Weisenbloom
66M
31349

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-205365 June 3, 1985


The Honorable John D. Dingell
Chairman, Committee on Energy
and Commerce
House of Representatives

DO NOT MAKE AVAILABLE TO PUBLIC READING
FOR 30 DAYS

Dear Mr. Chairman:

This is in response to your joint request of February 8, 1985, along with Chairman Edward J. Markey, Subcommittee on Energy Conservation and Power, House Committee on Energy and Commerce, that we review the Department of Energy's (Energy) legal opinion on the duration of the Residential Conservation Service (RCS) program. You also asked that we provide the Committee with our own view of the legal status of the program. We received Energy's legal memorandum[1]/ on March 11, 1985, and have carefully reviewed it.

As you are aware, the statutory basis for the RCS program is title II of the National Energy Conservation Policy Act of 1978 (NECPA), as amended, 42 U.S.C. § 8211 et seq. Section 215 of NECPA[2]/ (42 U.S.C. § 8216) requires each large natural gas or electric utility[3]/ to undertake the following energy conservation functions for its residential customers:[4]/

---

1/ Energy's legal memorandum is a 13-page document, dated March 6, 1985, and formally entitled "Legal Analysis of the Duration of the Residential Conservation Service Program."

2/ The pertinent parts of section 215 of NECPA are set forth in an appendix.

3/ Covered utilities are those with annual sales for purposes other than resale of (1) natural gas exceeding 10 billion cubic feet or (2) electricity exceeding 750 million kilowatt-hours. 42 U.S.C. § 8212.

4/ Comparable but somewhat different duties are required of participating home heating suppliers by section 217 of NECPA, 42 U.S.C. § 8218. A "home heating supplier" is a person who sells or supplies home heating fuel (including No. 2 heating oil, kerosene, butane, and propane) to a residential customer for consumption in a residential building. 42 U.S.C. § 8211(20).

532203 / 127368

(1) Inform each residential customer each 2 years of statutorily specified energy conservation information (program announcement);

(2) Offer to perform certain project management requirements, including:

(a) An on-site inspection of a customer's home by a qualified energy auditor (program audit);

(b) Arranging to have suggested conservation measures installed; and

(c) Arranging for a lender to make a loan to finance the purchase and installation costs of conservation measures; and

(3) Provide customers, as part of project management, with lists of:

(a) Who sells or installs residential energy conservation measures in the area; and

(b) Lending institutions who offer loans for the purchase and installation of conservation measures.

NECPA specifically provides that the information (program announcement) duties prescribed terminate on January 1, 1985. See 42 U.S.C. §§ 8216(a), 8216(d) and 8218(a). However, NECPA contains no termination date for the project management requirements set forth in (2) and (3) above. See 42 U.S.C. §§ 8216(b) and 8218(a)(2). The issue is the legal status and duration of these project management requirements, as well as other aspects of the RCS program, in the absence of specific termination dates.

Energy has taken the position "that NECPA does not require the covered utilities to continue their RCS programs indefinitely in the future, but rather the duration of such programs is related to the 1985 terminal date provided explicitly in NECPA for the notice [program announcement] requirement * * *. Accordingly, such utilities may terminate their RCS programs within a reasonable time after the last offer of services is made on or about January 1, 1985 and they have completed their actions to fulfill service requests made as a result of such offers of services."

In our review of Energy's opinion in support of its position, we have been guided by the standards of review asserted and used by the courts. The courts have stated that the interpretation put on a statute by the agency charged with administering it is entitled to deference. Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792 (1965). However, while the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it is not conclusive. Marin v. United States, 356 U.S. 412, 78 S.Ct. 880 (1959). The persuasiveness of an administrative interpretation is dependent on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Federal Election Commission v. Democratic Senatorial Compaign Committee, 454 U.S. 27, 102 S.Ct. 38 (1981); Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161 (1944); Case & Co., Inc. v. Board of Trade of City of Chicago, 523 F.2d 355 (7th Cir. 1975). Moreover, whatever effect an administrative interpretation may have when the command of legislation is in some way ambiguous, when the congressional command is clear, it is simply beyond the power of the administrative agency to alter that command or to avoid its effects. Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975); Hometrust Life Insurance Co. v. U.S. Fidelity & Guaranty Co., 298 F.2d 379 (5th Cir. 1962).

Using these standards developed by the courts, we conclude in this instance that Energy's construction of the provisions of NECPA authorizing the RCS program is not "sufficiently reasonable" to be accepted by a reviewing court. See Federal Election Commission v. Democratic Senatorial Campaign Committee, supra. Our conclusion has several bases. First, Energy's position is premised on a fundamental error of statutory construction, which is controlling over all other arguments in Energy's legal memorandum, namely, that legislation is to be construed to be of limited duration unless there is evidence of a contrary legislative intent. In fact, the reverse is true. Substantive legislation (as contrasted with an appropriation act, see footnote 5) is construed as permanent unless there is specific language indicating a limited duration. Secondly, Energy attempts, through its interpretation of the RCS program's legislative history and the contemporaneous enactment of other legislation, to create a statutory ambiguity that doesn't exist. Thirdly, Energy's current position is not consistent with its earlier pronouncements. Accordingly, we find Energy's arguments to be unpersuasive. In addition, we conclude that, with the exception of the RCS program announcement duties which expired by the specific

terms of NECPA on January 1, 1985, the RCS program remains legally in effect until terminated by future legislation.

Presumption That Legislation Is Permanent

Energy's legal analysis seems to assume that Congress must affirmatively express its intention and purpose for permanence on each occasion when it enacts legislation without a termination date, else it will be considered temporary. For example, Energy states on page 8:

> "* * * it is highly improbable that Congress knowingly would have established a program of unlimited duration without a single comment to that effect."

No legal source is cited for this reasoning.

On the other hand, there is agreement among the standard legal authorities that it is a basic characteristic of our system of law that a statute, unless it explicitly provides to the contrary, continues in force indefinitely until duly altered or repealed by subsequent action of the lawmaking authority. 2 Sutherland on Statutes and Statutory Construction §§ 34.01 and 34.04 (Sands, 4th ed.); 73 Am. Jur. 2d, Statutes § 375; 82 C.J.S. Statutes § 316. "Any deviations from this rule are exceptional." 2 Sutherland on Statutes and Statutory Construction § 34.01, supra. In fact, it has been held that a court may not, even for the purpose of sustaining the validity of a statute as an exercise of the police power, read into a statute a limitation in duration that is neither expressed nor implied therein. 73 Am. Jur. 2d, Statutes § 376; Vanderbilt v. Brunton Piano Co., 111 N.J.L. 593, 169 A. 177, 89 A.L.R. 1080 (1932). Consequently, substantive legislation is presumed to be permanent, unless it provides to the contrary, and Congress need not on each occasion affirmatively express its intention and purpose that the

legislation be permanent[5]/. See The Reformer, 70 U.S. (3 Wall.) 617 (1865); N.A.A.C.P. v. Committee on Offenses, 201 Va. 890. 114 S.E.2d 721 (1960); Plaquemines Parish D.E. Com. v. Board of Supervisors, 231 La. 146, 90 So.2d 868 (1956); Vanderbilt v. Brunton Piano Co., supra.

In addition, the concept and frequency of sunset provisions in legislation is of recent development, and is not inconsistent with these longstanding authorities. Generally, provisions limiting the duration of a statute are explicitly set forth in a separate section. This focuses attention on the limitation and facilitates the amendment process if extension of the act is desired. 1A Sutherland on Statutes and Statutory Construction § 20.23.

The permanence of legislation must, of course, be understood in the context of the legislative process. A statute is permanent or in effect for the indefinite future only until subsequent legislative action repeals or modifies it. Such repeal or modification could potentially occur at any time.

---

5/ We acknowledge that a different standard applies to appropriation acts, which are generally enacted to fund agencies of the Government each fiscal year. Thus 31 U.S.C. § 1301(c) provides:

> "An appropriation in a regular, annual appropriation may be construed to be permanent or available continuously only if the appropriation--
>
> "(1) is for rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps; or
>
> "(2) expressly provides that it is available after the fiscal year covered by the law in which it appears."

Consequently, it has been the longstanding position of this Office that a provision contained in an appropriation act (as contrasted with a nonappropriating statute of substantive law) may not be construed as permanent legislation unless the language or the nature of the provision makes it clear that such was the intent of Congress. 62 Comp. Gen. 54 (1982); 36 Comp. Gen. 434 (1956); 10 Comp. Gen. 120 (1930); B-209583, January 18, 1983; B-208705, September 14, 1982.

Yet Energy in its legal memorandum consistently questions whether Congress intended to impose duties on covered utilities "in perpetuity."

Energy's concern for the "perpetual" nature of certain aspects of the RCS program, coupled with its reversal of the presumption in favor of the permanence of legislation, misdirected the focus of its analysis. Two excerpts from Energy's legal memorandum are illustrative:

> "* * * neither the legislative history of NECPA nor the statute itself explicitly specifies a termination date for this duty [on covered utilities to provide RCS services]. However, this silence may itself convey the intent of Congress in this matter because it is highly improbable that Congress knowingly would have established a program of unlimited duration without a single comment to that effect. The eternal character of such a program, had it been intended, would certainly have elicited vigorous comments from the States, utilities, and consumers in the hearings that preceded the passage of NECPA. Neither the committee reports nor the floor debates even hint at permanence of any duty imposed by section 215. (Page 8.)

> "* * * It seems very doubtful that Congress would have been content to rely on mere silence in NECPA and its legislative history to breach the harmony of the statutory scheme by extending one element of the RCS program forever beyond January 1, 1985, particularly when the program was anticipated to have accomplished its goals by then." (Page 11.)

We found this approach by Energy to be fundamentally in error. First, we don't agree that the statute is completely silent on the issue. Subsection 211(a) of NECPA, 42 U.S.C. § 8212(a), in describing the coverage of the RCS program, states, in part, "This part shall apply in any calendar year to a public utility * * *." (Emphasis added.) It then goes on to specify the sales volumes required before a public utility would be covered. Energy fails in its legal memorandum to acknowledge this provision, although it was cited prominently in the Congressional Research Service memorandum of September 26, 1983, addressing this same matter, which was provided to Energy.

Secondly, assuming the statute were silent, the absence of congressional discussion about the duration of the RCS program does not reflect a congressional intent that the program was to be temporary. Legislation is presumed to be permanent, unless Congress explicitly provides to the contrary. Consequently, Congress does not have to lay a foundation for permanence, either in the statute or the legislative history, each time it passes a bill.

Thirdly, Energy's reliance on Shurtleff v. United States, 189 U.S. 311 (1903), and United States v. American Trucking Ass'ns., 310 U.S. 534 (1940), is not helpful to its case. In both instances the court declined to infer major departures from longstanding public policies and practices from ambiguous statutory language in the absence of a clear indication of legislative intent to do so. In the former case, the court rejected attribution of life tenure on good behavior to a Federal official holding the statutory position of general appraiser of merchandise when the statute provided for removal for cause but provided no explicit term of office. With the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by a life tenure since the foundation of the Government. Thus, the issue was not the permanence of the statutory provision but the interpretation of its meaning on the term of office issue.

In the second case, the court declined to construe general language of the Motor Carrier Act to grant the Interstate Commerce Commission broad regulatory responsibilities over carrier employees beyond "the customary power to secure safety in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual powers over all employees." 310 U.S. at 546 and 547. Again, the permanence of the statutory provision was not at issue.

If there were a lesson from these two cases for application to the present issues, it would be that a court will not depart from longstanding public policies and practices without clear evidence of legislative intent that it do so. If there is a statutory ambiguity concerning the duration of the RCS program and an absence of explicit legislative discussion and intent on the point, the court would follow the longstanding presumption in American law that statutes are enacted as permanent legislation.

We therefore believe Energy's position is premised on a fundamental error of statutory construction, which not only led to a misdirection in analysis, but critically affected its conclusion on the duration of the RCS program.

## Legislative History

Energy attempts, through its interpretation of the RCS program's legislative history and the contemporaneous enactment of other legislation, to develop a circumstantial case supporting a termination of the remaining aspects of the RCS program within a reasonable time after the last offer of services is made on or about January 1, 1985, the statutory termination date for public utility program announcement responsibilities.

Energy asserts that it was the goal of the RCS program to have 90 percent of American homes and businesses insulated by 1985. Since the RCS program was designed to have achieved this purpose by 1985, to have extended the RCS program beyond that point would appear to be illogical, according to Energy.

The RCS provisions of NECPA originated as part of the Carter Administration's National Energy Plan. The actual substance of what was to become section 215 was contained in the House's National Energy Act bill (H.R. 6831, 95th Cong., 1st Sess. (1977)). H.R. 6831 set out six national energy goals to be achieved by 1985. One of these goals was the insulation of 90 percent of all American homes and all new buildings, including residences and commercial buildings, schools and hospitals. See, H.R. Rep. No. 496, Part 4, 95th Cong., 1st Sess. 7 (1977).

However, a review of the legislative history reveals no indication that the time frames established for these goals were intended to set the duration of the proposed energy programs. Rather, it appears that the time specific objectives were designed "to allow progress toward these goals to be monitored and assessed." Id., at 15. Moreover, the Committee recognized that the goals were ambitious and probably could not be achieved by the provisions of the Act alone. The Committee went on to state: "Nevertheless, the goals set useful targets for additional voluntary action on the part of individual Americans, business firms, and other entities, and State and local governments; and for additional actions by the Federal Government." Id.

Therefore, it is not surprising that although the committee report states one of the goals of the RCS program in a time delineated manner, no explicit termination date generally limiting the duration of the RCS program was incorporated into the statute itself. Thus the goal of insulating 90 percent of American homes by 1985 was an objective of the program but not a statutory requirement. A non-statutory time specific goal is not inconsistent with a permanent program statute. Congress may at any time amend or repeal the legislation if the

objective is met or altered. In any event, the residential energy conservation measures encouraged by the RCS program are broader than just insulation.6/.

---

6/ Subsection 210(11) of NECPA, 42 U.S.C. § 8211(11), defines "residential energy conservation measure" as including:

> "(A) caulking and weatherstripping of doors and windows;
>
> "(B) furnace efficiency modifications including--
>
> "(i) replacement burners, furnaces or boilers or any combination thereof which, as determined by the Secretary, substantially increases the energy efficiency of the heating system,
>
> "(ii) devices for modifying flue openings which will increase the energy efficiency of the heating system, and
>
> "(iii) electrical or mechanical furnace ignition systems which replace standing gas pilot lights;
>
> "(C) clock thermostats;
>
> "(D) ceiling, attic, wall, and floor insulation;
>
> "(E) water heater insulation;
>
> "(F) storm windows and doors, multiglazed windows and doors, heat-absorbing or heat-reflective glazed window and door materials;
>
> "(G) devices associated with load management techniques;
>
> "(H) devices to utilize solar energy or windpower for any residential energy conservation purpose, including heating of water, space heating or cooling; and
>
> "(I) such other measures as the Secretary by rule identifies for purposes of this part."

Therefore, we do not believe that Energy has established that the objective of a 90 percent success rate in insulating homes and buildings by 1985 is necessarily inconsistent with a permanent program statute.

Energy also argues that NECPA should not be considered in isolation, but in the context of other legislation contemporaneously enacted and sharing a common purpose, particularly the Energy Tax Act of 1978, Pub. L. No. 95-618, approved November 9, 1978, 92 Stat. 3174. According to Energy, the two acts should be read together since the "two measures were introduced in Congress simultaneously, share a common purpose, are linked by specific legislative history, and were both passed on the same day." Therefore, Energy argues, the fact that the tax credits for residential energy conservation improvements are available only for expenditures made through December 31, 1985, 26 U.S.C. § 44C(f), suggests that the RCS program was also intended to be of limited duration. More specifically, Energy contends that the termination of the energy tax credits as of December 31, 1985, is significant since "[t]his period allows sufficient time for a utility customer to install and to receive a tax credit for improvements suggested as a result of an RCS audit conducted as late as January 1, 1985, or a reasonable time thereafter."

We agree that the legislative history of NECPA and the Energy Tax Act of 1978 establishes a close relationship between the RCS program and the energy tax credits. As Energy notes, the energy tax credits are available for the same measures encouraged to be installed under the RCS program. See, 26 U.S.C. § 44C and 42 U.S.C. § 8211(11). We also agree that the tax credits were clearly intended as an incentive to occupants of residential buildings to have energy conservation measures installed. See, H.R. Rep. No. 496, Part 4, supra, at 21 and 23.

However, the tax credits and the RCS program were not co-extensive. The RCS program is available to any residential customer of a utility who owns or occupies a residential building. The energy tax credits, on the other hand, are available only to taxpayers for a property they use as a principal residence. Moreover, while the tax credits were intended to be an impetus to encourage participation in the RCS program, it was expected that the savings in energy costs from the installation of energy conservation measures would pay for their installation. Id., at 23.

In addition, neither the legislative history of NECPA nor of the Energy Tax Act suggests that the termination of the

energy tax credits was linked specifically to the duration of the RCS program. In fact, the legislative history of the energy tax credits argues against this interpretation. When the energy tax credits were first proposed, they were to be available only for expenditures made before December 31, 1982, not 1985. Title II of H.R. 6831, 95th Cong., 1st Sess. (1977). However, the termination date for the program announcement requirement then provided for in the RCS utility program was January 1, 1985. Title I of H.R. 6831, supra. Thus as first introduced the RCS program announcement provisions as well as the other RCS utility requirements clearly were intended to continue beyond the availability of the energy tax credits.

We note that two separate committees were involved in the consideration of titles I and II of H.R. 6831, the House Committee on Interstate and Foreign Commerce and the House Committee on Ways and Means, respectively. When the respective titles were reported from their respective committees, these provisions of concern here remained unchanged. However, when the House's Ad Hoc Committee on Energy considered all of the responses to H.R. 6831 from the involved permanent legislative committees, a consolidated bill was proposed (H.R. 8444, 95th Cong., 1st Sess. (1977)). Under this bill the energy tax credits were extended until December 31, 1984, and the only RCS termination provision, applicable explicitly only to the program announcement requirements, was not amended but remained unchanged at January 1, 1985. The House Ad Hoc Committee on Energy did not mention the RCS program as its reason for extending the energy tax credits. Rather, it was because of concern over the ability of the insulating material industry to meet the anticipated increased demand.7/ Nor did the Senate Committee on Finance that extended the energy tax

---

7/ "The Ways and Means Committee bill provides that both the residential insulation credit and the residential solar and wind credits are to apply from April 20, 1977, through December 31, 1982. The Ad Hoc Committee amendment makes these credits available for 2 additional years, through December 31, 1984. (footnote continued on the next page).

credits through 1985 suggest that the reason was to make the credits correspond with the RCS program. Again the stated purpose for the extension was because of concern over potential supply problems.8/ Thus we found no evidence of congressional intent that the termination of the RCS program was to be related to the expiration of the energy tax credit.

---

7/ "Since the firms that produce insulating materials are presently operating near their optimal plant capacity, the Ad Hoc Committee is concerned that taxpayers, in their desire to use the credit before the expiration date, would increase demand above the industry's ability to produce insulation. The additional 2 years should moderate demand sufficiently to enable producers to fill each year's orders.

"The extension of the solar and wind credit is designed to further encourage the installation of this newly commercialized technology for residential use." H.R. Rep. No. 543, Vol. 1, 95th Cong., 1st Sess. 51 (1977).

8/ "The committee is mindful of potential supply problems that the fiberglass insulation industry might encounter. Thus, while the credit is provided for a limited number of years, that period of time was made sufficient in length (through 1985) so that the demand generated for this insulation by the credit would not be sharply increased in any one year." S. Rep. No. 529, 95th Cong., 1st Sess. 30 (1977).

We recognize that the public laws composing the National Energy Act program were to be complementary so as to compose a comprehensive program, so we are not surprised that the energy tax credits complement the RCS public utility program. On the contrary, we would be concerned if they were in some way inconsistent. However, it does not necessarily follow that complementary programs must have the same or related expiration dates. A time-limited energy tax credit is not at odds with a permanent RCS program statute. Since we find Energy's reference to the Energy Tax Act for conclusions on the duration of the RCS program in the NECPA not to be supported by the legislative history, the argument is unpersuasive.

Energy also relies on the legislative history of the Energy Security Act, Pub. L. No. 96-294, approved June 30, 1980, 94 Stat. 611. Energy cites a portion of a sentence from the report of the Senate Committee on Energy and Natural Resources that states, in part:

> "* * * section 215 of NECPA requires the utility to offer to perform an energy audit every two years until January 1, 1985 * * *." S. Rep. No. 387, 96th Cong., 1st Sess. 208 (1979).

Energy quotes this passage as evidence that the Senate Committee considered the duty to offer to perform an energy audit under section 215 as expiring on January 1, 1985.

However, we note initially that the proposed amendment to NECPA that this passage was trying to explain was never enacted. Thus this passage, like other more recent legislative initiatives on the RCS program, is post-enactment legislative history that is generally given little weight in interpreting a statute. In addition, the phrase relied on by Energy is in obvious conflict with the statute. The offer required by subsection 215(b) of NECPA contains no termination date. Moreover, a utility is not required to perform an energy audit every 2 years. The statute requires the utility to make only one inspection of a residence.[9/] 42 U.S.C. § 8216(b). What was required by the statute every 2 years until January 1, 1985, was for the utilities "to inform" its residential customers of certain energy conservation matters,

---

9/ A subsequent owner may request another audit, however. 42 U.S.C. § 8216(d).

including the availability of the energy audit. 42 U.S.C. § 8216(a). A phrase in a committee report that is prepared 2 years after the enactment, and that is clearly at odds with the statute, cannot be persuasively relied on.

In partial summary, therefore, we conclude that, in its legislative history discussion, Energy has not provided any concrete links in the statute, its legislative history or that of contemporaneously enacted legislation between Energy's interpretation and the absence of a termination date(s) in NECPA for the majority of the RCS program.

Consistency of Agency Interpretation

Energy states that since the inception of the RCS program, it has consistently taken the position that the RCS program was intended to terminate during 1985. As evidence of this, Energy points to the preamble to the 1979 proposed rules for the RCS program, which contain a 5-year economic analysis of the program (FYs 1979-85). See 44 F.R. 16546 (March 19, 1979).

However, while the analysis was based on a 5-year timeframe, this alone does not indicate that Energy considered the RCS program for utilities to be time limited. As part of its proposed rules, Energy also prepared a draft Regulatory Analysis for comment. See 44 F.R. 16575 (March 19, 1979). This Regulatory Analysis was finalized for publication in conjunction with Energy's final rules for the RCS program. Although not published in full as a part of the preamble to the final rule, that preamble noted that copies of the Regulatory Analysis were available at the Department of Energy. See 44 F.R. 64647 and 64648 (November 7, 1979). Subpart V(E) of the "Residential Conservation Service Program: Regulatory Analysis," DOE/CS-00104/1 (U.S. Dept. of Energy, October 1979), entitled "Sunset Provisions," states:

> "Although the economic and energy analyses assumed a five-year program duration, the rules analyzed do not contain a completion date for the RCS Program. The Program is designed to help achieve the National Energy Plan goal calling for the insulation of 90 percent of American homes by 1985. In keeping with this goal--and NECPA--the RCS Program rules do not require any promotional activities by covered utilities or participating home heating suppliers after December 31, 1984. State reporting requirements terminate on July 1, 1986.

There are no other provisions for terminating the RCS Program in the rules. Correspondingly, there are no provisions for terminating the Program in NECPA.

"Activities by the states, by energy and measures suppliers, and by installers and lenders will continue beyond December 31, 1984 until the last installation requested under the Program has been completed. In the absence of a Program completion date, such requests for installations under the Program could continue indefinitely. Participating home heating suppliers may withdraw voluntarily at any time. States may discontinue record keeping in 1986. Covered utilities, however, could be liable for operation of the Program for many years later.

"It is reasonable to expect that states will want to terminate their Plans, at the latest, with the termination of the reporting requirements. However, for each post-1984 installation of a vent damper, electric ignition system or wind energy system under the Program, a post-installation inspection is required. Additionally, a customer requesting an installation of such measures under the Program will expect that the installer has been properly certified through a state-approved qualification procedure. The availability of this and other benefits implies continuation of the state Plan for as long as covered utilities have to operate their programs. Concurrently the federal enforcement provisions will have to remain in effect.

"DOE is aware that additional congressional action may be required to resolve these ambiguities." (Emphasis added.)

Consequently, it is evident that Energy was well aware in 1979 that the majority of the aspects of the RCS program had no termination date, and developed its regulations accordingly, with a recognition that the duration of these elements of the RCS program, including the duties placed upon covered public utilities, could continue indefinitely. Energy in 1979, when it specifically addressed the issue, declared an agency position contrary to Energy's current position. Use of the 5-year RCS program duration for the economic and energy

analysis was apparently a matter of convenience. Accordingly, there is an obvious inconsistency in Energy's positions. If anything, Energy's contemporaneous construction of NECPA in 1979 would be entitled to the greater weight. See Udall v. Tallman, supra.

GAO's View

As indicated above, the RCS provisions of NECPA are not completely silent on the duration of the program. Subsection 211(a) of NECPA, 42 U.S.C. § 8212(a), in describing the coverage of the RCS program, states, in part:

> "This part shall apply in any calendar year to a public utility * * *." (Emphasis added.)

In addition, assuming the statute were silent on the point, the absence of congressional debate and explicit intent in the pre-enactment legislative history as to the duration of the RCS program does not reflect a congressional intent that the program was to be temporary. On the contrary, in that situation, the legal system presumes permanence.

Energy itself acknowledges the clarity of the statutory language on termination by stating:

> "Reading all of these provisions together, it is clear that the covered utilities are under no obligation to inform customers of the availability of any RCS service after January 1, 1985, * * *. It is also clear that the statute does not expressly provide an expiration date for utilities' obligations under subsection 215(b) to offer (and implicitly to provide) the specified services * * *." (Page 3.)

Accordingly, the principle of expressio unius est exclusio alterius is applicable. This principle of statutory construction provides that where the manner and operation of a statute is designated, there is an inference that all omissions should be understood as exclusions. Duke v. Univ. of Texas at El Paso, 663 F.2d 522 (5th Cir. 1981), cert. denied ___ U.S. __, 105 S. Ct. 386 (1984); 55 Comp. Gen. 1077 (1976). It expresses the learning of common experience, one should not assume that the omissions were inadvertent but rather they were purposeful. Consequently, here when Congress specified in subsections 215(a), 215(d) and 217(a)(1) of NECPA, 42 U.S.C. §§ 8216(a), 8216(d) and 8218(a)(1), a termination

date of January 1, 1985, for the RCS program announcement requirements and failed to specify any termination date(s) for the remaining portions of the program, an inference arises from these omissions that Congress intended these portions of the program to be excluded from a definite termination date and to remain in effect indefinitely until Congress repealed or modified them.

Moreover, the statute does not expressly or by necessary implication link the expiration of the program with the one and only termination date explicitly provided, which by its terms is only applicable to the program announcement requirement. Nor did we find anything in the legislative history that mandates or directly suggests a linkage of the two. In addition, they are not so inherently interdependent that continuation of the remainder of the RCS program after the expiration of the program announcement requirement would be impracticable.[10]/ The most that can be said is that the

---

[10]/ The program announcement requirements are contained in subsection 215(a) of NECPA, 42 U.S.C. § 8216(a), which provides:

> "Each utility program shall include procedures designed to inform, no later than January 1, 1980, or the date six months after the approval of the applicable plan * * *, if later, and each two years thereafter before January 1, 1985, each of its residential customers who owns or occupies a residential building, of--
>
> "(1) the suggested measures for the category of buildings which includes such residential building;
>
> "(2) the savings in energy costs that are likely to result from installation of the suggested measures in typical residential buildings in such category; (footnote continued on the next page)

remaining RCS program functions may be somewhat less effective without the periodic program announcement requirements. However, even this consequence is mitigated by the fact that customers have already been made aware of energy conservation measures through past program announcements.

Nor do we believe, as Energy asserts, that the reason the statute is silent on the expiration date is because of the "impracticability" of fixing a date certain for all covered utilities to complete their duties under section 215. We find no support for Energy's position in the legislative history. Moreover, if a reasonable termination point can be implied, it could have been explicitly provided for if Congress so chose. Further, Congress could have at any time since the inception of the program amended the statute to provide for a time limitation, and it chose not to do so.

---

10/ "(3) the availability of the arrangements described in * * * [the project management requirements]; and

"(4) suggestions of energy conservation techniques, including suggestions developed by the Secretary, such as adjustments in energy use patterns and modifications of household activities which can be employed by the residential customer to save energy and which do not require the installation of energy conservation measures (including the savings in energy costs that are likely to result from the adoption of such suggestions)."

We therefore conclude that, with the exception of the RCS program announcement duties which expired by the specific terms of NECPA on January 1, 1985, the RCS program remains legally in effect until terminated by future legislation.

As agreed with your staff, this opinion will not be made publicly available for 30 days or until its prior release by your Office.

Sincerely yours,

for Comptroller General
of the United States

**APPENDIX**

The pertinent parts of section 215 of the National Energy Conservation Policy Act, as amended, 42 U.S.C. § 8216, are as follows:

> "(a) Each utility program shall include procedures designed to inform, no later than January 1, 1980, or the date six months after the approval of the applicable plan under section 212, if later, and each two years thereafter before January 1, 1985, each of its residential customers who owns or occupies a residential building, of--
>
> "(1) the suggested measures for the category of buildings which includes such residential building;
>
> "(2) the savings in energy costs that are likely to result from installation of the suggested measures in typical residential buildings in such category;
>
> "(3) the availability of the arrangements described in subsection (b) of this section and the lists referred to in section 213(a)(2) and (3); and
>
> "(4) suggestions of energy conservation techniques, including suggestions developed by the Secretary, such as adjustments in energy use patterns and modifications of household activities which can be employed by the residential customer to save energy and which do not require the installation of energy conservation measures (including the savings in energy costs that are likely to result from the adoption of such suggestions).
>
> "(b) Each utility program shall include--
>
> "(1) procedures whereby the public utility, no later than January 1, 1980, or

the date six months after the approval of the applicable plan under section 212, if later, will, for each residential building, offer to--

"(A) inspect the residential building (either directly or through one or more inspectors under contract) to determine and inform the residential customer of the estimated cost of purchasing and installing the suggested measures and the savings in energy costs that are likely to result from the installation of such measures (a report of which inspection shall be kept on file for not less than 5 years which shall be available to any subsequent owner without charge), except that a utility shall be required to make only one inspection of a residence unless a new owner requests a subsequent inspection;

"(B) arrange to have the suggested measures installed (except for furnace efficiency modifications with respect to which the inspection prohibition of section 213(a)(2)(B) applies, unless the customer requests in writing arrangements for such modifications in writing); and

"(C) arrange for a lender to make a loan to such residential customer to finance the purchase and installation costs of suggested measures; and

"(2) procedures whereby the public utility provides to each of its residential customers the lists as described in section 213(a)(2) and (3).

* * * * *

"(d) In the case of any person who becomes a residential customer of a utility

carrying out a utility program under this section afer January 1, 1980 (or the date six months after approval of the applicable plan, if later), and before January 1, 1985, not later than 60 days after such person becomes a residential customer of such utility, such utility shall inform such person of the items listed in subsection (a), the offer required under subsection (b)(1)(A), and shall offer such person the opportunity to enter into arrangements referred to in subparagraphs (B) and (C) of subsection (b)(1)."