Topic:

THE UNITED STATES ENERGY SOURCES AND THE QUEST FOR A UNIFIED ENERGY POLICY: ARE WE STILL GIVING THE FOSSIL ENERGY INDUSTRY THE UPPER HAND AGAINST RENEWABLES?

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Introduction:

In the year 2005, commentators noted that, most of the electricity in the United States came from coal-fired plants (51%). The rest of the power came from nuclear power (20%), natural gas (18%). Hydroelectricity contributed 7%, and petroleum accounted for only 3%. It is further stated that, geothermal, biomass, solar, and wind together account for just a little over 1.5% of the net generation of electricity.[2] Robin Lunt further added that, even though the data for 2006 only extended until September [of the same year], the information comparing the first nine months of 2005 to the first nine months of 2006 accounts for almost a 50% drop in electricity generated from petroleum in the same year, 2006.[3]

The purpose of this work is to find out whether, despite of all these difference in sources of energy, the United States can still come up with a unified energy policy to regulate the country's energy regime.

The online Free Dictionary defines the term "Coordinate or Co-ordinate[4]" as meaning, to cause to work or function in a common action or effort or; to make harmonious; or harmonize; or to organize or integrate (diverse elements) in a harmonious operation in order to work together. For the purpose of this work we will use the term "Coordinate" to mean to organize all the regulating systems, whether on federal levels or state levels, to cause them to work together to achieve a uniform, economic, and or environmental goals or, simply to have a uniform (federal) policy, country wide energy regulating body.

The question this work seeks to answer is whether a single, unified and coordinated Energy Policy would serve a better purpose or, having every state in the United States regulating its own regional Energy Policy is the best economic and environmental way to regulate energy?

It is noted as an example that, the North Carolina Energy Policy Act created the Energy Policy Council, within its Department of Commerce. Its purpose is to advise and make recommendations on Energy Policy to the Governor of the state and the General Assembly.[5] The Energy Policy Council also serves as the

[2] Robin J. Lunt., Recharging U.S. Energy Policy: Advocating for a National Renewable Portfolio Standards, 25 UCLA J. Envtl. L. & Pol'y 371 (2006-2007), see: "II. Sources of Electricity," at 376.
[3] Id.
[4] http://www.thefreedictionary.com/coordinate
[5] N.C. Gen. Stat. 113B-2(a).

state's central energy policy planning body[6]. Edward Esping and Jill Gustafson[7] observed that, the North Carolina Energy Policy Council consists of 16 members[8] one of whom is appointed by the Governor as Chair of the Council for a term of four years. Esping and Gustafson went on to confirm that, the responsibility of the North Carolina Energy Policy Council is to advise and make recommendations on how to increase the domestic energy exploration, development, and production within the North Carolina state and, the region so as to promote economic growth and job creation. Economic growth and job creation in the state, is also thought to be as one of the most important tasks to the Governor and General Assembly[9]. It is further observed that, the Chair of the Council, with the consent and approval of the members, may organize the Council's work to carry out the provisions of the Act and to ensure the efficient operation of the Council. It is noted that, the Energy Policy Council adopts its own rules of procedure, meets regularly, and is authorized to create necessary advisory committees[10].

We will observe here, the first challenge, if we are to achieve a national coordinated energy policy. We will note that, the state of North Carolina regulates its own energy policy. In their long term energy policy, there is no room for legislation coming from out of their state. So they regulate its own. This point is well noted here.

The second point to note that sets the state apart is that, the North Carolina statutes[11] places the North Carolina Energy Policy Council within the Department of Environmental and Natural Resources, rather than the [Federal] Department of Commerce. This is not unusual. But it further confirms and sets down the point that, that state regulates its own, rather than falling under a Federal statute.

It is confirmed that the North Carolina Lieutenant Governor is charged with the responsibility of serving as chair of the North Carolina Energy Policy Council[12].

The message in the above literature as observed by Esping and Gustafson is clear. Here again we will note that, the state of North Carolina regulates its own policy, when it comes to its affairs on the energy industry in the state. Cases have been made for and against a single, unified, nationally coordinated energy policy, as this work will show here bellow.

The History of the [United States'] National Energy Policy Development.

Commentators on the energy industry observed that, the National Energy Policy Development Group (NEPDG), operated in secrecy. Most of their operations in the George Bush administration was seen to be

[6] N.C. Gen. Stat. 113B-2(c).
[7] Edward K. Esping and Jill Gustafson, 46. Energy Policy Council, 11A N.C. Index 4th Energy 46 (2015). See pg. 1.
[8] N.C. Gen. Stat. 113B-3(a), also specifying the qualifications, manner of appointment, and terms of the members.
[9] N.C. Gen. Stat. Ann. 113B-3(a), amended effectively July 29, 2013. See quote by Esping and Gustafson (2015). See at 1.
[10] N.C. Gen. Stat. 113B-5(c). Also see Esping and Gustafson (2015) at 1.
[11] N.C. Gen. Stat. Ann. 113B-2(a), amended effectively July 1, 2013.
[12] N.C. Gen. Stat. Ann. 113B-4(a), amended effective July 29, 2013. See quoted by Esping and Gustafson (2015) at 2.

confidential, with a deliberate attempt to conceal the identity of the individuals who make up the energy policy development group.

If we wish to contemplate on the unification of energy policy in the United States, then the understanding of the National Energy Development Policy and, the group that was made responsible for this task by President George W. Bush's administration, the National Energy Policy Development Group (NEPDG) is critical.

Benjamin W. Cramer[13] who wrote in 2008, suggests that, an understanding of the connection between members of the George Bush administration and the energy industry executive is essential for examining the administration's views on energy policy. Cramer adds that this view culminated in the recommendations of Dick Cheney's[14] National Energy Policy Development Group. Cramer further noted that, George Bush,[15] Cheney and other members of the era's administration had long-established connections with the energy industry. Here we are then tempted to ask, what is wrong with having a long standing connection with the energy industry? Would it not have benefited the administration to understand the energy industry better? We might think that, as a matter of suggestion, this longstanding connection with the energy industry, can be put to good use by using the connection to come up with a more efficient policy. In response, it is further noted that, some sectors of this wide ranging industry include fossil fuel exploration and extraction, pipeline and delivery operations, alternative energy research and development,[16] and public power utilities. In Cramer's opinion, these industry connections had noticeable impacts on Cheney's actions in convening the NEPDG and in formulating its policy recommendations, Cramer says. It is noted that it was during this time that fossil fuel related business was giving an upper hand, while renewable related business industry was kept at bay, as we will later see here.

In Cramer's observation, Industry influence, it was noted, often exercised through campaign contributions, was also strongly openly observable in the two most noteworthy companies to cultivate relations with the administration of the day, Enron and Halliburton.

[13] Benjamin W. Cramer, The Power of Secrecy and the Secrecy of Power: FACA and the National Energy policy Development Group, 13 Comm. L. & Pol'y 183 (2008), see at 186.
[14] Mr. Dick Cheney, was Vice President to President George W. Bush.
[15] Cramer (2008) 183, see at 187-88; Also see quoted by Cramer (2008) at footnote 16: Bush family connections with the fossil fuel business dated back to the late nine-teenth century. Ancestor Samuel Prescott Bush, a budding steel baron, established ties with the Standard Oil Corporation and inaugurated the ongoing family involvement with the oil industry. As both entrepreneurs and politicians, the Bush family has remained involved in the business ever since, extending through Senator Prescott Bush, President George H. W. Bush, and into the most recent presidential administration. . . .
[16] Note that the Bush Administration provided little support for alternative energy. For instance, as Bush told the then-Senator Minority leader Tom Daschle shortly after his inauguration in January, 2001, "Alternative energy is something long in the future. There is nothing we can do with it that helps us much now." See: Tom Daschle & Michael Dorso, Like No Other Time. The 10^{7th} Congress and The Two Years that Changed America Forever 53 (2003).

It is further observed that, the influence of Enron on the George Bush Administration became widely known after that company collapsed in 2001.[17] The commentators who followed the Bush administration more keenly, noted that, when Bush became president earlier that year, one of his first actions was to absolve energy companies (including Enron and its industry allies) of responsibilities for a months-long electricity supply crisis in California at the time. The administration proceeded to dismiss any requirements for those companies to provide remedies for shrinking power supplies and skyrocketing consumer prices.[18] Nonetheless, the Federal Energy Regulatory Commission (FERC) in its investigation, concluded that, the crisis was the result of Enron and other large energy concerns that manipulated California's recently deregulated public utilities markets.[19]

Enron's success in gaining influence with the Bush administration encouraged other companies in the energy sector to expect to be rewarded for their contribution in helping the administration with financial contributions in coming to office, writes Cramer. It was observed further that, the Wall Street Journal reported that, *"Oil companies felt particularly confident that a President Bush will take care of them and have provided generous support."* It must therefore, be thought that, these connections with the energy sector resulted in a pro-industry outlook on energy policy, which in turn, says Cramer, has significantly influenced the behavior of the National Energy Policy Development Group (NEPDG), at the lobbying group of the time.[20]

Meanwhile, it is confirmed that, Vice President Dick Cheney, at the time cultivated a long and well-documented relationship with Halliburton from 1995 to 2000. This he did during, and between his tenures as secretary of defense under George H. W. Bush and Vice President under George W. Bush. Cheney served as Halliburton's CEO, back then. Cramer's opinion adds that, the company clearly had a motivation for hiring Cheney. The motivation was that, Cheney's political and professional contacts gave the company a competitive advantage, as its contacts with the U.S. government more than doubled during Cheney's tenure at this position.[21] We are then tempted to ask, what does the hiring of Mr. Dick Cheney intended to achieve?

In response it is noted that, one of the first structured activities of the Bush Administration, at the time, was to begin formulating a new federal energy policy. Cramer further writes that, popularly known as the

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[17] See quoted in Cramer (2008) 183, at 188, footnote 20:
Bush's relationship with Enron Company dates back to 1986, when the then up-and-coming pipeline maintenance company purchased stakes in one of Bush's Texas Oil Ventures. Enron CEO Ken Lay aligned his company with the Bush political family, as George H.W. Bush was then Vice President. See: Robert Brice, Pipe Dreams Greed, Ego And the Death of Enron 86-88 (2002). Lay was later a prominent contributor to, and organizer of, the younger Bush's campaign for governor of Texas and president of the United States.

[18] The stance deflected public attention to the long term needs for increased energy production, in the form of new power plants, oil drilling facilities, and the like. See Jeanne Cummings & Jim VandeHei, Bush Energy Plan Takes Risks by Focusing Long Term, Wall St. J., (May 11, 2001), at A16.

[19] Cramer (2008) 183, see at 188-89, footnote 22.

[20] Id.

[21] Cramer (2008) 183, see at 189; Also see: Id, footnote 26:
During this period, Halliburton took advantage of efforts to privatize the Department of Defense, which Cheney had initiated earlier as Secretary of Defense; also see David Lazarus, Energy Providers Have Juice, San Francisco Chron,. (Nov. 22, 2002), at B1.

"energy task force," "the National Energy Policy Development Group (NEPDG)" was authorized by George W. Bush nine days after he took office in January 2001,[22] with Cheney immediately named as the head of the group. It is further noted that several Bush administration government officials were named as members of the NEPDG group, it is said. So too, it is confirmed that, several members of the White House staff were named to the group as well. Cramer points out here that, his investigation further revealed that, many of these officials named to the group, reportedly had established political and commercial connections with the energy industry.[23]

Should it now be assumed that these individuals as a group, had a direct interest in the outcome in the quest for the national energy industry policy?

According to Cheney, writes Cramer, the NEPDG was convened "to create a "national energy policy" designed to help bring together businesses, government, local communities and citizens to promote dependable, affordable, and the much hoped for environmentally sound energy for the future."[24] But the identities of those representatives of business, along with those of the local communities and citizens, have suspiciously never been officially disclosed, it was noted.

One might be tempted to ask then, whether we might further then assume whether these members operated in bad faith, if their identity could not be publicly disclosed? In response, it is said that, early in the proceedings, the task force announced that its meetings were off the record. The task force had laid down rules that, the participants must share no information with anyone outside the group. It is pinpointed out that, at one time, for three months after the group convened, all NEPDG meetings were held behind closed doors. Various Enron executives also met personally with the energy task force at least ten times, it is noted. In April 2001, CEO Ken Lay presented Cheney with a list of ten national energy policy recommendations, and was said to have personally given his views on the then-recent controversy over the California electricity crisis.[25]

If the public was denied information about the group's meetings, then how would the public debate the energy policy quest the group wished to accomplish, one might ask then?

In response to the above enquiring thought, Cramer noted that, eighteen energy firms that had contributed to the Bush campaign were able to voice their concerns directly to the energy task force. Cramer went on to narrate that, these secret meetings later came to light when some of the companies reportedly begun to boast about their involvements with the task force to investors and the business press. For example, shortly after the release of the energy task force report, it was noted that, Peabody Coal advertised its involvement while promoting an upcoming stock offering, and then credited the task

[22] Bush Memorandum Established the National Energy Policy Development Group, Jan. 29, 2001; Also see, Judicial *Watch Inc. v. National Energy Policy Development Group*, 219 F. Supp. 2d 20, 24-27 (D. D. C. 2002).
[23] Cramer (2008) 183, see at 190-91.
[24] Report of the National Energy Policy Development Group. This quote is from Dick Cheney's official letter to the President to introduce the report.
[25] Id.

force for making the offering $60 million more profitable than had reportedly been anticipated by Wall Street, Cramer saw.[26]

Again here we might be tempted to ask that, was membership into the group a reward for campaign contributions that brought the Bush administration into office?

In response, Cramers writes that, in March 2001, it is reported that, representatives of selected environmental groups and alternative energy firms were contacted by the task force and given just an unfavorable forty-eight hours window period opportunity to supply structured comments on national energy policy.[27]

In a further observation It can be assumed that the energy policy group gave renewable energy companies and enthusiasts little or no opportunity at a fair treatment. Could an action of access to information, through Court have succeeded against the group to get it to divulge their operations, goals and agenda?

In response, the company's influence on America energy policy, after Bush took office, has never been officially or publicly disclosed, Cramer says. It is further noted that, in light of the company's business practices, a great deal of concerns were raised by concerned parties like politicians, legal scholars, and the media over the Bush administration's general refusal to publicly discuss or shed light onto the matter, it is noted.[28]

It is confirmed that, on May 15, the day before the official NEPDG report was released, it is said that Cheney reportedly hosted a brief meeting with representatives from several different (renewable industry) wind, solar and geothermal energy firms. The discussions of the concerns, in the NEPDG report is almost, completely absent, noted Cramer.[29]

Here, we are again tempted to ask, was Cheney negotiating in bad faith? We will assume so, because he is seen to have an interest in the outcome that fossil energy becomes the dominant source of energy in the country, at any cost to the detriment of renewable industry.

In response, Cramer explained that, the NEPDG has been treated as a clandestine operation, regardless of the fact that it was a policy-making entity that released an official public report. But if this public policy report is to be believed by the general public, then it was not in good faith. It was further noted, of the group that, all its internal documents and meeting minutes have been withheld from the public in whose interest they purported to work.[30] Following this meeting, it is said that, Cheney has steadfastly refused to divulge such records. Efforts by the media, citizens' groups, and government representatives to find this official information, through legal and procedural means, was greeted with a continuous display of

[26] Cramer (2008) 183, see at 192-93.
[27] Id.
[28] There had been speculations that George W. Bush's secrecy regarding his ties to Enron, and the company's influence on policy could raise issues of contempt of congress and the separation of powers doctrine of the constitution. See Damell L. Weeden, The Rise and Fall of Enron: A White House Nondisclosure Entangles Seeration of Powers and Contempt of Congress, 35 McGeorge L. Rev. 65, 68-77 (2008).
[29] Id.
[30] John D. Podesta, Shadow Creep: Government Secrecy Since 9/11, 2002 U. Ill. J. L. Tech. & Pol'y 361, 370.

secrecy and noncooperation from the Bush administration. Further developments have noted that, various environmental and public interest groups, several congressional committees and subcommittees, and the Government Accountability Office (GAO) have all made legal efforts to pry information about the energy task force out of the George Bush administration.[31] But despite the nearly complete inability of the American Public culminated from the effective and skillful clandestine ability of the group to hide its operations, information from the group was never unearthed.[32] This was also because the legislative and judicial branches of the U. S. Government was unable to discover how the energy task force's policy ideals were formulated, Cramer says. Cramer confirms that, many of the recommendations in its report eventually became law via a variety of bills introduced in Congress, says Cramer.[33] That the group had political influence and clout is undoubted by the energy policy observers and related interest groups, to this day.

Did the Bush administration, due to its secrecy and favoritism towards the fossil industry, hinder the developments it was intended to promote? We attempt to answer the above question in the chapter that follows.

The Federal Advisory Committee Act (FACA).

It is pointed out that, the saga of the National Energy Policy Development Group, as we have seen explained above by Cramer, raised many questions about government secrecy and the behavior of the advisory committees, both of which are addressed in the Federal Advisory Committee Act (FACA).[34] However, citizens and the media largely unable to utilize FACA in an attempt to uncover the secrecy of the energy task force, due largely to ambiguity in the Acts language and precedents formed during its judicial history,[35] says Cramer.

What then is new, that FACA brought with it that could have unearthed the secrets of the Bush administration favoritism and positive bias towards fossil energy?

In response, it must be noted that, the passage of FACA reflected a growing congressional concern over conflict of interest in the use of advisory committees, it is said. Cramer adds that, also, at the time the act was debated in congress, there were thousands of such committees in operation. It is further noted that, such committees were causing great public concern over their expense. The act was primarily designed to allow for easier management and effective administrative control of the several committees that were in the operation at any given time. This mechanism was designed as a process of terminating outdated

[31] General Accounting Office, Chronology of GAO's Efforts to Obtain NEPDG Documents from the office of the Vice President, April 19, 2001 to August 25, 2003 (2003). The Government Accountability office was established by law to support Congress in improving the performance and accountability of the Federal Government. See Budget and Accounting Act, Pub. L. 67-13, 42 Stat. 20 (1921). Note that the acronym "GAO" previously stood for General Accounting Office.
[32] Id.
[33] Cramer (2008) 183, see at 194-95.
[34] 5 U.S.C. app. Sections 1-15 (2000) enacted (1972).
[35] Id.

committees, and to restrict the unfettered creation of new committees, an administrative culture that was prevalent with the Bush administration at the time. In addition, Cramer confirm that, FACA ushered in the new change requiring that, all advisory committee meetings would be open to the public, beginning then.[36]

If FACA was equipped with such legal mechanism to bring those industry entities to book, for their failure to comply, then why did they fail to succeed?

It is noted in response that, FACA, at its inception, brought with it the desire to control government waste. But an equally (if not more) important reason for the passage of FACA by Congress was reportedly, the concern about the influence of special interest groups, as we had expressed earlier in this work. It is added that, the FACA attempts to require a "fairly balanced" points of view among members of the advisory committees. But also it has as one of its important tasks and responsibilities, was the attempt to prohibit industry-only committees.[37]

Cramer observed that, FACA had just the right tool to bring compliance and enforcement of the rules. But why did they fail to succeed here then, we may ask?

Cramer, in response opines that, regardless of its subsequent enforcement and legislative history, FACA had ushered in several reforms in the un-effective and unproductive use of advisory committees. This FACA did by regulating their formation and operations, and by subjecting them to the open attention of the public and its office representatives,[38] Cramer said.

The National Energy Policy Development Group, is said to present concerned citizens with what is thought to be the proverbial Catch-22. It is suggested that, those who wish to learn who participated in the energy task force could conceivably use the Federal Advisory Committee Act. However, some of the members of the committee were not employees of the federal government. However, Cramer noted that, the members of the NEPDG could not be identified unless the Bush administration released information about the group.[39]

The Bush administration, and Vice President Cheney in particular, were responsible for perpetuating this show of secrecy by simply denying that any none-governmental employees participated in the NEPDG—a tried-and-true strategy for avoiding FACA challenges.

Cramer points out that, the *Report of the National Energy Policy Development Group*, in its introductory section, was able to partially lift this veil of secrecy by listing only Bush Administration officials, cabinet members, and White House personnel as members of the task force. It is thought that, this officially published list made it easier for the administration to claim that only full-time government employees of

[36] The relevant sections of FACA referenced are 5 U.S.C. app. Sections 2(a), 5(a), 5(b), 10(a) (1)(2000). Quoted in Cramer (2008) 182, see at 199, footnote 75.
[37] 5 U.S.C. app. Sections 5(b)(2), 5(c) (2000). These provisions of FACA have not been subjected to strong enforcement.
[38] Id.
[39] Id.

the time participated.[40] Cramer opines that, this line of reasoning somehow, proverbially put the fox in charge of the hen house, so to speak. This reasoning shifted the burden of proof away from the administration officials who had compiled that very same list of participants, and by making it impossible for the public or the press to determine if the list was accurate or complete, says Cramer.

The above realization raised suspicion in that, the very same said administration officials had an interest in the outcome of any new energy policy. For very obvious reasons, they would work tooth-and-nail to ensure that renewable enthusiasts don't succeed. That they were biased against renewable energy entities, should not surprise us. This is representation in bad faith, and conflict of interest, because the policy they were to bring into being favored fossil fuel policy more than renewables.

Before the non-compliance of the energy task force can be discussed, Cramer explained that, the most important legal challenge to the group's secrecy can be seen in the case, *Judicial Watch v. National Energy Policy Development Group*,[41] where the plaintiffs in this case suggested a strong use of the requirements of FACA in determining whether the NEPDG really was an advisory committee, and pushed for an end to the Bush administration's secrecy over the energy policy of the era.

In *Judicial Watch v. National Energy Policy Development Group*, the secrecy of the energy task force inspired court challenges from a variety of government representatives and citizen's groups. Did they succeed? Cramer in response points out that, to date, none of these proceedings has penetrated the official secrecy surrounding the NEPDG. These legal challenges was the *Judicial Watch* case, which shed a harsh light not just on the extent of the Bush Administration's secrecy efforts, but also on the effectiveness of the Federal Advisory Committee Act.

The first serious attempts to apply the FACA to the energy task force was initiated by a rather unlikely partnership of citizens' advocacy groups. *Judicial Watch*[42] initiated the case in July 2001. Just then, about two months after the energy task force's report was released to the public. Crammer confirms that, the group's initial complaint charged that the NEPDG was not in compliance with FACA. FACA mandated that the group's documents and meetings should be open to the public, and that the committee's membership should be disclosed. Judicial Watch also cited two Supreme Court cases in contending that no presidential administration should be above government scrutiny, and that legal action should not be necessary to obtain information about government meetings.

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[40] Id.

[41] *Judicial Watch v. National Energy Policy Group*, 209 F. Supp. 2d 20 (DDC 2002).

[42] Judicial Watch is a primarily conservative organization that promotes government transparency and often mounts legal challenges to reveal undisclosed or secret government information. See About Judicial Watch-Our Mission, available at: http://www.judicialwatch.org/mission.shtml
Shortly before the suit against NEPDG was filed, Judicial Watch had also made a friendly request to Vice President Cheney for the information about the Energy Task Force. This request was rejected. See Judicial Watch, Timeline For Energy Task Force Case.

It is confirmed that the Natural Resources Defense Council attempted to unlock the secrecy of the committee through other pressure groups requests, only to find that the released documents were heavily blacked out by Bush administration officials.[43]

Yet again, this was another sign of operating in bad faith on the part of the Bush administration. We are tempted to ask that, to what extent did FACA go, to bring the members of NEPDG to book through legal means?.

In response, the *Judicial Watch* case embarked on the legal attempts by enjoining members of the Bush administration it can lay its hands on as we can see here bellow.

Judicial Watch v. National Energy Policy Development Group included as defendants all of the employees of the federal government it can lay its hands on. These included defendants known to be members of the energy task force, private industry representatives who were believed to participate in the NEPDG itself, and Vice President Dick Cheney as primary defendant. Commentators observed further that, utilizing news reports of suspected private industry involvement, *Judicial Watch* went ahead and named Mark Racicot, Haley Barbour, Thomas Kuhn, Ken Lay, and ninety-nine "Jane Does" and "John Does" as the private members of the energy task force under the suit.[44]

Cramer adds that, Judicial Watch and Sierra Club sought disclosure of information about the times and location of NEPDG meetings, what was discussed at those meetings, who was in attendance, how many times did the meeting take place, how many times any particular task force member attended meetings, and how many attendees were private individuals. Cramer observed that, the statutory text of FACA was the legal basis for these challenges.[45]

It is confirmed that, on January 31, 2002, early in the deliberations for the case, District Court Judge Emmet G. Sullivan issued an order partially rejecting the government's initial motion to dismiss, in which the defendants claimed that FACA requirements directly interfered with the activities of the executive branch, in turn violating one of the doctrines of separation of powers. Sullivan ruled that failure by the government to provide such details amounted to "insufficient guidance" for determining the constitutional concerns of the case.[46] It is noted that, the order did not take effect while the trial was still in progress, as these other constitutional concerns continued to be argued. Cramer observed that, on July 11, 2002, the court denied all remaining motions by the other defendants to dismiss the suit, allowing full arguments to proceed.[47]

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[43] Kalen (2008) 183, see at 208-209.

[44] 219 F. Supp. 2d at 24. See also Civil Action No. 01-1530, Judicial Watch, Inc., et al., v. Natural Energy Policy Group, et al; Sierra Club v. Vice President Richard B. Cheney, et al., available at http://www.judicialwatch.org/cases/67/discoveryplan.htm
Marc Racicot was a former Governor of Montana who was then working as an energy lobbyist, Haley Barbour was a former head of the Republican National Committee, and Thomas Kuhn was president of the Edison Electric Institute, an industry lobbying consortium made up of shareholder-owned electric companies.

[45] Id.

[46] Cramer (2008) 183, see at 210-211.

[47] Id.

Here we are again tempted to ask, if the executive branch represents the American public, why are their activities that does not relate directly to national security be carried on or accomplished shrouded in secrecy? Should it not be ask that the American public had the right to know?

In response, Cramer confirm that, the Bush administration and the other defendants raised constitutional and statutory arguments to justify keeping the energy task force records secret.[48]

Commentators further observe that, given the ultimately indecisive outcome of the *Judicial Watch* case, and the general trend embodied in other cases of the same nature, Cramer writes confirming that, citizens have had very little success in unveiling secret government activities via legal challenges under the "toothless" FACA, or in filing claims of violations of the acts requirements, says Cramer.[49]

Cramer further went on to confirm that, because of its under-utilization and non-enforcement in appropriate situations, FACA has mostly been seen as toothless and ineffective in achieving to make the advisory committee process more transparent. Cramer saw that, these weakness in the act have been illustrated by the continued secrecy of Dick Cheney's energy task force, which FACA has been unable to crack, says Cramer.[50]

But then, how deep did this Bush administration embed itself in government secrecy, with a tight fist hold on the energy policy?

The following chapter attempts to answer the above question, on the Bush administration government secrecy and the energy policy of the time.

Government Secrecy and Energy Policy.

Cramer's opinion was that, the public scrutiny afforded to FACA could impair a president's ability to obtain information from qualified experts, because some of those experts would be less likely to make unpopular or politically incorrect recommendations. This is more so, it is suggested if they knew their contribution could be made public, says Cramer. This is particularly likely when the ultimate result of the particular task force's efforts is a public report, as it was for the NEPDG, says Cramer.

Other commentators have justified this action with the explanation that, in order for the government to function, certain information must be kept confidential. But Cramer in response argues that, there is an inherent contradiction, however, in operating an excessively secretive government in a society with constitutional and cultural prerogatives for openness and accountability.

[48] Id.
[49] Cramer (2008) 183, see at 221-222.
[50] Id.

It is said that, secrecy in the White House is nothing new, of course. In the words of a renowned ethicist Sissela Bok[51], a shortage of information about government activities reduces public debate and understanding about important issues and trust in the government itself.

Yes, I agree with Sissela Bok's observation here.

Cramer concludes that, the secrecy of the Bush Administration's energy policy should have been considered a matter of public concern. Yet another commentator would suggest that Bush administration's actions borders upon contempt of Congress

Therefore, continues Cramer that, it is in the public's interest to know if the American energy policy has truly been formulated to enhance the choices available to consumers and control their costs, of if that policy has been written to enhance the profitability of select corporations. America's national energy policy indeed impacts the daily lives of citizens, and knowing how that policy is formulated is essential for making personal choices and for the effectively monitoring and understanding the government activities.[52]

Many interested groups in America will accept the statement of Cramer here above that, America's national energy policy indeed impacts the daily lives of citizens. If this is indeed so, then why were the details of the policy hidden from the American public? Perhaps it is because the members of the policy group, had an interest in its outcome, particularly when all the members had a close connection to the fossil fuel industry itself. I agree with this statement that they were biased, towards the renewables' energy industry itself.

As we shall see here bellow, Cramer tries to narrate what changes where effected, by President Obama's administration, when he come into office.

Enter Obama, in John Kennedy's footsteps?

When President Barack Obama took office in 2009, the comparison to President John F. Kennedy, Jr. were inevitable. In 2008, late-Senator Edward M. "Ted" Kennedy compared the then-Democratic presidential nominee Obama and his brother, President Kennedy: *"There is a new wave of change all around us, and if we set our compass true, we will reach our destination—not merely victory for our party, but renewal for our nation . . . . So with Barack Obama . . . the dream lives on."* [53]

[51] Sissela Bok, Secrets: on the Ethics of Concealment and Revelation, Published by Vintage (1989).
[52] See David R. Hodas, Executive Previlage and Energy Policy, 19 Natural Resources and Environment 68 (2004): Also see quoted in Cramer (2008) 183, see at 227, footnote 219.
[53] Robert Denton, Jr., The 2008 Presidential Campaign: A Communication Perspective 23 (2009) (quoting Senator Ted Kennedy's address to the 2008 Democratic National Convention); Also see quoted in :Joshua P Fershee, 39 Tex. L. J. 131 (2009) at 131-132.

Fershee notes that, from a policy perspective, though, President Obama is more often compared to Abraham Lincoln or Franklin Delano Roosevelt, than to President Kennedy.[54] Writing in 2009, Fershee argues that, President Obama had much to gain from looking to President Kennedy's policies, not just his rhetoric, especially in setting energy policy. Fershee, pointed out that, President Kennedy's policies could have become a resource and roadmap for the current Administration and all those who sought to ensure access to affordable energy while preserving the environment.[55] Fershee attempts to puts President Kennedy's energy initiatives and proposed legislation and puts that motivation in context. He tries to see whether the policies whose initiatives were divided into technological, regulatory, economic, and political (domestic and international) climate of the Kennedy years could be applicable in the Obama years today. Fershee noted that, though the Kennedy energy policies were insightful, they were not without shortcomings and consequences.

My observation still is that, there are several state and federal agencies with interests that overlap. Which one of them has the upper hand, if we may ask? An example is that, you cannot set up an oil well, without obtaining approval from the environmental agency. This will now lead us to explore President Kennedy's policies, in the paragraphs that follows bellow.

The Complex Nature of the Kennedy Energy Policies.

Fershee noted that, although many of the specific issues have changed over the past fifty years, President Kennedy's policies can still provide a useful model in developing ways to address modern concerns, he says. President John Kennedy, though spent short time in office, with a conflicting record, he was accurately portrayed as an environmentalist.[56] President Kennedy was also a major supporter of space exploration and atomic power. An ardent supporter of the environment, he also advocated expansion of nuclear power for civilian use and proposed and supported construction of coal slurry pipelines, wrote Fershee.

As president Kennedy explained to the United Nations in 1963, that man now has the capacity to control his own environment, reiterating that:

[54] See Matt Bai, Don't Look Back, N.Y. Times, Feb. 1, 2009, at MM9, (stating that viewing President Obama "as crisis President" leads comparisons to Lincoln and FDR, but "as cultural icon" President Kennedy is a more apt comparison).

[55] See Joshua P. Fershee, 39 Tex. Envtl. L. J. 131 (2009) at 132, footnote 6. See President Barack Obama, Remark at Southern California Edison Electric Vehicle Technical Center (Mar. 19, 2009) (providing President Obama's remarks as they were prepared for delivery) ("We can remain one of the world's leading importers of foreign oil, or we can make the investments that will allow us to become the world's leading exporters of renewable energy. We can let climate change continue to go unchecked, or we can help stem it."), see available at http://www.energy.gov/news2009/7067.htm

[56] Fershee (2009) 132, see: The Broad and Complex Nature of the Kennedy Energy Policies, at 133; See also: Benjamin Kline, First Along the River; A Brief History of the US Environmental Movement 75-76 (3d ed. 2007).

. . . . *"We have the power to make this the best generation of mankind in the history of the world—or to make it the last"*

President John F. Kennedy.[57]

Fershee confirms that, President Kennedy, more than 40 years ego, predicted that:[58]

> *"If we fail to chart a proper course of conservation and development—if we fail to use these blessings prudently—we will be in trouble within a short time in the resource field, predictions of future use have been consistently understated. But even under conservation projections, we face a future of critical shortage and handicaps. By the year 2000, a United States population of 300 million—nearly doubled in 40 years—will need far greater supplies of farm products, timber, water, minerals, fuel, energy, and opportunities for outdoor recreation. Present projections tell us that our water use will double in the next 20 years; that we are harvesting out supply of high-grade timber more rapidly than the development of new growth; that too much of our fertile top soil is being washed away; that our minerals are being exhausted at increasing rates ; and that the Nation's remaining undeveloped areas of great natural beauty are being rapidly pre-empted for other uses."*
>
> President John F. Kennedy.[59]

Many of us will agree with the above policy expectations. Many will confirm and will echoe that President Kennedy, though spent an incomplete term in office, he hard ushered in fresh positive expectations in the nation of agendas he had hoped to accomplish. We agree that most of his policies on the nation's natural resources lived on to this day.

Fersee confirms that, on many of the above predictions, President Kennedy was right. The US population in 1963 was approximately 189 million people.[60] It is noted that, in 2000, it was more than 280 million. Fershee goes on to write that, it was not until about 2007 that the population actually hit 300 million people, a mere 7 years "late," wrote Fershee.[61] As for water supply, Fershee noted that, President Kennedy was correct that water needs would increase greatly. Total water withdrawals for all uses in 1960

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[57] President John F. Kennedy, Jr., Address before the 18th General Assembly of the United Nations (Sept. 20, 1963), available at http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03_18thGeneralAssembly09201963.htm (providing the transcript of the address, as well as the audio file).

[58] Fershee (2009) 132, see at 134. Also see quoted in Farshee (2009) 132, see at 134.

[59] President John F. Kennedy, Special Message, Special Message to the Congress on Natural Resources (Feb. 23, 1961), available at http://www.presidency.ucsb.edu/ws/index.php?pid=8466&st=&st1=.

[60] US Census Bureau, Historical National Population Estimates: July 1, 1900 to July 1, 1999, available at http://www.census.gov/popest/archives/1999s/popclockest.txt

[61] US Census Bureau, Population Estimate, http://factfinder.census.gov/home/saff/main.html?_lang=en (click on "Population Finder" tab and then follow hyperlink to "Population for all states in the United States, 2000-2008").

were 270 billion gallons per day (bgd), by 1980, that number reached a peak use of 440 bgd, twenty years later, the number had decreased to 408 bgd,[62]just as the late President had predicted.

It is noted that President Kennedy sought to combine the "widely scattered resource policies of the Federal Government." It is said that, he noted that, prior policies overlapped and often conflicted and that funds were often wasted on competing efforts, wrote Fershee.[63] The president recognized that, funds and attention devoted to annual appropriations or immediate pressures diverted energies away from long-range planning for national economic growth. Fershee saw that, although President Kennedy's policies did not always achieve this standard, no president since has endorsed such a comprehensive energy plan. Fershee argues that, many of the issues Kennedy was concerned about are applicable today, but the problems have evolved, and in many cases, expanded and that, we are still concerned about nuclear proliferation.

We would agree that President Kennedy had good advisers on this topic of natural resources policies. While the late President expanded infrastructure for resources, was this a delicate task which required a delicate balance or a practical impossibility? Fershee attempts to explain in the paragraphs that follow here bellow.

Promoting Conservation While Expanding Infrastructure for Coal and Electricity: A Delicate Balance or a Practical Impossibility?

President Kennedy supported the use of coal for energy, noted Fershee. He understood the need for additional fuel sources to power the economy and raise the quality of life in many parts of the country.

Specifically, during the 1960 presidential campaign, then-Senator Kennedy promoted coal for electricity, a concept he called "coal by wire,"[64] noted Fershee. He had noted that, between 1948 and 1960, coal employment had declined from 127, 000 employees to less than 50,000.[65] Today, statements about coal are often tied to the need to reduce traditional coal plants and increase "clean coal" technology, it is said. It would be rare indeed to hear of even coal advocates arguing publicly for increased coal use without touting an ability to reduce emissions.

The "ancient power of coal," Kennedy had stated, burnt at the mines and transmitted over huge cables—can re-enter homes of America in the most modern of forms—as electric power.[66] In this manner, Kennedy

[62] Fershee (2009) 131 at 134; Also see: USGS Estimated Water Use in the United States in 2000, http://pubs.usgs.gov/circ/2004/circ1268/htdocs/table14.html
[63] Fershee (2009) 131 at 134-135. Quoted from: President John F. Kennedy, Special Message to the Congress on Natural Resources (Feb. 23, 1961), available at http://www.jfkling.com/speaches/jfk/publicpapers/1961/jfk49_61.html.
[64] John F. Kennedy, Remarks of Senator John F. Kennedy at Morgantown, West Virginia (Apr. 18, 1960) available at http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/JFK+Pre-Pres/1960/002PREPRES12SPEECHES_60APR18B.htm.
[65] Id.
[66] Id.

proposed to bring coal back into the home, not by trucks and a shovel, but by wires and a switch.[67] Fershee noted that, even with more utilities shifting away from coal, more than 50 percent of all U.S. electricity still comes from coal-fired plants today.[68]

We would agree with Fershee that, President Kennedy had accurately predicted that this would happen. What then did the President put in place to try and counter this need in an expanding population growth, and the ever dwindling natural resources? How did the president balance environmental concerns with economic development?

Coal Slurry Pipelines.

In an attempting to balance environmental concerns with economic development, President Kennedy recognized the need for energy throughout the country, and coal slurry pipelines were one way he saw to ensure progress.

Coal Slurry pipelines are pipelines used to transport coal from where it is mined to where it is consumed. For very short distances, large trucks are used to transport coal, but trains and barges are preferred for long distances. In some cases it is more economical to move the coal by pipeline than by train or barge.[69] Once he was in the White House, Fershee in response explains that, President Kennedy continued his support for coal, while at the same time promoting increased conservation efforts. It his time, it is noted that, it was not easy to advocate for conservation and increased coal use at the same time. Many commentators of the time would agree that to achieve this balance was impractical. President Kennedy, in addition to discussing the need to address water pollution and promote land conservation, also promoted the use of a coal slurry (a coal and water mixture) to produce electricity. Fershee pointed out that, in support of coal for electricity, Kennedy announced a proposal to develop coal slurry pipelines, similar to those used for oil, to facilitate interstate transportation.

Fershee confirms that, coal slurry pipelines are still in existence today.[70] From an environmentalist's perspective, it is said that, these pipelines are particularly unappealing. That, first, they move coal for use in generating plants, which leads to significant emissions of greenhouse gases and other toxic pollutants. And that, second, slurry pipelines use a tremendous amount of water, Fershee finds.[71]

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[67] Id. Also quoted by Fershee (2009) 131, see at 141.

[68] Paul Davidson, Utilities Shrink the Role of Coal on Global-Warming Worries, USA Today, Sept. 22, 2008, available at http://www.usatoday.com/money/industries/energy/2008-09-21-coal_N.htm.

[69] http://www.bing.com/search?q=coal+slurry+pipeline&FORM=HDRSC1

[70] Fershee (2009) 131, see at 142; also see: W. Shepherd & D.W. Shepherd, Energy Studies 112 (2d. ed. 2003). Originally, those pipelines moved the coal slurry using about equals parts coal and water. Newer pipelines can move coal that has been compressed into logs. Office of Indus. Tech., US Dep't of Energy, Coal Log Fuel Pipeline Transportation System (1999), available at http://www.nrel.gov/docs/fy00osti/26740.pdf. Coal log pipelines save about 70% water as compared to traditional slurry pipelines.

[71] See William Ashworth, The Late, Great Lakes: An Environmental History 216 (1986) ("A coal–slurry pipeline moves coal by crushing it to a fine powder, mixing it with large amounts of water, and pumping the water with its suspended coal particles through large-diameter pipes").

Fershee explains that, large coal power plants use hundreds of tons of coal each day, with corresponding water needs for a slurry pipeline. This issue, he noted, is especially sensitive for pipelines in areas with scarce water resources. He reiterates that, as an example, one of President Kennedy's two proposed coal slurry pipelines was the Black Mesa Mine, which shipped coal slurry 273 miles from a northern Arizona mine (in the middle of the Hopi and Navajo reservations) to the Mohave Generating Station near Laughlin, Nevada.[72] It is noted that, the pipeline was the world's longest water slurry pipeline that moved five million tons of pulverized coal per year to the 1,580-megawatt electric power plant. It is said that to run the pipeline, Peabody, the original owner, begun pumping 4,000 acre-feet per year of drinking water from the aquifer under Black Mesa, crushed coal was mixed with the water and injected into the slurry pipeline, Fershee narrates.[73]

In 2006, Fershee writes that, rather than invest $1 billion to clean up the power plant's emissions, operations of the plant were suspended. It is said that, the plant was expected to be off-line for at least four years, the amount of time expected that would be needed to resolve conflicts over the plants emissions and to negotiate with two native tribes over rights to the water needed to deliver fuel to Mohave as a slurry. It is thought that, efforts to reopen the plant have stalled, and that, it is not evident that the plant, or the pipeline, will ever resume operations, says Fershee.[74]

The President then embarked on the task of securing and spreading infrastructure country wide, to transport these resources as narrated here bellow.

The Need for Infrastructure.

On the continuous, and lasting, need for infrastructure, President Kennedy's time was not so different from our own today, in terms of a vast need for energy infrastructure, says Fershee. In addition to nuclear power and coal slurry lines, electricity infrastructure was a continuing need.

President Kennedy often touted the success of the Rural Electrification Act (REA),[75]which provided the long-term financing and technical expertise needed to expand the availability of electricity to rural customers.[76] His remarks for a September 1963 speech at the University of North Dakota stated that, since the REA passed in 1936, more than 900 cooperative rural electrification systems had been built with the assistance of federal financing, Fershee, states.

[72] See : Robert Jerome Glennon, Water Follies: Groundwater Pumping and the Fate of America's Fresh Waters 155 (2004), quoted by Fershee (2009) 131, see at 142.
[73] John Dougherty, Wisdom of the Ancestors, Phoenix New Times, Dec. 1, 2005, available at http://www.phoenixnewtimes.com/2005-12-01/news/wisdom-of-the-ancestors.
[74]Fershee (2009) 131, see at 142-143.
[75] Rural Electrification Act, ch. 432, Title I, s.1, 49 Stat. 1363 (1936) (current version at 7 USC s 901 (2006)). See also quoted in Fershee (2009) 131, at 143.
[76] President John F. Kennedy, Planned Remarks for Delivery at the University of North Dakota (Sept. 25, 1963). [hereinafter, Planned Speech].

The REA's financial undertaking was enormous, Fershee writes. It is confirmed that, more than $5 billion has been advanced to 1,000 borrowers. And that, over 1,500,000 miles of power lines—enough to criss-cross the nation 500 times—have been built, serving 20 million American people. The investment, President Kennedy noted, was remarkably sound, it is stated. Out of nearly 1,000 borrowers, only one is known to be delinquent in payment; and the total losses on the $5 billion advanced are less than $50, 000. It is noted that, this low level of default is especially striking in today's financial times, fershee wrote.[77]

It is further noted that, few investors were willing to invest in the rural electrification project without federal financing, yet few private businesses could cite such a successful record.

North Dakota, at a remarkable 97 percent, was the state with the highest percentage of people being served by REA funded utilities, it is said.

In addition to the financing issues, it is stated that, President Kennedy argued that the REA raised the standard of living, strengthened the US economy, and even improved national security by providing the power necessary to increase industrial activity at will. It is confirmed that, in North Dakota, the President noted that, prior to the REA, three percent of farms were powered by electricity; and that by 1963 nearly every farm in the state had power. Fershee points out that, President Kennedy highlighted the effects. What was 30 years ago a life of affluence, in a sense today is a life of poverty,[78] says Fershee.

As the work of REA was not complete despite its success, President Kennedy sought continuation of the REA to ensure that rural residents had access to power at competitive costs.

Fershee's opinion is that, today, continued construction is necessary, but now, the need is not related to demand, he writes.[79] It is noted that, US energy infrastructure has not kept up with the increasing needs of a growing population that uses more per capita power than ever before. Fershee continued to narrates that, construction of energy infrastructure continued through the 1960s, but that investments in electric transmission lines (the high-voltage lines moving wholesale electric energy) declined (in real dollars) for twenty-three consecutive years between 1975 and 1998.[80] It is confirmed that, since 1998, investment has slowly increased, but that it is still below 1975 levels. Fershee confirms that, in 2004, this failure of infrastructure investment translated into a mere 0.6 percent increase in circuit miles on the US interstate transmission system, Fershee said.[81]

Fersee further suggests that, capital needed to improve the US energy infrastructure investment remains significant. He adds that, estimates from $56 billion to $100 billion, are common, and that others have argued that, as much as $450 billion is needed to appropriately address electricity infrastructure needs.

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[77] Fershee (2009) 131, see at 143.
[78] Fershee (2009) 131, see at 144.
[79] Joshua P. Fershee, Misguided Energy; Why Recent Legislative, Regulatory, and Market Initiatives are Insufficient to Improve the US Energy Infrastructure, 44 Harv. J. on Legis. 327, 329 (2007).
[80] Press Release, Federal Energy Regulatory Commission, Commission Proposes Transmission Pricing Reforms to Increase Power Grid Investment (Nov. 17, 2005), available at http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=10882511.
[81] Fersee (2009) 131, see at 144; Also see, Joseph T. Kelliher on Transmission Pricing Proposed Rules (Nov. 17, 2005), available at http://www.ferc.gov/news/statements-speeches/kelliher/2005/11-17-05-kelliher-pricing.pdf.

[82]And that, these investment estimates do not account for all of additional investments that are needed to address climate change concerns, Fershee says.

This will lead us to explore the several different policies set in place, with tasks that overlap on related issues, yet the policies each worked in isolation, with different policies' enforcers as explained by Sam Kalen in the paragraphs that follow bellow.

Different Policies on related issues, each in Isolation.

Sam Kalen,[83] explored that question of, and suggests that, Energy, Environments, and Public Land, and Natural Resources Policies cannot be understood in isolation. Many commentators would agree with this finding that many policy enforcers were never united into a single policy regulation. He focused on the U.S. Energy Policy, and what he calls the historic failure to coordinate and integrate adequate environmental, public land, and natural resource goals and considerations into the development of energy policy.

We are tempted to ask that, why were there many different policy enforcers with tasks that overlap?

In response, writing in 2005, Kalen points out that, the evolution of the nation's treatment of energy policy and two trends appear to be converging to suggest that, someday soon, instead of debating separately and energy policy, an environmental policy, or a natural resource/public land policy, the discussion will turn, he says, towards the development of a more holistic National Resource Policy.

He explains that, past experience demonstrates that establishing a meaningful energy policy requires at the outset effective coordination of economic, national security, environmental, and natural policies.

Kalen sees that, today, many federal agencies are involved in responding to aspects of any energy policy. The Federal Energy Regulatory Commission (FERC), he observed that, for the most part implements energy policy, a role it wrestled from the Department of Energy (DOE) during the mid-1970s when Congress created DOE. Kalen went on to observe that, while the U.S. Environmental Protection Agency (EPA) is considered the principal federal agency entrusted with environmental protection, says Kalen, the Department of the Interior (DOI), the National Marine Fisheries Service, the US Forest Service, and the US Army Corps of Engineers all implement aspects of environmental policy along with natural resource policy. With the same goals, yet each agency worked independently in isolation to each other. It is pointed out that, the Interior Secretary of the time, in 2005, Gayle A. Norton, for instance, discussed the Bush administration's National Energy Policy, and in doing so conveyed her department's role, commenting that in addition to alternative energy resources "[w]e must also increase domestic production of

[82] Union of Concerned Scientists, Lessons From the August 2003 Blackout (August 10, 2005), http:www.ucsusa.org/clean_energy/technology_and_impacts/impacts/lessons-from-the-august-2003.html.
[83] Sam Kalen, Replacing A National Energy Policy With a National Resource Policy, 19-WTR Nat. Resources & Env't 9 (2005), see at 9.

additional energy sources, especially natural gas," and recommended the use of best management practices to address environmental effects.[84]

Kalen went on to find that, establishing an energy policy that transcends each of the agencies involved is difficult, no matter how sound the policy may be. Each federal agency acts in accordance with its own statutory mission and responsibilities. Kalen further writes that, before DOI can allow resource development on public land, adequate environmental review under the National Environmental Policy Act (NEPA)[85] must occur, Kalen finds. Furthermore, Kalen adds that, NEPA, the Endangered Species Act (ESA),[86] the Coastal Zone Management Act,[87] the National Historic Preservation Act,[88] the Federal Land Policy and Management Act,[89] and other such laws and regulations also must be satisfied, Kalen wrote.

Kalen finds that, any goals of promoting greater reliance on natural gas utilization similarly requires coordination among, and appreciation for other agency mandates and concerns.[90] The infrastructure for transporting any new gas must be present, sufficient natural gas fields must be accessible, and the market and the economic structure must allow for it, Kalen observed. Although the last component is shaped by prices and the presence or absence of regulatory controls imposed on market behavior,[91] Kalen observed that, the first two components are influenced in part by environmental and natural resource and public land policies, he wrote.[92]

The decisive questions to be asked, Kalen observed are that, are the public lands available for gas development? Is there sufficient pipeline capacity capable of moving the gas from the fields to an efficient and appropriate market? If not, are new pipelines necessary or are regulatory controls or incentives necessary to provide access to existing capacity, and what will be the environmental effects? These questions illustrate that, however laudatory promoting the use of natural gas may be, Kalen points out that, availability and price, coupled with environmental and natural resources policies, will dictate implementation. Implementation, in turn, will depend upon adequate, site-specific environmental review and resource planning, Kalen confirmed.[93]

Here Kalen and Fershee whom we have seen earlier, both agree with each other that formulation a single national energy policy is both challenging and improbable to say the least.

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[84] News Release, Department of the Interior, "Secretary Norton Touts Sensible Energy Development With Best Management Practices," (June 22, 2004); Also see quoted in Kalen, 9 (2005), at 9.
[85] National Environmental Policy Act (NEPA), 42 U.S.C. sections 4321 et seq.
[86] The Endangered Species Act (ESA), 16 U.S.C. sections 1531 et seq.
[87] The Coastal Zone Management Act, 16 U.S.C. sections 1451, et seq.
[88] The National Historic Preservation Act, 16 U.S.C. sections 470, et seq.
[89] The Federal Land Policy and Management Act, 43 U.S.C. sections 1701 et seq; and other such laws and regulations also must be satisfied.
[90] Kalen (2005) 9, see at 10.
[91] See Daniel Yergin, Gary Simon, I.C. Bupp, Caught in the Muddle: The Dilemma of Today's Electric Power Industry, 8 NAT. RESOURCES & ENV'T 3 (1994).
[92] See Michael L. Godec & Leonard R. Crook, Jr., Environmental Policy and the Natural Gas Exploration and Production Industry, 6 NAT. RESOURCES & ENV'T 14 (1992).
[93] Kalen (2005) 9, at 10.

During the Clinton administration, Kalen observed that, fiscal and personnel constraints apparently delayed such reviews and the concept of "eco-royalty" relief—the provision to industry of "credit" for providing the necessary resources for NEPA compliance in accordance with public land planning—emerged as one solution. Yet, eco-royalty relief requires congressional action—action that had been proposed, but was not [yet] effected [at the time], Kalen wrote.

The administration of George W. Bush, alternatively, Kalen observed, responded to the coordination problem by aggressively suggesting that public lands would be made available for oil and gas development, as well as development of renewable resources (low-impact hydro, solar, wind, biomass and geothermal), and by implementing new policies that appear designed to more swiftly review the efficacy of oil and gas development of the public lands in particular areas.[94] It was observed that, these policies, new at the time, included restarting DOI's commitment to not unduly restrict access to the public lands for energy projects and outlining a strategy for integrating the assessment of oil and gas reserves on the public lands into energy use authorization, as well as, among other things, facilitating the review and processing of Applications for Permits to Drill by simultaneously processing and completing NEPA compliance on multiple plans with similar characteristics.

On August 14, 2004, DOI's Bureau of Land Management issued an Instruction Memorandum (IM) directing that state and field offices could defer oil, gas and geothermal leasing of specific tracts pending completion of land use planning review,[95] Kalen confirms. Regardless of the actual effect of DOI's policies, the National Petroleum Council NPC reported that government policy encourages the use of natural gas but does not address the corresponding need for additional natural gas supplies, Kalen wrote.[96]

So what then are the difficulties in achieving coordinated national policy? Kalen's explanation features in the paragraphs that follow here bellow.

Achieving Coordinated Policy, The difficulty.

In response, Kalen narrates that, as a nation, the Unites States' treatment of coal development best illustrates the difficulty of achieving a coordinated energy policy, Kalen wrote then.

Kalen further observed that, following World War II, the growing dependence on oil imports became a matter of national security and led to the advent of a mandatory oil import program.[97] Kalen went on to

[94] DOI/DOE, Assessing the Potential For Renewable Energy on Public Lands, (Feb. 2003); see also, Scientific Inventory of Onshore Federal Lands' Oil and Gas Resources and Reserves and the Extent and the Nature of Restrictions or Impediments to their Developments (Jan. 2003), (prepared pursuant to the Energy Policy Conservation Act Amendments of 2003, Pub. L. No. 106-469, section 604).
[95] BLM, Fluid Mineral Leasing and Related Planning and (NEPA) Processes and Best Management Practices, IM No. 2004-110 Change 1.
[96] NPC, Balancing Natural Gas Policy—Fueling The Demands of a Growing Economy, 7 (Sept. 2003); Also see http://www.npc.org/reports/ng.html
[97] Douglas R. Bohi & Milton Russell, Limiting Oil Imports; An Economic History and Analysis, John Hopkins University Press, (1978); Also see quoted in Kalen (2005) 9, at 10.

say that, when viewed as a means to achieve energy security, oil import policy was a collection of diverse and loosely articulated instruments that, in his opinion, failed to promote any one clear goal.[98] This same period witnessed the effects of the Supreme Court's decision in *Philips Petroleum Co. v. Wisconsin*,[99] which required that the Federal Power Commission (now FERC) regulate the power of natural gas sold by independent producers into the interstate market—ultimately affecting demand. It is remembered that, the confluence of events resulted in long lines at the gas pumps as the country experienced the effects of the Arab oil embargo, then.

Kalen recalls that, the Nixon administration responded by endorsing the goal of energy independence and elevated the role of coal. The *Energy Supply and Environmental Coordination Act* of 1974,[100] promoted coal utilization and allowed the Federal Energy Administration[101] actually to prohibit certain use of natural gas or petroleum products Kalen remembers.

Congress sought further to promote the diligent development of coal resources on public lands when it passed the *Federal Coal Leasing Amendment Act (FCLAA*).[102] This act sought to discourage speculation and facilitate the development of public coal resources based on land use and resource planning. Yet, the federal coal program was in considerable disarray at the time and became marred in controversy and litigation, and the effort to develop leasing targets under FCLAA generated disagreements between DOI and DOE, Kalen recalls.[103]

We will observe here again that the Department of Interior and the Department of Energy could not work together in harmony, yet their goals remain the same. Whose interest would they serve while we can detect rivalry between these agencies?

Kalen went on to state that, to further complicate matters, after two vetoes the Surface Mining Control and Reclamation Act (SMCRA),[104] became law on August 3, 1977. In one of the veto messages, President Gerald Ford exclaimed that, while he favoured protecting the environment, he believed that he could protect the environment and achieve energy independence "without adding unnecessary costs, without creating more unemployment and without precluding the use of vital domestic energy resources."[105] The SMCRA is the primary federal law that regulates the environmental effects of coal mining in the United States.

SMCRA created two programs: one for regulating active coal mines and the second, for reclaiming abandoned mine lands. SMCRA also created the Office of the Surface Mining, an agency within the

[98] Bohi & Russel, (1978) at 16.
[99] *Philips Petroleum Co. v. Wisconsin*, 347 US 672 (1954).
[100] The Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat.246 (1974).
[101] The Federal Energy Administration—the agency, now part of DOE, charged with implementing federal oil allocation and pricing regulations.
[102] The Federal Coal Leasing Amendment Act (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083 (1976).
[103] Kalen (2005) 9, see at 10-11.
[104] The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. ch. 25, Section 1201 et seq., Also see: Pub. L. 95-87.
[105] Veto of the Surface Mining Control and Reclamation Act of 1975, reprinted in H. DOC. 94-160, 94th Cong., 1st Sess. (1975).

Department of the Interior, to promulgate regulations, to fund state regulatory and reclamation efforts, and to ensure consistency among state regulatory programs.[106] The Carter administration provides an answer here bellow.

The Carter Energy Plan[107] similarly emphasized greater reliance on coal resources, along with promoting conservation, renewables, and advanced nuclear technologies. Kalen observes that, the Carter plan touted coal as, the most abundant domestic fossil resource,[108] as the fuel of choice, and presented the Power plant and Industrial Fuel Use Act,[109] as one mechanism for facilitating the use of coal over other fossil resources in all new electric utilities and major industrial fuel-burning installations. Kalen writes that, the Carter proposal also sought to transfer to, at the time, the new Department of Energy certain responsibilities on federal lands for the leasing of coal, such as due diligence requirements and production rates. Kalen note that, although the Carter Energy Plan recognized the environmental problems associated with coal production, it generally suggested that new technologies ultimately would address these problems, Kalen says.

It is thought that, a critical aspect of the Carter energy plan was doomed from the outset, it is said. As an energy policy that relied upon coal development and production, it was said to have too many variables, including the newly enacted environmental and natural resources policies. While the Carter Energy Plan may have considered the environmental constraints imposed by the prior implementation of the Federal Water Pollution Control Act of 1972, and the Clean Air Act of 1970 and the ensuing 1977 amendments, it is thought that, the plan failed to correctly anticipate the market and adequately address the new requirements, as illustrated by the fact that OEs 1980 projection for coal demand in 1985 and 1990 was 36 percent and 90 percent higher, respectively, than what actually occurred, Kalen observed.[110]

In Kalen's opinion, a similar incongruity continues today. He adds that, FCLAA still requires diligent development of coal resources. And that, as such, federal coal leases, absent having their leases suspended, are obligated to develop the resource "diligently."[111] A modern-day national resource policy that focuses less on coal production and more on the adverse environmental aspects of coal utilization, therefore, might not be consistent with the 1970s era FCLAA goals of encouraging greater and quicker coal development:

> *"Conversely, FCLAA's goal may make sense if the idea it to encourage production of Western over Eastern coal—considering the Clean Air Act implications of burning the generally lower sulfur content Western coal. The point is, not what is the correct answer, but rather that someone is asking the questions and coordinating policies."*

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[106] https://en.wikipedia.org/wiki/Surface_Mining_Control_and_Reclamation_Act_of_1977 ; Also see: Office of Surface Mining Reclamation and Enforcement (U.S. Department of Interior), at: http://www.osmre.gov/about.shtm

[107] Both in 1977 and Plan II in 1979

[108] With then almost 4 trillion tons of coal in place.

[109] The Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92. Stat. 3289 (1978).

[110] Kalen (2005) 9, see at 11.

[111] E.g., 30 U.S.C. sections 201, 202(a), 207.

Sam Kalen, 2005.[112]

Kalen refuses to assume that any administration could easily identify a policy choice that will be free from potential incongruities or the possibility of any enacted policies becoming outdated before implementation. We will have to possibly live with the idea that, each choice to emphasize one energy source over another triggers a host of energy, environmental, and resource policies, he wrote. For Example, the Ford administration's focus on the potential for nuclear technologies could not have anticipated the escalating costs and impact of the 1975 Brown's Ferry and 1979 Three Mile Island Incidents,[113] Kalen wrote.

We would agree with Kalen here that, if we chose one energy source over another, we would trigger a host of energy, environmental, and resource policies, and the policy would become outdated before it is even implemented. I agree with Kalen's observation above. This would also raise the question of conflict of interest among the different policy enforcers.

Kalen notes that, some observers today recommend greater reliance on renewable resources such as wind, solar, biomass and hydropower.[114] But it is said that, these suggestions do not escape the real problem of energy and environmental policy integration, as the debate over hydroelectric power demonstrates, noted Kalen.

We are then tempted to ask that, how much progress has the renewable energy cover to this day?

In response Kalen expresses the finding that, hydroelectric power was once promoted as a renewable resource, while today it receives the brunt of large-scale environmental opposition because of the perceived effect that such projects have on river morphology, the natural hydrograph (natural flow regime) and fishery resources dependent upon the water resource, Kalen wrote.

Kalen went on to opine that, in the Unites States, wind power often is championed as a feasible renewable resource, but it raises its own unique problems, Kalen says. It is noted that, most wind power development in the United States occurs onshore, unlike in Europe relying heavily on wind power from offshore development. In the United States, Kalen writes that, the Bureau of Land Management has responded to such development on public lands by establishing a national wind energy policy program. In Kalen's opinion, the eventual limits of this program will be influenced by natural resource and public land policies and how much more development will be allowed,[115] Kalen wrote then.

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[112] Sam Kalen (2005), Replacing a National Energy Policy with a National Resource Policy, 19-WTR Nat. Resources & Env't 9, see at 11.

[113] The Three Mile Island Accident, was a nuclear meltdown that occurred on March 28, 1979, in reactor number 2 of the Three Mile Island Nuclear Generating Station (TMI-2) in Dauphin County, Pennsylvania, United States. It was the worst accident in US commercial nuclear power plant history. The incident was rated a five on the seven-point International Nuclear Event Scale: Accident With Wider Consequences.
See: https://en.wikipedia.org/wiki/Three_Mile_Island_accident

[114] See: Wendy B. Davis, Elimination of the Deletion Deduction For Fossil Fuels, 26 SEATTLE U. L. REV. 197 (2002).

[115] Kalen (2005) 9, see at 11-12.

Kalen further opines that, today here in the United States, the development of wind farms offshore has been hampered by regulatory uncertainty and the question whether congress will extend the production tax credit.[116] As a consequence, opines Kalen that, focusing on energy, environmental, or natural resources policy discretely and individually appears antiquated. It is therefore noted that, the 1990 Amendments to the Clean Air Act were as much a reflection of energy policy as they were environmental policy. Kalen found that, some observers have suggested that, first before any energy policy can be crafted, an environmental / natural resource policy must be developed.[117]

I find myself agreeing with Kalen that, before any energy policy can be put in place, an environmental and natural resource policy must be developed. We then wonder what should the formulated energy policy acomplish?

In response , Kalen found that, the critical question is whether the underlying assumption for developing energy policy is that of economic growth or ecological sustainability, and that those who start from these two very different original views will find it difficult to come to an agreement over what [the United States'] energy policy should look like.[118]

Kalen concluded his opinion by suggesting that, in this search for a national energy policy, we should be looking for what he called a comprehensive national energy strategy. The strategy plan should then identify broad goals, which should include: improve energy efficiency; ensure against energy disruptions; promote energy production and use in ways that respect health and environmental values; enlarge the national portfolio of energy choices and technologies; and; finally cooperate in the international arena to resolve global economic, environmental and security concerns,[119] he concluded.

In observation, many commentators would agree with Kalen's suggestion here above. We now go on to find out what other commentators would suggest. Struble's opinion follows here bellow, while he discusses the Energy Policy Act of 2005.

The Energy Policy Act of 2005.

The Energy Policy Act of 2005, rules over transmission siting before the 2005 EPACT.[120] Struble points out that, Congress passed the 2005 EPACT on July 29, 2005 and President Bush signed it into law on August 8,

[116] [By] 2005 calculated to be, a credit of 1.8 cents per kilowatt-hour, as adjusted for inflation, to producers of electricity from wind energy.
[117] Kalen (2005) 9, see at 12; Also see: Gary C. Bryner, The National Energy Policy: Assessing Energy Policy Choices, 73 U. Colo. L. Rev. 341 (2002).
[118] Kalen (2005) 9, at 12, quoting from Bryner (2002) 341.
[119] Kalen (2005) 9, see at 13.
[120]Erich W. Struble, National Interest Electric Transmission Corridors; Will State Regulators Remain Relevant, 113 Penn St. L. Rev. 575 (2008)

2005.[121] Referred to as a "smargasboard," the 2005 EPACT seeks to streamline permits for oil wells and power lines on public lands.[122] The legislation also includes approximately $85 billion worth of subsidies and tax breaks for most forms of energy, including electricity. Struble explains that, EPACT was a potentially far reaching provision of the legislation which had the potential to repeal of the Public Utility Holding Company Act of 1935 ("PUHCA"), which traditionally foreclosed mergers in the electricity industry. Some viewed the repeal of PUHCA, Struble says, as a way to raise the capital necessary to build transmission lines and generating plants. But also, generally, the legislation was touted as a comprehensive national energy plan which would put America on the path to reducing its dependence on foreign oil.[123]

We are again tempted to ask, how far has the present energy policy come in order to reduce dependence on foreign oil?

In response Struble finds that, before the 2005 EPACT, regarding transmission siting, it is stated that, traditionally, state and local regulatory entities coordinated the siting of transmission lines, Struble states.[124] State rather than federal regulation made sense because the electricity market emerged as, and for a long time remained a "bundled, highly balkanized, and locally based industry," Struble found.[125] When countenancing proposed electricity projects, Struble continues to state that, the inquiry for state regulators has been two-folds: is the proposed structure needed, and what are its environmental ramifications? It is thought that the focus of this enquiry is largely "parochial" as we shall see here bellow.

The focus is the above enquiry is largely parochial, i.e., when local needs and realities are emphasized and little attention is paid to the regional benefits potentially flowing from the siting process or exercise of eminent domain. Struble observes that, many aspects of the structure and governance of the electricity industry have changed; however, the siting regime has largely remained the same.

Critics of the 2005 EPACT have argued that it fails to decrease America's dependence on foreign oil because it does not set standards for automobile fuel efficiency, squanders federal funds by giving fossil and nuclear energy industries unjustified subsidies, and, by repealing PUHCA, caters to the profit interests of corporations at the expense of consumers.[126]

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[121] See President George W. Bush, Address at Sandia National Labaratory: President Signs Energy Policy Act (August 8, 2005), available at www.whitehouse.gov/news/releases/2005/08/20050808-6.html [hereinafter President Signs Policy Act].

[122] Struble (2008) 575, see "2005 EPACT" at 587; also see: Michael Grunwald & Juliet Eilperin, Energy Bill Raises Fears About Pollution, Fraud: Critics Point to Perks for Industry, Wash. Post, July 30, 2005, at A1.

[123] President George W. Bush, commenting on Congress' work on the 2005 EPACT, stated: "They recognized that we need a comprehensive approach to deal with the situation we are in. In other words, we need to conserve more energy; we need to produce more energy. We need to diversify our energy supply, and we need to modernize our energy delivery." President Signs Energy Policy Act, supra.

[124] Struble (2008) 575, see: "Transmission Siting Before the 2005 EPACT," at 586.

[125] Denise L. Desautels, Who Should Regulate The Siting of Electric Transmission Lines Anyway?; A Jurisdictional Study, The Electricity J., May 2005, at 11.

[126] Struble (2008) 575, see: "2005 EPACT," at 587.

On the above findings by strubble, mention is made that, the fossil fuel energy industry receives preferential treatment and funding at the expense of renewables.

Of concern here, says Struble, is section 1221(a) of the 2005 EPACT, which added a new section, section 216, to the Federal Power Act.[127] The Secretary of Energy ("Secretary")[128] is required, in consultation with "affected states," to conduct a study of electric transmission congestion.[129] Struble adds that, the Secretary was responsible for completing an initial congestion study within one year of the 2005 EPACT's enactment, that is, before August 8, 2006. Struble points out that, the statute requires the DOE to issue additional studies every three years.[130]

That based on the results of congestion study, Struble writes, and after considering alternatives and recommendations from interested parties, the Secretary must issue a report which may "designate any geographic area experiencing electric energy transmission capacity constraints or congestions that adversely affects consumers as a national interest electric transmission corridor (NIETC),"[131] Struble finds. In determining whether to designate a NIETC,[132] 16 U.S.C. section 824p(a)(4) provides that the Secretary may consider whether:

- The economic vitality and development of the corridor , or the end market served by the corridor, may be constrained by lack of adequate or reasonable priced electricity;
- Economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy and a diversification of supply is warranted;
- The energy independence of the United States would be served by the designation;
- The designation would be in the interest of national energy policy; and
- The designation would enhance national defense and homeland security[133]

Struble argues that, a reading of the 2005 EPACT suggests that a NIETC designation has the effect of potentially involving the federal government in the business of electric transmission siting decisions. Specifically, the statute gives FERC jurisdiction, under certain conditions, to approve permits requesting permission to site new transmission infrastructure or modify existing infrastructure. It is pointed out that, FERC's jurisdiction exists when: (1) the state does not have authority to site the project or cannot consider the interstate benefits of the project; (2) the applicant does not qualify for a state permit because it does not serve end-use customers in the state; or (3) the state has withheld approval for more than one year or has conditioned its approval in such a manner that the project will not significantly reduce congestion

[127] See: 16 U.S.C.A. s.824p (West 2008).
[128] The terms "Secretary," "Department", and DOE will be used here interchangeably throughout this comment.
[129] Struble (2008) 575, see at 587-88; Also see: 16 U.S.C.A. s.824p(a)(1).
[130] Section 824p(a)(1).
[131] Section 824p(a)(2).
[132] NIETC stands for National Interest Electric Transmission Corridor.
[133] Sections 824p(a)(4)(A)-(E).

or it is not economically feasible.[134] The statute explicitly notes that it does not prohibit any individual from constructing or modifying any transmission facility pursuant to state law.[135]

The DOE's position is that a National Corridor designation does not constitute federal preemption of state siting authority, Struble finds. He adds that, the DOE argues a NIETC designation does not imply that a preference for transmission construction: A National Corridor designation is not a siting decision; it does not dictate the route of any transmission project. If a transmission project is proposed in a National Corridor, it will be the State siting authorities, and potentially FERC if certain conditions are met, that will determine the specific route of the project, Struble writes. Thus, as characterized by the DOE, the 2005 EPACT does not give the DOE the power traditionally wielded by states to determine if and where transmission infrastructure is necessary to address congestion and constraint problems, Struble found.

It is stated that, many parties disagree with the DOE's position that a National Corridor designation does not constitute federal preemption. Struble states that, for example, Representative William DeWeese, the one time Majority Leader of the Pennsylvania House of Representatives, commented that, section 1221(a) "forsakes the rights of states and their political subdivisions to adopt, administer, and manage land use policies and decisions that conflict with the ambitions of profit seeking corporations seeking to locate and construct high voltage transmission lines,"[136]Struble wrote. In addition, it is noted that, Paul Tonko, Member of the New York State Assembly, stated that in his 15 years as energy Committee Chairman "few issues has given rise to the concern and sense of disempowerment that the potential exercise of federal preemption regarding transmission line siting has created."[137]

We then ask, what concerns and sense of disempowerment that the potential exercise of federal preemption regarding transmission line siting create?

Transmission Siting After the 2005 EPACT.

In response, Strubble stated that, one of the major controversies surrounding the recent designation of the two NIETCs is whether such designation takes siting power away from state authorities and give it to FERC. Struble points out that, a NIETC designation will undoubtedly affect traditional electric transmission

[134] Section 824p(b)(1)(C). Sections 824p(b)(2)-(6) place further conditions on FERC's ability to issue a permit: the facilities will be used for the transmission of electric energy in interstate commerce; the project is consistent with public interest; the project will significantly reduce congestion and protect or benefit consumers; the project is consistent with national energy policy and will enhance energy independence; and the project maximizes, to the extent reasonable and economical, the transmission capabilities of existing towers or structure. Also see quoted in: Struble 2008 575, at 589, footnote 107.

[135] Struble (2008) 575, at 588-89.

[136]Struble (2008) 575, at 589 footnote 113; See also: Section 1221 of the Energy Policy Act of 2005: Hearing Before the Subcomm. On Domestic Policy of the H. Comm. On Oversight and Government Reform, 110th Cong. (2007) (testimony of Rep. William DeWeese) ("If FERC is permitted to use its congressionally conveyed authority to commandeer and usurp the traditional role of states and their administrative agencies to review and approve the location and construction of high voltage transmission lines, Pennsylvania, not unlike every other state, would have no control, no say, and no recourse other than expensive litigation…..").

[137] Struble (2008) 575, at 589-90.

siting practices, he says. He adds that, some states will be affected very little; FERC involvement will likely be minimal. It is thought that, other states, however, will be profoundly affected if they fall within the National Corridor; FERC involvement in electric transmission line siting decisions in these states will likely be high. Struble opines that, how much a given state will have to share its siting authority with FERC will depend largely on the state's traditional siting practices, he says.

Parochialism has been a major factor in state regulation of transmission line siting. However, it is thought that, some states emphasize local concerns more than others. Commentators who include, Ashley Brown, have identified three categories of states along the "parochialism spectrum."[138] Struble argues that where a particular state falls along this spectrum will likely suggest the extent to which its siting authority will wane with the rise of FERC jurisdiction. Thus, particular states are identified by reference to their location on the parochialism spectrum. These states will then serve as examples illustrating how a state's traditional siting practices will determine the future relevancy of state siting officials under potential National Corridor designations.[139]

On dominant parochialism, the first category of states to include those where parochialism dominates decision making, have been identified. In these states, suggests Struble, eminent domain or siting authority is granted only where the project is necessary to service in-state customers. A NIETC designation will most profoundly affect states with this predominantly parochial outlook. This is because FERC jurisdiction is generally triggered under a NIETC designation when a state's primary concern is local and state siting officials cannot or likely will not consider the interstate benefits of the project, says Struble.[140]

Struble point out that, for example, FERC jurisdiction would likely have existed with respect to developers seeking to site new transmission facilities within Mississippi if that state had been encompassed within the recently designated National Corridors, at the time.[141] In *Mississippi Power & Light Company v. Conerly*[142], Mississippi Power & Light Company ("MP&L") sought to serve end-users in Louisiana by constructing a 500 kilovolt ("Kv"), 51 mile transmission line from a substation in Franklin County, Mississippi. MP&L first applied for a certificate of public convenience and necessity ("CPCN") from the Mississippi Public Service Commission ("MPSC"), as required by law. MPSC granted the CPCN and MP&L then sought to acquire the necessary right of way. Because several affected property owners would not agree on the purchase and sale of their property, MP&L filed petitions for condemnation with the Special Court of Eminent Domain. The landowners, appellees, moved to dismiss, arguing, inter alia, that MP&L

[138] Ashley Brown is Executive Director of Harvard University's Electricity Policy Group, a program of the Center for Business and Government at Harvard's Kennedy School of Government. In 2003, Brown and Daniel's siting analysis was published. The article was meant to focus on state consideration of regional and overall competitive benefits in the context of the exercise of eminent domain and siting certificate determination; Also see quoted by Struble (2008) 575, at 591-92, footnote 134.

[139] Id.

[140] Struble (2008) 575, see "Dominant Parochialism" at 593-94.

[141] Among the DOE's designation of two NIETCs, it is noted that under the 16 USC section 824p(a)(1), the DOE must issue a congestion study every three years. Therefore, although Mississippi was not included in the corridor designations done at the time in 2006, it was thought that, it may in the future fall within such a designation.

[142] *Mississippi Power & Light Co. v. Conerly*, 460 So. 2d 107 (1984), see at 108.

sought to construct the transmission line to carry electricity interstate from a generation station in Mississippi to Louisiana facilities.[143] Struble writes that, the Special Eminent Domain Court granted the landowners' motion and dismissed all condemnation proceedings. The Mississippi Supreme Court affirmed[144] and held that the proposed transmission line's primary purpose was to benefit regional electricity transmission service rather than to serve Mississippi customers.

Struble opines that, because the Mississippi Constitution[145]and related legislation[146] requires the condemnation of property be for "public use," the Mississippi Supreme Court concluded that the MPUC did not have jurisdiction to grant a CPCN where the certificate was primarily sought for interstate benefits. The court agreed with the trial court judge "that the terms 'public necessity' and 'public use' as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of Mississippi."[147]

Struble further opines that, if a factual scenario similar to Conerly emerged in the future, and if at that time Mississippi were located within a National Corridor, FERC jurisdiction would be likely. FERC would have jurisdiction under 16 U.S.C. section 824p(b)(1) if a utility such as MP&L sought to construct a transmission line primarily to bring greater stability and reliability to the regional grid because of MPUC's predominantly parochial focus, Struble saw.

Traditionally, Struble saw that, as *Connerly* suggests, such a proposed project would have been automatically rejected by state siting officials outside of MPUC's authority. Struble finds that, the effect of FERC jurisdiction under a NIETC designation would mean that the project would at least be considered rather than rejected out of hand. FERC could consider the utility's proposal and reject it, leading to the same result, or FERC could approve the project and the utility would be permitted to site a transmission line within the state even though it would not primarily serve in-state customers, Struble argued. He concludes that, or course, unless the state withheld approval for more than one year, the state regulatory body would retain its jurisdiction, unencumbered by FERC, with respect to applications for projects meant to serve in-state customers, Struble concludes.[148]

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[143] Appellees contended that the "allegation by MP&L of incidental benefit to MP&L customers is a masquerade to justify constructing the interconnecting high power line." Appellee further argues that the line "was not for public use or public necessity as those terms apply to the utility and its consumers in the State of Mississippi." Appellees maintained that " the purpose of the line is 'interstate' rather than 'intrastate,' as was stated in the MPSC order attached and made a part of the condemnation proceedings."; Also see quoted in Struble (2008) 575, at 593, see footnote 148.

[144] In *Conerly*, 107 (1984) at 112-13: The Mississippi Supreme Court explained:
The eminent domain court judge held that the granting of the certificate of convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in the Mississippi Constitution. The reasoning for this holding was the language in the opinion to the effect that the primary purpose of the 500 Kv line was to carry electricity interstate from Mississipi to Louisiana.

[145] Miss. Const. art. III, s. 17.

[146] Miss. Code Ann. s. 11-27-15 (West 2007).

[147] *Mississippi Power & Light Co. v. Conerly*, 460 So. 2d 107 (1984), see at 113.

[148] Struble, 557 (2008), see: "Dominant Parochialism," at 594 footnote 158; Also see: 16 U.S.C.A. section 824p(b)(1)(C) (West 2008).

One can't help but notice that the fossil fuel industry dominates this debate. Any debate hinting that policy support for renewables will not escape attention? The discussion on policy support for renewable by another commentator, Felix Mormann follows here bellow.

Policy Support for Renewables.

The debate over policy support for renewables across the globe and, more recently, here in the United States, is dominated by two deployment policies—renewable portfolio standards (RPS)[149] and feed-in tariffs (FITs).[150] A Renewable Portfolio Standard (RPS) is a regulatory mandate that requires the increased production of energy from renewable sources such as wind, solar, biomass and other alternatives of fossil and nuclear electric generation. It is also known as renewable electricity standard. A feed-in tariff[151] is an economic policy created to promote active investment in the production of renewable energy sources. Feed-in tariffs typically make use of long-term agreements and pricing tied to costs of production for renewable energy producers.

Felix Mormann whose article is the most recent on this energy debate, explains that, RPSs create markets for solar, wind, and other renewables by requiring electric utilities to source a portion of the electricity they sell from renewable energy. Mormann went on to find that FITs beckon renewable power generators with above-market rates for their output and guaranteed access to the electricity greed.

Mormann went on to narrate that, in the absence of comprehensive federal policy action on climate change and clean energy, states are increasingly stepping in to fill the policy void, Mormann finds.[152] It is observed that, twenty-nine states, the District of Columbia, and three U.S. territories have adopted RPS policies to promote renewable energy[153]. It is thought that despite the widespread popularity of RPS programs at the state level, however, many believe that a federal RPS would yield better results. Mormann states that, over two dozen proposals for a federal RPS and its more inclusive sibling, the clean energy standard[154] have been introduced on Capitol Hill, but that, none has yet passed both chambers of congress.

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[149] https://en.wikipedia.org/wiki/Renewable_portfolio_standard

[150] Felix Mormann, Clean Energy Federalism, 67 Fla. L. Rev. 1621 (2015), see at 1624. Also see: Marc Ringel, Fostering the Use of Renewable Energies in the European Union: the Race Between Feed-in Tariffs and Green Certificates, 31 Renewable Energy 1 (2006).

[151] http://en.wikipedia.org/wiki/Feed-in_tariff

[152] Mormann (2015)1622, see at 1625. Also see: Daniel A. Farber, Climate Change, Federalism, and the Constitution, 50 Ariz. L. Rev. 879, 883 (2008); Also see: Richard B. Stewart, States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures, 50 Ariz. L. Rev. 681, 683 (2008).

[153] N.C. Clean Energy Tech. Ctr., Renewable Portfolio Standard Policies (2015), available at http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf

[154] Mormann (2015) 1622 at 1625; Also see: Clean Energy Standard Act, S. 20, 111th Cong. (2010) (including solar, wind, geothermal, and other renewables as well as clean-coal and new nuclear generation facilities as eligible sources of clean energy).

Mormann acknowledges that his article[155] was the first to address the crucial question of decarbonizing America's energy economy, by exploring the environmental, economic, regulatory, and political economy factors that determine the comparative merits of RPS and FIT implementation at the federal and state level. It is thought that, empirical evidence and qualitative analysis indicate that the widely popular RPS-adopted by nearly thirty states-ought to be implemented at the federal rather than state level.

We agree with Mormann's suggestion here above that, the crucial question of decarbonizing America's energy economy cannot be done without first exploring the environmental, economic, regulatory, and political economic factors. Any energy policy cannot work in isolation.

Mormann went on to argue that, to be sure, RPS and FIT policies could conceivably each be implemented concurrently at both the federal at state levels. He goes on to suggest that, such 'cooperative federalism' has long been a staple U.S. environmental regulation,[156] as illustrated by the Clean Air Act's requirement of state Implementation Plans for the Environmental Protection Agency's National Ambient Air Quality Standards,[157] with similar, albeit optional, delegation programs under the Clean Water Act for implementation of the National Pollution Discharge Elimination System.[158] In each of these instances, implementing states have the right to go above and beyond the regulatory floors set by the federal government.[159]

We will now embark on an attempt of making the case for a federal implementation of clean energy policy, here bellow.

Making the case for Federal Implementation of Clean Energy Policy.

Here we are again tempted to ask: What would a federal implementation of clean energy policy accomplish?

In response, Mormann observes that, the proponents of federal RPS implementation generally rely on three types of arguments to make their case for a national RPS mandate.[160] He saw that, the first type builds on the ecologies of scale of the American electricity grid and the environmental benefits that renewable energy offers. The second type, he says, draws on the economies of scale that a national RPS mandate would achieve and, the third type addresses concerns over regulatory competition and the threat of a race to the bottom as the result of a panoply of competing state-level RPS programs.

[155] Mormann (2015) 1622 at 1627.
[156] Clean Air Act of 1963 s. 2, 42 U.S.C. S. 7402 (2012) ("The administrator shall encourage cooperative activities by the States and local governments . . . . "): Clean Water Act s. 103, 33 U.S.C. s. 1251(b) (2012) (same); Endangered Species Act of 1973 s.6, 16 U.S.C. s. 1531 (c) (2) (similar), quoted in Mormann (2015) 1622 at 1627. Also see footnote 19.
[157] 42 U.S.C. ss. 7409-7410 (2012).
[158] 33 U.S.C. ss. 1342 (2012).
[159] William W. Buzbee, Asymmetrical Regulation: Risk, Preemption, and the Floor/ Ceiling Distinction, 82 N.Y.U. L. Rev. 1547, at 1564 (2007) (discussing federal regulatory floors in the context of environmental law).
[160] Mormann (2015) 1622, at 1634: see "The Case For Federal Implementation of Clean Energy Policy.

The ecologies-of-scale argument for a federal rather than state RPS has two prongs, writes Mormann. The first prong relates to the design characteristics of the U.S. electricity sector and its power grid, while the second prong builds on the scale and public good nature of the environmental benefits that renewable energy technologies create.[161]

Mormman observed further that, the U.S. power grids rarely follow state lines. While there is no seamless national power grid[162], two of the three primary power grids-also referred to as interconnects-serve multiple state. It is pointed out that, Orders No. 888, 889, and 2000 of the Federal Regulation Commission (FERC) have led to the formation of a number of Regional Transmission Operators, each of which encompass several different states,[163]Mormann wrote. We are persuaded here to believe that, as a tribute to the electricity grid's interstate architecture, courts have long acknowledged that the flow of electricity is impossible to trace and inherently interstate in nature. This was confirmed in the case of *New York v. F.E.R.C.*[164]where the first question court considered was whether FERC has its jurisdiction by including unbundled retail transmissions within the scope of its open access requirements in Order No. 888. New York argued that the FERC overstepped in this regard, and that such transmissions because they are part of retail transactions-are properly the subject of state regulation. New York insisted that the jurisdictional line between the States and FERC falls between the wholesale and retail markets, said the court.

The court in the above case further added that, as the Court of Appeals explained, however, the landscape of the electric industry had changed since the enactment of FPA, when the electricity universe was "neatly divided into spheres of retain verses wholesale sales". It is further observed here that, as the Courts of Appeals further explained, the plain language of the FPA readily supports FERC's claim of jurisdiction. FERC's jurisdiction includes the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.[165] Therefore, the unbundled retail transmissions targeted by FERC are indeed transmission of electric energy in interstate commerce, because of the nature of the national grid. The court in the above case saw that, there was no language in the statute limiting FERC's transmission jurisdiction to the wholesale market, although the stature does limit FERC's sale jurisdiction to that at wholesale.

Now for an electric transmission company that delivers electricity with customers in multiple states, which of the states would claim jurisdiction over the electric company? Wouldn't a federal statute accommodate them?

In response, it is pointed out that, many electric utility companies serve customers in multiple states, and that American Electric Power, for instance, delivers electricity to more than 5 million customers through

[161] Mormann (2015) 1622, at 1634: see "Ecologies of Scale."
[162] See: Peter Fox-Penner et all, Smart Power-Climate Change, the Smart Grid, at the Future of Electric Utilities 89-92 (Island Press 2014) For the discussion of the vision for a US National Transmission Superhighway and the seemingly insurmountable obstacles it faces.
[163] See FERC, Regional Transmission Organization Map, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last updated September 17, 2015).
[164] *New York v. F.E.R.C.*, 535 US 1, 7 (2002).
[165] 16 USC ss 824(b); also see Section 201(b) of the FPA states that FERC's jurisdiction includes transmission of electric energy in interstate commerce.

almost 40,000 mile of transmission lines, which cover close to 200, 000 square miles, including parts of Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.[166] Mormann continues to argue that, some commentators expect the formation of more multistate utilities following the Energy Policy Acts of 2005 with its repeal of the *Public Utility Holding Company Act* of 1935 (PUHCA) that had imposed limitations on utility mergers.

Mormann found that, proponents of a federal RPS argue that only a national RPS mandate can account for, and accommodate the US electricity sector's multistate ecology. He went on to suggest that, state-level RPS programs are considered "physically at odds" with the interstate transmission system.

It is observed further that, when advocates of a federal RPS point to the power grid's interstate architecture, they tend to ignore the pivotal role of the existing state and regional seams within the national electricity network. For instance, it is thought, different protocols and technical standards among the various network operators represent significant obstacles along the path toward a nationwide, seamlessly integrated power grid,[167] pointing to different standards among regional transmission operators as key problems that cannot easily be harmonized.[168]

More opinions have been expressed that, by itself, a federal RPS mandate would do little to alleviate problems of network compatibility, much less bring about the idealized National Transmission Superhighway.[169] To vindicate a national RPS with interstate transmission criteria appears almost anachronistic considering the U.S. Court of Appeals for the Fourth Circuit's recent curtailment of FERC's authority to site transmission infrastructure.

In *Piedmond Envtl. Council v. FERC*,[170] two state utilities commissions and two community interest organizations petition for review of several rulemaking decisions made by the *Federal Energy Regulatory Commission* (FERC or the Commission) in connection with FERC's implementation of the new Section 216 of the *Federal Power Act* (FPA) and the *National Environmental Policy Act* (NEPA). Section 216 of the FPA, which was added in 2005, give FERC jurisdiction in certain circumstances to issue permits for construction or modification of electric transmission facilities in areas designated as national interest corridors by the Secretary of Energy.[171]

In the *Piedmont* case, petitioner CARI claimed that FERC was required to prepare an environmental assessment (EA) or an environmental impact statement (EIS) when it adopted its regulations detailing the information requirement for permit applications under Section 216 of the FPA. NEPA required federal

[166] See : AEP Sustainability-Reports and Fast Facts, Am. Elec. Power, http://2013.aepsustainability.com/fastfacts/ (providing a map from 2013 that indicates the coverage area of American Electric Power).
[167] Robert J. Michaels, National Renewable Portfolio Standard; Smart Policy or Misguided Gesture?, 29 Energy L. J. 79 (2008). See at 109: pointing to different standards among regional transmission operators as key problems "that cannot be harmonized."
[168] Mormann (2015) 1621, see at 1635.
[169] Peter Fox-Penner et al, Smart Power-Climate Change, the Smart Grid, and the Future of Electric Utilities 89-92 (Island Press 2014).
[170] Piedmont Envtl. Council v. FERC, 558 F. 3d 304, 315 (4th Cir. 2009).
[171] Piedmont Envtl. Council (supra) 304, See: opinion per Michael, Circuit Judge, at 309.

agencies to prepare an EA or an EIS for "all major Federal actions significantly affecting the quality of the human environment."[172] FERC determined that its adoption of the new regulation did not amount to major federal action because the regulations were simply procedural. Thus according to FERC, neither an EA nor an IES was required. FERC's determination was reviewed for reasonableness under the circumstances.[173] The court further observed that,[174] a reading of the entire provision reveals that Congress intended to act in a measured way and conferred authority on FERC only when a state commission is unable to act on a permit application in a national interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions. The court continued to observe here that, the broader context of Section 216(b) thus confirmed that the meaning of "withheld approval of more than 1 year" was plain: it meant that action on a permit application has been held back continuously for more than one year. The continuous act of withholding approval does not hold the final administrative act of denying a permit. For this reason the court thus reversed FERC's interpretation of the phrase "withheld approval for more than 1 year."

Mormann argues that, FERC has long had jurisdiction over the terms and condition of all existing electric wholesale, i.e., non-retail or end-use transmission.[175] But, added Mormann, it was not until the 2005 *Energy Policy Act* that FERC received minimal authority over the siting and construction of new transmission lines. The Act grants FERC siting and permitting authority where states are unable or fail to act if the area in question has been designated as "a national interest electric transmission corridor," Mormann pointed out.[176]

What about the competitive relationships that regulators have that aims to ensure a healthy environment, while on the other hand attracts industry businesses to ensure their constituents an economic prosperity? This is "a race to the bottom" as we will explore here bellow.

The Race to the Bottom and Regulatory Leakage.[177]

In response, another argument for the federal RPS builds on what is thought of as a commonly observed phenomenon in environmental regulation, often referred to as the "race to the bottom." The concept points to the competitive relationship between various regulators, such as states, that aim to ensure a healthy environment while also attracting industry and business to ensure their constituents' economic prosperity. Kirsten H. Engel in explaining "a race to the bottom", noted that the term race to the bottom refers to the progressive relaxation of state environmental standards, spurred by interstate competition to attract industry, that also occasions a reduction in social welfare below the levels that would exist in

[172] 42 U.S.C. Section 4332(2)(c)
[173] Piedmont (supra) 304 at 315; Also see: Sugarloaf Citizens Ass'n v. FERC, 959 F. 2d 508, 512 (4th Cir. 1992).
[174] Piedmont (Supra) 304, see at 315
[175] 16 U.S.C. S.824(b) (2012): It states that, Use or sale of electric energy is interstate commerce.
[176] Mormann (2015) 1621 at 1636; Also see: 16 U.S.C. section 824p(a) (2012). The Department of Energy has the authority to make such a designation. Also see: Section 824p(h)(2).
[177] Mormann (2015) 1621, see: Regulatory Leakage and the Race to the Bottom, at 1646

the absence of such competition.[178] Engel went on to explain that, the widely accepted theoretical model for the race to the bottom is non-cooperative game theory, of which the classic "Prisoner's Dilemma" is perhaps the most well-known example. According to this model, Engel writes that, although all states would be better off if they each cooperated with each other by collectively maintaining optimally stringent environmental standards, the incentives are such that each state will instead relax its standard in an ultimately unsuccessful bid to attract industry, she wrote.

Engel, pointed out that, in the wake of a widely cited article by Professor Richard Revesz,[179] it was observed that scholars have begun to question the very existence of a "race-to-the-bottom" in environmental standard-setting. Swimming against the tide of prior scholarship, these revisionist critics contend that the effort of state competition upon state environmental standard-setting are welfare-enhansing, rather than welfare-reducing.[180] Revesz concluded that the forces of interstate competition, far from being conclusively undesirable in environmental law, are at least presumptively beneficial. These revisionist critics contend that any welfare loss resulting from reduced environmental quality is more than made up for by compensating gains from increases in economic activity.[181]

It is further observed that, rent seeking actors look to benefit from the heterogeneity of the regulatory landscape by relocating to states with less stringent or no environmental regulation at all. Such leakage is a common challenge for policies that aim to reduce pollution and other socially undesirable activities but, in the process, impose compliance costs on affected industries. Mormann adds that, some proponents of a federal RPS claim that the existing "hodgepodge regulation" of state-level RPSs promotes a regulatory race to the bottom between the states, with some trying to avoid leakage streams and others hoping to benefit from them.[182]

It is suggested that, given time, utilities may be able to shift some of their generation capacity from one state to another to escape, what Mormann sees as, strict environmental standards. But that, they are unlikely to roll up the cables of their transmission and distribution lines or move their customer base out of state to regain their freedom of fuel choice. The risk of regulatory leakage from utility migration, therefore, is practically negligible.[183]

Ratepayers bear the financial burden of RPS-and FIT-induced premium payments to promote power generation from renewables. It is further believed that, private households and small businesses are

[178] Kirsten H. Engel, State Environmental Standard-Setting; Is there a "Race" and is it "to the Bottom"?, 48 Hastings L. J. 271 (1997), see at 274.
[179] Richard L. Revesz, Rehabilitating Interstate Competition; Rethinking the Race to the Bottom Rationale for Federal Environmental Regulation, 67 NYU L. Rev. 1210 (1992) : finding race to the bottom argument unsupported and the federal intervention inappropriate.
[180] James E. Krier, On the Topology of Uniform Environmental Standards in a Federal System—And why it Matters, 54 Md. L. Rev. 1226 (1995). See at 1236-37 : arguing that A Race to the Bottom does not exist; Also see: Alvin K, Klevorick, Reflections on the Race to the Bottom (Jan. 2, 1995)(unpublished paper presented at the American Association of Law Schools Annual Meeting, on file with the author)(elaborating upon Revesz' argument that even if a Race to the Bottom Exists, federal intervention is not the solution).
[181] Engel (1997) 271 see at 275.
[182] Mormann (2015) 1621, see at 1646.
[183] Mormann (2015) 1621, see at 1646-47.

unlikely to relocate solely on the basis of modest increases in theirs electricity bills. But that empirical evidence suggests, however, that some particularly energy-intensive industries are sensitive to rising production costs from increased rates for renewable energy and may react by relocating their production facilities to jurisdiction with lower electricity rates.[184] Mormann suggests that, sophisticated FIT design can mitigate, if not altogether prevent, leakage by exempting select industries from sharing the cost of renewables support without sacrificing overall policy efficacy.[185] International examples of industry-sensitive, yet promotionally effective FIT programs include Austria, Denmark, Germany, and the Netherlands.

Morman concludes that, upon closer inspection and consideration of the utility industry's structural characteristics, the race to the bottom argument caries relatively little weight in favour of a federal over state-level RPS and even less weight for federal rather than state implementation of a FIT program,[186] Mormann wrote.

In making a case for state implementation of clean energy policy, what are those who advocate for it intend to accomplish? This question is explored in the debate that follows here bellow.

Making the Case for State Implementation of Clean Energy Policy.

It is said that the advocates of RPS support for renewables at the state level build their cases arguments that fall into three categories: the first category rebuts the necessity of a federal RPS in light of existing state efforts to promote renewable energy. The second category harnesses the differences in renewable energy resource availability across states and their distributional implications. The third category emphasizes the historical role of states as the regulators of fuel choices.

Commentators have given references to a long list of local, state, and regional policy measures in support of renewable energy usually accompanying this assertion.[187] Others narrow the scope of the argument with a specific reference to existing state-level RPS mandates and their coverage of two thirds of the U.S. population. Mormann argues that, regulatory competition among states and their RPS regimes is expected to improve the overall quality of regulation as states learn from each other's failures and successes . He notes that, ultimately, the redundancy argument is not so much a call for continued state

[184] An illustrative example of leakage resulting from high electricity prices for energy-intensive industries is the relocation of a Spanish steel plant to Poland in response to increases energy costs. Gabriel C. Alvarez et al., Universidad Rey Juan Carlos, Study of the Effects on Employment of Public Aid to Renewable Energy Sources 33 (2009).

[185] See Felix Mormann et al., A Tale of Three Markets: Comparing the Renewable Energy Experiences of California, Texas, Germany, 35 Stan. Envtl. L. J. (2016) (showing that exempt energy-intensive industry customers in Germany in Germany pay less for electricity than their competitors in California and Texas).

[186] Morman (2015) 1621, see at 1647; Also see Mormann, footnote 147:
There are strong arguments to expect a race to the top as the likely outcome of state-level feed-in tariff support for renewables.

[187] Kevin L. Doran, Can the U.S. Achieve A Sustainable Energy Economy from the Bottom-Up?; An Assessment of State Sustainable Energy Initiatives, 7 Vt. J. Envtl. L. 95, 116 (2006).

RPS as it is an argument against too much federally mandated support for renewables deployment, especially by way of a national RPS, he says.

It is noted that, at present, state FIT programs in the United States cover no more than seven states and approximately 54 million Americans. Most importantly, it is thought that, a federal RPS or FIT would not necessarily have to displace existing state RPS or FIT programs. A multilevel RPS scenario, however unlikely in the current political climate it is thought, could emulate successful examples from other areas of competing environmental regulation, such as air quality, where the federal government sets minimum standards while allowing the states to adopt stricter regulation.[188]

Mormann's opinion is that, the case for federal rather than state-level RPS implementation based upon the U.S. electricity sector's ecology is not as clean cut as it may seem at a glance.[189] On one hand, a federal RPS appears better suited to address the interstate nature of electricity transmission and trade. Mormann further observed that, on the other hand, states continue to play a pivotal role in regulating these and other core activities of America's electricity industry, including transmission siting and merger control.

Geography aside, Wrote Mormann, states' historical sovereignty over the composition of utilities' fuel mix is not a strong argument to endorse state over federal implementation of renewable energy policy. Mormann argues that, any attempt to vest the authority to mandate the fuel mix of state-regulated utilities at the federal level would, therefore, require substantial regulatory reform. Mormann adds that from a functional point of view, the history of state jurisdiction over utility fuel choice and its regulatory manifestation suggest that support for renewable energy through RPS or FIT policy will be more straightforward to implement at the state level.

Mormann concludes that, implementation of a FIT program at the federal level would require significant regulatory reform, encroaching upon traditional domains of state regulatory sovereignty such as local interconnection, distribution, and retail ratemaking authority. It is further observed that, for many representatives on Capitol Hill, the risk of sacrificing state regulatory authority will, by itself, be enough to vote against a federal FIT policy. Mormann, reiterates that, more than two decades of fruitless congressional debates over a federal RPS offer ample proof of the enormous challenges of building support for a strong federal commitment to renewable energy. With their market based design and their environmental benefits, says Mormann, RPS policies have, at least in theory, the potential to appeal to both Republican liberalism and Democratic environmentalism. It is thought that, if this bipartisan appeal was not enough to gain congressional approval for RPS bill, building support for a price-based, federal FIT policy will likely be even more difficult. To infuse the clean energy and climate policy debate with the threat to curtail state regulatory authority will make reaching a compromise more challenging still, concluded Mormann.[190]

[188] Mormann (2015) 1621, see: "The Redundancy of Multilevel Efforts," at 1648-49; also see California's more stringent standards for motor vehicles emissions adopted under the Clean Air Act's Waiver provision of 42 U.S.C. section 7543(b) (2012).
[189] Mormann (2015) 1621, see at 1638.
[190] Mormann (2015) 1621, see at 1653-54.

There are many agencies that enforce environmental or energy policies. They all have disjointed policies. How easy will it then be, to formulate one common national policy with all these enforcers in place? It is a challenging task as we shall see here bellow.

Environmental or Energy, All with disjointed Policies.

Scholars generally support the notion that environmental policy and energy policy have been disjointed, wrote Antoine Schellinger.[191] Schellinger went on to suggest that, to date, the primary effect of environmental law policy has been the internalization of production costs by the energy industry. It is argued that, contemporary policy favours extracted fuels since it relies on a "constrain but permit" model with numerous exemptions for traditional energy producers, which are embedded in the aged framework that developed its implementation choices prior to the knowledge of current renewable technology. It is suggested that, the developed environmental regulatory outcome is a simultaneous limitation but perpetual dominance of fossil based energy production. Yet Schellinger also points out that, other scholars suggest that energy policy decisions include what she calls an environmental slant through the analysis of three equal goals: economic security, resource independence, and environmental sustainability, she saw.[192] This is yet another confirmation that, an energy policy cannot be achieved in isolation, ignoring economic, resources, and environmental concerns.

But still, how would policy uniformity be achieved? The narration that follows bellow attempts to provide an answer regarding the challenges policy makers can be faced with, in the application of the "Mobile Sierra Doctrine."

Application of Mobile Sierra Doctrine.

In the quest for a uniform, united Federal energy regime, would the "Mobile Sierra Doctrine" help achieve uniformity into a single United States energy regime? Many commentators have refuted this suggestion in achieving uniformity. Could the failure to achieving this federal regime unity be because of diversity and difference of each regional signature?

The Mobile Sierra Doctrine arose from two cases decided on the same day in 1956, *United Gas Pipeline Co. v. Mobile Gas Serv. Corp*.[193] involving the *National Gas Act*[194] (NGA), and the *Federal Power*

[191] Antoine C. Schellinger, Energy is Energy: Segregation of Renewable and Fossil Fuel Impedes Energy Security Goals, 55 S. Tex. L. Rev. 471 (2014), see at 479.
[192] Schellinger (2014), Id. Also see: Lincoln L. Davies, Incentivizing Renewable Energy Development; Renewable Portfolio Standards and Feed-in Tariffs, 1 KLRI J. L. & Legis. 39, 44-45 (2011).
[193] United Gas Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373, 12 Pub. Util. Rep. 3d (PUR) 112 (1956)
[194] National Gas Act (NGA), 15 U.S.C.A. section 717d.

Commission v. Sierra Pacific Power Co.[195] involving the *Federal Power Act*[196] (FPA). The doctrine came to be understood as a presumption that a rate set in a freely negotiated contract passes the statutory "just and reasonable" test; overcoming the presumption requires a heightened showing, such as "public interest necessity" or "extraordinary circumstances."

Michael A. Rosenhouse explains that, Under the *Federal Power Act* (FPA), and the *Natural Gas Act* (NGA), the *Federal Energy Regulation Commission* may adjust rates for wholesale suppliers of gas and electricity so that they are "just and reasonable."[197]

We are then tempted to ask: Why can't this adjustment, by a federal agency—charged with this responsibility to adjust rates—achieve the same uniform rates (figures) all over the country?

In response, Rosenhouse goes on to explain that, *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County Wash.,*[198] the U.S. Supreme Court held that, the Mobile-Sierra Presumption applied to challenges by both purchasers and sellers of wholesale electricity, the court thus rejecting the Ninth Circuit holding that purchasers need only show that the contract rate falls outside a "zone of reasonableness," he found.

Here we ask again, if there is a federal body that regulates natural gas and electricity, FERC, then why is the Mobile-Sierra Doctrine not being used to challenge rates in order to achieve a uniform rate countrywide?

We observe that, Rosenhouse does not appear to have a clear answer on the above question. Rosenhouse, explains that, wholesale interstate sale of natural gas and electricity are regulated by the Federal Energy Regulatory Commission (FERC or Commission) under the Natural Gas Act (NGA) and the Federal Power Act (FPA), respectively, he says. He goes on to explain that, under both statutes, regulated utilities must file compilations of their rate schedules, or "tariffs," with the Commission and provide service to customers on the terms and prices set forth therein, and utilities wishing to change their tariffs must notify the Commission within a prescribed time before the change is to go into effect. The next sentence then gives us the point that rates can differ. Rosenhouse then makes the point that, utilities are also permitted to set rates with individual purchasers through bilateral contracts, wish also must be filed with the commission before they go into effect,[199] he found.

[195] Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 76 S. Ct. 368, 100 L. Ed. 388, 12 Pub. Util. Rep. 3d (PUR) 122 (1956)
[196] The Federal Power Act (FPA), 16 U.S.C.A. section 824d(a).
[197] Michael A. Rosenhouse, Construction and Application of Mobile-Sierra Doctrine, Under Which Federal Energy Regulation Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard, 62 A.L.R. Fed. 2d. 427 (2012), see at 427.
[198] Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County Wash., 554 U.S. 527, 128 S. Ct. 2733, 171 L. Ed. 2d 607, 62 A.L.R. Fed. 2d 787 (2008).
[199] Rosenhouse (2012), see: 2. Summery and Comment

Under the Natural Gas Act, rates charged by sellers of natural gas are required to be "just and reasonable," and any such rate or charge that is not just and reasonable is declared to be unlawful.[200]

The "Mobile-Sierra Doctrine" is not complete without discussing the "Memphis Clause" as we shall see here in the paragraphs that follows.

The "Memphis Clause" on the "Mobile-Sierra Doctrine."

The "Memphis Clause" is held under the particular facts and circumstances that the "Mobile-Sierra doctrine"—pursuant to which the Federal Energy Regulation Commission (FERC) must presume that, the rates set out in the freely negotiated wholesale energy contract meets the "just and reasonable" requirements imposed by law, which presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest—did not apply to the parties' agreement because such agreement included a provision, sometimes called a "Memphis Clause,[201]" expressly or impliedly permitting the seller to seek a unilateral rate change under the ordinary just and reasonable standard that would apply in the absence of a contractual rate commitment.

In *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*[202], proceeding to review order of Federal Power Commission denying motion of customers to reject new rate schedule filed by natural gas company. The United States Court of Appeals for the District of Columbia Circuit,[203] reversed the Commission's order, and certiorari was brought. The Supreme Court, Mr. Justice Harlan, held that a natural gas company could increase the rates which it charged its customers, under tariff-and-service type agreements, upon complying with the provisions of Natural Gas Act authorizing rate increases on filing of timely notice thereof, where the agreements with the customers did not preclude it from doing so, though customers had not agreed to the changes.

The United States Supreme Court, held that a contract between a pipeline company and a wholesale customer providing that the rates to be charged would be those provided in the pipeline rate schedule, "or any effective superseding rate schedule" on file with the Federal Power Commission, did not implicate the Mobile-Sierra against unilateral filings changing rates from those set in a contract between a supplier and a wholesale customer, inasmuch as the contract itself contemplated changes in rates by such unilateral filings. The Supreme Court explained that, the pipeline bound itself to furnish gas to customers during the life of the agreements, not at a single fixed rate as in *Mobile*, but at what in effect amounted to its current "going" rate. Contractually, said the Court, this left the pipeline free to change its rates from

[200] The language of s. 205(a) of the Federal Power Act (FPA) is virtually identical: all rates and charges of any public utility in connection with the transmission or sale of electric energy subject to the jurisdiction of FERC must be just and reasonable and any such rate or charge that is not just and reasonable is unlawful.
[201] Referring to the decision in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153, 26 Pub. Util. Rep. 3d (PUR) 314 (1958), discussed this section, expressly recognizing the validity and the enforceability of such a clause.
[202] Id.
[203] 102 U.S. App. D.C. 77, 250 F. 2d 402.

time to time, subject, of course, to the procedures and limitations of the Natural Gas Act. The decisive difference between this case *Memphis Light* and *Mobile*, said the Court, was that in Mobile, one party to a contract was asserting that the Natural Gas Act somehow gave it the right unilaterally to abrogate its contractual undertaking, whereas the pipeline in the instant case sought simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract. Mobile expressly noted that in the absence of any contractual relationship, rates determined ex parte by the seller may be filed under the unilateral filing provision of the *Natural Gas Act*, explained the Court, adding that it perceived no tenable basis for distinction between the filing on such a rate in the absence of contract and a similar filing under an agreement that explicitly permits it.

This concludes this debate on the quest for a coordinated national energy policy. The different debates on conclusions now follows here bellow.

Conclusion:

As we have seen in this essay, a stinging criticism came from Benjamin W. Cramer.[204] According to Cramer, the National Energy Policy Development Group (NEPDG) did not operate transparently, and the Federal Advisory Committee Act has not been effective in uncovering the group's secrecy. Cramer went further to confirm that, Energy Company CEOs who participated in the task force sessions have bragged in the press about their involvement.[205] It is confirmed that, Enron-specific policy enhancements were included in the NEPDG public report. It is also now known that, documents indicating the presence of industry officials have now come to light during Court room proceedings and in research by investigative journalists. In Cramer's opinion, it seems apparent from American political and media discourse that the officials and lobbyists from fossil fuel industries, via participation in the energy task force, influenced an official national energy policy that increases fossil fuel extraction and production to satisfy near-future increases in demand, thus enhancing the profitability of those same companies, says Cramer. Meanwhile, possible development of alternative fuels, and the concerns of activists regarding issues of pollution and costs, were effectively absent from energy task force recommendation and from America's official national energy policy, wrote Cramer.[206]

Cramer observes that, while the above conclusion have been obvious in the court of public opinion, they have been reduced to unsupported conjecture in the court of law. Cramer's article demonstrate that the public and the press will have little chance of successfully utilizing FACA in court when attempting to learn more about the energy task force's membership and activities.

[204] Benjamin W. Cramer, The Power of Secrecy and the Secrecy of Power: FACA and the National Energy Policy Development Group, 13 Comm. L. & Pol'y 183 (2008).
[205] Cramer (2008) 183, see at 227-228.
[206] Cramer (2008) 183, see at 228.

Cramer sees that, in a classic Catch-22, the entity that should release information about advisory committee membership—that is, the government executive or agency that utilized the committee in question—is the very same entity that may wish to keep the membership information a secret.

One must wonder about the length the Bush administration went to in court to maintain the secrecy surrounding the membership of the energy task force.

Cramer confirms that, the Bush Administration succeeded in maintaining the secrecy of the energy task force, especially the identity of all the participants, by using its very own acts of secrecy (that is, failing to admit that the industry officials were members) to justify continued secrecy about that membership.

Cramer concludes that, as seen in the saga of the NEPDG, the current vagueness and inconsistency of the act's language allows governmental defendants to paradoxically use the act to justify their own secrecy, in a fundamental contradiction of democratic theories of transparent government and open access to information. The case law indicates that FACA's weakness has failed citizens and journalists again and again during the act's largely dubious and unsuccessful carrier, Cramer concluded.[207]

Yet another commentator, Fershee, suggests that, the need for a coherent and comprehensive energy and environmental policy is one of the most important issues facing society today. Fershee points out that, energy and environmental issues impact broad and diverse areas of concern, including national security, public health and safety, economic growth, and climate change.[208] Fershee noted that, most of President Kennedy's programs have advanced to the point that little could (or should) be implemented today, from a tactical perspective. However, he added that, from a strategic perspective, his bold and expensive vision could still serve as a model for modern policymakers.

President Kennedy was willing to take on multi industries and make clear that the government would support and facilitate projects that were in the best interest of the country, not just the best interest of the particular constituencies. Although, writes Fersheer that, especially in practice, this characterization may be bit idealized, his concept was nonetheless clear. Fershee suggests that, modern politicians would be well-served to follow President Kennedy's admonition:

> *"From the beginning of civilization, every nation's basic wealth and progress has stemmed in large measure from its natural resources. This nation (The United States) has been, and is now, especially fortunate in the blessings we have inherited. Our entire society rests upon—and is dependent upon—our water, our land, our forests, and our minerals. How we use these resources influence our health, security, economy, and well-being."*
>
> *President John F. Kennedy, Feb. 23, 1961*[209]

[207] Cramer (2008) 183, see at 230.
[208] Fershee (2009) 183, see: Conclusion, at 144-145.
[209] John F. Kennedy, Special Message, Special Message to the Congress on Natural Resources (Feb. 23, 1961), see quoted in Fershee (2009) 131, see at 145.

Yet another commentator writing in 2005, Sam Kalen[210] noted that, after taking office in 2001, President George W. Bush established the National Energy Policy Development Group, designed to revisit the tenets of the national energy policy. Kalen opines that, although the history and outcome of this group received widespread public attention, including opposition from within the environmental and natural resources conservation community, he argues that, two recommendations of the group are relevant to a discussion regarding positive trends on the development of an integrated national resources policy. Kalen points out that, the group recommended, and President George W. Bush ultimately adopted, an executive order directing all federal agencies to include in all regulatory action significantly and adversely affecting energy supplies, distribution, or use, a detailed energy impact statement.[211] Next, at the request of the group, Kalen writes that, the President issued an Executive Order[212] promoting the expedition of federal agency permitting of energy-related projects and establishing an Interagency Task Force, chaired by the Council on Environmental Quality (CEQ), to ensure agency coordination.

The President indicated that, writes Kalen that, with CEQ's involvement energy production and environmental protection could be reconciled. The discussion also touched the topic of issuance of permits with respect to certain energy related facilities and land transportation crossings on the international boundaries of the United States.[213]Kalen argued that, although these initiatives recognized that the United States energy must involve a multidisciplinary approach and coordination among several federal agencies, they fall short by failing to appreciate the dynamic relationship among energy, resource, and environmental policies. He suggests that, any energy-related goal, can only be achieved if it is consistent with the environmental and natural resource-oriented programs and goals. Kalen says that, protecting unique habitat for a particular species, for example, might be on a par with expediting a particular pipeline right-of-way permit, he finds.[214] Kalen finds that, although these Executive Orders have had shortcomings, they have served a useful purpose—advancing the dialogue about the intersection or energy, environment, and resource policy—in the country.

Kalen suggests in his conclusion that, Law Schools, often the laboratories of future policy, should not fear to tread where presidential administration have floundered. The time is now for law schools to begin—by integrating energy, environmental, and natural resource policy. He opines that—the growth of environmental law programs, specific areas that embrace natural resources, biodiversity, ecosystem management, and energy law (non-oil and gas or mineral law)—in law schools, for this reason, must be encouraged. This, he find that, it is because, energy law sits at the intersection of environmental law, natural resources law, and regulated industries.

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[210] Sam Kalen, Replacing A National Energy Policy With National Resources Policy, 19-WTR Nat. Resources & Env't 9, see at 13-14.
[211] A detailed Energy Impact Statement: Exec. Order No. 13, 211 (2001).
[212] Executive Order Number 13, 212.
[213] Exec. Order No. 13, 337, 69 Fed. Reg. 25, 299 Apr. 30, (2004):
Issuance of Permits with Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States; Also see quoted in Kalen (2005) 9, at 14.
[214] Kalen (2005) 9, at 14.

Kalen finds that all his suggestions should be adhered to, because the Nation's consumption is expected to grow 1.5 percent annually through 2025. And that:

> *"how we will satisfy this demand through policy choices involving, among others, energy-efficiency and conservation, renewable resources, new technology, coal, oil, gas, LGN, or even nuclear power , will depend upon an equal appreciation of environmental and public land and natural resource policies. When this occurs, the substance of any such National Resource Policy has a better chance of reflecting a coordinated and perhaps more effective approach to the many environmental, energy and public land, and natural resource problems confronting us in the twenty-first century"*
>
> Sam Kalen[215]

Struble, on the other hand concluded his argument with the suggestion that, parochialism hinders utilities' ability to adequately address congestion and ensure electricity service reliability.[216] He confirms that states with predominantly parochial electric transmission line siting regimes that are now located within NIETC's will either have to liberalize their outlook or face federal preemption. On the other hand, states with less parochial tendencies have already embraced the reality of regional electric markets. Struble makes an example of states like Wisconsin and Ohio, that have modern electric transmission siting laws that recognize the integrated nature of the nation's electric grid and are effective in addressing some of the problems facing the grid. State regulators in these states will remain relevant as potentially more and more areas of the country fall within the national corridor designations,[217] Struble wrote.

Yet another commentator, Antoine Schellinger, who suggests that, the segregation of policies, one for renewable, and the other for fossil fuels would impede on energy security goals, further suggested that, in order to increase the ability of the renewable fuels production to attract capital, [renewable fuels] must be viewed by the investment community as a lower risk investment.[218] Writing in 2014, Schellinger finds that, perceived investment risks is an amalgamation of factors such as policy stability, technology readiness level, and forward commodity prices, she says. She opines that, regulations that allow renewable fuels to be more closely into the extant energy supply chain diminish the perceived risks as well; the renewable fuels developer can collaborate with established players and develop synergies resulting in superior business plans,[219] she said.

Another commentator who wrote about ten years ago, Mormann notes that, energy was described as the center stage upon which environmental law, certainly in terms of global warming and many other environmental issues, will be played. Mormann went on to observe that, over the past decades, hydraulic francturing for shale gas and oil, nuclear reactor (re)licensing, biofuel mandates for the transport sector, integration of a growing share of renewables into the electricity mix, and other controversies at the intersection of environmental and energy law have proven these words downright visionary. Along the

[215] 19 WTR Nat. Resources & Env't 9 (2005) at 14.
[216] Struble (2008) 577, see "Conclusion" at 598.
[217] Struble, Id.
[218] Antoine C. Schellinger, Energy is Energy: Segregation of Renewable and Fossil Fuels Impedes Energy Security Goals, 55 S. Tex. L. Rev. 471 (2014), see "Conclusion," at 526-27.
[219] Schellinger (2014) 471, at 526-27.

way, clean energy law has begun to emancipate itself from environmental law in the scholarly debate, says Mormann. Drawing on the well-established environmental federalism literature, the emerging on clean energy federalism is a symptom of clean energy laws' coming of age. Mormann's article adds to that literature by offering two case studies, a novel model for policy integration, and theoretical insights to the clean energy federalism literature.[220]

FIT and RPS policies both seek to mitigate climate change by promoting the build-out of low-carbon, renewable energy infrastructure, it is said. Yet, subtle differences in both policies' design characteristics, it is said, point to different policy implementation pathways. Existing regulatory authority and the greater ability to account for local needs and opportunities suggest that FIT programs are better suited for implementation at the state rather than federal level, it is thought. RPS policy, on the other hand, it is observed, requires a market size and uniformity of such scale that it is better implemented at the federal rather than state level.[221]

In his conclusion, Mormann suggests that, as opposed to the traditional view that RPS and FIT policies represent mutually exclusive policy alternatives, he suggests a model for closely integrating both policies toward a better, more efficient allocation of investor and regulatory risk. It is further seen that, properly integrated, a joint RPS-FIT regime could harness the competitive market forces inherent in portfolio standards and redirect them to optimize overall risk allocation. In interstate competition, these forces would help reduce the cost to rate payers of FIT programs. With aggregate risk mitigation greater than the sum of its parts, such an integrated RPS-FIT regime could leverage higher private-sector investment in renewables while requiring lower return than necessary under less coordinated current policy approaches, Mormann believes.[222]

Personal Observations and Suggestions; where do we go From Here?

Our question still remains, is one coordinated United States Energy Policy even possible? Put differently, is it even being considered by the federal government agencies that regulate energy in this country? What must the coordinated national energy policy expected to accomplish?

This work attempts to answer the above questions in the fashion that follows here bellow.

Walter Rusinek[223] writing in 1995, concluded then that, the next few years could see a vast revision of natural resources law. Rusinek predicted that, most likely, however, as government attempts to balance competing interests, the basic structure of most existing natural resource law will remain intact, albeit

[220] Morman (2015) 1621, see at 1680.
[221] Mormann (2015) 1621, see at 1680-1681.
[222] Mormann (2015) 1621, see at 1681.
[223] Walter Rusinek, Balancing Competing Interests A Natural Resource Law Primer, 31-MAR Ariz. Att'y 24 (1995).

somewhat amended. He suggests that, consequently, attorneys in all areas of practice will need to remain aware of their potential legal impact of these laws, he concluded.[224]

In the words of one commentator, Sam Kalen, as we have discussed earlier in this work, a comprehensive national Energy Strategy[225] should identify at least five broad goals: improve energy efficiency; ensure against energy disruptions; promote energy production and use in ways that respect health and environmental values; enlarge the nation's portfolio of energy choices and technologies; and finally, cooperate in the international arena to resolve global economic, environmental and security concerns. Many of us find ourselves agreeing with Kalen's view.

Writing in 2005, Kalen had suggested then that, The Clinton administration acknowledged the need to integrate energy and environmental policy, focusing heavily on sustainable development and the environmental effects of energy production, and in particular global warming. Kalen went on to observe that, the administration had pursued an energy policy that had provided substantial and economic, environmental, and national security benefits for the American public. Kalen points out that, this policy, however, has been based on a legislative and regulatory framework last revised in the early 1990s. Kalen suggests that, it is now time to take stock of our Nation's energy progress, identify the most substantial challenges that remain, calibrate energy policy goals to the new century, and propose long term solutions.[226]

Again many of us find ourselves agreeing with Kalen. Kalen's suggestion offer a way forward, although his suggestion offers no practical ways on how the energy regulation goals can be achieved.

But the Bush administration was a step back words, because the designated agencies operated in secret. Because of this secrecy in operation, it gave no chance for the input of public debate and suggestions. If we are to achieve a unified coordinated national energy policy, all energy sources should receive equal attention. Instead the Bush administration gave more favours, preferential treatment, and latitude to fossil fuel sources, while ignoring the renewable energy industry contributions.

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[224] Rusinek (1995) 24, see at 29.
[225] Sam Kalen, Replacing A National Energy Policy with a National Resource Policy, 19-WTR Nat. Resources & Env't 9 (2005), see "Comprehensive National Energy Strategy (Apr. 1998)," at 13.
[226] Kalen (2005) 9, see at 13.

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