Washington Law Review

Volume 56 | Number 3

7-1-1981

Energy Facility Siting: Recent Models of Reform

Charles R. Ching

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Energy and Utilities Law Commons

Recommended Citation

Charles R. Ching, Comment, *Energy Facility Siting: Recent Models of Reform*, 56 Wash. L. Rev. 467 (1981).
Available at: https://digitalcommons.law.uw.edu/wlr/vol56/iss3/8

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

ENERGY FACILITY SITING: RECENT MODELS OF REFORM

There is a growing recognition of both the scope and the magnitude of this nation's energy problem.[1] The nation's recognition of the need to protect the environment defines the boundaries within which an acceptable solution to this problem may be found.[2] The Reagan Administration has reaffirmed the commitment of the previous administration to increasing domestic energy production and to reducing the nation's dependence on foreign oil. Although the details of the Reagan energy program are still developing, it is clear that the new administration has placed a high priority on solving the energy problem. Less clear, however, is what impact the commitment to stimulating domestic energy production will have on the nation's prior commitment to environmental protection.

Increasing domestic energy production necessitates the building of new energy production plants and the decision to allow construction of a major energy facility requires a compromise between protecting the environment and satisfying the nation's energy needs.[3] One way to expedite construction of domestic energy facilities is to eliminate the bureaucratic and regulatory red tape that impedes the development of energy projects. Two proposals have merged as methods of overcoming the hurdles in the siting process posed by red tape and delay. The first, fast-track siting,[4] was advocated by the Carter Administration. The second, one-stop siting,[5] is currently utilized by a number of states.

This comment first defines the energy-environment dilemma which frames the issues of energy facility siting. The comment then compares and evaluates the relative strengths and weaknesses of fast-track siting

1. A recent article aptly characterized the energy crisis as an "Everything Crisis." TIME, December 22, 1980, at 54.

2. Broad statements of the nation's policy toward the environment are contained in the National Environmental Policy Act of 1969:

> The purposes of this [Act] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation....

National Environmental Policy Act of 1969, §2, 42 U.S.C. §4321 (1976).

3. *See* notes 13–16 and accompanying text *infra*.

4. "Fast-track" siting refers to a siting process in which selected energy projects are placed on an expedited schedule, a "fast-track," through normal siting procedures to speed their completion. *See* section II *A infra*.

5. "One-stop" siting is a siting process in which a single administrative body evaluates all aspects of an energy project and exercises final authority to approve or deny the project. *See* section II *B infra*.

and one-stop siting. The comment concludes that, in an effort to expedite the siting process and to increase domestic energy production, the Reagan Administration should adopt a federal policy favoring one-stop siting.

I. BACKGROUND: THE ENERGY-ENVIRONMENT DILEMMA

Regardless of the study selected, there is a consensus that national energy demands will increase.[6] The high standard of living enjoyed by most Americans corresponds with a high level of energy consumption.[7] Skyrocketing gasoline and home fuel costs[8] have made Americans fully aware of the central role that energy plays in their lives. The fundamental importance of energy to a modern society makes it unreasonable to assume that the government will permit energy needs to go unmet. Consequently, the only questions which remain to be answered are how much energy needs will increase and how those needs will be met.

How the nation will meet its future energy needs will be influenced significantly by the dramatic increase in environmental awareness that has taken place within the past fifteen years. The planning of energy policy no longer revolves solely around considerations of demand.[9] Energy issues

6. Before 1973, energy studies consistently projected that the total U.S. energy demand would more than double by the end of the century. Recently, unreliable foreign oil supplies and resulting shortages have forced a serious reconsideration of America's energy future. Emphasizing both energy efficiency and energy conservation, a recent report estimates that the nation can limit the increase in total energy demand to approximately 10-15 percent by the year 2000. COUNCIL ON ENVIRONMENTAL QUALITY, THE GOOD NEWS ABOUT ENERGY vi–viii (1979). *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, 10TH ANNUAL REPORT 315–30 (1979); *Six-Year Review of Energy by the Harvard University School of Business: Hearing Before the Subcomm. on Energy Conservation and Supply of the Senate Comm. on Energy and Natural Resources,* 96th Cong., 1st Sess. (1979); *Shortages of Gasoline, Heating Oil and Diesel Fuel: Hearing Before the Subcomm. on Energy Regulation of the Senate Comm. on Energy and Natural Resources,* 96th Cong., 1st Sess. (1979).

7. Energy provides the technological foundation of modern societies. Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities,* 58 VA. L. REV. 257, 261 (1972). *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT: ELECTRIC POWER 1–5 (1973); COUNCIL ON ENVIRONMENTAL QUALITY, 10TH ANNUAL REPORT 315 (1979).

8. Between January 1978 and March 1979, the national average of motor gasoline prices increased approximately 18.5 percent and the national average of residential heating oil prices increased approximately 21 percent. *Shortages of Gasoline, Heating Oil, and Diesel Fuel: Hearing Before the Subcomm. on Energy Regulation of the Senate Comm. on Energy and Natural Resources,* 96th Cong., 1st Sess. 160–62 (1979).

9. *See, e.g.,* Washington Energy Facility Site and Evaluation Act:

> It is the intent [of the legislature] to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. Such action will be based on these premises:
>
> (1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.

now must be formulated in conjunction with national environmental policies. The production of energy and the protection of the environment, however, present two competing policies.[10] Underlying the energy-environment conflict are two axioms. First, the nation's increasing energy needs must be met.[11] Second, the production of power to meet those energy needs will have an adverse impact on the environment.[12] The decision whether to proceed with a proposed facility, therefore, requires an inevitable compromise of either energy values or environmental values.[13]

The federal government and state governments have passed numerous environmental protection laws.[14] Permit requirements and application procedures can ensure that all energy facility siting decisions consider environmental values.[15] The existing environmental controls represent leg-

(2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

(3) To provide abundant energy at reasonable cost.

WASH. REV. CODE §80.50.010 (1979). *See also* Luce, *Power for Tomorrow: The Siting Dilemma*, 25 REC. ASS'N BAR CITY N.Y. 13, 25 (1970); Comment, *Industrial Site Selection: Existing Institutions and Proposals for Reform*, 55 NEB. L. REV. 440 (1976).

10. The absolute protection of the environment is unreasonable if the nation is to continue generating power to meet its energy needs. Willrich, *supra* note 7, at 259, 303. *See* Lippek, *Power and the Environment: A Statutory Approach to Electric Facility Siting*, 47 WASH. L. REV. 35, 63 (1978); Comment, *California's Energy Commission: Illusions of a One-Stop Power Plant Siting Agency*, 24 U.C.L.A. L. REV. 1313 (1977). *See also* Murray & Seneker, *Industrial Siting: Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301, 302 (1978).

11. Case & Schoenbrod, *Electricity or the Environment: A Study of Public Regulation Without Public Control*, 61 CALIF. L. REV. 961, 963–64 (1973); Rodgers, *Siting Power Plants in Washington State*, 47 WASH. L. REV. 9, 14 (1972); Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 SO. CAL. L. REV. 502, 503 (1972). *See also* Murray & Seneker, *supra* note 10, at 302.

12. The development of various fuel sources has been characterized as a choice between "competing brands of environmental destruction." Lippek, *supra* note 10, at 36. The environmental effects of energy production include thermal discharge, air pollution, and landscape blight. *Id. See* Tarlock, Tippy & Francis, *supra* note 11, at 507–13; COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT: ELECTRIC POWER 9–11 (1973).

13. A compromise of either environmental protection or energy production is inevitable in the absence of an environmentally neutral source of energy. *See* Lippek, *supra* note 10, at 63; Willrich, *supra* note 7, at 303; Comment, *supra* note 10, at 1313. *See also* Murray & Seneker, *supra* note 10, at 302.

14. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1976); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4361 (1976); Washington State Environmental Policy Act of 1971, WASH. REV. CODE §§ 43.21C.010–.910 (1979); California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21175 (West 1971 & Supp. 1980). *See generally* W. RODGERS, ENVIRONMENTAL LAW 697–834 (1977).

15. The House Committee on Interior and Insular Affairs compiled a list of the types of federal laws and permits that could pertain to the construction of a synfuels plant to illustrate procedural problems which confront a major energy facility. The committee found twelve federal laws which required the issuance of permits and ten federal laws which would potentially apply to the project, but do not require permits. H.R. REP. No. 410, Part 1, 96th Cong., 1st Sess. 5–9 (1979). *See, e.g.*, S. REP. No. 331, 96th Cong., 1st Sess. 20–24 (1979).

islative efforts to strike a politically acceptable balance between the environment and energy. Since many of the environmental regulations were drafted incrementally and were framed for specific needs, current regulations are sometimes redundant and often marked by fragmented procedures.[16] The responsibility for monitoring compliance with environmental regulations has been diffused among numerous governmental agencies. Consequently, agencies with limited jurisdiction over environmental issues have been created and they have tended to develop vested interests in protecting one resource or serving a limited constituency.[17]

Representatives of the energy industry and legal commentators have criticized the complex maze of environmental permits and procedures.[18] The energy industry argues that fragmented permit procedures result in unnecessary delays which translate into increased costs.[19] Legal commentators, on the other hand, find fault with the lack of coordination in the permit issuing process.[20] From an environmental perspective, the fragmented procedures, combined with the limited jurisdiction of regulatory agencies, militate against a complete balancing of environmental concerns by individual agencies in their decisions.[21]

There is nothing which mandates that environmental concerns have precedence over other pressing national concerns, or vice versa. Ulti-

16. Fragmentation occurs as a result of regulations which are designed to meet specific problems. The regulatory agencies promulgating these regulations, although functionally related, are often organizationally separate. Consequently, inter-agency lines of communication are significantly reduced causing repetition and overlap. COLORADO DEP'T OF NATURAL RESOURCES, DRAFT MANUAL: COLORADO'S JOINT REVIEW PROCESS FOR MAJOR AND MINERAL RESOURCE DEVELOPMENT PROJECTS 3(1980); Case & Schoenbrod, *supra* note 11, at 965; Tarlock, Tippy & Francis, *supra* note 11, at 556; Comment, *Energy Facility Siting in Oregon: Towards Regulatory Effectiveness*, 58 OR. L. REV. 220, 223 (1979). *See also* Murray & Seneker, *supra* note 10, at 303–06.

17. Murray & Seneker, *supra* note 10, at 305. *See generally* COLORADO DEP'T OF NATURAL RESOURCES, *supra* note 16, at 2; Luce, *supra* note 9, at 13; Van Baalen, *Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act—Advance or Retreat?* 11 LAND & WATER L. REV. 27, 29 (1976).

18. *See* F. BOSSELMAN, D. FEURER & C. SIEMON, THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION (1976); Van Baalen, *supra* note 17, at 28–29; Willrich, *supra* note 7, at 259. *See also* Murray & Seneker, *supra* note 10, at 318.

19. Delay is manifested in three types of costs: the costs of replacing energy expected to be produced by the delayed project, the inflated costs of construction after delay, and the costs of carrying charges on capital already expended on the project. CONGRESSIONAL BUDGET OFFICE, DELAYS IN NUCLEAR REACTOR LICENSING AND CONSTRUCTION: THE POSSIBILITIES FOR REFORM 28–29 (1979); Willrich, *supra* note 7, at 270–71.

20. COLORADO DEP'T OF NATURAL RESOURCES, *supra* note 16, at 2; Van Baalen, *supra* note 17, at 29. Although environmentalists have expressed concern about fragmented procedures, the possibility of delaying or stopping a project increases with the number of opportunities for hearings and permits. Accordingly, project opponents may find the maze of permits strategically advantageous in their opposition to an energy project. Lippek, *supra* note 10, at 48; Rodgers, *supra* note 11, at 20.

21. COLORADO DEP'T OF NATURAL RESOURCES, *supra* note 16, at 2–4; Luce, *supra* note 9, at 23; Van Baalen, *supra* note 17, at 29.

mately, the choices to be made between energy and the environment are political. The political climate as well as the energy needs of the nation will, as a result, play a role in dictating what choices will be made. One commentator has characterized the nation as being in the midst of two simultaneous crises: an energy crisis and an environmental crisis.[22] Recent developments[23] in the Middle East have given a new urgency to the resolution of the conflicting interests in energy and the environment. Concerns for national defense and economic security[24] increase pressure to boost domestic energy production. Unfortunately, nothing has reduced the adverse environmental impact accompanying energy production. Energy programs, therefore, must continue to be carefully drafted in light of environmental consequences regardless of the temptation to focus solely upon the exigencies of domestic energy production.

II. MODELS OF REFORM

Increasing speed and efficiency in the power plant siting process by reforming the siting institution is not a novel concept. Efforts to reform the siting process have focused on creating both a rational and an expeditious procedure. Two common methods of reform have been referred to as the fast-track approach and the one-stop approach. Both approaches are intended to alleviate the burdens of multiple licensing and both share certain features. First, both share the immediate goal of expediting the energy facility permitting process. Second, both proposals attempt to eliminate unnecessary procedural delay by the creation of a single agency with the power to consolidate and coordinate the activities of the concerned regulatory agencies. A comparison of the two models reveals significant differences that have important implications for their value as models for siting reform.

A. *Fast-Track Siting*

One of the models that has been developed in an effort to accommodate both energy and environmental interests is the fast-track siting model. The model provides for the identification of priority energy projects and

22. Willrich, *supra* note 7, at 259.

23. The Iran-Iraq conflict, begun in September 1980, threatened to disrupt major oil supply shipping lanes. The conflict underscores the increasingly unpredictable and volatile political climate of a region relied upon by a majority of Western nations for the bulk of their energy supplies.

24. *See generally* CABINET TASK FORCE ON OIL IMPORT CONTROL, THE OIL IMPORT QUESTION: A REPORT ON THE RELATIONSHIP OF OIL IMPORTS TO THE NATIONAL SECURITY (1970); S. REP. NO. 331, 96th Cong., 1st Sess. 18 (1979).

the placement of such projects on a fast track through the normal siting process. The fast track is carved out of existing siting procedures by either accelerating the decision-making process or reducing the number of decisions to be made, or both. The siting process remains intact to the extent that only specified projects are expedited through the process. Non-priority energy projects are still subject to the normal siting procedures.

An example of a plan to implement such a model was found in the Carter Administration's energy program proposal.[25] The proposal focused on expediting the energy facility siting process as a means of stimulating domestic energy production.[26] A new agency, the Energy Mobilization Board (EMB),[27] was designed to accelerate the development of domestic energy resources by modifying or eliminating procedural impediments to the construction of selected non-nuclear energy facilities. Proponents expected the new agency to foster coordination and integration of federal, state, and local procedures necessary for the approval of energy facilities.[28]

25. The Carter proposal evolved into the Priority Energy Project Act of 1979. Guidelines for legislation establishing an Energy Mobilization Board were issued by the White House in a memorandum sent to Congress. Specifications for Establishment of Operations of an Energy Mobilization Board (July 19, 1979) (copy on file at the *Washington Law Review*). The Senate and the House of Representatives each passed a statute providing for a version of the Energy Mobilization Board. *See* S. 1308, 96th Cong., 1st Sess. 125 CONG. REC. S14,058 (daily ed. Oct. 4, 1979); H.R. 4985, 96th Cong., 1st Sess., 125 CONG. REC. H9993 (daily ed. Oct. 31, 1979). The bill was reported out of conference committee on June 21, 1980. H.R. REP. NO. 1119, 96th Cong., 2d Sess. (1980). The conference bill was defeated in the House on June 27, 1980 and was subsequently referred back to conference committee where it died. 126 CONG. REC. H5796 (daily ed. June 27, 1980).

The bill was a legislative response to the myriad of laws that must be complied with before the construction of a major energy facility. There are approximately 23 federal laws or executive orders which apply to major energy projects. The Department of Energy has found 54 federal laws related to at-home energy development and conservation. 125 CONG. REC. H9987 (daily ed. Oct. 31, 1979) (remarks of Rep. Broyhill); 125 CONG. REC. H9979 (daily ed. Oct. 31, 1979) (remarks of Rep. Corcoran).

26. S. 1308, 96th Cong., 1st Sess. § 2, 125 CONG. REC. S14,054 (daily ed. Oct. 4, 1979).

27. The Board would have consisted of four members to be appointed by the President under the Senate version and five members under the House version. S. 1308, 96th Cong., 1st Sess. § 4(b)(1), 125 CONG. REC. S14,055 (daily ed. Oct. 4, 1979); H.R. 4985, 96th Cong., 1st Sess. § 174(a), 125 CONG. REC. H9993 (daily ed. Oct. 31, 1979). A proposed budget provided for, in addition to the Board members, the positions of general counsel, executive director, and a staff of 50. H.R. REP. NO. 410, Part 2, 96th Cong., 1st Sess. 38 (1979).

28. S. 1308, 96th Cong., 1st Sess. § 2(b)(1), 125 CONG. REC. S14,054 (daily ed. Oct. 4, 1979); COUNCIL ON ENVIRONMENTAL QUALITY, THE PRESIDENT'S ENVIRONMENTAL PROGRAM 2 (1979). This approach implicitly suggested that Congress perceived a combination of procedural technicalities and repetitious procedures as the major obstacles to domestic energy development. Congress expressly rejected the alternative case-by-case solution of exempting energy projects from permit requirements by special legislation. The House Committee reasoned that special legislation normally is enacted

As a means of implementing fast-track siting, the EMB would have been empowered to designate priority energy projects, to promulgate project decision schedules, and to preempt any other agency that failed to comply with the decision schedule set by the EMB. Any persons planning or constructing a non-nuclear[29] energy facility could have applied to the EMB for designation of their project as a priority energy project.[30] If the project received priority status, the EMB would then have established a project decision schedule for the completion of the project.[31] To assist in the promulgation of expeditious decision schedules, the proposal would have allowed the EMB to recommend the waiver of certain federal, state, and local requirements on a project-by-project basis,[32] thereby reducing the number of decisions as well as the time required to complete a decision schedule. In the event that any of the concerned agencies failed to meet a decision schedule deadline, the EMB could have either stepped in and made the decision according to applicable law[33] or sought a court order to force an agency decision.[34]

---

only after bureaucratic delays have occurred and completion of the project is threatened. In contrast, the EMB theoretically provides a more desirable solution because it prevents delays and ensures that timely decisions are made in a coordinated manner. H.R. REP. No. 410, Part 2, 96th Cong., 1st Sess. 13 (1979).

29. S. 1308, 96th Cong., 1st Sess. § 2(b)(1), 125 CONG. REC. S14,054 (daily ed. Oct. 4, 1979).

30. A priority status would have been granted to those projects that would reduce, directly or indirectly, the nation's dependence on foreign oil. The designation of a priority energy project would have required the concurrence of the chairperson and at least two of three board members. The Act also would have required that the decision be made within 60 days of receipt of the designation request. *Id.* § 11, 125 CONG. REC. S14,058 (daily ed. Oct. 4, 1979).

31. A project decision schedule would have set deadlines for any agency decision or action necessary to the completion and initial operation of a project. The decision schedule would have identified what decisions or actions must be made by a particular agency as well as the order in which they must be made. The Act also would have required federal, state, and local agencies to adopt special, expedited procedures to meet the schedules set by the EMB. The decision schedule could have required the agencies to render decisions in a shorter period of time than required under current laws. *Id.* §§ 17, 19, 125 CONG. REC. S14,058 (daily ed. Oct. 4, 1979).

32. Both the bill passed by the Senate and the bill passed by the House would have granted waiver powers to the EMB. Under the Senate bill, the Board would have been empowered to waive procedural requirements of existing law. *Id.* The House bill, on the other hand, would have empowered the Board to waive substantive requirements of existing law. H.R. 4985, 96th Cong., 1st Sess. § 185, 125 CONG. REC. H9995 (daily ed. Oct. 31, 1979).

33. The power to preempt agencies which did not comply with their project decision schedules was proposed in the original White House guidelines sent to Congress and provided for in the Senate version of the bill. White House memorandum, *supra* note 25, at § VII; S. 1308, 96th Cong., 1st Sess. § 21, 125 CONG. REC. S14,059 (daily ed. Oct. 4, 1979). The Senate bill required that, if necessary, the Board develop an adequate record before rendering a decision in lieu of a preempted agency. *Id.*

34. *Id.* § 21(b)(1), 125 CONG. REC. S14,059 (daily ed. Oct. 4, 1979); H.R. 4985, 96th Cong., 1st Sess. § 183, 125 CONG. REC. H9995 (daily ed. Oct. 31, 1979). Judicial review of priority projects would have been streamlined under both versions of the bill. The Senate version lodged exclusive jurisdiction over the review of actions of both the fast-track siting agency and the other concerned

B. *One-Stop Siting*

Many states have enacted legislation designed to ease or to coordinate energy facility siting. A number have adopted a one-stop siting process to expedite the various agency proceedings that otherwise are required to site an energy facility.[35] The concept arose in response to a recognition by states that existing siting procedures were assuming byzantine complexity and imposing oppressive burdens on the energy industry. The one-stop concept attempts to remedy the problem by allowing a single administrative body to consider and to decide all issues relating to the construction and operation of an energy facility.

Conceptually, the one-stop process is simple.[36] A siting council is created to evaluate all aspects of a proposed energy facility.[37] Proponents of a project submit a single application to the council[38] which, in turn, is authorized to certify a project by issuing a single permit.[39] Certification by the council preempts all permit requirements of other regulatory agencies.[40] An energy project, therefore, is subjected only to those require-

---

agencies with the Temporary Emergency Court of Appeals. S. 1308, 96th Cong., 1st Sess. § 27(a)(1), 125 CONG. REC. S14,060 (daily ed. Oct. 4, 1979). In addition, the Senate bill attempted to limit the reviewing court's deliberation period. *Id.* § 27(b), 125 CONG. REC. S14,060 (daily ed. Oct. 4, 1979). The House version limited the availability of judicial review by shielding both the designation of priority projects and the setting of decision schedules from judicial review. H.R. 4985, 96th Cong., 1st Sess. § 187, 125 CONG. REC. H9996 (daily ed. Oct. 31, 1979). Regarding the constitutionality of limitations on judicial review of agency action, see Library of Congress Congressional Research Service, Limitations on Judicial Review of Agency Action (July 6, 1979).

35. At least 22 states have enacted energy facility siting legislation. For a listing of state statutes, see Murray & Seneker, *supra* note 10, at 303 n.12. Eighteen of those states have followed a one-stop approach. *See* Granger & Wise, *A Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising Effectiveness*, 10 ENVT'L LAW 457 (1980). *See, e.g.*, Energy Facility Site and Evaluation Act, WASH. REV. CODE §§ 80.50.010–.902 (1979); Public Utility Environmental Standards Act, CONN. GEN. STAT. ANN. §§ 16–50g to –50z (West Supp. 1981); Power Plant Siting Act of 1974, KY. REV. STAT. ANN. §§ 278.020–.027 (Baldwin 1979).

36. The numerous state versions of the one-stop process prevent the singling out of a definitive model. The Washington version, however, was the prototype for many of the states and exhibits all of the characteristics of the one-stop process and will be used for illustrative purposes. *See* WASH. REV. CODE §§ 80.50.010–.902 (1979).

37. The siting council primarily consists of representatives from regulatory agencies who would otherwise have permitting responsibilities. Membership on the council, however, should be extended to include all pertinent agencies and not just those with permitting authority. *E.g.*, WASH. REV. CODE § 80.50.030 (1979).

38. *See* Murray & Seneker, *supra* note 10, at 330–31. *See, e.g.*, WASH. ADMIN. CODE §§ 463-42-010 to -620 (1977).

39. *See* Van Baalen, *supra* note 17, at 29. *See, e.g.*, WASH. REV. CODE §§ 80.50.100–.110 (1979).

40. Rodgers, *supra* note 11, at 20; Tarlock, Tippy & Francis, *supra* note 11, at 555–56; Van Baalen, *supra* note 17, at 30.

ments and conditions mandated by the council,[41] rather than to a number of redundant, and possibly contradictory, requirements imposed by various separate agencies.

The siting council coordinates[42] the various regulatory agencies by eliminating administrative redundancies.[43] The one-stop process simultaneously preserves the expertise of the individual regulatory agencies and produces a streamlined method for all interested agencies to evaluate a proposed energy facility.[44] As a result, the one-stop agency provides a unified forum where the range of environmental, social, economic, and energy issues raised by the construction of an energy facility can be examined in a single permitting procedure. The council, therefore, should reach an integrated decision after considering special interests, parochial departmental interests, and the composite needs of society.[45]

It is essential, if one-stop siting is to accomplish its objectives, that both the energy industry and environmentalists be willing to make compromises. The compromise that the one-stop concept demands between the energy industry and environmentalists may be viewed as a trade-off of due process rights. Through the exercise of their due process right to be heard, environmentalists have the power to transform each step of the permitting process into an opportunity to thwart or delay a project. From the energy industry's point of view, the closer to the completion of a project such due process rights are exercised, the greater the threatened capital investment loss. Accordingly, environmentalists have been offered a more comprehensive opportunity to be heard earlier in the planning and construction stages. In exchange for more due process rights[46] in the earlier stages of a project, the environmentalists are deprived of their oppor-

41. Rodgers, *supra* note 11, at 20; Tarlock, Tippy & Francis, *supra* note 11, at 555–56; Van Baalen, *supra* note 17, at 30.

42. Commentators have noted that preemptory power by the siting council is unnecessary to the effective use of the one-stop concept and that such power creates the potential for using the siting council as a tool to dismantle environmental regulations. Accompanying preemptory power is the threat that a "power crisis of the future might stampede [the authorization of plants] without the usual pollution control features," and thereby provide a ready shield from environmental regulations for the energy industry. Rodgers, *supra* note 11, at 22. Consequently, each regulatory agency should retain and exercise "its existing statutory powers to prescribe conditions for—and perhaps to veto—" a proposed energy project within the framework of the siting council. *Id.* at 23. *See also* Tarlock, Tippy & Francis, *supra* note 11, at 555.

43. Van Baalen, *supra* note 17, at 30.

44. Tarlock, Tippy & Francis, *supra* note 11, at 556; Van Baalen, *supra* note 17, at 30.

45. Rodgers, *supra* note 11, at 23–24.

46. The enhanced due process rights acquired by environmentalists take a variety of forms, including: the provision for independent consultants to collect the requisite scientific data; the appointment of a counsel for the environment during the one-stop proceedings; and the substitution of adjudicative-type hearings for legislative-type hearings. *See, e.g.*, WASH. REV. CODE §§ 80.50.071, .080, .090(3) (1979).

tunity to be heard once a project is under construction. By granting earlier, expanded due process rights to environmentalists and by eliminating the gauntlet of permits faced by the energy industry, the one-stop concept offers both an efficient decision-making process and a reasonable compromise between the conflicting values of energy and the environment.

III. FAST-TRACK AND ONE-STOP SITING: A COMPARISON AND EVALUATION

To respond to the energy crisis, the Reagan Administration must formulate an energy policy and create proposals to implement that policy. Expediting the siting process while maintaining the ability to balance energy and environmental considerations will be an important challenge to the policymakers. An analysis of fast-track and one-stop proposals provides an opportunity to examine whether the existing requirements of the siting process have raised an unnecessary and insurmountable barrier to the development of domestic energy resources.

The primary strength of fast-track siting is the creation of an alternative expedited siting procedure available to a number of selected energy projects. The creation of an expedited process with can coordinate and facilitate siting requirements is praiseworthy. Fast-track siting's strength, however, is also its weakness. By creating an alternative siting procedure for selected projects, fast-track siting implicitly recognizes the existence of shortcomings in the current siting process and, more importantly, suggests the expendability of existing procedures. The approach, nonetheless, eschews any attempt to grapple with the presumably expendable siting procedures applicable to non-priority projects.

The one-stop process defuses criticism of the permitting process made by both energy industry representatives and by environmentalists. First, substitution of a single certification for multiple permits frees the energy industry from the burdens and the hazards of a fragmented permitting process.[47] Second, a single evaluation that fully considers all of the interrelated issues provides a more appropriate framework for considering environmental interests.[48] A major limitation of the one-stop concept is that it presumes the necessity and value of existing permit requirements. Efficiency is improved and delay reduced, but only to the extent achievable through increased coordination. In short, the one-stop approach does not provide for the elimination of siting requirements which may be spurious.

Although they bear a superficial resemblance, the fast-track and the

47. *See* note 16 and accompanying text *supra*.
48. *See* note 21 and accompanying text *supra*.

one-stop concepts differ significantly in their ends. A comparison of administrative structures reveals very different long-range goals. The major purposes of a one-stop agency are to simplify and to expedite the permitting process. In contrast, expediting the permitting process is only a means of achieving a fast-track agency's long-range goal. Unlike one-stop siting, fast-track siting was conceived and proposed within the context of a perceived threat to national security[49] so its primary administrative mission was to boost the *construction* of domestic energy plants.[50]

The means employed by fast-track siting also differ significantly from those advocated by the one-stop concept. The one-stop concept is designed to shorten the permitting period by coordinating the requirements of various agencies into a centralized procedure. The powers of a one-stop agency are limited to those of coordination.[51] The fast-track agency as proposed by President Carter, however, was vested with wide-ranging powers of waiver[52] and preemption[53] and could eliminate permit requirements to accelerate the permitting process.

The departure of the fast-track concept in both ends and means from the one-stop concept has two major implications. First, the administrative momentum toward energy facility construction makes an impartial exercise of the fast-track agency's broad powers improbable. Consequently, the EMB's administrative orientation as expeditor of energy project construction would likely have influenced all EMB decisions. Second, the initial determination whether to fast-track an energy project would be the most crucial. The significance of granting priority status to a proposed energy project lies in the pervasive influence such decisions would have on the subsequent exercise of the fast-track agency's waiver and preemption powers.

In determining which licensing procedures create unnecessary delay and are therefore waivable, a fast-track siting agency would be required to engage in a balancing of the costs and benefits of a required procedure.[54] The decision to fast-track a project—a decision which implicitly

49. S. REP. No. 331, 96th Cong., 1st Sess. 18 (1979); S. 1308, 96th Cong., 1st Sess. § 2(a), 125 CONG. REC. S14,054 (daily ed. Oct. 4, 1979).

50. *See, e.g.*, 125 CONG. REC. S13,858 (daily ed. Oct. 2, 1979) (remarks of Sen. Jackson).

51. Powers which extend beyond those of coordination are superfluous to the one-stop agency's ability to effectively discharge its responsibilities. Accordingly, the power of a one-stop agency should be limited to that of coordination and not, for example, extended to include preemption. *See* note 42 *supra*.

52. *See* note 32 and accompanying text *supra*.

53. *See* note 33 and accompanying text *supra*.

54. The EMB would have had to make decisions that, by nature, necessitate a balancing of competing interests. It would have been difficult, if not impossible, for Congress to have established any meaningful criteria to guide the EMB in its weighing of the quantitative and qualitative evidence.

recognizes the beneficial value of the particular project—is likely to influence the balancing process in favor of construction. A predisposition toward the beneficial value of an energy project will inevitably affect how a siting agency perceives the costs and benefits[55] of a permit requirement.

A biased exercise of waiver power by the agency, in turn, creates a threat that it can shape the decisions made by federal, state, and local agencies. Accompanying the power to dictate procedures is the power to influence the ultimate decision of the agency.[56] Under the Carter fast-track proposal, a significant portion of siting decisions would have been made by the EMB, directly or indirectly, because of the pressures it would have been able to exert on the decisions of permitting agencies.

Similarly, a fast-track siting agency's decision to award priority status would affect the use of its preemption power. The EMB, for example, would have been able to preempt an agency which had failed to meet its decision schedule.[57] Little chance exists that a fast-track agency, already convinced of the necessity of a project, would render a decision contrary to its prior judgment and adverse to the project. The proponents of a project would be pleading their case a second time before an agency already persuaded of the project's value.

The powers of waiver and preemption present in the Carter fast-track model thus extend beyond the authority necessary to remedy problems of fragmentation and redundancy in the siting process. Such powers threaten any potential benefit to be gained from the fast-track approach as a coordinating mechanism and risk losing the valuable contributions and expertise of both local and federal agencies.[58] Fast-track siting, as such,

55. With the goal of energy plant construction in mind, it is submitted that the "costs" of a permitting requirement can be identified as the amount of time delay produced by the requirement relative to the necessity of the project. Conversely, the "benefits" represent the environmental and health safeguards provided by a permit requirement relative to the potential dangers posed by a project. As the value of a project rises, the amount of time delay becomes increasingly important, thereby raising the "cost" of a permit requirement. Likewise, a confidence in the value of a project will result in the safeguards appearing to provide fewer "benefits" than if a project's worth or value were in question.

56. There is continuing controversy as to whether substantive administrative decisions are, in fact, influenced by a modification of administrative procedures. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4361 (1976), has provided a forum for debate over this issue. *Compare* Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263, 279–86 (1976) (the procedural requirements of NEPA have resulted in gradual substantive changes in agency decisionmaking) *with* Comment, *Implementation of the Environmental Impact Statement*, 88 YALE L.J. 596 (1979) (a purely procedural response is inadequate to implement the goals of NEPA).

57. *See* note 33 and accompanying text *supra*.

58. Those agencies which have been preempted or whose permitting functions have been waived can no longer contribute to the siting process. *See* Rodgers, *supra* note 11, at 23–24; Tarlock, Tippy & Francis, *supra* note 11, at 554–56.

creates an atmosphere in which the ability of the siting process to accommodate environmental concerns is brought into question and the integrity of the process is subject to challenge.

The prescription of an effective remedy depends upon an accurate diagnosis of the problem. Because of the corresponding trade-off in environmental quality, it is especially important that actions taken to increase energy production be informed decisions. Accordingly, an analysis of the fast-track model must include an evaluation of the premises which underlie the fast-track concept.

Three premises underlie the fast-track approach:[59] First, that the immediate construction of various energy facilities will provide the most effective solution to the energy problem; second, that environmental protection statutes represent the major source of delay in energy facility construction; third, that licensing statutes and procedures in their current form are expendable. The validity of these premises cannot withstand scrutiny.

Accelerating all domestic energy project construction guarantees neither the most effective nor the fastest method of solving the nation's energy problem. It is a mistake to equate the rapid construction of energy facilities with the efficient development of energy resources. Careful planning, rather than speed, achieves efficient and economical energy development. The fast-track approach accelerates only those projects which have been proposed by the energy industry.[60] Nothing assures that the energy industry proposals will promote the efficient and socially cost-effective development of finite resources. Although the proposed fast-track legislation guaranteed action, it failed to guarantee that the most efficient and cost-effective steps would be taken to solve the energy problem.

Environmental procedures are a source of delay in the construction of energy facilities. To suggest that they are the major source of delay, however, is unwarranted. First, studies which have examined energy facility construction have concluded that environmental statutes merely contrib-

59. *See* Duerksen, *Energy Haste May Make Political, Ecological Waste,* CONSERVATION FOUNDATION LETTER (Oct. 1979).

60. Commentators have argued that a fundamental shortcoming of current energy policy is that private industry remains in control of major policy decisions such as the types of energy researched and promoted as well as the designing of energy plants. Energy industry decisions are motivated more often by considerations of "internal business accounting and overall industry efficiency [than by] the external socioeconomic benefits and detriments of individual siting decisions, or . . . their cumulative impacts on the surrounding economy." Hamilton, *Power Plant Siting: A Literature Review,* 19 NAT. RESOURCES J. 75, 95 (1979). *See also* Rodgers, *supra* note 11, at 32; Tarlock, Tippy & Francis, *supra* note 11, at 561; Comment, *supra* note 10, at 1315 n.8.

ute to the overall delay of a project.[61] Other delays include labor disputes, project planning, availability of materials, and availability of financing.[62] Second, new Council on Environmental Quality guidelines promise to expedite the time-consuming Environmental Impact Satement process by streamlining existing procedures.[63]

Implicit in the Carter Administration's decision to grant a fast-track agency power to waive procedural laws was the suggestion that current procedures are expendable. No evidence warrants the assumption that the procedures responsible for delay failed to provide better decisions.[64] Opponents of the EMB, for example, pointed to the exemption of the Alaska pipeline from licensing laws as evidence of the importance of environ-

61. Reviewing a study conducted by the Library of Congress which examined six energy facility case histories, Senator Stafford noted:

> Despite their readily apparent differences a review of the case studies points to two basic conclusions: First, that it is difficult to attribute the delay or foreclosure of construction of energy development facilities solely to substantive Federal environmental protection laws; and second, that usually it appears that a general lack of consensus on the need for the project, at least as proposed, underlies the difficulty promoters of the projects have faced in trying to obtain necessary regulatory approvals.

125 CONG. REC. S13,876 (daily ed. Oct. 2, 1979) (remarks of Sen. Stafford).

62. A recent study conducted by the Congressional Budget Office illustrates the types of delays which may occur in the licensing and construction of nuclear reactors. CONGRESSIONAL BUDGET OFFICE, DELAYS IN NUCLEAR REACTOR LICENSING AND CONSTRUCTION: THE POSSIBILITIES FOR REFORM (1979). Although the study deals only with nuclear power plants, a majority of the delay factors are common to all power plants. Delays in the reactor lead time occur in two phases: the licensing phase and the construction phase. *Id.* at 11–17. Sources of delay during the licensing phase are primarily limited to the Nuclear Regulatory Commission's (NRC) safety report analysis and environmental report. *Id.* at 19–22. The longest delays in reactor lead time occur after the issuance of a construction permit, when the reactor is under construction. *Id.* at 23. Approximately 80 percent of the total amount of delay reported for reactors under construction occurred because of events or decisions in the private sector unrelated to the NRC. *Id.* More specifically, the two largest sources of construction delay are the reconsideration of future energy demand and financial delays. *Id. See also* Case & Schoenbrod, *supra* note 11, at 997–99; Willrich, *supra* note 7, at 271.

63. 40 C.F.R. §§ 1500–1508 (1980). The new regulations, effective July 30, 1979, *id.* § 1506.12, were promulgated pursuant to President Carter's 1977 order for the Council to issue regulations, replacing prior guidelines, to implement more effectively the procedural requirements of NEPA. Exec. Order No. 11,991, 3 C.F.R. 123 (1978). "In pursuit of [improving agency decisions by reforming the decision-making process], the regulations ease compliance with NEPA by clarifying procedures, reducing paperwork, and minimizing delay." Fisher, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVT'L L. REV. 347, 348 (1979). *See* COUNCIL ON ENVIRONMENTAL QUALITY, 10TH ANNUAL REPORT, 577–81 (1979); Comment, *Implementation of the Environmental Impact Statement*, 88 YALE L.J. 596 (1979). *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS (1976); General Accounting Office, The Environmental Impact Statement—It Seldom Causes Long Project Delays But Could Be More Useful If Prepared Earlier (1977).

64. "[T]here may be good reason for delaying project decisions in the course of the EIS process. If a proposed action is complicated, the NEPA requirements for a careful look at consequences and for thoughtful analysis of public and agency comments help agencies to reach an informed decision." COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS 27 (1976). "A number

mental procedures.[65] They argued that had proper consideration been given to all the impacts and the available alternatives, the subsequent unexpected glut of Alaskan oil on the West Coast would have been avoided.[66]

The shortcomings of the EMB should remind the Reagan Administration that the formulation of an effective program to stimulate domestic energy production is dependent upon an accurate diagnosis of the problem. Environmental protection laws should not be made the scapegoat for lagging domestic energy production. Nothing warrants the assumption that environmental laws are primarily responsible for the energy crisis faced by the nation, nor the belief that an elimination of such laws will rescue the country from its current crisis.

The EMB experience also underscores the hazards of drafting energy-environmental legislation which is incapable of delivering its promised benefits. The EMB proposal was designed to eliminate delays in the permitting of selected energy projects and thereby reduce the time required to bring energy projects on line.[67] A major conceptual weakness of the proposal, however, was the single focus upon permit requirements as a method to expedite the process. Other major factors which contribute to delay in the siting phase of an energy project were unaffected by the proposal.[68] Absent the assurance that the EMB could have expedited energy facility siting, the proposal compromised the ability of the siting process to address environmental concerns in exchange for a dubious promise of more energy.

IV. PROPOSAL

A fundamental lesson to be drawn from the proposal of fast-track siting is a recognition of the limitations of the siting process as a means to stimulate domestic energy production. The primary limitation on any modifi-

---

of agencies stated that the environmental analysis and decisions made by various agency personnel have significantly improved environmental planning and management." *Id.* at 26. *See also* GENERAL ACCOUNTING OFFICE, *supra* note 63, at 34–37 (Some projects have been modified for environmental reasons because of the impact statement process; the increasing agency and public awareness of environmental statements led to better planning decisions on later projects. Notably, the costs of preparing an EIS have been minor, averaging approximately one-tenth of one percent of project costs.); Hamilton, *supra* note 60, at 91.

65. 37 CONG. Q. 2136 (1979).

66. *Id.*

67. "The proposal before us would create a strong EMB, one that would cut through the bureaucracy and dramatically reduce the time required to bring vital energy projects on line." 125 CONG. REC. S13,858 (daily ed. Oct. 2, 1979) (remarks of Sen. Jackson).

68. For example, the EMB would have been powerless in the face of labor disputes. *See* H.R. 4985, 96th Cong., 1st Sess. § 186(b)(1)(A), 125 CONG. REC. H9996 (daily ed. Oct. 31, 1979).

cation of current siting procedures is the necessity of preserving public confidence in the process.[69] In this regard, the EMB proposal was admirable in that it sought to coordinate the numerous siting requirements and reduce the uncertainties and the administrative redundancies inherent in a fragmented process. The decision to extend waiver authority to the EMB, however, threatened to skew the process in favor of energy values.[70] The ability to eliminate permit requirements was particularly unjustified in the absence of evidence that such requirements were either expendable or the major source of delay.[71] The proper focus of attempts to streamline the process should be coordination. Increased coordination would lend certainty to the process and reduce any existing agency overlaps without overlooking concerns embodied in current siting requirements.

In the event that the Reagan Administration includes in its energy program a plan for the modification of current power plant siting procedures, a sensible and environmentally responsible alternative would be establishing a federal one-stop procedure.[72] Unlike the EMB approach which attacked the substance of environmental regulations in an attempt to expedite the process, the one-stop concept expedites the permitting process by coordinating existing laws.[73] In addition, one-stop siting reforms promise to yield more long-term benefits than the fast-track approach which only provides an alternative siting procedure for a limited number of selected energy projects.[74] A one-stop policy would enable the energy industry to gain a measure of certainty in the permitting process with timely deci-

69. Any change in the decision-making process which results in a reduction of public respect and confidence in the process will increase the number of decisions challenged in court and consequently negate any potential efficiency benefits from the modification. *Hearings on S. 1684, S. 1915, and S. 3631 Before the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 268 (1972) [hereinafter cited as *Senate Commerce Comm. Hearings*] (statement of Robert Rauch, Assistant Legislative Director, Friends of the Earth); *Hearings on H.R. 5277, H.R. 6970, H.R. 6971, H.R. 6972, H.R. 3838, H.R. 7045, H.R. 1079, and H.R. 1486 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 238 (1971) [hereinafter cited as *Communications and Power Subcomm. Hearings*] (testimony of Rogers C.B. Morton, Secretary of the Interior).

70. *See* notes 54–58 and accompanying text *supra*.

71. *See* notes 61–66 and accompanying text *supra*.

72. In 1971, the Nixon Administration introduced legislation proposing the establishment of state or regional one-stop agencies for the certification of major electric generating and transmission facilities. H.R. 5277, 92d Cong., 1st Sess., 117 CONG. REC. 4374 (1971). The bill died in committee. *See generally* Case & Shoenbrod, *supra* note 11, at 1001–04; Tarlock, Tippy & Francis, *supra* note 11, at 553–59. Any new legislation should follow the EMB's lead and attempt to address all non-nuclear energy resources as a unified topic, rather than fragmenting consideration of the different sources of energy. *See* Case & Schoenbrod, *supra* note 11, at 1007.

73. *See* note 42 and accompanying text *supra*.

74. *See* note 30 and accompanying text *supra*.

sions, yet preserve a confidence in the ability of the decision-making process to arrive at fair and balanced decisions.

A federal policy favoring one-stop siting could best be developed by the creation of federal guidelines[75] requiring states to utilize the concept. The one-stop concept should be implemented on the state level[76] since state agencies are sufficiently close to the communities affected by a proposed site to be responsive to local concerns. At the same time, they are sufficiently removed so that the local concerns do not override broader public interests.[77] The lodging of one-stop siting responsibilities with state governments is also preferable because it avoids a potential constitutional states' rights issue[78] and, of particular appeal to the Reagan Administration, it avoids the creation of a new federal bureaucracy.

Implementation would require the designation of an existing neutral

---

75. Guidelines could include the establishment of:
1) requirements with respect to both the issues and the data to be included in long range plans;
2) criteria for evaluating the environmental impact of a proposed site;
3) criteria for evaluating the environmental impact of alternative sites;
4) procedures to ensure early public participation in the planning and certification stages;
5) procedures and requirements with respect to the formation of state one-stop agencies and their powers;
6) procedures to ensure consideration of regional impacts; and
7) requirements with respect to adequate staffing of the state one-stop agencies.

76. Because energy needs and environmental impacts associated with a project may extend beyond the boundaries of the state in which it is located, adjacent states which may be affected by the project should be granted standing to participate in the review and certification proceedings of the state in which the project is located. Federal hydroelectric power plants which encompass several states would remain under the coverage of the Federal Power Act, 16 U.S.C. §§ 791–828 (1976).

77. *Communications and Power Subcomm. Hearings, supra* note 69, at 240 (testimony of Rogers C. B. Morton, Secretary of the Interior). *See also id.* at 299–315 (statement of Gordon J. F. McDonald, Council on Environmental Quality); *id.* at 858–61 (testimony of John G. Quale, President, Wis. Electric Power Co.). One state initiative in response to the proposed override of state and local laws by the EMB has been Colorado's Joint Review Process (JRP). Designed as a method to retain state control over energy resources, the JRP Draft Manual proclaims that JRP is not a new siting procedure, but a management system drafted to increase efficiency between the three levels of government. Similar to the fast-track approach, JRP would be available only to a limited number of projects. *See generally* COLORADO DEP'T OF NATURAL RESOURCES, *supra* note 16. Approximately 20 states have expressed an interest in the state level reform model created by Colorado. Status Report No. 12, Status of the Colorado Joint Review Progress Program 3 (Feb. 1981).

78. The states' rights issue would be raised in the context of a federal agency making decisions involving traditional generic state governmental functions such as zoning decisions, land-use controls, and safety regulations as they are applicable to energy facilities. In addition, given the opposition encountered by the EMB on states' rights grounds, it is doubtful that a new federal bureaucracy that impinges upon state authority would be passed by Congress. *See* Library of Congress Congressional Research Service, Constitutional Analysis of Energy Mobilization Proposals (July 31, 1979); Department of Justice, Memorandum: Constitutionality of the Energy Mobilization Board Proposal (July 24, 1979), *reprinted in* 125 CONG. REC. S13,884–87 (daily ed. Oct. 2, 1979); Fischer, *Allocating Decisionmaking in the Field of Energy Resource Development: Some Questions and Suggestions*, 22 ARIZ. L. REV. 785 (1980).

federal agency[79] to develop federal guidelines for state compliance. The guidelines should provide flexibility for states to adapt the one-stop concept to their particular needs.[80] Methods to ensure compliance by the states could be modeled after the 1971 federal one-stop proposal.[81] The federal government could preempt the field and conditionally delegate the preempted siting authority back to the states.

The *sine qua non* of one-stop siting is the creation of a certifying agency[82] and the utilization of a single master application.[83] Federal guidelines would require the creation of a new state siting agency, or the adaptation of an existing siting agency, with final authority on all state siting issues. To assure public confidence in the process, the guidelines should require the adoption of procedural safeguards, such as provisions for independent consultants to gather the requisite siting data, and a publicly funded counsel representing the environment.[84] The certifying agency should operate as a coordinating mechanism allowing separate agencies with demonstrated competence in various fields to retain their input into the process.[85]

An important improvement in the siting process would be the incorporation of a mandatory extended planning horizon.[86] Long-range open planning with a periodic review by federal agencies should diminish the often unchecked power the energy industry exercises in their formulation

79. *See, e.g.*, H.R. 5277, 92d Cong., 1st Sess., 117 CONG. REC. 4374 (1971). H.R. 5277 allowed the President to designate a Federal Certifying Agency. President Nixon planned to designate the proposed Department of Natural Resources or the existing Department of the Interior as the Federal Certifying Agency. *See Communications and Power Subcomm. Hearings, supra* note 69, at 240 (testimony of Rogers C.B. Morton, Secretary of the Interior).

80. *Communications and Power Subcomm. Hearings, supra* note 69, at 299–315 (testimony of Gordon J. F. McDonald, Council on Environmental Quality).

81. *Id.* at 696–713 (statement of William R. Gould, Senior Vice-President, Southern California Edison Co.; Chairman, Western Systems Coordinating Council).

82. *See* notes 37–38 and accompanying text *supra*.

83. *See* note 38 and accompanying text *supra*.

84. *See* note 46 and accompanying text *supra*.

85. *See* note 42 and accompanying text *supra*.

86. *See, e.g.*, H.R. 5277, 92d Cong., 1st Sess. § 4(a), 117 CONG. REC. 4374 (1971). H.R. 5277 required the electric utilities to reveal the general location, size, and type of bulk power supply facilities over a ten-year planning horizon. A preliminary review of alternative energy facility sites would occur five years in advance of construction. *Id.* § 8(c), 117 CONG. REC. 4374 (1971). *See also Senate Commerce Comm. Hearings, supra* note 69, at 142 (testimony of Michael McCloskey, Executive Director, Sierra Club); *id.* at 225 (testimony of Gordon J. F. McDonald, Council on Environmental Quality); *Communications and Power Subcomm. Hearings, supra* note 69, at 238 (testimony of Rogers C. B. Morton, Secretary of the Interior).

As an example of a state statute, see the Warren-Alquist State Energy Resources Conservation and Development Act, CAL. PUB. RES. CODE §§ 25000–25007 (West Supp. 1981). The Act requires that the California Energy Commission engage in comprehensive planning and forecasting activities. The process has three components. The first stage is an evaluation of: (1) the extent that new facilities are

of energy project proposals.[87] The public availability of information combined with early participation by the public should facilitate the development of a consensus on the need of any project which ultimately reaches the siting phase.[88] Current procedures are frequently marked by an adversarial character because of the energy industry's desire to protect the financial investment required in order for a proposal merely to reach the siting application stage. The preliminary identification of sites and early hearings would ensure a full ventilation of issues before the time when the immediate energy needs of a community must prevail.

The comparison of the fast-track model with the one-stop model points out several features which should be avoided in drafting one-stop legislation. The power of waiver is unnecessary and should not be given to the siting council. Also, if the new administration wishes to use timetables as a means of encouraging expeditious decisions, it is important that a data requirement accompany any time requirement placed upon the agencies. A data requirement should ensure that quality decisions will not be sacrificed in the name of speed. Finally, a vital, but sometimes overlooked, consideration is to ensure that the siting council is adequately staffed so that it may effectively carry out its responsibilities.[89]

V. CONCLUSION

The nation's policymakers have chosen two conflicting goals—protecting the environment and satisfying the nation's energy needs. The decision to allow the construction of a major energy facility requires a compromise between these conflicting goals. Legal commentators and energy industry representatives agree that the decision-making process that forges the energy-environment compromise needs streamlining. Two pro-

---

needed, (2) the extent that proposed facilities are acceptable, (3) whether there are better alternatives, and (4) whether there are acceptable sites for the available technologies. The second stage requires an evaluation of the appropriateness of the utility's proposal in concept. The third stage involves a detailed critique of the specific proposal by the Commission staff and agencies for completeness. *See generally* CALIFORNIA ENERGY COMMISSION, POWER PLANT SITING POLICY PAPER (1978).

87. *See* note 60 and accompanying text *supra*. *See also Senate Commerce Comm. Hearings, supra* note 69, at 139–44 (statement of Michael McCloskey, Executive Director, Sierra Club). Review and comment responsibilities should be undertaken by several agencies. Those agencies could include: the designated Federal Certifying Agency, the Council on Environmental Quality, the Army Corps of Engineers, the Federal Energy Regulatory Commission, and the state one-stop agency.

88. *See* note 62 *supra*. In light of recent energy demand studies which have readjusted downward energy need forecasts, it may be increasingly difficult to develop a consensus on the need for a new energy facility. Early public participation in the planning process, therefore, will be of particular importance in developing a consensus in the coming years. *See* note 6 *supra*.

89. *See* Granger & Wise, *supra* note 35, at 479–80.

posed schemes exist for streamlining major energy facility siting decisions. The first proposal is fast-track siting, which creates an agency to accelerate the development of domestic energy resources. The second is one-stop siting, which creates a siting agency to decide all issues relating to the construction and operation of an energy facility. A one-stop agency is preferable because it creates a single forum for rational, efficient, and comprehensive siting decisions. The fast-track approach, on the other hand, is premised on several questionable assumptions about our current energy dilemma. In addition, the fast-track approach is not comprehensive and its inherent bias favoring energy facility construction skews the balancing process to the detriment of environmental interests.

Charles R. Ching