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## **An Agricultural Law Research Article**

# **Food, Fuel, and Federal Curtailment Regulation**

by

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Originally published in CHICAGO-KENT LAW REVIEW  
56 CHI.-KENT L. REV. 789 (1980)

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# FOOD, FUEL, AND FEDERAL CURTAILMENT REGULATION

WILLIAM A. MOGEL \*

I have often thought that if heaven had given me a choice of my position and calling, it should have been on a rich spot of earth, well watered, and near a good market for the productions of the garden. No occupation is so delightful to me as the culture of the earth.

Thomas Jefferson<sup>1</sup>

American agriculture is energy intensive.<sup>2</sup> It has been observed that agricultural production "is a sequence of interdependent energy using activities."<sup>3</sup> The United States Department of Agriculture estimates that twenty-two percent of this country's energy is used in the production of food and fiber.<sup>4</sup> Approximately one half of that energy is petroleum based and approximately one third is from natural gas.<sup>5</sup>

Although only two percent of all Americans "work the land,"<sup>6</sup> this country's approximately 2.5 million farms constitute the third largest industrial user of energy after the steel manufacturing and petroleum refining industries.<sup>7</sup> The American farmer is dependent upon natural gas and petroleum products<sup>8</sup> for, *inter alia*, fertilizer, fuel, irrigation,

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1. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 202-03 (P. Ford ed. 1894).

2. See G. MILLAR, THE SECOND ANNUAL MIDWESTERN CONFERENCE ON FOOD AND SOCIAL POLICY (1977) [hereinafter referred to as MILLAR I]:

Commercial production agriculture is, of course, crucially dependent on the energy derived from fossil fuels. Fuel energy is consumed in food production in two ways. It is used off the farm to manufacture products used for farming, such as natural gas for nitrogen fertilizers, coal for steel production, and petroleum for pesticides and machinery manufacture. Fuel is used on the farm when manufactured products are used to produce crops: by tractors and other mobile machines during tillage, planting, cultivation, and harvesting operations; and by irrigation equipment, crop drying equipment, frost protection devices, and other items.

*Id.* §§ 2-20, 2-22.

3. Nelson, *Agriculture and Energy: A Legal Perspective*, 54 NEB. L. REV. 325 (1975) [hereinafter referred to as Nelson].

4. M. MEANS, THE SECOND ANNUAL MIDWESTERN CONFERENCE ON FOOD AND SOCIAL POLICY 2-3 (1977) [hereinafter referred to as MEANS].

5. *Id.*

6. See MILLAR I, *supra* note 2, at § 2-20.

7. See MEANS, *supra* note 4, at § 2-12.

8. As observed by Barry Commoner: "Unless we are willing to forego most of the advantages of modern . . . agricultural production . . . we must use some nonliving sources of energy." Commoner, *Reflections I*, THE NEW YORKER 53, 58 (Apr. 23, 1979) [hereinafter referred to as Commoner].

pesticides, and seed drying.<sup>9</sup>

The importance of American agriculture should not be underestimated. One American farmer can produce enough to feed himself and more than fifty others.<sup>10</sup> The value of United States farm exports for the year beginning October 1979 is estimated to be between \$35 and \$40 billion, which produced an agricultural trade surplus of approximately \$20 billion.<sup>11</sup>

In addition to its significant economic role, American agriculture aids this country's worldwide humanitarian efforts<sup>12</sup> and is a diplomatic weapon in our foreign policy.<sup>13</sup> More importantly, however, American agriculture provides us with "adequate nutritious food of acceptable variety to feed the increasing population."<sup>14</sup>

The high productivity of American agriculture since the closing of the frontier in the early part of this century largely is attributable to two events, both of which are dependent upon non-renewable fossil fuels: the introduction of the gasoline tractor at about the time of World War I<sup>15</sup> and, after World War II,<sup>16</sup> the large scale use of nitrogen fertilizer

9. G. HEICHEL, *THE SECOND ANNUAL MIDWESTERN CONFERENCE ON FOOD AND SOCIAL POLICY* §§ 2-11, 2-13 (1977) [hereinafter referred to as HEICHEL].

10. Testimony of Dr. John Pesek, Professor of Agronomy and Head of the Agronomy Department, Iowa State University (on file with author).

11. Wash. Post, Aug. 22, 1979, at D7, col. 5. Despite the growth in agricultural exports, our trade deficit in 1978 was \$28.5 billion and estimated to be \$23.5 billion in 1979. Detroit Free Press, June 28, 1979, at 1E, col. 5.

12. Chauncey, *The Question of Image—Who Shall Die?*, in 1 *FOOD AND SOCIAL POLICY* 77 (1978).

13. Culver, *Food in Foreign Affairs*, in 1 *FOOD AND SOCIAL POLICY* 103 (1978). See also 44 Fed. Reg. 18,818 (1979). Another recent example is an effort to tie the price of a bushel of American wheat to the price of imported oil. This campaign's slogan of "A bushel of grain for a barrel of oil" has been incorporated in a song entitled "Cheap Crude or No More Food." Wash. Post, May 6, 1979, at A3, col. 1. In this regard, it has been observed that:

The potential for U.S. leverage on world grain prices is supported . . . OPEC's wheat imports are growing faster than those of any other group of nations. . . .

It is true, of course, that wheat, unlike oil, is a renewable resource, grown year after year. But it takes oil to produce food, so there is a direct connection.

More than most other businessmen, American farmers are sensitive to the intimate economic relationship between oil and grain. Farmers use a prodigious amount of energy in growing and marketing their crops. . . . The same countries that have been raising oil prices have been getting a bargain—an American subsidy, some might call it—on the grain produced, processed and transported with that oil. In effect, the United States exports energy back to OPEC in the form of wheat, corn, rice, and vegetable oil. So the 'cheaper cruders' argue that it is equitable for OPEC to offer its food suppliers, including the United States, a lower price on oil, or a higher price for the grain.

Wash. Post, July 8, 1979, at C1, col. 3.

14. See Commoner, *supra* note 8, at 2.

15. See MILLAR *supra* note 2. In addition, it has been observed that:

To produce today's crop by turn of the century technology would require 61 million horses and mules that would need grain and forage from almost half the crop land now in cultivation to supply their feed. Twenty years would be needed just to raise these

which is manufactured from natural gas.<sup>17</sup>

The impact of the energy crisis on agriculture is significant because it will mean, at a minimum, that the farmer will pay ever increasing prices for his energy inputs<sup>18</sup> and will experience the continued spectre of diminishing deliveries of forms of energy derived from fossil fuels. The obvious impacts will be higher food prices and possibly less production. As a result of these undesirable consequences, the federal government has initiated policies<sup>19</sup> intended to insure adequate energy

animals. Performing the additional hand labor in such a change would require the relocation of almost one-third of the total labor force of the nation.

MEANS, *supra* note 4, at § 2-17.

16. G. FITE, *BEYOND THE FENCE ROWS* 219 (1978) notes that:

Commercial fertilizer was something like prepared feeds, in that prior to World War II most Midwestern farmers used it sparingly, if at all. For example, Iowa producers bought an average of 49,297 tons of commercial fertilizer annually during 1940-1944, but this figure had grown to 520,130 tons a year in the period 1950-1954.

17. Commercially, ninety-four percent of the world's nitrogen fertilizer is manufactured by the Haber process which synthetically combines hydrogen and nitrogen to produce anhydrous ammonia, the basis for various nitrogen fertilizers. The source of the hydrogen is natural gas. In the manufacturing operations, the hydrogen is "fixed" at high temperatures with nitrogen from the atmosphere to produce anhydrous ammonia. Thus, natural gas is used as a feedstock, *i.e.*, as the source of the hydrogen and as a process fuel to maintain the precisely controlled high temperatures required by the Haber process. It has been observed in testimony before the Federal Energy Regulatory Commission that:

Nitrogen is essential as a plant nutrient because every molecule of protein, the basis of life for every organism, contains nitrogen. . . .

Anhydrous ammonia, a form of fixed nitrogen, is the simplest, most economical source of fixed nitrogen for plant life and growth. . . .

More than anything else, nitrogen fertilizer has contributed to the high yields of the cereal and feed grains in this country and to a large extent to the high productivity of fruits, vegetables, pastures, and fiber and sugar crops.

Prior to the early 1950's, the best that a farmer could look forward to with the technology known at that time was about 35 bushels of corn per acre. This was just before the dramatic increase of nitrogen fertilizer production and use. Today, in Nebraska, the average yield expectation for corn on dry land is at least 80 bushels per acre, and approximately 115 bushels per acre for irrigated land. . . . The presence of nitrogen fertilizer allows the realization of higher plant populations, utilizing better hybrid seeds.

The gains for corn and wheat are most impressive because these two crops account for about one-half of the nitrogen fertilizers sold in the United States. Over 90% of the corn and over 60% of the wheat acres receive nitrogen fertilizers.

Testimony of James D. Atwood in *Kansas-Neb. Natural Gas Co.*, No. RP76-90 (1976). See also Nelson *supra* note 3. Nelson notes that: "The use of nitrogen fertilizer alone is credited with providing one-third of the productive capacity of crops." *Id.* at 328.

In other testimony before the Federal Energy Regulatory Commission, it was stated by a representative of a nitrogen fertilizer manufacturer that natural gas represents approximately eighty percent of the cost of production of anhydrous ammonia fertilizer. Testimony of John H. Colby in *Proposed Regulation for the Implementation of Section 401 of the NGPA of 1978* (Mar. 13, 1979).

18. Commoner, *Reflections II—The Solar Transition*, *THE NEW YORKER* 46 (Apr. 30, 1979), states that: "[N]early all the energy now used comes from nonrenewable sources. As a nonrenewable source is depleted, it becomes progressively more costly to exploit, so continued reliance on it means an unending and exponential rise in price."

19. With regard to federal policy on oil, it has been observed that the federal government "made the petroleum industry a government-sanctioned, government-protected, government-sub-

inputs to members of the agricultural community.

Since 1971, federal curtailment policy has focused on the proper method under the Natural Gas Act<sup>20</sup> of allocating diminishing supplies of natural gas among consumers that generally have contractual entitlements to purchase more than they will be allocated. Consequently, curtailment has been difficult for the regulator, the regulated, and the consumer. Curtailment policy became acceptable because it was based upon "end-use" considerations. However, with the passage of title IV of the Natural Gas Policy Act in November 1978,<sup>21</sup> established curtailment policies were impacted by a congressional determination that a special class of consumers—"essential agricultural users"—should receive a preference during periods of natural gas curtailments. That preference effectively rejected "end-use" as the lodestar for the allocation of natural gas by substituting an "end-product" criteria, thereby causing uncertainty and dissatisfaction.

This article will discuss recent federal action taken to insure a high level of protection for agricultural users during periods of natural gas curtailments.<sup>22</sup> The article will then set forth, as background, a summary of federal action, both administrative and judicial, taken under the Natural Gas Act with regard to formulating a national policy on natural gas curtailments. Next, the article will discuss the Natural Gas Policy Act of 1978 and the specific rulemaking proceedings initiated to protect essential agricultural users. The article concludes with recommendations for existing and future curtailment policies.

sitized cartel, and enabled it to operate a finely tuned scheme to restrict output and maintain prices on a worldwide scale." Adams, *Horizontal Divestiture in the Petroleum Industry: An Affirmative Case*, in *HORIZONTAL DIVESTITURE IN THE OIL INDUSTRY* 7, 13 (E. Mitchell ed. 1978). See also Jaidah, *The United States' Energy Situation: An OPEC View*, IX *NATURAL RESOURCES LAW* 617, 620-23 (1979); Kansas City Times, Apr. 30, 1979, at 11A, col. 1.

20. 15 U.S.C. § 717 (1976).

21. Pub. L. No. 95-621, 92 Stat. 3351 (1978) (codified at 15 U.S.C.A. §§ 3301-3432 (Supp. 1979); 42 U.S.C.A. § 7255 (Supp. 1979)) [hereinafter referred to as NGPA].

22. Although federal policies dealing with the allocation of petroleum products or the pricing of natural gas are not the subject of this article, it should be recognized that, for example, the Economic Regulatory Administration, Department of Energy, on May 25, 1979, amended its Special Rule No. 9 to Subpart A of 10 C.F.R. 211 to permit, *inter alia*, consumers engaged primarily in the trucking of perishable agricultural commodities to satisfy their requests for middle distillate fuel for a limited period. In addition, another example is a pending Federal Energy Regulatory Commission proceeding in *Regulations Implementing the Second Stage of Incremental Pricing Provisions of the Natural Gas Policy Act of 1978*, No. RM79-56 (June 28, 1979) which proposed to integrate incremental pricing and natural gas curtailment policies.

## BACKGROUND

In advocating any measure we must consider not only its justice but its practicability.

Theodore Roosevelt<sup>23</sup>

This background section summarizes the leading policy statements and adjudicatory decisions issued by the Federal Power Commission<sup>24</sup> and its successor, the Federal Energy Regulatory Commission,<sup>25</sup> and the significant federal court opinions on natural gas curtailments.<sup>26</sup> The time frame during which the law of curtailment has developed has been brief. Although the shortage of natural gas<sup>27</sup> is not a new problem,<sup>28</sup> it only has become significant since the early 1970's.<sup>29</sup>

23. E. MORRIS, *THE RISE OF THEODORE ROOSEVELT* 128 (1979).

24. The Federal Power Commission's, now the Federal Energy Regulatory Commission's, jurisdiction is set forth in section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1976). It provides that:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

See *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507 (1947).

25. Dept. of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified at 42 U.S.C.A. §§ 7101-7352 and scattered sections of 3, 5, 7, 12, 15 U.S.C.A. (Supp. 1979)). See also Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (1977).

26. Curtailment occurs when an interstate natural gas pipeline company experiences a gas supply shortage which precludes it from meeting all the requirements of all of its customers, and, as a result, allocates or rations its available supplies among its customers. See 18 C.F.R. § 281.203(a)(6) (1979). Although curtailment of service can result from a capacity shortage, as distinguished from a gas supply shortage, curtailment plans may not apply to capacity shortages. See *Lehigh Portland Cement Co. v. Florida Gas Transmission Co.*, FERC No. RP75-79 (Aug. 29, 1979).

27. Natural gas accounted for 35.3 percent of domestic energy production and 32.3 percent of domestic energy consumption in 1972. Over the twenty year period from 1952 to 1972, the consumption of natural gas grew at an average annual compound growth rate of about 5.7 percent. During that same period, comparable growth figures for coal were 0.2 and oil 3.9 percent. STAFF OF SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 93RD CONG., 1ST SESS., *NATURAL GAS POLICY ISSUES AND OPTIONS: A STAFF ANALYSIS* (Comm. Print 1973). See also Breyer & MacAvoy, *Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941, 943 (1973) [hereinafter referred to as Breyer & MacAvoy] who observed that the natural gas shortage "is a direct result of FPC regulation of producers' prices and that the shortage has been disproportionately borne by home consumers." *Id.*

28. The history of natural gas curtailments can be traced from 1946 when the Panhandle Eastern Pipe Line Co. was unable to fulfill its customers' requirements. As a result of a settlement that lasted for one year, the Federal Power Commission was not compelled to make a substantive determination as to the lawfulness of Panhandle's curtailment plan. *City of Detroit v. Panhandle Pipe Line Co.*, 5 F.P.C. 983 (1946). However, when Panhandle's allocation problems reoccurred, the Federal Power Commission approved a curtailment plan, *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 196 (1947), which resulted in several court actions by customers which were curtailed by Panhandle pursuant to its curtailment plan. In *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949), the United States Court of Appeals for the Sixth Circuit affirmed a dismissal of an action brought by a utility customer of Panhandle for specific performance of a gas service contract. Similarly, Panhandle Eastern Pipe

### *Federal Regulation*

The beginnings of the law of natural gas curtailments<sup>30</sup> can be traced to Order No. 431,<sup>31</sup> which was issued as a policy statement<sup>32</sup> by the Federal Power Commission in April 1971. Order No. 431, recognizing that "a number of natural gas pipelines indicated their inability to deliver sufficient gas to meet their firm demands,"<sup>33</sup> directed that all jurisdictional pipeline companies "take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit. . . ." <sup>34</sup> To achieve the foregoing objective, Order No. 431 directed the filing of curtailment plans.<sup>35</sup> Such plans should give consideration to the "curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available."<sup>36</sup>

The significance of Order No. 431 is that it established three principles for allocating natural gas service among classes of customers.

*Line Co. v. Michigan Consol. Gas Co.*, 177 F.2d 942, 946 (6th Cir. 1949), held that the district court lacked jurisdiction to enjoin Panhandle from curtailing deliveries of natural gas to Michigan Consolidated Gas Co. See also *Virginia v. Tenneco, Inc.*, 538 F.2d 1026 (4th Cir. 1976).

29. The shortage of natural gas has been judicially recognized. See, e.g., *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Public Serv. Comm'n v. Federal Power Comm'n*, 467 F.2d 361, 362 & n.1 (D.C. Cir. 1972); *Monsanto Co. v. Federal Power Comm'n*, 463 F.2d 799, 801 & n.1 (D.C. Cir. 1972). See also Mogel, *The Federal Power Commission's Authority to Set Area Rates by Rulemaking*, 5 SETON HALL L. REV. 31 (1973) [hereinafter referred to as *Rulemaking*].

30. Although not a curtailment case, *Granite City Steel Co. v. Federal Power Comm'n*, 320 F.2d 711 (D.C. Cir. 1963), established the principle that an interstate pipeline company had a statutory obligation, under section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a) (1976), not to impair service to its existing customers. The court held that "persons desiring gas for the first time, or desiring more gas, should not get it by taking it away from existing lawful customers." 320 F.2d at 713. Cf. *Algonquin Gas Transmission Co. v. Federal Power Comm'n*, 534 F.2d 952, 957 (D.C. Cir. 1975) which approved a plan whereby the pipeline curtailed its new customers prior to a pro rata curtailment of its existing customers. See also *City of Huntington v. Federal Power Comm'n*, 555 F.2d 1033 (D.C. Cir. 1977).

31. 18 C.F.R. § 2.70 (1979).

32. See *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 37-40 (D.C. Cir. 1974), which, in upholding a policy statement issued by the Federal Power Commission in 49 F.P.C. 85 (1973), discussed the lawfulness of general statements of policy promulgated by federal administrative agencies.

33. 45 F.P.C. at 571. Firm natural gas service is defined as a "higher priced service . . . which is continuous without curtailment except under occasional, extraordinary circumstances." H. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* 151 (1964). In contrast, interruptible service is a "lower priced service to utility customers which may be interrupted. . . . This service is on a 'when available' basis and may be interrupted frequently in winter periods when the demand for gas is greatest." *Id.* at 201. But see *Arkansas Power & Light Co. v. Federal Power Comm'n*, 517 F.2d 1223, 1234 (D.C. Cir. 1975), which held that the firm-interruptible distinction utilized in a curtailment plan of an interstate natural gas company was not supported by substantial evidence.

34. 45 F.P.C. at 571.

35. *Id.* at 572.

36. *Id.*

The first principle distinguished between firm and interruptible contracts. Under Order No. 431, customers with interruptible contracts were deemed, for the purposes of curtailment, to be of a lower priority than customers purchasing under firm contracts.<sup>37</sup> The second curtailment principle enunciated by Order No. 431 was that "inferior" end-uses, such as boiler fuel,<sup>38</sup> should have less protection from curtailment than higher priority end-uses such as natural gas used in residences.<sup>39</sup> The third curtailment principle established by Order No. 431 was that if a user has an ability to use an alternative fuel to natural gas, then that user deserves less protection from natural gas curtailments than a user without an alternative fuel capability. With the exception of Order No. 431's first curtailment principle (the firm-interruptible distinction), the remaining principles have been recognized by the courts and retained as valid criteria for establishing curtailment priorities.<sup>40</sup>

37. The firm-interruptible distinction as a basis for establishing curtailment priorities essentially was rejected by *Arkansas Power & Light Co. v. Federal Power Comm'n*, 517 F.2d 1223 (D.C. Cir. 1975). According to the court:

Even if it could be assumed that the reasons stated for adopting the firm-interruptible distinction were supported by substantial evidence, we would have some difficulty with the Commission's treatment of interruptible customers. . . . [W]e question why the fact that interruptible gas is put to inferior uses would support injection of a factor other than end-use into the curtailment plan. Would not end-use as the sole criterion of a plan adequately insure that interruptible gas is given the appropriate low priority?

*Id.* at 1234.

38. In *Louisiana v. Federal Power Comm'n*, 503 F.2d 844, 859-60 (5th Cir. 1974), the court agreed that use of natural gas in boilers is a low priority use. The court noted that:

FPC's conclusion that boiler use is relatively wasteful of gas is supported by record testimony that space heating using electricity generated by gas requires two to three times as much gas as heating by gas burned on the premises. Given the paucity of natural gas, it follows that the Commission correctly concluded that gas should be burned in a manner that better utilizes its potential energy. . . .

It is obvious, as the Commission concludes, that if gas is in short supply, and thus at a premium, more plentiful fuels should be burned wherever possible in order to save natural gas for functions which cannot utilize a substitute. Therefore the Commission subordinated gas used as boiler fuel because alternate fuel sources are more readily available for boilers than for other industrial processes.

*Id.* at 859. *Accord*, *Federal Power Comm'n v. Transcontinental Pipe Line Corp.*, 365 U.S. 1, 6 (1961); *Arkansas Power & Light v. Federal Power Comm'n*, 517 F.2d 1223, 1228 (D.C. Cir. 1975). *But see* *North Carolina v. Federal Power Comm'n*, 584 F.2d 1003 (D.C. Cir. 1978); *American Smelting & Refining Co. v. Federal Power Comm'n*, 494 F.2d 925 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974).

39. The belief that natural gas used in residences is a superior use is derived from Justice Jackson's dissent in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 634-35 (1944), which concluded: "Utilization of natural gas for highest social as well as economic return is domestic use for cooking and water heating, followed closely by use for space heating in homes. This is the true public utility aspect of the enterprise, and its preservation should be the first concern of regulation."

40. Section 401 of the NGPA added a fourth curtailment principle—the social value of the end product. Under section 401, uses of natural gas for agricultural purposes are deemed to be high priority. 15 U.S.C. § 717 (1976).



### Judicial Interpretations

The Supreme Court in *Federal Power Commission v. Louisiana Power & Light Co.*<sup>41</sup> referred to Order No. 431 with approval when it held that, under section 1(b) of the Natural Gas Act,<sup>42</sup> the Federal Power Commission had curtailment jurisdiction over direct sales of natural gas.<sup>43</sup> The Court's rationale was that the Federal Power Commission's curtailment power was incident to its broad authority to regulate the transportation of natural gas in interstate commerce.<sup>44</sup> Writing for the Court, Justice Brennan concluded that:

[W]hen we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that the Congress desired regulation by federal authority rather than nonregulation.

Comprehensive and equitable curtailment plans for gas transported in interstate commerce . . . are practically beyond the competence of state regulatory agencies.

Since curtailment programs fall within the FPC's responsibilities under the head of its 'transportation' jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities.<sup>45</sup>

Thus, the Court in *Louisiana Power & Light*, in an exercise of judicial lawmaking,<sup>46</sup> concluded that curtailment plans of interstate pipeline companies lawfully could apply to all sales by these companies.<sup>47</sup> The result reached is acceptable because it appears both logical and equitable. It would be unworkable to have curtailment of natural gas travel-

41. 406 U.S. 621 (1972).

42. 15 U.S.C. § 717(b) (1976).

43. Under section 1(b) of the Natural Gas Act, direct sales, *i.e.*, sales made directly by an interstate natural gas company to a user for its own consumption, are not subject to the Federal Energy Regulatory Commission's rate jurisdiction. See *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961).

44. 406 U.S. at 621, 641.

45. *Id.* at 641-42 (citations omitted).

46. See Schwartz, *Legal Restrictions of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). Professor Schwartz contends that: [J]udges have more 'expertise' than commissioners. If the latter are expert in their special fields, the former are experts in synthesis. Daily confronted with the entire range of social conflict, the judges acquire perspective, become aware, as no administrators can, of all the conflicting goals towards which a society struggles.

*Id.* at 474.

47. See Coleman, *FPC Natural Gas Allocation: Curtailment in Context*, 50 TEX. L. REV. 1370 (1972), which states that: "By once more adopting an ingenious statutory interpretation, the Court stretched the inadequate and outdated provisions of the Natural Gas Act to permit the FPC to respond rationally in yet another unanticipated regulatory crisis." *Id.* at 1395-96 (footnote omitted). See also Note, *Regulated Industries—Natural Gas Regulation*, 61 GEO. L.J. 833 (1973).

ing in interstate commerce regulated by the various states and inequitable to place the entire burden of curtailment solely on a pipeline's resale customers.<sup>48</sup>

The next landmark after *Louisiana Power & Light* in the developing law of natural gas curtailments occurred in January 1973 when the Federal Power Commission issued, as another statement of general policy, Order No. 467.<sup>49</sup> In summary, Order No. 467 established nine curtailment categories of service in a descending priority of importance, which could be followed by pipelines in making allocations to its customers during periods of natural gas shortages. Significantly, under Order No. 467, both direct and indirect customers of interstate pipelines were treated in the same manner.<sup>50</sup> Specifically, Order No. 467 stated that:

We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource.

. . .

Secondly, we have determined that interruptible sales are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service.<sup>51</sup>

From the foregoing, it is clear that Order No. 467 reaffirmed Order No. 431's three basic curtailment principles: (1) end-use rather than the nature of a customer's contract;<sup>52</sup> (2) consideration of the alternative fuel capability of a consumer; and (3) the inferiority of boiler fuel. Order No. 467 also added the principle that between the same end-user,

48. *But cf.* *Southern Natural Gas Co. v. Federal Power Comm'n*, 547 F.2d 826 (5th Cir. 1977), which affirmed an order approving a curtailment plan for United Gas Pipe Line Co. even though the plan generally favored United's direct market customers at the expense of its pipeline customers. *Id.* at 834.

49. Order No. 467, 49 F.P.C. 85, 87 (Jan. 8, 1973), *as amended by* Order No. 467-B, 49 F.P.C. 583, 588 (1973) (ninth category added) (codified at 18 C.F.R. § 2.78 (1977)).

50. 49 F.P.C. at 86-87.

51. *Id.* at 86.

52. *American Smelting & Refining Co. v. Federal Power Comm'n*, 494 F.2d 925 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974). The court approved end-use as a factor to be incorporated as an element of a curtailment plan.

smaller users should be preferred and given greater protection over larger users.<sup>53</sup> Under the mechanism established by Order No. 467, the

53. 49 F.P.C. at 86-87.

The priority of service categories established by Order No. 467 is as follows:

- (1) Residential, small commercial (less than 50 Mcf on a peak day).
- (2) Large commercial requirements (50 Mcf or more on a peak day) and firm industrial requirements for plant protection, feedstock and process needs.
- (3) All industrial requirements not specified in (2), (4), (5), (6), (7), or (8).
- (4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.
- (5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.
- (6) Interruptible requirements of less than 1,500 Mcf per day.
- (7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day).
- (8) Interruptible requirements of more than 3,000 Mcf per day.

[ (9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

49 F.P.C. at 87. Category nine was added by Order No. 467-13, 49 F.P.C. 583 (1973).

The definitions utilized by Order No. 467 are codified in 18 C.F.R. § 2.78(c) (1979) and are as follows:

(1) *Residential*. Service to customers which consists of direct natural gas usage in a residential dwelling for space heating, air conditioning, cooking, water heating, and other residential uses.

(2) *Commercial*. Service to customers engaged primarily in the sale of goods or services including institutions and local, state, and federal government agencies for uses other than those involving manufacturing or electric power generation.

(3) *Industrial*. Service to customers engaged primarily in a process which creates or changes raw or unfinished materials into another form or product including the generation of electric power.

(4) *Firm service*. Service from schedules or contracts under which seller is expressly obligated to deliver specific volumes within a given time period and which anticipates no interruptions, but which may permit unexpected interruption in case the supply to higher priority customers is threatened.

(5) *Interruptible service*. Service from schedules or contracts under which seller is not expressly obligated to deliver specific volumes within a given time period, and which anticipates and permits interruption on short notice, or service under schedules or contracts which expressly or impliedly require installation of alternate fuel capability.

(6) *Plant protection gas*. Is defined as minimum volumes required to prevent physical harm to the plant facilities or danger to plant personnel when such protection cannot be afforded through the use of an alternate fuel. This includes the protection of such material in process as would otherwise be destroyed, but shall not include deliveries required to maintain plant production. For the purposes of this definition propane and other gaseous fuels shall not be considered alternate fuels.

(7) *Feedstock gas*. Is defined as natural gas used as raw material for its chemical properties in creating an end product.

(8) *Process gas*. Is defined as gas use for which alternate fuels are not technically feasible such as in applications requiring precise temperature controls and precise flame characteristics. For the purposes of this definition propane and other gaseous fuels shall not be considered alternate fuels.

(9) *Boiler fuel*. Is considered to be natural gas used as a fuel for the generation of steam or electricity, including the utilization of gas turbines for the generation of electricity.

(10) *Alternate fuel capabilities*. Is defined as a situation where an alternate fuel could have been utilized whether or not the facilities for such use have actually been installed; *Provided, however*, where the use of natural gas is for plant protection, feedstock, or process uses and the only alternate fuel is propane or other gaseous fuel then the consumer will be treated as if he had no alternate fuel capability.

lowest priority, that is, the one designated with the highest number (category nine is the first curtailed priority), is curtailed fully by a pipeline prior to any curtailment of the next highest category.<sup>54</sup>

Although Order No. 467 emphasized the importance of end-use curtailment, the specific priorities of service established by it incorporated the nature of a consumer's contract since all of the nine priorities were categorized on the basis of whether the customer purchased under a firm or interruptible contract. Thus, curtailment priorities established by Order No. 467 granted a preference to firm contracts over interruptible contracts, even if the end-use under the lower priced, interruptible contract was more socially desirable than the end-use served under the firm contract.<sup>55</sup>

Order No. 467 was reviewed by the D.C. Circuit in *Pacific Gas & Electric Co. v. Federal Power Commission*<sup>56</sup> which held that it merely was a general statement of policy and, as such, was exempt from the rulemaking requirements of section 553 of the Administrative Procedure Act<sup>57</sup> and was not reviewable under section 19 of the Natural Gas Act.<sup>58</sup> The court observed that a general statement of policy, such as Order No. 467, did not establish a "binding norm" but merely "announces the agency's tentative intentions for the future."<sup>59</sup> The D.C. Circuit concluded:

Order No. 467 does not establish a curtailment plan for any particular pipeline. The effect of the order is to inform the public of the types of plans which will receive initial and tentative FPC approval, but there is no assurance that any such plan will be finally approved.<sup>60</sup>

Since the holding of *Pacific Gas* meant that pipelines were not com-

The lawfulness of these definitions originally promulgated by Federal Power Commission Order No. 493-A, 50 F.P.C. 1316 (1973), was upheld in *City of Wilcox v. Federal Power Comm'n*, 567 F.2d 394, 403 (D.C. Cir. 1977).

54. 49 F.P.C. at 87.

55. Order No. 467's reliance on private contracts is consistent with *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), which held that if a public utility, subsequent to entering into a contract for the sale of energy, unilaterally files with a regulatory commission a new tariff inconsistent with its contractual obligations, the newly filed tariff is a nullity and does not abrogate or supersede the contract. *Accord*, *Richmond Power & Light Co. v. Federal Power Comm'n*, 481 F.2d 490 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973) (rate filings by a utility must be rejected because inconsistent with contractual obligations); *Borough of Lansdale v. Federal Power Comm'n*, 494 F.2d 1104 (D.C. Cir. 1974) (error committed when commission did not summarily reject a rate increase filing which was inconsistent with the parties' contract).

56. 506 F.2d 33 (D.C. Cir. 1974).

57. 5 U.S.C. § 553 (1976).

58. 15 *id.* § 717r.

59. 506 F.2d at 38.

60. *Id.* at 40.

pelled to comply with Order No. 467, dispute and uncertainty prevailed, particularly among the customers of pipelines.

As Judge Bazelon observed in *Consolidated Edison Co. v. Federal Power Commission*,<sup>61</sup> "the pipelines sell all the gas they can during periods of shortages and consequently are not overly concerned with which customers receive it. What does concern the pipelines is the possibility that they will be held civilly liable for failure to supply contract requirements of their customers."<sup>62</sup> At issue in *Consolidated Edison* was the lawfulness of action taken by three major interstate pipelines<sup>63</sup> in an effort to comply with Order No. 467 on an interim basis. The D.C. Circuit sustained, pending final Federal Power Commission and court review, the applicability of Order No. 467 to the three pipeline systems. By so doing, the court in *Consolidated Edison* granted, *inter alia*, an imprimatur of approval to adoption of the curtailment principles of end-use at the expense of private contractual arrangements and also recognized the appropriateness of equivalent treatment of direct and indirect customers. This latter action by the court has led one commentator to conclude that the effect of the decision is to unlawfully "rewrite the Natural Gas Act by expanding the FPC's authority over matters not in interstate commerce but simply affecting interstate commerce. This expansion of the FPC jurisdiction encroaches on state prerogatives in an area that should be a matter of local concern."<sup>64</sup> Notwithstanding the criticism, *Consolidated Edison* is significant because it gave credibility to the Federal Power Commission's "raised eyebrow"<sup>65</sup> regulation of natural gas curtailments.<sup>66</sup>

In this chronological overview of the law of natural gas curtail-

61. 512 F.2d 1332 (D.C. Cir. 1975).

62. *Id.* at 1340, quoting *Pacific Gas & Elec. v. Federal Power Comm'n*, 506 F.2d 33, 36 (D.C. Cir. 1974).

63. 512 F.2d at 1336.

64. Tiano, *The Limits of Federal Regulation of Natural Gas Curtailments*, 64 GEO. L.J. 27, 39 (1975).

65. 512 F.2d at 1341.

66. The court in *Consolidated Edison* expressed concern but did not resolve the question of contractual liability of pipelines in damage actions brought by customers receiving less than their contractual entitlements under an approved curtailment plan. *Id.* at 1340. This question has been dealt with in several circuits. In *International Paper Co. v. Federal Power Comm'n*, 476 F.2d 121, 125 (5th Cir. 1973), the Fifth Circuit held that the mere adoption of a curtailment plan "without more" will not serve as an absolute defense to private contract action by a direct industrial customer against a pipeline. The Fifth Circuit stated that the contract law defense of impossibility of performance may be inapplicable in action for damages for breach of contract. *Id.* at 126.

In *Monsanto Co. v. Federal Power Comm'n*, 463 F.2d 799 (D.C. Cir. 1972), the D.C. Circuit noted that even if the validity of a curtailment plan is upheld "it does not automatically follow that plaintiffs are lacking a contract remedy in damages." *Id.* at 808.

In *Louisiana v. Federal Power Comm'n*, 503 F.2d 844 (5th Cir. 1974), the Fifth Circuit admonished the commission to consider a proposed exculpatory clause in United Gas' tariff "on the

ments, it is helpful to review *City of Wilcox v. Federal Power Commission*,<sup>67</sup> which exemplifies the numerous curtailment issues that must be scrutinized by a reviewing court. In *City of Wilcox*, the D.C. Circuit was called upon to review a five step permanent end-use curtailment plan of El Paso Natural Gas System.<sup>68</sup>

At issue in *City of Wilcox* were the following curtailment matters: (1) the appropriate classification for fuel used for irrigation,<sup>69</sup> ignition, and flame stabilization purposes;<sup>70</sup> (2) the subordination of boiler fuel to the lowest curtailment priority;<sup>71</sup> (3) the permanent impact of a grant of extraordinary relief on a customer's priority classification;<sup>72</sup> (4) the adoption of a fixed base period;<sup>73</sup> (5) the priority classification for gas put into storage by the pipeline's customers;<sup>74</sup> (6) the impact of the Na-

assumption that United faces possible liability—not on the assumption it is immune." *Id.* at 867-68.

The reasoning of *International Paper* was followed by the Fifth Circuit in *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), where the Fifth Circuit agreed with the district court's referral to the Federal Power Commission of Mississippi Power & Light's (MP&L) action for breach of contract and damages in the amount of \$160 million against United Gas for its failure to supply the amounts of natural gas set forth in MP&L's contract.

Recently, in *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978), involving an action by an indirect industrial customer against its interstate pipeline supplier for breach of contract, negligent performance of the contract, fraud, and breach of statutory duty, the district court denied, *inter alia*, the pipeline's motion for summary judgment in the breach of contract action. The same court in *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, No. C-C-77-131 (W.D.N.C. Feb. 16, 1979), entered a judgment in the amount of approximately \$23.8 million and approximately \$1.9 million for prejudgment interest against the pipeline for breach of contract, negligence, and promissory estoppel. The judgment was appealed to the United States Court of Appeals for the Fourth Circuit. See *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33 (4th Cir. 1980).

67. 567 F.2d 394 (D.C. Cir. 1977).

68. *Id.* at 400.

69. *Id.* at 403. Irrigation fuel, which is an agricultural use of natural gas, is given high priority status under title IV of the NGPA. However, it has been asserted that irrigation use should be given lower priority treatment because it merely is an industrial use.

70. *Id.* at 404-05. The priorities of Order No. 467 do not specifically classify any use such as ignition fuel.

71. *Id.* at 405.

72. *Id.* at 404. Under section 2.78(b) of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 2.78(b) (1979), a party may request extraordinary "relief from curtailment." See, e.g., *Southern Cal. Edison Co. v. Federal Power Comm'n*, 524 F.2d 409 (D.C. Cir. 1975); *Texas Eastern Transmission Corp.*, 53 F.P.C. 691 (1975); *United Gas Pipe Line Co.*, 47 F.P.C. 196 (1972).

73. 567 F.2d at 408-12. The type of base period utilized by a pipeline is significant in the implementation of a curtailment plan. A fixed base period limits a consumer to its takes of natural gas during an historical period. Curtailment is then calculated on the basis of historical usage. As a consequence, a fixed base period precludes a pipeline's customers from growing. In contrast, a rolling base period is future-looking and permits growth. According to *City of Wilcox*: "Volumetric entitlements to El Paso customers must reflect consideration of total natural gas needs and the possibility of satisfying said needs, at least to some extent . . . rather than rigidly reapportioning entitlements solely on the basis of historical use of . . . gas." *Id.* at 411.

74. The court in *City of Wilcox* observed that:

The injection of natural gas into storage tanks by . . . the two California customers

tional Environmental Policy Act;<sup>75</sup> (7) the contractual liability of the pipeline to its curtailed customers;<sup>76</sup> (8) the lawfulness of a plan whereby customers who were not curtailed compensated customers who were curtailed;<sup>77</sup> and (9) the scope of the end-use data to be collected.<sup>78</sup>

After an extensive discussion of each of these issues, Judge MacKinnon concluded for the court that it must remand "the instant case for still more deliberation."<sup>79</sup> Although there is a strong judicial preference to affirm the final action of a federal administrative agency, *City of Wilcox* made clear that the Federal Power Commission had not fully met its mandate to insure that El Paso's curtailment was "just and reasonable."<sup>80</sup>

More recently, the D.C. Circuit in *North Carolina v. Federal En-*

of El Paso, creates a difficulty in the curtailment categories . . . . The interim plan on review there, Opinion No. 634, treated natural gas retained in storage as outside the scheme of any end-use deserving priority classification. Conversely, when such natural gas was withdrawn from storage, it was treated as though it had been supplied from an independent source.

The response of Opinion No. 697 was to treat storage-injection as an end-use in itself, and afford it Priority 2 classification. The Commission's reasoning was that "[n]atural gas used for injections into storage should also be accorded a relatively high priority as the primary purpose of storage is the projection of service to residential and other temperature-sensitive consumers during the winter heating season."

*Id.* at 412-14.

75. 42 U.S.C. § 4321 (1976). See also Mogel, *Energy and the Environment: Must There be a Choice?*, 13 CAL. W.L. REV. 1 (1976).

76. 567 F.2d at 418-19. See note 66 and accompanying text *supra*.

77. 567 F.2d at 419-20. The question of compensation was addressed recently in *North Carolina v. Federal Energy Comm'n*, 584 F.2d 1003 (D.C. Cir. 1978), where, in remanding for further administrative action a permanent end-use curtailment plan for a determination of the plan's reasonableness, the court noted that:

Compensation, by which customers curtailed less than the system average compensate those customers curtailed more than the system average, is one way to mitigate the disparate financial impact that results from end-use curtailment. When some customers are curtailed proportionately more than others, they effectively subsidize other customers. This subsidy represents a form of discrimination among pipeline customers. The function of compensation is not to eliminate this discrimination. Rather, through a compensation scheme, the impact of disproportionately heavy curtailment is moderated.

*Id.* at 1015. See also *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976).

78. 567 F.2d at 420-22.

79. *Id.* at 422.

80. The lawfulness of curtailment plans is measured by section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b) (1976). This section provides that:

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

ergy Regulatory Commission<sup>81</sup> concluded that a Federal Energy Regulatory Commission permanent nine category end-use plan,<sup>82</sup> which utilized an historical base period,<sup>83</sup> had to be remanded for an agency assessment of "the actual impact of the plan on ultimate consumers."<sup>84</sup> The significance of *North Carolina*, other than being the latest word on curtailment by the D.C. Circuit, is that it added a new criterion—an impact assessment—to other factors which must be assessed in determining the justness and reasonableness of a curtailment plan.<sup>85</sup>

Under review in *North Carolina* was a permanent nine priority plan that allocated the gas supply of Transcontinental Gas Pipe Line Corporation,<sup>86</sup> a major interstate pipeline company operating in Texas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, New Jersey, and the New York metropolitan area.<sup>87</sup> Transco serves eighty-one different customers, eighty of which are wholesale customers.<sup>88</sup> In 1976-77, Transco's curtailment level was forty-four percent.<sup>89</sup> The permanent curtailment approved for Transco allocated the pipeline's gas supply according to each customer's end-use during the twelve month historical base period from May 1972 to April 1973.<sup>90</sup> Under the agency-approved curtailment plan, some of Transco's wholesale customers were curtailed significantly more than others.<sup>91</sup> For example, distribution customers in North and South Carolina were curtailed 39.5 percent while Transco's distribution customer in Mississippi was curtailed only 9.6 percent.<sup>92</sup>

81. 584 F.2d 1003 (D.C. Cir. 1978).

82. The curtailment plan involved in *North Carolina* essentially followed the priorities set forth in Order No. 467. See 584 F.2d at 1010 and note 53 *supra*.

83. 584 F.2d at 1010.

84. *Id.*

85. In addition to its discussion of the necessity of an impact assessment, *North Carolina* also dealt extensively with the question of compensation. The court concluded that:

Because of the lasting discrimination inherent in an end-use permanent curtailment plan, the level of compensation accorded customers enduring heavier-than-average curtailment is a factor bearing on the reasonableness of the plan that the Commission must consider in prescribing a permanent curtailment plan. The Commission erred in failing to consider fully whether and how a compensation feature should have been included. . . . On remand, therefore, the Commission should explore the merits of the compensation issue on the basis of an adequate record.

*Id.* at 1017.

86. Hereinafter referred to as Transco.

87. 584 F.2d at 1008.

88. *Id.*

89. *Id.*

90. *Id.* at 1010.

91. *Id.*

92. *Id.* at 1011. A state-by-state tabulation revealed the following range of curtailment levels to have been experienced by Transco's customers:

Mississippi (1 customer)

9.6%



In view of the foregoing, Judge Wilkey for the court in *North Carolina* concluded:

While end-use is an appropriate consideration for purposes of curtailment, *discrimination resulting from an end-use plan can be justified only to the extent that the plan actually does protect high-priority uses from curtailment ahead of low-priority uses.* . . . We find that the Commission's conclusion that the . . . plan is just and reasonable *cannot be sustained in light of the Commission's failure to make findings as to the impact the plan would actually have on ultimate consumers.* The fact of the matter is that the Commission does not know what impact the plan will have on ultimate consumers, and therefore it is not in a position to justify the discrimination resulting from the plan as necessary to achieve end-use objectives. Indeed, it is quite likely that the plan is an 'end-use' plan in name only, and that, in fact, it allocates gas on a basis that *does not* reasonably ensure the protection of high-priority end-uses.<sup>93</sup>

Thus, the teaching of *North Carolina* is that a curtailment plan cannot be sustained as lawful unless the impact of the plan is known. This is not an unreasonable requirement *per se* but it may prove to be unobtainable in view of the extraordinary time consumed in administrative proceedings.<sup>94</sup> It may well be that impact data presented at the initiation of a curtailment proceeding may be stale by the time the matter becomes ripe for agency decision.<sup>95</sup>

Alabama	30.7%
Georgia	30.3%
North and South Carolina	39.5%
Virginia	33.0%
District of Columbia	16.4%
Maryland-Delaware	24.0%
Pennsylvania	19.5%
New Jersey	21.7%
New York	19.4%

93. *Id.* at 1012 (footnote omitted; emphasis in original).

94. The regulatory delay in Federal Power Commission proceedings was commented upon in *Phillips Petroleum Co.*, 24 F.P.C. 537 (1960), *aff'd sub nom. Wisconsin v. Federal Power Comm'n.*, 303 F.2d 380 (D.C. Cir. 1961), *aff'd*, 373 U.S. 294 (1963). In the administrative proceeding, it was observed that: "[I]f our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D.—eighty-two and one half years from now." 24 F.P.C. at 546. See *Rulemaking*, *supra* note 29, at 32.

95. A Federal Energy Regulatory Commission administrative law judge has observed in a report issued in *Northern Natural Gas Co.*, No. RP 76-52 (May 29, 1979) that:

The Northern curtailment plan has evoked a massive proceeding before the Commission, with a record to match. Parties beyond counting, represented by lawyers without number, have produced a record consisting of 12,722 pages of transcript (in 107 volumes), over 210 exhibits, and 54 items by reference. The hearings began in October 1975. The amount of time, effort, and money thus far expended on the case is incalculable. . . . There is, in short, a distinct possibility that little of the current plan will be reflected in the new plan Northern will have to file under the aegis of the new statute and the Commission's regulations implementing it. If that occurs, the record in this proceeding—so laboriously and expensively compiled—will not only become stale but may also be largely irrelevant.

*North Carolina* can be viewed as a bench mark in the eight years since Order No. 431 was promulgated by the Federal Power Commission. During that period, curtailment law has developed certain basic principles which have not been uniformly adhered to as a result of the non-mandatory action of the federal agency, the unique nature of the various interstate pipelines, their supply situations, and the composition, distribution, and location of their customer groups.<sup>96</sup> But for the federal action which has been taken,<sup>97</sup> curtailment law would have continued evolving by agency and judicial decision-making. However, with the passage of title IV of the Natural Gas Policy Act of 1978 on November 9, 1978, a significant new element was added by the congressional determination that certain consumers, described as "essential agricultural" users,<sup>98</sup> were to be given high priority treatment during periods of natural gas curtailment. Although the Congress did not intend major disruptions of existing curtailment plans,<sup>99</sup> that result can be anticipated.

96. It has been held that a curtailment plan is to be tailored to the particular needs of each pipeline and its customers. *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1972). See also *Consolidated Edison Co. v. Federal Power Comm'n*, 511 F.2d 372, 378 (D.C. Cir. 1974).

97. See note 101 *infra*.

98. Section 401(f) of the NGPA provides the following:

(1) ESSENTIAL AGRICULTURAL USE.—The term "essential agricultural use," when used with respect to natural gas, means any use of natural gas—

(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food,

which the Secretary of Agriculture determines is necessary for full food and fiber production.

15 U.S.C.A. § 3391(f) (Supp. 1979).

99. The legislative history of title IV of the NGPA states in pertinent part:

For purposes of implementing this section, the Commission is instructed to reopen curtailment plans that are already in effect under the Natural Gas Act only to the extent necessary to adjust those plans to bring them into conformity with the new curtailment priority schedule. The conferees were concerned that these changes not burden the Commission with lengthy proceedings which might throw existing curtailment plans into disarray. Therefore, the conference agreement includes the term 'to the maximum extent practicable' to assure that the Commission has the necessary flexibility in implementing any changes. For example, the conferees do not intend the reopening of curtailment plans for this limited purpose to result in adoption of a new base year for curtailment purposes.

S. REP. NO. 1126, 95th Cong., 2d Sess. 113 (1978).

## THE NATURAL GAS POLICY ACT OF 1978

Put him on a farm with the understanding he has to make his own living off it, and I bet he will give the farmers relief next year.

Will Rogers<sup>100</sup>

The evolution of the law of natural gas curtailments has been affected significantly by recent congressional legislation<sup>101</sup> primarily expressed in section 401 of the Natural Gas Policy Act of 1978<sup>102</sup> and several rulemaking proceedings initiated thereunder by the Federal Energy Regulatory Commission, the United States Department of Agriculture, and the United States Department of Energy through its Economic Regulatory Administration. The intended purpose of this collective federal action is to afford a relatively high level of protection to members of the agricultural community during periods of natural gas curtailments. A subsidiary result is a limited reordering of the system of priorities which has evolved since promulgation of Order No. 431.

A major impact of the NGPA determination that agricultural consumers are to be preferred during periods of natural gas curtailments creates a significant change in one of the hallmarks of existing curtailment law: end product—what a consumer utilized natural gas to produce—is by statutory fiat to have priority over end-use or how the natural gas actually was used in the consumer's operations. The second major impact is that the numerous rulemaking proceedings initiated under section 401 of the NGPA have not created certainty as to the level of protection to be accorded the agricultural community because of the tension among three different federal bodies which operate under different statutory mandates.

100. R. KETCHUM, *WILL ROGERS, HIS LIFE AND TIMES* 216 (1973).

101. The origin of the recent federal legislation establishing a new agricultural curtailment priority can be traced to the comprehensive National Energy Act which is comprised of the following five statutes: the National Energy Conservation Policy Act of 1978, Pub. L. No. 95-619, 92 Stat. 3206 (codified at scattered sections of 12, 15, 42 U.S.C.A. (Supp. 1979)); the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (codified at 42 U.S.C.A. §§ 8301-8483 and scattered sections of 15, 19, 45, 49 U.S.C.A. (Supp. 1979)); the Public Utilities Regulatory Policy Act, Pub. L. No. 95-617, 92 Stat. 3117 (codified at scattered sections of 15, 16, 30, 42, 43 U.S.C.A. (Supp. 1979)); the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (codified at scattered sections of 19, 23, 26 U.S.C.A. (Supp. 1979)); and the NGPA, 15 U.S.C.A. §§ 3301-3432, 42 U.S.C.A. § 7255 (Supp. 1979). In addition to the NGPA, only the Public Utility Regulatory Policies Act of 1978 and the Powerplant and Industrial Fuel Act of 1978 are of significance to the natural gas industry.

102. Pub. L. No. 95-621, 92 Stat. 3351 (1978) (codified at 15 U.S.C.A. §§ 3301-3432 (Supp. 1979); 42 U.S.C.A. § 7255 (Supp. 1979)). The NGPA has been criticized. One commentator noted that: "Even though the nationwide benefits of deregulation may exceed its nationwide costs, it is (at least in the short run) not in the interests of some gas consumers." Mitchell, *The Basis of Congressional Energy Policy*, 57 *TEX. L. REV.* 591, 596 (1979).

### Section 401 of the NGPA

As already indicated, title IV of the NGPA affects the law of natural gas curtailments by statutorily determining a preference for agricultural users of natural gas and establishing an order of curtailment priorities essentially based upon end product as distinguished from end-use considerations. Specifically, section 401(a) of title IV of the NGPA provides in pertinent part that:

To the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—

is necessary in order to meet the requirements of high priority users.<sup>103</sup>

Thus, by this language, the Congress has established two distinct curtailment categories: high priority users<sup>104</sup> and essential agricultural users. Moreover, section 402 of the NGPA establishes a third curtailment category: "essential industrial process and feedstock"<sup>105</sup> users which are to be subordinated in any priority scheme to both high priority and essential agricultural users.<sup>106</sup> As a consequence, during peri-

103. Compliance with section 401(a) of the NGPA is mandatory. Under section 502(c) of the NGPA, however, a pipeline company may seek an adjustment. Section 502(c) provides, in pertinent part:

The [Federal Energy Regulatory] Commission . . . shall, by rule, provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens. Such rule shall establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, exception to, or exemption from, such applicable rules or orders.

15 U.S.C.A. § 3412(c) (Supp. 1979).

This provision already has been the basis of adjustment filings by interstate pipeline companies. *See, e.g.,* Arkansas Louisiana Gas Co., No. TC79-134 (July 18, 1979).

104. Section 401(f)(2) of the NGPA defines high priority user as:

Any person who—

- (A) uses natural gas in a residence;
- (B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;
- (C) uses natural gas in any school, hospital, or similar institution; or
- (D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.

15 U.S.C.A. § 3391(f)(2) (Supp. 1979).

105. Section 401 of the NGPA does not define such terms as process fuel or feedstock. Therefore, it may be argued that these terms have the same meaning ascribed to them by 18 C.F.R. § 2.78(c)1 (1974) which was in existence prior to passage of the NGPA.

106. Section 402 of the NGPA provides in pertinent part:

(a) GENERAL RULE.—The Secretary of Energy shall prescribe and make effective a rule which provides that, notwithstanding any other provision of law (other than subsection (b)) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use, unless such curtailment—

- (1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c);

ods of natural gas curtailments, title IV of the NGPA mandates that all interstate pipeline companies give protection in the following descending order of priorities: high priority users, essential agricultural users, and essential industrial process and feedstock users.<sup>107</sup>

The significant change to existing curtailment law compelled by section 401 is its grant of special treatment to essential agricultural users, which are defined as those which use natural gas:

(a) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(b) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food,

which the Secretary of Agriculture determines is necessary for full food and fiber production.<sup>108</sup>

The legislative history of section 401<sup>109</sup> only indicates that its purpose is to "prohibit interstate pipelines from curtailing deliveries of natural gas for any agricultural use" unless the curtailment is required to protect service to either high priority or existing essential agricultural users.<sup>110</sup>

To make operative the substantive determination of section 401, its subparagraph (a) provides that not later than 120 days after November 9, 1978, the date of enactment of the NGPA, the Secretary of Energy "shall prescribe and make effective a rule"<sup>111</sup> which establishes that no curtailment plan of an interstate pipeline company may provide for curtailment of deliveries of natural gas for essential agricultural use

(2) is necessary in order to meet the requirements of high-priority users; or

(3) is necessary in order to meet the requirements for essential agricultural uses of natural gas for which curtailment priority is established under section 401.

(b) CURTAILMENT PRIORITY APPLICABLE ONLY IF ALTERNATIVE FUEL NOT AVAILABLE.—The provisions of subsection (a) shall apply with respect to any curtailment of deliveries for any essential industrial process or feedstock use only if the Commission determines that use of a fuel (other than natural gas) is not economically practicable and that no fuel is reasonably available as an alternative for such use.

15 U.S.C.A. § 3392 (Supp. 1979).

107. Presumably, boiler fuel usage would be the fourth and lowest priority. Title IV of the NGPA does not discuss the priority classification of boiler fuel.

108. 15 U.S.C.A. § 3391 (Supp. 1979). The legislative history of section 401(b) does not address the rationale for the two distinct definitions of essential agricultural users in section 401(f)(A) and (B). It may be speculated that in subparagraph (A), all uses, including boiler fuel, are deemed essential agricultural uses. In contrast, since subparagraph (B) limits the definition of essential agricultural users to the statutory enumerated end-users, it could be argued that, for example, boiler fuel used by a fertilizer manufacturer is precluded from being classified as an essential agricultural user. The rationale for section 401's different treatment of boiler fuel consumed by essential agricultural users may be unintended since neither the statutory language nor the legislative history offers an explanation.

109. S. REP. NO. 1126, 95th Cong., 2d Sess. 1 (1978).

110. *Id.* at 112-13.

111. Section 401(a) of the NGPA, 15 U.S.C.A. § 3391(a) (Supp. 1979).

except to meet the requirements of enumerated high priority users.<sup>112</sup> The statutory scheme of section 401 further provides in its paragraph (c) that, prior to the issuance of the Secretary of Energy's rule required by section 401(a), the Secretary of Agriculture shall certify to both the Secretary of Energy and the Federal Energy Regulatory Commission "the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential agricultural uses in order to meet the requirements of full food and fiber production."<sup>113</sup> Under section 403(b) of the NGPA<sup>114</sup> and section 402(a)(1)(E) of the Department of Energy Organization Act,<sup>115</sup> the Federal Energy Regulatory Commission is directed to implement the section 401 rules promulgated by both the United States Departments of Energy and Agriculture.

Thus, section 401 contemplates at least three separate rulemaking proceedings by the United States Departments of Energy and Agriculture and the Federal Energy Regulatory Commission to implement the essential agricultural user priority.<sup>116</sup> In actuality, the administrative

112. 44 Fed. Reg. 11,526 (1979).

113. Section 401(c) of the NGPA, 15 U.S.C.A. § 3391(c) (Supp. 1979).

114. Section 403(b) of the NGPA, 15 U.S.C.A. § 3393(b) (Supp. 1979) provides:

The Commission shall implement the rules prescribed under Sections 401 and 402 pursuant to its authority under the Department of Energy Organization Act to establish, review, and enforce curtailments under the Natural Gas Act.

115. Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified at 42 U.S.C.A. § 7172(a)(1)(E) (Supp. 1979)).

116. A fourth rulemaking initiated by the Federal Energy Regulatory Commission is *Procedures for Evaluating the Economic Practicability and Reasonable Availability of Alternate Boiler Fuel for Large Boiler Facilities*, No. RM79-40 (Aug. 29, 1979). That proceeding is pursuant to section 401(b) of title IV of the NGPA, 15 U.S.C.A. § 3391(b) (Supp. 1979), which provides:

If the Commission, in consultation with the Secretary of Agriculture, determines, by rule or order, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for any agricultural use of natural gas, the provisions of subsection (a) shall not apply with respect to any curtailment of deliveries for such use.

The legislative history of section 401 states:

The Commission, in consultation with the Secretary of Agriculture, will determine if alternative fuels are economically practicable and reasonably available to meet the needs of agricultural uses as certified by him. If the Commission determines that alternative fuels meet both tests, the uses will not qualify for a curtailment priority. . . . The conferees intend that the authority to restrict curtailment priority by determining that alternative fuels are economically practicable and reasonably available be utilized only in cases where it is clear that both tests are met. One of the reasons for imposing such a requirement is to prevent unnecessary increases in the cost of food in this country. The Commission determination that an alternative fuel is 'economically practicable' shall not include a requirement to switch to high cost alternatives. That is not what the conferees consider to be 'economically practicable'. . . .

S. REP. NO. 1126, 95th Cong., 2d Sess. 113 (1978).

On October 26, 1979, the commission issued, in No. RM79-40, Order No. 55 which established on an interim basis for the winter of 1979-80 that essential agricultural users generally have alternate fuel capability to use coal or residual oil.

proceedings which were triggered far exceeded the three contemplated by section 401 of the NGPA.<sup>117</sup>

117. The following table lists numerous actions to implement section 401 of the NGPA initiated by the Department of Agriculture (USDA), the Economic Regulatory Administration (ERA) on behalf of the Department of Energy, and the Federal Energy Regulatory Commission (FERC):

<u>Agency or Department</u>	<u>Action Taken</u>	<u>Date</u>
* USDA	Notice of Proposed Rulemaking	Nov. 20, 1978
* ERA	Notice of Proposed Rulemaking	Nov. 22, 1978
FERC	Notice of Public Hearing	Nov. 29, 1978
USDA	Public Hearings Held	Dec. 11-18, 1978
* FERC	Notice of Proposed Rulemaking (Interim Rule - Docket No. RM79-13)	Jan. 10, 1979
ERA & FERC	Joint Hearings on ERA Rule	Jan. 10-11, 1979
* FERC	Notice of Proposed Rulemaking (Permanent Rule - Docket No. RM79-15)	Jan. 12, 1979
FERC	Public Hearings Held Docket No. RM79-13	Jan. 26, 1979
FERC	Notice of Proposed Rulemaking (Transportation Agreements - Docket No. RM79-18)	Feb. 5, 1979
* USDA	Interim Rule Issued	Feb. 28, 1979
* FERC	Interim Rule Issued Docket No. RM79-13	Mar. 6, 1979
* ERA	Final Rule Issued	Mar. 9, 1979
FERC	Public Hearings Held Docket No. RM79-15	Mar. 6-19, 1979
FERC	Final Rule (Order No. 27) Issued in Docket No. RM79-18	Apr. 23, 1979
* FERC	Final Rule (Order 29) Issued Docket No. RM79-15	May 2, 1979
* USDA	Final Rule Issued	May 14, 1979
FERC	Order No. 29-A Issued Docket No. RM79-15	June 15, 1979
FERC	Rehearing of Interim Rule Denied Docket No. RM79-13	June 20, 1979
FERC	Order No. 29-B Issued Docket No. RM79-15	July 20, 1979
FERC	Rehearing of Final Rule (Order No. 29-C) Denied, Docket No. RM79-15	Oct. 22, 1979

\* Each of the federal actions denoted with an asterick will be discussed in chronological order in this article.

### Section 401 Rulemaking

The first section 401 rulemaking proceeding initiated was on November 20, 1978, when the Secretary of Agriculture issued a "Notice of Proposed Rulemaking and Public Hearings"<sup>118</sup> which contained a broad statement of purpose.<sup>119</sup> The Secretary of Agriculture sought oral and written comments<sup>120</sup> on a proposed regulation, which, *inter alia*, defined certain terms used in section 401,<sup>121</sup> identified essential agricultural uses, articulated the meaning of "natural gas requirements," and provided for a modification procedure.<sup>122</sup>

One of the two most significant provisions of the Secretary of Agri-

118. 43 Fed. Reg. 54,938 (1978).

119. The notice provided in part:

Natural gas is a crucial energy source in the food and fiber system. It is a major feedstock and fuel in the manufacture of nitrogen and other fertilizers and pesticides; it powers irrigation pumping and dries crops such as corn, rice, peanuts and hay; and it is the principal fuel for food processing. In certain processes, the clean burning characteristics of natural gas permit direct contact with foodstuffs without imparting any of the undesirable residues that are attendant with petroleum fuels. Natural gas also provides much of the energy for space heating in food warehouses and retail stores. From input supply to cooking in the home, natural gas is a major fuel used in the food system.

The production and processing of food and fiber commodities is a continuous process. Agricultural activities are biological in nature and involve the growing of plants and animals and the conversion of these perishable commodities into products to feed, clothe and shelter mankind. Once an agricultural activity is started, it must be carried through to completion; or significant losses can occur.

The curtailment of natural gas in the food system is especially burdensome on food industries and, ultimately, on food supplies.

Disruption of natural gas supplies to the food and fiber sector also results in increased prices to consumers across a broad range of purchases and contributes substantially to inflationary pressures in the general economy. The curtailment priority in Section 401 is designed to avoid such detrimental effects on farmers, agricultural suppliers, processors and marketers, consumers, and the Nation's economy.

*Id.* at 54,939.

120. Public hearings were held on December 11, 1978 in Washington, D.C.; December 14, 1978, in Sacramento, California; and December 18, 1978, in Chicago, Illinois. *Id.* at 54,938. The Department of Agriculture received 168 written comments and heard a total of 42 comments at the three public hearings. 44 Fed. Reg. 11,518 (1979).

121. For example, section 2900.2 of the proposed rule defined full food and fiber production to mean:

[T]he entire output of food and fiber produced for the domestic market and for export, for building of reserves, and crops for soil building or conservation. This term also includes the processing of food and fiber into stable and storable products, and the maintenance of food quality after processing.

43 Fed. Reg. at 54,941. Also defined were "establishment," "essential agricultural use establishment," and "current natural gas requirements." *Id.*

122. *Id.* at 54,942. The proposed modification procedure which was set forth in section 2900.5 provided, in pertinent part:

Determinations of, and certifications of natural gas requirements for, essential agricultural uses may be modified by the Secretary of Agriculture from time to time. . . . Requests for such modifications may be addressed to the Secretary of Agriculture who will review them at least annually. Such requests may propose additional classifications or



culture's proposed rule was its selection of Standard Industrial Classification<sup>123</sup> numbers to certify "those classes of establishments . . . that are carrying out essential agricultural functions necessary for full food and fiber production."<sup>124</sup> In other words, essential agricultural users were those SIC numbers that were designated by the Secretary of Agriculture's proposed rule.<sup>125</sup> One obvious advantage of using SIC num-

deletions of essential agricultural uses or may be based upon revised requirements for new establishments or additions to existing establishments.

*Id.* at 54,942.

123. Hereinafter referred to as SIC.

124. 43 Fed. Reg. at 54,939.

125. The SIC numbers designated in section 2900.3 of the proposed rule were as follows:

## FOOD AND NATURAL FIBER PRODUCTION

### DIRECT

- 01 Agricultural Production—Crops
- 02 Agricultural Production—Livestock Excluding 0272—Horses and Other Equines and Nonfood Portions of 0279—Animal Specialties, Not Elsewhere Classified
- 0723 Crop Preparation Services for Market—Except Cotton Ginning (see Natural Fiber)
- 08 Forestry
- 4971 Irrigation Systems

### FERTILIZER AND CHEMICAL INPUTS

- 1474 Potash, soda, and Borate Materials (agricultural related only)
- 1475 Phosphate Rock (agricultural related only)
- 287 Agricultural Chemicals
- 3274 Lime (agricultural related only)

### NATURAL FIBER

- 0724 Cotton Ginning
- 22 Textile Mills
- 2421 Saw Mills and Planning
- 2611 Pulp Mills
- 2823 Cellulosic Man-Made Fibers (rayon) from wood fiber
- 3111 Leather Tanning and Finishing

### FOOD QUALITY MAINTENANCE

- 4221 Farm Product Warehousing and Storage
- 4222 Refrigerated Warehousing
- 514 Groceries and Related Products.

*Id.* at 59,941. The selection of appropriate SIC numbers resulted in anomolous results. For example, it was observed by the proposed rule:

Alcoholic beverages have been included only where necessary to protect the agricultural products through processing. Thus, it is proposed to include wines, brandy, and brandy spirits because perishable crops such as grapes, apples, apricots, peaches, and pears are used in the manufacture of these products. Alcoholic beverages based on grain, which can be safely stored, are not included.

bers was that it avoided a case-by-case determination by the Secretary of Agriculture as to which facilities qualified as essential agricultural users.

The other significant and probably most controversial aspect of the Secretary of Agriculture's rule was its definition of natural gas requirements for essential agricultural users. The rule provided that: "the natural gas requirements for . . . the essential agricultural uses are certified to be 100 percent of current natural gas requirements of existing essential agricultural use establishments."<sup>126</sup> Utilization of a one hundred percent current requirements approach means that essential agricultural users were not only immunized to a large extent from curtailment but would be able to increase their natural gas requirements at the possible expense of the pipeline's existing lower priority customers.<sup>127</sup> In this regard, the proposed rule stated that it:

[C]ontemplates a current, rather than an historical base period method for determining requirements of natural gas for essential agricultural uses. Due to the vagaries of weather whereby energy demands unpredictably vary from season to season and year to year, the historical base period concept tends to be impractical for agriculture. This method allows the curtailment priority to apply to actual current requirements rather than to past usage.<sup>128</sup>

Although the Secretary of Agriculture's rule was the first word, it was not the last.<sup>129</sup> Two days after the Secretary of Agriculture issued his proposed rule, the Department of Energy, through its Economic Regulatory Administration,<sup>130</sup> issued a "Notice of Proposed Rulemaking and Public Hearings."<sup>131</sup> The notice stated that, to the maximum extent practicable, there would be no curtailment of natural gas for any

*Id.* at 54,939.

126. *Id.* at 54,942. In May 1979, President Carter strongly endorsed the Department of Agriculture's use of a one hundred percent current requirements approach for essential agricultural users. In a speech in Des Moines, Iowa, the President said that: "Under the Natural Gas Policy Act of 1978, 100 percent of current requirements for natural gas in Iowa will be maintained." Des Moines Register, May 5, 1979, at 5A, col. 1.

127. See note 30 and accompanying text *supra*.

128. 44 Fed. Reg. 54,940 (1978). Only two limitations on the one hundred percent current requirements approach were imposed. First, the volumetric limit set forth in the agricultural user's gas supply contract was a cap to the natural gas takes of the agricultural establishment, unless a contract amendment permitted deliveries to enable the user to receive one hundred percent of its current requirements. Second, the one hundred percent current requirements approach only applied to existing agricultural facilities and not to additions or to new agricultural facilities.

*Id.*

129. Moreover, the proposed rule was not the last word by the Secretary of Agriculture. On February 26, 1979, the Secretary issued an interim final rule, 44 Fed. Reg. 11,518 (1978), and on May 19, 1979, the Secretary issued a final rule, 44 Fed. Reg. 28,782 (1979).

130. Hereinafter referred to as ERA.

131. 43 Fed. Reg. 54,660 (1978).

essential agricultural use.<sup>132</sup> To implement its statement of purpose, ERA proposed regulations which merely restated section 401 of the NGPA.<sup>133</sup> For example, ERA's proposed rule neither addressed the merits of the one hundred percent current requirements approach utilized by the United States Department of Agriculture nor established

132. The notice further provided:

The proposed rule is a general rule, binding on all interstate pipeline companies, and would be effective immediately upon publication. The rule would provide that, "to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of natural gas for any essential agricultural use," unless at least one of three conditions exists. The circumstances permitting curtailment of essential agricultural uses would be: (1) "Curtailment does not reduce the quantity of natural gas delivered for such use below the use requirement certified by the Secretary of Agriculture;" (2) "such curtailment is necessary to meet the requirements of high-priority users;" or (3) "the Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines" that solar energy or another fuel (other than natural gas) "is economically practical" and "reasonably available" for that use. . . . The proposed rule defines "essential agricultural use" as that use of natural gas which the Secretary of Agriculture determines is necessary for full food and fiber production.

133. ERA's proposed rule provides in part:

(b) *General rule.* (1) Notwithstanding any other rule, regulation, or order of the Department of Energy, the Federal Energy Regulatory Commission or their predecessor agencies and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of natural gas for any essential agricultural use, unless—

(i) Such curtailment does not reduce the quantity of natural gas delivered for such use below the use requirement certified by the Secretary of Agriculture as necessary for full food and fiber production, pursuant to section 401(c), of the Natural Gas Policy Act of 1978; or

(ii) Such curtailment is necessary to meet the requirements of high-priority users; or

(iii) The Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines, by rule or order, that use of solar energy or another fuel (other than natural gas) is economically practicable and that the fuel is reasonably available for the essential agricultural use;

(2) Notwithstanding section b(1), any essential agricultural use which also qualifies as a high-priority user shall remain a high-priority user.

(c) *Definitions.* For the purposes of this general rule, the following definitions apply:

(1) 'Essential agricultural use' means any use of natural gas—

(i) For agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, or crop drying; or,

(ii) As a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food; which the Secretary of Agriculture certifies to the Secretary of Energy and the Federal Energy Regulatory Commission as necessary for full food and fiber production.

(2) 'High-priority user' means any person who—

(i) Uses natural gas in a residence including any apartment house or other multi-unit dwelling used primarily for residential purposes if that apartment house or other multi-unit dwelling does not have either existing alternate fuel (excluding solar energy) capability in place or access to adequate supplies of alternative fuels;

(ii) Uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;

(iii) Uses natural gas in any school, hospital, or similar institution which does not have either existing alternate fuel (excluding solar energy) capability in place or access to adequate supplies of alternate fuels;

(iv) Uses natural gas for any other use, the curtailment of which would endanger life, health, or maintenance of physical property, including minimum commercial and

procedures to insure that natural gas certified by the Secretary of Agriculture was not diverted to lower priority users by local distribution companies, which are not subject to the jurisdiction of the Federal Energy Regulatory Commission.<sup>134</sup>

One advancement, however, made by ERA's proposed rule was its setting forth, as an example,<sup>135</sup> the modifications required by section 401 upon a hypothetical curtailment plan.<sup>136</sup> For example, one modification was that schools, which use natural gas for boiler fuel, an obvious inferior use,<sup>137</sup> were to be upgraded ahead of essential agricultural users, which utilized natural gas for purposes superior to boiler fuel.<sup>138</sup> Another example cited by ERA's rule was that industrial feedstock users, which by definition have no alternate fuel capability,<sup>139</sup> would be downgraded below large users of boiler fuel, such as schools.<sup>140</sup> ERA observed these shifts mandated by section 401 and queried whether those shifts could be reconciled with the congressional desire not to cause major disruptions in existing curtailment plans.<sup>141</sup>

The next chronological step in the several section 401 rulemakings occurred on November 29, 1978, when the Federal Energy Regulatory Commission issued its "Notice of Public Hearing and Opportunity for Comment"<sup>142</sup> wherein the commission, *inter alia*, determined that

plant protection (when operations are shut down), sanitation, correctional facilities, and police and fire protection.

(3) 'Interstate pipeline' means any natural gas company, as defined in section 2(6) of the Natural Gas Act, which is engaged in the transportation by pipeline of natural gas.

(4) 'Natural gas' means either natural gas unmixed, or any mixture of natural and artificial gas.

*Id.* at 54,663.

134. See text accompanying note 45 *supra*. See also *Municipal Distributors Group v. Federal Power Comm'n*, 467 F.2d 741 (D.C. Cir. 1972). Therefore, the FERC could condition deliveries of natural gas by an interstate pipeline to its distribution customers upon the flow-through of this priority gas to the intended essential agricultural users. Although no local distribution company would be compelled to accept the agricultural priority gas, a local distributor would not receive any agricultural priority gas from its interstate pipeline supplier unless the distributor agreed to provide such gas to the intended essential agricultural users.

135. According to ERA: "We do not intend in the proposal to determine any specific order of priority among the high priority uses defined in the Act . . . but instead would allow the order of priority among such users in current plans to remain in effect to the maximum extent practicable. . . ." 43 Fed. Reg. at 54,661.

136. *Id.* at 54,662.

137. See note 38 *supra* and accompanying text.

138. 43 Fed. Reg. 54,662 (1978).

139. See note 53 *supra* and accompanying text.

140. 43 Fed. Reg. at 54,662.

141. *Id.*

142. The notice was issued in *Hearing and Public Comment on the Proposed Rule of the Department of Energy Relating to Protection of Essential Agricultural Uses from Curtailment of Natural Gas Deliveries by Interstate Pipelines*, FERC No. RM79-15 (Nov. 29, 1978) [hereinafter referred to as *Hearing and Public Comment*].

ERA's proposed rule should be referred to it and that a joint public hearing with ERA<sup>143</sup> would be held. The Federal Energy Regulatory Commission further said that its interest in the ERA rulemaking was necessary in order that it "confirm its current responsibilities with the rule promulgated."<sup>144</sup> The Federal Energy Regulatory Commission's notice stated that it would either: (1) concur in the adoption of the proposed ERA rule; (2) concur in the rule's adoption only with certain changes; or (3) recommend that the ERA rule not be adopted.<sup>145</sup>

In the chronology of events leading to promulgation of the final section 401 rules, the next federal actions also were by the Federal Energy Regulatory Commission. First, on January 10, 1979, the commission initiated a "Notice of Proposed Rulemaking"<sup>146</sup> whereby it required that interstate pipeline companies subject to its jurisdiction file tariffs applicable for an interim period of March 9, 1979 through October 31, 1979 to implement the agricultural priority of section 401 of the NGPA.<sup>147</sup>

The commission's proposed interim rule was significant to agricultural users for four reasons.<sup>148</sup> First, since its effective period was to be primarily during the warm weather, it recognized that agricultural requirements for natural gas are seasonal.<sup>149</sup> Second, it discriminated

143. *Id.* at 1-2.

144. *Id.* at 5.

145. *Id.*

146. The notice was issued in *Interim Regulation for the Implementation of Section 401 of the Natural Gas Policy Act of 1978*, FERC No. RM79-13 (Jan. 10, 1979).

147. The Commission stated:

This regulation . . . authorizes the granting of relief to high-priority users as defined in the statute [NGPA] and essential agricultural uses as they are certified by the Secretary of Agriculture. . . .

[T]he high-priority user's requirements are limited to those requirements currently included in the interstate natural gas pipeline's effective curtailment plan.

[T]he Commission plans to broaden its direct sales program to make it more accessible to meet demands not covered by natural gas pipeline curtailment plans.

*Id.* at 2.

148. See also Nelson, *supra* note 3, at 325, who concludes that:

[A]griculture's demand for petroleum and gas is subject to seasonal concentration within and between particular areas of the United States, such as high fuel use in the corn belt during spring planting and fall harvest. The timeliness of fuel availability for farm operations has a considerable impact on the quantity and quality of crop production.

*Id.* at 329.

149. The direct purchase program referred to is a commission rulemaking proceeding initiated in *Certification of Pipeline Transportation Agreements for Certain High-Priority Uses*, FERC No. RM79-18 (Feb. 5, 1979) proposed an amendment expanding its policy of allowing the transportation by interstate pipeline companies of natural gas purchased directly in the field by the ultimate end-user to include essential agricultural users which generally had been excluded from this existing commission program. On April 23, 1979, the commission issued Order No. 27 as a final rule establishing a direct sale program for, *inter alia*, essential agricultural users. Although the direct

against new agricultural users since it precluded those consumers, if they were not included in a pipeline's base period, from receiving relief.<sup>150</sup>

Third, and most significantly, the proposed interim rule's calculation of an essential agricultural user's volumes was not the one hundred percent current requirements approach proposed by the Secretary of Agriculture's rule of November 20, 1978,<sup>151</sup> but was based upon an historical period. In this regard, proposed section 281.103(b)(9) provided: "Essential agricultural requirements" . . . means the lesser of:

(i) the highest metered volume of natural gas purchased . . . in the . . . calendar year 1976, 1977, or 1978 and consumed for an essential agricultural use . . . or,

(ii) the maximum volume the essential agricultural user would be entitled to purchase . . . under the interstate pipeline's currently effective curtailment plan. . . .<sup>152</sup>

A fourth significant aspect of the commission's interim rule was that, in calculating an essential agricultural user's base period volumes, it utilized the base period volumes included in the various curtailment plans of the numerous interstate pipelines,<sup>153</sup> adjusted for the user's al-

sales program could be beneficial to essential agricultural users, it also may have the unintended effect of forcing essential agricultural users to pay higher prices for their energy than if the service was provided through the interstate pipeline.

For a discussion of the commission's direct purchase program, see American Pub. Gas Ass'n v. Federal Energy Regulatory Comm'n, 587 F.2d 1089 (D.C. Cir. 1978) which upheld the lawfulness of the direct purchase program.

150. The interim rule stated:

The only limitations on relief contained in this interim rule are that the end-user be included in the interstate pipeline's currently effective curtailment plan. This excludes agricultural users who may have attached to a local distribution company after the close of a pipeline's base period and who are not considered in the pipeline's curtailment plan.

151. 43 Fed. Reg. 54,662 (1978). Cf. *Congressional Aides Say USDA Goes Far Beyond NGPA With Allocation Scheme*, in *INSIDE F.E.R.C.* (Jan. 15, 1979) which reported:

[T]he agricultural provisions [of the NGPA] went as far as USDA and FERC seem to think they do. . . . They are going far beyond what the conferees intended.

He called the agricultural provisions in the act a 'throwaway'—congressional slang for a bargaining chip considered by both sides of an argument to be essentially meaningless—and said the staff felt they were deliberately drafting it with 'weasel words' that would leave the curtailment scheme intact. 'Obviously,' he said, 'the USDA is taking a more aggressive approach to this than I believe the legislative history and the statute itself warrant.'

152. Another potential conflict with the proposed section 401 rule of the Economic Regulatory Administration was noted by the commission's proposed interim rule since the ERA's proposed rule applied an alternate fuel test to both essential agricultural users and high priority users whereas the commission's proposal only applied an alternate fuel test to essential agricultural users. See note 142 *supra* and accompanying text.

153. According to the Federal Energy Regulatory Commission, twenty-nine major interstate pipeline companies transport approximately ninety-nine percent of the natural gas traveling in interstate commerce. Commission Staff Reports Impact of 1979-80 Winter Curtailment for Twenty-Eight Pipeline Companies (Sept. 1979). With regard to the impact of the section 401 rulemakings, it was concluded that:

ternate fuel capability.<sup>154</sup> The proposed adjustment, which would reduce an agricultural user's base period entitlement, was predicated upon the speculative theory that "where a user has been curtailed alternate fuel has been used in place of natural gas."<sup>155</sup> One obvious defect of such a theory is that it ignores the possibility of a shutdown as a result of equipment failure or a labor conflict. As a consequence of the public hearing procedure,<sup>156</sup> the commission's interim rule underwent several changes.<sup>157</sup>

The next event in the section 401 rulemakings occurred on January 12, 1979 when the Federal Energy Regulatory Commission issued a "Notice of Proposed Rulemaking" with regard to its proposed permanent rule.<sup>158</sup> This proposed permanent rule, which was to become effective on November 1, 1979, incorporated several principles which can be viewed as undesirable to the interests of essential agricultural users.<sup>159</sup> First, the commission's permanent rule failed to adopt the

The realignment of priorities will have no effect on the total gas available in the interstate market; however, it may cause a shift in the volumes of gas available to pipeline customers, both distributor and direct industrial. Those customers who qualify as agricultural users and those distributors with a large number of customers who qualify may now be entitled to a larger share of the pipeline supply.

*Id.* at 19.

154. Presently pending before the Federal Energy Regulatory Commission is a rulemaking proceeding (No. RM79-40) to establish standards for determination of alternate fuel capability. See note 116 *supra*.

155. See *Hearing and Public Comment, supra* note 142, at 4.

156. At the public hearing held on January 26, 1979, a diversity of views was expressed in connection with the Federal Energy Regulatory Commission's proposed interim rule. It was observed that:

In general, affected agricultural users opposed the proposed rule because it would base protection on past rather than current requirements. Industrial gas users, on the other hand, supported the proposed rule, subject to various modifications to afford greater protection to high priority and essential agricultural uses needing an assured supply as well as to nonagricultural process and feedstock requirements which lack alternate fuel capabilities. Interstate pipelines and distributors also generally supported the proposed interim rule because of minimum disruption to existing curtailment plans, but suggested certain revisions.

Foster Report 6 (Feb. 8, 1979) (on file with author).

157. See notes 171-83 *infra*.

158. The notice was issued in *Proposed Regulation for the Implementation of Section 401 of the NGPA of 1978*, FERC No. RM79-15 (Jan. 12, 1979).

159. According to the commission, the purpose of its permanent section 401 rule was to: [H]ave interstate pipelines file revised curtailment plans setting forth two new categories, placing high priority users and essential agricultural uses ahead of existing curtailment categories. The Commission views this as a reclassification of existing curtailment plans so that uses once categorized on another basis would now be categorized as high priority users or essential agricultural uses.

Under the Commission's proposed rules essential agricultural uses requirements will be calculated on the same basis as they are calculated in the interstate pipeline's presently effective curtailment plan. Thus, where an interstate pipeline curtails based on a past fixed base period, the requirements will be the base period allocation. Where another

Secretary of Agriculture's one hundred percent current requirements approach. Instead, proposed section 281.207<sup>160</sup> provided that the requirements of an essential agricultural user "shall be the maximum volume the [user] . . . would be entitled to purchase . . . under the interstate pipeline's effective curtailment."<sup>161</sup> The effect of this language was that if the interstate pipeline utilized an historical base period approach, the essential agricultural user would be limited to his historical usage which might be less than its current or future requirements.

The second issue<sup>162</sup> arising from the commission's proposed permanent rule was its application of an alternate fuel test which would further reduce the base period entitlement or requirements of essential agricultural users. Under section 281.207(c)(2)(i) of the permanent proposal, "alternate fuel capability will be deemed to be equal to the least amount of alternate fuel actually used in the comparable curtailment period of lowest alternate fuel use during the past three years."<sup>163</sup>

Another issue raised was the rule's determination that an agricultural user's alternate fuel capability<sup>164</sup> was to be made by each pipe-

basis is used that method will be used. After this volume is calculated, the user's alternate fuel capability will be subtracted out.

Where a determination is made that certain requirements can be satisfied with alternate fuel, those requirements will not be reclassified. This may result in certain end user's volumes being split among various curtailment categories.

*Id.* at 6-7.

160. *Id.* at 7.

161. *Id.*

162. *Id.* at 13.

163. The proposed section 281.207 excepted from its alternate fuel test, *inter alia*, essential agricultural users that consumed less than 50 Mcf on a peak day and or ones that consumed less than 300 Mcf on a peak day during 1976 and 1977 and 1978 did not exceed twenty percent of such person's peak day requirements for essential agricultural user measured on the thirty-six month period ending October 31, 1978. *Id.*

164. The standard for determining alternate fuel capability was set forth in proposed section 281.207(2)(ii)(E)(1)(ii) which provided the following broad test:

(ii) For purposes of this subparagraph "alternate fuel capability" means a condition where a fuel other than natural gas could be utilized to achieve the end use of natural gas. The facilities for such use may have actually been installed, but a potential capability to use a fuel other than natural gas also qualifies as an alternate fuel capability. Alternate fuel capability exists when use of alternate fuel is economically practicable and reasonably available to the end user. A fuel other than natural gas is deemed economically practicable when the cost of such other fuel plus the cost of the facilities required to utilize such fuel are, when compared with natural gas on the basis of units of energy displaced, sufficiently similar so that the user might reasonably be expected to use either fuel without serious adverse financial consequences.

(iii) In determining alternate fuel capability as defined in clause (ii), the following factors shall be considered:

(A) Does the facility or industry in question have the installed capacity to use an alternate fuel?



line's Data Verification Committee,<sup>165</sup> which was to be an "informal forum for the amicable resolution of disputes."<sup>166</sup> Significantly, the membership of the DVC was to include a representative of the pipeline, its distribution customers, and appropriate state or local regulatory bodies, but failed to include a representative of the agricultural community.<sup>167</sup>

A fourth issue raised by the commission's proposed permanent rule was that the rule appeared to encourage less than full compliance with the mandate of section 401 of the NGPA. In the preamble to its proposal, the commission stated:

Where modification of a pipeline's curtailment plan is required, individual pipelines may require a plan which varies from that in the proposed rule.

In past curtailment proceedings the parties have often arrived at a settlement of all issues without resort to adjudicatory proceedings before the Commission. This procedure may be appropriate here, and nothing in the proposed rule precludes any interstate pipeline and its customers from proposing, as a settlement, a curtailment plan that differs from that set out in our proposed rules.<sup>168</sup>

Obviously, if a pipeline has a curtailment plan which is at variance with section 401 of the NGPA or one that differs as a result of a settlement,<sup>169</sup> the congressional intent of protecting essential agricultural

- (B) Does the present state of technology permit the use of an alternate fuel to perform the particular end use?
- (C) Do other similar types of consumers presently utilize fuels other than natural gas?
- (D) If alternate fuel capability is technically feasible, what is the cost of conversion or replacement of facilities so that alternate fuel can be utilized?
- (E) What is the projected cost of the alternate fuel?
- (F) What is the projected cost of the natural gas?
- (G) Are there any other out-of-pocket costs required to utilize natural gas?
- (H) What part of the end user's total costs is attributable to the cost of fuel?
- (I) What competitive disadvantage will the end user suffer if it utilizes a fuel other than natural gas?
- (J) What is the projected availability of natural gas for that end user?
- (K) What is the projected availability of fuels other than natural gas?

*Id.*

From an agricultural user's view, the proposed statutory test *supra* was undesirable because it focused on, *inter alia*, "potential capability," and "technical feasibility." The effect of applying such tests could result in exclusion of an agricultural user from the appropriate priority classification. In addition, the commission changed its long established policy as expressed in 18 C.F.R. § 2.78(c)(10) (1974) of excluding "propane or other gaseous fuel" as an alternate fuel. Such a change in policy could have the adverse impact of significantly increasing the demand for propane.

165. Hereinafter referred to as DVC.

166. *Id.* at 15.

167. See *Proposed Regulation for the Implementation of Section 401 of the NGPA of 1978*, FERC No. RM79-15 (Jan. 12, 1978).

168. *Id.* at 5.

169. It is well-established that settlements can be approved by the Federal Energy Regulatory

users may be frustrated.<sup>170</sup>

During the period when both the Federal Energy Regulatory Commission's interim and final section 401 rules were the subject of the public comment and hearing procedure, the Secretary of Agriculture, on February 28, 1979, issued an "Interim Final Rule."<sup>171</sup> Although this additional rulemaking was not specifically contemplated by section 401,<sup>172</sup> it resulted from the numerous comments received by the Secretary of Agriculture in connection with his initial proposal.<sup>173</sup>

Comparison of the Secretary's interim final rule with his initial proposed rule makes two major issues clear. The first was the Secretary's and the public's satisfaction with the use of the SIC system<sup>174</sup> in classifying essential agricultural users.<sup>175</sup> The second issue, which represented a significant departure from the Secretary's initial proposed rule's utilization of a one hundred percent current requirements approach, was the interim final rule's section 2900.4(i) which certified essential agricultural requirements as follows:

(1) For each Essential Agricultural Use Establishment which (i) uses natural gas on farm for agricultural production, or (ii) consumes 300 Mcf or less of natural gas per peak day whether such Essential Agricultural Use Establishment is in existence on the effective day of this rule or comes into existence thereafter—100% of the current requirements.

(2) For each Essential Agricultural Use Establishment not included in paragraph (1) . . . the higher of:

(i) The actual volume of natural gas used by such Essential Agricultural Use Establishment . . . during the applica-

Commission even without unanimous consent. *Pennsylvania Gas & Water Co. v. Federal Power Comm'n*, 463 F.2d 1242 (D.C. Cir. 1972). As a consequence, a curtailment plan at variance with section 401 could be settled over the objection of an essential agricultural user.

170. Senator Henry M. Jackson, one of the sponsors of the NGPA has stated:

MR. TALMADGE . . . Will section 401 prevent repetition of such curtailments and eliminate the prospects of curtailments of even greater magnitude?

MR. JACKSON. The answer is yes. What we have done is to protect essential agricultural uses.

*Hearings on S. 621 Before the Senate Energy Comm.*, 95th Cong., 2d Sess. 10 (1978).

171. 44 Fed. Reg. 11,518 (1979).

172. It is well-established that federal administrative agencies have discretion in formulating procedures in the conduct of its rulemaking proceedings. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

173. 44 Fed. Reg. at 11,518.

174. *Id.* at 11,524.

175. According to the interim final rule: "[A]pproximately 85-90 percent of the total natural gas covered by essential agricultural use curtailment protection can be rather precisely delineated by applying the SIC Code to the data submitted by individual users to arrive at user-specific entitlement designations." *Id.* at 11,519.

Related to the Secretary's decision to retain the SIC system was his inclusion of the following diverse end products as meeting the definition of essential agricultural requirements: food packaging materials, beer, pet food, chewing gum, and ornamental horticulture. *Id.* at 11,520.

ble period of the most recent 3 years (updated annually) which has the highest corrected volume; . . . or

(ii) The maximum volume such Essential Agricultural Use Establishment would be entitled to purchase under the interstate pipeline's curtailment plan in effect on the effective date of this rule.<sup>176</sup>

This formula was an attempted compromise between the current requirements and historical base period approaches. The only explanation for the Secretary of Agriculture's new approach in defining requirements was the following conclusionary rationalization that: "a dual approach [is] designed to combine the current and base period approaches so as to achieve an effective and practicable result."<sup>177</sup> The Secretary of Agriculture's interim final rule also provided a mechanism whereby certain large users could receive greater natural gas entitlements than those prescribed by an historical base period approach.<sup>178</sup>

During the course of the several rulemaking proceedings, it became clear that disposition of the growth question—whether essential agricultural users should be limited to an historical base period or be permitted to increase their base period entitlements (the one hundred percent current requirements approach) to meet the growing need for food and fiber—was the key issue. This became evident when on March 6, 1979, six days after issuance of the Secretary of Agriculture's interim final rule, the Federal Energy Regulatory Commission issued its "final" interim curtailment rule which had become the subject of public hearing and comment commencing on January 26, 1979.<sup>179</sup>

176. *Id.* at 11,526-27.

177. *Id.* at 11,523.

178. Section 2900.4(b) of the proposed interim final rule provided that:

(b) If any Essential Agricultural Use Establishment, requiring more than 300 Mcf of natural gas per peak day, shall be unable to meet its current requirements with amounts computed pursuant to paragraph (a)(2) of this section and shall require an additional amount of natural gas for process and feedstock gas equal to twenty-five percent or more of the amount computed pursuant to paragraph (a)(2) of this section such Essential Agricultural Use Establishment may petition the Secretary of Agriculture for an exception. . . .

*Id.* at 11,527.

179. *Interim Regulation for the Implementation of Section 401 of the Natural Gas Policy Act of 1978*, FERC No. RM79-13 (Mar. 6, 1979). By an order issued June 20, 1979, the commission denied rehearing of the March 6, 1979 interim rule and correctly stated with regard to the growth question:

It is correct that the Secretary of Agriculture has not limited certified volumes to existing control volumes. The Commission has not changed the volumes certified by the Secretary of Agriculture. However, the issue is whether pipelines have responsibilities to meet those requirements, regardless of contract or certificate obligations. In the Commission's view, Section 401 requires pipelines to serve the volumes certified by the Secretary of Agriculture provided that the volumes do not exceed contract or certificate volumes. However, Section 401 does not create new contract or certificate obligations for interstate pipelines.

Although the commission's interim rule reflected several differences from its proposed rule issued on January 10, 1979,<sup>180</sup> the major change was set forth in section 281.107(c) which defined "essential agricultural supply obligation" as the *lesser* of the "volume certified by the Secretary of Agriculture" or the volume which may be determined by the interstate pipeline to either the direct sale customer or to the local distribution company without causing the pipeline to "violate any volumetric limitations"<sup>181</sup> set out in either its contract with the direct sale customer or the local distribution company.<sup>182</sup>

Although the commission's analysis is reasonable and probably consistent with section 401, it failed to reconcile the disparity between its definition of essential agricultural user's requirements and that of the Secretary of Agriculture which utilized a one hundred percent cur-

Thus, a curtailment plan is a method of allocation of contracted demand for natural gas. Therefore, the protection afforded agricultural use of natural gas by Section 401 of the NGPA does not create new contract obligations between interstate pipelines and their customers. . . . Increased service by interstate pipelines is governed by Section 7 of the Natural Gas Act (NGA) dealing with certificates of public convenience and necessity while curtailment plans in contrast deal with reductions in existing service. Section 401 of the NGPA does not compel an interstate pipeline to serve an essential agricultural user who is not now served by that pipeline. Absent the issuance of a certificate of public convenience and necessity under Section 7 of the NGA interstate pipelines cannot be required to increase service to existing customers or attach new customers. There was no indication that Congress, in enacting the NGPA, intended to override the certificate requirements of Section 7 of the NGA. Parties, however, are free to amend their contracts and pipelines are free to file applications for new or amended certificates under Section 7.

180. For example, the effective period of the interim rule was changed from March 9-October 31, 1979 to April 1-October 31, 1979. *Id.* at 6.

181. The meaning of volumetric limitations under the interim rule was the subject of an administrative proceeding in Cities Service Gas Co., No. TC79-79 (June 5, 1979), wherein the Federal Energy Regulatory Commission granted a request by Armour & Company, an essential agricultural user, for an additional ten Mcf per day for use at its Kansas City, Missouri meat processing plant. The interstate pipeline company initially refused Armour's request for additional service on the ground its internal company policy that was part of its tariff precluded any additional sales to Armour. The Commission disagreed:

The internal company policy adopted by Cities, in the face of curtailment or threatened curtailment in 1972, is in fact part of Cities' presently effective curtailment plan. . . . It is clear that in light of this prohibition prior to the passage of the NGPA Armour would not be entitled to the additional gas it seeks here. However, the Interim Curtailment Rule has superceded the provisions of Article 12 of Cities' tariff. . . . Therefore, the curtailment provisions in Article 12 of Cities' tariff are superceded to the extent they apply to deliveries of natural gas for essential agricultural users. . . . The passage of the NGPA and the Commission's Interim Curtailment Rule therefore allow service to Armour as long as the volumes provided do not violate any volumetric limitation of any contract to which the interstate pipeline is a party.

*Id.* at 6 (footnotes omitted).

182. The interim rule provided that: "The contractual entitlement for an essential agricultural user shall not be diminished because the . . . users contract with its direct interstate pipeline supplier is on an interruptible basis or because all or part of the local distributor's contract with any of its interstate pipeline suppliers is on an interruptible basis." *Id.* at 8-9.

rent requirements approach. Under the commission's interim rule,<sup>183</sup> an agricultural user could receive less than one hundred percent of its current requirements if those requirements exceeded a contractual limitation in any of the the contracts between the interstate pipeline, local distributor, and the direct user.

### *The Final Section 401 Rules*

The disparity between the Secretary of Agriculture's and the Federal Energy Regulatory Commission's interim rules was not resolved by the next federal action, the ERA's final rule, which became effective on March 9, 1979.<sup>184</sup> Although it received one hundred and fifteen written and oral comments on various issues,<sup>185</sup> the ERA continued to be the least active and least controversial federal body engaged in the section 401 rulemakings. For example, its definition of essential agricultural uses merely duplicated the language of section 401(f) and did not address the one hundred percent current requirements versus historical base period controversy.<sup>186</sup> ERA's final rule did make clear, however, that its general rulemaking was "binding on all interstate pipeline companies"<sup>187</sup> but was not an assertion of jurisdiction over the intrastate market.<sup>188</sup> The primary thrust of ERA's final rule was to rec-

183. The interim rule concluded:

The Commission agrees with the many commentators who emphasized that the agricultural sector is dynamic and its needs for natural gas are constantly shifting. . . . The Commission intends that its section 401 program . . . provide access to natural gas supplies adequate to assure that agriculture continues to be able to expand its productivity.

As finally enacted into law the purpose of this section [401(a)] is to insure full food and fiber production, however, the bill contains no comparable provision allowing for the expanded uses or new uses of natural gas.

*Id.* at 14-16.

184. 44 Fed. Reg. 15,642 (1979). The final ERA rule, as well as the final Federal Energy Regulatory Commission and Secretary of Agriculture rules, *see* notes 191-204 *infra*, are the subjects of appeals currently pending in *Process Gas Consumers Group v. Department of Agriculture*, No. 79-1336 (D.C. Cir. 1979).

185. 44 Fed. Reg. at 15,644.

186. The ERA's final rule defined essential agricultural use as any use of natural gas:

- (i) For agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying; or
- (ii) As a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food, which the Secretary of Agriculture determines is necessary for full food and fiber production.

*Id.* at 15,646.

187. *Id.* at 15,643.

188. *Id.* at 15,645. The question is whether the requirements of section 401 can be compelled in the intrastate market over which the Federal Energy Regulatory Commission generally lacks jurisdiction by virtue of section 1(b) of the Natural Gas Act, 15 U.S.C. 717(d) (1976). If the agricultural priority protection cannot be enforced at all levels, many essential agricultural users, who are indirect customers of interstate pipelines, will be denied the priority treatment accorded by section 401 of the NGPA.

oncile definitions of such terms as schools, hospitals, commercial establishments, and irrigation,<sup>189</sup> and to delineate the appropriate treatment for storage gas.<sup>190</sup>

In contrast to the ERA's final rule, the next federal action on May 2, 1979, was probably the most significant in all the section 401 rulemakings. On that date, the Federal Energy Regulatory Commission issued its Order No. 29 as its final rule.<sup>191</sup> Order No. 29 amends the Federal Energy Regulatory Commission's regulations by adding, effective November 1, 1979, a new section 281.201 which provides that: "[T]he curtailment plans of interstate pipelines protect, to the maximum extent practicable, deliveries of natural gas for essential agricultural uses and for high-priority uses in accordance with the provisions of this subpart."<sup>192</sup>

Specifically, section 281.205(a) of Order No. 29 requires interstate pipelines to establish a high priority use category designated as priority 1 and an essential agricultural use category designated as priority 2. Priority 1 is required to include all high priority use entitlements of direct and indirect customers and related storage injection volumes. Priority 2 must include all essential agricultural use entitlements of its direct and indirect customers and related storage injection volumes.<sup>193</sup> The method of curtailment requires that deliveries of natural gas be curtailed sequentially beginning with the lowest priority of service category. All categories are to be fully curtailed before priorities 1 and 2 are curtailed. Priority 1 is to be curtailed last.<sup>194</sup>

189. 44 Fed. Reg. at 15,645. However, ERA declined to formulate a standard definition for curtailment. *Id.* The necessity for having a definition of curtailment is made clear from the Federal Energy Regulatory Commission's final rule Order No. 29, see notes 191-200 *infra*, which limited that term to apply only if the interruption of the user's natural gas service results from the pipelines' gas supply shortage. However, curtailment also can result from a capacity or deliverability problem of the pipeline.

190. Section 580.03(d) of ERA's final rule provides:

Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to its customers for their injection into storage unless it is demonstrated to the Federal Energy Regulatory Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high-priority users or essential agricultural uses.

44 Fed. Reg. at 15,645.

191. Order No. 29 was issued in *Final Regulation for the Implementation of Section 401 of the Natural Gas Policy Act*, FERC No. RM79-15 (May 2, 1979); Order No. 29-A (June 15, 1979); Order No. 29-B (July 20, 1979); Order No. 29-C (Oct. 22, 1979). As indicated, see note 184 *supra*, Order No. 29 currently is pending appellate review.

192. 18 C.F.R. § 281.201 (1979).

193. Order No. 29 also attempted to reconcile the agricultural community's opposition to DVCs. The Federal Energy Regulatory Commission concluded that these committees would be useful in a "limited capacity" but were not to be used in a "fact-finding mode." See 18 C.F.R. § 281.213 (1979).

194. Order No. 29 in section 281.203(a)(6) essentially defines curtailment as resulting only

Order No. 29 attempts to reconcile the Secretary of Agriculture's method of calculating essential agricultural requirements with the Federal Energy Regulatory Commission's method. Order No. 29 states:

The Commission's final rule adopts the ERA rule in its entirety, and the Certification of 'Essential Agricultural Use' and Volumetric Requirements of USDA's interim final rule. Interstate pipelines are required to provide gas to supply the certified volumetric requirements for those users designated by the USDA. However, the interstate pipeline is not required to deliver natural gas to any customer in violation of any volumetric limitations set out in the contract between the interstate pipeline and its customer.

The Commission recognizes that incorporation by reference of the USDA rule will result in some expansion in the entitlements over the entitlements contained in current pipeline curtailment plans. In the past, the Commission's policy has not favored load growth; i.e., increasing new customers or base period entitlements. However, the Commission's reading of the NGPA and the many comments and legal analysis provided it in the extensive record in this proceeding leads it to the conclusion that some agricultural load growth was intended by Congress.

Thus, to the extent that load growth is required by the USDA rule and the agricultural users (or its local distributor) has the requisite contractual authority, it is the Commission's view that Congress intended that agricultural load growth be permitted.<sup>195</sup>

By this language and the specific provisions of section 281.208 of Order No. 29,<sup>196</sup> the Federal Energy Regulatory Commission did several things. First, it recognized the Secretary's expertise and mandate under section 401 to certify essential agricultural uses.<sup>197</sup> Second, Order No. 29 affirmed the principle that essential agricultural users should be permitted to increase their natural gas requirements. Third, Order No. 29 articulated a significant limitation on the growth con-

from a natural gas supply shortage. Upon rehearing, Order No. 29-C makes clear that the protection of section 401 of the NGPA and Order No. 29 does not apply to curtailments resulting from capacity limitations as well as from supply shortages. *Final Regulation for the Implementation of Section 401 of the Natural Gas Policy Act*, FERC No. RM79-15 at mimeo 16 (May 2, 1979).

195. *Id.* at 11-13 (footnote omitted).

196. Section 281.208 provides, in pertinent part:

*General Rule.* (A) The essential agricultural requirements of an essential agricultural user are those volumes (expressed in daily, monthly, seasonal or other appropriate periodic volumes) designated by the Secretary of Agriculture and calculated in accordance with 7 C.F.R. § 2900.4;

(B) Any volumes for which the Commission determines, in accordance with Section 401(b) of the NGPA, that the essential agricultural user has alternate fuel.

18 C.F.R. § 281.213 (1979).

197. In Order No. 29-C, *see* note 194 *supra*, the commission stated: "Determinations of what is necessary for full food and fiber production are the province of the USDA, not the Commission." *Id.* at mimeo 15.

cept.<sup>198</sup> What this means is that essential agricultural users' growth is limited by volumetric limitations imposed by certificates of public convenience and necessity issued under section 7 of the Natural Gas Act<sup>199</sup> or established as the result of contract.<sup>200</sup>

To complete this chronological examination of section 401 rulemaking, it is necessary to discuss briefly the Secretary of Agriculture's final rule, which became effective on May 14, 1979.<sup>201</sup> This final rule essentially did two things. First, it expanded the classes of uses which were certified as essential agricultural uses.<sup>202</sup> Second, and most significantly, this final rule made clear that the Secretary of Agriculture's certification was for "100 percent of current requirements for each essential agricultural use."<sup>203</sup> The final rule, in analyzing the earlier proposal of the Secretary of Agriculture, concluded:

[T]he USDA Final Rule contains the following variations from the

198. The Federal Energy Regulatory Commission stated:

The Commission adopts the USDA's certification of essential agricultural uses, but fully recognizes that increases in service are still subject to applicable state law, to section 7 of the NGA [Natural Gas Act] and existing contracts to which the interstate pipeline is a party. Parties are free to amend their contracts and pipelines are free to file applications for new or amended certificates under section 7.

*Final Regulation for the Implementation of Section 401 of the Natural Gas Policy Act*, FERC No. RM79-15 at mimeo 16 (May 2, 1979).

199. Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (1976), provides, in pertinent part:

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e) (1976), provides in part:

The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

200. See note 55 *supra*. It could be argued, however, that the limitations set by the Federal Energy Regulatory Commission's final rule are not in fact limitations since section 401(a) of the NGPA provides that "notwithstanding any other provision of law," the Secretary of Energy shall prescribe a rule that assures sufficient natural gas so that essential agricultural users can meet the ever growing need for, in the words of section 401(c), "full food and fiber production." The clear statutory language of section 401(a) seemingly would override the requirements imposed by state law, section 7 of the Natural Gas Act, or contract law.

201. 44 Fed. Reg. 28,782 (1979).

202. Food stores were classified as essential agricultural users. *Id.* at 28,783. By a notice of proposed rulemaking, the Secretary of Agriculture is proposing to amend its regulations to include metal crowns and closures (food related only) to the list of essential agricultural uses. *Id.* at 61,972.

203. *Id.* at 28,785. Section 2900.4 of the Secretary's final rule provides: "For purposes of Section 401(c), NGPA, the natural gas requirements for each Essential Agricultural Use Establishment, whether such Essential Agricultural Use Establishment is in existence on the effective date of this rule or comes into existence thereafter, are certified to be 100 percent of Current Natural Gas Requirements." *Id.* at 28,786.



Interim Final Rule regarding natural gas requirements of essential agricultural uses:

(1) The USDA Final Rule reverts to the position in the Proposed Rule of certifying 100 percent of current requirements as necessary for full food and fiber production.

(2) The USDA Final Rule reverts to the position in the Proposed Rule of not discriminating as to types of use, since 100 percent of current requirements is appropriate for all essential agricultural uses for purposes of the Secretary of Agriculture's certification.<sup>204</sup>

Thus, after almost one year of extensive rulemaking activities by two federal departments and one federal agency, the scope of the protection accorded to essential agricultural users by section 401 of the NGPA still is not clear.<sup>205</sup> The issue of whether the one hundred percent current requirements approach adopted by the Secretary of Agriculture can be meshed with the statutory responsibilities of the Federal Energy Regulatory Commission under section 7 of the Natural Gas Act<sup>206</sup> must await resolution by the courts of appeals.<sup>207</sup>

### RECOMMENDATIONS

We are people of plenty. We have become so through our energy, our inventiveness, our encouragement of initiative. Yet with the prevailing political philosophy of rewarding the unsuccessful and punishing the creators of our national abundance, there is no guarantee that we shall continue to be people of plenty. Washington is full of power-hungry mandarins and bureaucrats who distrust abundance, which gives people freedom, and who love scarcity and 'zero growth,' which give them power to assign, allocate, and control. If they ever win out, heaven help us!

S.I. Hayakawa<sup>208</sup>

Federal natural gas curtailment policy has not been fully successful in equitably allocating what has been called "nature's most perfect source of energy."<sup>209</sup> The reasons for the lack of success are attributable to the cumbersome nature of federal regulation, which places the

204. The final rule also stated:

The USDA has determined that specifications of natural gas requirements by using the base period approach contained in the Interim Final Rule would not be sufficiently flexible and responsive on a permanent basis to assure full food and fiber production in the event of significant increases in output levels or processing requirements brought about by changes in weather or other factors.

44 Fed. Reg. at 28,785.

205. See 7 C.F.R. § 2901 (1979), which sets forth applicable administrative procedures for obtaining adjustments of natural gas curtailment priority regulations.

206. 15 U.S.C. § 717f(c) (1976).

207. See note 184 and accompanying text *supra*.

208. S.I. HAYAKAWA, THROUGH THE COMMUNICATION BARRIER: ON SPEAKING, LISTENING, AND UNDERSTANDING 168 (1979).

209. Coleman, *FPC Natural Gas Allocation, Curtailment in Context*, 50 TEX. L. REV. 1370 (1972).

initiative for curtailment allocations with interstate pipelines and the inherent difficulties in making an equitable, national system of curtailment priorities.<sup>210</sup>

The recent action initiated by title IV of the NGPA granting essential agricultural users a preference during periods of natural gas supply shortages is positive and should not be diminished by either subsequent federal or state legislation or judicial action. However, the agricultural preference established by title IV of the NGPA represents a significant change in federal regulation because it grants a high level of protection based upon the end product produced by the consumer as distinguished from the traditional form of regulation which primarily focused on end-use, that is, how the ultimate consumer used the natural gas. If curtailment priorities are to be based upon the social utility of end products, the regulator is forced to make decisions which involve complex and possibly unresolvable social issues. If end-use criteria are retained, the regulator's decision-making may be easier, but at the expense of producing undesirable results.

As a consequence, it is recommended that federal curtailment regulation be modified to allow the forces of the market place to have a greater role.<sup>211</sup> It has been said in the context of federal price regulation of natural gas production: "In practice, regulation has led to a virtually inequitable gas shortage. It has brought about a variety of economically wasteful results, and it has ended up by hurting those whom it was designed to benefit. Thus, less, not more, regulation is required."<sup>212</sup> In order to avoid further growth of the "imperial bureaucracy"<sup>213</sup> of the federal administrative agencies, such a recommendation also is applicable to federal regulation of natural gas curtailments.

210. See Koplín, *Conservation and Regulation: The Natural Gas Allocation Policy of the Federal Power Commission*, 64 YALE L.J. 840, 861 (1955).

211. Breyer & MacAvoy, *supra* note 27, at 987.

212. Robert J. Samuelson has noted that: "This episode [allocation of diesel fuel] puts the lie to the common assumption that government can allocate any shortage more 'justly' than the 'market'—letting companies distribute to areas and customers willing to pay the most. It can't." Wash. Post, July 3, 1979, at F1, col. 2.

213. "Imperial bureaucracy" refers to an observation that federal agencies combine legislative, executive, and judicial powers that go largely uncontrolled by Congress, the President, and the courts. 65 A.B.A. J. 1463 (1979).