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STATE REGULATION OF POWER PLANT SITING

> Americans do not seem to be willing to let the utilities continue devouring these ever increasing quantities of water, air and land. And yet they also are not willing to contemplate doing without all the electricity they want.[1]

This conflict between the demands for environmental protection and available energy[2] is most acute in the development of power facility sites. Primarily because of the high visibility of the electric power industry's facilities and environmental impact, the siting of power plants has become a controversial issue.[3] Having recognized that the electric power industry is a major polluter, the public will no longer permit additional energy demands to be met without prior consideration of the harmful effects of such resource utilization. In the recent past, however, this new-found environmental concern has often ignored the nation's accelerating needs for additional energy.[4] Recent examples of power shortages caused by the delays inherent in private environmental litigation also indicate the inappropriateness of focusing only on environmental considerations. Fortunately, the incompatibility between the increasing need for electric power and the need to protect the environment is not absolute. Accommodations can be made which coordinate these objectives.

Private litigation based on nuisance law has failed to provide adequate environmental protection.[5] A plaintiff seeking such relief against environmental abuse must bear a very substantial and difficult burden of proof.[6] Furthermore, the case-by-case nature of private litigation pre-

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1. Main, *A Peak Load of Trouble for the Utilities,* FORTUNE, Nov., 1969, at 205.

2. Between now and 2001, the U.S. will consume more energy than it has before in its entire history. And by 2001, the annual demand is expected to double, while the annual worldwide demand is to triple. Starr, *Energy and Power,* SCIENTIFIC AMERICAN, Sept., 1971, at 37.

3. *Hearings on Powerplant Siting & Environmental Protection Before the Subcomm. on Communications & Power of the House Comm. on Interstate and Foreign Commerce,* 92nd Cong., 1st Sess., at 237 (1971) (remarks of Sec'y of Interior Rogers C.B. Morton) [hereinafter cited as *1971 Hearings*].

4. Warning signals are readily discernible. For example, in New York City, for four days in the summer of 1969, Consolidated Edison asked the public to conserve electricity. Low generating resources had resulted from a delay in completion of a new power project; the delay had been caused by a lawsuit brought by environmentalists. Luce, *Power for Tomorrow: The Siting Dilemma,* 25 RECORD OF N.Y.C.B.A. 13 (1970) [hereinafter cited as Luce].

5. H. Green, The Role of Government in Environmental Conflict, at 2, Sept. 11-12, 1969 (paper delivered before Conference on Law and the Environment, Warrenton, Va.) [hereinafter cited as Green].

6. The plaintiff must first prove that the defendant has engaged in activities which

vents the development of overall policies. Finally, the low rate of plaintiff success, along with the expense involved in such litigation, deters most members of the public from initiating private action.[7]

The failure of private litigation, reinforced by the results of comprehensive studies undertaken to ascertain how these conflicts can be met, indicates that the state legislatures must take the initiative in environmental defense.[8] This necessity for state action is the cornerstone of recently proposed federal legislation concerning power plant siting.[9] The legislation would provide an overall framework under which state governments could form regulatory certifying agencies. Such proposals reflect a belief that states are best suited to decide where power plants should be sited and emphasize the affirmative role that state governments must assume.

The appropriateness of state control is reinforced by the fact that states have the authority and ability to take affirmative steps in delineating standards and implementing a policy of public protection. The ability of the state to act for the protection of the health, safety and welfare of its citizens has traditionally been acknowledged as within the state's police power.[10] State governments concentrate on a smaller group of consti-

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have resulted or will result in irreparable injury to him. Once legally cognizable injury is shown, the plaintiff must still establish a causal relationship between the injury and the defendant's act. Moreover, even if injury and a causal link can be demonstrated, more may be necessary, because our legal system hesitates to stultify socially useful activities unless their adverse consequences on the public clearly outweigh their social utility. *Id.* at 1-2.

7. Moreover, the members of the public who appeal to the court for protection generally do not represent important economic interests, and the alleged injuries on which their claims rest are usually vague and speculative. Those who disturb the environment (*e.g.*, power companies), however, tend to have immediate and obvious economic interests and are engaged in socially useful endeavors. *Id.* at 7. *See* Kaufman, *Power for the People—and by the People: Utilities, the Environment and the Public Interest,* 46 N.Y.U.L. REV. 867 (1971).

8. Dr. Gordon J.F. MacDonald, testifying at hearings on proposed national legislation on power plant siting, commented on the need for state action in this area. He noted that states have the necessary constitutional authority in regard to land use decisions; they are responsible for enforcing environmental quality standards for air and water; they have various regulatory powers over public utilities. Moreover, the state governments are close enough to those affected to be responsive, yet removed enough to insure that local demands will not overrule broader public interests. *1971 Hearings, supra* note 3, at 299.

Unfortunately, however, with few exceptions, the states have not yet exercised the necessary leadership. Efforts to appease a diverse electorate result in compromise rather than in an integrated plan for action. Since the utilities are well financed and constitute an effective lobby, legislators and executives tend to pay heed to their arguments rather than to those ill-defined and speculative allegations presented by private individuals or groups who argue for environmental legislation. Green, *supra* note 5, at 7.

9. H.R. 5277, 92d Cong., 1st Sess. (1971).

10. *See* Sligh v. Kirkwood, 237 U.S. 52 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). It is worth noting that in enacting 1967 and 1970 federal air pollution control

tuents. Presumably this makes them more sensitive to public needs and, therefore, better able to formulate successful environmental policies.

Unfortunately, most current state regulation of power plant siting has proved ineffective. While recognizing that the licensing procedure is the key to effective regulation, most state legislation is deficient because it attempts to utilize existing agencies without providing for their proper interrelation. The states have typically failed to recognize the one basic requirement for effective licensing control—licensing must be administered and coordinated by one central certifying body, well in advance of any construction. Continued state reliance on the separate, uncoordinated licensing procedures of existing agencies, whereby separate licenses must be obtained for specific phases of development, can only allow fragmented review. Such a system cannot effectively assess the overall problems of plant siting. Thus, agencies often approve licenses or permits without understanding the dimensions of the problems before them and without giving regard to the total environmental threat presented by plant installation.[11] Attempts at regulation in New York and Connecticut reflect the deficiencies common in many states.

New York and Connecticut

Having recognized that a basic method of controlling power plant siting is the requirement of state approval before the start of plant construction, New York has provided that no gas or electric utility may begin construction of a power plant without first obtaining approval from the Public Service Commission.[12] That approval is to be based upon public necessity and convenience, as well as economic and engineering feasibility. Unfortunately, consideration of environmental factors has been precluded by legislative construction of the "public necessity and convenience" clause as only applicable in determining which of two or more utilities should be permitted to operate in a given area.[13] Furthermore, once a certificate of approval has been issued, a utility company may build new plants in the certified area without further approval from the

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legislation, for example, Congress indicated its desire not to displace this state power but, wherever possible, to leave the primary responsibility for establishing and enforcing standards in the states. *See* 42 U.S.C. §§ 1857c-2(a), -5, -6(c), -7(d), -9(b), d-1 (1970).

11. *1971 Hearings, supra* note 3, at 302. Industry is also concerned about the multiplicity of regulatory bodies. Power companies realize that indecision by any one of the agencies can lead to major construction and operating delays.

12. N.Y. Pub. Serv. Law § 68 (McKinney 1955).

13. New England River Basins Comm'n, Laws and Procedures of Power Plant Siting in New England 8 (1970) [hereinafter cited as Power Plant Siting].

Commission.[14] While a legislative scheme requiring prior approval theoretically may provide an affective means of regulation, a restrictive construction such as New York's renders this regulatory opportunity almost meaningless.

Regulation of financing arrangements is an additional method by which control over power plant installation can be asserted. Because of the enormous expense involved in construction, a power company is generally permitted to issue stock or borrow money to finance its plans. In New York such financing arrangements must first be approved by the Public Utility Commission. The power to refuse such approval would seem to provide the Commission with a means of achieving sound environmental control in power plant siting. However, where the Commission controls only long-term financing, as in New York, this power can easily be circumvented. Since the use of short-term financing need not be approved by the Commission, utilities can often complete construction, present the Commission with a *fait accompli* and then seek permission to issue stocks or bonds in order to repay the short-term loans.[15] Such a request can hardly be refused. In this manner, the state can be deprived of another mode of controlling the development of plant sites.[16]

Plant siting can also be controlled by land use regulation. In many states, however, the initial siting decision rests with local zoning authorities, thereby precluding the state from passing upon the merits of the site location. Former Connecticut law limited the state Public Utilities Commission to appellate review of initial siting decisions.[17] Consequently, if the land was not zoned or if there was no appeal from the zoning board's initial decision, the Commission was precluded from participation in plant siting determinations. Such local control over plant installation

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14. *Id.*

15. *Id.* at 10.

16. By enacting Pub. Act No. 575 [CONN. GEN. STAT. ANN., Supp. No. 4 (1971)], Connecticut has sought to prevent utilities from circumventing regulation by this means. Section 5(a) states:

> No person shall acquire real property in contemplation of, . . . commence the preparation of the site for, or commence the construction or supplying of a facility . . . that may . . . have a substantial adverse environmental effect . . . without having first obtained a certificate of environmental compatability and public need. . . .

17. CONN. GEN. STAT. ANN. § 16-235 (Supp. 1971). The Connecticut approach discussed in this section was that in effect before passage of the Public Utility Environmental Standards Act, which became effective, for the most part, on July 1, 1971. Pub. Act No. 575 [CONN. GEN. STAT. ANN., Supp. No. 4 (1971)]. The new legislation has corrected many of the deficiencies present under the old plan, but discussion of the latter is, nevertheless, appropriate because the problems faced by Connecticut in developing a good system are fairly typical, so that other states might well profit from Connecticut's experience.

prevents both the formulation of long-range planning guidelines for power expansion and the sophisticated assessment of a plant's environmental impact in a specific area. Realizing that municipal zoning boards generally lack the expertise, knowledge and desire required for sound development of plant siting, Connecticut has since established an independent agency capable of making informed site certification decisions.[18]

A state can also effectively control power plant siting by the imposition of water quality control standards as a part of its licensing procedure.[19] Connecticut has established a special Water Resources Commission[20] which must issue a permit before refuse can be discharged into state waters. If the Commission finds that a proposed discharge would pollute the waters, the permit will be denied until plans for effective treatment are submitted.[21] The Commission is also empowered to undertake periodic inspections of existing plant operations. If a substantial change in the manner, nature or volume of the discharge adversely affects water quality, the Commission can revoke the permit until the offender complies with environmental standards.[22] A similar Water Resources Commission has been established in New York.[23] However, Connecticut and New York only require that a permit be obtained prior to actual discharge.[24] Consequently, utilities can construct the plants prior to applica-

18. Pub. Act No. 575, § 4 [CONN. GEN. STAT. ANN., Supp. No. 4 (1971)] creates the Power Facility Evaluation Council. Section 12 specifically provides that local government units cannot intrude on the jurisdiction of this agency or on that of the state Public Utilities Commission.

19. Thermal power plants are necessarily located near large quantities of water, because plant designs frequently call for the construction of cooling water intakes or outfalls in public waters. Power companies may even need to build support structures in waters for overhead transmission lines traversing the water body. Naturally, a significant effect on siting decision can be achieved by public control of this construction. POWER PLANT SITING, *supra* note 13, at 23. For a detailed discussion of the environmental problems arising from thermal power facilities, see Comment, *Thermal Electric Power and Water Pollution: A Siting Approach*, 46 IND. L.J. 61 (1970).

20. CONN. GEN. STAT. ANN. § 25-54(a)-(c) (Supp. 1971).

21. CONN. GEN. STAT. ANN. § 25-54 i (c) (Supp. 1971).

22. CONN. GEN. STAT. ANN. § 25-54 j (Supp. 1971). The Commission also has power and discretion to advise and consult with governmental agencies of other states and with affected groups and industries within Connecticut in furtherance of the Act. CONN. GEN. STAT. ANN. ch. 47a, § 25-54c (c) (Supp. 1971). The recently enacted Public Utility Environmental Standards Act, Pub. Act No. 575 [CONN. GEN. STAT. ANN., Supp. No. 4 (1971)], does not seem to neutralize any of the powers of the Commission. The Commission's expertise could now be used at an earlier stage in the license proceeding (prior to construction) within the framework laid down by the new legislation. However, the extent of participation is still unclear.

23. N.Y. PUB. HEALTH LAW § 1210 (McKinney 1971).

24. A 1969 amendment to the New York law requires that a permit for thermal discharge be obtained before construction begins. However, the enactment concerns only nuclear power plants. N.Y. PUB. HEALTH LAW § 1140 (McKinney 1971).

tion. Again, the Board will be hesitant to refuse a license to an applicant whose plant is financed, completed and ready for operation.

One final way to control the location of power plants burning coal and oil is by air pollution regulations. This method has been utilized in New York and Connecticut, where Air Pollution Boards are authorized to promulgate appropriate emission standards.[25] Nevertheless, there is no requirement in either state that a permit be obtained prior to construction. In New York a producer can design a plant which in his own judgment (not necessarily that of an objective regulatory agency), complies with the standards recommended by the Air Pollution Board,[26] while in Connecticut a permit must only be obtained before any new emissions.[27]

It is apparent that these attempts at regulation suffer from a common defect: isolated aspects of the siting problem are delegated to various agencies without providing a statutory framework for their interrelation. These schemes prevent long-range planning and overall policy making. Furthermore, the existence of various decision making bodies results in unwarranted delay because each individual decision is subject to challenge. Finally, such regulation is simply ineffective, for numerous loopholes allow construction to begin before the utility need apply for approval.

State legislatures possess inadequate scientific knowledge and technological sophistication to make significant judgments on pollution control.[28] Therefore, state regulation of power plant siting must be delegated to administrative agencies better able to understand and give expert attention to plant siting problems. In this vein, it has been suggested that state legislation of power plant siting must contain three broad provisions. First, it must provide for both long-range planning and public availability of planning data.[29] Second, such legislation must require early indentification of power plant sites and public hearings to discuss their environmental suitability.[30] Third, and most important, the ability to coordinate the engineering, economic and environmental concerns involved in the final licensing of power projects must be combined in one state agency.[31]

Basically, a state must require licensing, administered and coordinated by one central certifying body, before construction begins on power plant facilities and transmission lines. This agency, after considering all

25. N.Y. PUB. HEALTH LAW § 1264 (McKinney 1971); CONN. GEN. STAT. ANN. § 19-506 (1969).
26. POWER PLANT SITING, *supra* note 13, at 32.
27. CONN. GEN. STAT. ANN. § 19-508d (1969).
28. 1971 HEARINGS, *supra* note 3, at 302.
29. *Id.*
30. *Id.*
31. Luce, *supra* note 4, at 23.

environmentally related facts and appropriate advisory recommendations, would grant or deny the construction license. Thus, only one decision would be reviewable—the grant or denial of the license.[32] This procedure would permit questions of energy needs, land degradation, air and water pollution and other environmental problems to be fully discussed and resolved prior to the time when the energy needs of the community become so acute that immediate action is required regardless of its environmental impact.

Agencies dealing with the problems of power plant siting are faced with social, economic, scientific and technological questions. Since power plant installations affect the total environment, action to control one type of pollution may influence another. Therefore, compliance with one agency's standards may result in violation of those of another agency. Numerous uncoordinated license proceedings, presided over by several independent and autonomous agencies, prohibit a state from dealing adequately with the serious ecological problems inherent in power plant siting.

Effective long-range planning of power needs and facilities requires expanded research and development efforts.[33] One agency alone is incapable of deciding these multidimensional questions. A state air pollution control board, for example, cannot comprehend the total environmental threat posed by a new power plant. Nevertheless, this board is still the most qualified agency to deal with the threat of environmental abuse posed by air emissions. Having several state agencies involved in the licensing process thus becomes imperative.

To assure successful planning, there must be cooperation and interrelation between the various agencies involved in environmental control, so that they can share their knowledge with each other. Agency guidelines and functions must be clearly defined and coordinated to insure

32. New York's procedure for determining all siting questions involving major utility transmission facilities protects against excessive judicial interference. (NEW YORK PUB. SERV. LAW §§ 120-30, McKinney Supp. 1971). Recognizing the grave consequences of delay caused by litigation, the procedure is designed to be in the nature of an in rem proceeding. All interests are given an opportunity to litigate their rights with respect to all aspects of the project in a single proceeding before the Appellate Division of the Supreme Court. *See* Stone, *Power Siting: A Challenge to the Legal Process,* 36 ALBANY L. REV. 1 (1971). By providing for initial review at a level above the trial court, New York seems to recognize that actions involving power facilities rarely terminate at the trial court. *Id.* at 12. Nevertheless, the statute applies only to transmission facility siting. The location of power plants in New York, as in other states, continues to be a process in which proposed construction is frequently held in abeyance indefinitely as a result of legal action.

33. Seder, *Regulatory Activism—The Aftermath of Scenic Hudson,* 1969 ABA PUB. UTIL. LAW SECTION 3.

proper responsibility in siting decisions. Before power plant construction can begin, a "panel of interested local and state agencies which by the nature of their jurisdiction have a substantial interest in the outcome of the licensing procedure"[34] should advise the final license-granting body.

Such a systematic process, wherein the contributions of participating agencies are synthesized by one central body in reaching a "final" decision, is imperative if states are to meet the challenge posed by plant siting. Centralized licensing at the preconstruction stage is the major means by which effective regulation can be established. Fragmented agency action leads to unplanned growth and piecemeal destruction of the environment. Fortunately, legislation recently enacted in several states indicates that a solution is possible.[35]

MARYLAND AND WASHINGTON—A BETTER WAY

The states of Washington and Maryland have recently enacted new planning and coordinating mechanisms for the siting of power plants.[36] In both states administrative agencies are now charged with the responsibility for establishing and enforcing environmental standards. Furthermore, official state policy requires all affected agencies to recognize environmental quality while considering power needs. Although Washington and Maryland have failed to legislate the clear guidelines necessary for effective long-range planning and adequate notice of decisional criteria, they have enacted enabling legislation which allows the appropriate agencies to formulate such standards.[37]

One major cause of ineffective regulation of power plant siting has been insufficient scientific and engineering understanding on the part of agencies involved in the licensing procedure.[38] However, the need for

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34. Luce, *supra* note 4, at 22-23. This technique has been referred to as the "consultative process." It is an outgrowth of reality because when dealing with complex problems, whose solutions are not easily ascertainable, agencies must carry on an interchange.

> Since agencies live by reason, they must constantly seek understanding; this need leads them to consultation. Moreover they must see to it that the public interest is not only accurately assessed, but also that it is understood by those who will implement the . . . program.

Carlson, *Consultative Law: An Emerging Legal Development,* 68 COLUM. L. REV. 1496, 1502 (1968).

35. *See* ARIZ. REV. STAT. ANN. § 40-360 *et seq.* (Supp. 1971); ORE. LAWS ch. 609 (1971).

36. WASH. REV. CODE § 80.50.010 *et seq.* (1971); MD. ANN. CODE art. 43, § 706, art. 66C, §§ 5A, 726, 763-68, art. 78, §§ 54A, 54B, 90, art. 96A, § 11 (ch. 31, [1971] Laws of Md.).

37. WASH. REV. CODE § 80.50.040(1) (1970); MD. ANN. CODE art. 78, § 1 (Supp. 1969).

38. Many environmental agencies seem to suffer from this problem, whether at

research in the field of environmental protection has been recognized by the state of Washington. Its Thermal Power Plant Site Evaluation Council has the power to make and contract for independent studies of proposed thermal power plant sites and transmission line routes.[39] Similarly, Maryland has established a complex Environmental Trust Fund which will be used to finance such research.[40]

Maryland has also recognized the need for interagency cooperation. Maryland law provides that the Secretaries of Natural Resources, Health and Mental Hygiene and Economic and Community Development work together with electric company representatives to implement a continuing research program for electric power plant site evaluations.[41] These representatives cooperate with the state Public Service Commission which, in turn, is responsible for assembling and evaluating annually the long-range plans of Maryland's public electric companies. Washington also officially endorses the need for interagency consultation, and its Thermal Power Plant Site Evaluation Council consists of directors and administrators from several departments, agencies and commissions.[42]

This type of legislation clearly broadens the administrative process and, by coordinating knowledge about a power plant site proposal, encourages effective siting control. By this cooperation, the complex nature of the licensing process can be appreciated. Furthermore, a mechanism is provided for identifying in advance both long-range goals and potential problem areas.[43]

Washington's licensing procedure calls for "a binding agreement between an applicant and the state which shall embody compliance to the siting guidelines" adopted by the Thermal Power Plant Site Evaluation Council.[44] These guidelines must be met "prior to or concurrent with the construction or operation of any thermal power plant" within the state.[45] The Council, after extensive investigation and consultation with

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local, state or federal level. The Environmental Protection Agency, for example, was initially directed toward lawyer-directed regulation and control and was most eager to make an initial impression upon industry and the public. Unfortunately, it seems the agency may not, in many cases, have the necessary scientific and technological support to make its directives stick.

39. WASH. REV. CODE § 80.50.040(8) (1970).

40. MD. ANN. CODE art. 66C, § 763 (cs. 31, § 1, [1971] Laws of Md.).

41. MD. ANN. CODE art. 66C, § 764 (ch. 31, § 1, [1971] Laws of Md.).

42. WASH. REV. CODE § 80.50.030(3) (1970).

43. The end result of this cooperation could be a requirement that utilities locate facilities in protected sites designated by the state, unless they can show affirmatively that their proposed site possesses superior environmental qualifications. Ross, *Power and the Environment: A Statutory Approach to Electric Facility Siting,* 47 WASH. L. REV. 35, 59 (1971).

44. WASH. REV. CODE § 80.50.020(6) (1970).

45. WASH. REV. CODE § 80.50.020(6) (1970).

other state environmental agencies, reports its recommended disposition of an application to the Governor, who makes the final decision.[46]

Maryland law requires that a power company apply to the state Public Service Commission for a certificate of public convenience and necessity prior to construction. Upon receipt of an application, the Commission notifies the Departments of Natural Resources and Water Resources, which then investigate the proposed plant site. The results of these studies, together with a recommendation that the certificate be granted, denied or granted with conditions, are then returned to the Commission. Following a public hearing on these recommendations, the Chairman of the Commission makes a final decision.[47]

Despite the importance of coordinated and systematic review of plant design and location by a single regulatory agency, the Washington and Maryland laws are unclear as to the scope of authority and method of operation of the central agency. One commentator believes that the Washington legislation[48] in effect provided that the Council's authority supersedes that of all other licensing agencies, thereby allowing that body to grant permits over their objections.[49] However, to foreclose this possibility the Council itself has adopted specific regulations requiring an applicant to:

> submit plans relating to the satisfaction of existing statutory criteria, requirements, standards and regulations of those state agencies which, prior to certification, have any legal authority over conditions or activites related to the site.[50]

While this final version retreated somewhat from an earlier proposal requiring utilities to "submit evidence of satisfying existing statutory

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46. WASH. REV. CODE § 80.50.100 (1970). Allowing the Governor to make the final determination appears to be a major deficiency in the Washington law. After an extensive scientific and legal evaluation of the proposed site by experts, the chief political officer of the state makes the final decision.

47. MD. ANN. CODE art. 66C, § 5A (ch. 31, § 1, [1971] Laws of Md.). This is the general procedure. For plants producing more than 69,000 volts of power, the application must be submitted at least two years in advance. The procedure followed in this case differs slightly. MD. ANN. CODE art. 78, §§ 54A, 54B (ch. 31, § 1, [1971] Laws of Md.).

48. [C]ertification . . . shall bind the state or any of its departments, . . . subject only to the conditions set forth in such certification.

The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission or board of this state.

WASH. REV. CODE § 80.50.120 (1970).

49. Rodgers, *Siting Power Plants in Washington State,* 47 WASH. L. REV. 9, 21 (1971) [hereinafter cited as Rodgers].

50. WASH. ADMIN. CODE § 463-12-010 (5) (1970).

criteria . . . of those state agencies having any legal authority"[51] over plant siting, it is a step in the right direction. It seems imperative that the central agency embrace and enhance the pollution control functions performed by existing agencies rather than ignoring or emasculating them.[52]

The powers of the various existing agencies need not, and should not be curtailed. The Washington Council and the Maryland Commission should function as coordinating mechanisms, while other agencies retain and exercise their statutory powers. Both states have recently enacted legislation allowing the conditions prescribed by the individual agencies to be incorporated into the site certification agreement. If a state agency could previously unilaterally veto a proposed site under its jurisdiction, it should still be able to do so within the broader framework provided by the central body. That body, in turn, should try to resolve conflicting opinions. "Through its broad representation from among the spectrum of state interest, [it] is designed to be a unifying forum where parochial department interests must be evaluated against the composite needs of the state."[53]

No utility company should unilaterally decide what is best for the public. Unilateral decision making has only succeeded in creating public resistance, conflict, delay and unnecessary expense. Agencies must, therefore, give increased attention to citizen involvement so that the public may "inform the agency and presumably assist it in reaching a decision which will further the public interest or accommodate the public convenience and necessity."[54] Washington legislation affords an opportunity for public participation in planning and site approval by providing that the Plant Evaluation Council hold a public hearing in the county of the proposed site within sixty days of receipt of an application for site certification.[55] If necessary, additional public hearings may be held.[56] Furthermore, after the Council receives a site application, the attorney general must

51. WASH. ADMIN. CODE § 463-12-010 (5) (Proposed Reg., Mar. 23, 1970) (on file with Washington State Thermal Power Plant Siting Council, Olympia, Wash.).

52. Maryland law is also deficient in this respect. It implies that the Public Service Commission can make its own recommendations even if they conflict with the findings of other regulatory agencies. MD. ANN. CODE art. 66C, § 5A (ch. 31, § 1, [1971] Laws of Md.).

53. Rodgers, *supra* note 49, at 24.

54. Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 SW. L.J. 731, 736 (1970) [hereinafter cited as Hanes].

55. WASH. REV. CODE § 80.50.090(1) (1970); *cf.* Pub. Act No. 575, § 7(a) [CONN. GEN. STAT. ANN., Supp. No. 4 (1971)] (hearing required between thirty and 180 days after application). *See also* MD. ANN. CODE art. 78, § 54A (ch. 31, § 1 [1971] Laws of Md. 96) (joint hearing with local governing bodies).

56. WASH. REV. CODE § 80.50.090 (4) (1970).

appoint an attorney to "represent the public and its interest in protecting the quality of the environment."[57]

By enabling public groups as well as relevant state agencies to take part in the initial plant siting decision, flexible communication channels, important in resolving plant siting problems, can be maintained. However, while citizen participation can inform agencies, the ultimate responsibility for protecting the public interest and the environment rests with the administrators.[58]

Finally, a proper licensing procedure must insure expeditious judicial review of state licensing decisions. Both Maryland and Washington have recognized that mere consolidation of reviewing authority in one agency does not obviate the necessity for supplemental judicial review.[59] While courts should not "interfere with agency discretion in applying a particular standard, . . . they can and must decide if the proper standard is being used."[60] Courts should, therefore, have knowledge of the decisional criteria imposed by the certifying agency. To be effective, however, such review must take place before site preparation is commenced.[61]

CONCLUSION

Any apparent incompatibility between the protection of the environment and the production of electricity is not absolute. "Accommodations can be made which recognize the validity of both social objectives."[62] The state administrative process, if properly organized and defined, is capable of reacting to new and complex problems. The state licensing procedure, in particular, has great potential for both regulating the power industry and controlling the siting of future power installations.

It can be argued that such stringent environmental standards as imposed by a unified state licensing procedure pose additional hurdles for developers and will deter them from constructing the facilities necessary

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57. WASH. REV. CODE § 80.50.080 (1970); *cf.* Pub. Act No. 575, § 8(b) [CONN. GEN. STAT. ANN., Supp. No. 4 (1971)] (attorney appointed as counsel for the Council).

58. Hanes, *supra* note 54, at 739.

59. MD. ANN. CODE art. 66C, § 767 (ch. 31, § 1, [1971] Laws of Md.); WASH. REV. CODE § 80.50.140 (1970).

60. Note, *Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?*, 59 GEO. L.J. 420, 425 (1970).

61. Prof. Joseph L. Sax thinks the principal role of the courts in the licensing process of power plants is to "restrain projects that have not been adequately planned and to insist that they not go forward unless and until those who wish to promote them can demonstrate that they have considered and adequately resolved reasonable doubts about their consequences." J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 113 (1971).

62. Luce, *supra* note 4, at 13.

to supply increasing demands. Perhaps the better argument is that tightening pollution control regulations will induce the power industry to minimize the harmful effects of its plants and, thereby, to protect the environment.

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