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The Energy Mobilization Board

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Some of the energy projects that could reduce the United States need for imported oil have been abandoned or unduly delayed by the regulatory process. The proposed SOHIO pipeline from Long Beach, California to Midland, Texas, for example, captured the attention of Congress last spring when company officials announced their intention to abandon the project after spending over fifty million dollars in pursuit of approximately 700 required permits. Proposed refineries in Maine and Virginia have been delayed in the regulatory process for over four years without final action.

With such projects in mind, President Carter proposed the creation of an Energy Mobilization Board (EMB) in his July 15, 1979 energy address to the country. Carter's objective in establishing the EMB was "[t]o foster appropriate coordination and integration of local, State and Federal actions necessary for the approval of energy facilities" that would reduce United States dependence on imported oil as an energy source. To this end the proposed EMB would be empowered to expedite decisionmaking of federal, state, and local agencies, a process frequently referred to as "fast tracking."

In a display of decisiveness uncharacteristic of congressional action concerning energy policy, Congress acted on the President's proposal within four months, with the House enacting a stronger bill than the President requested. The President's proposal and the versions approved by the Senate and House had certain common elements. Basic to each scheme was a small, presidentially appointed Board that would...
have authority to designate priority energy projects, establish a schedule for all major agency decisions required before such projects could be implemented, waive certain laws that may inhibit agency approval, and limit judicial review.

The House and Senate proposals also contained significant differences. These differences reflect the difficult issues causing regulatory delay in the first place. Left to the Conference Committee were the difficult tradeoffs between federal authority and state autonomy, energy development and environmental protection, and fast track procedures and due process requirements. These tradeoffs are indicative of the divergent political forces that have an interest in energy regulation and the difficulties that the Conference Committee faced in reaching agreement.

I

HASTENING THE REGULATORY PROCESS

A. Designating Priority Projects

Deciding which energy projects should be eligible for EMB procedures is highly controversial. Under the President's proposal, the EMB would be empowered to designate "critical energy facilities" in accordance with their potential for reducing oil imports. The congressional approach is not so simple; the House and Senate bills established specific exemptions and automatic inclusions for certain types of energy projects and criteria for deciding on other projects. Nuclear energy projects, for example, were not eligible for fast track procedures under

7. See text accompanying notes 88-106 & 125-37 infra.
8. See text accompanying notes 62-87 infra.
9. On April 23, 1980, the Senate conferees voted nine to eight to accept the compromise proposal offered by the House conferees. The final version provides: (1) that the Board will be composed of three members; (2) that Environmental Impact Statements will still be required under the National Environmental Policy Act of 1969 (NEPA), but that the Council on Environmental Quality shall determine which agency will lead in the preparation of the EIS for each project; (3) that the Temporary Emergency Court of Appeals will have exclusive jurisdiction to decide all cases filed pursuant to the EMB legislation; (4) that the Board can make decisions in lieu of any federal, state, or local agency that fails to meet a Project Decision Schedule deadline, provided that such action is consistent with applicable federal, state, and local laws; (5) that the Board can suspend application of a federal, state, or local law to a priority project if that law was enacted after the filing of an application for priority status; and (6) that the Board may recommend the suspension of any federal law, with specified exceptions, that presents a "substantial impediment" to the completion of a priority project, provided that the Board finds such waiver will not result in substantial harm to public health or safety. The bill provides that such recommendations will become effective only upon acceptance by the President and approval within 60 days by both houses of Congress; it limits the application of such waivers to a maximum of 12 projects per year. [1980] 11 Env't L. Rptr. (BNA) 54-5.
10. See White House Memorandum, supra note 4, at 3-4.
either congressional proposal. Northern Tier pipeline proposals, already covered under special fast track legislation enacted in 1978, also were exempt from fast track procedures under the House bill unless the President proposed their inclusion. Both bills, on the other hand, automatically included certain coal-related projects, and the Senate extended this special coverage to oil drilling on federal lands and any small hydroelectric project.

For projects not covered by automatic inclusions or exemptions, the House bill provided twelve criteria for the Board to consider in determining whether such projects should be designated as priority projects. These criteria, which were adopted by the Conference Committee, are significantly broader than the sole decisional factor of reducing dependence on imported oil, set forth in the Senate and presidential proposals. They include, in addition, the time that normally would be required to obtain all necessary agency decisions and the adverse impacts that would result either from selecting the project for fast tracking or from any delay in completing the energy project likely to occur if the project is not fast tracked. Neither of the congressional proposals limited the total number of projects that could be

17. [1980] 11 ENVT'L RPRTR. (BNA) 54.
19. H.R. 4985, 96th Cong., 1st Sess. § 178(c)(1),(6)-(7), 125 CONG. REC. H10,098-99 (daily ed. Nov. 1, 1979). The other nine criteria are: "the magnitude of any economic, social, and environmental impacts and costs associated with the energy project in relation to the impacts and costs of alternatives to such project," id. § 178(c)(2); "the extent to which the energy project would make use of renewable energy resources," id. § 178(c)(3); "the extent to which the energy project would conserve energy," id. § 178(c)(4); "the extent to which the energy project would contribute to the development of new production or conservation technologies and techniques," id. § 178(c)(5); "the extent to which the energy project would impinge upon the quantity and quality of presently available and future water resources," id. § 178(c)(8); "the comments received concerning the energy project," id. § 178(c)(9); "the regions of the country that will be most heavily impacted by the energy project as well as most benefited by the project," id. § 178(c)(10); "the availability of significant economic, environmental, or technical data," id. § 178(c)(11);  and "the anticipated effects upon competition in the energy industry, and the extent to which such designation will create competitive inequities among applicants." Id. § 178(c)(12).
fast tracked,\textsuperscript{20} although the President proposed a flexible limit of seventy-five,\textsuperscript{21} and an unsuccessful Udall proposal imposed a limit of twelve per year.\textsuperscript{22} While Congress may have feared that a limit would result in unnecessary delay of important but undesignated projects, it is equally likely that the EMB’s unlimited discretion to designate projects was the product of porkbarrel congressional politics and lack of agreement among members of congress on national priorities. In either case, the congressional approach will likely result in the EMB’s docket being drastically overcrowded as soon as it is created.\textsuperscript{23}

\textbf{B. Proposing Decision Schedules}

Each of the proposals required that the Board, after designating an energy project as a priority project, promulgate a Project Decision Schedule setting forth the time within which agency decisions concerning each project must be completed. In developing the schedule, the Board must: (1) comply with the National Environmental Policy Act of 1969 (NEPA),\textsuperscript{24} (2) collect data from concerned agencies,\textsuperscript{25} and (3) promulgate the schedule.\textsuperscript{26}

Although NEPA had been criticized as a major source of regulatory delay,\textsuperscript{27} none of the EMB proposals allowed direct circumvention of NEPA requirements on priority projects. Under NEPA, federal agencies are responsible for determining whether an environmental impact statement (EIS) is required under the Act for any project under their jurisdiction.\textsuperscript{28} Under current Council on Environmental Quality (CEQ) regulations, if more than one agency is involved in a group of

\textsuperscript{21} White House Memorandum, \textit{supra} note 4, at 3.
\textsuperscript{23} See text accompanying notes 123-24 \textit{infra}.
\textsuperscript{28} 42 U.S.C. § 4332(2)(c) (1976).
related actions, such agencies may agree upon a lead agency to supervise preparation of the EIS.\textsuperscript{29} Under the Senate bill, the EMB would determine whether an EIS is required for a priority project, and if so, which agency will lead preparation of the EIS.\textsuperscript{30} The House Bill delegated these determinations to the CEQ.\textsuperscript{31} The Conference Committee adopted a compromise: the CEQ is empowered to decide whether an EIS is necessary; if the CEQ fails to act within the deadlines of the Project Decision Schedule, however, the EMB can act in its place.\textsuperscript{32}

Collection of information by the EMB from all governmental agencies concerned with an energy project is the key step in formulating a Project Decision Schedule. The information each agency must submit, which is not currently collected systematically by any administrative body, includes a tentative schedule of all actions to be taken before a project can receive agency approval, a statement regarding the amount of funds and personnel available to the agency, and the anticipated impact of affording an energy project priority status.\textsuperscript{33} Once notice of priority designation is published in the Federal Register, concerned agencies are given thirty days to submit the information.\textsuperscript{34} The House bill required federal, state, and local agencies to submit the information directly to the EMB, whereas the Senate bill imposed on the Governors of affected states responsibility for ensuring that state and local agencies submit the required information.\textsuperscript{35} The Conference Committee adopted the House provision.\textsuperscript{36}

\textbf{C. Enforcing the Decision Schedule}

After collecting tentative schedules and related data from each agency concerned, the Board is required to compile and publish in the Federal Register a Project Decision Schedule.\textsuperscript{37} The schedule must be consistent with the tentative schedules submitted by the agencies "unless the Board determines that a different schedule is essential in order

\begin{itemize}
\item[29. ] 40 C.F.R. § 1501.5 (1979).
\item[31. ] H.R. 4985, 96th Cong., 1st Sess. § 180(a), 125 CONG. REC. H10,099 (daily ed. Nov. 1, 1979). The Conference Committee agreed to incorporate the House provision in the final bill. See note 9 supra.
\item[32. ] [1980] 11 ENVTL L. RPTR. (BNA) 54.
\item[34. ] \textit{Id}.
\item[35. ] \textit{Id}.
\end{itemize}
to expedite and coordinate agency review.” 38 The House bill provided that “to the maximum extent possible” the schedule should not allow agency actions to take longer than twelve months; 39 the Senate bill provided a more generous limit of two years. 40 The final version imposes a twelve-month limit. 41 Once the schedule is established, the Board retains the authority to grant extensions if it becomes impractical to adhere to the schedule. 42

The Board is required to monitor compliance by each agency and person to whom the Project Decision Schedule applies. 43 The procedures established by the Senate and the House for enforcing the schedule differ greatly. The House proposal provided three alternative enforcement mechanisms: the EMB could modify the Decision Schedule to facilitate compliance, 44 make a decision in lieu of the delinquent agency, 45 or recommend to the President that the requirement for approval by such agency be waived altogether. 46 The Senate bill provided two mechanisms for enforcing compliance with the schedule. Like the House bill, it empowered the Board to make a decision or perform a required action in lieu of a delinquent agency, but without a prior hearing or presidential approval. 47 The Board instead could bring an enforcement action in a United States district court. 48 If the latter alternative was chosen, the court, rather than the Board, would determine whether the agency has failed or is reasonably likely to fail to meet the deadline and whether the Board should modify the schedule. 49 The Conference Committee adopted the Senate version, but granted original jurisdiction over enforcement actions to the Tempo-

41. Conference Report, supra note 36, at H5482.
43. The responsibility for monitoring compliance is made explicit in the House bill, H.R. 4985, 96th Cong., 1st Sess. § 184, 125 CONG. REC. H10,099-100 (daily ed. Nov. 1, 1979); in the Senate bill it is implied by the enforcement provision, which empowers the Board to make a decision in lieu of an agency that fails to meet the deadlines imposed by the Project Decision Schedule. S. 1308, 96th Cong., 1st Sess. § 21(a)(1), 125 CONG. REC. S14,059 (daily ed. Oct. 4, 1979).
45. Id. § 186(a)(2)(B), (b), 125 CONG. REC. H10,100.
46. Id. § 186(a)(2)(C), (c), 125 CONG. REC. H10,100.
48. Id. § 21(b), 125 CONG. REC. S14,059.
49. Id. § 21(b)(3), 125 CONG. REC. S14,059.
In many respects, the final version grants the Energy Mobilization Board more autonomy than it would have had under the House proposal. If the Board should choose to make the decision in lieu of the agency rather than bring a court action to enforce the schedule, under the final version the only check on the Board’s decisionmaking authority is judicial review. In contrast, the House bill required the Board to submit a proposed decision to the President, who could veto or revise the decision before it became final and subject to judicial review. Despite provisions for expediting judicial review, use of the courts as an enforcement mechanism probably is the more time consuming of the two alternatives. Thus to minimize delay, it is likely that the Board more often will choose to make the decision in lieu of the agency. The direct executive veto provision in the House bill, on the other hand, would have provided an automatic check on EMB decisions, and would more effectively have ensured the political accountability of decisions made in lieu of agencies.

II

RESOLVING SUBSTANTIVE DISPUTES

The method for resolving substantive snags was the greatest difference between the House and Senate bills. Simply stated, the Senate sought only to achieve a timely decision, while the House sought a timely decision that would permit implementation of the project. Disagreement over this issue reflects the divergence in views over whether the EMB’s role should encompass substantive regulation or be limited to expediting the regulatory process through procedural controls.

The Senate explicitly recognized the right of any agency to deny approval of a designated project. The only power granted to the EMB for resolving substantive disputes under the Senate proposal was a limited grandfather provision. The Board could waive temporarily any federal, state, or local regulatory requirements that are enacted af-

52. See text accompanying notes 62-87 infra.
53. With the exception of laws or regulations enacted after the commencement of construction of a project, the Senate proposal makes no provision for waiver of regulatory requirements unless an agency fails to comply with the decision schedule. See notes 52-54 infra and accompanying text.
ter the commencement of construction where waiver is "necessary to avoid a significant delay in the completion and commencement of operation of the facility." This waiver power was subject to veto by the Administrator of the Environmental Protection Agency or the Secretary of the Interior.

An apparent purpose of the House version, on the other hand, was to discourage any federal agency from withholding approval of a proposed facility. If the Board found that a federal requirement presented a "substantial procedural or substantive impediment" to implementation of the project, it could recommend a waiver of federal law. To obtain such a waiver, the EMB was required to publish notice of its recommendation in the Federal Register, provide a public comment period, and obtain presidential concurrence.

The Conference Committee spent six months attempting to negotiate a compromise between the Senate and House provisions for grandfathering and substantive waiver. The final version increased the scope of grandfathering, while severely constraining the EMB's power to override substantive laws. The application for priority status, rather than commencement of construction, now marks the date after which new laws can be waived by the EMB, and the Board's decision is no longer subject to administrative veto. The Board has no power, however, to waive existing laws, although it can recommend to the President that a federal law be suspended. If the President agrees with the recommendation, and both the House and Senate approve within sixty days, the waiver is effective, subject to a limit of no more than twelve such actions per year.

III
LIMITING JUDICIAL REVIEW

The fast track proposals include various provisions designed to limit review of EMB and agency actions on priority energy projects. Perhaps in response to past court decisions refusing, on due process grounds, to give effect to statutory provisions that directly limit judicial review, Congress, in the EMB proposals, provided several mecha-

56. Id. § 33(a), 125 Cong. Rec. S14,060.
58. Id.
60. Id.
61. Id.
nisms designed to limit judicial review indirectly. Included are restrictions on jurisdiction, on the availability of injunctive relief, and on the applicability of NEPA to EMB actions. In addition to these indirect limitations on judicial review, however, the EMB proposals include major provisions that directly limit review of certain EMB actions.

Most traditional NEPA claims would not be precluded under the EMB proposals. The need for and the adequacy of environmental impact statements will remain potential subjects for litigation. In contrast, judicial review of various other EMB actions is substantially limited under the congressional bills. The Senate bill precluded judicial review of EMB designation of Priority Projects. The House proposal, which was adopted by the Conference Committee, precluded review of several categories of EMB action, including designation of priority projects, establishment of Project Decision Schedules, recommendations to waive statutory requirements, and actions by the Board in monitoring agency compliance with the decision schedule, "except as may be required by the Constitution of the United States." As the drafters of the House provision apparently recognized, however, unqualified limitations on judicial review, like the one included in the Senate bill, are likely to be denied effect by courts for failure to meet due process requirements. The final version, while circumventing this problem by including qualifying language, leaves the scope of judicial review uncertain.

Congress has attempted to minimize the impact of judicial review

64. S. 1308, 96th Cong., 1st Sess. § 33, 125 Cong. Rec. S14,060.
65. Id. § 13(a), (b), 125 Cong. Rec. S14,057.
69. While such across-the-board preclusions of judicial review have been upheld in a few cases, alternative remedies have always been available to the aggrieved party. See, e.g., Briscoe v. Bell, 432 U.S. 404, 409-15 (1977) (upholding a provision prohibiting judicial review of determinations made by Attorney General and Director of the Census under the Voting Rights Act, where another section of the Act provided for narrowly limited suits to be brought before a special three-judge district court); Weinberger v. Salfi, 422 U.S. 749 (1975) (upholding a provision barring suits based on Federal question jurisdiction where another provision of the Act provided special statutory jurisdiction). These cases strongly suggest that some procedure for review is required.
of federal, state, and local agency decisions concerning priority energy projects through jurisdictional and other procedural mechanisms. The Senate bill provided for expedited review of any "petition for review of the . . . Act or of any action pursuant to th[e] Act." The Conference Committee adopted a similar provision that gives the Temporary Emergency Court of Appeals exclusive jurisdiction to decide substantive issues of state and federal law where suit is brought challenging agency actions; jurisdiction is not limited to actions brought to enforce or challenge decision schedule requirements.

If a suit were filed under this provision challenging a state agency's action under state law, the jurisdiction of the Temporary Emergency Court of Appeals could be attacked as failing to meet the "arising under federal law" standard of article III of the Constitution. A petition for review of a state agency's action raising only issues of state law arguably is not within the jurisdiction that Congress is empowered to confer upon federal courts under article III. Although the statutorily created jurisdiction of a similar emergency court established by the Emergency Price Control Act of 1942 was sustained as within article III limits, the jurisdiction conferred upon that court extended only to cases brought to invalidate federal administrative regulations, orders, or price schedules promulgated pursuant to that Act.

71. Conference Report, supra note 36, at H5489. The final version carefully sets forth which of the EMB and agency actions are subject to judicial review in the Temporary Emergency Court of Appeals; it leaves jurisdiction over the remainder in the federal district courts. Id. The House bill required that such actions be filed in the federal district court for the district in which the project was located. H.R. 4985, 96th Cong., 1st Sess. § 189(b)(1), 125 CONG. REC. H10,102 (daily ed. Nov. 1, 1979).
72. Id. See also 125 CONG. REC. S13,859 (daily ed. Oct. 2, 1979) (remarks of Sen. Jackson), in which Senator Jackson noted the "expeditious manner" in which the Temporary Emergency Court of Appeals could dispose of cases, and stated: "In reviewing agency actions, TECA would apply exactly the same standards of review that apply to nonpriority projects."
73. Section 2 of article III provides in part that "[t]he judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."
74. The Temporary Emergency Court of Appeals that the EMB vests with jurisdiction over such actions probably would be treated as an article III court. The Emergency Court of Appeals, established under the Emergency Price Control Act of 1942 to hear complaints filed to enjoin price control regulations promulgated under that statute, was treated as an inferior court established under article III for purposes of deciding cases asserting constitutional challenges to its jurisdiction. See, e.g., Yakus v. United States, 321 U.S. 414, 429 (1944); Bowles v. Willingham, 321 U.S. 503, 511 (1944); Lockerty v. Phillips, 319 U.S. 182, 186-87 (1943). The final version provides that where the exercise of jurisdiction by a federal court would be constitutionally impermissible, the appropriate state court shall have jurisdiction. Conference Report, supra note 36, at H5489.
The only federal law directly involved in a suit challenging state agency action brought in the Emergency Court of Appeals pursuant to the EMB legislation would be the naked grant of federal jurisdiction made by the proposed Act. To allow Congress to create "arising under" jurisdiction solely on a jurisdictional provision would make ineffective the limitations on federal court jurisdiction embodied in article III. On the other hand, the grant of jurisdiction here was made to further the national goal of developing domestic energy resources by expediting review of agency decisions on important energy projects. It has been argued that such jurisdiction is justified where necessary to protect a substantive federal regulatory policy.

Even if the emergency court's power to hear actions based solely on state law were established, the ability of Congress to preclude the state courts from entertaining such actions by making the federal jurisdiction exclusive could be challenged under the commerce clause. Judicial review of actions based on state law, as well as the state and local planning activities that would be the subject of such review, arguably are integral state functions; under National League of Cities v. Usery such interference with state court review is not within Congress' power under the commerce clause. Since the Emergency Court of Appeals would be bound by state court interpretations of state law, however, and since only a fraction of the suits brought pursuant to a particular state law would be required to be filed in the federal court under the proposed EMB legislation, the federal intrusion into state functions is less compelling than in National League of Cities, where the application of federal minimum wage and hour provisions to state employees could have seriously damaged the financial condition of the state government.

79. See National Mutual Insurance Co. v. Tidewater Transfer Co., Inc., 337 U.S. 582, 650-53 (1949) (dissenting opinion of Justice Frankfurter arguing that when the sole source of the right sought to be enforced is state law, there is federal jurisdiction only when the parties are from different states, and that to hold otherwise is to "expand 'the [federal] judicial Power' in "disregard [of] an explicit limitation of Article III.").

80. Cases interpreting § 301 of the Taft-Hartley Act have suggested that the federal courts have "protective jurisdiction" in areas with a high degree of overall federal regulation and interest, even where Congress has left issues to be decided by reference to state law. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); International Brotherhood of Teamsters v. W.L. Mead, Inc., 230 F.2d 576, 580 (1st Cir. 1956). See also Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 184-96 (1953).

81. In his dissenting opinion in Lincoln Mills, Justice Frankfurter argued that the statutory provision that conferred jurisdiction on federal district courts in cases arising "entirely by virtue of state law" was unconstitutional, and rejected the "protective jurisdiction" theory. He distinguished the Taft-Hartley Act provision creating federal jurisdiction in cases involving labor disputes, which he viewed as jurisdictional only, and not a source of substantive federal law, from the bankruptcy cases in which "[a]t least . . . a substantive federal law was present somewhere in the background." 353 U.S. 448, 473-75 (1957).

82. See text accompanying notes 107-24 infra.
The Senate bill prohibited injunctive relief that will last for more than ninety days in any action brought pursuant to the Act. At one time it was believed that the due process clause precluded legislation from limiting available remedies. Later, however, the Supreme Court upheld the Norris-LaGuardia Act, which strictly limited the power of inferior federal courts to issue restraining orders or injunctions in cases involving labor disputes, treating the provision as merely a limitation on the jurisdiction of these courts, and as such squarely within Congress' power under article III. Since this case has been followed in later actions, it appears unlikely that the limitation on relief in the bill would be subject to serious constitutional challenge.

IV

IMPACT OF EMB PROPOSALS

A. Environmental Implications

The creation of an Energy Mobilization Board to hasten the implementation of Priority Energy Projects would have a direct impact upon the effectiveness of regulatory environmental protections. The differences between the House and Senate bills are significant in this regard. Although each version requires the Board to determine whether a project is of sufficient national interest to be designated a priority energy project, the House bill sets forth the considerations relevant to that determination. The factors listed in the House proposal emphasize social and environmental costs, energy conservation, use of renewable natural resources, and development of new technology, as well as the projects' contribution to the growth of an American synfuels industry. Furthermore, in addition to the information to be submit-
ted by affected agencies to aid the Board in determining whether to grant priority designation, the House bill authorized the Board to require agencies to submit an analysis of the project's environmental impacts, with suggestions for mitigating measures. Assuming the Board would take advantage of the opportunity to acquire such information and would consider the various environmental criteria when determining whether to grant priority status, the House bill more effectively incorporates environmental concerns into the first level of EMB decisionmaking.

The fast tracking aspects of both the House and Senate bill are important in determining the environmental impact of the EMB proposals. The House bill established shorter time limits for Board and agency action than did the Senate bill; under each version, agencies could alter their internal decision schedules and consolidate proceedings to keep within the Project Decision Schedule's deadlines. Such speedups give those opposing an energy project less time to build an effective coalition and campaign.

Perhaps more significant are the schedule enforcement provisions. As noted above, both bills authorized the EMB to make a decision on a project in lieu of an agency in the event that the agency fails to comply with the Board's Decision Schedule for the project. With no provision to ensure the political accountability of such EMB decisions, under the final bill the Board might not hesitate to override environmental requirements, and accord more weight to concern about the domestic energy supply than to considerations of public health and safety. Arguably the executive veto provision of the House proposal would have ensured that such decisions were more responsive to public concerns about environmental protection, although this would depend largely on prevailing executive policy.

The greatest threat to environmental protection posed by the proposed EMB legislation concerns new categories of energy proposals for which there is substantial uncertainty about environmental impacts. Shale oil extraction, coal gasification, and coal liquefaction all are considered prime candidates for designation. These projects involve the

91. Id. § 177(b)(3), 125 Cong. Rec. H10,098.
92. See text accompanying notes 39-40 supra.
modification of organic compounds, creating by-products that include cadmium and lead. There has been little practical experience with such technologies. Projects such as these may be favored by the EMB under the congressional proposals, which empower the Board to waive the application of laws and regulations not yet in force that it anticipates will substantially impede implementation of the project. The Senate bill restricted such waivers to federal, state, and local requirements promulgated after commencement of construction of a project, and requires a finding by the Administrator of the Environmental Protection Agency that such action would not endanger public health. Under the Conference agreement the EMB may suspend application of requirements imposed by laws enacted after the application for designation as a priority project. More significantly, while the Senate provision allowed only for temporary suspension of such requirements, the Conference agreement, like the House proposal, provides for suspension for "the life of the Project." The final version leaves intact House provisions that protect against waiver of primary air quality standards established under the Clean Air Act and waivers that would contravene interstate water compacts, but omits the provision prohibiting waivers that would conflict with state or local initiatives or referendums specifically related to the establishment of an energy project.

The final EMB proposal indicates greater congressional willingness to abandon the substantive requirements of existing environmental legislation than did the prior bills. While the House bill required explicit congressional approval before the Board could permanently waive laws and regulations put into effect after initiation of a project, the Conference agreement leaves such waivers to the discretion of the Board. Thus the degree to which the EMB adversely affects the environment will be determined largely by its treatment of new coal and oil shale projects.

97. Id.
103. Conference Report, supra note 36, at H5485-86.
104. Id. at H5486.
105. Id. For the original provision in the House bill, see H.R. 4985, 96th Cong., 1st Sess. § 187(b)(6), 125 CONG. REC. H10,101 (daily ed. Nov. 1, 1979).
B. Effects on State and Local Autonomy: Constitutional Considerations

The gravest implication of the pending EMB legislation concerns state and local autonomy, particularly in such important areas of environmental regulation as land use and air and water quality. The provisions in the bills that impose time limits on agency decisionmaking and remove decisionmaking authority from an agency’s jurisdiction for failure to meet these limits may not be a constitutional exercise of federal power under the commerce clause. Even if the EMB legislation is determined to be constitutionally permissible, arguably it is an inadvisable usurpation by the Federal Government of state and local authority.

The constitutionality of the EMB proposals may depend on judicial interpretation of *National League of Cities v. Usery*, in which the Supreme Court refused to give effect under the commerce clause to an amendment to the Fair Labor Standards Act extending its wage and hour provisions to state employees. Although the Court recognized that the amendments were within the scope of the commerce clause, it held that the Federal Government was limited in exercising its otherwise plenary powers to acting in a fashion that does not “interfere with the [states’] integral governmental functions” or “impair [their] ‘ability to function effectively in a federal system.’”

The *National League of Cities* decision established a two-tier test for impermissible infringements on states’ rights. First, the governmental activity sought to be regulated by the Federal Government must be “essential to [the State’s] separate and independent existence.” Secondly, the interference by the Federal Government must either impose a substantial financial burden on the state or “substantially restructure traditional ways in which the [state or] local government [has] arranged [its] affairs.” Both elements of this test for unconstitutional infringement arguably are present in the proposed EMB legislation.

The Court in *National League of Cities* specifically mentions “fire prevention, police protection, sanitation, public health, and parks and recreation” as functions traditionally carried out by the state and local


108. 426 U.S. 833 (1976). See remarks of Senator Weicker suggesting that under the standards set forth in *National League of Cities* the fast tracking provisions of the Senate provision could not withstand constitutional challenge. 125 CONG. REC. S13,297 (daily ed. Oct. 3, 1979). But see R. Ehlke, supra note 107, at 42, concluding that certain features of these provisions ameliorate the intrusion by the Federal Government on state and local autonomy and thus “reduce the likelihood of successful constitutional challenge.”


110. Id. at 846.

111. Id. at 847-51.
Professor Richard Stewart has argued that "regulatory activities of the administrative state, including, in particular, the maintenance of environmental quality," logically should be included in that list. Recent cases supporting Professor Stewart's liberal view have recognized the operation of a municipal airport, the licensing of drivers, and the conservation of state resources as essential state functions. Sections of the Surface Mining and Control Act of 1977 were challenged successfully in Virginia on the basis of this claim.

The EMB proposals would impose a substantial burden on states and localities insofar as the Board's Project Decision Schedule may require evaluation and decisionmaking on Priority Energy Projects to be conducted within a shorter time period than otherwise would be allotted. Moreover, the legislation, if enacted, may result in the purposeless expenditure of state and local funds. During the floor debate on the Senate bill, Senator Weicker declared:

[The agency] must start the process, hoping to comply with the schedule; if not, the process is prematurely ended and Federal decisionmakers take over. Because a State cannot be expected to abandon such traditional and essential functions as zoning, land-use control, and health and safety regulation, it must enlist its regulatory resources each time with the possibility of premature termination of the process together with its attendant waste of State money and personnel time.

The Federal Government may argue that the legislation does not constitute an intrusion into state and local affairs, but instead is a form of "cooperative federalism" of the type sustained in the Clean Air Act cases. In these cases, which involve constitutional challenges to various standards imposed on states by the Act on the grounds that they

112. Id. at 852.
114. Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (holding that operation of municipal airport was integral function of city government and therefore not subject to wage and hour provisions of Fair Labor Standards Act).
115. United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978) (holding federal magistrate's suspension of defendant's driver's license as punishment for drunken driving on federal enclave was intrusive on state's power to regulate its highways).
117. Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus, 10 ELR 20,128, 20,131 (W.D. Va. Jan. 1980). The court noted that certain provisions of the Act, which required surface mined land to be restored to its approximate original contour, deprived the Commonwealth of "its right to dictate whether this land could be better used for some other purpose," id., and that the Act "operates to 'displace the States' freedom to structure integral operations."
119. See R. Elhke, supra note 107, at 18-24.
interface with state autonomy, the courts, while holding that a federal administrator cannot compel the states to establish or administer a program regulating air pollution, have explicitly stated that conditional federal grant programs, designed to secure state compliance with federal requirements, are constitutionally permissible. It is unlikely that the courts would accept a characterization of the EMB proposals as a cooperative regulatory venture, however, since they involve neither conditional federal grants nor other written agreements between the Federal Government and the states.

Alternatively, the Federal Government may argue that the legislation is constitutionally justifiable under the balancing approach that Justice Blackmun, in his concurring opinion, suggested the majority was employing in National League of Cities. Under this test the Government will argue that the national interest in ensuring an adequate domestic supply of energy resources is demonstrably greater than the states' interest in adhering to the timetables for decisionmaking provided in their own statutes and regulations. Moreover, the Federal Government will claim that state and local government compliance with EMB decision schedules is essential to the legislative goal of ensuring rapid development of domestic energy sources.

Even if the EMB legislation were found to be constitutional, it may not be advisable for the Federal Government to become involved in state and local decisionmaking. The inherently local nature of certain regulated activities and the large number of governmental actions required for major projects would present serious problems for a small agency operating in Washington, D.C. The SOHIO project, for example, required excavation permits, easements, and right-of-way agreements and other development permits from nine state agencies and twenty-nine local agencies in California alone. An early version of the House proposal submitted by the Committee on Interior and Insular Affairs provided a total staff of only sixty persons for this new agency. Thus a few large projects involving some peculiarly local

120. See, e.g., Brown v. Environmental Protection Agency, 521 F.2d 827, 835 n.42 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 992-93 n.26 (D.C. Cir. 1975).
121. But see R. Elhke, supra note 107, at 18-24.
123. The SOHIO project was designed to transport Alaskan crude oil by pipeline from Long Beach, California to Midland, Texas. SOHIO Pipeline Hearings, supra note 1, at 1, 39.
124. H.R. REP. No. 419, pt. 1, 96th Cong., 1st Sess. 25 (1979). Although the final version, as passed by the House, left open the size of the EMB staff, H.R. 4985, 96th Cong., 1st Sess. § 174(c)(1), 125 CONG. REC. H10,098 (daily ed. Nov. 1, 1979) (empowering the chairman of the EMB to appoint "an Executive Director and such additional personnel as he deems necessary to carry out the functions of the Board"), the size will be limited by the budget Congress appropriates for operation of the EMB. The cost estimates submitted to the House for the version of the bill sponsored by the Interstate and Foreign Commerce Committee, which included the unlimited staff provision incorporated in the final House
problems conceivably could create more work than the Board could reasonably be expected to handle.

C. Hastening Development of Domestic Energy Sources

There is serious doubt that the EMB will significantly hasten the development of domestic production of energy; attempts to speed up the regulatory process may actually have the opposite effect. The overlapping jurisdiction of the EMB and other administrative bodies may cause confusion that will delay rather than expedite priority energy projects. Because of its lack of expertise and small size, the EMB may be unable to carry out its charge effectively. State and local agencies, anxious to protect their autonomy, may deny energy projects prematurely in order to avoid federal intervention in their decisionmaking. Others, intent upon causing delay, may raise legal challenges to priority projects based on new legal issues created by the EMB legislation itself. Finally, the EMB provisions are not limited to domestic energy production projects; thus EMB resources may be consumed and environmental controls may be relaxed for projects with no capacity to reduce the nation’s dependence on foreign oil.

The EMB overlaps with two existing programs designed to resolve substantive disputes concerning certain proposed projects. Congress explicitly precluded EMB authority over projects covered by the Northern Tier fast track legislation.\(^{125}\) That legislation, which is designed to expedite projects like the SOHIO and Northern Tier pipelines,\(^{126}\) already provides special procedures similar to the EMB bills’ provisions, but is applicable only to crude oil transportation projects.\(^{127}\) The relationship between the EMB and the Endangered Species Committee, whose function is to determine on a case-by-case basis whether exemptions may be granted from the Endangered Species Act’s prohibition against federal actions that threaten the survival of an endangered species,\(^{128}\) poses similar problems.\(^{129}\)

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\(^{125}\) See notes 12 & 13 supra and accompanying text.

\(^{126}\) The Northern Tier project, a consortium whose members include U.S. Steel Corp., Burlington Northern, Inc., and Westinghouse Electric Co., involves a proposed 1500-mile pipeline from Port Angeles, Washington to Clearbrook, Minnesota.

\(^{127}\) See, e.g., 43 U.S.C.A. § 2005 (West Supp. 1979) (requiring Secretary of the Interior to establish an expedited review schedule for crude oil transportation systems); id. § 2008 (establishing procedures for waiver of Federal law); id. § 2011(c) (granting exclusive jurisdiction to Federal district courts for petitions challenging actions of the President or other Federal offices concerning approval or disapproval of crude oil transportation systems covered by this Act).

\(^{128}\) 16 U.S.C.A. § 1536(e)(1)-(2) (West Supp. 1979). The Committee is empowered to grant exemptions from the Act if “(A) it determines on the record . . . (i) there are no reasonable and prudent alternatives to the agency action; (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action . . . and (B) [if the Committee
The advantages provided by the EMB's power to act in lieu of agencies that are behind schedule for the most part are illusory. It is difficult to see how the EMB, with less expertise than agencies under whose jurisdiction the project would ordinarily fall, can analyze the project and make an informed decision in less time than the superceded agency. Thus the total time elapsing between the failure of the agency to meet the Project Decision Schedule and the EMB decision may exceed the amount of time that would have been required by the agency itself.

The size and complexity of its charge easily could overwhelm the small staff of the EMB. For example, a substantial amount of paperwork must be performed by the staff for each priority project. In the House proposal, notice is required to be published in the Federal Register upon the filing of any application for priority designation or decision concerning such designations, the formulation of proposed Project Decision Schedules, or the recommendation of waivers of federal requirements, as well as the promulgation by the Board of generally applicable regulations. Moreover, the Administrative Procedure Act requires a comment period following publication at each of these stages. In addition, with such extensive publication requirements the EMB must maintain a steady flow of communication between itself and project applicants, concerned agencies, and members of the public who express an interest in particular projects. And there are no limits in either of the congressional proposals on the number of projects that may be designated as priority projects. Thus, it is easy to envision the EMB staff immersed to the point of being unable to function effectively. This problem may be mitigated, of course, to the extent that the Board itself exercises discretion to limit the number of priority designations.

The EMB legislation may backfire in either of two ways. State and local governments interested in protecting their autonomy might disapprove a project prematurely to avoid the intervention and control of decisionmaking by the Federal Government. With more time for the state or local agency to analyze the impacts of the project and consider revisions and alternatives, it might eventually grant approval; faced with the fast tracking provisions of the EMB legislation, an

establishes] reasonable mitigation and enhancement measures . . . .” Id. § 1536(h)(1)(A)(i), (ii), (B).

129. The Committee is already considering exemptions for two projects, one of which is an oil refinery. The 1978 Amendments to the Endangered Species Act: Evaluating the New Exemption Process Under § 7, [1979] 9 ENVT'L. REP. (BNA) 10,031.


agency might deny the project with the consequence that domestic energy production will be inhibited rather than increased.

Second, the EMB legislation may present those persons intent upon delaying certain energy projects with an arsenal of new legal issues.\(^{132}\) Thus the Associated General Contractors of America recently informed Congress that they would prefer no EMB over the EMB proposal passed by the House.\(^{133}\) The Association’s fears that the EMB will create more problems and delays may well be more justified than environmentalists’ concern that the fast track provisions will result in a massive railroading of environmentally disastrous energy projects.

There is no assurance that any sacrifices in environmental quality occasioned by the EMB provisions will decrease our dependence on imported oil. Although this has been held out as the express purpose of the EMB legislation,\(^{134}\) the criteria for designation of priority energy projects do not limit the Board to expediting projects that will increase domestic energy production.\(^{135}\) Thus, as the legislative debates suggest, the proposed refinery in Hampton, Virginia,\(^{136}\) likely would qualify for fast track procedures, although it would not result in increased domestic production, but merely would increase our refining of imported crude oil.\(^{137}\) While the need to increase the nation’s self-sufficiency in energy production may justifiably take precedence over some environmental and other regulatory requirements, such shifting of domestic priorities is not warranted in the case of projects that will not serve that goal.

CONCLUSION

Legislation that may undo the beneficial results of environmental

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132. For example, a challenger might assert that a decision made by the EMB in lieu of an agency was an unconstitutional usurpation of state authority. See text accompanying notes 107-24 supra.

133. Letter from the Associated General Contractors of America to the Honorable Phil Gramm (Oct. 19, 1979), reprinted in 125 CONG. REC. H10,071 (Nov. 1, 1979).

134. See, for example, the White House Memorandum, supra note 4, at 1, stating the purposes of proposed EMB legislation as follows:
   - To assist in accelerating development of non-nuclear domestic 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.
   - 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.

135. See note 19 supra and accompanying text.

136. This was one of six energy projects chosen by the Congressional Research Service of the Library of Congress for review to ascertain “the causes of delays in selected energy projects, with a view toward providing background on the need for and implications of proposed ‘fast track’ legislation.” 125 CONG. REC. S13,934 (daily ed. Oct. 3, 1979).

controls has become the focus of Congress at the end of a decade that began with the passage of these very same protective devices. Special procedures have already been established for preventing regulatory impediments to the SOHIO and Northern Tier pipeline projects and projects threatened by the Endangered Species Act. Moreover, after the announcement of the proposed EMB, the Department of Defense declared its intention to introduce similar fast track legislation to eliminate environmental regulatory barriers to the MX Missile Project.

Congress should pause to examine the rationale for the various rules and regulations that are blamed for regulatory delay. A systematic study of the situation would shed light on some of the values and tradeoffs that Congress ignored in the EMB legislation. While a new balance may be justified in the competing goals of energy development and environmental protection, perhaps the change should be wrought directly, through changes in the laws and regulations that are blamed for delay, rather than by creating "superagencies," like the proposed EMB, that will override existing laws and add yet another tier to an already complex system of governmental regulation.

POSTSCRIPT

On June 27, 1980 the House rejected the Conference Committee Report, voting 232-131 to recommit the bill to conference. Misgivings about the encroachment upon states' rights, a concern that the EMB would create as much red tape as it was intended to eliminate, and a reluctance by members of the Republican party to support a key element in the President's energy program in an election year, apparently combined to produce this result. In light of these difficulties, perhaps Congress should address specific proposals to encourage the rapid development of particular energy projects rather than pursuing the politically unwieldy task of creating an institutional mechanism with effects as wide-ranging as the EMB.

Ross Cheit

138. See text accompanying notes 125-27 supra.
139. See notes 128-29 supra and accompanying text.
140. Military Seeks to Ease Environmental Curbs on MX Missile Bases, N.Y. Times, Nov. 18, 1979, at 1, col. 2.
141. See [1980] 11 ENVIR. REP. (BNA) 323.