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# Coal Conversion and Amendments to the Clean Air Act

*Daniel J. Snyder, III\**  
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## I. INTRODUCTION

On June 22, 1974, the Congress of the United States enacted the Energy Supply and Environmental Coordination Act (ESECA)<sup>1</sup> to provide for a national coal conversion program in order to conserve petroleum products and natural gas and to increase the use of coal. In the words of the statute, the purpose of the Act was "to provide for a means to assist in meeting the essential needs of the United States for fuels, in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment . . . ."<sup>2</sup>

Section 2(a) of ESECA,<sup>3</sup> as amended by the Energy Policy and Conservation Act of 1975,<sup>4</sup> authorizes the administrator of the Federal Energy Administration (FEA) to issue orders to major fuel consumers prohibiting them from burning natural gas or petroleum products as the primary energy source until January 1, 1985. As a balancing force, § 3 of ESECA was added to the Clean Air Act<sup>5</sup> as a new § 119.<sup>6</sup> This amendment to the Clean Air Act requires the administrator of the Environmental Protection Agency (EPA) to insure that the air quality requirements of the Clean Air Act are

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1. Pub. L. No. 93-319, 88 Stat. 246 (codified at 15 U.S.C. §§ 791-98 (Supp. IV, 1974), as amended (Supp. V, 1975) and in scattered sections of 42 U.S.C.).

2. ESECA § 1(b), 15 U.S.C. § 791 (Supp. V, 1975).

3. *Id.* § 792.

4. Pub. L. No. 94-163, § 101, 89 Stat. 875, amending 15 U.S.C. § 792 (Supp. IV, 1974) (now codified at 15 U.S.C. § 792 (Supp. V, 1975)).

5. 42 U.S.C. §§ 1857-571 (1970), as amended (Supp. V, 1975).

6. *Id.* § 1857c-10.

coordinated with the coal conversion provisions of ESECA.

The newly added § 119 of the Clean Air Act sets up the following coordination mechanism to be utilized by the EPA Administrator in response to the issuance of an FEA prohibition order:

An [FEA prohibition] order . . . shall not become effective until (i) the Administrator of the Environmental Protection Agency notifies the Federal Energy Administrator under [section 119(d)(1)(B) of the Clean Air Act] that such plant or installation will be able on and after July 1, 1975, to burn coal and to comply with all applicable air pollution requirements without a compliance date extension under [section 119(c) of such Act], or (ii) if such notification is not given, the date which the Administrator of the Environmental Protection Agency certifies pursuant to [section 119(d)(1)(B) of such Act] is the earliest date that such plant or installation will be able to comply with all applicable requirements of such [section 119]. Such order (or modification) shall not be effective during any period certified by the Administrator of the Environmental Protection Agency under [section 119(d)(3)(B) of such Act].<sup>7</sup>

This statutory scheme for coordination between FEA and EPA was translated into an operable program with regulations and guidelines which are as intricate as the statute itself.

It is the intent of this paper to outline the environmental and energy concerns which led to passage of ESECA, describe the operation of ESECA, show how expected amendments to the Clean Air Act will change this operation, and comment on future interaction between environmental and energy considerations.

## II. ENVIRONMENTAL AND ENERGY CONCERNS LEADING TO ESECA

### A. *State Implementation Plans (SIP's) and Sulfur Oxides (SO<sub>x</sub>)*

State implementation plans (SIP's) were developed in response to the statutory mandate contained in § 110(a)(1)<sup>8</sup> of the Clean Air Act which required each state to adopt and submit to the EPA Administrator, within nine months after the promulgation of a national primary ambient air quality standard (primary standards), a plan

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7. 15 U.S.C. § 792(b)(3)(B) (Supp. V, 1975).

8. 42 U.S.C. § 1857c-5 (1970), *as amended* (Supp. V, 1975).

providing for implementation, maintenance and enforcement of each primary standard in the air quality control regions within that state. Section 110 also contained a similar requirement for each state to plan for the attainment of the secondary ambient air quality standards (secondary standards).<sup>9</sup> Section 109<sup>10</sup> defined primary standards as that ambient air quality standard which must be obtained and maintained in order to protect the public health. Secondary standard was defined as that ambient air quality standard necessary "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."<sup>11</sup>

In April of 1971, EPA published standards for the following major air pollutants: sulfur dioxide (SO<sub>2</sub>), particulate matter, carbon monoxide (CO), hydrocarbons (HC), nitrogen oxide (NO<sub>x</sub>), and photochemical oxidants.<sup>12</sup> By establishing a primary standard for sulfur oxides (SO<sub>x</sub>), EPA jumped feet first into what was to become a major controversy involving the issues of clean air and increased energy supply.

The controversy arose from the fact that fuel combustion at power plants, factories, residential and commercial sources accounts for almost 80 percent of sulfur oxide emissions and over 25 percent of particulate emissions.<sup>13</sup> In 1972, for example, power plants alone emitted over 17 million tons or nearly 60 percent of the total SO<sub>x</sub> emitted in that year.<sup>14</sup> Thus, the need to control SO<sub>x</sub> emissions from power plants was evident if primary standards were to be attained and maintained. The crucial point, however, in terms of the controversy between environmental improvement and increased coal utilization was that in 1972 *coal-fired power plants* emitted nearly 16 million tons of SO<sub>x</sub> (out of over 17 million tons of SO<sub>x</sub> emissions for all power plants). The 16 million tons emitted from *coal-fired plants* accounted for over 50 percent of the SO<sub>x</sub> emissions in 1972.<sup>15</sup>

There were two basic options which could be used to ensure that

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9. *Id.* § 1857c-5(b).

10. Clean Air Act § 109, 42 U.S.C. § 1857c-4 (1970).

11. *Id.* § 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970).

12. 40 C.F.R. §§ 50.4-.11 (1975).

13. COUNCIL ON ENVIRONMENTAL QUALITY, FIFTH ANNUAL REPORT 118 (1974) [hereinafter cited as FIFTH ANNUAL REPORT].

14. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL PUBLIC HEARINGS ON POWER PLANT COMPLIANCE WITH SULFUR OXIDE AIR POLLUTION REGULATIONS 1 (January 1974).

15. *Id.* at 11.

power plants complied with SO<sub>x</sub> emission limitations: (1) removal of sulfur oxide gases after combustion with flue gas desulfurization (FGD) systems—a capital intensive, technological solution which would accommodate high-sulfur fuels, or (2) burn low-sulfur fuels—a cheaper resource-oriented solution which would depend on natural gas, low-sulfur oil, or low-sulfur coal. Since original estimates predicted that FGD technology generally would not be available until after 1975,<sup>16</sup> the low-sulfur fuel option appeared to be the more practical and acceptable action.

As a result of the relative attractiveness of using low-sulfur fuels to control SO<sub>x</sub> emissions in order to attain and maintain air quality standards for SO<sub>2</sub>, many states regulated the maximum sulfur content of oil or coal which could be burned in power plants.<sup>17</sup>

In opting for low-sulfur fuels to comply with air quality standards, some states (but not Pennsylvania) submitted SIP's for EPA approval which required achievement by 1975 of not only the primary standard for SO<sub>2</sub> but also the more stringent secondary standard. Attainment of health-related primary standards was required by the Clean Air Act within three years from the date of approval of the SIP<sup>18</sup> but attainment of the more stringent secondary standards was required only within a "reasonable time." Additionally, many states imposed the SO<sub>x</sub> emission limitation throughout the state thereby requiring low-sulfur fuels even in areas of the state meeting both primary and secondary standards.<sup>19</sup> Thus, many SIP's included what is known as "SIP overkill"—a situation which ESECA addressed in an amendment to § 110(a) of the Clean Air Act requiring EPA review of each state's implementation plan.<sup>20</sup> The effect of SIP

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16. SULFUR OXIDE CONTROL TECHNOLOGY PANEL, FINAL REPORT ON PROJECTED UTILIZATION OF STACK GAS CLEANING SYSTEMS BY STEAM-ELECTRIC PLANTS 7-9 (1973).

17. FIFTH ANNUAL REPORT, *supra* note 13, at 118.

18. Clean Air Act § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970), *as amended* (Supp. V, 1975).

19. COUNCIL ON ENVIRONMENTAL QUALITY, FOURTH ANNUAL REPORT 162 (1973).

20. ESECA § 4(a), Pub. L. No. 93-319, § 4(a), 88 Stat. 246, *amending* 42 U.S.C. § 1857c-5(a)(3) (1970) (codified at 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. V, 1975)) provides:

(a) Section 110(a) of the Clean Air Act is amended in paragraph (3) by inserting "(A)" after "(3)" and by adding at the end thereof the following new subparagraph.

"(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If

overkill was substantial in terms of emphasizing an emerging trend of decreased coal consumption by power companies. As originally submitted to EPA, the overly stringent SIP's would have prevented use of approximately 155 million tons of domestic high-sulfur coal per year. This domestic high-sulfur coal would be replaced by approximately 584 million barrels of imported low-sulfur oil.<sup>21</sup>

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the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission."

21. President's April 18, 1973 Message to Congress on Energy, 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 389 (1973).

The emerging trend of decreased coal consumption which was accelerated by overly stringent SIP requirements was discussed by Donald G. Allen, Vice President of the New England Electric System, in testimony before the Senate Public Works Committee in June of 1975:

Traditionally the major fuel utilized by our industry to produce electricity has been coal. In recent years, however, the percentage of electricity produced by coal has declined. The trend was primarily the result of two factors.

The first factor was cheaper alternate fuels. Residual oil could be obtained by utilities at lower delivered prices on the East and West Coasts and on the Great Lakes at plants to which oil could be barged. While coal prices at the mines remained substantially the same in the 1960's, transportation costs rose substantially through a series of almost annual across-the-board national rail tariff increases.

The second major factor that accelerated the decline in coal's percentage of production of electricity was the imposition of air pollution control restrictions in the late 1960's and the acceleration of that process by the passage of the Clean Air Act in 1970. Because of fuel composition availability and cost and the uncertainties and costs of alternative control technologies, many utilities shifted from coal to oil at existing plants . . . and elected to build new plants fired by oil instead of coal. . . . In many instances, oil meeting the requirements for complying sulfur content specified in State Implementation Plans has been attainable more readily, and at lower delivered prices, than has complying coal. . . . This made substantial quantities of Eastern and Midwestern [high-sulfur] coal unusable, and the resulting shortages of complying low sulfur coal forced prices upward, again giving oil a competitive advantage.

During this period, utilities on the East and West Coasts became increasingly dependent on oil and utilized little if any coal. In the Northeast, the deterioration of the rail systems, highlighted by the bankruptcy of the Penn-Central, accelerated this shift. . . . To summarize, the factors tipping the economic balance against coal and in favor of oil were (1) world oil prices, (2) Federal import policies, (3) Federal and State air pollution control regulations, especially SIP overkills and (4) coal rail transportation costs and rail car shortages.

*Hearings on S. 1777 on Greater Coal Utilization before the Senate Comm. 's on Interior and Insular Affairs and Public Works, 94th Cong., 1st Sess., ser. 18, pt. 2, at 862-65 (1975) [hereinafter cited as 1975 Greater Coal Utilization Hearings].*

### B. *Energy Crisis and the Move Back to Coal*

In October 1973 war again broke out in the Middle East and oil became a major weapon in the renewed conflict. The oil-producing Arab states imposed an oil boycott upon the United States. Prior to the boycott, 25 to 30 percent of the residual oil consumed in the New England and Middle Atlantic states (the states hit heaviest by the boycott) was imported from the Middle East. Most of this imported oil had a low-sulfur content.<sup>22</sup> A winter heating oil shortage which was somewhat anticipated suddenly developed into a general oil crisis which pitted clean air concerns against concern for national energy independence.

EPA responded to this sudden crisis in the winter of 1973-74 by encouraging short-term variances from state sulfur content regulations and, where possible, power plant conversions from oil to coal.<sup>23</sup> Thus, the passage of ESECA in June of 1974 with its purpose of promoting the conversion of power plants *from oil to coal* was a continuation of action initiated after the Arab oil boycott and was an attempt to reverse an established trend among power plants of converting *from coal to oil*.

## III. THE ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974 (ESECA)

### A. *How ESECA Functions*

Under § 2 of ESECA, the Federal Energy Administration may require that oil burning and natural gas burning power plants and other major fuel consumers convert from natural gas or petroleum products as a primary energy source to coal<sup>24</sup> by issuing a prohibition order. In issuing a prohibition order, FEA must insure that the following criteria are met: (1) that the plant or installation has the capability and the necessary plant equipment to burn coal; (2) that such a conversion would be practicable and consistent with the purposes of ESECA; (3) that adequate coal supplies and coal transportation facilities be available while the order is to be in effect; and (4) in the case of a power plant conversion, that the reliability of electric service provided by the power plant will not be impaired.

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22. FIFTH ANNUAL REPORT, *supra* note 13, at 119.

23. *Id.*

24. ESECA §§ 2(a)(1), (2), 15 U.S.C. §§ 792(a)(1), (2) (Supp. V, 1975).

After making the above findings, FEA would then issue a prohibition order prohibiting the use of natural gas or petroleum products as a primary energy source, thus requiring conversion to coal by the affected power plant.

The prohibition order is not effective, however, until EPA reaches conclusions on certain air quality issues as required by § 119 of the Clean Air Act.<sup>25</sup> EPA must specify the earliest date upon which the order may become effective either by notifying the FEA Administrator that the source for which a prohibition order is being issued (ordered source) can immediately burn coal in compliance with all applicable air pollution requirements without a "compliance date extension" or by certifying to FEA the earliest date prior to January 1, 1979 on which the ordered source will be able to burn coal in compliance with all applicable air pollution requirements.<sup>26</sup> If EPA concludes that the ordered source cannot comply immediately but can comply with existing SIP emission limitations prior to January 1, 1979, one of two possible certifications must be made: (1) if the ordered source is eligible for a "compliance date extension," then the certification date is the earliest date on which the ordered source will be able to comply with any "primary standard conditions" and/or "regional limitations" applicable to the ordered source; (2) if the ordered source is not eligible for a "compliance date extension," the certification date is the earliest date on which the ordered source will be able to burn coal in compliance with all applicable air pollution requirements.<sup>27</sup>

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25. 42 U.S.C. § 1857c-10 (Supp. V, 1975).

26. Clean Air Act § 119(d)(1)(B), 42 U.S.C. § 1857c-10(d)(1)(B) (Supp. V, 1975).

27. Clean Air Act §§ 119(d)(1)(B) to (2)(B), 42 U.S.C. §§ 1857c-10(d)(1)(B) to (2)(B) (Supp. V, 1975) provides:

(B) Whenever the Federal Energy Administrator issues an order under section [2(a) of ESECA] which will apply after June 30, 1975, the Administrator of the Environmental Protection Agency shall *notify* him if such source will be able, on and after July 1, 1975, to burn coal and to comply with all applicable air pollution requirements without a *compliance date extension* under subsection (c). If such notification is not given—

(i) in the case of a *source which is eligible for a compliance date extension* under subsection (c), the Administrator of the Environmental Protection Agency shall *certify* to the Federal Energy Administrator the date determined under paragraph (2)(B) of this subsection, and

(ii) in the case of a *source which is not eligible for such an extension*, the Administrator of the Environmental Protection Agency shall *certify* to the Federal Energy Administrator the earliest date on which the source will be able to burn coal and to comply with all applicable air pollution requirements.

The certification date procedure just described involves a complicated interaction of three terms of art: (1) eligibility for "compliance date extension" which is the threshold consideration for application of (2) "primary standard condition" and (3) "regional limitation."

B. *Compliance Date Extension (CDE), Primary Standard Condition, and Regional Limitation*

Eligibility for a compliance date extension (CDE) is outlined in the *Code of Federal Regulations*.<sup>28</sup> The following criteria must be met by a source which has been issued an FEA prohibition order in order to qualify for a CDE:

(1) The ordered source will not be able to burn available coal in compliance with all applicable air pollution requirements without a compliance date extension which would extend existing air pollution requirements for that source.<sup>29</sup>

(2) The ordered source must have submitted to EPA an approvable plan for compliance which must include the following elements: (a) the date by which the ordered source will execute a contract for a long-term supply of low-sulfur coal which would permit the ordered source to be in compliance with existing SIP requirements (even if SIP contains overkill) no later than December 31, 1978, or the date by which the ordered source will execute contracts for long-term supply of coal and continuous emission reduction systems (e.g., FGD) which would permit the ordered source to be in compliance with

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(2)(A) The Administrator of the Environmental Protection Agency, after consultation with appropriate States, shall prescribe (and may from time to time, after such consultation, modify) emission limitations, requirements respecting pollution characteristics of coal, or other enforceable measures for control of emissions . . . for each source to which a compliance date extension under subsection (c)(1) of this section will apply. Such limitations, requirements, and measures shall be those which he determines must be complied with by the source in order to assure (throughout the period that the suspension or extension will be in effect) that the burning of coal by such source will not result in emissions which cause or contribute to concentrations of any air pollutant in excess of any national primary ambient air quality standard for such pollutant.

(B) Whenever the Administrator prescribes a limitation, requirement, or measure under subparagraph (A) of this paragraph with respect to a source, he shall determine the earliest date on which such source will be able to comply with such limitation, requirement, or measure, and with any regional limitation applicable to such source.

*Id.* (emphasis added.)

28. 40 C.F.R. §§ 55.01-.09 (1975).

29. *Id.*

*existing* SIP requirements no later than January 1, 1979; (b) the dates by which any necessary construction for plant modifications or installation of continuous emission reduction systems will be initiated and completed; and (c) a commitment by the ordered source to take action "to prevent imminent and substantial endangerment to the health of persons" when such action is considered necessary by the EPA Administrator.<sup>30</sup>

(3) The ordered source during the term of the CDE will be able to comply with an applicable "primary standard condition" and "regional limitation."

(4) The ordered source in its conversion to coal will not create a significant risk to public health from pollutants which have no promulgated air quality standard.<sup>31</sup>

Primary standard conditions<sup>32</sup> and regional limitations<sup>33</sup> were designed to be applied independently of each other. In a situation in which there is no regional limitation, EPA may grant the converting source which is subject to the FEA prohibition order a compliance date extension and require as a primary standard condition of that CDE (assuming source eligibility) control of emissions only to the point that primary standards are met.<sup>34</sup>

The regional limitation procedure is somewhat more complex, interesting, and controversial. If an ordered source is located in an air quality control region in which a primary standard for a pollutant is not being met, a regional limitation applies as to that pollutant. Thus, EPA *cannot* authorize the ordered source via a primary

30. *Id.* § 55.04(a)(2).

31. Clean Air Act § 119(d)(3)(B)(iii), 42 U.S.C. § 1857c-10(d)(3)(B)(iii) (Supp. V, 1975).

32. "Primary standard condition" is defined in 40 C.F.R. § 55.02(d) (1975):

"Primary standard condition" means an emission limitation, requirement respecting pollution characteristics of coal or any other enforceable measure for control of emissions prescribed by the Administrator (after consultation with appropriate States) for each source to which a compliance date . . . will apply, for the purpose of assuring . . . that the burning of coal by such source will not result in emissions which cause or contribute to concentrations of any air pollutant in excess of any national primary ambient air quality standard for such pollutant.

33. "Regional limitation" is defined in 40 C.F.R. § 55.02(e) (1975):

"Regional limitation" means the requirement that a source which is located in an air quality control region in which a national primary ambient air quality standard for an air pollutant is being exceeded in that region, may not emit such pollutant in amounts which exceed any emission limitation (and may not violate any other requirement) which applies to such source, under the applicable implementation plan for such pollutant.

34. ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE FOR REGIONAL LIMITATION DETERMINATIONS UNDER ESECA 1 (1975).

standard condition to control emissions only to the point of compliance with primary standards. Rather, where a regional limitation applies for a pollutant, EPA must ensure that the ordered source will not violate the emission limitation or any other requirement for that pollutant contained in the implementation plan.<sup>35</sup> The option of temporarily reducing SIP overkill in the plan by applying a primary standard condition is foreclosed if the ordered source is located *anywhere* within an air quality control region in which pollutant concentrations are found in excess of the national primary ambient air quality standard.

A logical question to ask regarding a regional limitation is why have a compliance date extension if the ordered source must comply with all limitations and requirements of an applicable SIP. An answer to this question was proposed in an EPA Office of General Counsel Opinion Memorandum:

The argument that it makes no sense to have a compliance date extension that in most cases will not extend anything overlooks the fact that, quite apart from any such extension, grant of a compliance date extension is the mechanism by which a source becomes subject to a binding compliance schedule for both burning coal and complying with SIP requirements. Section 119(c)(2)(A)(iii). Requiring such a compliance schedule makes complete sense as a policy under the statute.

The purpose of ESECA, as stated in Section 1(b), is "to provide for a means to assist in meeting the essential needs of the United States for fuels, in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment." Where the regional limitation applies, this purpose is to be realized by converting plants to coal as soon as they are able to comply with the applicable implementation plan provisions as the regional limitation requires.<sup>36</sup>

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35. Clean Air Act § 119(c)(2)(D), 42 U.S.C. § 1857c-10(c)(2)(D) (Supp. V, 1975).

36. Environmental Protection Agency, Office of General Counsel Opinion Memorandum, Oct. 15, 1975. That memorandum continued:

A reading of the statute that requires sources subject to the regional limitation to submit compliance schedules for conforming to it will serve this purpose far better than one that does not.

When a coal conversion order is issued to a source by FEA, EPA must then certify to FEA the earliest date on which that source will be physically able to burn coal and comply with SIP requirements, § 119(d)(2)(B). Under section 2(b)(3)(B) of ESECA, the certified date then becomes the earliest date on which the FEA order can become effective.

To summarize the existing situation under ESECA, the statute provides for the FEA under § 2(a)<sup>37</sup> to prohibit power plants and other major fuel burning installations from using petroleum products or natural gas as the primary energy source thus mandating conversion to coal if certain basic criteria of plant capability, practicability, adequacy of coal supply, and continued reliability of electric service are met. Section 3 of ESECA, included as an amended § 119 to the Clean Air Act<sup>38</sup> requires EPA action to establish the effective date upon which the ordered source can either immediately or at some future date burn coal in compliance with applicable air pollution requirements. For those ordered sources which upon conversion to coal could not immediately comply with pollution control requirements, a compliance date extension may be available to ac-

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The mere act of predicting when the source would be physically able to burn coal and comply with SIP requirements, however, does nothing to ensure that it will actually take the steps to make that prediction come true. Nor will the pre-existing SIP provide such a mechanism, for it will have been drawn up on the assumption that the source will continue to burn oil or gas as its primary energy source. Unless a compliance schedule providing for conformity to the regional limitation is authorized, therefore, a source will be able to refuse to make any preparations for control of new emissions due to coal burning without any exposure to enforcement until the actual day of conversion. At that point, of course, liability would arise, but inevitably considerable time would elapse before that liability resulted in the installation of control equipment. During that time, SIP requirements would be violated, contrary to the purpose of the statute.

Compliance schedules for meeting the regional limitation could be imposed on and enforced against sources in a relatively straightforward way.

When FEA issued a conversion order to a source, EPA would proceed to determine whether the conditions for a compliance date extension were met. Voluntary application by the source would not be a prerequisite, for the words of the statute are mandatory, specifying that EPA "shall issue a compliance date extension" to any source that meets the conditions for it. Other statutory provisions authorize EPA to require submission of any information that might be necessary to such a determination, § 114(a)(iii).

It is a *precondition* to the issuance of a compliance date extension that a compliance schedule for meeting SIP requirements have been approved. Section 119(c)(2)(A)(iii). Accordingly, even though the compliance date extension itself may not take effect until the conversion order does, see § 119(c)(1)(A), the compliance schedule may quite properly impose binding obligations before that date.

Indeed, the enforcement provisions of Section 119 can easily be read to authorize enforcement of a compliance schedule before the underlying compliance date extension goes into effect. Thus § 119(g)(2) provides explicitly that "[i]t shall be unlawful for any person to fail to comply with any requirement under subsection (c), or any regulation, plan, or schedule thereunder."

*Id.* (emphasis added.)

37. 15 U.S.C. § 792 (Supp. V, 1975).

38. 42 U.S.C. § 1857c-10 (Supp. V, 1975).

comply with one of the following: (1) If the ordered source is not subject to a regional limitation, the term of the CDE for a particular pollutant, (e.g., SO<sub>x</sub>) would provide an extension of time during which the ordered source would take steps, as prescribed in its plan for compliance, to meet SIP emission limitations *in existence* when the FEA order was issued as expeditiously as practicable. The CDE may not extend beyond the end of 1978. During the term of the CDE, the ordered source need not comply with all emission limitations, but it *must* meet all primary standard conditions imposed to ensure compliance with *primary* standards. In this first case, EPA certification of the effective date of the prohibition order means the earliest date upon which the ordered source will be able to burn coal and meet primary standard conditions. The FEA prohibition order is effective on the date certified. (2) If the ordered source is located in an air quality control region in which primary standards for a particular pollutant are being exceeded, that source is subject to a regional limitation. Thus, the term of the CDE for that particular pollutant would involve an enforceable compliance schedule which would provide time for the ordered source to comply with existing emission limitations for that pollutant with the end compliance date sometime prior to December 31, 1978. The date upon which the ordered source could burn coal and comply with the regional limitation—*i.e.*, comply with all existing air pollution requirements including SIP requirements for the pollutant in question—would be the earliest effective date of the FEA prohibition order.

In addition to being extremely complicated and confusing, elements of the CDE, the primary standard condition, and the regional limitation arrangement have been criticized for delaying the conversion program. Initial estimates show that approximately 15 percent of the ordered power plant capacity should be able to burn coal and comply with applicable air pollution requirements immediately; 48 percent of the ordered capacity should be able to meet SIP requirements prior to 1979; the remaining 35 percent of ordered capacity would be unable to meet existing SIP requirements until after the beginning of 1979<sup>39</sup> which would extend beyond the permissible limits of a compliance date extension. FEA's enforcement power under its prohibition order has since been extended from January 1, 1979

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39. Environmental Protection Agency, Memorandum on the Status of Power Plant Compliance with ESECA Regulations, Nov. 26, 1975.

to January 1, 1985<sup>40</sup> thus making the breakpoint of 1979 less critical than before. Nonetheless, the inability of over one-third of the ordered capacity to convert to coal within the original time frame of ESECA indicates that some changes to the original structure are in order.

#### IV. ESECA AND RELATED CLEAN AIR ACT AMENDMENTS

Two glaring problems with § 119 of the Clean Air Act<sup>41</sup> are the compliance date provision which requires the coal converting plants to comply with *existing* SIP requirements as soon as practicable but no later than the beginning of 1979, and the provision which imposes a regional limitation requirement on ordered sources which are located in non-attaining air quality control regions while the sources are proceeding with conversion to coal.

The provision requiring compliance with an existing SIP is a "problem" in the sense that the ordered source must commit itself to achieve compliance by 1979 with SIP emission limitations in effect at the time the FEA prohibition order is issued.<sup>42</sup> This commitment is required even if EPA review under § 4(a) of ESECA<sup>43</sup> indicates the SIP is overly stringent and goes beyond attainment and maintenance of primary standards. Thus, even though the state amends the SIP to deal immediately with only accomplishment of primary standards, the ordered source would be committed to comply with the requirements of the SIP in existence upon issuance of the FEA order.

One proposed ESECA-related amendment to the Clean Air Act would permit an ordered source, eligible for a compliance date extension, to comply with the requirements of the SIP which were in effect at the end of the CDE's term.<sup>44</sup> This amendment would permit ordered sources to comply with the SIP revision and treat both the ordered source and other sources not subject to a prohibition order and a CDE equitably in relation to the SIP revision.

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40. See text accompanying notes 2, 3 *supra*.

41. 42 U.S.C. § 1857c-10 (Supp. V, 1975).

42. FEDERAL ENERGY ADMINISTRATION, DRAFT ENVIRONMENTAL IMPACT STATEMENT [DEIS], ENERGY INDEPENDENCE ACT OF 1975 AND RELATED TAX PROPOSALS 7-26 (1975) [hereinafter cited as DEIS, ENERGY INDEPENDENCE ACT].

43. See note 20 *supra*.

44. See, e.g., Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390 (5th Cir.

The second "problem" provision—the regional limitation—requires the ordered source to comply with existing SIP emission limitations at the time the source converts to coal if there is a violation of a primary standard anywhere in the air quality control region. The regional limitation applies to the ordered source without regard to the source's contribution or lack of contribution to the violation.

It was estimated that the regional limitation provision prevented conversions to coal which in 1977 could have resulted in fuel consumption savings of approximately 236,000 barrels per day of oil and oil-equivalent natural gas.<sup>45</sup> Additionally, the requirement for immediate compliance at time of conversion with limitations greater than that needed to achieve primary standards would significantly and unnecessarily increase the cost of the conversion effort. The potential impact of increased costs was assessed by Frank Zarb, FEA Administrator, as follows:

Accordingly, it may be impossible for FEA in some cases to make the finding that a conversion requiring the immediate addition of permanent controls is environmentally "practicable." If FEA cannot make a finding of practicability as required by ESECA, a conversion order cannot be issued.

Hence, the effect of regional limitations in ESECA may be to reduce the number of conversions significantly—or at least to delay them—and thereby to forego or delay the corresponding increase in consumption of coal and the reduction of the imported oil.

Removal of the regional limitation will not jeopardize public health, since the plants will still be required to meet primary ambient air quality standards before burning coal.<sup>46</sup>

## V. CONCLUSION

The proposed amendments on compliance with a revised SIP and on eliminating the regional limitation provision—as well as other ESECA-related amendments which have not been discussed in this paper—are common sense corrective adjustments to the original

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45. *Hearings on H.R. 2633 and H.R. 2650 (and all other bills which amend the Clean Air Act) Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., ser. 26, pt. 1, at 141 (1975).*

46. *Id.* at 141-42.

ESECA procedure. These corrective adjustments maintain the *existing* balance between issues of environmental quality and issues of national energy independence. The adjustments should reduce many of the short-term uncertainties which exist for the coal industry and power generation utilities and should produce a more streamlined system for coal conversion.

Basic questions regarding the technology and costs of power plant emission controls to meet Clean Air Act requirements and whether Clean Air Act requirements unnecessarily restrict increased coal utilization will continue to be asked and debated. Nonetheless, *the* basic environmental question regarding the need for air quality controls to protect public health from excessive SO<sub>2</sub> emissions has been answered. As a result, primary standards remain unchanged and form the basis for environmental decisions.<sup>47</sup> An EPA perspective on future interaction between environmental and energy considerations has recently been outlined:

Today, the Nation clearly needs a farsighted energy policy that is compatible with our environmental objectives, especially as they relate to protection of public health. Such a policy should embrace both conservation and greater reliance on domestic energy resources other than petroleum and natural gas.

Coal, one of the Nation's most abundant natural resources, can and should play a vital role in reducing the energy dependence and vulnerability of which the President spoke. Conservation efforts also must be a major ingredient of our national energy policy. Business, as well as consumers, can substantially restrain electrical energy consumption. More energy-efficient products and processes already exist, and more can continue to be developed.

Conservation efforts are vital but will not alone result in the petroleum savings necessary to make this Nation significantly less dependent on foreign sources of oil. We must find increased uses for plentiful domestic fuels such as coal.

We believe that larger amounts of coal can be used in an environmentally sound manner if we proceed with proper care.

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47. See U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, AIR QUALITY CRITERIA FOR SULFUR OXIDES 155-58 (1969). See also ENVIRONMENTAL PROTECTION AGENCY, POSITION PAPER ON REGULATION OF ATMOSPHERIC SULFATES (1975).

Our projections indicate that natural economic forces will increase coal demand by approximately 50 percent from 1973 through 1980—that is, from about 600 million tons to more than 900 million tons. For the utility sector, the largest user of coal, we expect a 73 percent increase in coal as the energy source for fossil-fuel fired plants in the 1973-1985 time frame. This would mean that 72 percent of all the electrical energy generated from fossil-fuel plants by 1985 would be produced by coal.<sup>48</sup>

ESECA provides a “sound legal base” for promoting greater utilization of our domestic coal resources while insuring that air quality is attained and maintained in order to protect public health.<sup>49</sup> The expected ESECA-related amendments to the Clean Air Act will continue this movement toward energy independence with assurances of environmental quality.

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48. 1975 *Greater Coal Utilization Hearings*, *supra* note 21, at 1522.

49. *Id.* at 1523.