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## Contrived Crisis: An Environmental Lawyer's View of the Supposed Fuel Shortage

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# CONTRIVED CRISIS: AN ENVIRONMENTAL LAWYER'S VIEW OF THE SUPPOSED FUEL SHORTAGE

PHILIP WEINBERG\*

Even the most casual newspaper reader was aware of the impending "energy shortage." The publicity mills of the major oil companies ceaselessly ground out warnings that "crude oil is in tight supply,"<sup>1</sup> that "gasoline shortages may occur for several years,"<sup>2</sup> and that "available domestic energy supplies will not be enough to meet our needs."<sup>3</sup> The threat of gasoline rationing has been hoisted like the post-Civil War bloody shirt of a century ago. Oil producers complain that "environmental constraints" prevent the Alaska pipeline, offshore oil drilling<sup>4</sup> and the construction of refineries. At this point it is reasonable to ask whether the crisis is to some extent induced by the petroleum industry, and whether we, like Othello, are being goaded into tragically irreversible steps despite our insistence on the ocular proof.

The focus of any discussion of oil shortages must be oil use. The United States, with six percent of the world's population, consumes 34 percent of its energy.<sup>5</sup> Our energy consumption expands at 4.2 percent per year and will, unless checked, double in 15 years.<sup>6</sup> The United States annually consumes five billion barrels of oil, or about 1,000 gallons per person, and this figure is expected to double by 1985.<sup>7</sup> Oil constitutes 45 percent of the total fuel used in the United States. While some of this is employed in heating and for electric

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The views expressed in this article are those of the author and do not necessarily reflect the views of the Office of the Attorney General.

1. Shell Oil Co. advertisement, N.Y. Times, June 26, 1973, at 22, col. 4.

2. *Id.*

3. Gulf Oil Corp. advertisement, N.Y. Times, June 6, 1973, at 69.

4. Mobil Oil Corp. advertisement, N.Y. Times, July 10, 1973, at 16, col. 4.

5. See generally H. PERRY, ENERGY, THE ULTIMATE RESOURCE (1971).

6. See generally 1 NATIONAL PETROLEUM COUNCIL'S COMMITTEE ON UNITED STATES ENERGY OUTLOOK, UNITED STATES ENERGY OUTLOOK: AN INITIAL APPRAISAL 1971-1985 (1971).

7. See J. Kohl, Energy and the Environment: Yesterday, Today, and Tomorrow, at 7, Apr. 17, 1973 (unpublished paper submitted to the Regional Conference of Attorneys General).

power generation, more than half is expended in transportation. Of this, an overwhelming percentage is consumed as gasoline in the engines of private automobiles.

Far more than any other single fact, it is this country's dependence on the automobile which has brought us to an ever-increasing reliance on oil, increasing demands for new petroleum sources without regard to economic and environmental consequences. In 1950, automobiles accounted for 89.6 percent of total passenger-miles of traffic within American cities. That figure rose to 95.4 percent by 1970. At the same time, numerous public transportation systems within those cities languished and were abandoned. In the case of intercity passenger-miles the percentage of travel by private automobile has hovered around 87 percent since 1950, but here the mode of travel has shifted heavily from trains and buses to airplanes. The following table vividly portrays this imbalance:

PERCENT OF TOTAL PASSENGER MILES<sup>8</sup>

	<i>Urban</i>		<i>Intercity</i>	
	1950	1970	1950	1970
<i>Buses</i>	10.4*	4.6*	5.2	2.1
<i>Railroads</i>			6.4	0.9
<i>Automobiles</i>	89.6	95.4	86.8	87.0
<i>Airplanes</i>			2.0	9.7

\* Including subways and street cars.

Railroads are by far the most efficient means of transporting both passengers and freight, in terms of energy consumed. A gallon of fuel will move a ton of freight 200 miles by rail, in contrast to 58 miles by road and a scant 3.7 by air.<sup>9</sup> Yet the automobile has become the principal means of passenger travel to a greater extent here than in any other country.

A lengthy analysis of the factors responsible for the dominance of the auto is beyond the scope of this article, but it must be remem-

8. See E. Hurst, *Energy Consumption for Transportation in the U.S.*, Mar. 23, 1972 (unpublished manuscript at Oak Ridge Nat'l Laboratory).

9. See *id.* See also Commoner, *Trains into Flowers*, HARPER'S, Dec. 1973, at 78-86.

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bered that it is our dependence on this mode of transportation which is responsible for our rising consumption of oil. This, in turn, has bred a host of environmental and economic problems, whose dimensions have been realized only within the past year or two. To highlight the most significant of these is the objective of this essay.

### THE CYCLE OF DEPENDENCY ON OIL

The appetite of the American economy for greater quantities of oil is insatiable. The search for new sources now stretches from the Arctic Circle to the continental shelf east of Long Island. Of course, sizable imports arrive from Canada, Iran and Latin America. As the demand increases, the search intensifies. Bruce Catton trenchantly notes that

[i]t is fairly easy for man to assert his mastery over his earthly environment, but once he has asserted that mastery he has to go on exercising it no matter where the exercise takes him. The age of applied technology has one terrible aspect—each new technique has to be exploited to its absolute limit, until man becomes the victim of his own skills. The conquest of nature cannot end in a negotiated peace. Invent a single device like the automobile, to get you from here to there more quickly than you could go without it; before long you are in bondage to it, so that you build your cities and shape your countryside and reorder your entire life in the light of what will be good for the machine instead of what will be good for you.<sup>10</sup>

Instead of seeking means of reducing our dependence, technology beats the drum for increased consumption of petroleum, for expansion of the highway system, and for the design and advertisement of cars which consume ever-increasing quantities of gasoline. To satiate these demands, we are impressed with the need for Alaskan oil, oil from shale, increased imports, offshore leases. As a thoughtful writer has observed:

Government predictions about future energy demand have the force of self-fulfilling prophecy. By sponsoring long-term investment to meet expected needs, government policy will reinforce the existing pattern of energy demand. The commitment to provide for future demand will itself create demand. The commitment to provide fuels

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10. B. CATTON, *WAITING FOR THE MORNING TRAIN* 5-6 (1972).

in a particular form will perpetuate demand for those fuels . . . .  
[Thus] new production may become, in practice, a substitute for energy saving.<sup>11</sup>

Another powerful cause of this dependency stems from the economics of oil marketing. It is conceded by both its detractors and defenders that the oil industry makes its profits at the wellhead rather than at the service station. The retail price charged for gasoline provides only a slight return and in some highly competitive areas it may even be sold at a loss. The real earnings are made when the distributor purchases the oil from its parent corporation or its producing subsidiary at the posted price which is significantly greater than the actual costs of production. These profits are subject to the depletion allowance, and are thereby given preferential treatment.<sup>12</sup> It should be noted however, that depletion allowance is not applicable to profits realized at the retail level.<sup>13</sup> For these reasons it is more profitable for producers to obtain new sources of oil than simply to raise their retail prices.

#### NEW OIL SOURCES AND THE LAW

Prior to the enactment of the National Environmental Policy Act<sup>14</sup> in 1969, potential harm to the environment provided little basis for challenging a decision by oil producers or the government to tap new sources of oil. Tort actions are available under common law principles to recover for oil spills or other damage to property, but this remedy cannot be invoked to review the propriety of a mere decision to construct a pipeline or to lease oilfields. The National Environmental Policy Act requires agencies of the federal government to prepare and issue a detailed environmental impact statement whenever they plan or license a project which might adversely affect the environment, and to "study, develop, and describe appropriate alternatives" to their action.<sup>15</sup> The Act squarely imposes the responsibility

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11. Rothschild, *Illusions about Energy*, N.Y. REVIEW OF BOOKS, Aug. 9, 1973, at 29.

12. INT. REV. CODE of 1954, §§ 611-14. For an excellent discussion on the impact of the depletion allowance on petroleum industry pricing, see M. DECHAZEAU & A. KAHN, INTEGRATION AND COMPETITION OF THE PETROLEUM INDUSTRY 221-22 (1959).

13. INT. REV. CODE of 1954, §§ 611-14.

14. 42 U.S.C. §§ 4321 *et seq.* (1970) (particularly §§ 4321-33).

15. National Environmental Policy Act of 1969, §§ 102(2)(C)-(D), 42 U.S.C. §§ 4332(2)(C)-(D) (1970).

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on each federal agency to consider the environmental consequences of its decisions, and furnishes a remedy if the agency neglects this duty or performs it in a perfunctory manner.<sup>16</sup>

Under the landmark decision of *National Resources Defense Council, Inc. v. Morton*,<sup>17</sup> NEPA was held applicable to the approval of offshore oil leases by the Interior Department despite that Department's insistence that it was without power to adopt the alternatives which are available. Leases of lands on the outer continental shelf of the coast of Louisiana were enjoined for failure to comply with NEPA even though an environmental impact statement had been submitted. The statement acknowledged the risk of large-scale oil spills which would damage beaches, coastal wetlands, and particularly the largest estuarine coastal marsh complex off the shores of the United States from which is harvested vast quantities of seafood.

The significance of the decision lies in its requirement that the Secretary of the Interior fully consider the environmental consequences of various alternatives to the granting of oil leases; elimination of oil import quotas, development of oil shale and nuclear and other potential sources of power, as well as an increase in the supply of natural gas through a price ceiling.<sup>18</sup> Subsequently, the Secretary of the Interior prepared a somewhat more detailed impact statement and was again challenged.<sup>19</sup> While this suit was pending the government cancelled the lease offer.

However, pressure for the granting of offshore oil leases has continued, and, if anything, has intensified. Producers continue to bemoan attempts to regulate offshore drilling. Mobil insists that "[t]he outer continental shelf off the United States East and West Coasts has to be opened to exploration for new resources of oil and natural gas."<sup>20</sup> When this exploration comes, who will control it? At present the Interior Department asserts jurisdiction over the outer continental shelf,

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16. 42 U.S.C. § 4332(2)(C)(v) (1970).

17. 458 F.2d 827 (D.C. Cir. 1972).

18. At present the Federal Power Commission imposes ceilings on natural gas prices paid to producers pursuant to the Natural Gas Act of 1938, 15 U.S.C. § 717 (1970). Natural gas is a virtually pollution-free fuel. Critics of these price ceilings have pointed out that excessive reliance on oil could be lessened by making gas more readily available, and have proposed the use of NEPA as a weapon to achieve that result. See Note, 47 IND. L.J. 725 n.1 (1972), citing Roddis, *What Is Inferior Use of Gas?*, PUB. UTIL. FOR., Oct. 14, 1971, at 90.

19. *Natural Resources Defense Council v. Morton*, 337 F. Supp. 170 (D.D.C. 1972).

20. Mobil Oil Co. advertisement, N.Y. Times, July 10, 1973, at 16, col. 3.

and therefore over the oil within those lands. This claim is based upon the Submerged Lands Act<sup>21</sup> which defines the "seaward boundary of each original coastal State . . . as a line three geographical miles distance from its coast line . . . ."<sup>22</sup> The statute adds:

Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union . . . .<sup>23</sup>

Contending that under English, Dutch and Spanish law, the colonies bordering on the Atlantic had acquired rights to the continental shelf, the seaboard states from Maine to Florida have asserted in recent years that they have the right to halt offshore drilling in those waters or, alternatively, to grant leases and obtain royalties. The federal government has commenced an action in the Supreme Court as an original jurisdiction suit against the thirteen Atlantic coastal states to determine title to these underwater lands.<sup>24</sup> Hearings before a master concluded several months ago and argument before the Court is expected this year.

Although the precise geographical limits of the states' jurisdiction will remain unresolved until the Supreme Court renders a decision, several states have considered legislation aimed at regulating offshore oil drilling. Florida has enacted a statute imposing strict liability for spills in its waters resulting not only from drilling but from shipping, transfer or storage of oil as well.<sup>25</sup> Although predictably challenged as having been preempted by the federal government's power to regulate navigation, the legislation was recently sustained by the Supreme Court.<sup>26</sup> In addition to its imposition of strict liability for oil spill damage, Florida's excellent statute requires operators of oil terminals and ships carrying oil to establish proof of financial responsibility, and the state is empowered to regulate spill-prevention and containment equipment.

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21. 43 U.S.C. § 1312 (1970).

22. *Id.*

23. *Id.*

24. *United States v. Maine*, 398 U.S. 947 (1970).

25. Florida Oil Spill Prevention & Pollution Control Act, ch. 70-244, [1970] Fla. Laws 740.

26. *Askew v. American Waterways Operators, Inc.*, 93 S. Ct. 1590 (1973).

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The other states have not as yet followed Florida's lead although the need for legislation to regulate oil spills is evident. New York's legislature adopted a bill similar to Florida's statute imposing strict liability for oil spill damage. Regrettably, however, it was vetoed by the Governor at the close of the 1973 session.<sup>27</sup> New legislation to prohibit offshore oil drilling in coastal waters has been introduced at the recommendation of New York's Attorney General, but has not yet been enacted.<sup>28</sup> It should be a top priority item for this year's legislative session, not only in New York but in every major seaboard state.

There is no doubt that at some point the exploitation of offshore oil will become a necessity, but the history of recent destruction caused by such drilling off the California and Louisiana coasts points to the need for greater development of safeguards before the further authorization of such potentially devastating activity. Additionally, the damage highlights once again the need for profound and critical re-examination of this country's rising need to consume a disproportionate share of the world's oil.

Overshadowing the drive to exploit offshore oil is the vast oil field of northern Alaska. This enormous reserve near Prudhoe Bay, expected to yield as much as 70 billion barrels, has set off a rush to exploit it as rapidly as possible without consideration of the effects upon Alaska's land, wildlife and waters. The consortium of oil companies organized to tap these reserves and construct a 764-mile pipeline to transport the oil to the deepwater port of Valdez has now succeeded in obtaining unprecedented congressional exemption from compliance with NEPA.<sup>29</sup> This accords automatic governmental sanction, without judicial review, to a method of oil extraction which risks the most grievous environmental consequences. The risks include massive oil spills from tankers threading the fog-shrouded Inside Passage south from Valdez, the chance that an earthquake may cause a break in the pipeline, as well as danger of thaws of the Alaskan permafrost in case of such a rupture. A fracture in the line would transform surrounding land into slush and increase the likelihood of other ruptures. Further-

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27. Veto Message No. 268 (June 22, 1973) (vetoing the proposed Marine Coastal Waters Protection Act, A. 8093-A, 196th Sess. (1973)).

28. S. 7859-A, 195th Sess. (1972); A. 8979-A, 195th Sess. (1972) (reintroduced in 1973).

29. N.Y. Times, Aug. 3, 1973, at 1, col. 6.

more the plans of the consortium call for pumping the oil at temperatures of at least 158 degrees—high enough to risk thawing the permafrost even if no spills occur.<sup>30</sup> At these temperatures, damage to the permafrost would be irreversible and removing the hot oil in the event of a spill would be nearly impossible. As the Interior Department's own impact statement warns:

A large hot oil pipeline buried for hundreds of miles has no precedent. Unique effects unfamiliar in pipeline experience would arise primarily from the loss of strength and change in volume of ice-rich soil when it is thawed by heat from the pipe.<sup>31</sup>

In addition, the pipeline will create a barrier which would disrupt the migration of moose, caribou and other Alaskan wildlife. Despite these evident dangers, the oil companies have won dispensation from the protection furnished to the public by NEPA. This exemption is doubly harmful because it constitutes an egregious precedent for excusing other pet projects from NEPA's safeguards.

The circumvention of NEPA in the case of the pipeline will have other adverse effects. Preparation of a final impact statement, and judicial airing of its adequacy, would have given the public the opportunity to consider alternate means of tapping Alaska's oil, including the proposal to ship it by pipeline across Canada. Although this would be a longer route, the danger of earthquakes would be eliminated and the need for transshipment by tanker obviated. A second option is rail shipment which has the capacity to move equal quantities of oil at rapid speed while avoiding nearly all the hazards and environmental risks posed by the pipelines.<sup>32</sup>

For the foreseeable future a large portion of the oil the United States consumes will continue to be imported, plans to tap offshore and Alaskan reserves notwithstanding. Only through governmental action to reduce our profligate consumption of gasoline can our dependence on imports be lessened. But, like the electric companies which until recently touted the advantages of electric heat and "total electric living" while struggling to produce enough power to avoid brownouts,

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30. For a comprehensive discussion of these risks, see Hoffman, *Evolving Judicial Standards Under the National Environmental Protection Act and the Challenge of the Alaska Pipeline*, 81 *YALE L.J.* 1592, 1613-19 (1973).

31. Impact statement no. 93, quoted in Hoffman, *supra* note 30, at 1620 n.129.

32. Morgan, *Oil by Rail*, *ENVIRONMENT*, Oct. 1972, at 30.

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many oil companies continue to advertise their gasoline while simultaneously warning of fuel shortages and blaming those who seek environmental safeguards for problems which result from the overuse which the producers themselves encourage. The delusion that our supplies of oil are limitless must be recognized and we must economize in order to avoid disaster.

### A PLAN OF ACTION

There are several specific steps which are essential to lessen our overdependence on oil and to protect our coasts and other lands from the ruinous effects of spills. None of these is costly and all can be commenced immediately.

Most urgent is a serious commitment to public transportation. The millions of miles driven each day by persons compelled to commute by private automobile to and from work, school and shopping as a result of inadequate public transportation engenders a wasteful and inexcusable consumption of fuel. This daily onslaught, aside from the vast amounts of gasoline it burns, brings with it a host of other problems and expenses including otherwise unnecessary road construction, air pollution, traffic noise, road and parking congestion, and the distorted land use fostered by a culture excessively dependent on the automobile. Sometimes overlooked is the burden that this unbalanced transport system places on those unable or unwilling to drive.

Government at all levels has belatedly begun to respond to this need. In recent years Congress has enacted the Urban Mass Transportation Act<sup>33</sup> and the Rail Passenger Service Act,<sup>34</sup> while New York and several other states have adopted legislation to subsidize urban and commuter rail transportation and to establish public authorities to construct and operate these systems.<sup>35</sup>

On the other hand, the federal government has stubbornly opposed devoting funds to the operation of rapid transit routes. Although New York has legislation authorizing its Department of Transporta-

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33. 49 U.S.C. §§ 1601 *et seq.* (1970).

34. 45 U.S.C. §§ 501 *et seq.* (1970).

35. N.Y. PUB. AUTH. LAW §§ 1260-78 (McKinney 1970). *See also* CONN. GEN. STAT. ANN. § 13(b)(11) (1973); MASS. GEN. LAWS ANN. ch. 161A §§ 1-29 (1964); N.J. STAT. ANN. §§ 32:22(1)-(19) (1963); PA. STAT. ANN. tit. 66, §§ 2001-43 (1973).

tion to operate intercity passenger rail routes,<sup>36</sup> no funds have been appropriated to implement that provision.<sup>37</sup> Two other states, Massachusetts and Illinois, are currently subsidizing intercity passenger trains under a provision of the Rail Passenger Service Act whereby Amtrak, the Government-sponsored corporation operating intercity passenger service, will meet up to one-third of any losses from a particular route, if the state will pay the remaining deficit.<sup>38</sup> More states should take advantage of this program.

Amtrak itself, while representing a major commitment by the federal government to improve railroad service, should be transformed into a non-profit corporation. There is no more reason for Congress to dictate that rail passenger service produce a profit than for it to impose such a requirement on the public schools, the highways, or the armed services. It was the very inability of passenger trains to earn a profit for the railroad companies which led to their neglect and the discontinuance of many trains prior to the creation of Amtrak. The act establishing Amtrak stated that

[M]odern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion on our highways and the overcrowding of airways and airports. . . .<sup>39</sup>

In view of this finding, it makes little sense to tie Amtrak to an unrealistic requirement to achieve a profit. If railroad passenger service is essential, as Congress correctly found, it should be maintained as a public service in a manner similar to the treatment afforded passenger trains in virtually every other country.

The public has a stake in the adoption of routes by Amtrak and should be given a greater voice in their selection. The United States Supreme Court quite recently construed the Act which established

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36. N.Y. TRANSP. LAW § 14-c (McKinney 1972).

37. The 1973 Transportation Bond Issue, enacted as ch. 1049 of the 1973 Laws of New York, contained such a provision. The announced purposes of the bond issue specifically included introduction of high-speed passenger train service between New York City, Albany and Buffalo. In November, 1973, the voters of New York State rejected the bond issue.

38. 45 U.S.C. § 563 (1970).

39. 45 U.S.C. § 501 (1970).

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Amtrak as barring suits by citizens to challenge the selection of routes by Amtrak.<sup>40</sup> In view of the numerous routes connecting major cities which Amtrak discontinued,<sup>41</sup> the Act should be amended expressly to permit greater public participation in route selection and judicial review of Amtrak's decisions.

The bankruptcy of the Penn Central and six other major north-eastern railroads has threatened wholesale abandonment of many vital routes furnishing both freight and passenger service. Congress is now considering legislation to establish a government-sponsored non-profit Northeastern Rail Service Corporation to assume control over those lines of the bankrupt northeastern railroads which the Corporation finds to be essential.<sup>42</sup> Here too, the public should be authorized to contribute more fully to the selection of routes along with the Interstate Commerce Commission and the Corporation itself. Judicial review of route selection should also be expressly permitted. Few events would increase our already prodigious consumption of oil as dramatically as the dismemberment of our railroad system. Conversely, the improvement of rail passenger and freight service would divert thousands of cars and trucks from congested highways and enormously reduce gasoline use.<sup>43</sup>

While this legislation is being appraised, the Penn Central and other railroads have applied for discontinuance of branch line passenger and freight service, abandonment of trackage, and curtailment of related service such as harbor lighterage. The ICC, despite its statutory

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40. *National R.R. Pass. Corp. v. National Ass'n of R.R. Pass.*, 42 U.S.L.W. 4132 (U.S. Jan. 9, 1974). See also *Wood v. National R.R. Pass. Corp.*, 341 F. Supp. 908 (D. Conn. 1972); *In re Penn Central Transp. Co.*, 329 F. Supp. 572 (E.D. Pa. 1971); *Quincy Coll. & Sem. Corp. v. Burlington N., Inc.*, 328 F. Supp. 808 (N.D. Ill. 1971).

41. In the Northeast alone, by failing to include them in its system of essential routes, Amtrak has allowed passenger service to halt between New York, Cleveland, Toledo and Chicago, between New York and Detroit, and between Boston and Albany, Buffalo, Cleveland and Detroit. See *N.Y. Times*, Jan. 29, 1971, at 1, col. 5. A legal action by New York State has enjoined the attempted sale by the Penn Central of 12 miles of its right-of-way under which passenger trains formerly entered Albany and Rensselaer from Boston. *State v. United States*, Civ. No. 73-262 (N.D.N.Y., Aug. 30, 1973).

42. H.R. 4897, 93d Cong., 1st Sess. (1973); S. 1031, 93d Cong., 1st Sess. (1973).

43. Improved rail transit would divert much traffic from the overcrowded air corridors surrounding major cities as well, saving fuel as well as alleviating airport congestion and noise. Studies have shown that one out of six airline passengers to or from New York has as his destination Boston, Providence, Philadelphia, Baltimore or Washington—all cities within close proximity to New York by mainline railroad. See Lefkowitz, *Jamaica Bay: An Urban Marshland in Transition*, 1 *FORDHAM URB. L.J.* 1, 12 n.44 (1972) (citing a National Science Foundation study).

responsibility to maintain adequate service "to meet the needs of . . . commerce,"<sup>44</sup> has generally approved these reductions in service while the courts, limited to the substantial evidence test, have almost invariably sustained these determinations.<sup>45</sup> On the other hand, NEPA has furnished an effective shield against ICC decisions which fail to weigh the environmental consequences of the severing of rail service.<sup>46</sup>

In addition to increasing governmental commitment and commensurate funding to rail transportation for both passenger and freight, there are other steps which should be taken to conserve energy and to produce it more efficiently. Oil producers should be required to devote a substantial amount of their revenues to the development of safeguards against spills under the supervision of the Environmental Protection Agency, which has jurisdiction over water pollution.<sup>47</sup> Approval of the Alaskan pipeline should have been conditioned upon full compliance with NEPA, and Congress can still explicitly mandate consideration of the benefits of rail shipment of oil from Alaska as well as the safer alternative pipeline through Canada. Each seaboard state should adopt the sort of stringent safeguards enacted by Florida and contemplated by New York to regulate oil spills in its coastal waters. Regulation of commercial airlines by the Civil Aeronautics Board should require the pooling of heavily traveled routes, such as between New York and Chicago, to reduce unnecessary flights. Prohibition by the Federal Aviation Administration of general aviation (private, non-commercial aircraft) from busy airports such as Kennedy and O'Hare would also reduce congestion and thus conserve fuel aside from its other obvious benefits to travelers.

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44. Interstate Commerce Act, 49 U.S.C. *Statement of Policy* (1970) ("to promote safe, adequate, economical and efficient service . . . to the end of developing, coordinating and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of commerce of the United States, of the Postal Service, and of the national defense"). See also *McLean Trucking Co. v. United States*, 321 U.S. 67, 81 (1944) ("affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country"); *New England Divisions Case*, 261 U.S. 184, 189 n.6 (1923) ("properly to meet the transportation needs . . . the necessity . . . of enlarging [transportation] facilities").

45. See, e.g., *City of Sheridan v. United States*, 303 F. Supp. 990 (D. Wyo. 1969), *aff'd*, 396 U.S. 281 (1970); *State v. United States*, 299 F. Supp. 989 (N.D.N.Y. 1969), *aff'd*, 396 U.S. 281 (1970).

46. See, e.g., *State v. United States*, Civ. No. 73-262 (N.D.N.Y., Aug. 30, 1973); *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973); *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 93 S. Ct. 2405 (1973); *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972).

47. 33 U.S.C. § 1251(d) (Supp. 1972).

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Legislation has also been proposed to impose a fuel economy tax on automobiles which consume greater than average amounts of gasoline. Under a bill now in Congress, cars which operate at 20 miles per gallon or more would pay no tax, but a ten miles per gallon car would pay \$96 per year.<sup>48</sup> Under another proposal, commuters using car pools would be able to deduct their expenses.<sup>49</sup>

In addition, since a substantial amount of fuel is consumed in the production of electric power, conservation of electricity will result in a saving of oil as well. As a condition of any raise in rates granted to electric utilities, the state public utility commissions should direct that a reasonable proportion of the increase be devoted to research into more efficient production of power, a position which has been taken by the New York Attorney General's office in rate increase applications before the Public Service Commission.<sup>50</sup> Building construction codes should be amended to encourage designs which conserve electricity, such as efficient insulation and individually controlled lights and air conditioning.

Finally, the economics of the oil industry itself must be shifted. Tax reforms, particularly reduction of the oil depletion allowance, can reduce the dependence on profits at the wellhead and force the industry to earn the bulk of its revenues from the sale of gasoline and fuel oil. This would curtail the incentive to expand oil production to levels which are unsound from the standpoint of conservation of finite resources. The crisis may be contrived, but the underlying problems are real indeed. It will take effective, vigorous governmental action to stem them. Oil, after all, is a substance capable of producing light as well as heat.

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48. H.R. 7531, 93d Cong., 1st Sess. (1973).

49. H.R. 6640, 93d Cong., 1st Sess. (1973).

50. Research is, for example, presently under way to determine the feasibility of converting fossil fuels directly into electricity without the need to produce steam to turn turbines—a step which would substantially increase the efficiency of power generation and thus result in sizable savings of fuels. Passell & Ross, *Effluence and Affluence*, COLUM. F., Winter 1973, at 30, 35.

