

Mr. DINGELL. Of course appeals courts are notoriously reluctant to engage in trial work.

The Chair is going to recognize his colleague, Mr. Stockman.

Mr. STOCKMAN. Thank you, Mr. Chairman.

I want to ask you a frank question. Do you really believe that this is going to be helpful, some kind of fast track approach or Energy Mobilization Board? Isn't it a copout for addressing the substantive laws that create all these procedural tangles by excessive and unrealistic limits? Wouldn't we be advised to get the Clean Air Act back out and strip mining back out and perform the surgery we need? I don't see how an expedited process is going to help much on PSD permitting requirements. That is all built in in terms of the monitoring you have to do.

Once you have done that, the question is whether somebody is going to challenge the adequacy of the model you have used and so forth. Wouldn't we better spend our legislative time and couldn't we hope for more salutary results in the next 4, 5, or 8 years if we look at the basic sources of roadblocks rather than attempting to create a process like this?

Mr. FARRAND. I have a two part answer to that question if it is directed at me. One is that this legislation will assist in one sense. The designation of priority does have a salutary effect on the executive agency. I was in the executive branch when the Alaska pipeline finally got approved even though Congress had to come in and bail us out.

The sense of national urgency that surrounded that consideration did have the effect of making things happen faster than they otherwise would have happened.

So in a moral suasion sense, yes, this bill will do some good.

I will agree with you that our preference, in fact we indicated in our formal statement that we felt the Congress should go beyond this legislation and get at the basic statute.

Mr. STOCKMAN. What will be the most important aspects to look at in your view?

Mr. FARRAND. From the standpoint of the coal industry it is the Clean Air Act. But it may not be as broad a change as some people might envision.

Now that the new source performance standards have been promulgated, we hope they won't be litigated to death, but if they remain in effect as now proposed, the utility industry, our customers, have some reasonable idea of what is going to be required of them and they are making their plans accordingly. The change that will probably be required in terms of a statutory change will be an elongated exemption of the State implementation plan to allow utilities, now constrained against burning coal, to burn coal where the emissions do not exceed the Federal or national air quality standards but nevertheless exceed those standards imposed by the State under the SIP.

The current window in section 110(f) of the Clean Air Act is not sufficient to allow that to happen.

Mr. DINGELL. Would you say that again, please.

Mr. FARRAND. The window of time in which the President may grant or declare an exemption to the State implementation plan is now, I believe 120 days in section 110(f) of the Clean Air Act. It will have to be substantially longer than that in order to allow the plants now burning oil to burn coal.

Mr. STOCKMAN. Let us follow up on that. Are you suggesting that the State implementation requirements would result in the emission control levels substantially in excess of the ambient standard.

Mr. FARRAND. They do.

Mr. STOCKMAN. Is that due to implementation of the best available control technology requirement on new plants?

Mr. FARRAND. No. What I am referring to now is conversion of existing facilities.

Mr. STOCKMAN. If you want to convert an oil-fired plant to coal, that wouldn't be considered a new source and come under the Federal regulations?

Mr. FARRAND. No, it would not, it is my understanding. Consolidated Edison testified at the hearings on the companion legislation on the Senate side that requirements imposed by the State of New York and the city of New York forced them to burn distillate oil. Within the constraints of the Federal ambient air quality standards they could back out 15 million barrels of oil a year by burning coal.

Mr. STOCKMAN. That is not bad for one State. What you are saying is by State implementation in New York or the Federal requirement on new sources, and I am not sure I agree with you because I understand anything that is substantially modified is considered a new source, but in either case is resulting in the

maintenance of a lot of oil fired generating facilities because they are probably keeping them together with bailing wire and bubble gum.

If you had reasonable emission control standards it would be cheaper actually, or roughly equivalent, to burn coal but it is not happening, is that correct?

Mr. FARRAND. That is essentially correct.

These bills do not address that problem. We believe it is going to have to be addressed before the goals outlined in the President's address for conversion can be met.

Mr. SCOTT. I would like to respond to your questions, Mr. Stockman. That is that the legislation as drafted right now will not accelerate permitting in our judgment. I think they can be made to accelerate it but there will still be at the end of the line one final point where there will not be a resolution. We think unless the Clean Air Act and basic statutes are changed, they will simply come to an impasse and the Federal Government will say: "That project will have to die or we, the Feds, will override and you tell the local people you are going to have that project in their backyard, like it or not."

We agree that the Clean Air Act and basic environmental laws need to be looked at again to see if there is some way to avoid this awful impasse and telling local citizens, "Like or not not, you are going to have this project in your backyard." There are changes that will have to be made in the Clean Air Act. We have submitted six recommendations to the National Commission. I can touch on these this morning if you care to but these are very basic issues that are causing this confrontation. They are going to have to be resolved if we are going to avoid somebody getting overridden.

Mr. STOCKMAN. What you are saying is that you might get a 10-percent, hypothetically, acceleration from this fast track procedure but the real substance of the body of the blockage stems from the requirement of the emission standards, permitting procedures and so forth?

Mr. SCOTT. That is correct. I think these bills can be reworked to overcome the turf problem that exists between agencies. What I don't know how to overcome is the simple inability of an applicant to find enough emission reduction offset credits, that may be needed in both attainment and nonattainment areas—the June 18 decision of the District of Columbia Appeals Court—which is the heart of the Clean Air Act; and I don't know how to overcome this unless the act is changed and the Feds say you do it. I think there is a great need for the Clean Air Act, particularly those key issues, to be looked at again.

Mr. STOCKMAN. If you want to permit a plant in an attainment area, how long will it take you just to do the air monitoring and all the steps you have to go through before you can even get a permit to begin construction?

Mr. SCOTT. As you know, the requirement is for a year of monitoring first.

Mr. STOCKMAN. If they reject your monitoring result because your model is not accurate, you have to go back and model for another year, don't you?

Mr. SCOTT. You have to fill in. There is a grey area. Our estimate was that a full-blown PSD process prior to the June 18 appeals court decision, prior to that, would take 2 years. Our experience says that is the minimum time. Since the June 18 decision all bets are off. There is no way of knowing how long it will take. The agency says to us: We don't know what your requirement will be. We have to do a study and come back and tell you what your requirements are.

Mr. STOCKMAN. That is just one case, and that is a PSD permit to initiate construction.

There is no way the fast track procedure can shorten that 2-year time frame you are talking about?

Mr. SCOTT. We think yes, up to the point of what do you do with offsets. Up to that point it can be done with fast track. It can be done with issues mentioned earlier, namely having meetings of all agencies telling the applicants what requirements they will have to meet, a firm timetable to cut this process off and have Federal preemption of the permit handling following State plans. You follow this chain on down all the way—which I think is doable—but you get to the end about which I have real concerns and that is what do you do if you don't have enough offsets.

Mr. STOCKMAN. Even on the PSD?

Mr. SCOTT. Even on the PSD.

Mr. STOCKMAN. Are there offsets on PSD?

Mr. SCOTT. Since the June 18 decision that is what happened. The way we interpret the court decision you will have offsets in clean areas just like in dirty areas.

Mr. STOCKMAN. It is a process then of acquiring the offsets in some area where there is not much industrial activity right now which will take a considerable period of time.

Mr. SCOTT. Either the offsets are not there or some other company is there but won't give up the offsets.

Mr. FARRAND. I can give you a classic example that occurred some years ago on an oil shale project in Colorado. The applicants themselves in modeling the area found that the background air emissions exceeded the national standard in three categories. Yet there was virtually nothing out there which they could trade off. The only alternative would be to destroy the vegetation that was giving off these hydrocarbon emissions.

Mr. STOCKMAN. Isn't there another issue there? Is there any hard data on baseline for sulfur emissions in an area that has not had much sulfur emissions in the past?

Mr. SCOTT. In many geothermal areas you have natural fumaroles. Under the decision of the D.C. Appeals Court June 18, we believe EPA has to establish ambient quality standards for H_2S . We know from years of monitoring in these two areas there are high and low levels of hydrogen sulfide from fumaroles. Any air quality standard and any increment is long since exceeded. What do we do? The answer is we don't know.

Mr. STOCKMAN. Thank you.

Mr. DINGELL. The time of the gentleman has expired.

The Chair recognizes Mr. Braun for questions.

Mr. BRAUN. Section 207(c) of H.R. 4573 provides that, The deadlines in the project decision category shall be consistent with the

statutory obligations of Federal agencies governed by such schedule." Can you tell me if you have looked at the statutory procedural requirement that applies to these various agencies and have you determined whether or not the statutory procedure requirement causes too much delay? In other words, as the bill is drafted now the statutory procedural requirement continues to apply even though you have a decision schedule. The question is, Have you looked at those statutory requirements to determine either that they are acceptable or nonacceptable, consistent or inconsistent with expedited decisions?

Mr. SCOTT. For the ones we have looked at the answer is that those requirements can be handled if there are up front requirements for what constitutes a complete application.

Mr. DINGELL. Say that again.

Mr. SCOTT. The time requirements can be handled if an applicant knows up front what he will have to provide to have a complete application.

Mr. DINGELL. Suppose your procedural requirements are just so heavy that you can't function within the time and still carry forward—

Mr. SCOTT. Procedural requirements we are familiar with, and I confess up front we have not studied every single statute on this, but the ones we are most concerned about we feel can be handled by providing the permitting authorities some additional manpower funding in order to do this.

The workload on a single permit is not all that great. It is just when a guy has a stack of permit applications it takes him a while to go through them. There is a need to beef up the permitting authority manpower.

Mr. DINGELL. You are suggesting then that we had better do two things. One is to require of the agencies, (a) whether they have personnel and funds to process these things within the time limit, and (b), what the effect would be on other permits of applicants too because they might very well have applications that could be shoved to the back of the burner and you might wind up, unless you significantly increase the level of personnel and ability inside the agency, that some projects might be as important from the national interest standpoint as those you expedited.

Mr. SCOTT. It is a very real problem, Mr. Chairman. Certainly the agencies that we deal with are grossly understaffed in handling fast track projects.

Mr. DINGELL. Thank you.

Mr. FARRAND. Mr. Chairman, the problem in section (c) of 207, is that if the word "statutory" is underlined the decision schedule may be set in accordance with the statutory requirements and any additional time requirements imposed by regulations therefore are superseded by subsection (e), once that schedule is set, then all other deadlines or requirements are held notwithstanding.

Mr. DINGELL. Say that again.

Mr. FARRAND. What the Secretary has to do in establishing a schedule and in consultation with the pertinent agencies to find out what they have to do by statute, as I read this, and if there are statutory time limits say 6 months, to consider a Clean Air Act plan or 6 months to consider a mine plan, or has to lay before the

Department of Justice for an antitrust review for a limited period of time, those have to be included.

Those time frames have to be included within the schedule established. But if there are other deadline requirements imposed by regulation, which is in fact very often the case, those requirements may be waived under subsection (e).

Mr. DINGELL. Mr. Braun.

Mr. BRAUN. Thank you, Mr. Chairman.

If any laws may be waived by the Energy Mobilization Board—make that assumption—should the committee provide that the Energy Mobilization Board seek a threshold approval of these waivers of law as was done in the Alaska Natural Gas Transportation Act.

Mr. SCOTT. I would like to come back to Mr. Stockman's point. If you repair some of the basic laws this won't have to happen. Certainly the issue of when the Federal Government can tell some local individuals that they are going to have to put up with a project, like it or not, is a very difficult issue. I would hate to think that every one of these issues would have to go back to Congress because I don't think the workload would be manageable.

Mr. DINGELL. I have no quarrel with you on that, that we probably need to make some changes in the Clean Air Act. Just to observe the area in which that question could be considered how long do you think it would take the Congress to go back and change the basic Clean Air Act?

Mr. SCOTT. I could not hazard a guess. That is a very emotional issue.

Mr. DINGELL. We had a 4-year fight over the last amendment.

Mr. SCOTT. All I am trying to say is until some of these very basic issues are resolved through basic laws, somebody has to make an agonizing, if indeed there is going to be override of local concern.

Mr. FARRAND. I can give you a scenario which I think might help relatively quickly. That is we have a case where a powerplant was converted to coal under the present statutory exemption for a limited period of time. At the end of that statutory period of time the exemption allowing them to burn coal expires and they have to go back to oil and the oil in fact is not available. Congress under those circumstances would have to react.

Mr. DINGELL. I would like to agree with you but I don't.

Mr. BRAUN. The President has suggested that the Energy Mobilization Board be authorized to waive the statutes. The question is whether or not there should be a check on that authority or on that power. Is it through the Congress or another body located in the executive branch?

Mr. FARRAND. My personal feeling is that a waiver without congressional ratification of some sort would not increase the certainty but in fact would increase the uncertainty of a project. It would just be subject to so much challenge that we don't think it would be viable.

Mr. BRAUN. The President proposed the creation of an Energy Security Corporation to provide assistance to certain energy processes and the President has also proposed the creation of the

Energy Mobilization Board to expedite the Government permitting process for certain designated priority energy projects.

My question is whether or not you believe that all the energy projects receiving assistance from this Energy Security Corporation should be designated as priority energy projects by the Energy Mobilization Board.

Mr. FARRAND. I do.

Mr. SCOTT. I think the point we are trying to make early on, that there should be a generic definition of what constitutes a project, would moot that issue. Obviously if the Government is going to get involved by definition it is an energy priority project. I think it is a much simpler direct way to do it to define what constitutes an energy project early on so that we don't have to face it on a case-by-case determination.

Mr. BRAUN. Should the committee provide specific authority for the Secretary or the Board to revoke a designation of priority status?

Mr. SCOTT. I go back to the point I just made. I think the basic legislation should define what guidelines, what qualifications would make a priority project.

Mr. BRAUN. Let us say a priority project has been designated. The question is once designated should there be authority for the Board or the Secretary, whoever is doing the designating to revoke that designation?

Mr. SCOTT. With proper early on generic designation the answer is no.

Mr. FARRAND. Mr. Braun, I would add that there is provision for an extension of the deadline, at least in H.R. 4537, and furthermore at the end of the extension there are no penalties if they don't meet the deadline. Under those circumstances I would think provisions to revoke designation would be specious.

Mr. BRAUN. OMB has a procedure by which they try to expedite certain projects. One of their criteria about a critical oil energy facility is that OMB would exclude facilities for which decision by covered Federal agencies are not essential to the facilities progress and facilities for which there is little probability of delay through the Federal review process.

My question is whether or not a person seeking a priority energy project designation should be required to demonstrate that Federal decisions are essential to the facility's progress or that the delay by local, State or Federal agencies is likely.

Mr. SCOTT. I think that I made the point earlier today that many companies are going to have a psychological problem and they are going to say, "I am not going to fuss with this priority concept because it is just going to slow me down and it hopefully won't be mandatory." If we go on a case-by-case basis and make all these showings the companies will chance their luck in going to routine methods, current methods, and not try to take advantage of the priority concept because it may turn out to be not a priority procedure in the end.

Mr. BRAUN. You would not support this requirement?

Mr. SCOTT. Any time you get this detail in what qualifies for a priority treatment you are going to turn people away.

Mr. FARRAND. I would agree with that. Furthermore I would like to reiterate the thought that in requiring all these findings you may end up with a decision which requires a NEPA statement unless that is also addressed in this bill.

Mr. BRAUN. One final question. Do you believe that any specific projects ought to be nailed in the legislation or should that be left to the discretion of the decisionmaker to designate the project as an energy project.

Mr. FARRAND. I would prefer the more equal way of designating projects generically rather than specifically.

Mr. BRAUN. Generically in the legislation or by someone else?

Mr. FARRAND. Generically in the legislation.

Mr. BRAUN. You don't think that is adequately done at present?

Mr. FARRAND. No.

Mr. BRAUN. Thank you, Mr. Chairman.

Mr. DINGELL. Any questions, Mr. Finnegan.

Mr. FINNEGAN. I have one question. Is it your understanding that the way the bills are structured that the naming of a priority project does not result in the actual approval of a permit or anything of the sort? I assume the agencies themselves would still have to operate under existing law, isn't that correct, so that it is conceivable even that project may be denied a permit?

Mr. FARRAND. There is debate in our industry whether the designation of a project will enhance the probability of approval of decrease that probability. At this point there is no agreement among those with whom I have discussed that point as to whether the designation will encourage the agencies to look more favorably or less favorably upon a particular proposal.

Mr. FINNEGAN. But the legislation has really not that intent. It is just to get the speed up of the procedures under which the projects could be considered, not to give it a tilt one way or the other.

Mr. FARRAND. We understand that.

Mr. FINNEGAN. Is it your understanding that the bill excludes ore, uranium mines, mills, and enrichment plants and so forth? Is there specific authority needed for the Secretary to revoke a designation?

Mr. FARRAND. I think it is not necessary.

Mr. DINGELL. You mean not necessary or not desirable.

Mr. FARRAND. I don't think it is desirable either.

Mr. DINGELL. Specifically you think the power to designate includes the power to dedesignate, remove it from the list of designations?

Mr. FARRAND. I can't answer that question from a legal standpoint. Certainly there is no provision for it in the bill as it now stands. Our contention is that there is an exemption, that there is an extension which is possible. Furthermore there is no penalty for failure to act. You could say the failure to act was in fact a dedesignation.

Mr. DINGELL. A legal question could arise on that point.

Mr. FINNEGAN. Are you familiar with the task force established by OMB regarding the coordination of various projects in the coal area?

Mr. FARRAND. Yes.

Mr. FINNEGAN. Did that work? How did that work?

Mr. FARRAND. I don't think there is ample evidence to say that it worked.

Mr. FINNEGAN. When you say you served on it, you served in the Government?

Mr. FARRAND. When I was in the Government in the very initial stages.

I have to say I know of no specific project that was approved using that mechanism, none that I know of using that OMB designation.

Mr. DINGELL. Aren't you telling us then that that was not successful?

Mr. FARRAND. Yes, sir, I am.

Mr. DINGELL. I notice you have graciously tried to evade that. It occurred to me you were not telling us that it was successful and it appears you are now telling me that it is unsuccessful.

Mr. FARRAND. That may be concluded, yes.

Mr. FINNEGAN. The successor to the Executive Order 12129 was issued on April 1 providing for a critical energy facility program to be administered by OMB. Has anything happened since that Executive order?

Mr. FARRAND. My understanding is that nothing specifically under that order has occurred to date.

Mr. FINNEGAN. Do you think it is a good idea to have the authority of either this Board or OMB in the Executive Office of the White House or do you think it should be located someplace else?

Mr. FARRAND. I think if you are going to have the clout to demand decisions in a timely fashion from the myriad agencies of Government the only place you can have that is in the White House itself.

Mr. FINNEGAN. What about in selection of projects for designation either under the Executive order or under these bills, what kind of public participation would it have to be so that the public would have a say, the public being your competitive projects and so forth as well as individual citizens?

Mr. SCOTT. I think if you do it on a case-by-case example you will turn away people who will have potential priority energy projects. They simply won't run that risk. Furthermore you will have little guys getting stepped on inevitably because it will be the big companies with the big clout who will come in and say, "I have a red hot project."

Mr. FINNEGAN. I still have some problem understanding the generic project. Are you saying all transmission lines are going to be considered priority projects and once you do that, let us assume a series of them, are you really boiling the whole thing down so that you never have anything called priority but you have a bunch of priorities that will be subject to the same sort of track?

Mr. SCOTT. It is much simpler to have the generic system. I agree with you it is not the simplest thing in the world to define exact words. Having a generic definition in the basic legislation is going to increase the probability of applicants using the fast track system. If you have it on a case-by-case basis which in essence gets

to be a political exercise, companies are going to steer clear of it if they possibly can.

Mr. FINNEGAN. Take an agency like FERC which includes licensing of electric power companies, what kind of activities would you consider would be matters that would be considered priority type projects? Would it be a hydroplant?

Mr. SCOTT. I like Mr. Farrand's definition anything that will help displace foreign energy.

Mr. FINNEGAN. Eventually those decisions have to get up to the top to five members. They can only handle so many decisions at the time.

Mr. SCOTT. If you have a good definition, good generic definition, then all the agencies dealing with those know at the moment applicant comes in and says, "I have a priority project," they can look at the qualification and say, "You are right, it is a priority project. We will put it on this track here," and we will know we have to perform certain duties at a certain time. To my way of thinking that is an operable system until you get to the end of the line when the guy does not have an offset or some neighbors say, "We don't want that dumped in our backyard."

Mr. FINNEGAN. How do you get to the problem the chairman raised before, what do you do with the other applications that are not fitting in this priority category? They still have to be decided by the same commission.

Mr. FARRAND. What we are dealing with is a question of national priority. If you assume our national priority is to back out of oil in the fastest way possible then that is where we put our budgetary and human resources to get those things considered and, where worthy, approved.

Mr. FINNEGAN. You mentioned that there would be a lot of small businesses that would be hurt fairly seriously if they are shunted aside. That gets to the question of what kind of public participation do you have in establishing priority, either on a case basis or generically.

Mr. FARRAND. We may need a threshold over which all projects are automatically considered and under which individual projects may be considered on their merits.

Mr. SCOTT. There is another system which the chairman touched on a while ago. That is in this whole process of beefing up the permitting agencies to do a proper job you provide then with enough support so that they can handle all projects on a fairly fast track system. This is a fairer way than trying to say—

Mr. FINNEGAN. That is in large part a problem in a number of agencies.

Mr. SCOTT. One very important problem. There are others but that is one of them.

Mr. FARRAND. In designating the categories you give the agencies a much better idea of what their decisionmaking capabilities are going to have to come up to. Given the budgetary cycles and hiring practices, there is much more likelihood they can handle it under a generic definition than they can under an individual system now in this legislation.

We have no way of judging what their budgetary requirements or manpower requirements will be next year so they have no idea

how many of the projects will be designated by the Secretary or by the Mobilization Board.

Mr. DINGELL. Gentlemen, the committee thanks you for your very helpful testimony and the time you have given us.

The Chair announces that our next witness will be John McCormick of the Environmental Policy Center. If you will identify yourself fully for the purposes of the record we will be happy to receive your statement.

**STATEMENT OF JOHN L. McCORMICK, WASHINGTON
REPRESENTATIVE, ENVIRONMENTAL POLICY CENTER**

Mr. McCORMICK. Thank you, Mr. Chairman.

My name is John McCormick. Washington representative of the Environmental Policy Center, Washington, D.C.

Mr. Chairman and members of the subcommittee, it is a pleasure to appear before this subcommittee to offer the views of the Environmental Policy Center on an issue of great national importance. The scope of this hearing touches upon the concerns that the Congress and the Nation have been addressing for more than a decade. However, the urgency, under which the debates are being waged today, portrays the crisis atmosphere which is so visible in Washington and throughout the Nation.

The combined effects of inflation, rapid increases in energy costs, the realization of an approaching recession, and a pervasive feeling of helplessness and loss of direction are taking their toll on the spirit of America. The frustration of its citizens has been read correctly by this Congress but the response from Washington, to date, has been one of overreaction in the wrong direction.

The difficulties which the Nation has struggled through in the past 203 years have been of equal, or greater magnitude and complexity. Who can argue that the present-day phenomenon of gasoline lines and \$1 per gallon gasoline prices are as grave a situation as the United States faced in the Civil War and its Reconstruction period or in the Great Depression? There is little practical education we can glean from our past which can be applied to our energy problems. But, we can take comfort from the fact that we have survived far more serious difficulties and we prospered from those perilous circumstances.

There should not be any among us who does not know that we Americans, representing 5 percent of the world's population, use almost 30 percent of the world energy production. United States per capita energy demand is not our badge of distinction any longer. It has become a symbol of our arrogance throughout the world as we blindly suck dry irreplaceable oil and gas reserves, thereby making the remaining fuels more difficult and expensive to produce.

Our inconveniences suffered in long gasoline lines or in unemployment lines due to shortages of energy were real and painful. Minimum-wage earners found themselves pumping their own gasoline at twice the price after waiting through several hours of crawling up to the trough to fill their gas-guzzler at the expense of the necessities they will learn to do without. For all of our complaining though, our pains are incomparable in terms of the energy

crisis that much of the world's population faces every day of their lives

For more than 30 percent of the world's masses, their search is not for an open gasoline station to satisfy their energy needs; they are caught up in a life and death search for firewood to cook their next meal and steal a bit of warmth from the cold reality of their misery. The pressures of this constant hunt for the remaining twigs and sticks on the hillsides in Nepal and Pakistan by peasants are being witnessed by the severe erosion and siltation that follows the denuding of those slopes. The silt collects in the stream and river beds which overflow more frequently and with a greater toll in life, property, and precious topsoil.

Some argue that the loss of the former is of less consequence than the latter; topsoil is irreplaceable. As the trek for the vital supply of firewood stretches into several days of walking, the people are forced to fall back upon cattle dung, their only source of soil nutrients, to supply fuel for their domestic needs.

Kerosene, once seen as the salvation fuel of these people in the late 1960's, has now been priced beyond their reach—due, in part, to our insatiable demand for much of the world's production of petroleum. Erik Eckholm's study of, "The Other Energy Crisis: Firewood," published by the Worldwatch Institute in 1975, summed this pitiful situation by saying that today's driving habits in Los Angeles, and today's price and production-level decisions in the Persian Gulf, can influence how many tons of food are lost to floods in India.

I realize this does not direct itself to your legislation but I wanted to use that as an opening statement.

President Carter chose not to mention the plight of the world's neediest people when he addressed our problems of energy shortages and high energy prices. Instead, he focused his message on a strategy which totally ignored their peril and, in the process, he chose a path which can only bring about more tension and insecurity throughout the world in the remaining 20 years of this century. We may impose an oil import quota if we follow his program but our demand for OPEC oil will not decrease because he is putting all of our energy dollars into a business fix which is programed to fail.

Our Nation's history is littered with massive programs of one form or another which came to the rescue in our darkest hour. Lately, we have heard a great deal about the U.S. War Production Board's achievements during the early years of World War II. When our supplies of natural rubber were in danger of being cut off, the Nation swung into a massive Federal program to convert the domestic rubber industry from a natural, to a synthetic rubber producer. With an extraordinary effort, joining Federal dollars and industry technology, the synthetic rubber tire industry was born overnight. An infusion of more than \$600 million produced about 40 plants in a matter of 18 months. But, this accomplishment does not necessarily reflect a technological triumph.

The Commission created by President Roosevelt to solve the rubber crisis wrote that, "Every one of the synthetic rubber processes is technically sound and ultimately will work." One of the directives of the commission stated that no new synthetic processes

were to be substituted for those approved. What the United States and the world witnessed in those dark days was not a herculean technological accomplishment. It was better described as a business arrangement where the taxpayer purchased an industry because it could not purchase enough tires. This is not meant to belittle the fact that we did supply our needs when we faced an ominous situation. It merely puts the event into a better perspective.

An irony to the synthetic rubber saga is that we have created a demand for a product which requires petroleum and natural gas as feedstocks, and in its own way, contributes to the pressures on the world's remaining supplies of those finite resources. Truck and heavy equipment tires cannot use synthetic rubber because it becomes less adhesive under intense heat. Passenger car radial tires also require a blend of synthetic and natural rubber and they offer greater fuel savings than conventional all-synthetic tires. As the Nation's passenger car fleet adopts a wider use of radial tires, our demand for synthetic rubber may decrease in a planned fashion. However, there is no comfort in realizing that our dependence upon synthetic rubber is closely tied to our dependence upon imported oil because our demand for rubber products far surpasses the available natural resource locked in the world's rubber trees.

The Appolo program is held up as a glowing achievement of modern times but, in retrospect, it was a venture which relied on existing technology which was refined to meet the specific needs of the NASA program and our Moon launch. Again, it was a business fix which landed our astronauts on the Moon and it proved that money could buy success when we had the technology in hand.

Now, we are embarking on another national crash program which is a new breed of animal because the stakes have never been higher; the rationale less sound; and, the payoff less certain. We are going after the biggest business fix in the history of our U.S. Treasury. With a declared war chest of \$88 billion, we are going to risk everything on the old American philosophy; every problem has its price.

I look at that \$88 billion amounting to about 2.5 million barrel per day production, I see that averages about \$35,000 to \$40,000 per new barrel of production. When I consider the estimated cost of available energy conservation technology being at the higher end about half that amount, I stress the irrationality of directing our attention to synthetic fuels.

This administration is putting the finishing touch to a sweeping proposal which can only be overshadowed by this Congress appetite to throw money at synthetic fuels technologies in the name of responding to present day energy problems. Never mind that the 25 or more plants may cost more than double their estimated \$1.5 billion each, or that they may not provide a marketable product without perpetual care from the taxpayer. We are going to war with energy shortages and no cost is too great in the battle before us.

Every war has its victims and this war will probably make victims of all of us whether we live downwind of the plant, pay for its upkeep, or mortgage our homes to buy its products. We are not only going to heat up our already unbearably inflated economy, we have the potential to add a small amount of heat to the entire

planet in the form of entrapped radiant heat from the Earth which cannot penetrate the increasingly denser blanket of carbon dioxide which is a pollutant from those synfuels plants.

In 1977, the esteemed National Research Council concluded, in a report titled, "Energy and Climate," that the climatic effects of carbon dioxide release may be the primary limiting factor on energy production from fossil fuels over the next few centuries. Given a better appreciation of the existing data, that statement is being viewed as highly optimistic and some world experts are beginning to discuss the impact from carbon dioxide buildup as a problem we must confront in this century.

Based upon constant monitoring data from stations at Mauna Loa Observatory in Hawaii and at the South Pole the concentration of CO_2 in the upper atmosphere is increasing at a rate that will allow it to double by the year 2030, at present growth rates for world fossil fuel combustion. If a large increase in synthetic fuels processing, a doubling of coal use in the United States and throughout the world is factored in, that doubling time is shortened. Using the best computer model and the information available, a doubling of the CO_2 in the atmosphere, could increase the average temperature of the lower atmosphere about 2° to 3° C at the equator and 6° to 9° C at the poles.

Such a climatic change would affect the temperature of the ocean's water and dramatically change precipitation patterns. More important, according to the NRC study, a rise in average annual global air temperature would result in a gradual poleward movement of agroclimatic zones. Summer temperatures might become too high in our Corn and Grain-Belt States. The likelihood of shifting our Grain Belt to the north is limited since the acidic podzol soils of the Northern States are badly leached and tremendous amounts of nutrients would have to be made available to try to attain previous agricultural output.

President Carter did not mention this to the American public in his energy talk either. The discussion of carbon dioxide buildup and the impact of a synfuels option, coupled with vast increases in the use of coal for direct combustion cannot be found in his energy fact sheet either.

It is another American phenomenon to keep certain problems out of sight and out of mind. But, this problem will not go away and, whether we choose to address it now or when it is too late, some of us in this room this morning, and certainly our children and grandchildren will suffer through its consequences even though we cannot describe, accurately, what will happen to their lives.

While his speech carefully avoided any mention of the long-term consequences of the long march he would put us on, the President did not hesitate to admonish us—and possibly certain of us more than others—that to make absolutely sure that nothing stands in the way of achieving his goals, he will urge you to create an Energy Mobilization Board. Just like its historic, and highly decorated grandfather, the War Production Board of World War II, it will be a redtape cutter and an expeditor of completing key energy projects.

He did mention that we will protect the environment. But, in the next breath he rattled his sabre at NPEA, and passed the word down the ranks that, "When this Nation critically needs a refinery or a pipeline, we will build it."

It is not going to be as simple as the administration and the coal and energy companies think, to push aside the more immediate needs and concerns of the American public as he tries to force a supposedly critical nuclear powerplant or waste disposal facility into a community because the energy mobilization board decides it is necessary. National surveys continue to show that the public does not want to trade in clean air and a healthy environment for increased energy supplies. Most Americans, whether they support nuclear power or not, will not let a nuclear plant be located in their neighborhood or allow the nuclear waste to be buried in their State. America is not asking for energy at any cost. President Carter has declared his war on energy. We know that when it comes to energy use in this country, we are the enemy. Is our President declaring an energy war on us and our environment?

The Energy Mobilization Board is a disaster looking for a place to happen. All of the gains that the public achieved in the last several years of intense debate on clean air and water laws, strip mining reclamation guidelines, health protection laws, and labor laws are all being thrown to the energy cats in the stadium as the energy mobilization board presides over the contest. When it appears that the protective laws are getting the upper hand, the board waives its pen in the air and the laws are waived aside and the cats regain their advantage.

The board would be empowered to designate certain energy projects as critical to achieving the Nation's import reduction goals and to establish binding schedules for Federal, State, and local decision-making with respect to those projects. If an agency, whether State, Federal, or local, fails to act within the specified time, the board will have the power to make the decision for the agency, using the application of appropriate laws.

In order to expedite projects, the board could waive procedural requirements of Federal, State, or local laws. To avoid delays once construction begins, the board could also waive the application of new substantive or procedural requirements of law which come into effect after construction of the project has commenced. Does this mean that as we learn more about the dangerous carcinogens associated with certain of the synthetic fuels plants, we will not be able to apply protection to the workers if the plant is already in operation?

The President's proposal to create such a board must be resisted by this Congress at all costs. We are a nation of individual States which have rights which must be protected. Will the Energy Mobilization Board have the power to decide that water from Wyoming will be pumped into a coal slurry pipeline because an electric utility company in Texas or Louisiana has a friend on President Carter's Energy Mobilization Board?

H.R. 4499, as introduced, is not much better than the board but it can easily be corrected with amendments which remove the Department of Energy from the role as lead agency and replace it with the critical energy facility program presently being imple-

mented by the Director of OMB. This is pursuant to Executive Order 12129, April 5, 1970.

By providing that all decisions made by the Director of the program be in accordance with existing statutes and regulations being enforced by the various agencies, it would be possible to coordinate the permitting and licensing process of energy facilities deemed to be in the national interest.

The criteria by which projects are designated to be in the national interest must be broadened to include a test of the project's cost relative to the energy produced and whether the facility is an important component in our national energy program. Conservation projects and facilities should also be included as critical energy sources of domestic energy supply in section 202. That section excludes research and demonstration facilities from the purview of the legislation and this can be read as a built-in bias for existing technologies only.

Section 207 is a contradiction of the intent of the bill. If the justification for this legislation is the acceleration of permit application processing, it makes no sense to allow extensions of time for incomplete applications on the part of the project sponsors. Further into the bill, there is restrictive language applied to Federal agencies when they fail to meet their deadline for action as defined in the project decision schedule. This legislation should demand equally diligent adherence to deadlines from project applicants.

H.R. 4499 is deficient in that it does not include the involvement of Indian tribal governments during the project decision schedule process pursuant to section 210 of this title. Considering the vast amounts of committed reserves of coal on tribal lands in the Northern Great Plains and Southwestern States, many of the proposals for designation as priority energy projects will probably originate on Indian lands. Therefore, the bill should specify that tribes are to be included in the process.

Section 210, the project decision schedule provision, should clarify the role of each Federal agency in determining respective project decision schedules if the letter, spirit, and integrity of existing statutes and regulations is to be protected. This section must clarify that consultation between the principal entity, possibly the critical energy facility program and each Federal agency is substituted with a requirement of Federal agency concurrence in determination of project decision schedules and that each agency retain the authority to establish their own deadlines within the project decision schedule. The agencies must be protected from preemption of their authority or existing Federal statutes and regulations.

Without the incorporation of the above recommended changes, H.R. 4499 is unacceptable and the Center will work against its adoption. Furthermore, the idea of an Energy Mobilization Board with its vast powers to waive statutes and regulations is far more dangerous and does not deserve the support of this Congress.

This Nation was founded on a Constitution of laws, not men. Those laws are meant to protect all Americans, the rich and the poor, the energy gluttons and the energy preservers. If we, as a people, choose an energy policy which promises only the highest priced energy in the world—at the expense of the health and well-being of its citizens—our children will be the victims. With that,

Mr. Chairman, I will end my statement and open myself to questions.

Mr. DINGELL. We thank you for your statement.

The Chair will recognize Mr. Finnegan for questions.

Mr. FINNEGAN. Mr. McCormick, you heard some of the comments in the room earlier. In looking at the bill, let me ask you about the definition of an energy facility. Do you think it is too broad for the purposes of this bill, or should the designation be on a facility-by-facility basis or generic basis, as was suggested earlier?

Mr. McCORMICK. I think, more important than broad definitions, we should limit the scope of the legislation to a certain number of facilities that can be designated. I think that is probably of paramount importance.

In defining "energy facility" I would certainly see difficulties in using the words, "mine, well, rig, building, equipment," because there we may be talking about a single dragline. There are 5,000 coal surface mines in the Nation. It is not clear that particularly on Federal lands if those mines came under review when a Federal program had to supersede a State program which had failed, that those mines would come in and ask for status as a priority energy project during the review process as the Feds review the mine, to assure that it would comply with the Federal program once the State program is superseded.

I would also like to comment that in the Statement of Purposes in this legislation there is a phrase, "Other than research and demonstration facilities." I think that is an error, because some of the more important strategic or energy priority facilities might well be R. & D. facilities. I think they ought to be included.

I see the words, "energy conservation exploration." I think that should be more explicit throughout the bill, that energy conservation is also considered a meaningful energy production goal, not that it is going to produce energy but it is going to replace imported oil.

Mr. FINNEGAN. About what the generic designation of facility is, would you support that idea, or do you think it has to be on a case-by-case basis? You mentioned a limited number each year. One of the bills has six. Are you supporting that idea, and if so, what happens if one is designated, something happens in the process—for example, the financing goes down the tube—you have to have a procedure for substituting one of that six?

Mr. McCORMICK. I would like to address it first. When you say in the generic sense, if we consider a coal gasification plant as it comes in as an application, consider that a priority energy project, I don't interpret that to mean that all applications for coal gasification plants will automatically be considered a priority energy project.

Mr. FINNEGAN. That is not what it is under the bill. I think one of the witnesses was suggesting that to be the case this morning.

Mr. McCORMICK. I would not accept that at all. I think it should be on a case-by-case basis.

Mr. FINNEGAN. His argument, I believe, was that it would have an impact competitively. All the big companies would be winners and all the small companies would be losers?

Mr. McCORMICK. I don't have a feeling for that.

Mr. FINNEGAN. Would you agree with or support the idea of requiring a single comprehensive environmental impact statement be prepared for a project and a lead agency for the impact statement be designated by either the Secretary or somebody as a part of that?

Mr. McCORMICK. I think the Secretary of the Federal agency responsible for issuing the evaluation of the final environmental impact statement for that particular project should have the sole discretion of determining whether an environmental assessment or environmental impact statement is required. I don't think that statement should be made by the director of this fast track.

Mr. FINNEGAN. You will agree that at the time of the designation of a project on a certain schedule, it might be useful to have designation of who is that lead agency and who is responsible?

Mr. McCORMICK. Yes, I agree that would help.

Mr. FINNEGAN. You stated that the time procedures that are set forth in this are too short in trying to consider what our designated projects—

Mr. McCORMICK. Yes, I think they are unrealistically short, particularly when you have a broad definition of "energy facility."

The point I would make is that if we open up that definition of "energy facility" to include such a broad array of physical structures, we may flood the Department of Energy or that receiving office with many hundreds of applications.

When we hold the time frame down to 45 days, I think that is asking too much of the Department or any department. If we were to limit the number to 6 or 8 or 10, I think their 45 days might be more reasonable.

Mr. FINNEGAN. But that is the final designation, the number is the final designation. To reach that designation, you are liable to have several hundred applications?

Mr. McCORMICK. Yes. If we didn't limit the final designation, we would still have that process.

The more important point I would make is that if the Congress holds this timetable down to such a small number of days—and doesn't that take into consideration the need, possibly, to increase the level of bureaucracy within these agencies so that they have the manpower, the budget, to accomplish what they are being asked to accomplish in such a short period of time—then I think we circumvent the intent of the act.

Mr. FINNEGAN. At the time of the designation, should not the designation require there be a finding that there be adequate personnel and funds to carry out the time schedule established?

Mr. McCORMICK. Most definitely. We have amendments directed to that point.

Mr. DINGELL. And also that such event would not unduly prejudice proper consideration of other projects?

Mr. McCORMICK. Yes, sir; we would agree with that.

Mr. FINNEGAN. The bills talk about approvals and actions by the various Federal agencies. It is not clear from the bill what laws we are talking about and what agencies we are talking about.

Is it your understanding this is pretty much limited to environmental laws, or is it broader, or should it be broader?

Mr. McCORMICK. Its broadness is only determined by the nature of the application. If the application requires permits from OSHA, the Coalmine Health and Safety Board, possibly some labor-related permits, I think the variety of Federal agencies that could be involved is quite limitless.

Mr. FINNEGAN. What about the idea suggested by the President, of establishing a board that would have authority to waive procedural requirements, whether they be in statutes or regulations and the laws themselves, what are your views on that?

Mr. McCORMICK. We are very opposed to that, and we think it is quite unnecessary; it is another version of overreacting.

The President has put in its place a critical energy facility program which seeks to accelerate a permit process but does not attack existing State and Federal statutes and regulations.

When I consider that word "procedural," one of the processes in attaining a coal surface mining permit is to do core sampling. Core sampling provides all of the necessary information to the regulatory authority to determine if reclamation is going to be possible, because there the authority can determine the amount of acidity in the soil, the absence or availability of natural mining stones to neutralize that acid. Without those core samples which take some amount of time to drill, the regulatory authority would really be guessing that the operator can reclaim the land. He may also find out there is an insufficient amount of coal in the first place, and the operator may not make enough profit to return the land to a reclaimed condition.

If that would be considered a procedural process, then there we have circumvented one of the more important parts of a very essential law. That is just one example. I can cite dozens of others.

Mr. FINNEGAN. Finally, do you think this bill adequately addresses the problem of State requirements, State approval action vis-a-vis the Federal, and do you agree with the previous witnesses that maybe there should be preemption of the State if they don't act within a certain time frame?

Mr. McCORMICK. If the Federal budget were to reach out to State agency budgets, perhaps there might be some case for that. If there were a State like North Dakota which in the past several years, because they didn't have much activity in surface mining, had only one person approving the surface mine permits, asking a State agency to respond where their budget and their personnel are so limited, to track with the Federal agency where the Federal budget is so many billions of dollars, is totally unfair. States have a right to protect themselves. I would hope that this Congress does not impinge upon those States' rights to protect its citizens.

Mr. FINNEGAN. Thank you.

Mr. DINGELL. The Chair recognizes Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman.

Mr. McCormick, I have tried to run through your testimony hastily. I particularly am impressed with the part that is addressed on pages 2 and 3, the problems faced by so many people in the world with reference to their food needs, and where you start out talking about the need for firewood, I get terribly ambivalent feelings—I should not say that; I don't have any ambivalent feelings about an ability to work these things out to a final conclusion—I

think it is unfortunate that we cannot work them out to a final conclusion—but I get ambivalent feelings about some of the approaches we have.

I have people who would like me to support tax credits for woodburning stoves.

I just have to say that I don't have a great deal of enthusiasm for that, because I see the possibility that if you encourage woodburning stoves beyond the encouragement they have already had as a result of our energy crisis, you may mess up not only Maine but my district a little, because we have a lot of trees being chopped down and not replaced now, simply because of the need to produce food.

I worry about what that may ultimately lead to in terms of values to the soil and other things a few generations hence.

So I think you make a very persuasive argument in this area and perhaps an argument for the use of a more intelligent, economic rationale.

You make reference to Nepal. I have not been to Nepal, but I have been in Ethiopia. The most significant thing required in Ethiopia is the planting of eucalyptus trees as a windbreak to try to get the countryside stabilized.

Now, having said all that, and supporting your environmental approach to that extent, I am also concerned about the fact that ours, while it is an agricultural economy with reference to supporting the rest of the world, is not an agricultural economy with reference to the employment and mechanisms for survival that most people in our society have to rely on.

Much as I wish the whole United States were like my district, there are peculiar places like Los Angeles, Calif., and Miami Beach, and even—I am told—places like Detroit—

Mr. DINGELL. Detroit is not a peculiar place.

Mr. BROWN. Let the record show that I chose not to argue with the chairman.

Anyway, my question is, how do we address the need to sustain in at least—for lack of a better term—a graceful way, in an economic sense, the need that this Nation seems to have for high energy utilization? Then I want to take that full circle and come back to the agricultural side.

I had the opportunity to have somebody suggest to me recently that maybe one of the ways would be a return to what was referred to as natural agriculture. I am not sure what natural agriculture is. It was described as purchasing horses as a means of tilling fields and so forth. Frankly, we can survive on that basis in my part of the country. We cannot survive on it, I think, as a nation, to feed the people in the cities here, because we are obliged to have mechanized agriculture if we are going to do that; and we certainly don't offer much help to the people in Pakistan and Ethiopia if we don't have the ability to export 20 percent of our agricultural products abroad to try to help other people in other parts of the world.

Now, it is that dichotomy that I have difficulty with. It makes me feel that at this point there is a need for us to be able to cut through the limitations that we have placed in law on the environmental, land use and other restrictions in order for us to be able to

address something which has come to us as a very sharp crisis at this point.

I proposed the other day on the floor of the House that we do it with the President making a decision and submitting that decision, or allowing that decision to be overridden by the Congress if he chose to abrogate any of the existing laws.

I see this fast track bill as a means of speeding up administrative decisions only, but not in any way abrogating existing law or being able to address the effort that the President might want to make for the good of the whole society by the objections of relatively few people. Now, tell me, how should we deal with that problem? Should we not address those basic laws at all, or should we try to address them in such a way that Congress could speak to the issue, or should the President be allowed to do it at his whim, or how would you suggest we address that problem?

Mr. McCORMICK. The President should not have the power to address those environmental laws, those statutes and regulations which would be a part of fast track at his whim. That should be the power of Congress. Congress makes the laws; the President upholds them.

Mr. BROWN. Let us say that there is one shale plant out West which may take a lot of water that otherwise would be used for agricultural purposes, that would diminish the amount of water that might be used for agricultural purposes in order to make shale into oil in a certain area in the West; and the President says in that case we must abrogate because that is where the shale oil is, 72 percent, according to OTA, is in such lands, we must abrogate that law for this single project, and the Congress either vetoes it or doesn't veto it by inaction and lets that take effect. Could you buy that kind of circumstance?

Mr. McCORMICK. It is not a question of buying it; it is how are we going to deal with it when it arises.

As I see the direction the President is looking to take us—

Mr. BROWN. It is not, however, permitted in this bill. If that were added to the bill, I think it would be a strengthening amendment for the hand of the President and the Congress to address the fuel needs.

My real question is whether you would find violent objection to that?

Mr. McCORMICK. Yes, we would, because, as I read the Energy Mobilization Board, that Board would have the power to make a decision for a State.

Now, the State of Wyoming made a decision regarding coal slurry pipeline permits, allowing a company to pump water from Wyoming to Texas to slurry coal. The State legislature was given erroneous information by the company regarding the impact that their test wells would likely have over a longer period of time.

It was only after the legislature acted to give that permit to the company that they learned that they had made a grave mistake. It takes several years, perhaps 5 years, to determine what impact the mining of water from a ground water formation is likely to have in the region.

If the company comes in with an application to have their coal slurry pipeline designated as a priority energy facility, and the

State of Wyoming says it is going to take us several years to make the determination that pumping that water is not going to have an effect on the water pressure in the agricultural community or on oil or gas wells in that region, the President could say, "That is not good enough; we need the permit now. The State says, "We cannot provide that permit." The Energy Mobilization Board moves in and makes the decision for the State. That is the way I read the Energy Mobilization Board. It is totally unsatisfactory.

Mr. BROWN. How would you then generalize this thing I proposed the other day, where, if the President and the Energy Mobilization Board made that decision on a single project, that the Congress would have the right to either veto it or not veto that decision by the President?

Mr. McCORMICK. That is a real improvement, except the President could veto that override, I suspect.

Mr. DINGELL. Not if he used the EPCA process.

Mr. BROWN. You see, the legislation is now reading that the President now has that authority unalloyed, without any process or demurrer on anybody's part.

Mr. McCORMICK. I read the Energy Mobilization Board that way. I do not read H.R. 4499 or H.R. 4573 that way.

Mr. BROWN. H.R. 4499 and H.R. 4573 are the numbers of these bills?

Mr. McCORMICK. Yes.

Mr. BROWN. Let me focus on what you are saying. You don't like the Energy Mobilization Board but you accept this bill as it is?

Mr. McCORMICK. No, not as it is, Congressman. We have a package of amendments addressing the difficulties we see in H.R. 4499. They are similar to amendments we proposed to the House Interior Committee and the Senate Energy Committee. If these committees adopt these amendments, and with another obvious review of what the committees have done, we might be in a position to lend our support to any adoption of this fast track method.

Mr. BROWN. I am still having trouble here, because what I am hearing is that you are suggesting that you are opposed to any procedural device.

Mr. McCORMICK. Any procedural——

Mr. BROWN. Sorry—any procedural speedup.

Mr. McCORMICK. Not against procedural speedup as long as the agencies are given the proper tools to work with. I am opposed to any procedural waivers. The procedural waiver might be in an existing statute or regulation, there being a certain deadline for compliance with some action as a process of having a permit process completion.

If the Secretary or whoever can take the project schedule deadline and say to the Department of the Interior, "We will take 120 days to review the reclamation plan of that coal strip mine in New Mexico," that is good enough; you have to conform to the 45-day limit; and that permit comes in in November and there is 2 feet of snow in New Mexico at that time, the regulatory authority can't comply, and the Secretary has the power to waive that procedure. It is the waiver of procedure, and I read procedure as meaning statute or regulation, and since you implement a statute through

regulations, the procedure is the regulation, you waive the regulation when you waive the procedure.

Mr. BROWN. You have no objection to requiring the authorities, whoever they are, to make their decisions within a certain limited time frame?

Mr. McCORMICK. Again, with that caveat——

Mr. BROWN. Wait a minute. To shorten the timeframe or require that they make a decision by a certain time, because we give the authority in the law for somebody to make a decision, we frequently do not spell out how long it takes to make the decision. A decision that logically might be made in 90 days sometimes takes a year and a half to work its way from the bottom of the file to the top of the file in a decisionmaking agency.

That is the first decision. You have no objection to our speeding that process up?

Mr. McCORMICK. Let me say for the record, Congressman, we would support that idea as long as the shortening of time frames was made consistent with existing statutes and regulations. That could require a broad definition.

The statute or regulation might require completion of the permit process and the completion of that permit process might require analysis of drilling samples.

Mr. BROWN. Sometimes, again, this is not spelled out in the basic legislation. We don't write in those details sometimes. What do you say in that event?

Mr. McCORMICK. We would try to protect the sovereignty, for lack of a better word, of the various Federal agencies, that they have the full time required to complete the responsibilities they have to maintain in the statute pertaining to that part of the permitting process.

So we protect the Federal agencies in carrying out all their responsibilities, but we still recognize the possible advantage in consolidating the entire permitting process.

Mr. BROWN. In other words, you are afraid that judgment in 30 days might be required, whereas it would really take 90 days to get all the facts in and so on?

Mr. McCORMICK. That is right.

Mr. BROWN. And you object to the idea of shortening any of the appeal processes?

Mr. McCORMICK. Those of us who are focusing our attention on this array of bills are sort of dividing up our concerns.

The Natural Resources Defense Council has considerable interest in the judicial review process of the bill. I cannot say that I can speak as eloquently as they on that portion of the bill.

Mr. BROWN. Could you tell me simply how they feel? Are they opposed in general to shortening the process for presentation on appeal?

Mr. McCORMICK. It is my feeling that the consensus is that we could live with shortening of the appeal process, as long as it were applied equitably between the applicant and the public. I think, beyond that, Congressman, I don't feel competent to reply.

Mr. BROWN. I won't press you on that.

You are opposed to the Presidential authority without congressional review?

Mr. McCORMICK. Yes.

Mr. BROWN. Would you be opposed to it if there were a congressional review procedure in the waiver of existing law?

Mr. McCORMICK. That also provided for a one-House veto. Congressman, I would like to ask to have the opportunity to submit that response in writing.

Mr. BROWN. Could you do it soon, because I have the feeling that—never mind my questions—we are on our way on some of these processes.

Mr. McCORMICK. The fast track.

Mr. BROWN. The fast track has already been constructed at least for the consideration of the bill. Are you willing to have any limits on procedural delays at all?

Mr. McCORMICK. Not if it jeopardizes in any way existing statutes and regulations.

Mr. BROWN. Jeopardizes in any way? In other words, if the President could waive, with either the active acquiescence or the failure to veto by one House of Congress, could you accept that?

Mr. McCORMICK. Again, I would like to include that in my written response.

Mr. BROWN. If you would, because I think that is one of the alternatives. I have a little problem—whether I agree with the law or not, and I would like to make a statement for the record in conclusion—I have a little problem with the President having the authority to waive an existing law. I may happen to feel that is a rotten law. On the other hand, it is passed by a majority of the Congress and I am enough of a traditionalist, conservative, for lack of a better term, that it is the law, and to have the President to be able to waive it bothers me a little.

So I am still consistent with some of my liberal friends who got terribly upset when it was another President, but don't seem to be upset when it is a President they tend to get identified with, in a pedigree sense, a little better than another President.

I think my position is more consistent than theirs; however, I do think there are times—and this may be it; there certainly was in World War II, where, as an administrative measure, we gave the President the right to say, "In the public interest this must be done, and I speak for the whole society"—however, I would like to see the Congress both responsible for and implicated in the decision then that the President takes, so that we have to vote individually on allowing him to waive that law collectively, help him make that determination.

Now, I don't think that that is either irresponsible per se environmentally, or irresponsible per se from the standpoint of meeting our energy needs. I think that it makes for a procedural linkup between the representatives of the people and the administrator of the people, not the representative, because, you know, one of the problems this President is having and some others have had, is that they thought they were representing the people. The hell with that. We hire them as executives and administrators.

The trouble is, we sometimes get very poor ones. If we could make a linkup between the administrators and the representatives of the people's judgments through this procedure, it seems to me that then we have a protective procedure from both sides; and if

you stand alone, get your shot and try to influence those of us in the Congress who are helping the President make a decision, and the representative of the oil company can get in there and make his argument too; and we come to a conclusion in the process that we established in the original law; frankly, I don't see anything wrong with that.

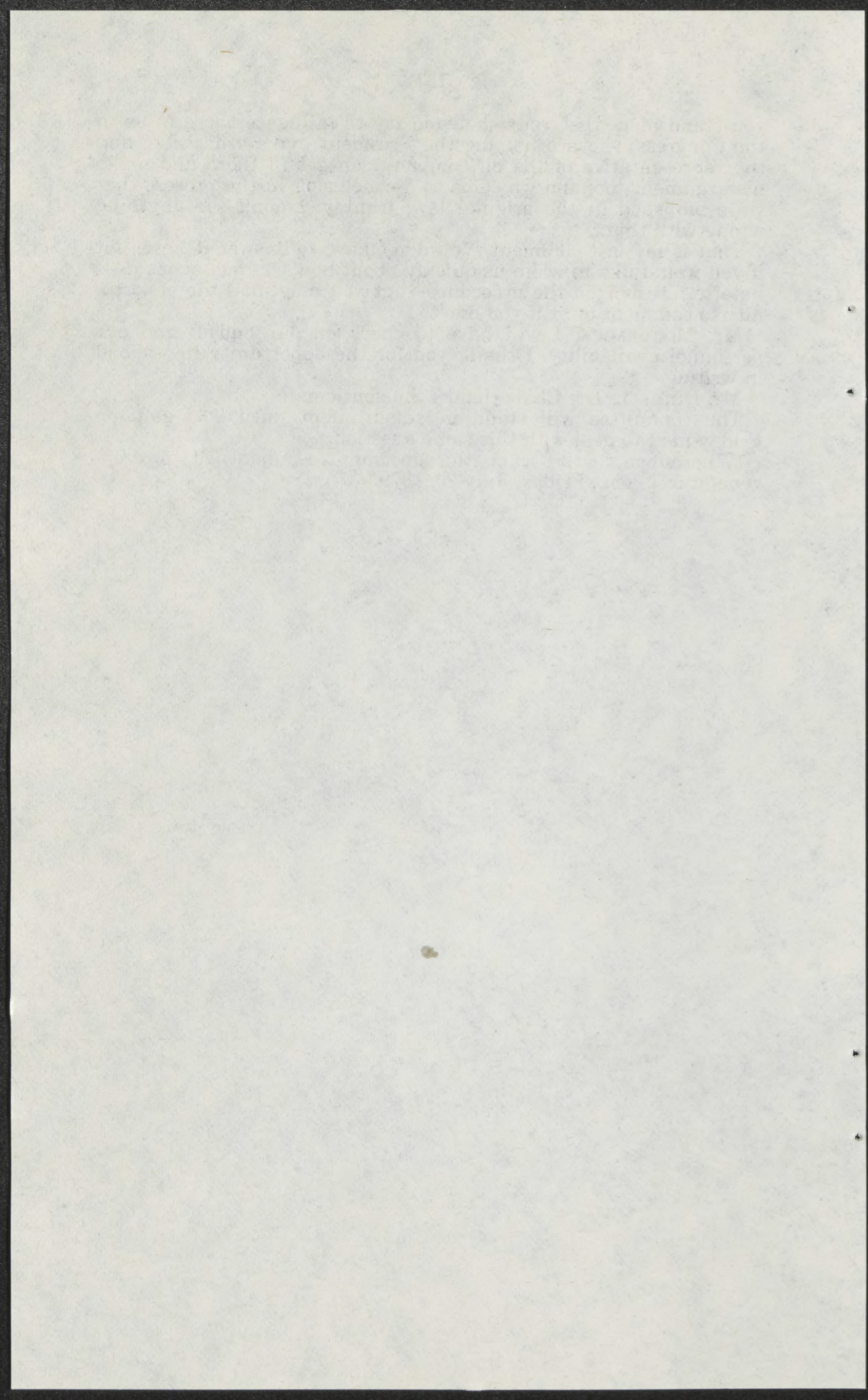
That is my last comment. You don't have to answer it here, but if you would like to write us quickly about how you feel about it—I hate to foreshorten the procedure—but you may miss the opportunity to comment on it if you don't.

Mr. McCORMICK. I will have to check on our budget and our personnel availability. I thank you for the opportunity to respond in writing.

Mr. DINGELL. The Chair thanks the gentleman.

The committee will stand in adjournment until 9:30 a.m. on Friday next to deal with this same question.

[Whereupon, at 12:10 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Friday, July 20, 1979.]



PRIORITY ENERGY PROJECT ACT OF 1979

FRIDAY, JULY 20, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND POWER,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 9:45 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John D. Dingell, chairman, presiding.

Mr. DINGELL. The subcommittee will come to order.

This morning the subcommittee considers H.R. 4573 and H.R. 4499, the Priority Energy Project Act of 1979, often called the fast track legislation, plus proposals by the administration to deal with the question of expediting the construction and the processing of applications relating to energy facilities of critical importance to the Nation.

We have a large panel this morning. We are particularly grateful to them all for being with us and for their assistance to the committee in its attempts to proceed toward enactment of legislation relating to these matters.

Our panel comprises the Honorable Alvin Alm, Assistant Secretary, Policy and Evaluation, Department of Energy; the Honorable Guy Martin, Assistant Secretary for Land and Water Resources, Department of the Interior; the Honorable Charles B. Curtis, Chairman, Federal Energy Regulatory Commission; the Honorable William Drayton, Assistant Administrator for Planning and Management, Environmental Protection Agency; Mr. Eliot Cutler, Associate Director for Natural Resources, Energy, and Science, OMB; the Honorable Gus Speth, Acting Chairman, and Mr. Nicholas Yost, General Counsel, Council on Environmental Quality; Brig. Gen. Hugh G. Robinson, Acting Director of Civil Works, U.S. Department of the Army; Mr. Edward A. Helme, associate director for energy and natural resources, National Governors' Association; and Mr. Joel Jacobson, the New Jersey Commission on Energy, representing the National Governors' Association.

Gentlemen, we thank you all. We apologize for hearing from you as a panel, but I think consideration will be more orderly as we proceed.

The Chair has been advised that Mr. Cutler has very important business elsewhere. In order to accommodate his concerns, we will hear him first.

Mr. Cutler?

STATEMENTS OF ELIOT R. CUTLER, ASSOCIATE DIRECTOR FOR NATURAL RESOURCES, ENERGY AND SCIENCE, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT; ALVIN L. ALM, ASSISTANT SECRETARY FOR POLICY AND EVALUATION, DEPARTMENT OF ENERGY, ACCOMPANIED BY ERIC FYGI, DEPUTY GENERAL COUNSEL, DOE; GUY R. MARTIN, ASSISTANT SECRETARY FOR LAND AND WATER RESOURCES, DEPARTMENT OF THE INTERIOR; HON. CHARLES B. CURTIS, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY; WILLIAM DRAYTON, JR., ASSISTANT ADMINISTRATOR FOR PLANNING AND MANAGEMENT, ENVIRONMENTAL PROTECTION AGENCY; NICHOLAS C. YOST, GENERAL COUNSEL, COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT; BRIG. GEN. HUGH G. ROBINSON, ACTING DIRECTOR OF CIVIL WORKS, OFFICE OF THE CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY, DEPARTMENT OF DEFENSE; EDWARD A. HELME, ASSOCIATE DIRECTOR, ENERGY AND NATURAL RESOURCES PROGRAM, NATIONAL GOVERNORS' ASSOCIATION; AND JOEL R. JACOBSON, REPRESENTING THE NEW JERSEY DEPARTMENT OF ENERGY

Mr. CUTLER. Thank you, Mr. Chairman. I appreciate your indulgence very much. I am sure we are all pleased to appear before you today to discuss the President's program, H.R. 4499, introduced by you, Mr. Chairman, and H.R. 4573, introduced by Mr. Udall.

Rather than taking up this subcommittee's time with an analysis of the need to reduce U.S. petroleum imports—

Mr. DINGELL. Mr. Cutler, pardon me for interrupting you. In order to perhaps save the time of all of our panelists, we will insert the full text of your statements in the record in each instance, and we will then recognize all of you for such summary as you deem appropriate.

Mr. CUTLER. Thank you, Mr. Chairman.

If I may, I would proceed to page 3 of my prepared testimony and read, if I may, three pages of it which most specifically address the matters before the committee today.

The synfuels program will produce substantial import reductions by 1990 and holds out the further possibility of additional private deployment thereafter. Further import reductions in the 1980-90 period will be achieved through the prompt implementation of the President's proposals for unconventional gas, heavy domestic crude oil, mandatory electric utility oil consumption reductions, residential and commercial building conservation, mass transit assistance, and auto fleet efficiency improvements. Though the savings from these programs are generally earlier and cheaper than synthetic fuels, they do not hold as large a potential beyond 1990.

The Energy Mobilization Board is a necessary part of the President's program. The EMB will assure fast tracking of Federal, State, and local permits and reviews on facilities which are critical to the accomplishment of our import reduction goals.

We propose that the EMB be established in the Executive Office of the President, and that it have the authority: To designate projects critical to our import reduction goals as critical energy facility; to establish binding deadlines for decision by all Govern-

ment agencies on critical energy facility; in the event that any Federal, State, or local government instrumentality fails to meet the decision schedule, to make the decision itself under the terms of the appropriate Federal, State, or local statute, after public notice and comment; to waive procedural requirements, such as timetables or hearing requirements without prejudice to the substantive requirements of law; and to waive, on a case-by-case basis, the application of new procedural or substantive standards which come into effect after a critical energy facility has received all necessary approvals and commenced construction.

These authorities are undeniably powerful, but they have been carefully tailored. The role of the EMB will be to insure that decisions are made without needless delay, to cut through redtape, and to provide some reasonable certainty that decisions once made will not change.

This proposal differs in several respects from the legislation now before you. Most prominently, it would establish the EMB in the Executive Office of the President rather than at the Department of Energy or the Energy Security Corporation.

The administration firmly believes that it would be substantively dangerous and administratively unworkable to grant a single-mission agency broad authority over the procedures and responsibilities of agencies with very different missions and mandates.

The result could be the wholesale and unnecessary sacrifice of health, environmental, and safety values. It would most certainly yield an intolerable adversarial relationship among government units each suspicious of the other's motives.

A second major difference between EMB and the legislation before this committee is that the administration's proposal would allow the establishment of legally binding decision schedules for State and sub-State governments. We propose that this authority be backed up by the same mechanism used at the Federal level—failure to issue a decision on time would allow the EMB to preempt the laggard agency and make the decision, applying the appropriate Federal, State or sub-State law.

Fast tracking at the Federal level alone is clearly inadequate. The Sohio pipeline experience underscores that point. If we are serious about a synthetic fuels program, as the President is, then we must tackle the whole problem.

A decision to designate a critical energy facility or to establish a decision schedule would not be subject to judicial review. Decisions of the EMB and actions of Federal, State, and local agencies necessary for the approval of critical energy facilities would be subject to judicial review only: (1) After EMB determines that the permitting process for a critical energy facility has been completed; or (2) if the EMB determines that earlier review of an agency action is necessary to expedite completion of the project approval process or is necessary to assure fairness to the parties involved.

Such actions challenging the granting or denial of approvals must be brought within 60 days in the Federal court of appeals for the circuit in which the facility involved is located. If a transportation facility is involved, the relevant circuit would be that in which the terminus of the facility is located.

Reviewing courts would be required to render their decisions within 90 days, except where the Constitution requires a longer period.

Any petition for review to the Supreme Court would have to be submitted within 30 days and the Court would be directed to expedite action on the appeal.

It is time to bite the bullet on these issues. The urgent need to reduce oil imports denies us the luxury of leisurely decisions and extended review.

The administration program strikes a balance between the import reduction imperative and the need to preserve critical environmental, health, and safety values. The Energy Mobilization Board is a necessary part of that program.

If I might, Mr. Chairman, I would like to insert at this point in the record of the hearing the specifications for establishment of operation of an Energy Mobilization Board, a White House release dated July 19, which describes proposed specifications for the use in drafting legislation to establish and set forth the power and duties of an Energy Mobilization Board.

Mr. DINGELL. Without objection, those will be inserted in the record.

Mr. CUTLER. Thank you, sir. That concludes my statement. I would be pleased to answer any questions at this time or later.

[Mr. Cutler's prepared statement and the White House release follow:]

STATEMENT OF ELIOT R. CUTLER, ASSOCIATE DIRECTOR FOR NATURAL RESOURCES, ENERGY, AND SCIENCE, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT

Mr. Chairman, members of the subcommittee, I am pleased to appear before you today to discuss the President's Import Reduction Program, H.R. 4499 introduced by Mr. Dingell, and H.R. 4573 introduced by Mr. Udall.

I will not take up this subcommittee's time with an analysis of the need to reduce U.S. petroleum imports, beyond the observation that this year's new demonstration of the economic and national security threat posed by continued dependence amply demonstrates the need for drastic action. We simply cannot afford to allow the economic vitality of the nation to be throttled by the OPEC cartel.

The Congress acted last year by enacting substantial portions of the Administration's initial proposals. We estimate that this action will reduce 1990 imports by about 2.5 MB/D, to a level of roughly 10.5 MB/D, depending on future oil prices and U.S. economic growth. We estimate that the decontrol of domestic crude oil prices, the energy supply and conservation investments announced by the President on April 5, and the actions announced in the June Solar Energy Message will, if fully enacted, further reduce 1990 imports by 1.5 MB/D to between 8.5 and 9 MB/D.

Together with the April 5 decontrol decision, the President asked that the Congress enact a strong Windfall Profits Tax. The President committed himself to the use of the Windfall Profits Tax proceeds to assist low income households to ameliorate the higher energy costs imposed by decontrol, to provide additional Federal assistance for energy-efficient mass transit, and to undertake energy supply and conservation investments to reduce our dependence on imported oil. The President proposed that this be accomplished by the establishment of an Energy Security Trust Fund which would assure that the windfall profits which would otherwise accrue to domestic petroleum producers will be diverted to satisfy the public interest in reducing dependence on imported oil.

The Administration is gratified that the House of Representatives acted promptly in enacting the Windfall Profits Tax and establishing the Energy Security Fund. The Senate must now follow suit. The President's Import Reduction Program can be undertaken only if the tax and the Fund are enacted. Should the Congress fail to enact an adequate tax, the Congress and the Administration will be forced to make a very unpleasant choice: either the public will have to bear taxation at historically

high levels, or the Program will have to be cut back and the nation's energy security put at risk.

In brief summary, the President's Import Reduction Proposal consists of 8 major elements:

(1) Establish annual oil import quotas to ensure achievement of our import reduction goals.

(2) Create an Energy Security Corporation to direct the development of 2.5 MMB/D of oil substitutes from coal liquids and gases, oil shale, biomass, and unconventional gas by 1990.

(3) Establish a three-member Energy Mobilization Board empowered to expedite permitting and construction of critical energy facilities.

(4) Provide new incentives for development of heavy oil resources, unconventional gas, and oil shale.

(5) Require utilities to cut current oil consumption by 50 percent, saving 750,000 barrels of oil per day.

(6) Establish a major new residential and commercial conservation program designed to save 500,000 barrels of oil per day by 1990.

(7) Provide \$2.4 billion annually in assistance to low-income families in the United States.

(8) Provide a total of \$16.5 billion over the coming decade for improvements in the nation's mass transportation system and in automobile fuel efficiency.

We estimate the combined effect of these initiatives to be a reduction in oil imports in 1990 of 4.5 MB/D, or roughly 50 percent of our current projections.

The accomplishment of this program relies heavily on the successful development of the nation's coal, oil shale, biomass, and unconventional gas resources through the Energy Security Corporation. The ESC would be mandated to achieve the production of 1.5 to 2.0 MB/D of synthetic fuels from coal, shale, and biomass by 1990. This massive effort likely will require the construction and operation of at least 30 major conversion facilities of 50 KB/D each, and perhaps 22 very large coal mines. The ESC, an independent, government-sponsored enterprise with a 12 year Congressional charter, would have a broad range of financing tools available to maximize its leverage with the private sector. These include price guarantees, Federal purchase agreements, direct loans, loan guarantees, and the authority for a limited number of government owned facilities to be operated by either the government or private contractors.

This synfuels program will produce substantial import reductions by 1990, and holds out the further possibility of additional private deployment thereafter. Further import reductions in the 1980-90 period will be achieved through the prompt implementation of the President's proposals for unconventional gas, heavy domestic crude oil, mandatory electric utility oil consumption reductions, residential and commercial building conservation, mass transit assistance, and auto fleet efficiency improvements. Though the savings from these programs are generally earlier and cheaper than synthetic fuels, they do not hold as large a potential beyond 1990.

The Energy Mobilization Board is a necessary part of the President's program. The EMB will assure "fast tracking" of Federal, State, and local permits and reviews on facilities which are critical to the accomplishment of our import reduction goals. We propose that the EMB be established in the Executive Office of the President, and that it have the authority:

(1) To designate projects critical to our import reduction goals as Critical Energy Facility;

(2) To establish binding deadlines for decision by all government agencies on Critical Energy Facility;

(3) In the event that any Federal, State, or local government instrumentality fails to meet the decision schedule, to make the decision itself under the terms of the appropriate Federal, State, and local statute, after public notice and comment;

(4) To waive, procedural requirements, such as timetables or hearing requirements without prejudice to the substantive requirements of law;

(5) To waive, on a case-by-case basis, the application of new procedural or substantive standards which come into effect after a Critical Energy Facility has received all necessary approvals and commenced construction.

These authorities are undeniably powerful, but they have been carefully tailored. The role of the EMB will be to ensure that decisions are made without needless delay, to cut through red tape, and to provide some reasonable certainty that decisions once made will not change.

This proposal differs in several respects from the legislation now before you. Most prominently, it would establish the EMB in the Executive Office of the President, rather than at the Department of Energy or the Energy Security Corporation. The

Administration firmly believes that it would substantively dangerous and administratively unworkable to grant a single-mission agency broad authority over the procedures and responsibilities of agencies with very different missions and mandates. The result could be the wholesale and unnecessary sacrifice of health, environmental, and safety values; it would most certainly yield an intolerably adversarial relationship among government units each suspicious of the other's motives.

A second major difference between the EMB and the legislation before this committee is that the Administration's proposal would allow the establishment of legally binding decision schedules for State and sub-State governments. We propose that this authority be backed-up by the same mechanism used at the Federal level: failure to issue a decision on time would allow the EMB to preempt the laggard agency and make the decision, applying the appropriate Federal, State, or sub-State law.

"Fast tracking" at the Federal level alone is clearly inadequate. The SOHIO pipeline experience underscores that point. If we are serious about a synthetic fuels program, as the President is, then we must tackle the whole problem.

A decision to designate a critical energy facility or to establish a decision schedule would not be subject to judicial review. Decisions of the EMB and actions of Federal, State and local agencies necessary for the approval of critical energy facilities would be subject to judicial review only (1) after EMB determines that the permitting process for a critical energy facility has been completed or (2) if the EMB determines that earlier review of an agency action is necessary to expedite completion of the project approval process or is necessary to assure fairness to the parties involved.

(a) Such actions challenging the granting or denial of approvals must be brought within 60 days in the Federal Court of Appeals for the Circuit in which the facility involved is located (if a transportation facility is involved, the relevant Circuit would be that in which the terminus of the facility is located).

(b) Reviewing courts would be required to render their decisions within 90 days, except where the Constitution requires a longer period.

(c) Any petition for review to the Supreme Court would have to be submitted within 30 days and the Court would be directed to expedite action on the appeal.

It is time to bite the bullet on these issues. The urgent need to reduce oil imports denies us the luxury of leisurely decisions and extended review. The Administration program strikes a balance between the import reduction imperative and the need to preserve critical environmental, health, and safety values. The EMB is a necessary part of that program.

SPECIFICATIONS FOR ESTABLISHMENT OF OPERATION OF AN ENERGY MOBILIZATION BOARD

Set forth below is a description of specifications for use in drafting legislation to establish and to set forth the power and duties of an Energy Mobilization Board (EMB).

I. Statement of purposes

To assist in accelerating development of non-nuclear energy resources.

To eliminate or modify procedural impediments to the construction of non-nuclear energy facilities that would, in the judgment of the EMB, contribute to the achievement of national oil import reduction goals without altering substantive Federal, State or local standards established prior to the commencement of construction.

To foster appropriate coordination and integration of local, State and Federal actions necessary for the approval of energy facilities that would contribute to the achievement of national oil import reduction goals.

II. Definitions (listed below are key terms that will require definition)

"Commencement of construction" of a critical energy facility—this will determine the date for "grand-fathering" critical energy facilities to protect them from the impact of future substantive and procedural requirements. (Use the definition in the EPA indirect source regulations.)

"Energy project"—should include all non-nuclear physical structures that the EMB determines are necessary for the construction and operation of a project for which application to be designated a critical energy facility has been made (e.g., refineries, pipelines, fuel conversion plants, transmission lines, etc.)

"Critical energy facilities"—energy projects determined by the Energy Mobilization Board to contribute to the achievement of national petroleum import reduction goals pursuant to the procedures set forth in the legislation.

III. Establishment of EMB

An EMB would be established in the Executive Office of the President. It would consist of three members appointed by the President with the advice and consent of the Senate and the members would serve at the pleasure of the President and under his direction.

The Chairman of the EMB would be appointed by the President and would have the authority to appoint an Executive Director, as well as other necessary staff to carry out the Board's responsibilities.

The EMB would have the authority to make rules and regulations and take other actions necessary to carry out its functions including the authority to direct agencies to submit (1) proposed schedules for completing critical energy facilities and (2) relevant records when the EMB makes a decision for an agency.

The EMB would be exempt from the Advisory Committee Act and Sections 553-559 of 5 U.S.C. (the rulemaking and adjudicatory provisions of the Administrative Procedure Act) although it would take appropriate actions to complete the record supporting any decision it makes for an agency.

Decisions of the EMB would not be "major Federal actions" within the meaning of Section 102(2) of the National Environmental Policy Act of 1969.

The EMB would be authorized (1) to designate a single agency to prepare a single environmental impact statement for any critical energy facility and (2) to the extent that the EMB finds it necessary to orderly completion of a critical energy facility, to waive or modify all or part of any Federal, State or local environmental impact statement requirement provided that the EMB establishes alternative procedures for the assessment of the environmental impacts of the facility.

The EMB would be authorized to designate no more than 75 critical energy facilities at any one point in time.

IV. Authority of designate critical energy facilities

The EMB would be authorized to designate certain non-nuclear energy facilities as "critical" when it finds that an energy facility would contribute to the achievement of national oil import reduction goals established by the President. In making such a determination, the EMB would consider:

(1) The extent to which the facility would reduce the nation's dependence upon imported oil.

(2) The need for the facility in terms of meeting present and future energy requirements of the nation taking into account overall national economic, environmental, social and security goals.

(3) The extent to which establishment of the facility would advance needed scientific, technical, engineering and practical expertise needed to reduce the nation's dependence on imported oil.

V. Procedures for designating critical energy facilities would include the following

Any person planning or proposing an energy facility could apply to the EMB for designation. Within a specified time after receiving an application, EMB would issue a decision on the designation request. *Prior to its decision, EMB would obtain public comment on the proposed designation.*

The EMB would be required to establish procedures to ensure that as a condition for designating a critical energy facility, the EMB would have adequate and timely access to information necessary to grant or maintain the designation.

A decision by the EMB designating a critical energy facility would not be subject to judicial review.

VI. Establishment of project decision schedules

The EMB would be authorized to establish binding decision schedules of not less than one year for any actions necessary at the Federal, State or local level for approval of a critical energy facility.

The EMB could waive or modify procedural requirements imposed on critical energy facilities by Federal, State, or local law including but not limited to timetables and requirements for hearing and notice.

Decisions by the EMB establishing project decision schedules would not be subject to judicial review.

VII. Substantive decisions by EMB

If a Federal, State or local agency fails to comply with a Project Decision Schedule, the EMB would be empowered to make the decision and, where necessary, to take whatever additional action is required to develop a record adequate for decision. In making any such decision, the EMB would be required, except as provided

in section VI, to apply applicable Federal laws, and the substantive requirements of applicable State and local laws.

VIII. Waiver of post construction requirements

The EMB would be empowered to waive on an individual basis the application of substantive and procedural requirements that are enacted or established after construction has commenced on a critical energy facility. Such a waiver could be granted when the board finds (1) the waiver is necessary to ensure timely and cost-effective completion and operation of the facility and (2) the waiver would not unduly endanger public health or safety.

IX. Judicial review

Decisions of the EMB and actions of Federal, State and local agencies necessary for the approval of critical energy facilities would be subject to judicial review only (1) after the EMB determines that the permitting process for a critical energy facility has been completed or (2) if the EMG determines that earlier review of an agency action is necessary to expedite completion of the project approval process or is necessary to assure fairness to the parties involved.

Such actions challenging the granting or denial or approvals must be brought within 60 days in the Federal Court of Appeals for the Circuit in which the facility involved is located (if a transportation facility is involved, the relevant Circuit would be that in which the terminus of the facility is located).

Reviewing courts would be required to render their decisions within 90 days, except where the Constitution requires a longer period.

Any petition for review to the Supreme Court would have to be submitted within 30 days and the Court would be directed to expedite action on the appeal.

X. State assistance

Technical assistance would be made available to State and local agencies to assist them in expediting actions affecting critical energy facilities and in complying with Project Decision Schedules established by the EMB.

XI. Appropriations

Such sums are authorized to be appropriated as may be necessary to carry out the purposes of this Act.

Mr. DINGELL. Mr. Cutler, we thank you for that very helpful statement. As the Chair has observed, your statement will appear in full in the record.

The Chair will recognize now Mr. Alm.

STATEMENT OF ALVIN L. ALM

Mr. ALM. Mr. Chairman, members of the committee, perhaps I could save you time just by making one observation, because the testimony that I have provided the committee is very similar to Mr. Cutler's, if that meets with the committee's approval.

I would like to focus on one issue, and that is the need to develop a coordinated mechanism for the myriad requirements that face some large energy and other projects.

The creation of the Energy Mobilization Board with the new authorities we would request for such a board will provide this mechanism. It would be a mechanism to provide, first of all, coordinated schedules, and then methods to waive certain requirements to see those schedules are met.

We believe that the suggestion that the administration has made along with elements of the two bills can provide this needed effort to move energy facilities forward.

Mr. Chairman, I would be happy to answer any questions now or later, as you wish.

[Mr. Alm's prepared statement follows:]

STATEMENT OF ALVIN L. ALM, ASSISTANT SECRETARY FOR POLICY AND
EVALUATION, DEPARTMENT OF ENERGY

Mr. Chairman, members of the committee, it is a pleasure to be with you today to discuss the proposed "Priority Energy Project Act of 1979," set forth as H.R. 4573 and Title II of H.R. 4499. I think we all agree that there is a need to speed up the current process of bringing major new energy facilities on line. Today the builders of energy projects face many difficulties. The problems include uncertainty over future government regulation, the complexities involved in obtaining numerous Federal, State, and local permits, and delays that result from time-consuming judicial review. These are the things that the proposals we are talking about today are designed to remedy.

I would like my remarks here to focus on what features the Administration believes any legislation should contain. First, the President proposes to establish an Energy Mobilization Board with the Executive Office of the President. The Board would be authorized to review applications for and designate "critical energy facilities," a designation similar to that given to "priority energy projects" under both H.R. 4573 and H.R. 4499.

Second, the President has proposed a ceiling of 75 projects which may be designated as critical energy facilities at any one time. This should provide the EMB with sufficient flexibility to designate the number and types of projects which will maximize our progress toward eventual energy independence. Any limitation of the kind suggested in H.R. 4573, i.e., six projects, is unrealistic in view of the President's program objectives, which could require from 30 to 50 fuel conversion plants.

Third, we believe that the broad definition of "energy facility" proposed in H.R. 4499 and H.R. 4573 is necessary in order to allow the Board to review and select from a wide range of projects. While the broad definition may initially give rise to a large number of applications, we believe that the review periods specified in both bills are adequate to allow prompt, yet thorough consideration of the applications.

Fourth, the Administration believes strongly that, in many cases, State and local approval procedures could present obstacles to development which are equal to or greater than those presented by Federal approval procedures. For this reason, the President has proposed to allow the Board to establish binding project decision schedules which incorporate Federal, State, and local actions. Whenever possible, this schedule would adhere to existing statutory schedules and the recommendations of the appropriate agency. The Board could, however, where necessary, waive the procedural requirements of the applicable Federal, State, or local law.

Fifth, the President's proposal would empower the Board to substitute itself for the Federal, State, or local agency if that agency failed to meet the deadline established in the project decision schedule. Although this raises questions about Federal versus State and local authority, this power is needed if the Board is to be able to expedite the decision process. The proposal draws a clear distinction between the procedural and substantive authorities. The Administration emphasizes that all critical energy facilities would be required to comply with the substantive provisions of all applicable laws.

Finally, the Administration proposal exempts certain decisions from judicial review and provides for expedited and consolidated treatment by the courts of decisions affecting critical energy facilities as do both H.R. 4499 and H.R. 4573.

Mr. Chairman, the President has set a National objective of reducing reliance on foreign sources of energy. To accomplish this goal we will have to construct major new energy facilities in many parts of the country. In recent years numerous procedures and requirements have been adopted at the Federal, State, and local levels which affect the planning, construction, and operation of energy facilities. Although most of these requirements legitimately deal with issues of due process and environmental protection, cumulatively they can result in an administrative morass. Sensible procedures must now be developed to balance the need to expedite construction with the need to protect the environment and other concerns. Moreover, it is essential to have a mechanism to allow coordination of the myriad requirements and to fashion a decision schedule which meets project objectives. We believe that the Administration proposal fulfills this test and will help us to increase domestic energy supply while protecting other values.

That concludes my prepared remarks, Mr. Chairman. I will answer any questions the Committee may have.

Mr. DINGELL. Mr. Alm, we thank you for that.

The Chair recognizes now Mr. Guy Martin. Thank you for being with us.

STATEMENT OF GUY R. MARTIN

Mr. MARTIN. Thank you very much, Mr. Chairman.

I would also submit my statement and just make a brief summary.

Mr. Chairman, I am here representing Secretary Andrus. I think it is appropriate to say with regard to Federal lands the Department of Interior has the most basic sorts of responsibilities for carrying out a series of permitting activities for many of the energy facilities which would be covered by the various bills that are at issue here today.

We subscribe very strongly to the approach the President has taken and commend it to this committee. We think that this bill demands better performance from Government itself in taking on these tasks.

The question we have asked is whether or not, given the substantive responsibilities that we have, our Department is able to meet these obligations and to serve well under the Energy Mobilization Board proposed by the President. The answer to that in short, Mr. Chairman, is yes.

The Secretary has already taken a number of actions over past months which are specifically designed to do the same kind of thing, and the Bureau of Land Management—BLM—created an Office of Special Projects, which goes directly to this purpose.

The National Park Service has created an office for the specific purpose of expediting decisions about the protection of air quality in national parks during the process of siting of major energy facilities.

The Office of Surface Mining has, through procedural reorganization, shortened the time it takes to approve mining plans from the traditional 4 to 6 years down to 50 weeks.

So, we feel very comfortable with the directives that the President has proposed in his Energy Mobilization Board. We feel quite confident that we can work constructively within this framework, and we commend it for the committee's favorable action.

[Mr. Martin's prepared statement follows:]

STATEMENT OF GUY R. MARTIN, ASSISTANT SECRETARY FOR LAND AND WATER RESOURCES, DEPARTMENT OF THE INTERIOR

Thank you, Mr. Chairman. I appreciate the opportunity to be here today on behalf of Secretary Andrus, to present the views of the Department of the Interior on the need for legislation to expedite the permitting process for priority energy facilities.

As you know, Mr. Chairman, the Administration is in complete agreement with the need for more timely and effective decision-making to assure the development of the energy facilities our country needs. The President has established firm objectives for reducing our dependence on foreign oil, and for increasing the production of American energy resources. As you know, one of the key Administration objectives is the enactment of legislation to create an Energy Mobilization Board.

Fulfillment of these energy objectives will not be easy, for any element of our society. All regions of our country, all sectors of the economy, and all social and political interests will have to contribute to making improvements, substantial improvements, in the way the United States produces and uses energy.

To meet these objectives, Secretary Andrus and all of us at the Department of the Interior believe that the President is correct in demanding better performance from the Federal government itself. Government at all levels must improve its efficiency and productivity, and expeditiously coordinate those actions which are necessary for permitting, licensing, and approving energy facilities.

I believe that the Energy Mobilization Board which the President has asked you to establish will allow the President, and all of us who are responsible for implementing his energy objectives, to use the authority that is needed to require that priority energy projects get the attention and action they deserve. The Energy Mobilization Board can be used to make Federal agencies perform the way that Congress intended—making sound decisions, and making them quickly enough to assure that the public interest in the development of essential energy facilities is served. The authorities of the Energy Mobilization Board will also serve as an incentive for close teamwork between our Department and other Federal agencies, while bringing all of the Federal agencies into a coordinated and productive working relationship with state and local governments.

Secretary Andrus and the Department of the Interior are already taking steps that will make it possible for Interior agencies to meet their responsibilities to the Energy Mobilization Board. The Bureau of Land Management, which is the Federal agency with the greatest responsibility for issuing rights-of-way for powerplant sites, pipelines, transmission lines, and other energy facilities on Federal lands, has been reorganized. BLM Director Frank Gregg has established an Office of Special Projects, which will see that top-priority energy facilities are dealt with properly. The National Park Service has established an office to provide the special technical assistance National Park Superintendents need to determine how energy facilities can be sited without damaging the air quality of our National Parks. The Office of Surface Mining has adopted a new mine plan approval process, that will reduce the time needed to approve a mining plan from the historical 4- to 6-year period down to 50 weeks, even for those mines requiring an environmental impact statement.

And Secretary Andrus has ended nearly a decade of management paralysis over the leasing of Federal coal, and has established a new Federal coal leasing program capable of making leasing decisions to assure that adequate supplies of Federal coal are available to meet future energy needs.

Looking at specific projects, I believe the record shows that the Secretary and the Department have demonstrated that setting priorities can produce results. This week, the Secretary announced the publication of the Draft Environmental Statement on the Intermountain Power Project. Because of the close cooperation between the Secretary and Utah Governor Scott Matheson, and coordination and hard work by Federal and state agencies, IPP was rescued from the conflict and indecision which had marked previous attempts to build the project. More recently, another project which would also supply coal-fired energy to Utah, Nevada and California, the Allen-Warner Valley Energy System, was put on a priority basis, and the project sponsors are now assured of firm and timely dates for decisions. We have, in an effort that began last month, cut four months from the planned timetable for completing the environmental statement on the ETSI coal slurry pipeline, and will shorten that schedule even more before we're through.

This experience convinces me that the Department is able to respond to the President's orders, that we can work with the Energy Mobilization Board to develop priority schedules that will maintain the integrity of the Department's substantive responsibilities, while improving the timeliness of our decisions.

I have not prepared a point-by-point analysis of the elements of H.R. 4499 and H.R. 4573. Instead, I would respectfully urge the Committee to approve promptly the Energy Mobilization Board as requested by the President. I believe that the Energy Mobilization Board can effectively carry out the urgent mission which the President has demanded. Thank you.

Mr. DINGELL. Thank you very much.

The Chair recognizes now our old friend, the Honorable Charles Curtis.

Mr. Curtis, we are happy to have you with us. You are recognized for such comments as you desire to make.

STATEMENT OF HON. CHARLES B. CURTIS

Mr. CURTIS. Thank you, Mr. Chairman.

I have a statement which I would submit to the committee. It is covered by a short summary. With the indulgence of the committee, I would like to read that.

I have also appended to the statement the answers to the questions posed in your letter to me, Mr. Chairman, respecting these hearings.

Mr. DINGELL. Under the unanimous consent request of the Chair, it will be inserted in the record in full.

Mr. CURTIS. Essentially, Mr. Chairman, I would like to make three points to the committee.

First, I think it is not enough in the so-called fast track legislation to merely compel a decision to be made upon an expeditious schedule, nor as H.R. 4573 would do, to compel a decision to be made within a specific statutory time frame. Essentially, we must confront the reality that the processes of Government, as well as the fabric of the generic laws administered by Government, do not admit to or permit that type of expedition. We cannot at the same time preserve fully the substantive and procedural requirements of the various generic laws and obtain a decision within a fixed statutory period merely by compelling that the decision be made. We must confront those weaknesses in our decisionmaking process.

I would make the suggestion to the committee that the President's proposal to establish an Energy Mobilization Board which will be equipped with substantive powers to waive procedural requirement and to cut through the generic substantive requirements where it is determined essential in the national interest, is a more realistic confrontation of the reality of our decisionmaking impediments.

I would also urge the committee to consider in the context of all this legislative effort that different agencies are by statute charged with different missions. They frequently carry out these missions without any specific guidance and from the President of the Congress as to how to reconcile the differing charges.

No vehicle is provided in the two bills before the committee today to reconcile those missions when they do come into conflict.

Mr. DINGELL. Would you say that again? I want to be sure I have that.

Mr. CURTIS. Yes. The problem is essentially this—if I might use the example of hydroelectric licensing. There are 17 Federal laws that impact on hydroelectric licensing. The basic decision at least with respect to privately owned facilities on navigable waters resides in the Commission. Now, even if on an expedited and coordinated basis the various facets of Federal Government were to render decisions, there needs to be, in my opinion, a mechanism for rationalizing the several decisions of Government where terms and conditions imposed by individual agencies may be unnecessarily in conflict with one another.

What we are attempting to do, I take it, in this legislation, is to view the actions of Government as a whole, in order to provide coordination. In my opinion, that contemplates more than simple coordination of the scheduling and commitment of Government resources, but rather, coordination of the outcome of the several different agency involvements in a major product decision.

Second, I would recommend to the committee that there be clear congressional direction that the agencies of Government be free from whatever ex parte limitation may be imposed, so as to allow that consultative and coordinative effort to proceed.

Mr. DINGELL. You would say at that point that for consultative work by the agencies, there should be a waiver of ex parte requirements?

Mr. CURTIS. For example, if the Emergency Mobilization Board is to establish a decisional, binding decisional, and coordinative requirement for the various agencies of Government—and the Federal Energy Regulatory Commission is one of those agencies—there is substantial question whether as a decisionmaker on a proceeding which is required to be determined on a record, after opportunity for hearing, I can talk to the Chairman of the Energy Mobilization Board. The question would apply even with respect to scheduling matters and whether, for example, I could talk to the Secretary of the Interior with respect to coordinating our decisions.

Mr. DINGELL. The same authority would have to vest in other agencies, too, would it not?

Mr. CURTIS. In my opinion, it would.

Now, you can make some sort of memorandum of those conversations. But I think that we do need some flexibility in loosening what might be unnecessarily restrictive limitations on communications of decisionmaking officers of Government where they are involved in exercising decisions in proceedings which are quasi-judicative in character.

Mr. DINGELL. I think you are right.

Will you submit some language on that particular point, please?

Mr. CURTIS. I certainly will.

Mr. DINGELL. I don't want you to clear it with OMB. I just want your own thoughts.

Mr. CURTIS. The third area I would recommend to the committee for study is the problem that results when generic statutes are in inherent conflict, or that the substantive requirement of the several laws which influence a decision lose a substantive impediment. Most often, I would expect it to be in the character of the procedural requirements for the decision to be in basic conflict.

I would suggest to the committee that the President or the President's officer in the form of the Energy Mobilization Board should have authority to submit to the Congress a waiver of that substantive requirement, project specific, in the nature of the procedure which is established under the Alaskan Natural Gas Transportation Act, for example.

In my opinion, it is important that whatever procedure attaches to the Presidential authority or the congressional review thereof, it is essential to equip the Federal agency that has this fast track responsibility with some mechanism to obtain waiver of generic or substantive requirement which impedes or conflicts with the direction to make expeditious decision.

Mr. DINGELL. Do you think that should be invoked at any time, or only at specific times?

Mr. CURTIS. I think that that is an extraordinary power, and I believe that the Congress would insist, in any case, on limiting the circumstances in which it might be invoked.

It perhaps is something that should have a form of a limitation in it that defines by the relationship of the Executive to the Congress, such as is contained in the Alaskan Natural Gas Transportation Act in which the Congress has committed itself to a nonamen-

datory expedited legislative act of approving a recommendation of the President by joint resolution within a fixed self-imposed time frame.

Third, I think that the committee should consider giving specific statutory direction and clarity to defining the scope of judicial review. There also appear to be somewhat conflicting directions when, on one hand, the bills direct that a decision be made under an expedited schedule and, on the other, they say that no schedule shall impose upon an agency a requirement that is inconsistent with their substantive requirements under law. I am afraid you simply cannot have it both ways. Here again, I am emphasizing the procedural aspects of the laws which we administer.

If we are directed by statute, as H.R. 4573 does, to make a decision within 9 months, irrespective of whether we even have a complete application before us, in a case where we must make a decision on a record after opportunity for hearing, I can tell the committee that the only decision that the Commission will be able to make in many circumstances, and it will vary on the complexity of the project, will be a decision of disapproval.

We simply cannot conclude the process and honor the substantive requirements for due process that are woven into the fabric of law within that type of time frame. We may not be able to.

Mr. DINGELL. You are saying that is because of the constitutional requirements of due process?

Mr. CURTIS. No. It is because of the requirements of existing law.

My problem, to put it rather badly, Mr. Chairman, is that we simply cannot legislate a result without confronting the limitations that are already contained in Federal law that impact on that decisionmaking process. Here I think that aspect of the President's proposal that would permit waiver of procedural requirements is essentially important.

The last thing I would recommend to the committee, and this is perhaps out of order with my independent regulatory hat on, is that I would wait. I would not give this legislation, these two bills, a fast track. I would wait until the committee has before it the President's proposal for an Energy Mobilization Board which couples with it the confrontation with the basic impediments to the decisionmaking process; that is, the President would establish a Federal preemptive role in the case of State or local decisionmaking which impedes the process to the detriment of the national interest.

I would hope that the committee would give the President the opportunity of making that proposal so that it could be considered in the context of these other legislative initiatives. Both, then, can be compared as to practicality and result.

Thank you, Mr. Chairman.

[Testimony resumes on p. 171.]

[Mr. Curtis' prepared statement, attachment and the responses to written questions follow:]

STATEMENT OF
CHARLES B. CURTIS
CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION
BEFORE THE
SUBCOMMITTEE ON ENERGY AND POWER
OF THE
INTERSTATE AND FOREIGN COMMERCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

JULY 20, 1979

Chairman Dingell and members of the subcommittee, I am pleased to appear before you today to discuss Title II of H.R. 4499 and H.R. 4573, two versions of "The Priority Energy Projects Act of 1979."

Last week in testimony before the Energy & Environment Subcommittee of the House Interior and Insular Affairs Committee, I addressed three problems that exist in both versions of this legislation. A copy of those remarks is attached to this statement. Let me outline them briefly.

While I agree with the goal of speeding vital energy projects through the regulatory process, there are important issues that are not addressed by this legislation.

First, different agencies are by statute charged with different missions. They frequently carry out these missions without any specific guidance from the President or Congress as to how to reconcile their differing charges. And no vehicle is provided by this legislation to reconcile those missions when they do come into conflict. I suggest the President be given the authority to reconcile conflicting agency decisions.

Second, if it is determined that there is an inherent statutory conflict in the missions of several agencies, I

recommend the President have the authority to present to the Congress a waiver of any statutory requirement which makes decision-making impractical or impossible within the stated time frame.

Third, many agencies such as my own are required to go through an extended evidentiary hearing process and render decisions on the record. Agencies will be hesitant to depart from these procedures at their own discretion. Specific statutory authority should be given those agencies making decisions on priority energy projects to depart from normal procedural requirements and to substitute rulemaking procedures for trial type procedures in order to expedite the process.

These three points are essential if we are to meet statutorily imposed time frames for decision-making.

Having said this, I would like to point out that in a number of ways Title II of H.R. 4499 is preferable to H.R. 4573.

For example, Section 207 of H.R. 4499 gives the Secretary the ability to extend time limits (a) for public comment; (b) for making a decision on a priority project, and (c) for required agency submissions.

In addition, Section 210 subsection (d) of H.R. 4499 gives the Secretary the authority to modify the Project Decision Schedule at "any time prior to completion" of the project rather than within a more fixed time frame.

Finally, the timing provisions of H.R. 4499 are more reasonable than H.R. 4573. For instance, H.R. 4499 gives forty-five days for public comment after the publication of notice in the Federal Register, and ninety days after receipt of an application for a decision on a priority energy project. H.R. 4573, on the other hand, allows only thirty days for public comment, and requires a decision within forty-five days. Given the complexity of the issues which surround such projects, it is important that we provide decision-makers reasonable time for consideration.

The goal of this legislation is to eliminate unnecessary delay. I hope that we will not create a situation that fosters ill-considered decisions which will later be regretted.

We need an energy priority projects designation system. To the extent that this legislation establishes an expeditious and reasonable one I support it.

The subcommittee requested that I answer a number of specific questions pertaining to this legislation. My answers are attached.

Statement of
Charles B. Curtis
Chairman, Federal Energy Regulatory Commission
Before the
Subcommittee on Energy and Environment
of the
Interior and Insular Affairs Committee
U.S. House of Representatives

July 11, 1979

Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to discuss H.R. 4573, the "Priority Energy Project Act of 1979."

This legislation is an outgrowth of what I believe is a justifiable public concern with the inability of federal, state and local governments to make prompt and well-reasoned decisions as to whether or not to authorize construction of major new energy facilities.

Looking at the process of the agency which I chair, I can understand the bases for this concern. The approvals process both in our agency and elsewhere suffers from a number of serious defects -- some of which this legislation may alleviate, others it will not.

The general goal of H.R. 4573 is straight forward -- to speed the movement of energy projects which are deemed vital to the national interest through the regulatory process. The thrust of the bill is procedural. The Commission must strive -- and is striving -- to make its regulatory efforts as expeditious as possible, while at the same time fulfilling its substantive mandates as delineated by the President and the Congress.

The Commission is well aware of the serious nature of the energy situation in this country. We are strongly committed to avoiding any unnecessary delays in the regulatory processes that fall within our jurisdiction. In the 21 months since it was established as an independent regulatory commission, the FERC has taken significant steps to simplify and streamline its procedures. Some of these actions are as follows:

Critical Project Status Report

The Commission has established a monthly Critical Project Status Report. This system has enabled us to cut an average of 40 percent from the time required to decide a critical energy supply case. Critical cases are those having a significant impact on energy supply or on questions of energy policy. A monthly report is issued which outlines the status and sets a timetable for decision on the most critical projects at the Commission. In addition, a specific project manager has been appointed for each critical case. He is responsible for expediting the regulatory process and ensuring that any delays are resolved quickly.

Delegation of Authority

The Commission has delegated to its staff office directors the authority to make decisions on routine matters that come within their jurisdiction. This has freed the Commission to concentrate on more important matters.

Hydro Licensing Procedures

In September 1978, the Commission amended its rules to simplify procedures for licensing small hydroelectric power projects (those with 1.5 megawatts or less of generating capacity). The new rules establish a simplified and easily understandable application procedure which will save time for both the license applicant and the FERC staff.

The Commission has recently taken a second step by issuing proposed rules to streamline the information required in license applications for "major" hydro projects where the dam and impoundment already exist. By eliminating unnecessary requests for information and consolidating and organizing requirements by subject matter, applications will be reduced in size from 12 itemized paragraphs and 23 exhibits to a brief initial statement and 7 exhibits. In addition, the FERC staff is currently developing simplified licensing procedures for large unconstructed hydroelectric projects.

These actions, taken together, constitute a major step to speed the use of a renewable resource and thereby reduce our dependence on scarce fossil fuels.

Unnecessary Natural Gas Filings

The Commission is in the process of extending the range of its "budget-type" application procedure for natural

gas facilities. This procedure makes it possible for natural gas companies to submit one application for a budget certificate. This certificate then allows the company to proceed with the construction of certain minor installations without the need to file for a certificate in each specific case. The budget-type application eliminates unnecessary paperwork and saves time for both the Commission and the natural gas companies. This frees the Commission to devote a greater proportion of its resources to major applications that will have a significant impact on the nation's energy supply.

However, in spite of the Commission's efforts to streamline and simplify its regulatory processes, there remain many conflicting goals and priorities of this and other regulatory agencies.

The first difficulty for agencies is that of setting priorities; regulatory agencies, in particular, are understaffed and, at least in the energy area, overwhelmed with demands on their time and attention. Every applicant's license or certificate application or rate case is of high priority to that applicant. Agencies such as ours are as much criticized for delay in the run-of-the-mill electric rate case as they are for delay in approval of major energy facilities. And in truth inordinate delays in the ordinary functioning of a regulatory agency can be as damaging to

the ability to raise capital and to make the everyday additions to capacity which we take for granted, as failure to act on applications for a bottleneck facility. Agencies would benefit from direction as to which projects are of such high priority that their ordinary work should be temporarily set aside in order to decide a matter of national importance. This bill would provide that direction, but very sensibly would limit the number of projects which could be designated as high priority in any year.

To highlight those projects designated as critical energy projects, the Congress and the Executive Branch could create a tracking system with target dates for those particular projects. To insure that those target dates are met, the particular tracking system and target dates should be highly visible and generate as much publicity as possible.

The second difficulty is that different agencies are charged by statute with differing missions. Frequently they carry out these missions without any specific guidance from the President or Congress as to how to reconcile their differing charges. The bill does little to resolve this problem. So long as federal agencies make timely decisions, they are free to make them in the same uncoordinated fashion as they always have. Decisions of state and local agencies need be neither timely nor consistent with each other.

The problem of conflicting agency pronouncements cannot be dealt with solely through an expediting statute such as the one proposed here. If Congress wishes to deal with this problem, it will have to take two further steps: (1) Provide for greater decisional authority in the President or some other federal officer; (2) Provide a procedure for reconciling conflicting statutory objectives. Even a single decision-maker cannot make legally defensible decisions if one statute prohibits what another requires. The Alaska Natural Gas Transportation Act of 1976 provides one model for vesting decision-making authority in the President and reconciling conflicting statutory requirements. The ANGTA provides that if the President finds that any provision of law requires waiver in order to permit expeditious construction and initial operation of the Alaska natural gas transportation system, then he may identify such laws and seek their waiver by act of Congress. The waiver is effective upon adoption of a joint resolution by the Congress.

The third difficulty that agencies face in considering energy facility issues is procedural. Regulatory statutes and the Administrative Procedures Act contain procedural requirements which in some cases accord parties rights to on-the-record hearings and which require substantial evidence in the record as a basis for the agency decision. Where these requirements apply, meeting the bill's nine

month target will, as a practical matter, be impossible. Ex parte rules and on-the-record hearing requirements constrain agencies from coordinating with other agencies or with the President's policy advisors except in public proceedings. The parties to agency proceedings and the public regard these procedural requirements as important safeguards to assure fairness and informed decision-making. An agency should dispense with them only if it has a clear direction to do so from Congress.

This legislation does not contain that direction. By limiting the grounds for judicial review so that failure to comply with procedures required by law is not grounds for overturning agency action, it implies that agencies are free to disregard the procedural requirements of APA, NEPA, and their own statutes. However, agencies will be reluctant to curtail statutory procedural rights without a clearer direction from Congress.

I would recommend that Congress, if it intends to change the current procedural requirements for agency action, do so explicitly. Congress may wish to authorize agencies to elect the use of modified notice and comment procedures with the opportunity for oral presentations in lieu of traditional trial type hearings. The Commission in its consideration of a variable rate of return for the Alaska gas system utilized similar provisions of the DOE Organization Act. We were able

to save a significant amount of time in what could have easily been a three year on-the-record proceeding.

The difficulty which the federal government has had over the years in even suggesting a procedural mechanism for reaching prompt facilities siting authorizations suggests the intractability of the problem. Congress has considered legislation of this type at least since 1970 and is no closer to a solution now than it was 9 years ago. However, I would suggest that by careful attention to the precedents that Congress has developed in ANGTA and to the necessity of developing a mechanism that is fair as well as efficient, it may be possible to enact workable provisions to deal with this problem.

Another problem with this legislation is the establishment of fixed dates on an across-the-board basis. No two projects are alike. Any procedure which covers such a broad area should have enough flexibility to take into account the vagaries of any specific situation. The timing mechanisms proposed in this legislation could create serious problems.

H.R. 4573 requires the Secretary of Energy to make a decision on whether to designate a project as an energy priority project "not later than forty-five days after receipt of an application." He is also to publish notice of

the application in the Federal Register and receive comments from interested parties within thirty days of the notice. It is possible that the Secretary will not receive the comments in time to take them into account in making his decision. He has no authority in the bill to extend the time for comments beyond 30 days or to extend his decision beyond 45 days.

A second timing problem relates to the federal agencies involved in an energy priority project. Those agencies are to provide the Secretary with a list of all government actions necessary to complete the project "not later than thirty days after notice appears in the Federal Register" designating a priority project. It is possible that the agencies involved will not have the specific details concerning the project, within the time limits proposed, to make a determination about what will be required. Again, necessary flexibility is lacking.

I support the general thrust of this legislation. The idea of designating a limited number of projects as a national priority is sound. However, there are a number of specific problems with this legislation which I have addressed this morning. I hope that the Congress will write legislation to remedy them.

ANSWER OF CHAIRMAN CURTIS TO DETAILED QUESTIONS
ON H.R. 4573 AND TITLE II OF H.R. 4499

July 20, 1979

(a) Question: The need for such legislation, since the president issued Executive Orders 2199 and 12083 which also attempt to establish priorities for certain energy projects and to coordinate activities of various agencies concerning energy?

Answer: E.O. 12083 (September 27, 1978) merely establishes an Energy Coordinating Committee, composed of the heads of the various Executive agencies, which is to ensure "communication and coordination" among Executive agencies on energy policy matters. No priorities for any energy projects are established by this order.

E.O. 12129 (April 5, 1979) establishes a Critical Energy Facility Program, administered by OMB, in which a number of Executive agencies participate. This "CEFP" covers critically-important, non-nuclear facilities that need federal permits for siting, construction, or operation. A master schedule is compiled, including target deadlines for all permits and actions that must be made by any agency, Federal or non-federal, Executive or non-Executive. These schedules are disseminated by OMB, which also tries to arrange joint agency review boards to speed up the approval process. Nothing in the Order modifies applicable Federal, state and local laws governing review procedures or permitting timely public participation.

I believe procedures like these in E.O. 12129 can go a long way toward cutting unnecessary delay. We have certainly experienced some success with a similar procedure, the monthly "Critical Project Status Report," which has enabled us to cut an average of 40 percent from the time required to decide a critical energy supply case. "Critical cases" are those at this Commission having a significant impact on energy supply or on questions of energy policy. The monthly Reports outline the status of the projects, and set timetables for decisions on them. An important feature of our CPSR system is the specific project manager who is appointed for each critical case, and who is responsible for expediting the case and resolving any delays.

But no matter how effective E.O. 12129 or similar systems (such as this Commission's CPSR) may be, I still believe there is a need for legislation here. Only clear legislation from Congress can resolve the interagency conflicts that are a major reason for the project delays we all have seen. Without precise statutory direction from Congress, the courts, the agencies, and the involved parties themselves will continue to work matters out (or fail in that effort) as they have in the past.

(b) Question: Whether the designation of priority energy facilities should be made by the DOE or by some other existing or new Federal agency?

Answer: The President's proposal is for a three-member Energy Mobilization Board (EMB), located in the Executive Office of the President. The EMB will be empowered to establish binding schedules for Federal, state, and local decision-making on critical projects, and as well to make the decision under applicable law if any agency fails to meet the deadline set by EMB. In my view, this proposal promises to be flexible and reasonably appropriate.

(c) Question: The point at which there is sufficient data upon which the Secretary of Energy may determine whether a project deserves a priority designation?

Answer: No one can say where this point is or when it is reached. No two projects will be the same. Applicants or project sponsors are likely to vary in competence and experience. Some proposals will be well thought out and developed; others will not. Whoever designates critical facilities will necessarily have to weigh uncertainties, balancing the likely benefits of a speedy designation order against the possible costs of a premature and erroneous decision. This underscores the need for flexibility, and the problems strict deadlines and extension provisions may create.

(d) Question: Whether the definition of an energy facility is too broad and whether the time periods in the bills are realistic in light of the possibility that under this definition there will be a large number of applications filed for consideration of projects?

Answer: The definition in H.R. 4499 of "energy facility" is not too broad, and might even be broadened to expressly include (as H.R. 4573 does) facilities on Federal lands or using fuel from Federal lands. The related definition of "project" might also be broadened, to conform to H.R. 4573. That would provide desirable flexibility. I think that some of the time periods in the bills are unrealistic; for example, compliance with statutory commands, procedural and due process requirements may in many cases, make it impossible to meet deadlines like the nine month target in § 207 of H.R. 4573. Of course, if there is a large number of applications for designating statutory timetables, such as that contained in H.R. 4573 which require designation not later than 45 days after application, may well prove impractical.

(e) Question: Whether the Secretary should be limited to making only six designations annually and whether such a limitation should permit the addition or deletion of designations?

Answer: Attempts to constrain the number of critical projects to a fixed statutory limit implies a perspicacity that does not exist. Here, we simply must rely on the sensible and reasonable exercise of statutory authority. Obviously, the designation of a project will lose prominence and the Act will fail to accomplish its purposes if priority management is attempted for a very large number of projects. If the Congress determines to impose fixed limits, however, I would urge you to reside some power in the designators to "drop and add" projects, and exceed the limit as circumstances dictate.

(f) Question: The estimated cost of administering this program and complying with its provisions in FY 1980, 1981, and 1982, including the number of personnel and level of expertise required by your agency to administer this program?

Answer: Our best estimates, on a low-medium-high range, are as follows:

	<u>Low</u>	<u>Medium</u>	<u>High</u>
--Staff-years:	14	45	77
--Salary and Support:	\$448,000	\$1,400,000	\$2,464,000
--Travel:	100,000	200,000	500,000
	<u>550,000</u>	<u>1,600,000</u>	<u>3,000,000</u>

The most significant indeterminable factor that will influence these estimates is the number of designated priority projects that will require speeded-up Commission action. Our low estimates will more likely be reasonably accurate if perhaps six or ten projects annually receive priority designations, since the Commission's priority load would then consist of perhaps two or three projects. However, if as many as 75 projects annually are designated for priority treatment then a commensurate increase in priority cases at this Commission is likely, and our high estimates would more likely be correct.

(g) Question: The impact of a priority designation and decision schedule on Federal agencies required to consider applications for approvals, permits, etc., for a designated project, and the availability of funds and personnel available to such agencies to act on all pending applications, and the impact that such designation and any schedules would have on applications by other persons that are pending before such agencies?

Upon designation, the Commission would allocate additional resources to critical projects. Of course, the remaining workload of the Commission would inevitably be deferred or suffer from diminished attention and staff commitment. It is doubtful, in my opinion, that the budgeting and hiring process are sufficiently flexible to permit the Commission to fully offset the diversion of staff resources to priority projects.

(h) Question: The extent to which the public should participate in the selection of projects for designation and in the establishment of schedules for decision?

Answer: I believe the public should participate in the selection of projects for designation, and in the establishment of schedules. Participation by the public is indispensable and should be assisted through inter-venor grants where appropriate -- especially if the scope and the depth of judicial review of agency decisions is to be sharply cut.

(i) Question: The inter-relationship of the Project Decision Schedule to other potentially conflicting time allowances established by statute or by agency regulation?

Answer: This is one of the most important areas addressed by this legislation. As the relationship between schedule deadlines and the agency's statutory time allowances becomes more uncertain, disputes will arise and these bills will not achieve their purpose. In particular, it is very unclear to me just what this relationship now is, in both H.R. 4499 and H.R. 4573. Sections 210(b), (c), and (d) and 212 of H.R. 4499 do not seem to be internally consistent, and section 213 seems to conflict with section 217. I strongly urge that every effort be made to resolve these uncertainties.

(j) Question: The impact of any decision schedule on the ability of interested parties to have an adequate and reasonable opportunity to express their views and present their arguments as provided under current law?

Answer: Any Schedule that truly expedites the approval process will have to limit both the public's participation and right to present views, and the accompanying obligation of the agency to receive, consider, and respond to these views. Limiting the length of the current process is the essence of these bills.

(k) Question: The effectiveness and appropriateness of sections 211 and 212 of H.R. 4499 and sections 208 and 209 of H.R. 4573?

Answer: I favor giving the President flexibility to decide, as section 211 of H.R. 4499 would do. Mandating a Presidential decision, as section 208 of H.R. 4573 would do, does insure a final resolution. But on balance, he should be entitled to choose to defer to a tardy agency, whether by giving extensions to it, as under section 209 of H.R. 4573, or by having discretion to act in the first instance when the agency misses its deadline, as under section 211 of H.R. 4499.

(l) Question: If a project is given a priority status, but one or more permits or authorizations is not completed within the established decision schedule, and the President does not make the decision to perform the necessary action in lieu of the applicable federal agency; what recourse should be available to the applicant?

Answer: The answer implicit in H.R. 4499 -- and any other approach that gives the President a "discretionary" final decisional authority -- is that the ordinary agency process continues if the President "does not make the decision or perform the necessary action." Otherwise, the "fast track" will cease to work at all.

(m) Question: Whether the legislation should provide that a designation of priority status does not affect the ability of a permitting agency to deny a permit request under applicable provisions of law and regulations?

Answer: Again, the implicit intent of both these bills is that while federal, state and local agencies must speed up their action, they are not in any sense required to issue "rubber stamp approvals" to any project designated as a "priority energy project." The only provision that seems to undercut this intent is section 213 of the H.R. 4499, and the identical section 210 of H.R. 4573.

(n) Question: Whether or not the decision designating a project as a priority energy project should be subject to judicial review?

Answer: No. If the project is critical and the national interest requires expeditious decisions, essentially an administrative, coordinated decision-making process is appropriate. Judicial review is not. Moreover, this kind of initial designation decision is interlocutory and not final agency action, and is therefore not ripe for judicial review.

(o) Question: Whether or not the bills adequately address the problem of coordinating reviews of projects by State agencies and local governments to insure that such reviews are conducted in a timely fashion?

Answer: It seems to me that that the President's approach here is sharply different from that in either bill. The President poses that the EMB have the power to act if state and local agencies do not act in a timely fashion, they may still find their "procedural requirements" waived by the EMB in order to expedite the project. That is the President's proposal, and it is, in my view, far more likely to succeed than the more hortatory provisions in sections 214 and 215 of H.R. 4499.

Mr. DINGELL. Thank you.

Mr. Drayton, we thank you for being with us.

STATEMENT OF WILLIAM DRAYTON, JR.

Mr. DRAYTON. Thank you, Mr. Chairman.

I have cut out most of my prepared statement to get immediately to the core.

The proposals of both the administration and the Congress share a cornerstone distinction. Neither our proposal or any of the bills I have seen would provide carte blanche to waive substantive environmental requirements. The administration's proposal has been designed with the intent of insuring that substantive environmental law be fully implemented.

Most of the major energy projects that are likely candidates for priority designation involve known or suspected hazards to environmental health and safety. Protection against these hazards must and will accompany accelerated energy development and production.

There are many causes of delay. They go well beyond Federal permitting requirements. In fact, other causes are often more important.

There has often been considerable opposition at the State and local levels to locating major energy facilities in their jurisdictions. We have to take such local concerns into account in any realistic analysis of permitting and judicial review.

A second major cause of slippage is applicant delay. When an applicant fails to provide adequate information on a project, the permitting authorities cannot move. When the project itself is delayed or changed, the permit writers can only wait.

We are well aware that we may face a more serious problem of project delays in the future as energy projects: One, become more numerous; two, in some cases become much more technically complex; and three, become even more controversial as several regulatory programs recently enacted begin to take effect. We are already taking steps to avoid those future problems.

The administration's proposed Energy Mobilization Board is a strong response to a number of difficult questions encountered in designing a fast track permit system for critical energy facilities that still maintains the substance of the laws.

First, what organization should be responsible? Because of the urgency of regaining energy independence, the administration believes that a separate board must be established in the Executive Office of the President. In this way, one Federal agency would not be put in the position of having to determine the balance between its own objectives and authorities and those of other agencies.

Second, what projects should be put on the fast track, and how should they be selected? The administration's proposal and most of the existing congressional proposals reach much the same answers to these questions. Therefore, with one exception let me leave most of this discussion to the record.

The one issue that I would like to address, however, is a very important one. The action we are proposing would establish procedures to insure that the regulating agency and the Board will have quick and adequate access to the information they will need to

process permit applications and to grant or maintain an energy designation.

Such procedures are essential to prevent an applicant from failing to respond adequately to a reviewing agency, thereby causing the agency to miss target dates and lose authority to conduct the necessary reviews.

With this sort of provision a facility could lose its priority status if it does not provide the required information on time.

This sort of safeguard is critical. As I mentioned earlier, one of the chief causes of project slippage now is just this sort of applicant delay.

Another question: What happens if an agency misses a deadline? Under the administration's proposal the EMB could make substantive decisions in lieu of Federal, State, or local agencies, but it would have to apply the applicable substantive requirements and develop an adequate record to support the decision.

Here again the administration is trying to preserve the substance of existing regulatory requirements.

EPA has introduced a series of reforms in the permitting process over the last 2½ years. These reforms, and others implemented in other parts of the administration will make it much easier for us to introduce these further reforms.

Let me quickly summarize a few of the major changes at EPA.

We have established a single point of contact for new source permits in each regional office. We now set target dates for completing the key steps in reviewing a permit application once we have the necessary information. In doing so, we try to collaborate with other Federal, State, and local agencies, as well as with the applicant right from the beginning.

We have found that setting decision dates and tailoring permit requirements to individual projects work best if the permitting procedures for various programs are designed to work together.

Consequently, on June 14 we issued proposed regulations to set up consolidated and consistent requirements for issuing permits under all EPA permit programs. We expect to issue these regulations in final form next winter.

We also will provide applicants with a single EPA application form, and we will issue all the necessary permits in one package for new facilities.

Our reforms are not limited to EPA's programs. We are close to completing a memorandum of understanding with the Department of Interior's Office of Surface Mining, combining the two agencies' stripmining regulatory efforts. OSM will issue a single permit.

We are also working with Interior to insure that Fish and Wildlife and Endangered Species reviews fit within the sequence of our consolidated permit procedures, so that there will be no last minute surprises that will hang up a project.

These and other reforms we and other parts of the administration have already put in place make the reforms envisaged in the administration's proposals easier to implement.

We have cut down the time period, and we have done a good part of the very hard job of meshing permitting programs established by different statutes and managed by different organizations.

If we are to succeed in both speeding the procedures and also insuring the implementation of Congress substantive mandates, we must continue this reform process across the administration.

This completes my abbreviated statement. I would like to submit the full statement for the record.

[Mr. Drayton's prepared statement follows:]

STATEMENT OF WILLIAM DRAYTON, JR., ASSISTANT ADMINISTRATOR FOR PLANNING AND MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY

Good morning, Mr. Chairman and Members of the Subcommittee. I am William Drayton, Jr., Assistant Administrator for Planning and Management of the U.S. Environmental Protection Agency. I would like to thank you for the opportunity to meet with you this morning to discuss the Administration's proposal for an Energy Mobilization Board to expedite the Federal, State, and local actions on permits and approvals required for critical non-nuclear energy projects. I also welcome the opportunity to summarize briefly for you and the Subcommittee the steps that we have already taken to avoid delay by ensuring that permits issued to all new construction—especially energy facilities—are handled quickly and are coordinated across programs and departments.

Let me begin by going right to a cornerstone distinction the Administration—and the Congress—share. Neither our proposal or any of the congressional bills I have seen would provide a carte blanche waiver of substantive environmental requirements. The administration's proposal intends that substantive environmental law be fully implemented.

Most of the major energy projects that are likely candidates for priority designation involve known or suspected hazards to environmental health and safety. Protections against these hazards must and will accompany accelerated energy development and production.

There are many causes of delay. They go well beyond Federal permitting requirements. Other causes are in fact of the more important. There has often been very considerable opposition at the State and local levels to the location of major energy facilities. We have to take such local concerns into account in any realistic analysis of permitting and judicial review.

A second major cause of slippage is applicant delay. When an applicant fails to provide adequate information on the project, the permitting authorities cannot move. When the project itself is delayed or changed, the permit writers can only wait.

We are well aware that we may face a more serious problem of project delays in the future as energy projects become (1) more numerous, (2) in some cases much more technically complex, and (3) perhaps more controversial as several regulatory programs recently enacted by Congress begin to take effect. We are already taking steps to avoid those future problems.

The administration's proposed Energy Mobilization Board is a strong response to a number of key questions encountered in designing a fast-track permit system for critical energy facilities.

First, what organization should be responsible? Because of the urgency of regaining energy independence, the Administration believes that a separate Board must be established in the Executive Office of the President to accomplish these activities. In this way one Federal agency is not in the position of having to make balancing decisions affecting its own authorities and those of other agencies. Instead the Board will be an independent entity in the Executive Office of the President without any conflicts caused by other duties and responsibilities.

Second, to what projects should the fast-track process apply, and how should they be selected? The administration's proposal and most of the existing Congressional proposals reach much the same answers to these questions. The project sponsor would apply to the EMB for designation as a critical energy facility, and the EMB would respond within a specified time after allowing public comment on the proposed designation. The EMB would consider a number of criteria in making its selection: (1) The extent to which the facility would reduce the nation's dependence on imported oil; (2) the need for the facility in terms of meeting present and future energy requirements of the nation, taking into account national economic, environmental, social and security goals; and (3) the extent to which establishing the facility would provide technical knowledge and practical expertise necessary to reduce the nation's dependence on imported oil.

The EMB would establish procedures to ensure that it has adequate access to information on a timely basis to grant or maintain the designation. Such procedures are essential to prevent an applicant from failing to respond adequately to a reviewing agency, thereby causing an agency to miss target dates and lose authority to conduct the necessary reviews. With this sort of provision a facility could lose its priority status if it does not provide the required information in a timely manner. This sort of safeguard is critical. As I mentioned earlier, one of the chief causes of project slippage now is just this sort of applicant delay.

The administration's proposal sets a ceiling of no more than 75 critical energy facilities that can be designated as critical energy facilities at any one time. Given the broad definition of an energy facility, some limit is essential in order to ensure that this special tool is used on the key projects that most need it.

Third, how are project decision schedules established? Under the administration's proposal the Energy Mobilization Board would be authorized to establish binding decision schedules of not less than one year for any actions necessary at the Federal, State, or local level for approval of a critical energy facility. This is an important distinction between the administration's proposal and most bills before the Congress. We believe that State and local governments are key actors in permitting these facilities, and they must be included in any decision-making process.

To avoid problems in establishing the schedule, the Energy Mobilization Board would be empowered to waive or modify Federal, State or local procedural requirements for proposed critical energy facilities. This power would cover timetables and hearing requirements. The administration's proposal would grant the EMB the authority to waive or modify all or part of any Federal, State, or local environmental impact statement requirements provided that the EMB establishes alternative procedures for the assessment of the environmental impact of the facility. The provision mandating alternative procedures to assess the environmental impacts of a facility is very important. Here, again, the administration is seeking to maintain the essence.

Fourth, what happens if an agency misses a deadline? Under the administration's proposal the EMB could make substantive decisions in lieu of a Federal, State or local agency, but it would have to apply the applicable substantive requirements and develop an adequate record to support the decision. Here again the administration is trying to preserve the substance of existing regulatory requirements.

Fifth, can the EMB provide more certainty for the critical energy facilities while they are being developed? Under the administration's proposal the EMB would be empowered to waive new requirements that come into effect after the facility has commenced construction on a case-by-case, when necessary basis. Such a waiver would only be granted when the Board finds (1) first that the waiver is necessary to ensure timely and cost-effective completion and operation of the facility and (2) the waiver would not unduly endanger public health or safety.

Finally, how can unresolved issues receive expeditious judicial and administrative review? The Administration's proposal provides that judicial review will be available only after the permit process is complete, except when an earlier review would expedite completion of a project. It includes a statute of limitations and consolidation of reviews in the Federal Court of Appeals for the circuit in which the facility involved is located. The administration proposal would set forth time deadlines for the court decisions.

It may help the Subcommittee to review these proposals against the experience EPA has had over the last several years with its own permit reforms. We have invested a great deal of management effort in these reforms because of their importance.

We have established a single point of contact for new source permits in each regional office. We have published the name and telephone number of such an individual in each of our regional offices in the April 19, 1979, Federal Register. This Register notice also defined the specific responsibilities for these individuals who will serve to expedite the review process. The regular, unified set of contacts growing from this initiative contributes importantly to the informal negotiations that frequently are the core of the permit process.

We invite industry to meet with us early, and we identify applicable requirements and any anticipated new requirements that may affect the facility. This helps us avoid the delays caused when industrial applicants fail to submit complete applications. It puts the onus on industry to respond with the necessary information in a timely manner.

Again: It is very important that the possibility of the EMB deciding in lieu of an agency not result in firms withholding important information needed to ensure that

a project meets environmental standards. Schedules cannot be adequately determined until we have a complete description of the proposed facility. By working together early we are able to avoid later problems.

We also set target dates for our completing the key steps in reviewing a permit application once we have the necessary information. In doing so we try to collaborate with other Federal, State and local agencies and with the applicant. Our target dates, which are designed to fit the specific facts of each project, ensure that our actions are timed appropriately to mesh with the critical steps involved in developing each new project.

Last Fall we adopted single contacts, target dates and self-imposed time deadlines for the review of applications for their completeness in response to recommendations of a joint industry-EPA Task Force. Industry emphasized the importance of predictable decision schedules in our work with them. The very satisfactory experience we have had to date with target date scheduling will enhance our work with the EMB.

We have also found that setting decision dates and tailoring the many permit requirements to individual projects work best if the permitting procedures for various programs are designed to work together. If this is not done, it will make the EMB's job much more complex. If it is done we can limit the instances in which the EMB needs to invoke procedural waivers.

We have been taking steps to make our permit procedures work together. Accordingly, on June 14 we issued proposed regulations to set up consolidated and consistent requirements for issuing permits under all permit programs which EPA administers. We expect to issue these regulations in final form next winter. We also will provide applicants with a single EPA application form and issue all the necessary permits in one package for new facilities.

EPA's reforms are not limited to EPA's programs. We are close to completing a Memorandum of Understanding with the Department of Interior's Office of Surface Mining (OSM) combining the two agencies' strip mining regulatory efforts. OSM will issue a single permit. The comprehensive reviews that the Department of Interior completes under the surface mining legislation will be used to fulfill EPA requirements.

We are also working with DOI to ensure that Fish and Wildlife and Endangered Species reviews fit within the sequence of our consolidated permit procedures, so there will be no last minute surprises that may hang up a project.

The existing systems, with our new reforms, will work well for the vast majority of projects. The list of projects receiving special attention should be selective so as not to overload the priority system and defeat its purpose. The Administration's proposal is based on this idea.

The States have to be partners with us in improving government permitting processes. Most permitting is State and local permitting—and so is most permitting delay. We plan to utilize supplemental funds under the Administration's proposed Integrated Environmental Assistance Grant Act to encourage States to take similar steps to EPA's permit consolidation. Funds under the proposed Energy Management and Planning Act and under the Clean Water Act and the Clean Air Act could also be used for this purpose. The EMB will also be empowered to provide grants to the States to assist them in meeting deadlines.

Finally, to be successful, Federal agencies involved in the permitting or review of critical energy facilities should not only have early meetings with the applicant and with other Federal or State agencies, but they should also make available timely technical guidance to ensure that proponents of new energy technologies are certain that their designs satisfy environmental requirements when they apply for permits. EPA is developing a Memorandum of Understanding with DOE on establishing adequate environmental protection for emerging non-nuclear energy technologies. Such a process, by establishing specific environmental requirements for emerging technologies early, will reduce the uncertainty of investments in new technologies and will assure that environmental performance is demonstrated along with economic feasibility. It would also reduce the need to grandfather these facilities from new requirements imposed after they commence construction if we introduce important environmental protection requirements early.

I think these are good indications of ways we are accelerating energy development and, at the same time, balancing all the interests and concerns related to our energy and environmental goals.

We at EPA are committed to making certain that environmental requirements do not unnecessarily delay needed energy projects. Our experience has been that environmental regulations are not a major source of delay. But, as I have noted, we

are taking steps to consolidate and accelerate the permitting process for all projects, including those designated as critical.

The Administration is committed to accomplishing both our energy and environmental goals as it promotes prompt, efficient, economical, and environmentally sound domestic energy development. We have just begun the job.

This completes my prepared statement. I'll be happy to respond to your questions.

Mr. DRAYTON. I would be happy to answer any questions you have now or later.

Mr. DINGELL. Thank you very much. The committee is appreciative of your assistance.

Mr. Yost, we are happy to hear you at this time.

STATEMENT OF NICHOLAS C. YOST

Mr. YOST. Thank you, Mr. Chairman.

I am Nicholas Yost, General Counsel. As I mentioned to you before, our acting chairman, Gus Speth, at this moment is testifying before the Senate Energy Committee and will be over here as soon as he is excused from there.

Mr. DINGELL. Mr. Yost, we think you will do just fine.

Mr. YOST. Thank you, sir.

I will also condense my testimony on behalf of the administration proposal in light of the remarks which have already been made, which cover much of the same material which we have covered.

As you indicated in your July 11 letter to the Council inviting this testimony, the subcommittee is and should be properly concerned about the vital issues at stake in this legislation.

On the one hand, there are some very important energy initiatives including those utilizing coal, renewable resources, and waste material which may be unduly delayed by lengthy procedures at Federal, State, and local levels.

On the other hand, expediting governmental action on important energy proposals must not sacrifice public health and safety, air and water pollution control, fish and wildlife resources, and other environmental values.

It is the Council's view that these vital considerations can be reconciled in a way that both protects environmental quality and accelerates governmental action on important energy proposals. It is this difficult balance which the administration has tried to achieve, and which is set forth in the attached specifications document which is part of our statement.

Let me concentrate the balance of the presentation on the matters which may be useful to the committee, which are within the special expertise of CEQ.

In discussing the accelerated permitting legislation I would like to focus on how the NEPA process and the environmental impact statement requirement fit in the President's program.

First we expect that environmental impact statements will be prepared for critical energy projects. Even where the EMB exercises its acceleration authority to the maximum by establishing binding decisions schedules of not less than 1 year, the Council believes the preparation of an environmental impact statement can be put on its own fast track to insure completion of the environmental impact statement process within 1 year for most if not all critical energy projects.

It is infinitely preferable to have a fast track environmental impact statement prepared within 1 year than to bypass the environmental impact statement altogether. The administration's specifications contemplate that environmental impact statements will be prepared for any critical energy facility.

While waivers are permitted when the EMB finds it necessary to orderly completion of a critical energy facility, we at the Council are confident that such waivers will not be necessary.

We intend to offer our good services to see that environmental impact statements are prepared in a timely manner and are prepared well, obviating the necessity for any waiver.

A fast track environmental impact statement which adequately examines the environmental issues and alternatives will be greatly facilitated by the requirement that the EMB establish procedures to insure that as a condition of designating a critical energy facility, the EMB would have adequate and timely access to information necessary to grant or maintain the designation.

This is of critical importance in enabling the EMB as well as Federal, State, and local agencies to complete their permitting processes expeditiously.

In this regard, a growing number of corporations have turned to early corporate environmental assessments of proposals before making decisions or commitments on technology, engineering design, and location.

These early corporate environmental assessments will be especially useful when prepared in connection with proposed energy projects for which critical designations are sought.

It is thus very realistic to anticipate timely completion of the environmental impact statement process under the most rigorous accelerated decision schedule set by the EMB.

As I said, if in any case this may not be possible, for these circumstances the EMB would have authority, in the specifications, to waive all or part of any Federal, State, or local environmental impact requirement provided that the EMB establishes alternative procedures for the assessment of the facility's potential environmental impacts.

In discussing the administration's specification document as a whole, one point must be emphasized. With the exception of new requirements imposed while construction of a project is underway, there are no provisions for the waiver of substantive environmental laws or provisions of laws.

The administration's basic commitment to clean air, clean water, and our overall national environmental policy remains unchanged. The only waivers provided are for procedures and, as I have testified, we at the Council intend vigorously to cooperate with the EMB so that environmental impact statements are prepared in a timely manner and that waivers of the procedural provisions of NEPA will not be necessary.

Without summarizing the whole of our attachment C to our statement, which is the results of our computer run of NEPA litigation, just two figures which may be of interest to the committee in keeping the impact of NEPA litigation on past energy projects in appropriate perspective; that is, that there have been injunctions issued on only 2 percent of all major Federal actions

involving the preparation of an environmental impact statement; second, in the first 8 years after NEPA's enactment in 1970 in only 15 instances were energy projects delayed by a NEPA injunction; in other words, fewer than 2 a year.

Mr. DINGELL. Say that again.

Mr. YOST. In the first 8 years after NEPA was enacted, in other words, from our figure 1970 through the end of 1977, there were only 15 instances, which are detailed in our attachment, in which energy projects were delayed by an injunction issued under NEPA, which comes out to fewer than 2 a year.

In conclusion, thank you for the opportunity to testify. The President and the Congress have each proposed similar initiatives to reduce American dependence on foreign oil, while minimizing the inevitable environmental effects which this effort will have domestically.

It is a difficult balance, but one which we look forward to cooperating with you to confront and resolve in legislation, which will serve the best interests of the American people.

Thank you.

[The prepared statement of Gus Speth, Acting Chairman, with attachments, follows:]

STATEMENT OF GUS SPETH, ACTING CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT

I appreciate the opportunity to testify on behalf of the Administration before your subcommittee concerning the provisions of the "Priority Energy Project Act of 1979," which is set forth in Title II of H.R. 4499 and H.R. 4573.

As you indicated in your July 11th letter to the Council inviting this testimony, the Subcommittee is and should be properly concerned about the vital issues at stake in this legislation. On the one hand there are some very important energy initiatives including those utilizing coal, renewable resources, and waste material which may be unduly delayed by lengthy procedures at Federal, State, and local levels. On the other hand expediting governmental action on important energy proposals must not sacrifice public health and safety, air and water pollution control, fish and wildlife resources and other environmental values. It is the Council's view that these vital considerations can be reconciled in a way that both protects environmental quality and accelerates governmental action on important energy proposals. It is this difficult balance which the Administration has tried to achieve, as I shall describe.

As you know, on July 16 the President announced significant actions to reduce this nation's needs for imported oil. The President's program includes establishing a three member Energy Mobilization Board within the Executive Office of the President which will be empowered to expedite permitting and construction of "critical energy facilities." On July 19, yesterday, the Administration's Specifications for legislation that establishes and sets forth the power and duties of the Energy Mobilization Board (EMB) were provided to the Congress. I have also attached a copy with this testimony. (Attachment A.)¹

Before discussing these specifications I would like to highlight what the Administration has already done under existing authority to reduce delays in the permitting of critical energy facilities. Actions already taken include:

- (1) Executive Order 12129 (April 5, 1979) establishing procedures for setting decision schedules for critical energy facilities under the direction of the Office of Management and Budget;
- (2) The Council on Environmental Quality's NEPA Regulations (effective July 30, 1979) which reform the administration of the NEPA and EIS process throughout the Federal government to eliminate delays and paperwork and to improve federal decisions. The NEPA regulations have a number of important provisions designed to improve the federal permitting process. The NEPA regulations improve federal permitting by:

¹ Attachment A, the White House release of July 19, 1979, previously submitted as an attachment to Eliot R. Cutler's statement (See p. 144), is not reprinted here.

(a) Avoiding delay. Time limits on NEPA process must be set at applicant's request.

(b) Eliminating duplication in EIS preparation and providing for joint federal-state hearings and reviews.

(c) All permits identified early.

(d) All agencies with authority over a project required to consult early and work with the lead agency.

(e) All agencies must develop procedures to aid applicants.

(f) All reviews to be prepared concurrently rather than consecutively.

(g) All information on mitigation that will be necessary to approve the project to be identified early.

Attached is a more detailed statement of how the NEPA regulations achieve these improvements. (Attachment B.)

In addition the NEPA regulations will reduce delays and paperwork in other ways by providing a specific mechanism with time limits for the designation of lead agencies, by requiring affirmative cooperation among federal agencies in the preparation and review of the EIS and by limiting the size of EISs normally to 150 pages or less (normally 300 pages or less for complex projects).

In discussing the accelerated permitting legislation I would like to focus on how the NEPA process and environmental impact statement requirements fits in the President's program.

First we expect that EIS's will be prepared for critical energy projects. Even where the EMB exercises its acceleration authority to the maximum by establishing binding decisions schedules of not less than one year, the Council believes the preparation of an EIS can be put on its own "fast track" to insure completion of the EIS process within one year for most if not all critical energy projects. It is infinitely preferable to have a "fast track" EIS prepared within 1 year than to bypass the EIS altogether. The Administration's "specifications" contemplate that EIS's will be prepared for "any critical energy facility." While waivers are permitted when the EMB finds it "necessary to orderly completion of a critical energy facility," we at the Council are confident that such waivers will not be necessary. We intend to offer our good services to see that EIS's are prepared in a timely manner and are prepared well, obviating the necessity for any waiver. A "fast track" EIS which adequately examines the environmental issues and alternatives will be greatly facilitated by the requirement that the EMB establish procedures to ensure that as a condition of designating a critical energy facility, the EMB would have adequate and timely access to information necessary to grant or maintain the designation. This is of critical importance in enabling the EMB as well as Federal, State and local agencies to complete their permitting processes expeditiously. In this regard, a growing number of corporations have turned to early corporate environmental assessments of proposals before making decisions or commitments on technology, engineering design and location. These early corporate environmental assessments will be especially useful when prepared in connection with proposed energy projects for which "critical" designations are sought. Through the early corporate environmental assessment program, sponsored by the Department of Commerce and supported by CEQ, we anticipate greater attention by Federal agencies to accelerating the EIS process. In addition, technical assistance to States and local governments, provided for in the Administration's "Specifications," will help in expediting environmental reviews. It is thus very realistic to anticipate timely completion of the EIS process under the most rigorous accelerated decision schedule set by the EMB.

As I said, if in any case this may not be possible, for these circumstances the EMB would have authority, in the specifications, to waive all or part of any Federal, State, or local environmental impact requirement provided that the EMB establishes alternative procedures for the assessment of the facility's potential environmental impacts.

In discussing the Administration's Specification document as a whole, one point must be emphasized. With the exception of new requirements imposed while construction of a project is under way, there are no provisions for the waiver of substantive environmental laws or provisions of laws. This Administration's basic commitment to clean air, clean water, and our overall national environmental policy remains unchanged. The only waivers provided are for procedures, and, as I have testified, we at the Council intend vigorously to cooperate with the EMB so that EIS's are prepared in a timely manner and that waivers of the procedural provisions of NEPA will not be necessary.

Before concluding I would like to provide for the record the results of the Council's very recent review of its litigation computer file on National Environmental

Policy Act (NEPA) litigation to determine the number of energy projects involved in NEPA lawsuits and the degree to which NEPA-related injunctions have halted or slowed down energy projects. (Attachment C.)

Thank you for the opportunity to testify. The President and the Congress have each proposed similar initiatives to reduce American dependence on foreign oil while minimizing the inevitable environmental effects which this effort will have domestically. It is a difficult balance, but one which we look forward to cooperating with you to confront and to resolve in legislation which will serve the best interests of the American people.

ATTACHMENT B

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., December 21, 1978.

Subject: How The NEPA regulations improve the Federal permitting process.

In its newly adopted regulations under the National Environmental Policy Act, the Council adopted a series of specific measures which will greatly improve the federal permitting process for energy facilities. The new regulations go beyond environmental impact statement requirements and address broader issues in integration and coordination of all environmental review and permit requirements. Major reforms include: All permits identified early; all agencies with authority over a project required to consult early and work with the lead agency; all agencies to develop procedures to aid applicants; avoidance of delay. Time limits on NEPA process must be set at applicant's request; all reviews to be prepared concurrently rather than consecutively; all information or mitigation that will be necessary to approve the project to be identified early; and eliminates duplication in EIS preparation.

This memorandum briefly discusses these and other provisions in the new NEPA regulations, which were issued on November 29, 1978.

Project sponsors often face a number of federal permit and license requirements before construction can start. There are a variety of federal statutes requiring different kinds of environmental reviews to precede the issuance of applicable federal permits or licenses. While NEPA's EIS requirement is the only comprehensive environmental review requirement, a project may require compliance with specialized environmental reviews and analyses such as those required under the Fish and Wildlife Coordination Act (in connection with the issuance of dredge and fill permits), or those required under the Clean Air Act (in connection with permits issued directly by EPA or by a state through its State Implementation Plan requirements). Similarly, a non-federal project may require federal permission and compliance with federal environmental reviews for some components, such as a BLM easement over public lands for transmission lines for a fossil fuel generating plant that otherwise requires no federal permits. In the past there have been cases, particularly where multiple federal permit and environmental review requirements are applicable, where compliance with various federal permit and environmental review requirements has been delayed. Reasons for delay include lack of coordination among federal agencies having approval and review authority, sequential (rather than concurrent) processing of permit and review requirements, failure to prepare environmental reviews early during the planning stages, inadequate guidance from federal agencies to permit applicants, adversary relations between agencies having differing missions, and duplication between federal and state environmental protection requirements.

The Council's final NEPA regulations address each of these problems in the federal permitting process. Applicable provision in the NEPA regulations which will improve federal permitting are summarized below.

1. Agencies having permitting, licensing or other approval authority over a project are required to consult early in the planning of the project. During this early consultation, called the "scoping process" agencies are to identify significant environmental issues, identify all applicable permit and environmental review requirements, and organize the preparation of the EIS in a way that consolidates and integrates all environmental reviews. (Sections 1501.1, 1501.2, 1501.7).

2. Agencies with jurisdiction by law over the project (e.g., permitting or approval authority) are required to cooperate with the lead agency in preparing the EIS. An agency having permit authority over a component of the project cannot stay aloof from the EIS preparation and intervene at later stage in the project approval to conduct environmental reviews necessary for the permit. (Section 1501.6).

3. Agencies having permitting or licensing authority are required to develop procedures that facilitate application of the NEPA process at the earliest possible time in cases where projects are being planned by private applicants or other non-Federal entities before Federal involvement. Such procedures must make available to potential applicants agency policies or designated staff to advise applicants of studies or other information foreseeably required for the later-stage Federal permit or approval. Such procedures must also indicate how the agency will consult early with appropriate State and local agencies, Indian tribes, interested private parties and organizations when the federal agency's permitting authority is reasonably foreseeable. (Section 1501.2(d)).

4. In order to avoid delays in applying the NEPA process to permits, the regulations require environmental assessments or EISs to be started no later than immediately after the permit application is received, preferably earlier and jointly with applicable State or local agencies. (Section 1502.5(b)). In addition, the lead agency is required to set time limits for the NEPA process at the request of the permit applicant so long as the time limits are consistent with NEPA and other essential considerations of national policy (Section 1501.8).

5. In order to minimize delays caused by sequential preparation of environmental reviews and analyses for a project requiring federal permits, licenses or approvals, the regulations require that the draft EIS serve to the maximum extent as the vehicle for conducting all required environmental reviews. This the draft EIS is to be prepared concurrently with and integrated with environmental studies, reports and analyses required by other federal statutes, regulations and Executive Orders (Section 1502.25(a)).

6. To facilitate identification of federal permit requirements for a project, the regulations require that all applicable federal permits, license and other approval requirements be identified initially when the EIS is started (Section 1501.7) and again when the draft EIS is circulated for review and comment (Section 1502.25(b)).

7. To improve coordination among federal agencies having authority over a project and to minimize adversary relations between agencies with conflicting missions, the regulations require federal agencies with jurisdiction by law to comment on the draft EIS and to state in their comments whether they need additional information to fulfill environmental review requirements for permits, licenses or entitlements they issue, and to state what additional information is required. In particular, a cooperating agency is required to specify any additional information it needs to comment adequately on the draft EIS's analysis of site-specific effects associated with the granting or approving by the agency of necessary Federal permits, licenses or entitlements. (Section 1503.3(c)).

Reinforcing this requirement, the regulations provide that when one federal agency with jurisdiction by law objects to or expresses reservations about the project on environmental impact grounds, the agency expressing the reservation or objection must specify any mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license or related requirements or concurrences (Section 1503.3(d)).

These provisions will help insure that federal permitting agencies will work closely with the lead agency in resolving environmental impact issues, and avoid adversarial positions which cause delay in the permitting process.

8. To minimize delays in the permitting process caused by duplicate reviews, the regulations allow a federal permitting agency to adopt the EIS prepared by the lead agency without recirculating it for review (Section 1506.3(c)). In addition, the regulations provide for eliminating duplication between the Federal EIS and State/local review requirements (Section 1506.2)).

CHARLES WARREN,
Chairman.

ATTACHMENT C

COUNCIL ON ENVIRONMENTAL QUALITY—JULY 1979

NEPA litigation and energy projects

The Council's review of NEPA litigation shows that during the first 8 years since NEPA's enactment (January 1, 1970 through December 31, 1977) 70 Federal agencies have prepared more than 10,000 EISs on their major Federal actions significantly affecting the environment.

During this 8 year period 938 NEPA lawsuits were filed. This represents slightly less than 10 percent of all projects involving the preparation of an EIS. Overall, NEPA-related injunctions were issued in 202 cases or in approximately 21.5 percent of all NEPA lawsuits. It is important to note, however, that these NEPA-related

injunctions represent only 2 percent of all major federal actions involving the preparation of an EIS.

With respect to energy projects and NEPA lawsuits, the Council's review reveals the following: of the 938 NEPA lawsuits brought during NEPA's first 8 years, 94 cases involved specific energy projects. This represents approximately 10 percent of all NEPA lawsuits. The type and number of energy projects involved in NEPA lawsuits is summarized as follows:

Type of energy project:	Number of NEPA lawsuits
Nuclear powerplants.....	26
Electric transmission lines.....	15
Hydroelectric power projects.....	10
Outer Continental Shelf oil and gas lease sales.....	9
Fossil fuel powerplants.....	9
Coal prospecting and mining activities.....	9
Oil and gas drilling projects—other than OCS.....	6
Miscellaneous energy projects.....	6
Pipelines.....	4
Total.....	94

About 50 percent of these cases involved energy projects where the federal agency with lead responsibility failed to prepare an EIS. The Council anticipates that this kind of NEPA lawsuit will significantly decline in the future especially in light of the Council's NEPA regulations which go into effect July 30, 1979. In the remainder of cases, inadequate compliance with NEPA's procedural requirements was alleged, often as a subsidiary claim (that is, where the principal legal claim was a violation of a statute other than NEPA).

Looking at NEPA-related injunctions involving energy projects, the Council found that of the 94 NEPA lawsuits involving energy projects filed during the first 8 years after NEPA's enactment, only 15 cases resulted in NEPA-related temporary or preliminary injunctions. These 15 cases represent about 16 percent of NEPA cases involving energy projects but only 1.6 percent of all NEPA lawsuits.

The Council believes that NEPA's requirements, which have been enforced by the courts, have produced more careful consideration by Federal agencies of less environmentally damaging alternatives and mitigation measures for proposed energy projects in furtherance of NEPA's national environmental goals and policies. The presence of judicial review has provided a healthy impetus for federal agencies to observe NEPA's requirements and has resulted in better federal decisions involving energy projects.

Mr. DINGELL. Mr. Yost, the time that was consumed in preparing NEPA's statements—what is the delay incurred through that event?

Mr. YOST. The Council in 1976 did a rather exhaustive survey of the effects of NEPA during the first 6 years of its existence. With the leave of the committee, I will have extracted from that study and submit to you very shortly the conclusions it has as to how long it takes to prepare NEPA statements and so on.

[The following letter and attachments were received for the record:]

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., July 23, 1979.

Hon. JOHN D. DINGELL,
Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During my testimony at the hearing on Friday, July 20, you asked me to provide you with available information on the time it takes agencies to prepare EISs. I said that I would promptly supplement my answers with a letter. The best available information is contained in CEQ's 1976 Report, "Environment Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies." Enclosed is Table 5 of the Report which summarizes the agency experience in the time required to prepare EISs. As the Table shows, 20 out of 28 agencies experienced an average time of less than 12 months in preparing their draft EISs.

We have no updated figures covering the period 1976 to the present on the time required by agencies in preparing EISs.

However, as you know the Council has taken steps since 1976 to accelerate the process. In 1977, at President Carter's direction, the Council began a year and a half effort to reform the NEPA and EIS process to reduce delays, reduce paperwork, and improve agency decisions. The result of this effort is the Council's NEPA regulations which become effective next week, July 30, 1979. These regulations have, as you know, been greeted with enthusiasm from a broad range of affected Americans, from business to the Governors' Association to environmentalists.

The NEPA regulations will reduce delay by:

1. Requiring agencies to set time limits appropriate to specific actions when applicants request them, and encouraging agencies to set time limits on EIS preparation;
2. Requiring agencies to integrate the NEPA process into early planning;
3. Emphasizing interagency cooperation before the EIS is prepared rather than submission of adversary comments after the EIS is done;
4. Providing for a swift and fair resolution of lead agency disputes, with time limits;
5. Establishing the scoping process for early identification of what are and what are not the real issues;
6. Requiring agencies to prepare the EIS as early as possible;
7. Requiring agencies to integrate their NEPA compliance with other environmental review and consultation requirements;
8. Providing for joint Federal-State-Local preparation of EISs, joint Federal-State-Local public hearings and other means to eliminate duplication;
9. Requiring agencies to combine their environmental documents with other documents to avoid duplication, and permitting incorporation by reference;
10. Providing for accelerated procedures in preparing EISs for proposals for legislation;
11. Providing for categorical exclusions (identification of all actions exempt from environmental review because they will not have significant environmental effects);
12. Providing for a concise finding of no significant impact to document cases where no EIS is necessary;
13. Providing for page limits on EISs (normally less than 150 pages; for complex proposals, normally less than 300 pages).

As a result of these reforms in implementing NEPA and in particular the environmental impact statement requirement the Council believes that agencies will be able to achieve substantial reductions in the time they have required, up to now, for preparing EISs. As I testified on Friday, it is very realistic to anticipate timely completion of the EIS process in the vast majority of cases even under the most rigorous accelerated decision schedule (not less than 12 months under the Administration proposal) set by the proposed Energy Mobilization Board. As we said in the Council's testimony, CEQ stands ready to assist in insuring that this happens. The one exceptional case might be that of scientific uncertainty—where we cannot predict effects, which may cause severe harm, of an untried technology. While the EIS could be completed, the data in it, like any other data needed for the decision, might be incomplete. In that regard I would reinforce Eliot Cutler's testimony on the issue—that in such a case it would be appropriate either (1) for the decision-maker to turn down the proposal, or (2) to extend the time until answers are available. By way of further answer I enclose 40 C.F.R. Sec. 1502.22 (effective July 30, 1979), which represents the Council's handling of this difficult issue in its NEPA regulations issued pursuant to President Carter's Executive Order 11991.

Please do not hesitate to call on us if we can be of further assistance.

Yours truly,

NICHOLAS C. YOST,
General Counsel.

Enclosure.

ENVIRONMENTAL IMPACT STATEMENTS—AN ANALYSIS OF 6 YEARS EXPERIENCE BY
70 FEDERAL AGENCIES

TABLE 5.—TIME REQUIRED FOR DRAFT EIS PREPARATION, FISCAL YEAR 1975

[In months]

	Mini- mum	Maxi- mum	Average
Agriculture:			
Forest Service ¹	1	24	13
Soil Conservation Service	36	60	48
Commerce	1	5	3
Defense			
Air Force	3	12	4
Army	5	15	6
Navy	2	24	4
Corps of Engineers	2	24	9
Health, Education, and Welfare	1	6	4
Housing and Urban Development	3	6	3
Interior	1	18	10
Bureau of Indian Affairs	4	6	5
Bureau of Land Management	2	38	20
Bureau of Outdoor Recreation	4	12	7
Bureau of Reclamation	8	28	19
Fish and Wildlife Service	3	12	8
National Park Service	12	24	14
Geological Survey	12	24	15
Justice: Law Enforcement Assistance Administration	3	9	7
Labor	5	12	5-6
State	NA		
Transportation:			
Federal Aviation Administration	1	9	7
Federal Highway Administration	5	16	10
Treasury			
Energy Research and Development Administration	9	13	11
Environmental Protection Agency	1	13	9
Federal Energy Administration	2	5	3
Federal Power Commission	9	30	15
General Services Administration	4	11	5
Nuclear Regulatory Commission	3	26	10

¹ Includes project planning, not just EIS preparation.

NA = Not available.

SECTION 1502.22—INCOMPLETE OR UNAVAILABLE INFORMATION

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

Mr. Yost. The point I have tried to emphasize today is that when there are compelling needs, as both the administration and the

Congress have recognized in the case of energy facilities today, when there are compelling needs, NEPA, an inherently flexible law, can be adapted so as to do its job within a timeframe compatible with the decision process.

Mr. DINGELL. Are you telling me it can be done administratively, without statutory perfection or change?

Mr. YOST. I think there is no question that this administration has tried in the past, both through the President's directive to CEQ and through the President's setting up by Executive order of a critical energy facility program, to expedite matters.

I think we all recognize that the finality of actual legislation will provide far more certainty than relying solely upon the initiatives which the administration has taken in the past.

Mr. OTTINGER. Will the gentleman yield?

Mr. DINGELL. The Chair would prefer to defer questions, but the Chair will yield.

Mr. OTTINGER. I will accede to the wish of the Chair.

Mr. DINGELL. The Chair recognizes General Robinson.

General, we thank you for being with us this morning.

STATEMENT OF BRIG. GEN. HUGH G. ROBINSON

General ROBINSON. Thank you, Mr. Chairman.

I am Brig. Gen. Hugh G. Robinson. I, too, would like to submit my statement for the record and just summarize a couple of points from that statement, if the chairman wishes.

Mr. DINGELL. Without objection, that will be so ordered.

General ROBINSON. Generally, Department of the Army permits are required for such energy facilities as powerlines, pipeline crossings, port facilities, oil refineries, oil drilling structures, and water supply intakes for cooling water for powerplants.

Specific requirements of other Federal laws such as the National Environmental Policy Act and the Clean Water Act have been worked into our regulations to insure proper protection of the environment.

We have adopted regulations to encourage agreements with other Federal, State and local agencies to process jointly and evaluate Department of the Army and other Federal and State permits. These include the issuance of joint public notices; the conduct of joint public hearings and the joint review and analysis of information developed during the processing of the permit application.

We have been working toward agreements with other Federal agencies—EPA, Interior, Commerce, Agriculture, and Transportation—as required by section 404(q) of the Clean Water Act to eliminate duplication, needless paperwork, and delays. The essential elements of these agreements will be early agency involvement, and specific time limits on the applicant, the commenting agencies and the Army Corps of Engineers.

The Chairman's letter of invitation to present testimony at today's hearing also requested views on several matters. The Department of the Army believes that other administration witnesses appearing before the subcommittee are better qualified generally to address these items and, accordingly, we defer to their respective views.

The Department of the Army, acting through the Chief of Engineers, will continue to cooperate fully in and support the formulation and implementation of programs and permit approval processes designed to expedite the construction, operation, and maintenance of nonnuclear energy facilities determined to be of critical national importance. President Carter recently announced his proposal for the establishment of an Energy Mobilization Board to accomplish this purpose.

The Department of the Army fully supports the establishment of the Energy Mobilization Board. The specifications to establish and to set forth the powers and duties of the Board have already been placed in the record, and I think that is sufficient on that particular proposal.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions that you may have now or later.

[General Robinson's prepared statement follows:]

STATEMENT OF BRIG. GEN. HUGH G. ROBINSON, ACTING DIRECTOR OF CIVIL WORKS, OFFICE, CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY

Mr. Chairman and Members of the subcommittee, I am Brigadier General Hugh G. Robinson, Acting Director of Civil Works, Office of the Chief of Engineers, Department of the Army.

I am pleased to testify for the Department of the Army on the need to expedite the approval process for critical energy facilities to achieve our national oil import reduction goals and to insure appropriate intergovernmental coordination and inter-gradation of actions necessary for the approval of such facilities.

The Secretary of the Army, acting through the Chief of Engineers, is responsible for administering various Federal laws that regulate certain types of activities in or affecting navigable waters and the oceans which impact upon the construction, operation, and maintenance of energy and other facilities.

The authorities for our regulatory programs are based primarily on Sections 9 and 10 of the River and Harbor Act of 1899 (33 U.S.C. 401 et seq.), Section 404 of the Federal Water Pollution Control Act as amended (33 U.S.C. 1344), and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). In addition, the authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States extends to artificial islands, installations and other devices, and fixed structures located on the outer continental shelf by Section 4(f) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333). Generally, permits are required for such energy facilities as power lines and pipeline crossings, port facilities, oil refineries, oil drilling structures and water supply intakes for cooling water for power plants.

The specific requirements of other Federal laws such as the National Environmental Policy Act, the Clean Water Act (401 state water quality certification), the Fish and Wildlife Coordination Act, the Endangered Species Act, the Marine Mammal Protection Act, the Historic Preservation Act, the Wild and Scenic Rivers Act, the Coastal Zone Management Act, and others have been fully incorporated into our regulations.

We have adopted regulations to encourage agreements with other Federal, State, and local agencies to process jointly and evaluate Department of the Army and other Federal and State permits. These include the issuance of joint public notices; the conduct of joint public hearings and the joint review and analysis of information developed during the processing of the permit application.

We have been working toward agreements with other Federal Agencies—EPA, Interior, Commerce, Agriculture, Transportation—as required by Section 404(q) of the Clean Water Act to eliminate duplication, needless paperwork, and delays. The essential elements of these agreements will be early agency involvement, and specific time limits on the applicant, the commenting agencies and the U.S. Army Corps of Engineers.

The Chairman's letter of invitation to present testimony at today's hearing also requested views on several matters. The Department of the Army believes that other Administration witnesses appearing before the Subcommittee are better qualified generally to address these items and, accordingly, we defer to their respective views.

The Department of the Army, acting through the Chief of Engineers, will continue to cooperate fully in and support the formulation and implementation of programs and permit approval processes designed to expedite the construction, operation, and maintenance of non-nuclear energy facilities determined to be of critical national importance. President Carter recently announced his proposal for the establishment of an Energy Mobilization Board to accomplish this purpose.

The Department of the Army fully supports the establishment of the Energy Mobilization Board. The specifications to establish and to set forth the powers and duties of the Board will be presented by the Department of Energy.

Mr. Chairman, this concludes my statement. I will be pleased to respond to questions that you or Members of the Subcommittee may have.

Mr. DINGELL. Is Mr. Jacobson here? Will you come forward and pull up a chair. We want to hear what you have to say.

Mr. Helme will have permission to insert a statement in the record at the appropriate time.

Mr. Jacobson, will you identify yourself?

Mr. Helme is here. At this time we will recognize you if you will identify yourself fully for the record.

STATEMENT OF EDWARD A. HELME

Mr. HELME. Edward A. Helme, associate director of the National Governors' Energy Resources program. I am here today on behalf of Governor Richard Lamm, chairman of the National Resource and Environmental Management Committee.

Mr. DINGELL. We will be happy to hear from you. We will recognize you for such summary of your statement as you wish. Without objection, your statement will be inserted into the record.

Mr. HELME. Mr. Chairman, and members of the subcommittee, my name is Ned Helme and I am the associate director of the National Governors' Association's Energy and Natural Resources program. I am testifying on behalf of Governor Lamm, chairman of the NGA Natural Resources and Environmental Management Committee. I appreciate the opportunity to appear before you this morning to testify on initiatives to expedite licensing of priority energy projects.

In policy positions passed in 1977, the Governors went on record in support of efforts to simplify and expedite the processes for siting major energy facilities. These policy positions stressed the particular need to increase the role of States in the siting process and to increase the cooperation between Federal, State, and local siting authorities to reduce unnecessary delays. During the last week, Governors have indicated their strong support for the President's proposals and their desire to work closely with the President in implementing his proposals. As regards the Energy Mobilization Board, perhaps the most direct way to spell out the Governors' views would be to describe the process as the Governors would like to see it operate. I would caution that this is a tentative position which will be further developed today and in the coming weeks.

I have copies of my statement to be distributed.

Mr. DINGELL. I think that would be helpful but as the development of the Governors' position regarding the processes the Board would take. We would appreciate having comments so we can keep them in view as we proceed with the legislation.

I would urge you, however, that that legislation is fast tracked. It is the intention of the committee, because of pressure of time and

our concerns with these matters, to speed up the progress of this legislation, so we ask you not to be dilatory.

Mr. HELME. This is our best shot at this point, Mr. Chairman, and we think we will stick to our guns on this, but as you know, 50 Governors do not always agree and there may be some changes or individual opinions expressed later on.

Mr. DINGELL. We will learn a good bit about this legislation as we proceed. It may save us a lot of fights and bitterness later.

Mr. HELME. We will lay out our major points on how we would like to see this process operate.

First, in the designation of priority energy projects, a consultation and concurrence process should be required to involve Governors of affected States in the designation decision. Consultation between the Governor and the Energy Mobilization Board should occur prior to the Board's decision to designate. Once the designation has been made, the Governor should be afforded 30 days to concur or not concur. If the Governor does not concur, the President would retain the option to override the Governor's decision based on a finding that designation of the project is in the national interest.

Mr. DINGELL. Are you suggesting that the President make that finding or that that finding be—

Mr. HELME. We are suggesting the President make that finding. Our feeling is the Board makes its shots on what should be designated and the Governor indicates his concerns. If he does not concur we feel that should be kicked up to the President's level of decisionmaking.

Second, the Mobilization Board should be given extensive powers to expedite Federal decisionmaking on Federal permits as envisioned in the President's proposal.

Third, the Mobilization Board should be required to consult with the Governor on a voluntary time schedule for State and local permit decisions on the priority project. The time schedule for such State and local decisions would be strictly voluntary and consistent with State statutes and regulations. Strong efforts should be made to develop concurrent reviews for Federal and State permits, and existing cooperative agreements or joint Federal/State agreements should be utilized to the maximum extent.

Fourth, where the Mobilization Board feels that the State or local decisions have been unnecessarily delayed beyond the voluntary deadline, the Board, after consultation with the Governor, could appeal to Congress for relief through legislative action.

The process outlined above offers significant opportunity for expediting decisionmaking on key energy projects without usurping State authority. The creation of the Energy Mobilization Board will bring needed coordination to the fragmented Federal siting process and will offer States one Federal entity to deal with the whole range of Federal permit decisions. It will greatly increase the opportunity for establishing concurrent permit reviews. If coupled with expanded delegation of Federal responsibilities such as the delegation of environmental reviews, the Mobilization Board concept could yield significant results.

The administration has already made significant efforts to expedite the Federal siting process. In April, OMB established proce-

dures for setting decision schedules for critical energy projects. A Cabinet-level Energy Coordinating Committee chaired by the Secretary of Energy was established by Executive order last September. The Governors strongly support these initiatives. In addition, several Federal agencies have developed excellent cooperative arrangements with the States. A good example is the Department of the Interior's Federal coal management program. Where such arrangements are in force, the Mobilization Board should not be permitted to interfere.

I would emphasize one final point. Discussion of fast track legislation has centered on the need to empower one entity with the authority to make permit decisions when delays occur. Governors strongly support this approach in the context of Federal permitting decisions. However, in the area of State permit decisions, whether in decisions which relate to Federal statutes such as an NPDES permit or an SIP standard, or in decisions which are based solely on State statutes, the Governors feel strongly that the decision must rest with the Governor.

Since Governors do recognize the need for some mechanism to eliminate delays in the State permitting process, NGA has supported the concept of congressional review. Governors feel strongly that with only a few exceptions, the vast majority of avoidable delays in siting decisions have occurred at the Federal level. The Energy Mobilization Board should go a long way toward reducing these Federal delays.

One possible way of expediting State processes would be to encourage States to create similar boards at the State level. This is a concept now under discussion by the Governors. It would avoid any preemption of legitimate State authority and provide an opportunity for close coordination between the Federal Energy Mobilization Board and its State counterparts.

Mr. Chairman, this concludes my formal testimony.

I have with me a letter from Governor Scott Matheson of Utah, which was sent to Senator Jackson on behalf of five Western Governors which further spells out the views of those Governors regarding title II of S. 1308. I would appreciate it if this could be included in the hearing record.

Mr. DINGELL. That will be helpful. Without objection, that will appear in the record at this point.

[The letter referred to follows:]

STATE OF UTAH,
OFFICE OF THE GOVERNOR,
Salt Lake City, July 6, 1979.

Senator HENRY M. JACKSON,
Chairman, Energy and Natural Resources Committee, U.S. Senate,
Washington, D.C.

DEAR SENATOR JACKSON: In behalf of the State of Utah and the Governors of Montana, North Dakota, Colorado and New Mexico, I want to report that the nation's energy condition is chaotic. We recognize that you and the Senate Energy Committee have indicated by the introduction of SB 1308 that the time for action has arrived. We concur. We believe that the country needs to begin to rapidly develop synthetic fuels in a responsible fashion. However, we also know that action taken on synthetic fuels this session won't produce a drop of fuel for years to come and there will remain a need for strong action now.

We urge the committee to act now to cut the demand for imported oil. The way to accomplish this is to target strong, effective conservation and renewable resource

initiatives in those areas of the country which are heavily dependent on foreign oil. We do not purport to have a ready made laundry list of actions Congress should take. However, we believe that it is your responsibility to make the necessary inquiry and to take the needed bold action to implement the new initiatives. While Congress has undertaken some conservation and renewable resource initiatives, we believe the enactment last November of a very limited solar tax credit ignores the most cost-effective solar application, passive solar, and falls short of the size of the credit needed. Your inquiry should not be limited to those programs currently contained in SB 1308, but should be much broader including, for example, a crash insulation program, new financial incentives for conservation, stronger requirements to use renewable resources in federally-supported projects, etc.

Regarding Title II of SB 1308, the "Priority Energy Project Act of 1979", we question whether the legislation is needed and whether it will accomplish its purpose or merely add another layer of bureaucracy. We believe that the Secretary of Energy already possesses the necessary authority to develop a cooperative process for expediting energy projects and that many of the delays experienced by energy projects are the result of a failure to exercise leadership.

We western state governors are particularly aware of the differences which leadership can make in assuring reasonable, but expeditious decisions on energy projects. For example, we believe that the working relationship which the Department of Interior has created with western states on many energy issues, such as the siting of power plants in Utah and the progress in developing a responsible coal leasing system, is exemplary of how expeditious and reasonable decisions can be made within the present law.

However, if in spite of these serious reservations, the committee should decide to adopt Title II, we recommend several changes:

Limit the application of Title II to projects which are directly related to the nation's oil shortage, such as synthetic fuel projects, pipelines and refineries.

Require that the Secretary of Energy not merely consider the criteria in Section 206 for designating a project as priority, but make written findings that in fact the project meets those criteria.

Require that the governor(s) of the affected state(s) agree with the Secretary of Energy before a project may be designated as priority.

Insure that a system is not established under which the Secretary of Energy on his own is empowered to independently override state law or is given the authority to bring unjustified political pressure to override state law.

Prohibit the exercise of Title II authority over projects which are currently the subject of agreements between the state and a federal agency, such as in the area of federal coal management.

With this type of focus, we believe a far more realistic and workable program will emerge from your deliberations.

Sincerely,

SCOTT M. MATHESON, *Governor.*

Mr. DINGELL. Mr. Helme, we thank you.
Mr. Jacobson.

STATEMENT OF JOEL R. JACOBSON

Mr. JACOBSON. I would like to point out the program lists me as the representative of the National Governors' Association. That is an honor I did not seek, nor was it bestowed upon me. I am afraid I must modestly indicate I am only speaking for the New Jersey Department of Energy.

Mr. DINGELL. We would like to have you do that. We are delighted to have you.

Mr. JACOBSON. Thank you.

I really have two points I would like to make, Mr. Chairman and members of the committee. The first is that we on the State level have faced this same identical problem in the past. Last year when we were enveloped by a burst of euphoria by the prospects of the Baltimore Canyon and the possibility of finding significant quantities of hydrocarbon, particularly natural gas, we started the proc-

ess in our State of siting the pipeline which would be necessary to bring the natural gas ashore.

As you might suspect, everybody agreed it was imperative that we do that, that we bring the product ashore, that we try to use our citizens for the employment of the jobs necessary, and everybody wanted the pipeline sited somewhere but everybody said, Please, pal, put it in his back yard, not mine.

Of course that is the general nature of the problem we are facing here.

In our State we resolved this, we hope intelligently, by having a co-extensive authority assigned for both the Department of Energy, which I head, and the Department of Environmental Protection, and this was done by legally approved documents establishing a planning and regulatory partnership where we acknowledge the different roles and responsibilities, yet make significant efforts to maximize integration of the planning of efforts to minimize the jurisdictional overlapping, procedural redundancy, delay, or inaction.

The process we employed in doing this, sir, was to manifest careful review of the application, thorough analysis, widespread deep penetrating input by the areas to be affected by the decision, and the individuals living therein, the intergovernmental cooperation of processing, we hope rational and intelligent decisionmaking and ultimately a procedure for resolution of any disputes which may have emerged from the two departments.

While we unfortunately have not had an opportunity yet to talk in terms of siting a pipeline, we hope we will shortly, and we would hope that this process would take care of everybody's interests and still serve the interests of bringing that pipeline ashore.

The second point I would like to make deals with the obvious by much more delicate question of preemption, and I am not prepared to present a recommendation with clinical precision here. Frankly, I have not had an opportunity to discuss this with my Governor, because of the haste with which this hearing was called and I was notified of it. He is out of the country and I could not even call him this morning.

Nonetheless, I would reflect a personal view. If this is truly the moral equivalent of war, I recognize full well that the States themselves cannot declare war or not declare war, and if we are seeking to impose upon ourselves the obligations to relieve that dependence upon foreign oil, obviously those decisions must be made, and in the process individual parochial interests must be subordinated to the national interests, so I am ready to accept at full level the Federal responsibility in extracting from the States prompt processing and decisionmaking.

I share the frustration that many share; of a bureaucracy unable or unwilling to make a decision, and I believe the obligations imposed in your proposed statute for procedural diligence, both in processing and timing, are imperative, and all the heavy influence of the Federal Government to be brought to bear against the States is welcome.

I am a little more concerned, however, as you might suspect, with the substantive decisions, primarily those affecting our State and its residents, and my concern is geared to the thought that

there are many decisions concerning perhaps the need, perhaps the technology, but certainly the location of a facility, in which we believe we may be better able to make that decision than some Federal agency. We would urge that the opportunity for exhaustive, deep penetrating input by the State concerning those particular decisions be provided to us, and as you notice, I am skirting specifically the question of who has the ultimate power and pre-emption.

I would like to conclude with one philosophical note. I really do not regard the Federal Government as the enemy, and to the contrary, I do not believe the Federal Government should regard the States as colonial possessions. I believe that just as we try to strike the balance between our ecological and economic needs in making these decisions, we can strike that balance between Federal and State authority and see that wholesome cooperation and harmony is the keynote with which we make these decisions.

[Mr. Jacobson's prepared statement follows:]

STATEMENT OF JOEL R. JACOBSON, COMMISSIONER, NEW JERSEY DEPARTMENT OF ENERGY

The State of New Jersey recognizes the need for "fast track" legislation, and is here today to offer support and comment to the legislation proposed in Title II of H.R. 4499 and in H.R. 4573.

We sympathize with the problems inherent in attempting to balance competing economic and environmental interests in the face of a large scale energy project, whether they be at the state or national level. Large energy development can no longer be located in strictly remote areas, "out of sight and mind." Their impacts cannot be localized either. New Jersey's environment is not only adversely affected by its own highly industrialized economy, but also by the industrial states to the west of it. At the same time our economic well being depends upon reliable energy supplies from outside the state, since New Jersey has no conventional, indigenous fuels to draw from.

The snags that can develop to hinder or obstruct an energy facility application are well-known. One group with organized, parochial interests or the denial of one permit out of dozens is all that's needed to block a project and tie-up millions of dollars. For example, a LNG terminal proposed for Cove Point, Maryland required 110 permits for approval. However, most of the concerns raised by these groups or agencies are legitimate and valid. Highly technical and justifiable arguments can be made on either side of the environmental-economic spectrum.

Because of this very reason—the complexity and diversity of the economic, environmental, and energy issues involved—our state has realized that formal mechanisms for achieving coordination among different agencies and levels of government are necessary for systematically and reasonably addressing and resolving these conflicting issues.

For example, the New Jersey Department of Energy and the Department of Environmental Protection have "coextensive jurisdiction" for the siting of energy facilities in the State. The State Energy Master Plan and the State Coastal Management Plan are legal, approved documents that together form a planning and regulatory partnership. This partnership, in acknowledging different roles and responsibilities, is designed to maximize the integration of planning efforts while minimizing the degree of jurisdictional overlap and procedural redundancy in the approval process.

Let me explain. First, these documents clearly delineate where different energy facilities should and should not be located, and under what criteria they will be judged as needed. Second and just as important, they prescribe formal and specific procedures for the review, approval and appeal of any facility application. Both documents were carefully drafted and revised on the basis of public review and comment. But most important, these two documents guiding energy development in the State are consistent in their language on procedure and policy. Furthermore, federal consistency provisions and national interest criteria for facility siting, contained in the Coastal Zone Management Act of 1972 and linked with these two state agency programs, already provide an orderly decision making process. To under-

score New Jersey's attitude toward an expeditious permit process, let me quote an excerpt from the State Energy Master Plan:

"If the department makes a determination that a facility is needed, it will become an energy advocate with other permitting agencies to ensure that the facility is constructed as judiciously as possible to ensure New Jersey's future energy needs."

A point to be emphasized here is that the time to analyze and resolve complex issues of regional or local concern is before the approval or permit process is actually under way. By critically examining the question of need a more prudent alternative or alternatives to a proposed facility may reveal itself, pointing to changing the size, location, technology, or number of facilities of the project. Clear policy statements on energy development in the U.S., taking in account these regional and local differences, can serve the national interest just as well as the eventual building of the energy facility. To simply push through proposals of energy projects, without due consideration to questions of need, and other national and regional alternatives to the project, will only undermine existing policies and conflict our ability to develop what is really needed—more integrated energy projects and systems. Approving individual energy projects without examining, in a system-wide approach, what came before and what will come after, can only go the way of the Alaskan pipeline project and help to create supply imbalances. Individual projects should be evaluated in terms of the need for future additional projects which will be generated by the initial decision.

Besides improving the regulatory process, clear and consistent language on energy development policy, established as part of a planning document or documents, or set in place independently of an individual application, acts to reduce the investment's uncertainty. Permitting delays under present conditions have a very significant impact on the net present value associated with an energy facility investment. For the 16 refineries recently proposed for East Coast sites which were either rejected or abandoned, an average of five to ten million dollars were lost just in the permitting process alone. The economic risks associated with a 700 million dollar refinery with annual cash flows of close to a billion dollars present the potential for much greater losses.

Presently, companies are now exploring for commercially recoverable quantities of oil and gas off New Jersey's coast. Nothing substantial has been discovered, so that facilities have not even been hinted at, much less proposed. However, New Jersey has been laying the groundwork for eventual OCS development, if and when discoveries occur and facilities are required. Planning efforts underway at our Department are centered on a comprehensive analysis of the costs, impacts and benefits, both direct and indirect, associated with an entire pipeline routing system, from the offshore platforms to the landfall to the inland terminal location. Various scenarios are being evaluated. The Department of Environmental Protection is similarly developing a planning methodology that will examine the same system in a more site-specific way. These planning studies are complementary, different in scope and approach. Industry sources have also been consulted about desirable siting scenarios and locations, which are incorporated in the analytical work.

This brings us to a second point, and I cannot stress it enough, focusing on the importance of drawing from state's experience on these matters, and developing a process which incorporates both state and national concerns, which need not be mutually exclusive.

An Office of Priority Energy Projects or similar entity can only act to resolve irreconcilable conflicts or regulatory stalemates for those singular projects in those singular states that require their intervention. It should not upset that chain of intergovernmental policies, plans, and programs that have been carefully developed and nurtured over the years. It cannot adequately take on the kinds of responsibilities that other government bodies now perform. If they do, they will find themselves unwisely sacrificing an established and well-defined process, and hence distorting what is meant by the national interest.

Before this legislation is enacted, some important issues need to be resolved.

Before a Priority Energy Projects Office is established and given authority to expedite applications, clear policies about energy development, or more specifically, fuel use policies on a regional level, must be formulated and agreed upon. Other more procedural policies must also be carefully specified. For example, what kinds of facilities will "fast track" legislation address? And what role will the states play in determining need for a facility, need as defined in its broadest sense involving location and technology as well as the facility itself? It's clear that in certain circumstances—for example, a facility's location—a state may be better equipped than the federal government to resolve some of these questions, given its more specific and accumulated level of expertise.

At the very least, a Priority Projects Office should seek to accomodate other states' policies and processes and maintain the chain of consistency that already exists. In this way, the balance between economic and environmental interests that has been developed in the kinds of policy documents we have in New Jersey can be maintained.

Our experience in New Jersey may or may not be a model for every state—each state is different—which is why federal leadership in this area is clearly needed. But it is also precisely why the federal leadership, as "fast track" legislation, should not seek to impose a single structure or course of action across all the states. This leadership must carry with it the assurance that expedited decision-making will in fact be rational decision making.

Mr. DINGELL. Mr. Jacobson, the committee thanks you for your very helpful testimony. The Chair will now recognize my colleagues for questions. The Chair observes that we have rather stern time limitations on this matter, and for that reason the Chair will very carefully observe the 5-minute rule. I am sure my good friend and colleague Mr. Brown will be most happy to assist the Chair.

The Chair recognizes now my friend and colleague, Mr. Ottinger.

Mr. OTTINGER. Thank you, Mr. Chairman.

First let me observe that being deeply involved in the issues of synthetic fuels, and having talked to and seen most of the people that intend to manufacture these fuels, that fast track or no fast track, the goals of the administration are a sham and an illusion. There is just no technical possibility of being able to produce the quantity of fuels that are being presented to the American people as coming from these synthetic fuels. These are all multi-billion-dollar investments of unproven, exceedingly complex technology.

We had the Gulf people up, for example, yesterday, and they say none of the people who are involved in shale oil or in coal conversion, which are the two basic synthetics that we are talking about, are going to have a commercialized module before 1984 or 1985, that you are not going to get any significant commercial production of these fuels before 1990, even if the technology does prove out. His statement was that we might get 30,000 to 40,000 barrels per day out of all these technologies by 1985. All of these things have to have a commercial module put up. They have to be tested to see if they really work.

The economics have to be looked at. The environmental consequences of these technologies are horrendous. All these things have to be looked at before we can proceed. There is a tremendous amount of knowledge that has to be acquired in this process. We should want to make sure that we do not merely provide the vehicle for being able to make foolish decisions. These projects are enormously capital intensive and can involve the Government in huge amounts of money. Indeed, the President is talking about some \$80 billion devoted to them, which is a whale of a lot of the taxpayers' funds. I am deeply concerned that we not do anything so inflexible here as to force the Government to make nonsensical decisions.

I am therefore concerned, first of all, about residing this authority in a board. We have created independent agencies in the past, sometimes to our regret, and cut them off to make decisions on their own ground. I wonder what the real need is for an independent board in this situation. It seems to me that the Department of Energy, as inadequate as it is, has acquired such knowledge as we have about these very intricate projects, and therefore Chairman

Dingell is very wise in proposing to reside this authority in the Department of Energy.

Second, what do you do if we do not have enough knowledge to proceed? You can set a bunch of deadlines, but if in fact studies of an environmental or a technical nature need to be done, there is no way of forcing those decisions.

Third, I am concerned about waiver of laws. You say procedural laws, but are you talking about things like child labor laws and Davis-Bacon? Are we going to revamp the entire legal structure of the country to move these projects? Exactly where is that line to be drawn? That is enough I guess for one question, Mr. Chairman.

Mr. Cutler.

Mr. CUTLER. Mr. Ottinger, I will try to address those in some order and I would appreciate it if you would try to keep me on track a little bit as I proceed.

With respect to the question of where the authority should be lodged, the President and the administration feel very strongly that the authority that is proposed for such an entity as an Energy Mobilization Board should be lodged outside the Department of Energy, and ought to be lodged within the Executive Office of the President, for the following reasons, and I think principally for this reason.

The fox ought not guard the chicken coop, and though in the President's program the major portion, though not all, of the synthetic fuels development effort would be the responsibility of a Government-sponsored corporation, the Department of Energy clearly is an agency which has a single mission, or many missions which comprise a single overall mission, and that is the development of energy technologies, the regulation of them, and overall the insurance that this country will be consistent with the President's goals, energy secure, more energy secure than we certainly are now, by 1990.

To lodge the authorities which we recognize to be unusual though necessary in any existing department would, I believe, we believe, place at risk the conduct of these responsibilities in a way that merits public trust and confidence, that will insure judicious consideration of the balancing judgments that this Board will have to make, or whoever has to exercise these authorities, and it is inconsistent, in our view, with the way the separation of powers within the Government and within one branch of the Government ought to be maintained.

It is, may I say, for many of the same reasons I think that many years ago, when the National Environmental Policy Act was written, that the Congress, I think with wisdom, decided that the requirement for an environmental impact statement should be provided, rather than a finding, so that there would be some check on the statement rather than a conclusory presentation by the responsible agency. That is our answer to your first question.

Your second question, as I recall, went to the extent to which the Board should waive or have the authority to waive laws such as Davis-Bacon, child labor laws, and so forth. We have attempted to be quite specific in saying that the Board's authority to waive laws, to waive the requirements of law, would be limited to procedural, that we have made procedural requirements, such as time sched-

ules for decision, requirements for hearings, requirements for public participation that may be duplicative, et cetera, for the conduct of the decisionmaking process.

We have very specifically provided for the treatment of the National Environmental Policy Act requirement for an EIS, and for such similar requirements as are contained in State and local statute. We have said quite clearly that the waiver of substantive requirements would not be within the power of the Board, unless construction on a project had commenced, and then only on a case-by-case, requirement-by-requirement basis within the judgment of the Board.

The kinds of substantive requirements that we have in mind, I think, are precisely the kinds that you have in mind. I am talking about such things as child protection laws, specific substantive laws such as the Clean Air Act and requirements under it, the Water Pollution Control Act, the requirements under it, the standards established by the state and local laws. We want those decisions to be made. We want those decisions to be made expeditiously. We do not want them to be waived.

You asked also, as I recall, and I am taxing my memory at this point, but you asked also as I recall what will happen if sufficient information is not available to make a decision. In that case a State or Federal agency always has the option to say no. It simply has to say yes or no within the schedule established by the Board, and the Board obviously would have the opportunity to extend that schedule.

Mr. ALM. Mr. Ottinger, if I may comment very briefly on the first question, speaking as the fox——

Mr. CUTLER. I did not have Mr. Alm in mind personally.

Mr. ALM. I think there is an inherent problem with one department.

Mr. CUTLER. If I may interrupt, Mr. Alm has been both a fox and a chicken.

Mr. ALM. I think I forgot what I was going to say. There is an inherent problem with one department attempting to coordinate the activities of another department. We had to deal with that question when we established the Executive order procedure for tracking all projects, and the Department agreed with the process of having OMB as a centralized entity without either fox or chicken coloration, perform that activity. The Board is a logical extension. It is an entity that would devote full time to the coordination of decision schedules to move these projects forward. We think this is the only practical way that this could occur organizationally.

Mr. OTTINGER. My time has expired, as the chairman has pointed out. It has taken me the better part of a year to be able to acquire a reasonable amount of knowledge about each of these technologies. What is left to be decided? What are the environmental concerns? That Board is going to have to be an exceptionally well-qualified Board to be able to function within a reasonable time, with the amount of knowledge that is required. I think that is a matter of real concern. I thank the chairman for his indulgence.

Mr. DINGELL. The time of the gentleman has expired.

Mr. DRAYTON. Mr. Ottinger, just let me add as one of the chickens in this situation that the third party is a very important

element here. The issue of expertise to which you allude cuts two ways. The country needs not only the expertise of the agency responsible for development, but it also needs the expertise of the several agencies charged with worrying about the environment or safety or any of the other concerns Congress has defined. Just as our judicial system does not assume that judges must have the expertise of the parties, it does assume that the judge must hear both sides. There must be a neutral third-party judge.

Mr. OTTINGER. I have found in these fields that in order to be able to be able to exercise judgment with any degree of sense, you have to acquire a whale of a lot of knowledge. These are very complicated technologies.

Mr. CUTLER. That is absolutely correct, and let me add to what you have said, Mr. Ottinger, that not only must members of this Board be qualified in their knowledge, but also qualified I think in their judiciousness and their demeanor, and further the Board is going to have to be assisted by a competent staff, and we assure you that the misgivings that I would not blame you for having would, I hope, not be borne out.

Mr. MARTIN. Mr. Chairman, may I also add to that. Somehow inherent in your question I find maybe a set of worst case assumptions, and in looking at this matter from the perspective of the Department of the Interior I think we made an assumption of both good faith and reasonableness in terms of the way we would expect this Board to function. In the first instance, all they would actually do is to look at the combination of permits and approvals that are necessary and the schedules for doing that, and make some judgments about the way in which that work was going to be done, and I would suspect that it would be extraordinary rather than common that they would then have to look at it at the end of the process, and overrule substantively, because of failure to meet a schedule, if they acted reasonably in good faith in the first instance.

If in fact the pattern of behavior of this Board starts out immediately to unreasonably restrict schedules, to, for instance, restrict either findings on clean air, clean water, or something else, to a time period in which no answers can reasonably be expected, it will only be a matter of time until they get the negative answers that Mr. Curtis predicted, and then, as a consequence, we would build back reasonableness into the schedule. The tenor of my testimony was to indicate that we think the Department is capable, given a good-faith Board, to perform credibly within this kind of coordinating mechanism.

Mr. OTTINGER. My time has expired, but take shale oil and the problems of the Colorado River, which irrigates a good deal of our most productive farmland in the country. You already have a problem with salinity in that river. The introduction of toxic substances through an accelerated shale oil program could force the choice between food and fuel. I do not want those decisions to be made on an unsound basis.

Thank you, Mr. Chairman.

Mr. DINGELL. The time of the gentleman has expired. The Chair recognizes next the gentleman from Washington, Mr. Swift.

Mr. SWIFT. Thank you very much, Mr. Chairman. As we talk about expediting decisionmaking, there tends to be an assumption, I think, that we are expediting positive decisions in each instance. What happens when someone says no? An agency evaluates and it says no to that project. Do you believe there should be mechanisms other than judicial review, and so forth, to override that? Should the President be able to override it?

Mr. CUTLER. Mr. Swift, no, we do not. Let me amend what I have just said. The proposal which the President has presented would not provide for the Board to have the authority to waive or reject substantive requirements of law.

Mr. SWIFT. I would then ask, Would that apply as well to State and local decisions?

Mr. CUTLER. Yes, it would, sir. Let me say that that is, I think, clearly the next bridge that you confront. It was our judgment that that bridge, that there is no evidence that suggests that we need to cross that bridge at this time. We believe that the substantive standards established by Federal, State, and local laws, ought to be and can be complied with. That the problem that we have been having is the inability of Federal, State, and local agencies, or the unwillingness of Federal, State, and local agencies to make a decision. That is what we are addressing. We are addressing that plus the judicial review delays, plus the moving target problem.

Mr. SWIFT. Would the Board have the authority to extend a time period for any agency? But I am particularly thinking of State and local agencies, if it were persuaded that they needed more time, not because they had been dragging their feet, but because the situation they were dealing with was perhaps especially complex?

Mr. CUTLER. Although we have not addressed that specifically in the specifications, sir, I believe that they should. I believe that is a good suggestion.

Mr. SWIFT. There was some reason to believe that in the *Sohio* case, that while the State of California received much of the criticism for what was perceived to be dragging its feet, bureaucratic delay, and so forth, that in fact *Sohio* was manipulating the process in such a way as to require—using the procedures in order to delay, and Mr. Drayson referred to this kind of possibility. What do you think ought to be worked into this legislation that would prevent the private sector from that manipulating the agencies through their process and cause delay?

Mr. CUTLER. We believe, Mr. Swift, that it is absolutely essential that the Board, as any agency ought to have, should have the authority to be sure that an applicant is able to provide and will provide the necessary information in a timely way for these kinds of decisions to be made. I believe in the *Sohio* case there is some evidence to suggest that such information may not have been provided in that fashion. We believe it ought to be, and that the Board should have the authority to make sure that it does, and indeed let me go further than that, one of the criteria that the Board ought to consider, though we have not directly spelled this out, in making a designation decision is whether an applicant really is well enough rounded to be able to travel a fast track well and safely.

Mr. SWIFT. Thank you very much, Mr. Cutler.

Mr. Helme, could you flesh out just a little bit your definition of a voluntary time schedule that you suggested should be worked out between the Board and States.

Mr. HELME. What we are suggesting is not a binding time schedule. We want a negotiated process so that we have an opportunity for the Board to meet with the State siting authority, the appropriate authority in that particular State, and to work out potential concurrent reviews and environmental permits, that sort of thing.

Mr. SWIFT. On a project-by-project basis?

Mr. HELME. Right, on a particular project, on a project-by-project basis, but we are not in favor of a strict mandatory time schedule.

Mr. SWIFT. One last question, and that has to do with judicial review. If you eliminate substantial judicial review in this process, does it not seem that that ought be balanced by being sure there is very substantial opportunity for public input prior to the decisions being made?

Mr. CUTLER. Let me address that in this way, Mr. Swift. The opportunities for public input that are available may, in some cases, be more than enough. It is that kind of problem that we seek to address in granting the Board the authority to waive certain procedural requirements. Clearly, a board could go too far in waiving those requirements, so that there was not enough opportunity for the public to participate in the decisionmaking process, and in that respect we believe the Board would be exceeding its authority.

With respect to judicial review, the Board, by providing for the consolidated and expedited judicial review, on the basis of the proceedings that would develop, we believe that a court of appeals would be in a position to make a decision, if it had before it a record that had been developed with sufficient public participation. If it did not, clearly the court could take care of that with its judgment.

Mr. YOST. If I might add to that, Mr. Swift, and only to invite your attention to paragraph 9 of the administration's specifications document on judicial review, which has been placed in the record, and to emphasize that that is not wiping out judicial review. It is basically accelerating it.

Mr. SWIFT. I am concerned, and I think that public input has been abused, as has judicial review in some instances, and been used simply to cause delay, but I am also concerned about situations such as one that occurred in my district, in which a pipeline company had been 3 years talking about going around Puget Sound. Two weeks before public comment was to be in, it changed to a cross-sound pipeline. A whole new set of people suddenly became very interested, weren't even able to receive a copy of the EIS before the deadline for public comment ended and BLM says, well you can comment later.

I think that is irresponsible on the part of the BLM in a procedure that does not let people have an appropriate opportunity to speak on these policy decisions. That is something we have to avoid.

Thank you very much, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman. The Chair recognizes now the gentleman from Texas, Mr. Loeffler.

Mr. LOEFFLER. Thank you, Mr. Chairman. I would like to ask the panel this morning—I think perhaps it was alluded to in this last answer to Mr. Swift's question: How do we overcome the preemption problems when the Energy Mobilization Board makes a final determination to override State as well as local law? In other words, what is going to be the final result with respect to the legalities of the situation? It has got to be very complicated, and I would like you to address that.

Mr. CUTLER. Let me address that and then perhaps other members of the panel might wish to as well. First of all, let me point out again that the Board's authority to waive State or local law is restricted to procedural aspects of State or local law, except once construction in a facility has commenced, and then only on a case-by-case basis.

Mr. LOEFFLER. But if we are only talking about the procedural aspect, then that really will slow the process.

Mr. CUTLER. We don't believe so, sir. We believe that a State ought to have, or local authority ought to have, the opportunity to make a decision that is required to be made by its laws and that we have decided that it is not necessary to cross the bridge, if you will, that we were discussing with Mr. Swift, that is the next step, which is just waiving State or local substantive law.

The question that you raise overall is fundamentally a constitutional question. It is a question with respect to the 10th amendment. There have been a number of cases that have gone up to the circuit courts of appeal with respect to the 10th Amendment, particularly in the context of the Clean Air Act. The decisions of the circuits are in some conflict, and I think it would be disingenuous of me to suggest that such a challenge might not be raised here, and that ultimately it might have to be decided by the highest court.

Let me, however, say that in considering and drafting the proposal which we have submitted, we have undertaken an extensive effort with the Department of Justice to examine the question. We are satisfied fully that the procedures which we have proposed would meet a constitutional test and have come forward with this proposal.

Mr. LOEFFLER. I might turn to Mr. Fygi, with whom I have had the pleasure of working in the past and for whom I have the greatest respect. Do you have any comment?

Mr. FYGI. If I can add one observation to the comments made in response to your question. In the context of the situation where the Board would be applying State substantive law in rendering a decision, when the State or local entity had not made the decision within the contemplated timeframe, conceptually there is really nothing different in that situation from an ordinary diversity case, in which the Federal courts routinely consider, apply, and construe—sometimes in the first instance—questions that are purely State law in character, so I think that this aspect of the administration's proposal is not necessarily all that novel in a constitutional sense.

Mr. LOEFFLER. Going back to the question of merely addressing the procedural aspects of State as well as local laws—and I recognize the difficulty from a constitutional standpoint of going into

the substance of these laws—if the Energy Mobilization Board is only able to override the procedural process, the final line in all likelihood will not really be effective. This begins to give me severe concern, because I am sympathetic toward the Energy Mobilization Board, which I think is a very positive approach in concept.

Mr. CUTLER. If you assume, as we have, that not only can the substantive consideration, substantive requirements of law be maintained, but also that they can be met consistent with the President's import reduction goal consistent with the program that we have outlined, if you assume that, as we do, after some considerable examination of that question, then you have to look at what experience we have with these kinds of permitting problems, identify the problems that need to be addressed, and address them. Let me just summarize the three problems that we have tried to address.

First, we have tried to address delay, redtape, extensive proceedings, et cetera, and these are problems not only because the longer these problems obtain, the greater the economic cost to a developer, and the project goes down the tubes, but they simply provide greater and greater opportunity for a challenge, and more and more hooks, if you will, for rejection.

We have addressed that problem, delays, and redtape. The second problem we have addressed is the judicial review problem. Judicial review can, when it occurs on a continuing basis, with interlocutory appeals happening every other day, can have the same effect. We have tried to address that question.

Third, you have the moving target problem, that is, a developer looks at a project, sees that the regulations may change right after he begins construction, and says, "I simply can't afford to take that risk." We have addressed that problem with respect to both procedure and substance, and in addressing those problems we believe that we have addressed the most fundamental problems that we have seen in our evaluation of this entire area.

To go beyond that, it seems to me, challenges in a very fundamental way the right of States, local governments, to make judgments about the kinds of standards that they wish to apply to operations within their jurisdictions, and the like, and challenges their fundamental right to make certain tradeoff decisions.

We do not believe it is necessary to do that. Should the Congress wish to do that, we would be happy to work with the Congress in developing appropriate standards and mechanisms for that purpose.

Mr. LOEFFLER. One final question that I would like to ask, and that is, I note with disappointment that the approach toward cutting redtape concerning nuclear projects is not a part of this package. To me, we must pursue an appropriate energy mix in our country, which includes all avenues of energy production, including nuclear. Why is nuclear omitted?

Mr. CUTLER. Nuclear is not included in this approach, Mr. Loeffler, for really two reasons. One, it is a fundamentally unique process by which nuclear facilities are considered and licensed, that is the NRC has very dominant jurisdiction, a very unusual set of procedures; and second, we have a specific legislative proposal to speed up the licensing and the consideration of nuclear plants.

That proposal was submitted to the Congress last year. It will be shortly submitted this year. We are addressing it. We are simply addressing it in a different way, and in a way we think is more appropriate to that particular kind of unique facility.

Mr. HELME. If I could get in one quick point on delays, we did a detailed analysis and study of all 50 States in their siting procedures and times needed for siting powerplants and that sort of thing. This showed the average time was 12 to 18 months from first receiving the program application for powerplant going to final decision, so I think part of the reason the administration does not feel it has to cross the bridge I think they recognize for the most part States are not the major points of delay. There are certainly some examples where they are, but I think in general you can make a good case that the States are not the source of delay.

Mr. CUTLER. If I may add to Mr. Helme's comment, and I am not being argumentative at all, many States do perform very well and very efficiently. It is undeniably true, however, that with respect to a given energy project, State and local government permits, and Sohio is a very good example, can be and often are not only more numerous than the Federal permits required, but the process of getting those decisions can be extended far beyond the time required for Federal decisions, so that in addressing the whole problem, we have to address, we believe, Federal, State, and local procedures.

Mr. OTTINGER [presiding]. The time of the gentleman has expired. Mr. Gramm.

Mr. GRAMM. Thank you, Mr. Chairman.

Mr. Martin, I would like to ask you a couple of questions. What percentage of our proven reserves of fossil fuels are on Federal lands?

Mr. MARTIN. I would have to supply those figures for the record. I can tell you that in the case of coal, approximately half are on Federal lands in the West, and they constitute about two-thirds to 75 percent of the western coal lands.

Mr. GRAMM. As best I can figure, about 50 percent of our total fossil fuels, if you combine the Btu equivalents on Federal lands. What percentage of our production of fossil fuels comes from Federal lands?

Mr. MARTIN. Again, I would have to give that figure for the record.

Mr. GRAMM. As best as I can figure, about 15 percent does.

Mr. BROWN. Would the gentleman yield, because I have asked for those same figures?

Mr. GRAMM. I would be happy to yield to my colleague from Ohio.

Mr. BROWN. I asked for those same figures about a month ago from the Department of Interior and have yet to get them, so I hope you have better success than I do.

Mr. GRAMM. I thank my colleague.

Mr. BROWN. I will take the issue to the floor early next week if I do not get them soon.

Mr. GRAMM. It seems to me that if we are going to talk about doing something about energy the best place to begin—by “we” I mean people in Government—that the best place to begin to try to

do something is at home, and one of the reasons that we are in the position we are in is that nowhere have we done a poorer job of exploiting our resources than in Government itself. How do you respond to that?

Mr. MARTIN. I think I may be in some disagreement, Congressman. There are three major activities for exploiting, as you say, fossil fuels now. The first is the Outer Continental Shelf program. I think that the program of the Federal Government right now, if you look at the schedule that has been submitted by the Secretary of Interior, is an active, aggressive schedule that is designed specifically to move into OCS areas on a very rapid basis. I do not know if you have looked at the last schedule, but I think you would agree upon looking at that there is an active onshore oil and gas leasing program, based on noncompetitive lease sales.

We have made a complete review of that over the past months, and we are going to be proposing, within the next month or so, a move to make onshore oil and gas leasing a more competitive system. One of the reasons we think that may be desirable is that it will increase the likelihood that lands that are leased will actually be explored and developed.

We would accompany that with a much more aggressive program regarding diligence. I believe that with regard to the issue of diligence, the Department of Energy may well have a comment.

On the issue of coal, I think that we have made the most expeditious possible response that could be made. When this administration took office, the Nation's Federal coal management program was paralyzed by one of the most debilitating pieces of litigation with which I have ever dealt.

The Secretary responded to that by entering into a court agreement which essentially allowed us to begin short-term leasing of coal, which we have done for now some 14 to 16 months, issuing an average of about two leases a month in high need situations. The Secretary made his final decisions on a new Federal coal management program on exactly the day that he announced he would make them. That program is now out in operation, with secretarial decisions and regulations to support the program. I think you heard the gentleman representing the National Governors' Association indicate, this is an example of a program put together with enthusiastic support of the States, and particularly the Western States where most of the coal will be developed.

Mr. GRAMM. Mr. Martin, I am willing to concede that there is a time lag between action taken by the Department of the Interior and production. The point I am trying to make is that whatever we are doing today, when you get down to objective measurement as to what the Government has done with resources directly under its control, that record is poor, and it is a record which has produced an impact on the American people by contributing to our shortfall, contributing to our shortages, and in turn driving up prices.

I would like to turn to Mr. Curtis, if I may. Mr. Curtis, I enjoyed your testimony because it seems to me that we are somewhat fooling ourselves on this fast track business. It seems to me this is another case of where the President wanted to come out with a program. We are anxious to support it, and the program really represents no difficult choices. It goes back to an old syndrome of

Government, which is to say there is nothing wrong with the way we have got Government set up. It will all work.

It reminds me of Galbraith on wage and price controls, which if we used for 5,000 years would never work, but Galbraith took the position if the people doing them were different people.

It seems to me that this fast track idea, which I am going to support, because if it does any good that will help. I am not very optimistic about it because I do not think our problem is just the people. I do not think our problem is just one of expediting things. I think our problem is as I understand your statement to say, our problem is that we have imposed so many regulations that the system is not workable, and to think that we are all of a sudden going to try harder and we are going to expedite things, and all of a sudden by new personnel, by a new layer of bureaucracies through this, I guess it will be called EMB, that things are going to start to move. It seems to me that is a copout on going back and looking at all this legislation and seeing where we really made mistakes in the Congress, and where we need to repeal legislation. Would you comment on that.

Mr. CURTIS. Yes, I will, Congressman. First of all, I believe that our energy future and destiny will require that type of hard nitty-gritty work on the part of the Congress, to try to sort out what has become a multiplicity of Federal requirements that have been built upon themselves without reference to that which has gone before. It is going to be hard work. It is going to take a long time to sort that out. It is an important exercise.

I would like to qualify or make clear something in my statement earlier. I believe the two fast track bills that are before the committee, and the explicit subject of our testimony today, do not hold out a promise for really addressing the problem and accomplishing our purposes. However, I tried to emphasize that the President's proposal does bite that bullet, in the words that Mr. Cutler used today, by providing specific mechanisms which, in one case, would permit the binding of the decisionmaking process at the state and local level; the substitution for that decisionmaking process, if the schedules are not made; and, equipping in the Office of the President a single Federal agency with the authority to waive procedural requirements. The latter is essential, in my opinion, if we are to expedite the decisionmaking process on critical project matters.

I think it is important to decide that once construction has begun, there should be a limited authority, as is proposed by the President, to waive both procedural and substantive requirements; and it is perhaps recognizing that politics is the art of doing that which is doable. A prudent first step, as suggested by the President, is to take one bridge at a time; and the first bridge is to get our decisionmaking process in order and address that which we know must be addressed.

There may need to be a requirement that the President be equipped, or the Energy Mobilization Board be equipped, with the authority to waive generic law itself prior to the completion of the construction project threshold that is contained in the specifications of the President. I must say I am a little more pessimistic in that area; and I think that if we are to truly confront this problem, we have to give someone the authority to say yes. We have a

system of government that resides the authority to say no in many Federal and in many State and local agencies. I think that we may ultimately come to the point where we need to reside authority to say yes in someone in the case of critical energy projects.

Mr. GRAMM. Mr. Curtis, let me thank you for that statement. I am well over my time so I will yield back to the chairman. If there are other witnesses that wish to make a statement and he will allow that, that will be fine. I agree with you, Mr. Curtis, on what must be done. I guess I disagree in the sense that I am not willing to set up some superboard that is going to circumvent law. What I want to see the Congress do, and we have got to have the help of the President and the bureaucracy to do it, is to go back and look at these laws and change them.

Mr. CURTIS. May I say one thing which will clarify my earlier statement. If the extraordinary—and it would be an extraordinary power—to waive substantive law requirements were to be vested in the Board, then quite obviously I think that the procedural mechanism for that should be project specific, akin to the type of mechanism that the Congress wrote into the Alaska Natural Gas Transportation Act.

Mr. GRAMM. Thank you, Mr. Chairman.

Mr. OTTINGER. The time of the gentleman has expired. Mr. Cutler.

Mr. CUTLER. Just a brief comment. I want to underline simply what Mr. Gramm and Mr. Curtis have said, and that is that the fundamental question is not whether the laws ought to be changed, whether these kinds of tradeoffs ought to be made, but whether the Congress ought to delegate to some what would be extraordinarily powerful individual or Board authority to do that. It is that which gives us grave reservation. It will be a tough job for the Congress, the President, and the administration. We are willing to engage in that with the Congress but to grant that authority to a Board is something that we would at this point be very cautious about doing.

Mr. CURTIS. May I add one qualification. The Alaska Natural Gas Transportation Authority does not delegate the authority to the President to change substantive law. What it does is to discipline by accepting the self-discipline of the Congress, by saying in essence that it provides a fast legislative track, so the President could submit a proposal for legislation.

It would be nonamendable project specific, and the Congress could vote it up or down within 60 days. It would not be a delegation of the authority of the Congress to legislate, but rather a procedure of self-restraint on the part of the Congress to consider proposals in nonamendment form, an expedited procedure of self-discipline.

Mr. OTTINGER. Mr. Gore?

Mr. GORE. Thank you very much, Mr. Chairman.

I don't think we have anybody on the panel who participated in the writing of this proposal, do we?

Mr. CUTLER. Yes, we do. I did, and Mr. Alm, and Mr. Drayton.

Mr. GORE. OK. I generally support the initiatives of the President and I look forward to helping enact many of these proposals. I have some serious questions, and even in this atmosphere of get-

ting things done in a hurry, and not tolerating any obstacles, I think we have got to take a close look at some of these provisions.

I would like to home in on this question of waiving substantive or procedural law.

Mr. Curtis has just referred to the Alaska Natural Gas Transportation Act of 1976. I have that here. In section 8(g) it says that at any time after a decision designating a transportation system is submitted to the Congress pursuant to this section, if the President finds that any provision of law applicable to action to be taken under sections (a) or (c) of section 9 to require waiver in order to permit expeditious construction and initial operation of the approved transportation system, the President may submit such proposed waiver to both Houses of Congress. Then the Congress has 60 days to veto or not.

I don't see anything wrong with that. But is the Congress going to pass laws under the Constitution, and then set up a board to say, "We don't like that law. Let's do away with that. That law is no good."

I think in spite of the circumstance, I just cannot go along with that.

We have got a Presidential veto. That is a sham, in all honesty. It says that the members of the Board will serve under the direction of the President and at his discretion. So what do you need a Presidential veto for? That is ludicrous, it seems to me. It doesn't add anything. It is just window dressing.

I don't understand why we shouldn't have a congressional veto of any waiver of substantive or procedural law, and if it is not in there, I cannot support it.

I would like to ask you, Mr. Cutler, since you seem to be the leading spokesman on this, why you would oppose the inclusion of a provision similar to section 8(b) of the Alaska Gas Transportation Act?

Mr. CUTLER. Mr. Gore, may I first say with respect to the Presidential authority to veto, we simply were underlining the authority that would reside in the President for the reasons that you mentioned.

I don't think it is a sham to say that the President could direct—

Mr. GORE. Why veto it? Why doesn't he just pick up the telephone and say, "Don't do this," if they serve under his direction, at his personal discretion?

Mr. CUTLER. My own sense is it is the more sensible way to proceed, simply because I think the Board ought to have an opportunity to consider and act on a question.

Mr. GORE. Does he have a veto over Hamilton Jordan's decisions?

Mr. CUTLER. I think he does.

Mr. GORE. He doesn't have a formal veto power. He doesn't have a Presidential veto message on Hamilton Jordan's decision to call up some Cabinet member and say your resignation is accepted?

Mr. CUTLER. I think, Mr. Gore, before Mr. Jordan makes such a decision he probably consults with the President.

Mr. GORE. That is exactly my point. And these people are going to do that, too, because they serve under his direction and at his discretion.

Mr. CUTLER. Let me answer that in the context of the difference between waiving a procedural requirement and waiving a substantive requirement because there is, in our judgment, quite an extraordinary difference.

When you have a facility that has to be considered for and receive hundreds and even over 1,000 different permits and licenses, each of which involves different procedures, duplicative hearings, et cetera, the Board will have to consider or not to consider how best it can consolidate the decision procedure, expedite the decision procedure for each and every facility.

Now, to require, if I may suggest, that either the President or the Congress consider in detail each and every one of those kinds of waivers would burden both the President and the Congress with more—

Mr. GORE. I disagree. I think the distinction between substantive and procedural law is a very tenuous distinction. If you want to write the substance, you let me write the procedure and I will win every time.

Mr. CUTLER. Mr. Gore, I think the distinction between procedure and substance does not suggest that the one is more important than the other. It suggests that there is a difference and it is a difference that has been recognized, I think, in law for a couple of hundred years at least.

Mr. GORE. Well, is the requirement to file an environmental impact statement substantive or procedural?

Mr. CUTLER. In our view, Mr. Gore, that is a procedural question. Now, the courts have differed—

Mr. GORE. You think that is procedural rather than substantive.

Mr. CUTLER. We think it is procedural. If I may answer the question in full, it deserves a fuller answer.

We believe that that is a procedural requirement. The courts have differed on whether it is a substantive or procedural requirement.

It was for that reason that we made very explicit the procedures, if you will, or the rules that ought to apply to the waiver of an environmental impact statement requirement rather than simply classifying it as procedural or substantive.

Mr. GORE. Well, as I say, and I know that my time—

Mr. OTTINGER. I wonder if Mr. Yost might want to comment on that. That is not my reading of the decision.

Mr. GORE. It is not mine, either. Go ahead.

Mr. YOST. I think Mr. Cutler has addressed that rather precisely by saying, as is the case on page 3 of the specifications, that the particular question of EIS has been specifically dealt with as something in which it is ordinarily contemplated that there will be a single agency to prepare the EIS, and in exceptional cases a waiver is possible.

However, as we have said in our testimony, we intend to work to try and get EIS's on fast tracks, so waivers won't be necessary.

The President's Executive order to the Council directing our reform of the NEPA process, which is in part summarized in one of the attachments to the statement, referred to section 102(2) of NEPA as procedural, and it is that which is the section within which the EIS requirement exists.

Mr. OTTINGER. It seems to me on that question that the courts have held pretty uniformly—as far as my knowledge of the law is concerned—that the requirement for an EIS, rather than the time schedule for one is a substantive requirement depending upon substantial Federal action involved.

Mr. YOST. That is, if you will excuse me, not the case, Mr. Ottinger. I think the courts have held that things under 102(2) are procedural. There has been dispute under section 101, as the section which states the national environmental policy, as to whether that section imposes substantive requirements on decisionmakers, which the Council, of course, has always said is the case.

But the environmental impact statement requirement of 102(2)(c) has always been held to be procedural, and the President in his Executive order referred to all the nine subsections of 102(2) as the procedural provisions of NEPA, which I think accurately states the law.

Mr. GORE. I yield to my colleague from Ohio.

Mr. BROWN. I only want to make an observation which is perhaps not too substantive, more procedural; that is, the only people amused at your line of questioning were the two representatives of State government. Everyone else was pretty sober about the whole problem.

Mr. GORE. Let me conclude my time pressing for an answer to the question to Mr. Cutler.

Mr. Cutler, would you oppose the inclusion of language similar to section 8(g) of the Alaska Natural Gas Transportation Act?

Mr. CUTLER. With respect to substance, Mr. Gore, I think not categorically. We would like to work with the committee in developing that.

In respect to procedure, we would oppose that. We believe the Board ought to have the waiver authority.

Mr. GORE. Why would you oppose it?

Mr. CUTLER. As I have stated, for the Board to have to come before the Congress with respect to every procedural waiver that it wants to establish with regard to each and every facility would not only burden the Board and the Congress unnecessarily, but I think would simply result in delay which would be clear to the purpose for which we are setting up—

Mr. GORE. I understand the Congress wouldn't have to have formal action on any of these within the 60 days. It could act if a decision of the Board was controversial and raised enough of an uproar that the Congress decided it wanted to veto something, then it could. I think it ought to have that authority.

Mr. CUTLER. If I may, before Mr. Curtis responds, let me simply say that we would much prefer, as I have said, that the operation and judgments of the Board not be so constrained.

If the Congress were to assign to the President such a provision, I am sure that it would not prove fatal. But for the reasons that I have stated, we think it would be unnecessary and harmful to the process we are trying to create.

Mr. GORE. But not fatal.

Mr. Curtis?

Mr. CURTIS. Mr. Gore, I believe the provision calls for a joint resolution of approval for a waiver. It would require affirmative

action within a 60-day period. I think that type of procedure is more appropriate to the fabric of law.

Mr. Cutler's point is one that I would urge the committee to consider very carefully; that is the direction for the procedural waiver is searching for a means of developing in essence a consolidated hearing record upon which these decisions should be made. That will involve the Board in a multitude of decisions that then are elevated to the level of importance that would require either Presidential or congressional action.

Mr. GORE. In brief conclusion, on the question of judicial review directly applicable to this point, I don't think, with all due respect, the implications have been adequately addressed. You can say the courts will address it in an expedited fashion. But you cannot repeal all of those things that give people the right to petition the courts.

If you have a procedure similar to section 8(g) of this act and the Congress by joint resolution acts on this, then it is reviewable in the courts only on constitutional grounds, and you do short circuit all of those lengthy judicial reviews, so you have substantial advantages by giving the Congress the power to have a congressional veto over this.

Mr. CUTLER. Let me make one more point. That is, should the Congress move in the directions that you have suggested, either with respect to procedural or substantive requirements and, as an added point that I ought to make, it would be very important that it not be a one-House veto. That is, as I think you know, a very strongly held position of the administration.

Mr. GORE. Thank you very much.

Mr. DINGELL. The time of the gentleman has expired.

I might advise that the matter of a one-House veto is the subject of strongly held views in the administration. But the administration should know that one-House vetoes are also matters of deeply held views up here.

You are going to have to understand, Mr. Cutler, this may be a difference that we may have to accept in the interest of moving expeditiously.

Mr. CUTLER. I understand that, Mr. Chairman.

Mr. DINGELL. The time of the gentleman has expired.

The Chair has been advised our colleague Mr. Brown has graciously agreed to waive his place in the list of the committee precedents in favor our colleague Mr. Shelby. For that reason, the Chair will recognize the gentleman from Alabama at this time.

Mr. SHELBY. Thank you, Mr. Chairman.

In the bottom line on this, if we are going to set up what the President has proposed here, the fast track regulation, isn't the bottom line to go ahead and have some legislation that is meaningful, so that this Board can preempt all the bureaucratic nightmares, and all the delays including the congressional delays.

Let's face it. I am a Member of Congress. But if we have the one-House veto, you are just talking about further delay. I think that the American people are tired of EPA. That is No. 1. I certainly am, and all their delays. I have been involved with them, and a lot of the others.

So, haven't we got to get down the road as to substantive changes? Give the President, give this Board some power to get in there and preempt the field, preempt EPA and the other, preempt the Congress if they have to.

We are going to write the legislation. Let's give it to them to do something about it. Otherwise, where are we going.

I would like some comment. If we don't have a meaningful Board that can cut out a lot of the so-called delays, such as comment time, and all the other bull that comes with it.

Mr. CUTLER. Mr. Shelby, I couldn't have stated some of the reasons for doing what we are doing much better than that. Let me say, however, that we have carefully examined—and it has been now for a period of about 1 year—the whole permitting process at the Federal, State, and local level.

We have tried to identify the genuine problems that need to be addressed because we know that proposing something like this, as has been pointed out by members of the committee, is a somewhat extraordinary suggestion.

We have addressed what we have identified to be the real inhibitions on speedy action, getting a yes or no decision. It is that next hurdle, the hurdle that you jump when you say that we are going to give somebody the authority to say yes if someone says no, that involves the kinds of questions that were raised earlier by Mr. Gore and others, and which suggests in our view, or which raises in our view the question of whether a board or single individual ought to have the authority to reject the application of substantive provisions of statutes which have been enacted by the representatives of the people of this country.

It is a hurdle which we have great misgivings about crossing, jumping, and if we are to do so, we would want to do so in a very careful way, as Mr. Curtis has suggested.

Let me add, if I may, that in my responses to Mr. Gore's question I may have mistakenly implied that in taking such a step we would approve of a joint approval process.

Mr. SHELBY. How would that work?

Mr. CUTLER. Before I mention how that would work, let me state that we would greatly prefer, if not insist upon, a joint disapproval process. A joint approval process, I believe, would in fact involve infinite delay by the Congress and would also raise, I think, serious questions with respect to the appropriate roles of the Congress and the Executive.

In any event, if the Congress were to decide that when the Board wishes to waive a substantive requirement of Federal, State, or local statute, the Congress ought to be involved.

One way to do it would be for the President to send the waiver of a substantive provision of law to the Congress, giving the Congress, say, 30 days or conceivably less time in which to, in a joint resolution of the Congress, act to disapprove the waiver.

That would be an approach which I think if the Congress were inclined to take it, would minimize delay, but yet would make sure that the Congress focused on what I believe would be in many cases an extraordinary step, and would substitute for the kind of nitty-gritty consideration of changing Federal and State and local

substantive laws and requirements that Mr. Gramm was addressing earlier.

Mr. SHELBY. If you don't have some procedural fast track type stuff where you can move this, why have this legislation, why set up this Board? In other words, we are right where we are, are we not?

Mr. CUTLER. No. We are setting up a fast track. We are saying that, first, we have found in examining these problems that procedures pile up, redtape piles up, we need to cut this short, we need to get it done quickly, and we need to give a Board the authority to waive procedural requirements, not only at the Federal level, but at the State and local level as well, and establish binding decision schedules that have to be met. We have done that.

Second, we have found that extensive and repeated judicial review on an interlocutory basis in many cases has at the Federal, State, and local level tied up these projects for months and even years.

We have expedited judicial review, consolidated it, made sure that it will happen quickly and efficiently, but fairly.

Third, we have found that the moving target problem discourages project developers, and in fact in many cases makes projects uneconomic, in that developers cannot be assured that once they begin construction, once they have all the permits in hand, that the rules of the game won't change in the middle of the game, and that they will suddenly be confronted with additional costs or conceivably with impossible requirements, requirements that are impossible for them to meet.

We have given the Board the authority to waive substantive and procedural requirements that come into effect after commencement of construction of the facility.

So, we believe that the proposal that the President has sent forward is strong, it is fair, and it will deal with the problems that exist in the real world.

Mr. SHELBY. Is it going to get the job done? If it is, we will support it. If it is weakened to where it is ineffective, we might as well untrack it here.

Mr. CUTLER. We believe it will get the job done, or else we wouldn't have sent it up.

Mr. SHELBY. Thank you.

Thank you, Mr. Chairman.

Mr. DINGELL. The Chair recognizes Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman.

First, I want to ask Mr. Martin if he really does have any intention of sending the gentleman from Texas, Mr. Gramm, the material he asked for.

Mr. MARTIN. Certainly.

Mr. BROWN. I hope he will send it to me, too.

Mr. OTTINGER. Would the gentleman yield just briefly?

Mr. BROWN. I asked about this information a month ago from Frank Gray, the Director of the Bureau of Land Management, and have yet to receive it.

Now, I think frankly it would have been helpful to me then with an interest I had then. But it is going to be helpful now to the

whole committee, and I think to the whole country, if you could just provide it.

Do you think you can do it by Tuesday?

Mr. MARTIN. I think so.

Mr. BROWN. Good.

Mr. DINGELL. If the gentleman would permit, without objection this will be inserted in the record at the appropriate place.

Mr. OTTINGER. Would the gentleman yield?

Mr. BROWN. I do want him to send it to me because I asked for it a month ago. I do want to have it personally.

Mr. OTTINGER. I would also like for the committee to have information you have on the production which has been achieved on the Federal lands which have been opened up for production.

Mr. BROWN. I think that comports to what Mr. Gramm asked for. He asked for what the percentage of energy sources were on Federal land—you can go back and look at the record—and also what the percentage of production from Federal land was.

Mr. MARTIN. He asked for total U.S. fossil fuel resources, federally owned fossil fuel resources, production in each category.

Mr. BROWN. That is correct.

[Testimony resumes on p. 221.]

[The following material was received for the record:]

INTERIOR DEPARTMENT RESPONSE TO INQUIRIES BY CONGRESSMAN CLARENCE J. BROWN

The Department of the Interior has not compiled all of the information requested on the amount of Federal lands potentially available and actually available for mineral exploration and development. Several studies have been done in the past few years exploring the question of availability of Federal lands for mineral development. None readily provide the precise information requested, nor can the Department verify the conclusion of any of these efforts.

In the absence of available data at this time that can be independently verified by the Department, information developed by the Office of Technology Assessment (OTA), April 1979, and Bureau of Land Management estimates that are based on available statistics are submitted herewith. The OTA study is the most recent study available and reports the data in categories similar to those requested.

Enclosures I, II and III are self-explanatory. They comprise pages 336, 337, and 338 of "Management of Fuel and Nonfuel Minerals in Federal Land", a report of the Office of Technology Assessment published in April 1979. Enclosure IV is based upon Table B. 1. -- "Availability of Federal Onshore Land for Development of Fossil Fuel and Fertilizer Minerals", of that report (see Enclosure I), adjusted to reflect only the "Lower 48." Enclosure V is based on that report. Enclosure VI pertains to lands actually under mineral lease.

It should be noted that several significant decisions regarding Federal land use have recently taken place or will take place shortly that are not entirely reflected in the enclosed data.

The Federal Land Policy and Management Act of 1976 (FLPMA) directed the Bureau of Land Management to identify all roadless areas larger than 5,000 acres administered by the Bureau that have wilderness characteristics. If an area meets that test, the law requires that it be studied and recommendations be made through the Secretary of the Interior and the President to Congress as to whether it is suitable or unsuitable for preservation as wilderness. The Bureau is still in the early inventory phase of that wilderness review process.

Of the approximately 175 million acres of public land reviewed in the Western States, nearly 113 million acres have been proposed for deletion from further review due to lack of wilderness values, leaving about 62 million acres for further consideration. Final decisions on these proposals will be made by the end of the summer after considering information provided by the public. The remaining acreage would be subject to a second phase intensive inventory, to be completed in the contiguous western States by September 30, 1980. In this second phase intensive inventory, BLM has accelerated the deadline for the Rocky Mountain "Overthrust Belt"; in this area the inventory will be completed by the end of this year.

After this phase, "wilderness study areas" will be designated and the balance of lands dropped from further wilderness review. As provided by FLPMA, lands determined by intensive inventory to have wilderness characteristics will be managed so as not to impair their suitability for preservation as wilderness until Congress decides their future use. An interim management policy and regulations on surface disturbance by hardrock mining are under consideration in the Department. With regard to mineral leasing, the Bureau of Land Management is continuing to issue leases in areas under wilderness review, but in some cases it will be necessary to preclude exploration and development on leases temporarily, until the review is completed.

In addition, the U.S. Forest Service has been conducting a wilderness review of about 62 million acres of Forest Service lands, known as RARE II. On April 16, the President decided to drop 36 million acres of these lands from further wilderness consideration. 15.4 million acres were recommended for wilderness designation and the remaining 10.6 million acres were allocated to further planning. The RARE II wilderness study areas in the National Forests are open to exploration under the mining law. In those proposed by the President for wilderness designation, the U.S. Forest Service does not recommend oil or gas leasing except when it can be done without surface occupancy of the kind that would degrade wilderness values. In those under further study the Forest Service has a policy of recommending that exploration be permitted under certain restrictions.

Finally, pursuant to section 522 of the Surface Mining Control and Reclamation Act, the Secretary of the Interior must review Federal lands to determine whether they contain areas unsuitable for surface coal mining operations. Unsuitability criteria have been developed by the Department and will be applied to medium and high potential coal lands in the land use planning process to identify lands that should not be leased for that purpose. This process has already been started.

These ongoing reviews and processes modify the data in the OTA report. However, because some of the affected acreage is already accounted for under existing categories of "restricted" lands in the OTA data, these acreages cannot simply be added to the totals of lands portrayed as closed or restricted by the OTA report. Moreover, restrictions will be removed on much of the acreage involved as the review process concludes and Congress acts on wilderness designations.

With regard to withdrawals of Federal lands from operation of the mining and mineral leasing laws, Section 204(1) of FLPMA requires a review of withdrawals in certain States to be completed within 15 years of the effective date of that Act. In order to obtain a comprehensive review, the Bureau of Land Management is also including in the review other withdrawals in other States. The Bureau of Land Management estimates that about 4000 withdrawals will be reviewed.

The Bureau is now in the process of identifying the withdrawals covered by the review and developing information about each one. This phase is expected to be completed by the close of this fiscal year.

It should be stressed that this effort does not cover withdrawals and reservations of lands in Indian reservations, the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, or the National Trails System.

The purpose of this review is to determine whether, and for how long, the continuation of a withdrawal would, in the view of the Secretary of the Interior, be consistent with the statutory objectives of the programs for which the lands were dedicated and of other relevant programs.

After submission of recommendations to the President and the Congress, the Secretary is authorized to terminate withdrawals, other than those made by Act of Congress, in accordance with those recommendations.

Table B.1.—Availability of Federal Onshore Land for Development of Fossil Fuel and Fertilizer Minerals
 Status in 1975*
 (Millions of acres)

Designated use	Formally closed	Highly restricted	Moderate or slight restriction
Military	22.9 (2.8%)	—	—
Indian (nonreservation)	0.9 (0.1%)	—	—
National parks, etc.	24.6 (3.0%)	—	—
National recreation areas	1.4 (0.2%)	0.2 (0.0%)	0.4 (0.0%)
Historic and archeologic	?	?	—
Fish and wildlife	1.9 (0.2%)	29.4 (3.6%)	—
Endangered species	?	?	—
National forest wilderness	—	11.6 (1.4%)	—
National forest wilderness study	—	15.2 (1.8%)	—
National forest roadless	—	—	42.5 (5.2%)
BLM roadless	0.1 (0.0%)	2.0 (0.2%)	22.8 (2.8%)
Wild and scenic rivers	0.1 (0.0%)	0.9 (0.1%)	—
Irrigation projects	—	7.6 (0.9%)	—
Stockraising and agricultural	—	—	65.8 (8.0%)
Water supply and control	7.8 (0.9%)	1.5 (0.2%)	—
Powersites	—	15.2* (1.8%)	—
Pipeline corridors	5.3 (0.6%)	—	—
ERDA and TVA	2.1 (0.3%)	0.9 (0.1%)	—
Petroleum and oil shale reserves	23.9 (2.9%)	3.7 (0.5%)	0.1 (0.0%)
Geothermal	—	1.1 (0.1%)	—
Surface occupancy	5.4 (0.7%)	0.5 (0.1%)	—
Statewide withdrawals	—	—	1.0 (0.1%)
Forest Service general	—	—	104.6 (12.7%)
BLM general	—	0.6 (0.1%)	136.9 (16.6%)
Subtotal non-ANCSA	96.4 (11.7%)	81.4 (9.9%)	374.1 (45.4%)
Alaska Native selections	49.2 (6.0%)	—	30.8 (3.7%)
Alaska State selections	39.1 (4.7%)	—	16.4 (2.0%)
ANCSA d-1	71.4 (8.7%)	—	—
ANCSA d-2	65.0 (7.9%)	—	—
Subtotal ANCSA	224.7 (27.3%)	—	47.2 (5.7%)
Total	321.1 (39.0%)	81.4 (9.9%)	421.3 (51.1%)

*The Alaska situation was changed in late 1978 by major new executive withdrawals that resulted in no increase (over prior ANCSA withdrawals noted in this table) in the land formally closed to development of the fossil fuel and fertilizer minerals. See section O of this appendix.
 *9.0 overlaps stricter ANCSA withdrawals and is not included in totals

ministrative conditions (for example, wilderness areas or certain reclamation projects), or administrative conditions (for example, BLM's primitive and natural areas) to such an extent that mineral activity is greatly discouraged, although it sometimes does occur. The "moderate or slight restriction" classification includes all other Federal onshore land, which is generally open to mineral activity, although there will usually be some requirement to mitigate the mineral activity's impact on the surface resources of the land, or the land may be closed with respect to a few minerals (for example, land open to location of metalliferous minerals only is classified as being moderately restricted for hardrock mineral activity).

Table B.2.—Availability of Federal Onshore Land for Development of Hardrock Minerals
Status in 1975*
 (Millions of acres)

Designated use	Formally closed	Highly restricted	Moderate or slight restriction
Military	22.9 (2.9%)	—	—
Indian (nonreservation)	0.9 (0.1%)	—	—
National parks, etc.	17.5 (2.2%)	7.1 (0.9%)	—
National recreation areas	1.4 (0.2%)	0.2 (0.0%)	0.4 (0.0%)
Historic and archeologic	?	?	—
Fish and wildlife	30.0 (3.8%)	1.3 (0.2%)	—
Endangered species	?	?	—
National forest wilderness	—	11.6 (1.5%)	—
National forest wilderness study	—	15.2 (1.9%)	—
National forest roadless	—	—	42.5 (5.3%)
BLM roadless	0.1 (0.0%)	2.0 (0.2%)	22.8 (2.9%)
Wild and scenic rivers	0.9 (0.1%)	0.1 (0.0%)	—
Irrigation projects	4.9 (0.6%)	2.7 (0.3%)	—
Stockraising and agricultural	—	—	41.9 (5.2%)
Water supply and control	7.8 (1.0%)	1.5 (0.2%)	—
Powersites	—	15.2 ^a (1.9%)	—
Pipeline corridors	2.9 (0.4%)	—	2.4 (0.3%)
ERDA and TVA	3.0 (0.4%)	—	—
Petroleum and oil shale reserves	27.4 (3.4%)	—	0.3 (0.0%)
Geothermal	1.1 (0.1%)	—	—
Surface occupancy	5.4 (0.7%)	0.5 (0.1%)	—
Statewide withdrawals	0.4 (0.0%)	—	0.6 (0.1%)
Forest Service general	—	—	104.6 (13.1%)
BLM general	0.6 (0.1%)	—	136.9 (17.1%)
Subtotal non-ANCSA	127.2 (15.9%)	48.4 (6.1%)	352.4 (44.0%)
Alaska Native selections	49.2 (6.2%)	—	30.8 (3.9%)
Alaska State selections	—	—	55.5 (6.9%)
ANCSA d-1	30.0 (3.7%)	—	41.4 (5.2%)
ANCSA d-2	65.0 (8.1%)	—	—
Subtotal ANCSA	144.2 (18.0%)	—	127.7 (16.0%)
Total	271.4 (33.9%)	48.4 (6.1%)	480.1 (60.0%)

*The Alaska situation was changed in late 1978 by major new executive withdrawals that, according to rough estimates provided to OTA by the BLM's Alaska Native Claims Office, resulted in a net increase (over prior ANCSA withdrawals noted in this table) of approximately 13 million acres (1.6%) in the land formally closed to hardrock mineral activity. See section O of this appendix.

^aQ overlaps stricter ANCSA withdrawals and is not included in totals.

D. Military

All lands withdrawn or reserved for the military, except naval petroleum, oil shale, or coal reserves, are subject to the operation of "the applicable public land mining and mineral leasing laws," except "where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved."²² However, the applicable public land mineral leasing laws in 1975 excluded from their coverage any acquired lands set apart for military or naval purposes, as well as the

²²43 U.S.C. § 158 (1970).

Table B.3.—Availability of Federal Public Domain for Development of Hardrock Minerals
Status in 1975*
(Millions of acres)

Designated use	Formally closed	Highly restricted	Moderate or slight restriction
Military	16.3 (2.2%)	—	—
Indian (nonreservation)	0.1 (0.0%)	—	—
National parks, etc.	12.5 (1.7%)	7.1 (1.0%)	—
National recreation areas	1.4 (0.2%)	0.2 (0.0%)	0.4 (0.1%)
Historic and archeologic	?	?	—
Fish and wildlife	26.1 (3.5%)	1.3 (0.2%)	—
Endangered species	?	?	—
National forest wilderness	—	11.4 (1.5%)	—
National forest wilderness study	—	15.1 (2.0%)	—
National forest roadless	—	—	42.5 (5.7%)
BLM roadless	0.1 (0.0%)	2.0 (0.3%)	22.8 (3.1%)
Wild and scenic rivers	0.9 (0.1%)	0.1 (0.0%)	—
Irrigation projects	3.0 (0.4%)	2.7 (0.4%)	—
Stockraising and agricultural	—	—	41.9 (5.6%)
Water supply and control	0.7 (0.1%)	1.5 (0.2%)	—
Powersites	—	15.2* (2.0%)	—
Pipeline corridors	2.9 (0.4%)	—	2.4 (0.3%)
ERDA and TVA	1.4 (0.2%)	—	—
Petroleum and oil shale reserves	27.4 (3.7%)	—	0.3 (0.0%)
Geothermal	1.1 (0.1%)	—	—
Surface occupancy	4.9 (0.7%)	0.5 (0.1%)	—
Statewide withdrawals	0.4 (0.0%)	—	0.6 (0.1%)
Forest Service general	—	—	77.9 (10.5%)
BLM general	0.6 (0.1%)	—	134.6 (18.1%)
Subtotal non-ANCSA	99.8 (13.4%)	48.1 (6.5%)	323.4 (43.5%)
Alaska Native selections	49.2 (6.6%)	—	30.8 (4.1%)
Alaska State selections	—	—	55.5 (7.5%)
ANCSA d-1	30.0 (4.0%)	—	41.4 (5.6%)
ANCSA d-2	65.0 (8.8%)	—	—
Subtotal ANCSA	144.2 (19.4%)	—	127.7 (17.2%)
Total	244.0 (32.8%)	48.1 (6.5%)	451.1 (60.7%)

*The Alaska situation was changed in late 1978 by major new executive withdrawals that, according to rough estimates provided to OTA by the BLM's Alaska Native Claims Office, resulted in a net increase (over prior ANCSA withdrawals noted in this table) of approximately 13 million acres (1.7%) in the amount of public domain formally closed to hardrock activity. See section O of this appendix.

†0 overlaps stricter ANCSA withdrawals and is not included in totals.

naval petroleum and oil shale reserves.²³ Moreover, the Secretary of Defense has generally determined that land withdrawn for strictly military purposes should be closed to mineral exploration and development for safety and security reasons.

Excluding the naval petroleum and oil shale reserves, there were 16.3 million acres of public domain and 6.6 million acres of acquired land withdrawn for strictly military purposes as of June 30, 1974.²⁴ All of this land is listed in the tables in section C as having been closed to mineral activity in 1975.

²³30 U.S.C. §§ 181, 352 (1970); Sec. 12(a) of the Federal Coal Leasing Amendments Act of 1976, Public Law 94-377, 90 Stat. 1083 (1976), eliminated the restriction against mineral leasing on acquired land set apart for military or naval purposes. However,

leasing of coal on such land is apparently restricted by sec. 12(b) of the Act to governmental utilities located in the State containing the land.

²⁴Public Land Statistics, table 9.

AVAILABILITY OF FEDERAL LAND FOR DEVELOPMENT OF

FOSSIL FUEL AND FERTILIZER MINERALS - 1975

(millions of acres)

<u>Designated Use</u>	<u>Lower 48 States</u>	<u>Formally Closed or Highly Restricted</u>
Military		20.5
Indian (non reservation)		0.9
National Parks, Monuments & Historic Sites		17.6
National Recreation Areas		1.6
Fish and Wildlife		9.1
National Forest Wilderness		11.6
National Forest Wilderness Study		15.2
BLM Roadless		2.1
Wild and Scenic Rivers		1.0
Irrigation projects		7.6
Water supply and control		9.3
Powersites		6.2
ERDA and TVA		3.0
Petroleum & Oil Shale Reserves		3.9
Geothermal		1.1
Surface occupancy		5.7
BLM general		0.6
TOTAL		117.0

Reference: Management of Fuel and Non-Fuel Minerals in Federal Land, Prepared for the Congress of the United States by the Office of Technology Assessment, 1979.

Enclosure V

LANDS AVAILABLE FOR MINERAL DEVELOPMENT,
INCLUDING ALASKA

There are approximately 823.8 million acres subject to the mineral leasing laws in the lower 48 States and Alaska. Of this amount, 321.1 million acres are formally closed to operations under the mineral leasing laws. This leaves a total of approximately 502.7 million acres which, under certain conditions and restrictions, are available for mineral leasing.

There are approximately 743.2 million acres subject to the mining law in the lower 48 States and Alaska. Of this amount 244.0 million acres are formally closed to operations under the mining laws. This leaves a total of approximately 499.2 million acres which, under certain conditions and restrictions, are available for entry under the mining laws.

This acreage data is based on figures in the April 1979 report prepared by the Office of Technology Assessment entitled, "Management of Fuel and Nonfuel Minerals in Federal Land."

Enclosure VI

LANDS UNDER LEASE
FOR COAL AND OIL AND GAS

As of December 31, 1978, 98.7 million acres were under oil and gas lease. Of this total 1.2 million acres are in Alaska.

As of June 15, 1979, 795,377 acres were under coal lease. Of this total, 2,593 acres are in Alaska.

Mr. BROWN. Mr. Cutler, on what legal basis does an agency make a determination whether an applicant is, and I quote, "Well enough grounded—" I suppose that means qualified— "to make application for fast track?"

Mr. CUTLER. Mr. Brown, the Congress obviously could, if it chose, write in very specific criteria and standards that the Board could apply in such a case. I would advise that it not do so.

I would advise rather that the Board be directed to be sure that in designating a facility as a critical energy facility (CEF,) that it investigate and satisfy itself that the sponsor of the project has in hand or can produce in a timely manner the information that will be necessary for the project sponsor to meet the requirements of all of the permit and licensing statutes that it has to comply with.

Mr. BROWN. Before it applies?

Mr. CUTLER. Before it is designated a critical energy facility.

Mr. BROWN. Doesn't that require some second-guessing, though, as to what all of the information might be that might be asked of it before they would be considered—

Mr. CUTLER. It involves, I think, less second-guessing than it does some reasonable consideration of the developer's capacity and intention to provide that information in a timely and complete way.

Let me emphasize why I think that is important.

We have endeavored to put a ceiling on the number of projects which can be designated as critical energy facilities. We do not believe that this Board ought to be empowered to simply displace on a wholesale basis all of the permitting and licensing processes and so forth that—

Mr. BROWN. I don't believe that, either. You are beginning to wander from my question. If you don't mind, I would like to get to the specifics of the question.

I am trying to determine whether or not that attitude, that there is some judgmental decision about well enough grounded to make application for fast track, begins to eliminate a lot of people from the possibility of applying for a project altogether.

In other words, I would assume that the project would be applied for on the initiation of some company that may have some wonderful energy saving or energy creating device, that the Government in its omniscience may not be aware of.

Then once they apply, then the Government turns around and says, "Well, now, wait a minute. We are not sure you are qualified to apply because this is a fast track area," yes?

Mr. CUTLER. No. What designation means, sir, is that all of the powers of the Board will be focused, or the consideration of the Board will be focused on this or these other projects. It is a limited number of projects.

Therefore, the Board ought to be judicious and use some discretion in selecting the projects that are going to come into that envelope. How you know is the following.

Mr. BROWN. When you apply as an independent individual or company, private company, how do you know when you apply for one of these energy development programs that you are going to be shifted over into the energy production board and moved to a fast track?

Mr. CUTLER. You don't know it until the Board designates. The Board should designate only when it is seated that once it designates a facility as a critical energy facility the sponsor of that facility will be able to provide the information that is going to be necessary for that expedited schedule to be met.

That judgment, I would submit, Mr. Brown, can be made by a board which looks to the capacity of the developer, its financial capacity—

Mr. BROWN. Is it the size? Financial capacity certainly has something to do with size.

Mr. CUTLER. Size is not a direct determinant of financial capacity, nor of technical capacity, nor of how much thought has gone into a proposal.

What we find when we go back and look at a lot of the experiences, as Mr. Drayton has suggested, and as I know from my own personal experience, you go back and look at a lot of the delays that have been encountered, a lot of those delays are the fault of the project sponsor.

The reason is that they come in with an idea and it is nothing more than an idea.

Mr. BROWN. Well, now, let me ask you another question. What motive would a company have to apply for fast track and then undertake to delay?

Mr. CUTLER. I don't think it would necessarily undertake to delay as an affirmative motivation. But I think it might find that it simply was not able to meet the requirements of an expedited consideration schedule.

Mr. BROWN. All right. Now let me ask another question. Could you provide me—again I hope by Tuesday, because we are considering this legislation for enactment very quickly—the evidence that Standard Oil of Ohio was delaying its application of the southwest pipeline as purposeful matter?

Mr. CUTLER. I don't believe, Mr. Brown, that I said that it was.

Mr. BROWN. What you said was there was evidence that Standard Oil of Ohio in response to the question raised by the gentleman from Washington, that they were delaying their application.

Mr. CUTLER. Let me say two things. First of all, I believe—and I will check the record because I would like to—I believe I qualified my statement much more carefully than that. Second, I will be happy to provide you with a statement of the Sohio experience from which you may draw your own conclusions.

[The following letter and attachment were received for the record:]

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., July 23, 1979.

HON. JOHN D. DINGELL,
Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the course of last Friday's hearing on H.R. 4499 and H.R. 4573, I made mention of the SOHIO pipeline project and used it as an example of a case in which it has been alleged that a developer did not provide information to a permitting agency in a timely and complete manner.

Representative Brown asked that I supply for the record any available elaboration of that allegation, and I, therefore, have enclosed a copy a "SOHIO Chronology" prepared by the staff of the California Air Resources Board.

Sincerely,

ELLIOT R. CUTLER,
Associate Director for
Natural Resources, Energy and Science.

Enclosures.

November 1976

The ARB, EPA and South Coast Air Quality Management district (AQMD) informed SOHIO that its October application was legally deficient and requested additional information.

January 1977

SOHIO informed the air pollution agencies that it was not yet prepared to complete its application.

March 1977

The ARB, in an effort to expedite SOHIO's technical work, supplied the company with detailed technical questions which remained unanswered by the November application.

April 1977

SOHIO submitted some additional technical data but acknowledged that its application was still incomplete. The company said the application would be completed shortly.

ARB Chairman Tom Quinn suggested to SOHIO that the "tradeoff" requirement of the application could be satisfied by installation of a scrubber on a Southern California Edison Company power plant and suggested that SOHIO contact Edison to determine if that company would cooperate.

June 1977

SOHIO was again notified that its application was legally incomplete and the company was again urged to contact Edison regarding "tradeoffs."

July 1977

SOHIO announced changes in its project design and lease conditions. ARB and Federal Energy Administration requested written clarification.

In an effort to expedite the permit process, AQMD decided to divide the public hearing process in two, with Phase One to review emissions information and Phase Two to consider a "tradeoff" package. Phase One hearings began in July.

August 1977

SOHIO provided information regarding project changes and also informed ARB that it had not yet contacted Edison.

ARB Chairman Quinn and state Energy Commission Chairman Richard Maullin jointly contacted Edison to determine if the company would cooperate with SOHIO on a "tradeoff" package. Edison indicated its willingness to meet with SOHIO representatives to discuss the matter.

Fall 1977

The California Coastal Commission voted to approve the SOHIO project, but determined that oil storage tanks could not be constructed on Pier J, as SOHIO requested, unless the company provided additional data.

December 1977

Because of SOHIO's failure to contact Edison regarding "tradeoff" possibilities, Governor Brown met in London with British Petroleum executives to urge that SOHIO be asked to negotiate with Edison.

Following the Brown-BP meeting, top officials from BP and SOHIO met with the governor and representatives from the ARB, state Energy Commission and Public Utilities Commission to discuss the SOHIO project.

January 1978

The AQMD voted to approve the SOHIO project, conditional on submission by the company of an acceptable "tradeoff" package.

SOHIO contacted Edison to begin exploring "tradeoffs." This initial contact of SOHIO came nine months after the ARB had first suggested Edison as a "tradeoff" partner.

February-July 1978

SOHIO and Edison met numerous times to negotiate "tradeoffs." Negotiations broke down on several occasions and ARB Chairman Quinn and federal Department of Energy representative Douglas Robinson assisted to resolve difficulties.

July 1978

SOHIO and Edison reached basic agreement on the "tradeoff" package. EPA and the ARB expressed acceptance of the Edison-SOHIO agreement and the AQMD staff began an informal review of the agreement even though it had not been formally submitted by SOHIO.

August 1978

Edison and SOHIO formally signed a contract for the "tradeoffs."

September 1978

AQMD scheduled Phase Two hearings to consider "tradeoffs," but SOHIO formally requested a postponement. The company was notified that hearings would be rescheduled immediately whenever SOHIO requested.

December 1978

Edison applied for a permit to modify its power plant to allow installation of a scrubber and De-NO_x system, the equipment specified in its contract with SOHIO.

January 1979

SOHIO formally filed its "tradeoff" package with the AQMD and requested that Phase Two hearings be rescheduled.

SOHIO executives met with the ARB to discuss pending litigation and other issues. The company said it needed final decisions from all state agencies by late summer.

February 1979

SOHIO executives met with leaders of the state legislature to request special legislation to expedite litigation. The legislative leadership promised cooperation and said special legislation could be enacted.

SOHIO executives met with Governor Brown and ARB Chairman Quinn, who promised cooperation. SOHIO again said final decisions would be needed by late summer.

March 1979

Following a five month postponement at SOHIO's request, the AQMD's Phase Two hearings began on March 8. A final vote was scheduled for March 16 and 17, with the AQMD staff recommending approval of the SOHIO project.

The Coastal Commission, at SOHIO's request, granted a procedural motion to expedite consideration of locating storage tanks on Pier J. The Commission set a vote on the tank issue for March 19.

SOHIO on March 13 announced it was abandoning the project and the following day officially withdrew its AQMD application, forcing the AQMD to cancel its final hearing.

Mr. BROWN. I wish you would, because I have seen a lot on both sides and this is the first time that I was aware that the applicant wound up spending \$55 million and delayed the project. Now it occurs to me that the Government can, by the the questions it asks, sometimes it may be proprietary questions, from an aggressive application can have the applicant say, Wait just a minute, we do not want to provide you that information. We don't think we should answer and we would like to have a little judgment here as to whether or not we should, because that seems to be not a delay by the applicant but, rather, a delay by the impropriety of the Government regulatory body, whatever it is, asking for questions that may in fact be out of line.

Mr. CUTLER. I agree, Mr. Brown, that that can happen. I do not believe that the problem that I was suggesting can obtain as precisely that problem. The problem I was suggesting is that an applicant can come forward for designation and simply be on its face ill equipped to proceed through the process for which it is applying.

Mr. BROWN. Let's go off that point, if I can. I think I understand where you are drawing the distinction here. Let me go back to the EIS procedural or substantive. We had spokesmen for environmental public interest groups before the committee the other day, and they suggested in their argument that in some cases a valid EIS cannot be done or cannot be made before a certain amount of time has elapsed, that it is not possible to get the information on which a rational judgment would be made by the licensing agency. Would you comment on that, please?

Mr. CUTLER. Yes, sir. Let me, if I may, refer you, and I don't know if you have this before you, but on page 3 of the specifications that both Mr. Yost and I have referred to previously, the third full paragraph on page 3 describes the procedure and the standards by which the EMB would be authorized to waive or modify an EIS requirement. Let me emphasize to you that the EMB would be authorized not only to designate a single agency to prepare a single statement, which I think is not only consistent with the Council on Environmental Quality's new regulations governing the NEPA process, but also simply stands as a way to expedite the EIS process itself.

Also let me point out that only to the extent that the EMB finds it is necessary to orderly completion of a critical energy facility may it do more, and what it may do is then waive or modify all or part of any Federal, State, or local EIS requirement, provided that the EMB establishes alternative procedures for the assessment of the environmental impacts of the facility.

Now it may be the view of some that valid or adequate environmental impact statement can only be developed if you take 3 years to do it. In such a case the Board will have to wait the amount of time that it would take to do that, and the necessity of doing it in that fashion, against the need to have the facility developed.

In making that balancing judgment, it would follow, in our view, should follow in our view, the approach set forth on page 3. If it did waive the EIS requirement, the EMB would have to provide alternative procedures for the assessment of the environmental impacts of the facility. That we believe is an important element of this approach, because it means that even though the letter of NEPA, for example, will not be met, we will have what is very importantly the purpose of NEPA, and that is that an environmental assessment be done.

Mr. BROWN. Does that have the support of the Council on Environmental Quality, Mr. Yost, or the Interior Department, Mr. Martin?

Mr. YOST. It does of CEQ, and let me supplement Mr. Cutler's answer by saying why in really two separate respects. First, as we indicated in our statement, NEPA is a very flexible kind of process of trying to evaluate environmental effects in terms of alternatives, before a decision is made, and if for other competing reasons of national importance it is essential to have a decision made within

a given amount of time, we believe that an EIS tailored to the time available is infinitely better than waiving an EIS requirement. It may not be as perfect as we would like, but, it surely is a lot better than not doing it at all.

Second, you raise a larger question which Mr. Cutler answered in response to an earlier question, I believe from Mr. Ottinger, about what do you do essentially if the information is simply not available. You do not know the effects, which is not just a NEPA question. It becomes a much broader question of sound, thoughtful decisionmaking, which includes the right, if extraordinarily dangerous effects seem like a real possibility, to say no to the project. It also includes the option, if a discreet amount of additional time will give an answer, of giving that amount of time, so in summary—

Mr. BROWN. Would you also suggest that it may raise the question of two conflicting dangers? One is a danger of the unknown as opposed to a danger that is known, but still you have to weigh the two dangers and make a decision; is that correct?

Mr. YOST. Certainly.

Mr. MARTIN. I would just say that we are also in support of that, and I might add one other distinction that has come up here today several times. That is, in Mr. Udall's bill he puts a fixed 9-month time limit on the processing of these items, and I think I pointed out along with Mr. Curtis at a hearing before Mr. Udall that any fixed time limit, whether it is 9 months or some later time, runs the risk of simply not recognizing that these many projects, whether pipelines, coal development, or anything else—

Mr. BROWN. Shale oil development?

Mr. MARTIN [continuing]. Shale oil development or anything are very different and are going to take a different amount of time to process. Our proposal allows that schedule to be set somewhat sensitively to the nature of the problem and I think if a reasonable standard does prevail there that we can live with the restrictions on the laws that Mr. Cutler described.

Mr. DINGELL. The time of the gentleman has expired. The Chair recognizes the gentleman from New Jersey for questions.

Mr. MAGUIRE. Thank you, Mr. Chairman.

Gentlemen, as I understand the proposal of the administration, no future substantive health, environment, safety laws or requirements would apply necessarily, or they could be waived if they were found to be inconvenient, with respect to the fast track energy projects which are under discussion. I would like first, Mr. Yost, to know how that is consistent with what you refer to on page 5 as this administration's basic commitment to clean air, clean water, and our overall national environmental policy, which you describe as remaining unchanged.

Mr. YOST. Certainly. If I understand your question, it is aimed at the provision in the administration's specifics document, which is in turn aimed at the problem which Mr. Cutler described accurately as the moving target problem, that is a situation in which when a particular project is targeted, certain rules apply.

The administration proposal says that those substantive rules will continue to apply. However, if some new obligation is placed midstream in the project, the administration proposal is saying

that that limited kind of new addition to the requirements can, if necessary, and under the provisions stated here, be waived. That is a limited waiver.

Mr. MAGUIRE. You just restated what I said. Now my question is if we have—let's take synfuels, a technology which is not thoroughly proven and applied. There have been the most serious kinds of questions raised by administration agencies and experts inside and outside of government as to the potential carcinogenic effects of some of these materials, serious questions raised by toxic emissions into the environment, serious questions raised about hazardous wastes, about drinking water. What you are saying in this proposal, if I can read black and white, is that future laws, requirements that would be generally applicable with respect to those matters could be waived in respect of the energy facilities that we are talking about on the fast track.

Now, that is a statement fact, is it not?

Mr. YOST. It is statement of fact as applied to a particular project which has in fact started construction.

Mr. MAGUIRE. Fine.

Mr. YOST. However, if I may supplement my answer, Mr. Maguire—

Mr. MAGUIRE. Don't restate the obvious. Let's have an answer.

Mr. YOST. I will not. However, I think we have to assume a certain amount of intelligence and sensitivity on the part of people who are applying the new laws—

Mr. MAGUIRE. Why?

Mr. YOST [continuing]. Who have learned the same things that the Congress has learned about how to deal with new problems which the Congress has come to address or EPA has come to adopt regulations on, that they too are not going to be insensitive to the state of the knowledge at the time they are making decisions.

Mr. CUTLER. Mr. Maguire, may I respond?

Mr. MAGUIRE. Yes. I would like to know how you think it is consistent, Mr. Cutler, with your statement on page 6 of the administration's commitment to the need to preserve critical environmental health and safety values. I want to know how this is consistent with that.

Mr. CUTLER. Let me explain. If you will note, Mr. Maguire, on page 5 of the specifications, the EMB's power to waive a postconstruction or a substantive or procedural requirement enacted or established after construction can be granted only when the Board finds not only that the waiver is necessary to assure the completion and operation of the facility, but also when the Board finds that the waiver would not unduly endanger public health or safety.

That places a responsibility on the Board not only to make a finding, but also to make a balancing judgment as to the degree of risk that waiving the requirement would mean for the public who would be exposed to the operation of the facility. That clearly transfers to the Board the responsibility to make a balancing judgment that currently no Board has.

Mr. MAGUIRE. Mr. Cutler, we have just come through a period of 20 years where we have watched the way that we handled nuclear energy in this country. We had an old outfit called the Atomic Energy Commission which was subsequently replaced by the Nu-

clear Regulatory Commission. We have now come to the point of believing that we were much too fast and loose with some of these considerations earlier on. There is unanimous agreement about that, now that we have had Three Mile Island.

We are all trying to figure out how to make that process work more effectively, and there is general agreement that there has been a problem in terms of having the same group of people in charge of promotion and regulation, and here we have what looks like about as close a parallel, as close a duplication of all the errors that were made at the time that we set up the AEC as anything I could imagine.

Mr. CUTLER. I fundamentally disagree, Mr. Maguire.

Mr. MAGUIRE. If I may just continue. Mr. Jacobson in his statement talks about whether expedited procedures will necessarily be rational procedures, whether expedited decisionmaking will necessarily be rational, and if we are going to reduce our commitment to health and environment and safety to some due consideration being given by a three-member group, I am afraid we are in a pretty weak position with respect to those concerns.

Now I would like Mr. Yost, if he would, to tell me what alternative procedures for the assessment of facilities' potential environmental impact, which he refers to on page 5, he would envisage, once there had been a finding that the proper and established, and if I may say expedited procedures, which now exist as a result of the very good revisions of the NEPA process that are already in place, once it had been determined that it was not possible to do the job right, I would like to know how you then have an alternative procedure to do the job right.

I heard your statement a minute ago, but what are we talking about, a minimally truncated EIS? Are we talking about something other than an EIS? What are we talking about? What are those alternative procedures? A little staff study for the three-member group? What are we talking about?

Mr. YOST. Let me start by saying for the reasons that I stated in CEQ's statement, we don't see that situation arising much if at all, simply because we believe the EIS can in fact be done within a period of time, and the administration proposal is for not less than a year.

If EIS were not in its totality, be used, we would certainly press for the nearest——

Mr. MAGUIRE. Approximation?

Mr. YOST. Well, that word occurred to me and I consciously did not use it.

Mr. MAGUIRE. It is hanging there in the air.

Mr. YOST. But the procedure which is closest to the full EIS requirement certainly, and environmental assessment as known in section 102(2)(e) of NEPA with as many of the full EIS requirements and protections as possible in it.

Mr. DINGELL. Would the gentleman yield for a brief question?

Mr. MAGUIRE. Sure.

Mr. DINGELL. As I understand it you are suggesting that you would have an environmental impact assessment in any event; is that right, Mr. Cutler?

Mr. CUTLER. You would in any event have an environmental impact assessment, yes, sir.

Mr. DINGELL. And you would to the most possible degree have an environmental impact statement in every instance where it was possible to do so without unduly slowing the project?

Mr. YOST. That is accurate.

Mr. DINGELL. It is your view also that the filing of an environmental impact statement is something which could be done in almost every instance?

Mr. YOST. That is accurate.

Mr. DINGELL. And that you can expedite the process of addressing the speedy, complex, and sensible and desirable complex of environmental impact statement without unduly prejudicing the project for failing to meet the time limits that you feel would be necessary for the conclusion of the project?

Mr. YOST. Yes.

Mr. DINGELL. I thank you.

Mr. MAGUIRE. I thank the gentleman for an excellent question. It leads me now to ask, who would do the truncated EIS, Mr. Yost or Mr. Cutler? Would it be the same people that would do the truncated EIS, or different people? Does anybody know who would do the EIS?

Mr. YOST. The administration provides specifically for a single agency, which is the lead agency, to prepare EIS.

Mr. MAGUIRE. That is the Energy Mobilization Board?

Mr. YOST. No, it is very carefully not putting this in the hands of the Energy Mobilization Board, but instead a lead agency, presumably designated under the usual criteria, which is the agency which is primarily responsible for implementing that particular project.

Mr. MAGUIRE. So in that respect it would remain the same procedure?

Mr. YOST. Pardon?

Mr. MAGUIRE. It would remain the same procedure as we have under NEPA?

Mr. YOST. NEPA is itself silent as to lead agencies. CEQ invented that in its guidelines early in the decade, when Mr. Alm was at the Council as its staff director, and in our regulations we elaborate on it. The EMB, however, would be the agency with authority to designate the lead agency under this proposal.

Mr. MAGUIRE. Fine.

Mr. Cutler, would the same people in fact do the truncated EIS?

Mr. CUTLER. Mr. Maguire, I really would not hazard a guess. I mean that is a hypothetical question—

Mr. MAGUIRE. No, it isn't.

Mr. CUTLER [continuing]. That I can't—

Mr. MAGUIRE. It is not a hypothetical question.

Mr. CUTLER. I think it is. If you want me to answer yes, I would be happy to answer yes. It would seem to me that logically the same people who would do the one would probably do the other.

Mr. MAGUIRE. So the people who could not get the job done in a year under the usual procedures would then be the same people who would do it in a more speedy period of time?

Mr. CUTLER. No.

Mr. MAGUIRE. Under the usual procedure?

Mr. CUTLER. You are using the term "the job" in one way in one part of your sentence and in another way in the other.

Mr. MAGUIRE. I don't think so.

Mr. CUTLER. Let me explain my point if I may. The job that would have to be done, the job that could not be done would be the job of fully and completely meeting the otherwise unchanged requirements of the National Environmental Policy Act or some State or local similar statute. The job that would be done on a truncated basis would be a job that was somewhat different, so that the people who could not do the job in the first case I would submit could quite conceivably do the job in the other case.

Mr. MAGUIRE. A moment ago, Mr. Cutler, you said Mr. Alm, I believe, and Mr. Drayton had participated in the draft of the specifications. Did Mr. Speth or anyone from the CEQ participate?

Mr. CUTLER. Absolutely.

Mr. MAGUIRE. Mr. Yost, who participated from the CEQ in the draft of the specifications?

Mr. CUTLER. Both Mr. Speth and myself.

Mr. MAGUIRE. Mr. Jacobson, you said you did not want Federal colonialism to come into being here on these issues. Would you comment on the administration's proposal to waive all State and local roadblocks, if and when that became necessary, versus the bills that have been proposed here which would retain a somewhat greater role for the States and localities than that?

Mr. JACOBSON. That troubles me, Congressman, and frankly while I was seemingly on the other side, when we considered problems within the State, I still recognized the importance of having exhaustive input by those people whose locality and interests would be touched upon. I frankly find it very difficult to say that New Jersey should not have any significant authority in making decisions affecting its life and welfare.

Mr. MAGUIRE. You talked, in one of the most interesting parts of your written statement, the way alternatives sometimes emerge from a process. I wonder, Mr. Cutler or anyone else in the administration, if you could describe for us how that process of alternatives emerging and decisions being refined, Mr. Jacobson says, for example, by critically examining a question of need, a more prudent alternative may reveal itself pointing to the size, location, technology, or a number of facilities of the project. He goes on to say to simply push through proposals will only undermine existing policies and constrict our ability to develop what is really needed, more integrated energy projects and systems.

It seems to me there is a lot of wisdom in that, based on a lot of experience, and I wonder, Mr. Cutler or any other representatives of the administration, if you could maybe tell us how you envisage that process of sifting and weighing alternatives in the context of a fast track setup, where one imagines it would be very simple to have someone come in and say, Hey, here is an energy project, to have the response be, Hey, we have got to move forward with this right away, boom, boom, boom, there we go. And then maybe 15 or 20 years down the road we will be looking around wondering why we have done this to ourselves. Would you comment on that.

Mr. CUTLER. I would be happy to. I think first of all there are two ways in which alternatives to a proposed project can and will

emerge. The first way is in the environmental impact statement process, whether it is the full statutory consideration or whether it is, as you have described it, the truncated version or any other version. Whatever version it is it ought to, would have to, in my judgment, consider alternatives to the proposed project. That is the first way.

The second way is that because substantive requirements of environmental protection statutes are not waived and cannot be waived through the process of trying to design facilities and site facilities—

Mr. MAGUIRE. I think it is very important when you make that statement that you include the word "existing."

Mr. CUTLER. Fine, I will be happy to substitute to the comments I made.

Mr. MAGUIRE. So there is no misunderstanding existing, environmental health—

Mr. CUTLER. Existing substantive requirements that cannot be waived. Through the process of developing facilities and designing and siting facilities to meet those standards, it is clear to me that alternatives will have to be considered and will emerge. I do not believe that the kind of fast track process that the administration has proposed carries with it the risk that alternatives will not emerge. Indeed, it seems to me that it will require that alternatives be considered very fully and very early in the process.

Mr. MAGUIRE. Thank you, Mr. Chairman.

Mr. DINGELL. The time of the gentleman has expired. The Chair recognizes Mr. Braun.

Mr. BROWN. Before you do that, would the Chair yield to me for a moment to make a final comment and then I am going to have to leave, I am sorry to say, because I have a luncheon obligation. I would like to ask one thing, and that is, if I could have your attention, General Robinson, because this relates to some experience that I think you may have had over some of the other agencies here. I think we have two problems that are basic to the establishment of this whole synthetic fuels program.

The first one is one in which we have much experience from World War II, and that is the operation of the War Production Board approach, of either guaranteeing loans or guaranteeing cost-plus contracts with private industry and so forth, and we had 20 years of negotiating out some of those turkeys and I think can write the legislation in a way to avoid that by the guaranteeing of the price of fuel as opposed to guaranteeing the project and the undertaking and the profit and the high salaries of people in that process, so I think we can improve that, but the other question, and I want to have the attention of all of you, but particularly Mr. Cutler on both these points, and then ask if General Robinson can supply me the information—perhaps he can or perhaps he cannot.

The other question is an area where we are plowing new ground, because in the first case, we were violating some fairly well established historic procurement laws and some other things, in the interest of speed, and in the interests of getting results. In this case we will be violating some fairly unestablished, in terms of the violation, environmental procedure, land management procedure,

toxic substances procedure and so forth, tailings problems and others.

Now the only agency that I can think of that has had experience in this area is the Corps of Engineers, where there has been perhaps a Federal project that has been undertaken, and then you have gotten either holdups or suits late in the environmental area, but I guess my point is that if we are going to override some of that legislation, the question is, are we going to wind up with all kinds of legal cases, constitutional challenges, lawsuits and so forth over the next 2 years from people who say: "Ah, sure you did that, because you wanted to meet an emergency, but you have left us with a nasty problem that we think the Government has to come in and clean up financially later on."

Now you understand the distinction I am drawing, Mr. Cutler, and the fact that the legislation, in terms of the economic side, has been pretty well pursued, and we know how to deal with that, and perhaps can deal with it procedurally, so that we can avoid the problems that came out of World War II, but in the other area, General Robinson, if you have got somebody in the legal operation that could provide us some information or some help on the areas in which you have had the greatest trouble, I would appreciate you supplying a memo for us on that subject. Do you understand my question?

General ROBINSON. Mr. Brown, I do, and I would be happy to do so. I would like to comment, however, that the bulk of the critical energy facilities we are going to be talking about are in the state of the art today, and would not be new state-of-the-art type facilities. In support of what Mr. Cutler said earlier about EIS's, we are one of the principal agencies that prepare EIS's. I fully agree that the agency designated to prepare the EIS, if you will, to do the job, also is equipped to do a shortened version, and can do so with great distinction, I might add. I think it is time that we looked at some of the procedures that require us to go through this very long-phased process in preparing EIS's, to try to reduce the time that it takes to get the job done, and I think we can do that.

Mr. BROWN. Thank you.

Mr. DINGELL. The time of the gentleman has expired.

The Chair now recognizes Mr. Braun for questions.

Mr. CUTLER. Mr. Chairman?

Mr. DINGELL. Mr. Cutler, I know what your problem is. I know what you are going to say. I know we have kept you overlong. I apologize. There are a few questions that I am afraid nobody but you can answer.

Mr. CUTLER. I appreciate the confidence, Mr. Chairman. I do think there are people at this table who are more than competent to answer them, but if you insist, I will be happy to stay.

Mr. DINGELL. I have instructed staff, and I know what your problem is—believe me, I apologize. The staff has been instructed to ask you only those questions which they feel that you can answer, and then we are going to excuse you.

Mr. CUTLER. I appreciate that.

Let me say, Mr. Chairman, I will be happy to answer over the weekend if necessary any further questions.

Mr. DINGELL. Maybe, if you will, you can designate to answer the questions for you. At this particular minute I am a little loathe to get anybody to answer any questions down there for the administration for reasons you probably understand.

Mr. CUTLER. I do, sir.

Mr. MAGUIRE. Mr. Chairman, in view of the critical role Mr. Cutler appears to be playing at this juncture on this matter before the committee and generally, I wonder if he would submit either to the committee or if you would prefer, Mr. Chairman, to myself, a résumé as to his background and qualifications and credentials in the fields that we are discussing.

Mr. CUTLER. I would be more than happy to, sir.

Mr. DINGELL. I have no objection to that.

Let me try and do this, Mr. Cutler. The Chair has forgone asking questions so that we could respect your time constraints. The Chair is going to recognize first Mr. Braun for questions of you and then Mr. Finnegan and then we will excuse you. I don't think that will take us very long.

Mr. CUTLER. Thank you.

Let me also say any of the gentlemen at this table are more than competent to answer any questions in my absence.

Mr. DINGELL. I have got to have the administration position clearly laid out. I do have apprehensions about getting it under the circumstances in which we labor.

The Chair is going to recognize Mr. Braun at this time.

Mr. BRAUN. Two questions for the panel.

The first question is whether or not specific authority should be provided to the Board to revoke a designation of a priority energy project?

Mr. CUTLER. Yes.

Mr. BRAUN. Could you address that, please?

Mr. CUTLER. The short answer is "Yes," Mr. Braun. Just to elaborate further, both the number of projects which we have suggested be established at the ceiling and the logic of the kinds of situations the Board will be encountering indicate in my view, in our view, the requirement that there be a designation authority lodged in the Board.

Mr. BRAUN. In what circumstances would you foresee that occurring?

Mr. CUTLER. If you will permit us to give that perhaps a day's thought and provide that to you, we would appreciate it.

Mr. BRAUN. Does anyone else on the panel wish to address this question?

Mr. CURTIS. In response to specific questions put by the committee, I did make that suggestion. While you have asked for the circumstances in which a determination may be to drop from designation, I would hope that that remain flexible and does not get built into a statutory credential, because it would undoubtedly end up being the subject of protracted litigation.

Mr. BRAUN. The second question has to do with whether or not the number of energy projects that may be designated as priority energy projects should be limited. The issue here is the exclusivity of the club. If you could address yourself to that issue.

Mr. CUTLER. We very strongly, Mr. Braun, believe that the number should be limited. Let me tell you why, and also give you the basis for the number which we have suggested.

We believe that the number of projects should be limited very simply because we do not believe this Board should have the authority to run roughshod in a wholesale way over the procedures and so forth of Federal, State, and local agencies with regard to any and all energy facilities that it decides to designate.

What we have is a tradeoff between wanting to give the Board some reasonable discretion in deciding what to designate and, at the same time, making sure that there is a check on abuse of that discretion.

Secondly, the number that we have proposed is 75. That is obviously not written in stone. Nor, however, is it arbitrary. We assume the following in suggesting 75:

We assume first that the Board ought to have the authority if it chooses to exercise it to designate all of the projects of the Energy Security Corporation which we estimate will number in the neighborhood of 50, or at a high range in 50.

Second, that it ought to have the opportunity, the authority to designate other projects, which though not sponsored by the Corporation meet the test of being essential to the import reduction goals which the overall program establishes.

We are not, as I have indicated, fixed on 75. We think it is a reasonable estimate of the number of projects.

Mr. BRAUN. If you are going to limit the number of priority energy projects, do you have any idea of whether or not you should allocate among the different types of possible projects?

Mr. CUTLER. I would urge that we not do that, Mr. Braun. I would urge that we rather leave it not only to the Board's discretion to make that judgment, but also that we recognize that the mix of the projects that we end up pursuing, or for example that the Corporation ends up pursuing, is a mix that only can we not decide now, but also that we ought not decide now.

We simply don't know all of the facts to make that decision, and therefore to construct a set of disaggregated ceilings by project type we believe would be a mistake.

Mr. BRAUN. Thank you, Mr. Chairman. Those are all the questions I have.

Mr. DINGELL. The Chair recognizes Mr. Finnegan.

Mr. FINNEGAN. Thank you, Mr. Chairman.

Mr. Cutler, Chairman Curtis in response to the questions that the committee put to him said—

I believe the public should participate in the selection of projects for designation and in the establishment of schedules. Participation by the public is indispensable and should be assisted through intervenor grants where appropriate, especially if the scope and depth of judicial review of agencies is to be sharply cut.

Can you comment on that, please?

Mr. CUTLER. Yes. I don't disagree at all with the view that the public ought to participate. Indeed, our thought is that the Board would have to publish for comment proposed designations, receive comment.

You will note, however, we have not suggested the judicial review of the Board's designation decisions be provided.

Mr. FINNEGAN. How about public participation in the schedules?

Mr. CUTLER. We would not be averse to the same kind of procedure for that decision.

Mr. FINNEGAN. How about the intervenor grants?

Mr. CUTLER. That raises a very different question.

Mr. FINNEGAN. Isn't it true that to the extent that you reduce the timeframe or the timetables for participation in a proceeding, you make it more difficult for the private citizen—

Mr. CUTLER. Let me answer it this way. I think that a carefully crafted provision that would allow the Board to make intervenor grants, but would not necessarily require that it be done in all cases, would be appropriate.

Mr. FINNEGAN. All right.

Mr. DINGELL. Could I ask a related question. Is there any proceeding or portion of the proceeding of either the Energy Mobilization Board or the Energy Security Corporation which should not be fully open to both the public at large or to the Congress?

Mr. CUTLER. Could you repeat the first half of that, Mr. Chairman. I apologize.

Mr. DINGELL. That is all right. I want you to understand full well what I am saying because it is a question of considerable importance to me.

Is there any stage of the proceedings or any portion of the deliberations of either the Energy Security Corporation or the Energy Mobilization Board which should be closed to either the public or the Congress and, if so, why?

Mr. CUTLER. The short answer, Mr. Chairman, is that in our view the answer is "Yes".

Mr. DINGELL. You say there are portions which should be closed?

Mr. CUTLER. Yes. If I may proceed?

Mr. DINGELL. All right. I am going to give you additional time to respond to this because I think—

Mr. CUTLER. I appreciate it. We will, for example, be delivering to the Congress this afternoon specifications for the Energy Security Corporation, which will, in some greater detail, answer that question with respect to the Energy Security Corporation.

Mr. DINGELL. All right. Let us defer that question until we again consider the Energy Security Corporation, or until you wish to submit the answer, except as you might choose to do so now.

But let us deal now specifically with the Energy Mobilization Board.

Mr. CUTLER. With respect to the EMB, we have not in the specifications provided for the waiver of either the Freedom of Information Act or any other Federal statute which would apply to a body lodged in the Executive Office of the President.

I might point out to you that the Sunshine Act would, by its terms, not apply to the EMB, and in our judgment ought not apply. The Freedom of Information Act, however, would.

The Freedom of Information Act, we believe, would provide the public with the opportunity to get from the Board under the terms of the act such information as it ought to be empowered to get.

I will be happy if you want to provide additional discussion on this point for the record. I would prefer not going beyond that at this time.

Mr. DINGELL. I think that would be appropriate. I am going to defer to counsel. We are getting into an area where I sense a strong possibility for conflict between the administration and the Congress.

Mr. CUTLER. If this is the only area, Mr. Chairman, we would be delighted not that it exists here, but that it would exist nowhere else.

Mr. DINGELL. We regrettably are trying to narrow the areas of conflict. I am not sure we have even identified them yet.

The Chair is going to yield to counsel.

Mr. FINNEGAN. In the answer to your last question you said the Sunshine Act does not apply. The legislative counsel we have been working with recently on this matter indicates the opposite.

Can you tell us why it does not apply?

Mr. CUTLER. I am, as the chairman is, perhaps venturing into an area on which I am not fully informed. I would defer to others here. But it is my understanding that the Sunshine Act does not apply—

Mr. FINNEGAN. Why shouldn't it apply?

Mr. CUTLER. Is the question why shouldn't it or whether it does?

Mr. DINGELL. If it doesn't, why should it not.

Mr. CUTLER. OK.

Mr. DINGELL. And if it does not, why does it not.

Mr. CUTLER. Can I address them in reverse order?

Mr. DINGELL. You may pick your course.

Mr. CUTLER. It is my understanding—and someone correct me if I am mistaken—that the Sunshine Act does not apply to units of the Executive Office of the President.

Mr. YOST. I will supplement that. Our agency has just been through some litigation on this subject. The end result of that litigation is basically that matters which are related to advice to the President are not within the Sunshine Act.

Mr. DINGELL. Those are matters which fall within Executive privilege.

Mr. YOST. It is akin to Executive privilege, but not exactly that.

Second, when the Council acts in a regulatory capacity, such as adopting NEPA regulations, in those cases the Sunshine Act would apply. Transferred to this situation, I would gather to the degree that recommendations are being made to the President, it would not apply.

But the act presumably would apply when the agency was taking actions not directed at the President but of a more regulatory capacity.

Mr. CUTLER. Mr. Chairman, if I may—and I would beg the indulgence of the Chair and the committee to do this—this is, I think, as you recognize, an extremely important set of questions.

Mr. DINGELL. It is.

Mr. CUTLER. I would very much appreciate the opportunity to supply over the weekend, if you wish, a fuller discussion of both the "does it" and "should it" questions for the committee.

Mr. DINGELL. Mr. Cutler, you should understand that the staff is going to be writing the bill over the weekend.

Mr. CUTLER. How about tomorrow?

Mr. DINGELL. I would say with all speed. I honestly anticipate the drafting could be done by nightfall.

Let me ask you this question. If you have citizens that are pressed with potential waiver of (a) their procedural rights; and (b) their substantive rights; are you going to say that the proceedings which are going to affect those matters are not or should not be open to them.

Now, explain that. Why?

Mr. CUTLER. Let me qualify what I am about to say by saying first that I am not an expert on the Sunshine Act and its provision, and I may want to correct what I say later. But there is no doubt in my mind that the proceedings, the deliberations of the Board generally ought to be open.

What disturbs me about what I gather to be some of the implications of the Sunshine Act is that I have been told virtually every time one member of the Board would want to talk to another member or mention to another member something about one of the cases before it, it would have to do so under circumstances that are very constraining.

I think that in many cases that may be problematic. But let me—

Mr. DINGELL. Maybe Mr. Curtis can give us some information on this matter.

Mr. CURTIS. Just from our experience, Mr. Chairman, one of the important points is that a three-member board is being proposed. A quorum would be two and, therefore, any meeting between two members would be a meeting within the terms of the Sunshine In Government Act, would preclude all conversation by the members of the Board with respect to any matter of their business unless they did so in a formal meeting within 7 days advance notice or by dispensing with the advance notice.

I wonder if—

Mr. DINGELL. Well, can we have a five-member board?

Mr. CURTIS. I don't mean to be proposing an alternative. I am just trying to underscore the limitation Mr. Cutler saw in that type of restriction.

Mr. CUTLER. I appreciate that.

Mr. DINGELL. Let us look at what you are doing.

The Board is going to waive substantive rights and procedural rights of States, local units of government, and citizens. They are going to be functioning, unless you have the Sunshine Act and the Freedom of Information Act apply, in deep darkness.

You are going to constrict the rights of citizens to judicial review. They are not going to be able to show on the basis of the record, why the Board did these things; what happened; what went into the decisions.

You have already constrained their rights to review substantially both as to time and as to the issues which are subject to review.

Mr. CUTLER. First of all, Mr. Chairman, the Freedom of Information Act would apply. That means that the record and all that goes into it would be open to public inspection. You will note that although we have expedited and to some degree constrained the opportunity for judicial review, judicial review will still have to take place on the basis of that record.

Mr. DINGELL. Judicial review takes place. But they function in the four corners.

Mr. CUTLER. You are absolutely right in pointing that out. I think the question is not with respect to the Freedom of Information Act. The question is with respect to the Sunshine Act, and what it implies in experience for the functioning of a board such as this.

The bottom line of what Mr. Curtis says was only when a Board member talks to himself or herself would there not be the requirement for 7-day notice. Now, whether creating a five-member board solves that problem is problematic to me because that means only two members could discuss a matter that was before the Board, and whether it is wise to place such tight restrictions, whether it is necessary to place such tight restrictions on the Board in order to accomplish your objectives, which I think are valid and important ones, is something that I think deserves some real thought.

I would be frank to admit I am not in a position to give you what I think is a good answer right now.

Mr. DINGELL. Let me have you understand the philosophical problem I have with this arrangement so we can all go forth at least understanding my concerns.

This Board is probably going to have greater power in terms of establishment of projects than anything since the Court of the Star Chamber or the Spanish Inquisition. If they don't function to the maximum degree of openness, I am not sure people are going to be able to trust the Government.

They don't trust us very much now. But I can only see them coming down here with fire and sword to storm the Bastille if we are not careful about how we craft this thing.

Mr. CUTLER. I can't agree more with your observation, not necessarily with the specific tribunals that you use for comparison—but with your observation that we very much need to be very careful, to make sure that the public trusts this process, and has reason to trust it.

How we go about doing that is something, as I have said, that I think needs more thought than I can say I have given to it personally.

Mr. DINGELL. I am glad you are concerned about it because it scares me.

Mr. Finnegan?

Mr. FINNEGAN. Mr. Cutler, following up on that, why do the specs provide that you are exempt from the Federal Advisory Committee Act—the Board would be exempt?

Mr. CUTLER. In our view, Mr. Finnegan, the Board is going to, in order to proceed intelligently, judiciously, with respect to the very questions that the chairman has noted, it will confront, we believe it ought to have fairly unrestricted opportunity to move outside its own staff, if you will, and receive advice.

Mr. FINNEGAN. But you can still receive advice. What are some problems of the Federal Advisory Committee Act that would prevent you from getting that kind of advice?

Mr. DINGELL. In fairness, why don't we suggest this. Would you give us specific problems in having the Federal Advisory Committee Act apply.

Mr. CUTLER. I would be happy to. I will have it for you if not late today, by 8 a.m. tomorrow.

Mr. DINGELL. In all good speed. We will try and be as humane in consideration as we can. In like manner, your concerns about the Freedom of Information Act should not apply.

Mr. CUTLER. We believe the Freedom of Information Act should apply, Mr. Chairman, affirmatively should apply.

Mr. DINGELL. And the Sunshine Act.

Now, the Freedom of Information Act applies only to documents. It doesn't apply to compelling the production of policy statements or the reasons for actions or judgments, does it?

Counsel advises me that it does.

Mr. CUTLER. Yes. Again, I am not an expert.

Mr. DINGELL. But only if those judgments are reduced to writing.

Mr. CUTLER. Under the FOIA you cannot subpoena—

Mr. FREI. FOIA runs only to production of existing documents.

Mr. DINGELL. As opposed to compelling—

Mr. Frei [continuing]. The formation of documents.

Mr. DINGELL. Yes. That is the point I was making.

Well, the Chair is going to recognize counsel.

Mr. FINNEGAN. Mr. Cutler, you have said if the Federal, State, or local agency fails to comply with the decisions scheduled, this Board would be empowered to make the decision and where necessary to take whatever additional action is required to develop a record adequate for the decision.

You also provide here, however, that the Board would be exempt from the APA procedures, both as to rulemaking and to adjudicatory procedures. As to the rulemaking, You are exempting the Board from the 553 procedures which only call for 30-day notice and a statement of what the rule is. But you further say you exempt from it adjudicatory procedures.

Let's assume for the moment that one of the decisions that isn't being made under the Board is FERC's and it is a decision which has been made up to that point under an APA-type procedure. It is half completed. Now you are going to come in in the middle of the ball game and change the procedures.

Now, what is going to be the judicial effect later on, when somebody goes in and challenges that decision that you make in any particular court?

Mr. CUTLER. Not me.

Mr. FINNEGAN. Or the Board.

Mr. CUTLER. Let me say first that I think the question ought to be answered in the context of the Board's authority to waive procedural requirements.

Mr. FINNEGAN. Beyond that. We have already established a schedule and clearly Curtis has moved and proceeded—

Mr. CUTLER. I know what you are saying. What I am saying is that your question ought to be answered in the context of remembering that we are giving the Board the authority to waive procedural requirements, so that in the FERC proceeding you were talking about, the Board could have in the first instance waived those procedural requirements, but it did not.

It ought to be able to waive those procedural requirements in the middle of the proceeding, but it also ought to have to produce a

record in appropriate form which will enable a court, a reviewing court, to adequately consider whether it performed its duties appropriately.

I don't think that is at all inconsistent.

Mr. FINNEGAN. At what point in time, Mr. Cutler, would this new procedure be established? After you found out that Mr. Curtis hadn't made the decision in time, or before?

Mr. CUTLER. The point is that—and I really don't like to personalize this, because Mr. Curtis makes most of the decisions on time—this would only come into play once an agency has failed to meet the decision schedule established.

Mr. FINNEGAN. I understand.

Mr. CUTLER. All right. So it is at that point that the Board could change the rules.

Mr. FINNEGAN. How would you change the rules now because you have waived your APA requirements for any proposed rule-making as to what those rules would be. How are the parties going to learn what those new rules are going to be at that time, and how long would it take to develop those new rules?

Mr. CUTLER. It seems to me, Mr. Finnegan, that depends very much on the nature of the issue, the complexity of the question, and so forth. Let me emphasize that any challenge that anyone seeks to bring that is based on a denial of due process, which will be heard.

It is by no means and explicitly not excluded, and could not be excluded from the jurisdiction of a court to hear that.

Mr. FINNEGAN. Let's assume for the moment that the case you are talking about is the High Mountain Sheep case pending before FERC, or was. Just use—

Mr. CUTLER. I am not familiar with that case.

Mr. FINNEGAN. It goes back many years.

Mr. CUTLER. I am sure it does.

Mr. FINNEGAN. The FERC didn't set the schedule for that particular hydroelectric project. That was done under the APA-type procedure, I believe, which it is at FERC, although there are many parties to that procedure.

What would you do as far as putting together procedures at that time.

Mr. CUTLER. Without knowing that case—and I really don't know that case—I really don't want to suggest precisely what procedures would be appropriate. What I would say is that the Board has a clear and—without constitutional amendment—incontrovertible responsibility to establish procedures which meet the requirements of due process.

Those procedures in my view may differ from circumstance to circumstance. But they would be subject to review by a court as to their adequacy. I don't know the High Mountain Sheep case. I cannot tell you exactly what would be appropriate in that particular case.

Mr. DINGELL. Wouldn't you be likely to wind up with a great deal of litigation over the changes in process which would be imposed by substituting new time limits, new deadlines, new procedures, without dealing even at all with the question of substantive rights, and wind yourself up in one of the thorniest rats' nest of

litigation that you could ever imagine just over the question of whether or not you had affected by your procedural and time limit changes the substantive rights of the parties to that proceeding.

Mr. CUTLER. My own sense of what would happen—and I really don't want to hold myself out as a prophet—is that a court, and probably the first instance that the Board in such a way, would have to define in some terms the limits of authority that the Board has to set procedure. It would do so interpreting the due process requirements of the Constitution.

Mr. DINGELL. That if it goes up and down, the Supreme Court is somewhere between a 3- and a 7-year process?

Mr. CUTLER. Not if the courts act under an expedited review, and I would suggest not only that the statute ought to encourage, and to the extent possible require that, but also that I think we find that courts posed with that kind of a question and this kind of a situation respond to the need to answer those questions fairly expeditiously. I think that we would have some better sense of the bounds of discretion that this Board constitutionally could operate under, and the only alternative to that would be for the Congress to specify precisely what procedures the Board ought to use, either in every case, that is universally in all cases, or in some infinite variety or infinite categories of different kinds of cases, and I think that to do the latter would probably unwisely constrain the Board's opportunity to use cold judgment in setting standards.

Mr. DINGELL. Mr. Finnegan.

Mr. FINNEGAN. I want to give Mr. Curtis and Mr. Fygi a chance to get into this, but I want to raise the suggestion that instead of opening up this kind of decision approach, wouldn't it be better, assuming for the moment that many statutes that Mr. Curtis is operating under, as well as other agencies operate, don't necessarily proscribe time schedules for action. They do not set forth the actual times, but those are done by regulation of the agency.

Supposing the Board, in establishing the schedule, was authorized to change or shorten the regulations, notwithstanding the regulations, to shorten the time schedule, and giving particular authority for that agency to move faster, on a so-called faster track, so that that agency could complete the decisionmaking within that schedule, and accelerate the process, without taking the possibility that your Board, which incidentally has no expertise and presumably would not build up an expertise, were sitting around waiting for a case——

Mr. DINGELL. Let me ask two questions, if I may break in. Where is the expertise in the corporate memory of this Board? Are they going to draw on Mr. Curtis' agency and other agencies such as Interior, for personnel and expertise, or are they going to have their own staff?

Mr. CUTLER. They will have their own staff.

Mr. DINGELL. They will have their own staff?

Mr. CUTLER. And in addition I suspect the beneficiaries of additional expertise as it may be required and subject to the Board's rules, but before I forget what Mr. Finnegan's question was, let me try to address it. I think what Mr. Finnegan is suggesting is that in the context that we have been discussing, that the Board be authorized only to waive time schedule, and not the procedures them-

selves, that is that once a certain kind of procedure had been used, for whatever amount of the decisionmaking process that had taken place, that would have to be used for the rest.

Mr. DINGELL. I beg your pardon, but the only way I can conceive that you could avoid the most appalling case of litigation would be to permit action subject to congressional veto and convert the issue from a regulatory process to simply a legislative cure of the issue. That is peripheral. I think you ought to readdress yourself to the other question, but keep my thought in mind, if you please.

Mr. CUTLER. OK. I believe first that the Board ought to have the authority to actually change the procedures. I think that is important, if we want this Board as we do to have the discretion to move fairly, but also as expeditiously as possible to get the decision made. The chairman has suggested that to do that might require congressional participation, if you will, in that decision, and I would refer back to the answers that I gave earlier in the morning, to a similar line of questioning, and that is—and I think Mr. Curtis gave—that is, that we would discourage the forwarding of procedural waiver decisions to the Congress, and for all the reasons that I mentioned earlier in the day.

Mr. CURTIS. I think Mr. Finnegan's question goes to the essence of the problem in the legislation, which is also the same problem that confronts agencies when they attempt to expedite their decisionmaking process. That problem is to meet the national demand or requirement for expedited decisions, while at the same time honoring the substantive requirement of the laws which the agencies administer. This, as in so many other things, requires a balance. Now it is the circumstance that the courts will review the decision for substantial evidence. If you do not have substantial evidence in your record, then that decision will not survive judicial review. The question on procedure is an important one as to whether you have substantial evidence.

Mr. DINGELL. You could probably shortcut your procedure and still have substantial evidence. Substantial evidence does not involve very much in the record. On the question of changing the procedure, and changing time limits, there is a long roster of cases which say that when you change procedural rates under certain circumstances, you actually can and do deny substantive rights. At that point you are back in your constitutional change and you are back before the courts for a long period of time.

Mr. CURTIS. I was going to make the point, Mr. Chairman. You may and you may not, and I would agree with the observation that you may, that the greatest security to the integrity of the decision is provided by submitting that waiver and effectively having it legislated, in which case the judicial scope of interest is very strictly constrained. Perhaps you may wish to consider residing discretion in the Board to submitting procedural waivers to the Congress when it feels it is confronted by a circumstance where a departure for procedural purpose may imperil the decision itself. It is discretionary.

Mr. CUTLER. I think that is a very wise suggestion. I would endorse that.

Mr. DINGELL. The only way you can absolve yourself with certainty from judicial review is by having the matter come up to Congress for a decision.

Mr. CUTLER. Yes, but I think the essential point of what Mr. Curtis is suggesting is that the change of procedures may infringe on substantial substantive rights, it also may not, and there may be cases where the Board is confident enough that they will not, that the Board should be allowed to proceed without exercising its discretionary authority to submit the question to the Congress. The Board obviously runs the risk, if you term it a risk, that a court will say, "You are wrong." But the Board, I believe, and I think Mr. Curtis believes, ought to have the discretion to make that judgment call.

Mr. FINNEGAN. Mr. Cutler, do you make any distinctions or does Mr. Curtis make any distinctions when you are talking about Federal actions versus State and local actions? Your procedure here affects State and local actions as well, and we may have State constitutional requirements that are somewhat different, that are binding on the State agencies and so forth. How do you deal with those actions without coming to Congress and getting a preemption?

Mr. CUTLER. I would not make a distinction, and I would rest on the discussion that we had earlier with Mr. Loeffler, I believe, of the constitutional issues involved, and Mr. Fygi's response and so forth.

Mr. FYGI. Can I speak to that very briefly? Clearly we are dealing with legislation that employs the commerce clause of the Constitution, to the extent that any such legislation would authorize an agency of the Federal Government to displace State law procedures, as is contemplated by the President's proposal. It is clear to me at least that there is no difference in circumstance presented by whether we are dealing with a State constitutional issue or a State statutory question. Under the supremacy clause of the Constitution the Federal statute would govern.

Mr. DINGELL. That is true, but only as long as you are not dealing with a vested substantive right of a citizen of a State under their State constitution. Even the commerce clause of the Federal Constitution does not permit you to strip a citizen of a vested constitutional right which that citizen possesses under a State constitution.

Mr. FYGI. I am not sure that I entirely agree with you, if I understand correctly the implication of your remark.

Mr. DINGELL. How do you disagree?

Mr. FYGI. I am of the view stated by Justice Marshall in *Gibbons v. Ogden* that the commerce clause power is plenary.

Mr. DINGELL. But you also have your due process clause?

Mr. FYGI. Indeed, in the Federal Constitution.

Mr. DINGELL. Are you telling me then that the commerce clause permits the Federal Government to stamp heavily upon a vested right under a State constitution?

Mr. FYGI. The commerce clause is, I would agree with you, governed by the due process clause of the fifth amendment. We are talking about Federal action.

Mr. DINGELL. I concur. I am aware of the difference between the 5th and 14th, but it is nonetheless there.

Mr. FYGI. The concept is there. I was disagreeing only with your formulation.

Mr. FINNEGAN. But you are talking in terms of giving what amounts to blanket preemption of authority on something that not even the Congress knows about at the time they passed the statute. What kind of preemption are you talking about?

Mr. FYGI. I am suggesting only that in my view it is clearly within the capacity, the constitutional capacity, of the Congress to pass a law like this, that would contemplate the partial preemption, if you will, of State procedural statutes, and that is really all we are speaking of constitutionally.

Mr. FINNEGAN. Have you discussed this with the Justice Department and gotten any memorandum from the Justice Department?

Mr. CUTLER. I should add, Mr. Finnegan, that the Justice Department was involved in the consideration and drafting.

Mr. FINNEGAN. Could you provide the memorandum that was provided to you on this point?

Mr. CUTLER. I am sorry, there was no memorandum provided.

Mr. DINGELL. Could you procure for us something relating to the constitutional issues on the proposals, and dealing specifically with the question of State and local laws, and the question of waiver of procedural and substantive requirements of both State, Federal, and local law? I think that is a question we are going to have to address, because I shudder at the thought of contending with that issue on the floor.

Mr. FYGI. We have spoken with Deputy Assistant Attorney General Simms of the Office of Legal Counsel, and I know he has considered these matters.

Mr. CUTLER. Let me understand, Mr. Chairman, your request. You would like a memorandum——

Mr. DINGELL. I really do want it from the Attorney General. If it is all the same to you I think it is very important we have it first hand, to know what he has had to say on these matters, because there is a potential constitutional question.

Mr. CUTLER. I want to make sure I understand. Are you asking that we have provided for the committee——

Mr. DINGELL. Yes.

Mr. CUTLER [continuing]. A new, because one does not exist, a new memorandum with respect to these issues?

Mr. DINGELL. Yes, please.

Mr. FINNEGAN. By the Attorney General though, not by Mr. Simms.

Mr. FYGI. We will go as high up as we possibly can to meet your time frame.

Mr. FINNEGAN. We have had situations before from Mr. Simms where he provides that kind of memorandum.

Mr. FYGI. We will have it at least from Mr. Harmon. He is much more——

Mr. FINNEGAN. The same problem.

Mr. FYGI. This is the same office that prepares the Attorney General's opinions.

Mr. CUTLER. Let me restate it. Given the time frame, we will do the very best we can to get much more.

Mr. DINGELL. Can you tell us the size of the staff that you propose to have for this entity of the EMB, Mr. Cutler?

Mr. CUTLER. Yes, Mr. Chairman. I have my staff working on that question right now. I can give you a general range.

Mr. DINGELL. Please give us the information you can now and give us more detailed information at a later time.

Mr. CUTLER. Sure, absolutely.

Mr. DINGELL. What would be the approximate size of the staff? Are they going to be duplicating the expertise and the work of the FERC, Interior, to some degree CEQ, to some degree Fish and Wildlife Service, in terms of the Coordination Act, and to a fair degree EPA's labors on clean water and clean air? They will probably be dealing with the responsibilities of the Corps. I have no doubt that they will be engaging in some matters that will deal with antitrust laws, OSHA, strip mining, and the coal mine safety statute. The roster of statutes they are going to be engaging in is almost boundless, plus State laws, local zoning laws, nuisance statutes, and whatnot else. How many do you intend to use?

Mr. CUTLER. Mr. Chairman, as I said we are currently developing that. I can give you a range starting at between 150 and 200. Let me point out two points that I think are important with respect to the question you have asked. First, the agency, the Board's staff will have the benefit of the assistance of all of those agencies as described. Second, it is important, I think, to focus on the fact that we do not anticipate the Board encountering as many of the worst case kind of situations that we have been, I think, discussing.

Should it do nothing else than make substantive judgment after substantive judgment, which we really do not anticipate and do not want to see happen, its staff needs might increase in response to that, but I really do not believe that we are likely to, or need we, nor should we encounter that eventuality.

Mr. DINGELL. There are two ways of addressing this question of size of staff. If you allow the continuation of the proceeding that the Energy Mobilization Board might take over, and the continuation of the same record, either by the agency which initiated the process under time limits by the Energy Mobilization Board, or if you allow them simply to take over and to then conclude the proceeding, utilizing the same record, you are probably going to need a big influx of staff, but if you have then take over and start over—

Mr. CUTLER. No, we do not anticipate that.

Mr. DINGELL. You would need a big staff.

Mr. CUTLER. We do not at all anticipate, in fact we do not provide the authority to start over, and indeed we want the Board to have the benefit of and the record that has been developed by an agency that simply does not meet the deadline, but let me emphasize again we expect and want and think it most appropriate that agencies meet the deadlines and make those decisions.

Mr. DINGELL. We have no quarrel with that. Do you anticipate that these folks are not going to be meeting the deadline?

Mr. CUTLER. Yes, and I am simply saying we do not anticipate much of that happening.

Mr. FINNEGAN. If you detail people from the other agencies though, you are going to take away people in the first place?

Mr. CUTLER. I have not suggested detailing people. I think that it is clear that there are going to be staff requirements that will have to be met. I think and I hope that the staff requirements can be kept to a minimum by the fact that the agencies responsible for making decisions will make decisions. We are not creating a Board whose principal purpose is to substitute itself for the agencies. We are creating a Board which will set schedules, which will try to make sure that the agencies meet those schedules, and which in the hopefully rare event that they do not, will be able to act in their place.

Mr. FINNEGAN. But you have to have the people on board in the rare event?

Mr. CUTLER. I have suggested that we are starting with an assumption that somewhere between 150 and 200 people will be necessary and available for that purpose.

Mr. DINGELL. Mr. Cutler, let's deal with the question of judicial review. When Mr. Curtis' agency concludes consideration of the matter and it goes to the courts, he has got to certify the record to the courts in connection with the Hill. Who is going to be certifying that record?

Mr. CUTLER. The Board would certify the record to the court of appeals.

Mr. DINGELL. They would. The substantive statute says the commission has to.

Mr. CUTLER. Which commission?

Mr. DINGELL. The Federal Power Act.

Mr. CUTLER. I am sorry, I misunderstood your question.

Mr. DINGELL. Let's just go back and say Mr. Curtis has to certify the record to the courts.

Mr. CUTLER. It would seem to me, Mr. Chairman, that the appropriate way to proceed, and as I pointed out earlier, we have not provided you with draft legislation, but we are willing to work with you in developing it, the appropriate procedure, it would seem to me, would be that when the question being considered moves from say FERC to the Board that FERC certify to the Board that the record is complete for that purpose, and that when the decision moves beyond the Board on up to the court of appeals, that the Board certify it to the court.

Mr. DINGELL. You have got a residual question we are going to have to address, and I do apologize for keeping you. After the Board has acted, you are going to have a certain residuum of rights and litigation as regards substantive rights of the parties. An individual may claim damages for allowing some kind of a trespass or impairment of his land rights or his water rights or something of that kind. How will those issues be resolved under this legislation?

Mr. CUTLER. Those issues would be resolved by a court which would hear on a consolidated basis all challenges to the action taken by the Board. The Board, as the specifications suggest, would and ought to have the authority to provide for essentially interlocutory appeals whenever it is necessary for the orderly consideration of the project or to assure fairness to the parties involved. I

think that that authority is extremely important for many of the reasons described.

Mr. DINGELL. You cannot take those rights away from the folks and you get yourself into a political fight if you try.

Mr. CUTLER. No, we do not suggest taking them away at all.

Mr. DINGELL. I understand, but you are going to have to protect them both by constitutional and simple political constraints or we will have a dogfight up here.

Can you tell me one other thing. What is going to be the liability assumed by the Federal Government by reason of actions taken under the Priority Energy Project Act? In other words, are we assuming Tucker Act responsibilities, Tort Claim Act responsibilities? What are the liabilities? Maybe Mr. Fygi would want to address that.

Mr. CUTLER. I would appreciate it if Mr. Fygi would address that.

Mr. DINGELL. I would like to do it with your concurrence.

Mr. CUTLER. May I offer my concurrence after rather than before?

Mr. DINGELL. Sir?

Mr. CUTLER. May I offer my concurrence after his statement rather than before?

Mr. DINGELL. You may decide the timing for your concurrence.

Mr. FYGI. It strikes me that the specifications themselves suggest legislation that would not alter the existing circumstances under which the Federal Government might be liable for its actions.

Mr. DINGELL. That is, Tucker Act?

Mr. FYGI. I do not know whether we are likely to be enhancing that particularly. We start with the proposition of sovereign immunity, except when waived by Congress, Congress has established in several statutes the circumstances under which the Government might be liable for its acts or omissions. It does not strike me that the scheme contemplated by this set of specifications would affect Federal liability any more than if Chairman Curtis' organization, under current law, provides a certificate for an entity that is thereafter constructed. I mean, that kind of question is really almost academic, it strikes me.

Mr. DINGELL. Mr. Cutler, can you get us an answer on that particular point at a time of your convenience as opposed to giving the answer at this time?

Mr. CUTLER. Yes.

Mr. DINGELL. We have dealt with Tucker Act responsibilities in connection with railroads, and we thought at one time on Penn Central we wrote something that gave us no liability. We wound up with a Tucker Act exposure that curled the hair of everybody on this committee.

Mr. CUTLER. I would agree with your observation that it has to be done very carefully, Mr. Chairman.

Mr. DINGELL. Like tying a knot in the tail of a tiger. Mr. Cutler, we do thank you. Mr. Finnegan has one more question.

Mr. FINNEGAN. Mr. Helme mentioned the need for the Governors to participate in the designation and also the establishment of the schedule. He also suggested a timeframe for being consulted and an opportunity to veto, an opportunity to concur, and if they failed to

concur, an opportunity to have the President veto. Do you have any opposition to that idea?

Mr. CUTLER. Yes. I would suggest that first of all without doubt the Governor, the mayor, the county commission, whoever would be affected by the establishment of schedule ought to be given and ought to be provided in the statute the opportunity to participate in the setting of that decision schedule.

However, beyond that, it is our view that there has to be a final decision on what the schedule ought to be, that that ought to be a decision of the Board and that with respect to the veto issue, I would refer back to my consideration with Mr. Maguire, I believe it was Mr. Maguire or Mr. Gore, I am sorry, where I noted that the specifications provide that the members of the Board will serve at the pleasure of the President, and under his direction, and we do not believe that any further statement of veto or concurrence is necessary. The Board would be acting for the President.

Mr. DINGELL. Are you suggesting then the presence or absence of—

Mr. CUTLER. I am sorry?

Mr. DINGELL. That the Senate confirm them?

Mr. CUTLER. Yes, Senate confirmation, absolutely.

Mr. DINGELL. Mr. Cutler, we have kept you a long time. Thank you very much.

Mr. CUTLER. Thank you. I appreciate it.

Mr. DINGELL. Gentlemen, we will excuse you all with our thanks. The subcommittee stands adjourned.

[The following statement was received for the record:]

STATEMENT OF CARL T. CURTIS, ATTORNEY FOR THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT

Mr. Chairman, this is made on behalf of the Central Nebraska Public Power and Irrigation District, with headquarters at Holdrege, Nebraska, which I will hereafter refer to as the District. The District was authorized by the Public Works Administration in the 1930's. It is a district organized under the law of the State of Nebraska, and it was built with a grant and a loan from the Public Works Administration. The District furnishes irrigation water to approximately 125,000 acres in south-central Nebraska.

The principal dam of the District is the Kingsley Dam, which is an on-river dam on the Platte River near the city of Ogallala, Nebraska. The reservoir at the Kingsley Dam has a capacity of 2,000,000 acre feet and is operating at 1,800,000 acre feet. The lake back of the dam is more than twenty miles in length.

At the time of the building of the Kingsley Dam, the construction did not include hydro-electric generating facilities. The water is released from the dam through two tubes, each 20 feet in diameter. Elsewhere in the system the District does own and operate three hydro-electric plants, the output of which is sold at wholesale to the Nebraska Public Power District.

The need for energy produced from renewable sources and the increased cost of petroleum and other fuels have now made it desirable and feasible to install hydro-electric generating facilities in one of the outlet tubes which were built when the Kingsley Dam was originally constructed. The District has proceeded with plans for the installation of the electric generating facilities at the Kingsley Dam. They have employed competent consulting engineers. The detailed plans are complete. Bids have been asked for and received, and in the opinion of the District, the bids received are very favorable and the District is anxious to proceed with the installation of the hydro-electric generating facilities at Kingsley Dam.

The size of the proposed generating facilities will be 50,000 kilowatts at maximum, and 38,000 kilowatts on an average. The construction cost in 1979 dollars is estimated at 30 million dollars. The total cost including financial costs, engineering, and all other items will be 50 million dollars in 1979 dollars. The District is financially responsible and able to proceed with this installation which will result in

energy saving of national significance. The installation of these facilities will result in the production of electricity in an amount which if produced from petroleum would require 150,000 barrels of petroleum annually, which has an estimated annual cost of three million dollars. The electric energy to be produced by this facility would almost double the power now being generated in the District's three hydro-electric plants.

On April 28, 1978, the District filed an application with the Federal Energy Regulatory Commission for an amendment to their license which would permit the installation of these generating facilities at Kingsley Dam. The number of the District's application is 1417. The Nebraska Public Power District has joined in the application for an amendment to the license of the District, and the number of their application is 1835. The National Wildlife Federation and the Tri-State Generating and Transmission Association, Inc., have intervened in the case before the Federal Energy Regulatory Commission.

The District has diligently pursued its application. The District has cooperated with and has responded to every federal agency, has participated in numerous conferences, and has done everything required by law to expedite the project so that this added energy could be available to meet our nation's needs. The application to amend the license is still pending before the Federal Energy Regulatory Commission.

The District respectfully requests this committee to adopt such amendments as are necessary in the pending legislation so that the District will be included in its provisions. This request includes, but is not limited to, a request for language specifically mentioning hydro-electric generating facilities and language which clearly shows that it is the intent of Congress to include projects of this size in the provisions of the act. The District urgently needs the benefit of the pending legislation for speeding up the procedures for the issuance of the amendment to their license so that the installation of the described hydro-electric facilities can be expedited.

The District further urges the committee to include such amendments to the pending bill as will give the District the benefit of speedier disposal of any court actions or judicial proceedings that might flow from the granting of the amended license. The District requests that the rights granted by the act which protect a project from long and numerous court actions and delays be granted to the District including the granting of such rights in case the Federal Energy Regulatory Commission issues the amendment to the District's license before the Board declares the District's project a priority energy project.

The District wishes to commend the committee for their efforts in presenting legislation that will contribute to the early solution of our energy problems.

[Whereupon, at 1:25 p.m., the hearings were adjourned.]

