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ENERGY AND ENVIRONMENTAL LAW IN TRANSITION: A PRACTITIONER'S PERSPECTIVE*

Ginger Lew**
Leon Silverstrom***

INTRODUCTION

For the past several years, Congress and the nation have been engaged in intensive consideration of a vital issue: the shaping of a comprehensive energy policy. By now, it is clear to many that the issues with which the policymakers have wrestled are far more fundamental than specific decisions concerning levels of taxation, gas prices, or oil import ceilings, important as these may be. What is involved is nothing less than an historic change in existing patterns of energy use and production, both in the kinds of fuels used and the levels at which they are consumed.

The course of these discussions has been marked by contention and confrontation. One of the most vocal debates has centered around allegations that environmental regulations have unduly proliferated, inhibiting energy research and production, and counterclaims that energy development has been undertaken without adequate environmental consideration and safeguards. A case in point was the proposed construction of the SOHIO pipeline to transport an estimated 500,000 barrels per day of Alaskan crude oil to Midland, Texas.1 After expending more than fifty million dollars and four years to obtain the 700 federal, state, and local permits needed for construction and operation,2 SOHIO abandoned the project in large part because of "environmental delays."3

Energy-related problems and projects have spurred the development of environmental law for years.4 Conversely, harmonizing com-

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* The statements and opinions expressed in this perspective are those of the authors, and do not represent the views of the Department of Energy.
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4. Greene County Planning Bd. v. Fed. Power Comm'n, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972), appeal after remand, 490 F.2d 256 (2d Cir. 1973); Calvert
peting energy development and environmental interests and goals remains one of the most elusive aspects of the strident energy controversy.

This energy/environment debate involves tremendous economic elements: how the losses resulting from the energy shortage should be apportioned, how the financing of new energy development is to be accomplished, and how energy profits should be divided. It also must consider other important factors including the effects of energy development on individuals' health and safety, the natural and man-made environment, daily and long-term living patterns, cultural values, and national defense. In all its aspects, the controversy involves difficult choices among fiercely competing interests.

As practitioners in the energy field, we perceive the lawyer's role in the energy/environment debate not only to serve as a facilitator—drafting contracts, regulations, litigating, participating in enforcement proceedings—but also to serve as an architect of solutions channeling the debate toward constructive action.

In structuring the Energy Developments section of this issue of the Ecology Law Quarterly, two difficulties emerged reflecting some of the problems encountered by energy law attorneys. First, though the initial drafts identified problems and potential solutions, the papers were steeped with discussions of the technology itself rather than the legal solutions. Second, a current analysis of the energy field and pending legislation was not easily achieved because of constant changes and new rulemaking.


5. In 1979, the net profits for 29 United States oil companies were 67% higher (a total of $22.3 billion) than earnings in 1978. Journal Groups' Profits Jump 67% in '79, OIL & GAS J., Feb. 18, 1980, at 60. According to one survey, the U.S. oil industry plans to spend almost $50.6 billion in domestic capital projects and exploration in 1980. U.S. Industry Spending to Hit Another Record, OIL & GAS J., Feb. 18, 1980, at 55.

Some years ago, various studies provided estimates of overall domestic capital requirements for energy self-sufficiency. The estimates range from $374 billion for the period 1971-85 (constant 1970 dollars), COMMITTEE ON U.S. ENERGY OUTLOOK, NATIONAL PETROLEUM COUNCIL, 1 U.S. ENERGY OUTLOOK: AN INTERIM REPORT 12 (1972), to one trillion dollars for the period 1975-85 (constant 1974 dollars), Horizontal Integration of the Energy Industry, Hearings Before the Subcomm. on Energy of the Joint Economics Comm., 94th Cong. 1st Sess. 49 (1975) (statement of C. Howard Hardesty, Jr., Vice Chairman, Continental Oil Co.).
Both the problems and the suggested solutions in the energy field are extremely technical and complex. They involve principles of physics, chemistry, medical science, engineering, and biology. Whether engaged in litigation, counselling, or policymaking, the lawyer must be able to cull, assimilate, and communicate the information necessary to accomplish the legal purpose at hand, translating the expertise of the engineer and scientist into the legal decisionmaking arena.

Complicating the technical obstacle is the fact that both the problems and solutions frequently involve gray, disputed areas. Controversies over the health effects of low levels of radiation offer a good example of this difficulty. Concentrated mass media reporting in recent years has sometimes resulted in a facile, generalized conclusion that low levels of radiation have caused significant numbers of cancers in certain populations, for example, workers in nuclear facilities, military and civilian participants in nuclear weapons testing, or members of the public residing near such facilities or testing sites. In evaluating administrative claims for compensation, undertaking litigation, proposing remedial legislation, and conducting nuclear licensing proceedings, the effects of low level radiation have required analysis and decisions by the legal community.

Generally not trained in science, the lawyer must not only serve as a translator and conduit of information, but must also be able to assess the relative importance to be given to dissenting opinions that may be out of step with prevailing scientific opinion. Often the lawyer has no scientific consensus, no single authoritative expert source to rely upon, and no single discipline to guide him in framing the dispositive issues.

A second difficulty faced in synthesizing the Energy Developments section has been the "moving target" problem. In all its aspects—technical, scientific, economic, political, legislative, and administrative—the energy/environment field is constantly changing. Technological breakthroughs are made daily; ongoing research reveals new solutions and new problems. International developments eliminate certain options and aggravate other pressures. Energy and environmental agencies at all levels of government are continually created, reorganized, eliminated, and reshuffled. An event such as the accident at Three Mile Island initiates a chain reaction of reviews, moratoriums, and revisions. Major regulatory controls are imposed, eliminated, and revised.

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DEVELOPING LEGAL ISSUES

The Developments in this issue discuss four central topics in the energy/environment debate. Coal, nuclear, and synthetic fuels (synfuels) issues are addressed, as well as controversies surrounding
some of the proposed organizations designed to facilitate energy development—notably, the proposed Energy Mobilization Board and Energy Security Corporation. As each of the mechanisms outlined in the Developments is implemented, a number of legal questions will arise. Each question must be adequately resolved for the mechanism to function as efficiently as possible. Below we discuss some of the issues raised by the four central topics dealt with in the preceding Developments that we see as particularly important to the energy/environment debate.

A. The Energy Mobilization Board

The proposed Energy Mobilization Board (EMB) raises numerous questions including the possibility that the EMB would be authorized to issue a decision when a state or federal agency fails to comply with an established Project Decision Schedule. Whether the procedural and substantive requirements normally governing the displaced agency would then govern the EMB, and whether the EMB could rely upon the incomplete record of the displaced agency remains to be clarified. It will also be interesting to see whether courts accord the EMB the same deference that is normally given an administrative agency with presumed expertise in a given field.6

The conferees have agreed on the scope of judicial review.7 They adopted a proposal similar to but more specific than the Senate proposal, which gave the Temporary Emergency Court of Appeals8 exclusive jurisdiction. For situations not enumerated in the bill, jurisdiction is left in the District Court.9 It appears from the conference report that the EMB need not appear as a party in agency or judicial proceedings.10 While it is a little unclear, it seems that EMB's decisions denying priority status to a project are subject to judicial review.11

A difficult and controversial question that faced the conferees was the EMB's authority to waive substantive federal law. To date, the bills have focused on the mechanical procedures for designating and fast tracking energy projects. The conferees agreement permits waiver of any federal, state, or local law enacted after application for priority

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11. See Conference Report, supra note 7, at H5489.
status has been made. The scope of the EMB's authority to waive state and local laws will be challenged by states concerned about federal pre-emption and state rights.

EMB proponents have argued that the purpose of the EMB legislation is not to endorse or approve a particular energy project, but rather to ensure decisionmaking by the appropriate federal, state, and local agencies in a coherent and timely fashion. Yet, the conferees' report specifically designates conversion of oil-fired power plants to coal as a high priority. Whether the provisions for fast tracking power plant conversions under the EMB will conflict with current lengthy administrative and judicial appeals of conversion orders under legislation governing coal-conversion is unclear.

B. Coal

Though the DOE estimates that coal supplies are sufficient to meet demands into 1981, there is some question about the sufficiency of future supplies. As the Surface Mining Control and Reclamation Act Development discusses, the Act establishes standards for land reclamation in strip-mined areas. An emerging issue may be whether the surface mining requirements conflict with the EMB's fast-tracking functions in the event of a coal shortage.

One of the provisions of the Act requires companies to reconstruct steep mine slopes to their approximate original contours. State officials have characterized such requirements as a "severe economic burden on coal production." On January 3, 1980, a federal district court ruled, in a suit brought by a Virginia coal industry group, that major portions of the Surface Mining Control and Reclamation Act were unconstitutional. The court enjoined the Department of Interior from enforcing its provisions, and from levying fines for violations. The Supreme Court has stayed the injunction.

The trial court found that there had been an unconstitutional displacement of state power in violation of the tenth amendment because the Federal Government had usurped the state government's power to

12. Id. at H5485.
13. Under the Powerplant Industrial Fuel Use Act, the current DOE timetable for the administrative appeals process is approximately 19 to 24 months.
15. See pages 762-73 supra.
make "essential decisions" in areas of traditional state authority.\textsuperscript{20} The court, however, failed to identify the criteria for defining an "essential decision." If the trial court decision were upheld, articulation of these criteria could have a significant impact on the EMB's authority to waive substantive federal law. If the federal steep slope reclamation provisions were eliminated, and the state established its own more lenient surface mining control program, could the EMB exercise its waiver or suspension authority and impose different standards? Would such action violate the tenth amendment proscription on invading the state's authority to make "essential decisions"?

The Development on the Powerplant and Industrial Fuel Use Act (PIFUA) notes that the Department of Energy (DOE) may in its discretion grant an exemption from the Act's coal conversion requirements.\textsuperscript{21} The issues of who has standing to initiate or participate in exemption proceedings, of the extent of due process, and of the parameters of the Administrative Procedure Act in these proceedings remain to be addressed in future administrative and judicial actions. Must the reasons underlying the DOE's decision be specified? Must there be a uniform, objective standard guiding exemption decisions, or may decisions be inconsistent?

The Development also states that the DOE, in considering exemption petitions, may ignore local regulations that were clearly established to aid the facility to evade PIFUA policies by precluding the use of coal or alternative fuels.\textsuperscript{22} This rule may leave a company in a bind between the DOE and local government requirements, in turn raising constitutional issues, as well as questions of fairness. For example, if the local requirement is to be set aside, who has the burden of initiating an appropriate proceeding to do so?

The relationships between PIFUA and other statutes need clarification. For example, would the grant or denial of an exemption or group of exemptions constitute a "major federal action" requiring an environmental impact statement? Would the DOE have to consider the environmental and health aspects of the alternative energy source in making its exemption decision? Could a state sue a neighbor under the Clean Air Act Amendments of 1977 to prevent implementation of a coal conversion order issued under PIFUA if the resulting pollution crosses state boundaries and uses up the state's non-significant deterioration increment?\textsuperscript{23} Would the EPA have authority to prohibit the coal

\begin{footnotes}
\item[21] See pages 774-80 supra.
\item[22] Id.
\end{footnotes}
conversion by revising the polluting state's implementation plan?

From a policy as well as a legal perspective it will be interesting to see how decisionmakers reconcile energy regulations that may have conflicting impacts. In 1978, when PIFUA was adopted, Congress also enacted the Natural Gas Policy Act of 1978.24 The intent was to provide incentives for increased domestic production of natural gas.25 The immediate result was an excess supply and corresponding reduction in intrastate prices,26 which encouraged utilities to burn more natural gas. PIFUA, however, limits the use of natural gas as a primary fuel source unless the generating facility receives an exemption from DOE. Whether Congress realized that PIFUA would have a depressive effect on the natural gas market is uncertain, but according to DOE statistics the production of natural gas has dropped sharply, and producers appear to be withholding production until higher prices can be obtained.27

Regarding the new source performance standards for coal-fired electric power plants, we wonder whether environmentalists' challenges to the standards, discussed in that Development,28 are misdirected and should focus instead on seeking more stringent sulfur standards for the existing generating facilities that are the primary source of acid-rain in the Midwest and Northeast.

The DOE is currently planning to submit a bill to encourage existing power plants to use fuels other than oil, primarily coal. This action will intensify the debate over the need for revised emission standards for these facilities. Phase I of the legislation would parallel PIFUA, but would identify the plants capable of converting to coal, while phase II would provide an economic incentive for the conversion. The issues raised by this action include whether stricter emission standards should be imposed following conversion, what incentives should be provided to encourage use of innovative technology, and whether different standards should be promulgated to control this unproven technology.

A related issue stems from the EPA proposal to regulate radioactive air pollutants. On December 27, 1979, the EPA announced its intention to develop emission limitation standards by categories of sources for carcinogenic and mutagenic radionuclides.29 Still in the tentative stages of discussion, the EPA is considering such categories as

27. Id.
28. See pages 748-61 supra.
29. 44 Fed. Reg. 76,738 (1979). A University of Texas study suggests that bone radia-
new and existing coal-fired power plants in urban areas. Should the EPA seek to regulate these facilities, it will be interesting to see how existing ambient air quality standards and the new source performance standards are integrated, set aside, or modified, and whether such regulation will impede the Department of Energy's proposal to convert oil-fired power plants to coal.

C. Synfuels

The synfuels Development poses questions about the legal viability of the synfuels program in light of environmental regulatory uncertainties. For example, most proposed synfuels projects are to be located near the primary sources, usually in areas where the air quality complies with the primary and secondary air quality standards. It is unclear how the preliminary decision in *Alabama Power Co. v. Costle*, which has created some uncertainty over how the prevention of significant deterioration (PSD) requirements are to be applied to industrial facilities, will affect the siting and construction feasibilities of synfuels plants. Moreover, regulatory clarification is not expected in the near future since the EPA is only in the preliminary stages of drafting regulations.

During the rush to bring synfuels technology to the commercialization stage, environmentalists have expressed concern over federal agencies' perfunctory compliance with, or total disregard of, the environmental impact statement requirement. The DOE Advisory Panel on synfuels recently criticized the DOE for not having prepared an extensive environmental impact statement for the overall synfuels program before federal aid was given. The absence of a comprehensive, generic environmental impact statement may raise the question of whether the DOE has undertaken a "major action" in violation of the National Environmental Policy Act (NEPA).

Furthermore, the Development's discussion of Senate bill 932 suggests that no actions of the proposed Federal Energy Security Corporation would be considered major federal actions requiring NEPA

30. See pages 781-89 *supra*.
31. 606 F.2d 1068 (D.C. Cir. 1979).
32. In areas where the air is cleaner than required by the national ambient air quality standards, emissions are regulated to prevent significant increases in ambient concentrations of particulate matter and sulfur dioxide. *See generally* Clean Air Act §§ 170-179, 42 U.S.C. §§ 7470-7479 (Supp. I 1977).
33. The National Environmental Policy Act of 1969 requires that environmental impact statements be prepared for each "major federal action" significantly affecting the quality of the human environment. 42 U.S.C. § 4332(c) (1976).
review, since the bill's primary purpose is to make financial support available to aid development of the private synfuels industry. If this conclusion proves correct, it will be interesting to follow the impact of this reasoning throughout the NEPA field, since federal financial support has long been a primary criterion for requiring NEPA review.

Synfuels development also faces an obstacle in the piecemeal manner in which it is regulated, through legislation like the Clean Air Act, Clean Water Act, NEPA, Surface Mining Control and Reclamation Act of 1977, and local land use controls. Proponents of this energy alternative are concerned that the lack of a coherent regulatory framework will cause costly delays. Because the environmental impacts of synfuels development are not fully known, there is an equal concern that regulation of this energy field will be inconsistent and continuously in flux. Based on the fate of other energy facilities, such as the SOHIO project, it would appear that these concerns are not misplaced. The regulatory uncertainties will significantly impede synfuels development unless cohesive and clarifying legislation is enacted.

D. Nuclear

The nuclear-related Developments discuss three critical aspects of nuclear power today: nuclear waste management, reactor emergencies, and the long-term effects of nuclear energy activities.

A common concern running through each of these Developments is maintenance of public confidence in the safety standards regulating the uranium fuel cycle. The promulgation and implementation of the standards rests with three primary agencies: the EPA, the Nuclear Regulatory Commission (NRC), and the DOE. The EPA focuses on radiation protection problems, preparing guidelines limiting cumulative impacts to the general environment and promulgating the ambient standards for classes of facilities. In implementing the standards set

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36. See page 788 supra.
38. See 40 C.F.R. § 1508.18 (1979); Homeowners Emergency Life Protection Committee v. Lynn, 541 F.2d 814, 817 (9th Cir. 1976); Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245 (7th Cir. 1976); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 14 (8th Cir. 1973).
43. SYNFUELS, Nov. 23, 1979, at 1, 2.
44. The term "uranium fuel cycle" is used to encompass environmental releases of radioactive materials resulting from uranium milling, chemical conversion, isotopic enrichment, fuel fabrication, nuclear power reactors, and fuel reprocessing. See 40 C.F.R. pt. 190 (1979).
45. EPA's jurisdiction in the field of radiation protection standards was established by Reorganization Plan No. 3, § 2(a)(6)-(7), 35 Fed. Reg. 15,623-24 (1970). It transferred to
by the EPA, the NRC regulates the radioactive releases from commercial facilities to ensure that the cumulative environmental impacts comply with EPA standards. This bifurcation of standard setting and implementation authority has resulted in interagency disputes, which may further dilute the public's confidence and give rise to legal challenges.

For example, the Uranium Mill Tailings Development states that the EPA was required to establish protection standards for radioactive emissions from tailings at inactive uranium mill sites by November 1979. As of April 1980, the EPA has not published the proposed standards, and the NRC has argued that the delay has prevented it from undertaking any remedial action. Moreover, the DOE has not been able to enter into cooperative agreements with affected states to clean up mill sites since the standards are unknown. In order to permit the two agencies to begin operations, the EPA is planning to issue interim guidelines and propose them for final consideration at the same time, with the understanding that the final regulations be no more stringent than the interim guidelines. This raises the question of whether public and industry participation in the rulemaking has been effectively eliminated, in violation of the Administrative Procedure Act.

With respect to the controversy concerning post-reactor radioac-
tive waste, the NRC has taken the position that the EPA does not have authority to impose requirements on disposition of high-level waste. Nonetheless, within the next eighteen months, the EPA is proposing to develop generally applicable environmental radiation standards relating to disposal operations for high-level waste. The NRC argues that the disposal and storage of high-level waste is within its exclusive jurisdiction, yet it acknowledges that it has not developed any protection standards. Though the jurisdictional dispute may only be resolved by Executive office intervention, the substantive problem of developing proper standards for storing and disposing nuclear waste remains unanswered.

CONCLUSION

We are concerned by the apparently defensive attitude toward environmental delays in the development of energy. If preservation and improvement of the natural and human environment is an essential national interest, then delays to incorporate thorough environmental reviews, assessments, and values should be a price frankly accepted and defended. Political realities, of course, must be recognized and managed. From a practitioner's perspective, we perceive that environmental concerns are increasingly being set aside, despite rhetoric to the contrary, as the energy problem and its impact on the national economy becomes greater.\(^5\)

Proper development of energy resources, however, requires neither stubborn obstruction of every major development proposal nor resigned acceptance of a lessened concern for the environment. We submit that environmentalists and energy proponents need to develop a coherent, pragmatic strategy integrating energy development goals and environmental concerns.

It is inevitable that the nation will insist upon the development of alternative domestic energy sources. In view of the decline in domestic energy production and the increase in consumption,\(^5\) it is essential to develop a workable environmental protection strategy for energy devel-

50. The DOE was recently criticized by its own Synfuels Advisory Board for treating environmental statements as "extrinsic constraints to the execution of the project rather than as an integral part." SYNfuels, Feb. 8, 1980 at 4, 5.

51. In 1978, total energy production in the United States was approximately three percent less than in 1972, the year before the embargo. Energy Information Administration, United States Department of Energy, 2 Annual Report to Congress 1978, at 5 (1979). According to DOE statistics, domestic energy production peaked in 1972 and has since declined. Id. During the same period, total energy consumption rose by nine percent. Id. at 6. The United States made up most of the difference by increasing oil imports which now account for approximately 50% of all the oil consumed in the U.S. Id. at 3. The cost of importing crude oil and petroleum products in 1972 was $4.36 billion; the 1978 cost was $39.53 billion. Id. at 15.
opment. As energy law practitioners, we see the need to incorporate certain assumptions as the basis for such a strategy.

First, conservation on a large scale should be clearly identified and promoted as the first priority goal. To date, it has not received the same level of active promotion as some other energy technologies, despite the fact that conservation is cost-competitive with other energy sources.52

Second, even if it is implemented on a large scale, conservation alone is not enough.53 Conservation can provide the energy for transition into the 1990's, but it cannot be substituted as a primary future fuel source. In the meantime, research and demonstration projects for alternative energy sources must continue.

Third, the environmental protection strategy should be flexible, in keeping with the uncertainties in our present understanding of the environment. For example, it is clear that the current environmental information base for many of the governmentally funded research programs, such as synfuels, is not as complete as needed. Energy proponents and environmentalists must, however, realize that such uncertainties are inherent in any program intended to bring to commercialization a set of technologies that are still untried. We do not have sufficient information to select an alternative as environmentally superior, nor do we have sufficient data to exclude a given technology from further consideration.

Fourth, recognizing the limited monetary and personnel resources of environmental interests, environmentalists and energy proponents should identify areas of fundamental concern where the debate might focus. Indiscriminate challenges could be wasteful, fruitless, and in some cases counterproductive. For example, had this been done on the SOHIO pipeline project, emphasis on overall environmental considerations might have prompted the seeking of realistic modifications to the project rather than total opposition. The posture of total opposition engendered intransigence and bitterness between the interested parties and may have jeopardized future projects. Had Congress enacted legislation to set aside local pollution regulations,54 the potential environmental degradation would have been significant.

Fifth, utilizing the recent amendments to the NEPA regulations,55

55. Among the key amendments to NEPA are: suggesting the maximum page length of an EIS, 40 C.F.R. § 1502.7 (1979); requiring an EIS to discuss energy requirements and conservation potential of various alternatives and mitigation measures, id. § 1502.16(e); and providing that at the time of decision the agency shall also prepare a concise public record
the environmental strategy should focus on ensuring effective integration and assessment of environmental data in energy policy and funding decisions. As noted by the Council on Environmental Quality, "[t]he usefulness of the NEPA process to decisionmakers has been jeopardized in recent years by the length and complexity . . ." of the EIS process. Relevant environmental information is essential to a reasoned choice among alternatives, but its significance can only be measured if the data becomes a meaningful part of the complete decisionmaking process.

The environmental strategy should have several objectives, including: a) to assist in evaluating specific projects which are proposed to be included in the future energy mix; b) to prevent or mitigate significant adverse environmental impacts that may result from these projects; and c) to develop a more complete information base for determining whether and how best to utilize the technical information gathered from demonstration projects. The development of an environmental strategy should be of the highest priority for both public interest and industry groups. Through coordinated efforts, the development of energy alternatives in an environmentally responsible manner can be achieved.

stating its final decision. *Id.* § 1505.2. The provision requiring a concise public record was one of the most strongly supported amendments. 43 Fed. Reg. 55,985 (1978) If an environmentally preferable alternative was not selected, that section now requires the agency to indicate the specific national policies that overrode the alternatives. 40 C.F.R. § 1505.2(b) (1979). According to the CEQ comments,

'[t]he primary purpose of requiring a decisionmaker to concisely record his or her decision in those cases where an EIS has been prepared is to tie means to ends, to see that the decisionmaker considers and pays attention to what the NEPA process has shown to be an environmentally sensitive way of doing things. Other factors may, on balance, lead the decisionmaker to decide that other policies outweigh the environmental ones, but at least the record of decision will have achieved the original Congressional purpose of ensuring that environmental factors are integrated into the agency's decisionmaking.


56. *Id.* at 55,978, 55,983 (1978). The CEQ went on to note that "[a]n unread and unused document [EIS] quite simply cannot achieve the purpose Congress set forth." *Id.* The regulatory preamble stated that:

There was broad consensus among these diverse witnesses. All, without exception, expressed the view that NEPA benefited the public. Equally widely shared was the view that the process had become needlessly cumbersome and should be streamlined. Witness after witness said that the length and detail of EISs made it difficult to distinguish the important from the trivial. The degree of unanimity about the good and bad points of the NEPA process was such that at one point an official spokesperson for the oil industry rose to say that he adopted in its entirety the presentation of the President of the Sierra Club.

*Id.* at 55,980.