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Administrative Agencies and the Energy Problem
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INTRODUCTION: ADMINISTRATIVE AGENCIES AND THE ENERGY PROBLEM

RALPH F. FUCHS†

This issue of the Indiana Law Journal focuses on an area of social policy and governmental action in which one of the major dilemmas that confront mankind in these last decades of the twentieth century is acutely presented. The rate at which energy is consumed in our society continues to increase geometrically in relation to the growth of population. Most of the needed energy comes from fossil or nuclear fuel, the conversion of which, by burning or breakdown in furnaces into usable heat, light or power, pollutes or damages the environment in a variety of ways. The extraction of fossil fuels¹ and the creation of hydroelectric power-generating facilities also give rise to ecological problems, as does the transmission of fuel or energy by pipeline, marine tanker or high-tension electric power lines. Conflicts among the needs to satisfy immediate energy consumption demands, to conserve resources and to preserve the environment often arise. The resulting complex of interrelated issues requires that short-run and long-range considerations be weighed when action is taken on proposals to provide or expand energy facilities or to formulate regulations to govern such facilities. Of transcending importance in itself, this situation exemplifies a wider range of problems which institutional decision makers, especially in government, must somehow learn to meet whenever decisions are to be reached on socially useful proposals that also endanger the environment.

It is an obvious truth, still not sufficiently understood, that the thin crust of the earth on which mankind lives, by extraction and processing of resources and disposal of wastes, is for the first time being strained in a manner and to a degree that threatens the continuance of the ecological system it sustains and, therefore, that the very survival of humanity under tolerable conditions is in jeopardy.² Within the hopefully expanding

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¹ See Note, Strip Mining of Coal: A Federal Response to State Legislation, infra at 771.

² The causes of this situation, which has developed largely since World War II, have recently been well discussed in B. CommoNE, THE CLOSING CIRCLE (1971). The author emphasizes a cumulation of recent technological changes as critically important at the present time. Among these, which have been imposed on the situation created by prior population growth, industrialization and urbanization, are (1) the replacement in common use of many organic and mineral products by synthetic ones, such as plastics and man-made fibers, which require the consumption of energy in factories for their production and create concentrations of wastes in the process; (2)
boundaries set by an increasingly refined technology, man must find ways to restrict his usage to the earth's capacity to respond healthily and must learn to adjust the burdens he imposes to the variety and geographical distribution of available resources. All relevant knowledge, much of it still to be gained, has to be brought to bear on problems as they arise; competing interests have to be evaluated; workable solutions have to be reached through a process of adjustment.

Traditionally in our private enterprise system, many of the basic decisions in matters relating to energy supply have been made by business enterprises according to a calculus of those costs and returns that are reflected in corporate books of account, modified by the requirements of government regulation. This regulation has been mainly in the economic interest of consumers or in the interest of the health and safety of persons closely affected, such as employees, neighbors or purchasers of products. Now, in the interest of conservation of resources and preservation of the environment, longer-range considerations must also be taken into account. They can either be translated into monetary costs by means of governmental fees, taxes or damage assessments, imposed on conduct which is to be discouraged, or be implemented by legal prohibitions, restrictions or requirements enforceable in various ways. Expanded attention to the publicly important ingredients of decisions can result in part, even in private enterprises, from informal pressures of public opinion and a developing ethic of business management; but competitive forces which tend to impose the cheapest practices on private decision-making render legal regulation inevitable and, because of geographical rivalry, require that much of this regulation be controlled or administered by the federal government through both national and international arrangements. The structure and processes of government involved in this regulation and the complex of legal rights to be considered receive attention in the pages that follow.


4. Much of the literature dealing with ecological problems, written by scientists and advocates of ecological safeguards, is successful in identifying causes of the present
The legislature is, of course, the governmental body that must act in the first instance to bring legal measures into operation. It has power to act definitively, within constitutional limits, but more often delegates authority. The knowledge needed for the formulation of precise rules is often lacking; yet the problems to be dealt with may be too urgent to permit continued inaction. Even when specific solutions could be devised on the basis of available information, the clash of powerful interests in the arena of a representative body is likely to produce a stalemate unless some means of acting without making final choices can be devised. The obvious expedient, often resorted to for one or both of the foregoing reasons, is legislation which specifies goals, enumerates factors to be considered in devising further measures to attain these goals, establishes one or more specialized administrative agencies charged with formulating these measures, and prescribes the rudiments of the procedures to be used and the sanctions to be employed. Hopefully, agency expertise, applied to expanded data and cognizant of varied views, will provide acceptable solutions despite the political factors involved. The legal duty of an agency to act, imposed by the legislature, will avoid total inaction and produce measures that can at least be tried and, if they are not irreversible, be more flexible than a detailed statute.\(^5\)

Such broad delegation of power to agencies raises constitutional issues, of course; but even though there remains a requirement that the legislative power be genuinely exercised by the legislature,\(^6\) this responsibility is fulfilled if objectives—even conflicting objectives—are stated in a statute and an agency is required to take action to serve them through ecological situation and in outlining solutions that should be reached but hardly attempts to propose institutional arrangements that might accomplish these solutions.


[T]he truth is that the legislative or community consensus sometimes extends only to the decision that the particular area should somehow be legally controlled. The allocation of administrative power then presents itself as the only means of preventing that limited community consensus from being frustrated by continuing disagreement as to the appropriate means.

Id. at 520 (emphasis in the original). See also J. LANDIS, THE ADMINISTRATIVE PROCESS 51 (1938). By contrast, Landis also refers to "the impossibility of delegating to the administrative the responsibility of making policy from the very irresolution of the legislature"; for when competing postulates as to the desirable action to take have so enlisted the loyalties and faiths of classes of people, the choice, to have that finality and moral sanction necessary for enforcement, must, as a practical matter, be made according to a method which resolves it as if it were one of power rather than one of judgment.

Id. at 59-60.

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measures that are grounded in proper procedures. The difficult issue surrounding such legislation is not constitutional but whether particular problems are best resolved by this kind of agency action or by the more largely political processes of a representative assembly.

It is no accident, then, that administrative agency action has become the principal reliance of government in its efforts to resolve ecological and other large-scale problems of modern society, just as the same or other agencies were earlier charged with providing solutions to less pervasive difficulties. A forerunner of this expanded role occurred with respect to the Interstate Commerce Commission. The legislative desire to eliminate certain evils in the railroad industry led to the establishment of the Commission in 1887. After additional needs came to be felt, the fostering of an efficient, justly operated, coordinated land transportation system was made the prescribed goal of the Commission’s actions under the Transportation Acts of 1920 and 1940. The shift of emphasis was prophetic, even though it was only dimly understood and never adequately implemented. Today in still larger matters the National Environmental Policy Act (NEPA) and its implementing Reorganization Plan not only enunciate expanded goals but establish new agencies to pursue them, impose new duties on existing administrative bodies and prescribe procedures to be employed. Included in these procedures are processes of coordination among agencies and among federal and state governments which go considerably beyond those previously existing.

18. Interagency coordination is similarly prescribed in some recent state environmental legislation. See, e.g., Ill. Rev. Stat. ch. 111-1/2, § 1047 (1971); Comment,
Legislation dealing with less pervasive, but still large-scale, contemporary problems does not go so far; but generally in both federal and state administration the emphasis is on ways of coping with large problems in an adequate manner and with sufficient insight to meet particular needs, utilizing “inputs” of data and opinions, rational processes of decision, and advice and action by technically qualified officials. To serve as a check on due performance of agency duties, enlarged possibilities of judicial review of agency action and inaction have become available.

Against the background of these developments, opposition to the growth of bureaucracy as an evil in itself seems archaic and is in fact diminishing, although criticism of alleged bureaucratic indifference and ineptitude is increasing. Society is coming to recognize that new agencies and augmented powers for old ones are necessary if not inevitable.

Tax increases to support enlarged government functions are contemplated. Yet there is a resulting intensified need for a discriminating choice of measures to be adopted, so as to restrict governmental proliferation and costs so far as possible and permit the private marketplace to make the decisions it is capable of rendering. Despite this need for prudence, no

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Thermal Electric Power and Water Pollution: A Siting Approach, 46 Ind. L.J. 61, 94-97 (1970); Note, State Regulation of Power Plant Siting, infra at 742. Federal-state and federal-local coordination have long been required under federal-aid legislation, with more limited objectives than under the environmental protection laws. As to federal-state action in the establishment and enforcement of air and water quality standards, see 42 U.S.C. § 1857c-5 (1970) (air); 33 U.S.C. § 1160(b) (1970) (water). See also 42 U.S.C. § 421 (1970), under which the initial determination of disability for federal disability insurance purposes may be delegated to state agencies by agreement. As to the operation of certain of these laws, see J. Davies, The Politics of Pollution (1970); Kline, Intergovernmental Relations in the Control of Water Pollution, 4 Natural Resources Law, 505 (1971).


20. Cf. C. Reich, The Greening of America 356 (1970), insisting upon immediate, exclusive attention to the goal of “a new way of life” as the future is debated, but stating also that his “Consciousness III . . . does not propose to abolish law, organization, or government,” but that “it asks instead that they serve rational, human ends.”

21. Currently there is a widespread belief that deregulation of large portions of the transportation industry would result in improved, less costly service under the spur of competition. Unregulated producers' natural gas prices, in place of the regulation by the Federal Power Commission that began in 1954, might have resulted in a better allocation of resources and a more adequate supply, relative to current demand, than the Commission has been able to bring about. See Note, Natural Gas and the Federal Power Commission, infra at 725.
viable alternative to an increasing reliance on government agencies has emerged. Population problems, human conflict, technological change and demands for greater welfare will continue and will not be harnessed or subdued without additional governmental measures to deal with them. The observation that administration by persons in authority, especially in government, is as much a part of the human condition as the physical environment was never before quite so true as it is today.  

The articles and notes that follow, dealing with specific consequences, in an energy context, of the factors just outlined, may render additional comments at this point superfluous. Nevertheless, it is possible that some common threads in the situations covered, identified by their relation to recent widespread administrative law developments, can usefully be drawn together. This, at any rate, is the task which will be undertaken in the ensuing paragraphs.

**Open Proceedings in Specialized Agencies**

The importance of specialization and expertise in the operation of administrative agencies has long been recognized. The need for them in determining policies and taking action with respect to energy and, more generally, in dealing with ecological and other large-scale problems of modern society is evident. Some agencies are specifically equipped by knowledge and training to exercise judgment respecting only some of the factors involved in the situations that confront them; but if so, they can be equipped to gather and consider additional relevant data and opinions. They will, in any event, have the head start of partial built-in knowledge in the effort to reach sound solutions, such as the Federal Power Commission has with respect to hydroelectric power station sites and the Federal Highway Administration has with respect to the location of roads. This partial expertise may obviously give rise to a narrow approach to problems and create a danger of bias against viewpoints from beyond its purview; but the participation of additional agencies, differently oriented, may be invoked—as it actually has been—in mitigation of this

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24. The Supreme Court, for example, in Udall v. FPC, 387 U.S. 428, 435-50 (1967), whether justly or not (cf. Harlan, J., dissenting, id. at 451), criticized the power-development orientation of the FPC which led it, in the Court's view, to give inadequate attention to fish and wildlife factors that had been called to its attention, before authorizing a major power project.

25. See note 18, supra.
hazard, at the same time as hearings and other means of ascertaining un-
oficial information and opinion are also employed.\textsuperscript{26}

A frequent observation with respect to ecological problems is that the most important choices to be made in determining policy involve value judgments as to the relative desirability or undesirability of feasible alternatives, in addition to technical knowledge and judgment. Social scientists such as psychologists, sociologists and economists have contributions to make in these matters, as do practitioners of such applied sciences as management, social work and planning; yet within the limits set by technology and by expertly determined costs, decisions in a democracy should be shaped primarily by the needs and desires of the general population who must pay the costs and who will be most significantly affected by the outcome. To a large extent these needs and desires are best known to those who experience them. Nevertheless, it would be a mistake to suppose that, as to environmental matters, the simple ascertainment of relevant popular desires (whether by vote or, hopefully, by the formation of a consensus after open hearings or the use of other means of communication, such as negotiation) is necessarily a superior method of decision to a less political process—not only because of technical factors involved but also because of conflicts of view and the difficulty of foresight. Many a prized public asset, including a sizable number of monuments, museums, parks and transportation facilities, might never have come into existence if initial popular choice had been a prerequisite to their creation. Of course, disastrous mistakes have also been made by headstrong persons in authority; and resort to popular decision, as in local bond-issue elections, is often salutary; yet a dominant role for common sense preferences is not likely to provide the best answers to all problems. Hence, even in a democracy, many matters are willingly entrusted to the determination of experts hopefully cognizant of social needs which may as yet be only imperfectly perceived.

The provision which has been made for interested individuals and groups to come forward as participants, orally or in writing, in proceed-

\textsuperscript{26} Even apart from the requirements of NEPA, the Power Commission and other agencies have recently weighed environmental factors more fully than used to be the case before taking final action. Jaffe, Book Review, 84 Harv. L. Rev. 1562, 1565-66 (1971); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971) (where, however, the Commission had acted pursuant to the court's prior remand of the proceedings). \textit{Compare} Manufacturers Light & Heat Co., 39 F.P.C. 294, 308-12 (1968) (Ross, Comm'r, dissenting), \textit{with} Stitt, Paul H. & Loretta, 39 F.P.C. 323 (1968). As to the Atomic Energy Commission, see Note, \textit{The National Environmental Policy Act, the Freedom of Information Act and the Atomic Energy Commission: The Need for Environmental Information}, infra at 755.
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ings under NEPA carries forward an accelerating tendency in federal agency action over the years. This tendency was given impetus by the rulemaking provision of the federal Administrative Procedure Act, which is applicable to the formulation by agencies of legally binding substantive rules. This provision requires the publication in the Federal Register of notice of proposed rulemaking, inviting the submission of data, views or arguments from interested persons to be considered by the agency. Trade association and other interest groups often disseminate these announcements further, in addition to responding themselves. Moreover, it has become a fairly common practice for agencies to employ these processes in rulemaking, even when the Act does not require them; and similar procedures may be used, without legal compulsion, in performing other agency functions, such as the issuance of licenses or permits, when they are of substantial public importance. Even in trial-type adjudication, which is required to be made on the basis of the record after opportunity for an agency hearing, opportunity is increasingly offered for interested persons and groups to intervene as parties or participate in other ways. This practice became virtually mandatory in numerous situations by reason of the decisions of two influential courts of appeals in the Scenic Hudson and United Church of Christ cases, involving licensing pro-

27. Building on a provision of NEPA for agencies to take account of "presently unquantified environmental amenities and values" [42 U.S.C. § 4332(B) (1970)] in making determinations which are subject to the Act, the Guidelines of the Council on Environmental Quality specify that "the fullest practicable provision" should be made for obtaining the views of interested parties, including, "whenever appropriate, provision for public hearings." CEQ Guidelines, supra note 17, at 7726 (§ 10(e)).
31. The CEQ Guidelines encourage such proceedings in the performance of all kinds of agency functions. CEQ Guidelines, supra note 17, at 7726 (§ 10(e)).
33. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (decision dealing primarily with agency duty to develop facts and with parties' standing in court).
ceedings in which the courts held that agencies, charged with duties to provide in their actions for certain public interests, are obligated to admit community groups representing those interests to the proceedings and to consider the contentions of these groups seriously.

Advances in these forms of "participatory democracy" in agency proceedings, together with pressures for their further extension, continue to emerge. Responding to a recommendation of the Public Lands Law Review Commission, the Department of the Interior recently announced a general policy of affording opportunity for public participation in all of its rulemaking proceedings whenever feasible, whether or not statutes so require. The Corps of Engineers has adopted a similar policy with relation to its consideration of projects affecting navigable waters. Even the Federal Trade Commission, which previously carried the entire burden of representing public interests in its cease-and-desist order proceedings, has recently permitted outside groups to take part when it appeared that they might be able to participate helpfully. The Administrative Conference of the United States has adopted a recommendation that a policy of encouraging and assisting these forms of public participation in government proceedings become government-wide. Further, it is coming to be recognized that when the needs and desires of poor people are relevant to agency proceedings, special measures to bring these interests to agency attention are appropriate, because private resources for this purpose are sparse and the interests involved lack political support and may be relatively strange to the decision makers. The Administrative Conference of the United States has urged strongly, in consequence, that a government-wide People's Counsel be provided to represent poor people in agency proceedings. If this step were taken, a new dimension would be added to proceedings involving the authorization of such projects as the construction of power plants or the strip mining of coal in areas where poor people live.

**EXPANDED APPLICATION OF THE FREEDOM OF INFORMATION PRINCIPLE**

Another strong recent tendency in federal administration, reflected

36. 33 C.F.R. §§ 209.120(f),(g) (1972).
37. See, e.g., Firestone Tire & Rubber Co., 3 TRADE REG. REP. ¶ 19,373 (FTC 1970); 3 TRADE REG. REP. ¶ 19,519 (FTC 1971).
in environmental proceedings, has resulted from the Freedom of Information Act, adopted as an amendment to the Administrative Procedure Act in 1966. The Act imposes duties which are largely nondiscretionary on all federal agencies to make available to members of the public, on request, information and documents in their possession, subject to exceptions which are specified. The courts have on the whole construed this measure broadly. Its effectiveness has been somewhat impeded by restrictive agency interpretations and depends in part on the practicability of litigation to enforce it; but enough cases are arising and reaching decision to effectuate increasingly the principles of the statute. In line with these disclosure principles, NEPA requires that the environmental impact statements accompanying agency actions in proceedings subject to the Act be made public. Carrying disclosure methods farther, the Guidelines of the Council on Environmental Quality specify that draft environmental statements which are to become the subject of hearings are to be made available in advance. Later, the comments received from other agencies and from nongovernment sources are also to be disclosed. As a result, interested persons may participate in agency environmental proceedings with increased effectiveness; and the communications media, concerned organizations and the public at large are able to scrutinize with great thoroughness the actions and proposed actions of agencies relating to projects which significantly affect the environment.

43. CEQ Guidelines, supra note 17, at 7724 (§10(e)).
44. Id. at 7726 (§10(f)). The Guidelines refer specifically to the Freedom of Information Act.
45. The consequences in nuclear power plant siting appear in Tarlock, Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC, infra at 645. See also Note, The National Environmental Policy Act, the Freedom of Information Act and the Atomic Energy Commission: The Need for Environmental Information, infra at 755. The process surrounding the recent authorization by the Secretary of Interior of a pipeline to carry Alaskan North Slope oil across the state is another outstanding example. The project was held up on a variety of legal grounds, including requirements of NEPA, by two district court injunctions before an official draft environmental impact statement covering the pipeline was filed. See Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). The proceedings then resulted, after hearings and written comments by other agencies, in a massive statement which was published and received intensive scrutiny by the persons concerned. Final action by the Secretary followed.
The Role of Trial-type Adjudication

The enlargement and delay of administrative agency proceedings, caused by a multiplication of participants and an expansion in the duties of agencies to seek and consider their contentions and the communications of other government agencies, may be mitigated by other recent developments in agency processes tending toward simplification and brevity. There has also been an increase in due process rights to agency hearings with many of the attributes of a trial, when significant personal interests are involved in agency proceedings; but proceedings involving broad interests in the environment, such as those under consideration in this symposium, are not likely to be greatly affected by this development. Even if they were to be, agency burdens could be reduced by an enlarging range of devices now becoming available to avoid or shorten hearings. Thus, the right to a hearing, even when it clearly exists, is recognized as subject to a showing that the hearing, if held, would contribute to the outcome of the proceeding. The agency can require a demonstration that serious issues of fact, law or policy will be raised and may tailor any hearing it grants, involving the presentation of evidence or argument or both, to the nature of the issues presented and the kinds of evidence to be adduced after these have been limited by means of prehearing conferences. In these

46. Goldberg v. Kelly, 397 U.S. 254 (1970), epitomizes this development. The Supreme Court held that whenever significant fact issues are present a recipient of federal aid to the families of dependent children is entitled to a hearing with rights of confrontation and cross-examination before the recipient's benefits can be withdrawn. The procedural rights of recipients of governmental benefits have been steadily expanded, even in the absence of judicially determined due process rights, by legislative and agency actions over the past forty years which have recognized the human importance of the interests at stake. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 449-502, 553-67 & authorities cited (5th ed. 1970); Fuchs, The Task of Procedure When Social Needs Become Legal Rights, 15 SOCIALSERV. REV. 721 (1941); Jones, The Rule of Law and the Welfare State, 58 COLUM. L. REV. 143 (1958). As to procedural rights in relation to other personal interests see GELLHORN & BYSE, supra, 569-601; Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971). See also Richardson v. Wright, 405 U.S. 208 (1972); Richardson v. Perales, 402 U.S. 389 (1971)


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ways the formal hearing process becomes a much more flexible and varied vehicle than it has traditionally been.

Almost all agencies have general authority to issue regulations to aid in the enforcement of the laws they administer.49 Most often the regulations issued pursuant to this authority are procedural or interpretative in nature; but, in addition, the agencies increasingly use this general rule-making power to eliminate issues from statutorily required formal proceedings by promulgating regulations that resolve those issues in advance and foreclose their further consideration.60 The formulation of these regulations is subject to the informal, participatory kind of proceedings outlined above, which can be much more expeditious than the trial-type hearings that would otherwise be required for the same issue each time a case involving it arose. There are limits to the substitution of rulemaking for adjudication in this way;51 but as these limits have recently been defined, they allow large scope for agency choice.52 By this device, grounds for license termination,53 conditions to be attached to certificates of convenience and necessity54 and possibly some of the causes for the issuance

49. Statutes bestow this authority in varying terms, generally similar to those of the Federal Communications Act, which authorizes the FCC to “make such rules and regulations, . . . not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i) (1970). With respect to radio, the Commission is authorized to “[m]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of this chapter.” 47 U.S.C. § 303(f) (1970). More generally, Congress has provided that:

The head of an Executive [Cabinet] department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.


51. See Gutknecht v. United States, 396 U.S. 295 (1970) (general rulemaking power held not to authorize regulations defining conduct subject to criminal prosecution).

As to limitations on the use of regulations to foreclose issues in agency adjudications, see Fitzgerald, Adoption of Federal Power Commission Price-Changing Rules Without Evidentiary Hearing: Statutory Collision, 18 Sw. L.J. 236 (1964); Fuchs, Agency Development, supra note 50, at 800-07.


of cease-and-desist orders\(^5\) may be specified across the board in advance with no further need for hearings upon them.

**Increased Availability of Judicial Review**

To a greater extent than formerly, the actions of federal administrative agencies, including those that bear on the environment, are subject to the check of judicial review. Several developments have contributed to the expansion that has taken place: the emergence of a “presumption of judicial reviewability,” most recently based on the Administrative Procedure Act;\(^6\) a willingness on the part of the courts to regard preliminary agency action as subject to immediate review, and an enlargement of the standing of interested persons and groups to bring review proceedings.

The first of these developments has resulted in a narrowing of the range of agency actions that are regarded as discretionary in a sense which immunizes them altogether from review by a court in a proceeding otherwise properly brought. A limited range of agency determinations remains beyond judicial scrutiny of the discretion that resides in them, because political (including foreign) affairs or military\(^7\) factors or the management of government business\(^8\) are predominantly involved. Even in relation to these areas of administration, however, courts are increasingly willing to determine the sometimes difficult issues of whether agency action has statutory warrant,\(^9\) fulfills the agency’s statutory duty,\(^9\) is

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\(^9\) Harmon v. Brucker, 335 U.S. 579 (1948) (legality of other-than-honorable discharge from the Army); Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971) (legality of denial of conscientious objector release); Parker v. United States, 448 F.2d 793 (10th Cir. 1971) (validity of determination that national forest area is not eligible for consideration as “primitive”); Cf. Ozbirman v. Regional Manpower Adm’n, 335 F. Supp. 467 (S.D.N.Y. 1971) (determination of effect of proposed wage of alien
based on requisite procedures and, of course, conforms to constitutional limitations. Agency determinations affecting the environment are among those which are open to judicial scrutiny on these grounds.

Agency action that is only indirectly enforceable is increasingly likely to be immediately reviewable, without the need to await further action. General regulations, for example, although their announcement terminates the rulemaking proceedings from which they issue, depend for their effectuation, even when they have legal force, on action implementing them by the agency (subject to judicial review) or by a court in the first instance. Arguably, therefore, the regulations are not “ripe” for review at the time they are issued. Sometimes statutes contain provisions for review, but even in their absence, regulations of this type have occasionally been directly reviewed in the past without the necessity to await enforcement proceedings. Nevertheless, it required the decisions of the Supreme Court in several recent drug regulation cases to establish firmly, over strenuous dissent, the view that enforceable substantive regulations often become reviewable upon issuance, by means of injunction or declaratory judgment proceedings, when they have immediate practical consequences for those affected. Even statements of policy that do not have legal force but nevertheless have identifiable practical effects have recently

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60. Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (duty of Secretary of the Interior to regulate traders on Indian reservations); Sloan v. Department of Agriculture, 335 F. Supp. 816 (W.D. Wash. 1971) (duty of Secretary of Agriculture to maintain surplus commodities and food stamp programs simultaneously in an area with a severely depressed economy).


been held reviewable as "final orders" within the meaning of the Review Act of 1950, 67 which is applicable to several federal agencies. 68

When a statute authorizes an agency to take temporary action pending final disposition of the matter before the agency, its interim action is often immune from judicial review because of a legislative purpose to make it so or because the short-run interests affected are thought not to require further protection. Such is the case, for example, with decisions to suspend or not suspend train discontinuances or carriers' newly filed rates pursuant to statute, when these are subject to agency review, 69 and may be the case with summary actions to prevent immediate harm to interests which the governing statute is designed to safeguard. 70 A significant tendency has developed, however, especially in the United States Court of Appeals for the District of Columbia, to review actions of this kind in order to require due attention to the public interests involved, including interests in the environment. 71 By this means, relatively prompt judicial intervention to secure adherence to statutory purposes becomes possible.

Enlarged judicial recognition of the standing of persons and groups to challenge agency determinations in litigation, which has also taken place, involves the interpretation given to the Administrative Procedure Act provision that any person "adversely affected or aggrieved" by agency action "within the meaning of any relevant statute" shall be entitled to judicial review of the action in an appropriate proceeding. 72 Numerous other statutes, including some that antedate the Administrative Procedure Act, use the same or similar words to designate the persons authorized to commence statutory proceedings to review specific agency actions. 73

A growing number of court decisions have held that individuals and groups are "adversely affected or aggrieved" in the requisite sense if they suffer adverse consequences in fact and, under the Administrative Procedure Act, if any other relevant statute brings the interest asserted within the context of legal protection. In addition, the Administrative Procedure Act provides that (as would be the case even without this provision) "any person suffering legal wrong" because of agency action may seek review of the action in a court. A large range of common law and constitutional rights may, in consequence, become the basis for obtaining judicial review. By virtue, then, of the Administrative Procedure Act and of legislation to secure particular interests or by reason of common law or constitutionally grounded claims, judicial review of a vast array of agency determinations, including many that affect the environment, may be had at the instance of many individuals and groups.

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76. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152-53, 159-60 (1951) (Frankfurter, J., concurring). At times, without the aid of statutes, the courts have upheld standing to secure review on the basis of "rights" that seem to have no identifiable legal source. See, e.g., Chapman v. Sheridan-Wyoming Co., 338 U.S. 621 (1950); International Ry. v. Davidson, 237 U.S. 506 (1922); Independent Broker-Dealers Trade Ass'n v. SEC, 442 F.2d 132, 140 n.10 (D.C. Cir. 1971), cert. denied, 404 U.S. 828 (1971).
77. Barlow v. Collins, 397 U.S. 159 (1970); Peoples v. Department of Agriculture, 427 F.2d 561 (D.C. Cir. 1970); Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968). In Investment Co. Institute v. Camp, 401 U.S. 617 (1971), the statutory recognition of the interest asserted by the plaintiffs was in a different statute from the one under which the agency action was taken and was quite tenuous. Cf. id. at 639 (Harlan, J., dissenting). NEPA establishes procedures to secure agency consideration of environmental factors which are of concern to individuals and groups whose interest, accordingly, is recognized by statute to this extent, either for its own sake or as representative of larger public interests. Judicial review extends to the determination of whether the procedures required by the Act have been followed and whether the resulting determination is free of arbitrariness and illegality, particularly because of failure to take due account of the environmental factors. Cf. Aleut League v. AEC, 337 F. Supp. 534, 542, 545 (D. Alaska 1971); Scherr v. Volpe, 336 F. Supp. 886 (W.D. Wis. 1971).
78. Among claims grounded in the common law is one to the maintenance of public uses to which natural resources are adapted or have been dedicated. See Tarlock, Book Review, 47 Ind. L.J. 406, 412-14 (1972).
79. Sierra Club v. Morton. —U.S.—, 92 S. Ct. 1361 (1972), imposes the limitation that those who sue must have more than an ideological interest in the particular subject matter or, as groups, must represent members possessing a more tangible interest. The decision, denying standing in the particular case because of the absence of the requisite interest, does not derogate from the decisions, some of which are cited in the opinion of the Court, in which standing has been upheld because such an interest was present. See, e.g., Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir 1970), cert. denied, 400 U.S. 949 (1970); Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971), modified, 451 F.2d 1130 (4th Cir. 1971); Pennsylvania Environmental Council v.
legislation authorizing any person to sue to halt or compel agency or private action affecting the public interest in preservation of the environment dispenses with the need to refer to any other law as a basis for standing.

These enhanced possibilities of judicial review do not, of course, make the courts available as a substitute for the agencies in the determination of policies involved in agency action; for the review that can be had is limited in scope. It is restricted in part by applicable statutory formulas, including the one contained in the Administrative Procedure Act, which limit the grounds on which agency action may be set aside. These formulas are generally flexible, however; hence the principal restraint upon the courts consists of their reluctance to interfere with agency responsibilities bestowed by legislation and their sense of inadequacy to make expert determinations. For the most part, the judicial check consists of enforcement of agency duties to follow specified procedures, to undertake serious internal deliberations, to provide findings which give assurance of adherence to the obligation to consider relevant factors and to make determinations that are rationally based on evidence and carry out the applicable law. Such a check is inherently of uncertain scope when, as is usually the case, the factors to be considered as relevant and the attention they should receive depend on the interpretation of broad constitutional or statutory terms. Nonetheless, insofar as courts are more sensitive to environmental or other broad policy considerations than are the specialized agencies or, by virtue of judicial tenure and independence, are freer to override the pressures of powerful special interests, judicial review can and does operate as an important means of securing safeguards for long-run public interests which otherwise might be ignored or lightly overridden.

THE POLITICAL CONTEXT

Despite all the expertness, careful procedure, sensitivity to the values

82. Typically, agency determinations in complicated situations are confirmed after the reviewing court has ascertained that due consideration has been given to the factors which are relevant. See, e.g., Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied —— U.S. —— (1972); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971); Western Addition Community Organization v. Weaver, 320 F. Supp. 308 (N.D. Cal. 1969).
83. These consequences are dramatically illustrated by the history of the Alaska pipeline proceeding, discussed in note 45 supra.
at stake and judicial objectivity that can be mustered, the ultimate outcome of agency policy determination, as of other governmental processes in a democracy, depends on a resultant of social and cultural forces that pull in different directions. Outcomes can be modified and purified to a significant extent by imposing checks and balances and strengthening rational processes of decision; but these refinements are ultimately subject to the willingness of people to tolerate and support the processes involved and to accept the results to which they lead. Agencies harassed by inadequate funding and by external pressures, as well as conditioned by current values which their personnel share with the populace at large, are not likely to effectuate with complete zeal the long-range purposes the legislature may have been moved to utter in such legislation as the National Environmental Policy Act, if these purposes conflict with immediate popular desires.\(^8\) The general run of courts, sharing the same limitations to a lesser extent and confined by their restricted role, cannot supply a complete corrective for the deficiencies that result.

The complex nature of many of the problems to be solved and the inadequacy of current knowledge applicable to them, moreover, have the consequence that demonstrably right or wrong answers are often not possible. In these situations ultimate choices rest of necessity on the foresight of someone who exercises authority and shoulders responsibility, taking cognizance of both political and technical factors. Whether the trans-Alaska pipeline should be built or a power plant installed in some location to serve human convenience and welfare at the cost of some damage to the environment and, if so, what safeguards are to be required are questions that must be answered, after all the evidence and arguments are in, by the determinations of decision makers whose informed statesmanship provides the best answers that are humanly possible. The most that can be claimed for any particular method of reaching decisions, including the use of agency processes to achieve stated purposes, is that it affords superior opportunities for rationality and concern for the future to play a leading role.