Considerations on the Permitting of Synthetic Fuels Projects

Robert M. Hallman
CONSIDERATIONS ON THE PERMITTING OF SYNTHETIC FUELS PROJECTS*

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The developing synthetic fuels industry presents a unique challenge to the regulatory process of government. As a former government official, I have observed agencies and courts at local, state, and federal levels struggling with the intricacies of synthetic fuels projects. Among the most difficult issues presented by the synthetic fuels industry is its potential environmental impact.

Environmental considerations are critical to the successful development of a synthetic fuels industry relying, as it does, on coal, oil shale, and tar sands as raw materials. Synthetic fuels projects present significant environmental problems: air and water pollution; solid waste disposal; land-use decisions; and extensive water consumption; and will result in occupational health and safety, as well as socio-economic, impacts. Further, the products and byproducts of synthetic fuels projects may pose health and environmental problems themselves.

Attempts to control the environmental impact of the synthetic fuels industry are hindered by its somewhat unique situation. The industry is developing at the same time that regulatory schemes for it are being devised. There is very little experience with commercial-size plants—indeed, there is no commercial-scale facility operating in this country. In addition, there is little information available on the nature of effluents and byproducts, or on specific consequences

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** Partner, Cahill Gordon & Reindel, Washington, D.C. office. Formerly served as Deputy General Counsel, United States Department of Energy and General Counsel, New York State Department of Environmental Conservation. B.A. Williams College; L.L.B. University of Virginia.
of synfuels\textsuperscript{1} activities. Given our limited knowledge and experience, uncertainty abounds—uncertainty as to substantive regulations and their promulgation; and uncertainty concerning costs of compliance.

These technological, regulatory, and economic uncertainties are further exacerbated by the maze that faces synthetic fuels projects in the form of an extensive web of permitting authorities and numerous opportunities for court challenges to projects. More than twenty federal regulatory programs can be involved in review of a synthetic fuels project. These projects face a vast number of approvals at the state and local levels as well.

With few exceptions, each regulatory requirement has been adopted in isolation, with little or no attention paid to its relationship to an overall approval process for energy projects generally, or for synthetic fuels projects in particular. Each set of requirements has tended to give rise to a new or distinct set of administrative and court procedures, with no mechanism for coordination or for ensuring that decisions will occur in time to meet the needs for which a particular project is designed.

Estimates of the time required to clear these labyrinths and construct a commercial-scale facility vary from a quite optimistic two to three years, to (in my view a more realistic) four to six years. Controversial projects—a category in which many synthetic fuels projects will undoubtedly fall—may take as long as a decade. The environmental and regulatory challenges to the development of a commercially viable synthetic fuels industry are thus readily apparent and far-reaching.

The purpose of this paper is to provide an introduction into the permitting issues now emerging as a source of substantial uncertainty to synfuel project sponsors. The topics discussed include: (1) changes in the approach of the federal Environmental Protection Agency (EPA) to developing pollution control guidance for synthetic fuels projects; (2) possible means of expediting the permit process for synthetic fuels projects; and (3) the potential impact of permitting considerations on the operations of the United States Synthetic Fuels Corporation.

I. Changes in EPA Pollution Control Guidance for the Synthetic Fuels Industry

Because of the lack of experience with synfuels plants and the consequent lack of data about pollutants and control technologies, the

\textsuperscript{1} The terms "synthetic fuels" and "synfuels" will be used interchangeably throughout this article.
EPA has not employed the conventional approach of issuing industry-wide regulatory requirements that set performance standards which serve as a floor of pollution control for synfuels technologies. Instead, the permitting process will be the primary regulatory mechanism by which environmental controls are established for the initial generation of synfuels projects. In other words, the terms and conditions of individual permits will determine how each particular plant is controlled.

Under these circumstances, the EPA during the Carter Administration embarked upon a somewhat unique approach to guide industrial designers, and federal and state permitting agencies responsible for synfuels projects. It decided to develop a set of pollution control guidance documents (PCGD’s) for each major synfuels technology. These included low-, medium-, and high-Btu gasification; oil shale; indirect coal liquefaction; and direct coal liquefaction. According to the EPA, these documents were intended to be nonbinding, nonregulatory materials designed to guide permitting authorities in establishing the terms and conditions of individual permits under their particular regulatory requirements. As explained by the EPA, the PCGD’s were intended to provide the EPA’s evaluation of “the best and most cost effective way to control these plants. . . . They will be technology-based but not technology-specifying, indicating ranges of suggested performance and pointing out the site-specific and technical factors that should be kept in mind during permit negotiations.”

The documents were also unique in that they examined environmental impacts on a multi- (or cross-) media basis. The EPA looked concurrently at all pollutants discharged to the air, water, and land, including those not currently regulated, in designing an environmental protection strategy. While the EPA planned to seek public comment on the documents prior to their final release, they were not to be developed pursuant to formal rulemaking procedures under the Administrative Procedure Act normally employed for promulgation of pollution control standards.

The above-described pollution control guidance strategy, however, appears to have been abandoned by the new EPA Administrator Anne Gorsuch in favor of conducting some limited research, subject to available funds, on specific environmental issues associated with individual synfuel technologies. Thus, in contrast to the PCGD ap-

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3. Id.
proach, the EPA does not now intend to provide information as to the range of available control options for particular technologies, or policy-related recommendations or considerations for permit writers; rather EPA personnel will apparently be limited primarily to providing technical assistance for specific permits on an as-available basis. The rationale for this switch in approach appears to be at least twofold: (1) budget cuts; and (2) a feeling that, while the PCGD's would be styled as guidance materials for permitting authorities, permit writers would place undue reliance on them so that they would in effect be treated as de facto federal standards.

While the current EPA approach offers little direction to project sponsors as to what types and levels of controls to expect from permitting authorities, it does appear to maximize the flexibility of sponsors and regulators in fashioning requirements for particular projects on a case-by-case basis. On the other hand, the substantial reduction in support for the permitting process reflected in the EPA's current cutbacks could seriously hamper efforts to expedite administrative consideration of permit applications. The absence of data on pollution control technologies, information which the PCGD system was designed to develop, and of technical experts trained, at a minimum, to identify the relevant questions about each synthetic fuels technology, will undoubtedly add to the burden of permitting officials and industry in negotiating agreeable permit conditions for each specific project. For example, state or local governments are not likely (at least in the near term) to have the capacity to develop the kind of information and expertise which might have been available under the PCGD approach.

Moreover, reduced efforts by the EPA to address environmental issues in this area could lead to increased concern on the part of the public as to the potential impacts of synfuels projects, and generate increased opposition to efforts to adopt expedited permitting procedures on the ground that more—not less—time plus extensive procedural safeguards are required to insure adequate assessment of all risks and options for each project. In short, withdrawal of federal efforts to develop base-line information and guidance with respect to environmental controls for various synthetic fuels technologies may have an adverse impact on regulatory reform efforts at all government levels.

II. OPTIONS FOR EXPEDITING THE PERMITTING PROCESS AND JUDICIAL REVIEW

As indicated earlier, synfuels projects confront a time-consuming and cumbersome regulatory maze. Prompt efforts to ensure timely, coordinated decisions by administrative agencies; reduce judicial delay; and provide a reasonable degree of regulatory certainty for project sponsors, appear essential if national energy goals are to be met. The available options to improve the process of regulating synfuels projects are: (1) administrative steps to streamline decision-making at the federal level; (2) legislation to mandate expediting procedures by federal authorities and to encourage cooperative efforts by states; (3) actions by states to expedite decisionmaking and initiate coordination with federal authorities; and (4) comprehensive reform mandating expediting procedures by both state and federal officials.

A. Administrative Action at the Federal Level

Administrative action at the federal level would involve tightening up decisionmaking as much as possible under existing authorities. Examples of efforts along this line are the Consolidated Permit Regulations issued by the EPA6 and the Priority Energy Project Tracking System—an internal procedure of the EPA which that agency has used to negotiate deadlines with project sponsors and to manage review of their permits. Reform through this means depends, of course, upon the flexibility of existing authorities. Moreover, this approach has limited utility with regard to independent federal agencies and cannot reach the area of judicial delay.

B. Mandated Federal Expediting

Legislation could be structured to direct new or existing federal executive bodies to select projects for priority treatment and to establish decision deadlines binding on federal agencies. These deadlines could be shorter than required by otherwise applicable law. Enforcement of deadlines could be accomplished by: (1) providing for automatic approval of a project unless an agency acts within the period specified; (2) transferring decisionmaking responsibility from

a delinquent agency to an expediting body or the President; and/or
(3) providing for court enforcement.

This approach could also include authority to exempt (possibly with
some form of Congressional oversight) projects from new federal re­
quirements and to consolidate review of federal agency decisions in a
single federal court. For nonfederal entities, the federal oversight
body might be directed to request proposed decision timetables from
state and local agencies; to seek their agreement to deadlines; and,
where agreement is not possible, to issue voluntary timetables for
decision.7 Technical and/or financial assistance might also be offered
to induce desired action at the state level.

C. State Action

Initiatives can be and have been undertaken by states both to ex­
pedite and consolidate permitting procedures at the state level and
to coordinate local, state, and federal activities. To expedite pro­
dcedures at the state level, a few states have enacted energy facility
siting legislation which provides for a state agency to coordinate
state permitting and establishes deadlines for permitting decisions
on the part of responsible agencies.8 Other states have enacted
legislation aimed primarily at establishing clear and expeditious time
frames within which permitting decisions on major development
projects must be made.9

A third approach to the problem is illustrated by Colorado's per­
mitting process. To coordinate local, state, and federal activities,
Colorado has administratively established a so-called "joint-review
process" for major energy and mineral resource development proj­
ects, including synthetic fuels projects. Based on a project sponsor's
request, a preliminary decision is made by the Colorado Department
of Natural Resources (DNR) as to whether a proposed project will be
accepted for participation in the program. The basic criteria for proj­
ect selection are: (1) whether the project is "major"; (2) whether its
application is submitted early in the permitting process; and (3)

7. Legislation along these lines, which would establish an Energy Mobilization Council in
the Executive Office of the President, has been introduced in Congress. H.R. 3236, 97th
8. See, e.g., Montana Major Facility Siting Act, MONT. CODE ANN., ch. 20, §§ 75-20-101 to
75-20-1205 (1981).
9. See, e.g., California Development Project Act of 1977, as amended, CAL. GOV'T CODE,
§§ 65920-65960 (West Supp. 1980); CAL. PUB. RES. CODE, §§ 21080; 21151.5; 21167.2; and
21167.3 (West Supp. 1980).
whether the resources are available to conduct a thorough review of
the project. If accepted, the state DNR attempts through persuasion
to secure the active participation of federal, state, and local officials,
and the project sponsor in a joint-review process. The purpose of the
joint-review team is to define the roles and responsibilities of all rele­
vant agencies and the project sponsors; to prepare a project-specific
decision schedule; and to conduct several public participation ac­
tivities. The process is not an attempt to develop an energy facility
siting procedure, or to change any established regulatory respon­
sibilities or procedures. Rather, it is initiated only through the re­
quest of a project proponent and is entirely voluntary. There are no
sanctions for failure to meet any established deadlines.
At least one mining and two synfuel projects (one oil shale project
and one coal-to-methanol project) have sought to participate in the
process.\textsuperscript{10} One state has adopted a process similar to that of Col­
orado and several others are reportedly considering establishing a
procedure like the joint-review process based on the generally favor­
able response to Colorado’s efforts.\textsuperscript{11}

\textbf{D. Mandated Action at Federal and State Levels}

An agency similar to the proposed federal Energy Mobilization
Board (EMB)\textsuperscript{12} with authority to promulgate and enforce expediting
procedures (including decision deadlines) binding on federal and
state authorities might be the most comprehensive and direct ap­
proach. It is also likely to be the most controversial. This legislation
would attempt to address the problem of judicial delay by con­
solidating judicial review of federal and state actions affecting priori­
ty energy projects in one federal court. Further, the legislation
would provide for procedural reform that would bind not only
federal, but state and local agencies, and would authorize additional
expediting procedures, \textit{e.g.}, consolidated hearings, for agencies deal­
ing with priority projects. The reform efforts here relate mainly to
the nature and extent of the federal role in permitting vis-a-vis state

\textsuperscript{11} See, \textit{e.g.}, Tennessee Major Energy Project Act of 1981, TENN. CODE ANN., ch. 18,
\textsuperscript{12} Legislation creating an Energy Mobilization Board was developed by a Conference
Committee of the Congress in 1980 but was defeated by a vote in the House of Representa­
tives. See \textit{CONF. REP. ON S. 1308}, 126 CONG. REC. H5479-5495 (daily ed. June 21, 1980); 126
CONG. REC. H5783-5797 (daily ed. June 27, 1980). A similar proposal has been reintroduced
and is now under consideration. See \textit{H.R. 3801}, 97th Cong., 1st Sess. (1981); \textit{see also} S. 668,
and local authorities, but they also touch on the possibility of a waiver or suspension of specific laws for priority projects pursuant, for example, to expedited legislative procedures.

III. THE SYNTHETIC FUELS CORPORATION AND EXPEDITED PERMITTING

No assessment of prospects for permitting reform for synthetic fuels projects would be complete without consideration of the potential involvement of the United States Synthetic Fuels Corporation (SFC). Congress established the SFC in 1980 under the Energy Security Act (ESA) as an independent federal entity, of limited duration, to assist commercial development of synthetic fuels production from domestic sources of coal, oil shale, tar sands, and certain heavy oil resources, through provision of various forms of financial assistance to the private sector. The SFC will have about $14 billion available for financial assistance during the next three to four years.

The basic theory behind the SFC is that it should function as much as possible like a private investment bank, although, as a creature of federal law, it is subject to a variety of statutory requirements and oversight controls. Under the ESA, the SFC’s selection of projects to receive financial assistance will be done on a competitive basis (to the extent feasible) through a series of solicitations issued by the SFC, and will be based on a review of a wide range of specific factors, e.g., diversity and production potential of the technology, as well as programmatic goals, e.g., 2 million barrels per day of oil equivalent nationwide by 1992. Given its substantial resources and mandate, the SFC’s activities could have considerable influence on the nature and extent of synthetic fuels projects launched in the near future. Its potentially significant role in the emergence of the industry gives rise to questions as to what obligations the SFC has under the ESA, and what opportunities are available to the SFC to

14. Water as a source of hydrogen through electrolysis is the other domestic resource specified in the ESA. Id. § 112(17) (to be codified at 42 U.S.C. § 8702(17)).
15. Id. § 152(a) (to be codified at 42 U.S.C. § 8752(a)).
16. Id. § 131(b)(X)(A) (to be codified at 42 U.S.C. § 8731(b)(3)(A)).
17. Id. § 125 (to be codified at 42 U.S.C. § 8721).
address potential environmental impacts associated with, and regula-

tory delays facing, synthetic fuels projects.

As regards environmental matters, determinations by the SFC to
award financial assistance to particular projects, as well as the selec-
tion process itself, are expressly exempt from the environmental im-
pact requirements of the National Environmental Policy Act of
1969 (NEPA). Moreover, the ESA does not specifically require the
SFC to consider environmental, health, or safety impacts in select-
ing specific projects for financial assistance. The SFC is not, how-
ever, immune from such considerations. Information on these issues
is available from several sources including:

(a) the Administrator of the EPA who is a member of the
statutory advisory committee to the SFC Board of Directors.
The committee must review the SFC proposal solicitations, and
advise the SFC (upon request) on matters within its expertise.
(b) the SFC itself which is required to consider the ability of
technologies seeking financial assistance to comply with
regulatory requirements.
(c) other federal agencies. Prior to awarding any financial
assistance, the SFC is authorized to seek the advice and recom-
mandation of, or information maintained by, any federal agency
or department.

Moreover, the SFC's project selection procedure sets forth a com-
mitment to consider environmental, health and safety, and socio-
economic impacts of projects applying for financial assistance. The
corporation's Project Evaluation Criteria provide that the SFC will
consider the status of a project's compliance with all applicable
regulatory requirements as "an important measure of whether a
project is sufficiently strong to be considered for financial assis-
tance." To assess that status, the SFC will evaluate projects against
criteria relating to: (1) environmental, health and safety, and regula-
tory acceptability; (2) socio-economic impact; and (3) water availabil-
ity and quality. In addition, each SFC contract for financial assist-

18. Receipt of financial assistance from the SFC, however, does not exempt a project from
having to comply with applicable local, state, or federal environmental, health, or safety laws
or regulations. Moreover, if a federal agency is involved with an SFC-assisted project through,
for example, the issuance of a permit or lease, that agency's action would be subject to NEPA
and may require a regional as well as a site-specific environmental impact statement. The
federal agency considering the action will also have to meet other federal "consultative" en-
vironmental requirements applicable to federal agencies.
20. ESA, § 172(a) (to be codified at 42 U.S.C. § 8773(a) (Supp. IV 1980)).
21. SECOND SOLICITATION FOR SYNTHETIC FUELS PROJECTS 19 (1981), adopted by the SFC's
ance must require the recipient to prepare, in consultation with the Department of Energy, the EPA, and appropriate state agencies, a plan acceptable to the SFC's Board of Directors for the monitoring of environmental and health-related emissions from the construction and operation of the project. 22

The SFC is also required to file an annual report with the Congress and the President which includes recommendations on actions Congress could take to facilitate the SFC's work in achieving the ESA's national synthetic fuels production goals. The report must "address the environmental impacts of the corporation's generic programs and decisions." 23 Finally, the SFC must submit to the Congress a comprehensive strategy for achieving national synthetic fuels production goals on or before June 30, 1984. The strategy is to include findings on "the environmental effects associated with each SFC-assisted project." 24

The SFC has no express authority or jurisdiction to approve the projects to which it extends financial assistance. Nevertheless, in creating the SFC, Congress was cognizant of the regulatory problems facing synthetic fuels projects. Specifically, Congress directed the corporation to give priority consideration to applications for financial assistance "from any concern proposing a synthetic fuels project in any State which, in the judgment of the board of directors, indicates an intention to expedite all regulatory, licensing, and related government agency activities which relate to the project." 25 It is worth noting that this language does not necessarily require that a state have a generalized expediting process; rather, it focuses on how the state intends to treat specific corporation-assisted projects.

The SFC has recently announced that it will "use a functional approach" in determining whether particular states exhibit an intent to expedite permitting. In general, this will involve an examination by the SFC of (1) whether a proposal specifies a realistic, detailed per-

22. ESA, § 131(e) (to be codified at 42 U.S.C. § 8731(e) (Supp. IV 1980)). A major unresolved issue in this regard concerns the criteria which the SFC will employ to assess the acceptability of environmental monitoring plans developed by project sponsors and, specifically, whether the SFC will require actions beyond those set forth in applicable environmental control permits. The SFC has recently rejected a recommendation by the General Accounting Office to publish guidelines implementing the environmental monitoring provisions of the ESA, reasoning that such guidelines would, in some respects, be redundant and, in other respects, premature. Letter from Edward E. Noble, Chairman, SFC to Milton J. Socolar, Acting Comptroller General of the United States, Nov. 25, 1981.

23. ESA, § 177(d) (to be codified at 42 U.S.C. § 8777(d) (Supp. IV 1980)).

24. Id. § 126(b)(3) (to be codified at 42 U.S.C. § 8722(b)(3)).

25. Id. § 127(f) (to be codified at 42 U.S.C. § 8723(f)).
mit timeline; (2) whether the timeline is consistent with the orderly and timely progress of the project; and (3) whether the timeline is consistent with experience of projects and relevant agencies. While these factors appear to be pertinent considerations, additional items which more directly relate to the nature and extent of a particular state’s commitment to expedite permitting would seem to warrant examination, particularly if the ESA mandate to provide priority to expediting states is to be utilized to promote regulatory reform.

In evaluating a state’s policy on expediting actions, the corporation should begin by examining the existing state regulatory apparatus, together with state policies for the development of synthetic fuels as reflected, for example, in the plans, pronouncements, or programs of responsible state officials. Where an identifiable expediting program is not in place, it would seem appropriate for the SFC to consider good faith commitments to establish effective programs in a timely manner. Items which, on their face, would appear to be important ingredients of any good faith efforts include: binding deadlines for major milestones in the project’s development; elimination of duplicative application requirements; consolidation of major proceedings; and coordination with appropriate federal and state officials. A commitment to provide sufficient resources would also be relevant.

At this point, it is not possible to determine how active the SFC will be in pursuing regulatory reform for synthetic fuels projects it decides to assist. It could simply decide to leave this matter to project sponsors. On the other hand, the SFC has available to it certain information-gathering and persuasive powers which might be used to assist project sponsors. For example, it could work through its statutory advisory committee to seek prompt action at the federal level; establish lines of communication and consultation with state officials to promote voluntary efforts at that level; and/or utilize the leverage provided by the priority assigned to states committed to expeditious project permitting to promote specific reforms.

Considerable opportunities are available to the SFC to influence the nature of environmental controls imposed upon the synthetic fuels projects it assists, and to encourage adoption of reforms to expedite permitting at all levels of government. However, the current administration appears largely committed to deemphasizing the government’s role in the energy area in favor of a so-called “free

market" approach, and to the transfer of increased responsibility for environmental regulation to the states. Thus, it would not be surprising to see the SFC adopt a hands-off policy in these areas, i.e., effectively to defer to regulatory authorities at each level of government for initiatives concerning regulatory reform and for establishment of environmental requirements. The most likely spur to any activism on the SFC's part would be requests from project sponsors who might find SFC initiatives useful in launching, or in resolving particular issues relating to, specific projects.

IV. CONCLUSION

The development of synthetic fuels is a new endeavor fraught with many familiar problems—problems of pollution, waste disposal, and resource conservation. Government officials and projects sponsors are searching for mechanisms to address these problems at the same time that the synfuels industry is developing. The regulatory challenge presented by this situation has prompted local, state, and federal agencies and legislatures to explore innovative approaches for permitting synfuels projects.

Adoption of a comprehensive solution based on the Energy Mobilization Board model appears unlikely at this time, owing to its controversial nature and the "new federalism" propounded by the Reagan Administration which posits minimum federal involvement and maximum state discretion in the environmental area. On the other hand, absent extreme budget cutbacks, prospects appear reasonably good for some administrative efforts to expedite federal permitting, and continued efforts by states to rationalize their regulatory programs, as well as to increase coordination with federal authorities. Whether such efforts will materially improve the current regulatory maze is not possible to judge in the abstract. Much will depend upon the extent of and incentives for coordination among affected parties and their commitment, at a minimum, to create workable means for ensuring clear, meaningful decision deadlines; consolidated, timely judicial review of agency decisions; and, reasonable certainty as to the terms to govern construction and operation of approved projects. Failure to continue vigorous pursuit of regulatory reform in the synfuels area will only serve to undermine efforts—whether governmentally or free-market oriented—to effectuate the nation's energy goals as quickly and soundly as possible.