Washington Law Review

Volume 47
Number 1 *Symposium: The Location of Electricity-Generating Facilities*

10-1-1971

Siting Power Plants in Washington State

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SITING POWER PLANTS IN WASHINGTON STATE

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Converse with a corporate manager who is anxious to preside over the construction of an oil refinery, pulp mill or aluminum plant and you are talking to a worried man. Ask someone in the Defense Department how easy it is to find a suitable storage facility for antiquated supplies of nerve gas and you will be told that the most remote boondocks of the world are too close.[1] "Don't put it here" is the universal response of irate citizens who prefer that industrial development and pollution disappear altogether or land in somebody else's backyard.

No group is more acutely aware of this widespread citizen revolt against the encroachment of industry than the electrical utilities. It is difficult to discover a trade journal that in the last several months has not acknowledged what is thought to be irresponsible opposition to proposals for nuclear, fossil-fueled and hydro-electric facilities.[2] Accustomed to a runaway growth rate that has approximately doubled the total use of electric energy every ten years since 1930,[3] and projecting a fourfold increase of today's generating capacity by 1990,[4] the industry was caught unprepared when the popular uprising called the environmental movement disrupted the best laid plans of irrevocable development.

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1. Washingtonians recall how nerve gas supplies stored in Okinawa were not welcome there, nor in Umatilla, Oregon, nor in Kodiak Alaska. The leading candidate for storage now is remote and tiny Johnson Island in the Pacific Ocean. *See* Rodgers, *Nerve Gas to the Northwest and Beyond,* 1 ENV. LETTERS 111 (1971).

2. *See, e.g.,* Editorial, *Power's Role in Urban Society Needs Recognition,* ELECTRICAL WORLD, May 1, 1971, at 7.

3. Statement of John Nassikas, Chairmen, Federal Power Comm'n, in *Hearings on a Report Covering the Principal Policy Questions Now Facing the Federal Power Commission Before the Subcomm. on Energy, Natural Resources and the Environment of the Senate Comm. on Commerce,* 91st Cong., 1st Sess., app. B, at 84 (1970) [hereinafter cited as *Commerce Committee Hearings*].

4. *Id.* at 55.

Casualties have been well publicized. The Federal Power Commission reports that, in the seven-year period from 1969 through 1976, 138 fossil-fueled steam-electric facilities and 64 nuclear generating units of 300 megawatt capacity or more are scheduled to begin service;[5] but construction of 54 units is currently reported delayed.[6] Of these, several have been eliminated or presently are in abeyance as a result of legal action.[7] In May of 1970 the voters of Eugene, Oregon, approved a four-year moratorium on a nuclear power facility planned for that area.[8] The decision of Minnesota's Northern States Power Company to proceed with a nuclear plant at its Monticello site on the Mississippi River has stirred up a bitterly contested controversy over the question of state power to impose radiation standards more stringent than those approved by the Atomic Energy Commission.[9] Florida Light and Power Company's proposed nuclear plant on the shores of Biscayne Bay has drawn the personal attention of the Attorney General who has authorized a suit to head off anticipated thermal pollution.[10]

Nor does the conflict between power and the environment disappear once the siting decision is settled. Disputes over design are common. Nine families in Michigan are praised—or condemned, depending on your point of view—for forcing the Indiana and Michigan Electric Company to modify the design of its nuclear plant to

5. *Id.* at 56 n.8.
6. *Id.*
7. *Commerce Committee Hearings, supra* note 3, at 63. Environmentalists are hardly the chief culprits. FPC Chairman Nassikas assigns responsibility for delay as follows: 52% (labor difficulties); 23% (equipment failure); 14% (late deliveries); 5% (miscellaneous); and only 6% (environmental considerations). RODALE'S ENV. ACTION BULL., Aug. 7, 1971, at 14.
8. Gillette, *Nuclear Reactor Safety: A New Dilemma for the AEC*, 173 SCIENCE 126, 130 (1971).
9. *See* Northern States Power Co. v. Minnesota, 320 F. Supp. 172 (D. Minn. 1971) (holding that Congress expressed its mandate to preempt the field by placing power in the Atomic Energy Commission and, therefore, Minnesota was without power to enforce its regulations). *See also* 55 MINN. L. REV. 1223 (1971). For a discussion of the background of the dual regulation issue see Loevinger, Book Review, 171 SCIENCE 790 (1971); Helman, *Pre-emption: Approaching Federal-State Conflict Qua Licensing Nuclear Power Plants*, 51 MARQ. L. REV. 43 (1967).
10. *See* United States v. Florida Power & Light Co., 311 F. Supp. 1391 (S.D. Fla. 1970) (denying motion for a preliminary injunction). The suit has been settled upon an agreement by the company to undertake an extensive construction program to halt hot water pollution, N. Y. Times, Sept. 2, 1971, at 56, col. 2

protect nearby properties from damage by erosion.[11] Citizen group intervenors were instrumental in securing a settlement agreement from Consumers Power Company with respect to the Palisades nuclear power plant on Lake Michigan requiring the installation of "closed-cycle cooling towers at the plant, plus a new waste handling system that will release essentially no radioactive wastes into the lake."[12] Executives of the Mohave Generating Station, a coal-burning project chiefly of the Southern California Edison Company, protest that it is technically impossible to meet tightening standards for fly-ash removal.[13] Officials of the Pennsylvania Power Company are chagrined at having spent $2 million for electrostatic precipitators for its unit finished a few years ago at New Castle, Pennsylvania, only to discover that more stringent regulations have rendered the technology already obsolete.[14] The Maryland Public Service Commission has granted a certificate to the Baltimore Gas and Electric Company authorizing construction of a nuclear plant, subject to an unusual proviso that "will require the backfitting of technological advancements, as they become available, that provide reasonable additional protection necessary for the public health and safety or protection of the environment."[15] Opportunities, in theory and fact, for knocking out a utility or imposing new design obligation are many and varied. Mr. Charles Luce, Chairman of the Board of New York's Consolidated Edison Company and former Administrator of the Bonneville Power Administration, has pointed out some of the pitfalls industry faces in developing new plant sites:[16]

> Taking as an example our proposed oil and gas fired units at the Astoria plant, we will need three approvals from Federal agencies, four

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11. *Hearings on Environmental Effects of Energy Generation on Lake Michigan Before the Subcomm. on Energy, Natural Resources and the Environment of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 14-17, 61 (1970) [hereinafter cited as *Lake Michigan Hearings*].

12. Businessmen for the Public Interest, Chicago, Ill., Release No. 710316-A (March 16, 1971). A copy of the Palisades Plant Settlement Agreement is on file in the University of Washington Law Library. Consumers Power Co., No. 50-255 (AEC, Mar. 12, 1971).

13. N.Y. Times, July 7, 1970, at 22, col. 1.

14. Wall Street Journal, Dec. 23, 1970, at 1, col. 6.

15. Baltimore Gas & Elec. Co., No. 59203 (Md. Pub. Serv. Comm'n, Jan. 19, 1971). A copy of this order is on file with the *Washington Law Review*.

16. Speech by Charles Luce, Chairman of the Board, Consolidated Edison Co., Before the Association of the Bar of the City of New York, Nov. 18, 1969, at 8.

from New York State agencies and at least twenty from New York city agencies, the exact number depending upon the final design of the plant.

Not to be overlooked are the lawsuits that impose additional hurdles for developers. At any point in the certification process which confronts most proposals, a utility is vulnerable to inconsistent demands, prolonged delays, interruption by litigation costing millions of dollars or even ultimate defeat by a last minute nullifying vote.[17] The industrial juggernaut programmed to build power plants ad infinitum is clearly in jeopardy.

Whatever the causes, it is indisputable that delays in the construction and operation of generating facilities have contributed to supply lagging behind demand. Ominous warnings of black-outs and brown-outs are daily news to many Americans.[18] Businesses and hospitals are hastening to develop their own emergency sources of energy.[19] Reductions in loads already have occurred in many parts of the country.[20] The crisis is here and it will bring inevitable reform.

I. SITING: THE ISSUE IN CONTEXT

Forces to be evaluated in assessing a national energy policy are not easily summarized. During the next several years the nation will experience extended debate over desirable levels of growth in generating capacity[21] and over the impact of rate structures and promotional pol-

17. With rising construction costs, says one industry official, "$25 million would be a conservative estimate on the cost of delaying a major plant for a year." Wall Street Journal, June 9, 1971, at 30, col. 1.

18. *See, e.g.*, Seattle Times, Aug. 11, 1970, at 8, col. 1; N.Y. Times, June 7, 1970, at 1, col. 5; The National Observer, Sept. 14, 1970, at 1, col. 1; Wall Street Journal, July 31, 1970, at 24, col. 1.

19. *See generally* U.S. NEWS & WORLD REPORT, Sept. 22, 1969, at 85.

20. *See, e.g.*, Wall Street Journal, Sept. 23, 1970, at 2, col. 2. The six-state New England area was forced to reduce its electric voltage by five percent in June of 1970. N.Y. Times, June 30, 1970, at 61, col. 7.

21. Estimates of desirable levels fluctuate widely. *Compare* ENVIRONMENTAL POLICY DIVISION, LEGISLATIVE REFERENCE SERVICE, THE ECONOMY, ENERGY AND THE ENVIRONMENT: A BACKGROUND STUDY PREPARED FOR THE USE OF THE JOINT ECONOMIC COMM., 91st Cong., 2d Sess. 5 (Comm. Print 1970) ("The average annual indicated growth rate is about 3.2 percent"), *with Commerce Committee Hearings, supra* note 3, at 84 ("For the Nation as a whole, the estimated average annual rate of growth between 1965 and 1990 is expected to be about 7.1 percent."). *See also* REPORT OF THE STUDY OF CRITICAL ENVIRONMENTAL PROBLEMS (SCEP), MAN'S IMPACT ON THE GLOBAL ENVIRONMENT 288-93 (1970) (pointing out discrepancies in energy projections) [hereinafter cited as SCEP].

icies on growth.[22] Choosing among competing fuels, with their distinct pollution costs, will pose cruel dilemmas. Critical temporary shortages of available supplies of natural gas, oil and coal have underscored warnings of black-outs and inspired proposals for rationing, price controls,[23] export embargoes[24] and for the establishment of a new agency to coordinate the nation's energy resources.[25] In addition, estimates of the energy picture of the future are further clouded by the continuing revolution in technology.[26] The development of the fast breeder reactor, to cite but one example, would vastly improve nuclear power and fuel economy and raise its thermal efficiency, while concurrently cutting down on air pollution from fossil-fueled facilities.[27] It is an understatement to acknowledge that the dimensions of a sound national energy policy are shaped by a myriad of unsettled economic, scientific and political considerations.

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22. For a comprehensive examination of these practices see OFFICE OF ECONOMICS, FEDERAL POWER COMM'N, PROMOTIONAL PRACTICES OF PUBLIC UTILITIES: A SURVEY OF RECENT ACTIONS BY STATE REGULATORY COMMISSIONS (1970) and FEDERAL POWER COMM'N, NATIONAL POWER SURVEY (1964).

23. Letter from the American Public Power Ass'n to the President of the United States, in N.Y. Times, Sept. 1, 1970, at 1, col. 5.

24. *See, e.g.,* N.Y. Times, Sept. 6, 1970, at 1, col. 1.

25. *See, e.g.,* N.Y. Times, Sept. 1, 1970, at 1, col. 5 (recommendation of Joseph C. Swidler, Chairman of the New York State Public Service Commission).

Bitter attacks have been aimed at the major oil companies, which own most of the natural gas leases, for creating an artificially induced shortage of this much-sought-after clean fuel. *See, e.g.,* Editorial, N.Y. Times, Oct. 2, 1970, at 1, col. 1. No less vigorous has been the inquiry into the oil industry's expanding control over other sources of energy, notably coal and uranium. *See, e.g.,* Testimony of Senator Gore, in *Hearings on Fuels and Energy Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 2d Sess. 31, 34 (1970) [hereinafter cited as *Interior Committee Hearings*].

The coal industry also has come under fire for unconscionable increases in prices. *See, e.g.,* N.Y. Times, Sept. 6, 1970, § 3, at 1, col. 1:

> . . . the responsibility for greatly enlarging the problem [of fuel shortages] was variously assigned to such diverse factors as sudden and unrealistic zeal for mine safety and pollution abatement, conflicts within the United Mine Workers of America, soaring exports at soaring prices to Japan and other foreign countries, a lack of railroad cars and, of course, the actions of the coal industry and the electric power industry.

See also Testimony of James R. Garvey, Vice President, National Coal Ass'n, in *Interior Committee Hearings, supra,* at 68, 72-73; Testimony of Alex Radin, General Manager, American Public Power Ass'n, in *Hearings on the Impact of the Energy and Fuel Crises on Small Business Before the Subcomm. on Special Small Business Problems of the House Comm. on Small Business,* 91st Cong., 2d Sess. 80-88 (1970).

26. Address by Glenn T. Seaborg, Chairman, United States Atomic Energy Comm'n, at the Associated Press Managing Editors' Convention, Honolulu, Hawaii, Nov. 19, 1970.

27. *Id.;* AEC Release No. 0-10 (Feb. 3, 1971). Already, a group of scientists has filed suit to force disclosure by the Atomic Energy Commission of the potential environmental impact of these new reactors. N.Y. Times, May 26, 1971, at 68, col. 1.

Within these broad, debatable and fluctuating parameters, there is universal agreement on a few specifics. First, power pollutes.[28] Under any interpretation, the trade-offs are ominous. Seattle City Light's application to the Federal Power Commission (FPC) to raise the height of Ross Dam, which would flood parts of the Skagit River Valley in British Columbia to the understandable consternation of many Canadians, is an indication that the oft-proclaimed "clean" hydro-electric facility exacts its own heavy costs.[29] The future supplies of natural gas that everybody wants are dependent in part on the off-shore exploration for oil that few people want.[30] Lives are lost in extracting coal from the ground; the land is lost that yields the fuel.

Mining uranium is similarly costly. The risks of catastrophic nuclear explosion are emphasized by the fact that utility executives are not known to be lobbying for a repeal of the Price-Anderson Act,[31] which provides excess liability insurance on each nuclear power plant. Atomic Energy Commission (AEC) scientists John Gofman and Arthur Tamplin, whose views are popularly disseminated if not professionally applauded, argue that if the United States population ever receives the maximum radiation dosage that soon-to-be-superseded AEC regulations now permit, 32,000 Americans would die annually from cancer and leukemia.[32] Their recommendation for a moratorium on the construction of new nuclear power plants has been endorsed by many.[33]

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28. Agreement on this proposition may not be universal. AEC Chairman Glenn T. Seaborg describes the proposition that "all power pollutes" as a "rather questionable Earth Day slogan." On Misunderstanding the Atom, AEC News Release, Vol. 2, No. 12. (remarks at the National Press Club Luncheon, Washington, D.C., March 22, 1971). The thrust of his observations indicate that power is necessary, not that its production is cost free to the environment.

29. Seattle Times, Dec. 9, 1970, § C, at 4, col. 1.

30. *See* Remarks of Senator Hansen, in *Hearings on Natural Gas Supply Study Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 7-8 (1969).

31. 42 U.S.C. § 2210 (1964). The Act explicitly recognizes the possibility of an accident resulting in a liability of at least $560 million since it establishes a requirement for insurance protection in the amount of $82 million plus a government indemnity agreement for an additional $478 million in damages. Above the aggregate sum, the Act expressly cuts off further liability. *Id.* § *2210(e)*.

32. *Hearings on the Environmental Effects of Producing Electric Power Before the Joint Comm. on Atomic Energy*, 91st Cong., 2d Sess., pt. 2, at 1395 (1970) [hereinafter cited as *Joint Committee Hearings*]. The AEC has proposed radiation emission standards that would reduce previously permissible exposure by a factor of 100. 36 Fed. Reg. 11113 (1971). The move hardly can be considered a repudiation of the Gofman-Tamplin thesis.

33. *See* J. GOFMAN & A. TAMPLIN, POISONED POWER: THE CASE AGAINST NUCLEAR POWER PLANTS 7-18 (1971) (Foreward by Senator Mike Gravel).

Others observe that the hundreds of radionuclides released into the environment are potential hazards to biological organisms, including man.[34] The documented tendency of the longer-lived compounds to accumulate in biological organisms with as yet[35] unknown consequences has led to universal scientific agreement that emissions should be kept to a minimum. Even the AEC now professes a standard that requires releases of radiation to be kept "as low as practicable,"[36] although to date no court has translated that declaration into an enforceable prescription of permissible technology.[37]

With the production of power comes inevitable wastes, some creating hazards for future generations. Oil and coal-fired plants are among the worst polluters in the country. To mention but one contribution, they are responsible for approximately one-half of the nation's air pollution by sulfur oxides,[38] which exact an estimated annual economic toll in excess of $4 billion.[39] Nuclear plants pose their own threat. By 1980, according to one estimate, 3,000 trucks carrying high-level radioactive wastes will be on our highways at all times.[40] Thermal pollution, or as some utilities would have it, thermal enrichment, is common to both nuclear and fossil-fuel generating facilities. By 1980, says Senator Muskie, approximately one-sixth of the total fresh-water runoff in the United States will be required for cooling

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34. SCEP, *supra* note 21, at 298 (expressing special concern with respect to the isotopes Iodine 151, Xenon 153, Strontium 90, Cesium 137, Tritium and Krypton 85). *See also* JOINT COMM. ON ATOMIC ENERGY, SELECTED MATERIALS ON ENVIRONMENTAL EFFECTS OF PRODUCING ELECTRIC POWER, 91st Cong., 1st Sess. 101-08 (Comm. Print 1969) (listing radionuclide emissions).

35. *Joint Committee Hearings, supra* note 32, at 1263, 1273.

36. *See* 35 Fed. Reg. 5414 (1970) (proposed amendments to AEC Reg., 10 C.F.R. §§ 20, 50 (1971).

37. To the AEC, "as low as practicable" means "reasonable efforts to control emissions." Portland Gen. Elec. Co., No. 50-344 (AEC Jan. 28, 1971) (a copy of this matter is on file with the *Washington Law Review*). A major revision of the Commission's regulations governing environmental considerations is in order as a result of the decision in Calvert Cliffs Coordinating Comm., Inc. v. AEC, 40 U.S.L.W. 2067 (D.C. Cir. Aug. 3, 1971).

38. ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT 3 (1970).

39. COUNCIL ON ENVIRONMENTAL QUALITY, THE PRESIDENT'S 1971 ENVIRONMENTAL PROGRAM 26 (1971). Spokesman for the nuclear industry are fond of data suggesting that the health effects due to a nuclear station are smaller than those from a conventional plant by a factor of 10,000 or more. *E.g.*, Remarks of AEC Commissioner James T. Ramey, Nat'l Acad. of Eng'r Forum on Power Plant Siting, March 16, 1971.

40. *Lake Michigan Hearings, supra* note 11, at 3. *See* COMPTROLLER GENERAL, PROBLEMS IN PROGRAMS FOR MANAGING HIGH-LEVEL RADIOACTIVE WASTES (1971).

and condensing purposes.[41] Though these astonishing volumes of hot water have productive potential in agricultural and recreational endeavors, they also pose significant risks to the viability of the marine environment.[42]

A second incontestable premise in the energy debates is that power generating facilities will be built. The FPC estimates that by 1990 thermal generating facilities of 500 megawatt capacity or more will require 90 new sites for fossil-fueled plants and 165 new sites for nuclear plants.[43] Concurrently, the operable circuit miles of major high voltage transmission lines will increase dramatically.[44] Huge 3,000 megawatt plants will demand 1,000 acres of land, 7 million tons of coal per year and $450 million for plant equipment.[45] It is accurate to say that the quality of life—and indeed life itself—of persons hundreds of miles away will be affected by decisions affecting the location of generating complexes. No miracle innovations in technology or hasty curtailment of consumption can avoid the certainty that costly, enormous, dangerous plants are going to be built somewhere.

Upon the understanding that the future will bring huge projects that are both essential and lethal, discussions of legal mechanisms for

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41. *Hearings on Thermal Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 2d Sess., pt. 1, at 1 (1968).

42. *Id.* at 471-568 (comprehensive bibliography on the effects of temperature in the aquatic environment).

43. *Commerce Committee Hearings, supra* note 3, at 56. Actually, the FPC may not be the most reliable source for energy consumption projections. Chairman Nassikas has pointed out that the FPC

> has been given a mandate to insure that the Nation maintains an abundant, reliable, low cost supply of electric power. The Commission and its advisory groups, therefore, must not assume that there will be a decline in the electric energy growth of the United States.

Minutes of the FPC's Task Force on the Environment, Aug. 5, 1970, at 1. A copy of these minutes is on file with the *Washington Law Review*. On the unreliability of most recent forecasts of energy consumption see BATTELLE MEMORIAL INSTITUTE, A REVIEW AND COMPARISON OF SELECTED UNITED STATES ENERGY FORECASTS (1969).

44. *Commerce Committee Hearings, supra* note 3, at 55. FPC Chairman John Nassikas conceded bluntly that "these are vast construction programs." *Id.* at 56.

45. These figures were presented in the testimony of S. David Freeman before the Subcomm. on Antitrust & Monopoly Legislation of the Senate Comm. on the Judiciary, Washington, D.C., May 5, 1970. A copy of Mr. Freeman's testimony is on file with the *Washington Law Review*.

Reduced to the absurd, the doubling of generating capacity every ten years, within two centuries, would mean that all available land space within the United States would be taken up by power plants, leaving no room for transmission facilities. Peterson, *The Space Available: A Report from the Committee for Environmental Information*, 12 ENVIRONMENT 2, 4 (1970). The prediction is based on the assumption that all electric power is to be produced by 1,000 megawatt power plants and that each requires an area of only 1,000 feet on each side.

resolving conflicts in power plant siting decisions are underway across the United States. Some states have enacted legislation;[46] others are about to act.[47] Federal legislation is a distinct possibility.[48] Valuable insights for the future can be drawn from the experience in Washington State, one of the first to enact comprehensive siting legislation. The principal purpose of this article is to convey one insider's view of the major compromises and concerns reflected in the statute.

II. THE WASHINGTON LAW

Signed by Governor Daniel J. Evans on February 23, 1970, the Washington State Thermal Power Plant Siting Act[49] has been given a mixed reception. In the opinion of this participant, there is some good with the bad. Though the legislation is still viewed uneasily by utilities and environmentalists alike, it remains to be seen whether an accommodation on siting can reduce the friction between power and environmental interests.

To set the stage for an analysis of the statute, a brief summary of its provisions and implementation is in order. The statement of purposes in section one acknowledges the fundamental dilemma: the legislature expresses an intention both "to preserve and protect the quality of the environment" and "to provide abundant low-cost electrical energy."[50] The act establishes a Thermal Power Plant Site Evaluation Council, consisting of 15 representatives of state agencies having regulatory responsibilities over, or in some cases only a remote interest in, the

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46. *See* ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, REPORT ON ELECTRIC POWER AND THE ENVIRONMENT 55-61, app. II (1970) (survey of state regulatory controls).

Maryland is now among the leaders of states with comprehensive siting legislation. *See* Power Plant Environmental Research and Site Evaluation Program, (to be codified in scattered sections of articles 66C, 43, 96A MD. ANN. CODE), *as amended*, S.B. 540 [1971] Md. Laws. The Act makes construction of any plant which might appropriate or use any state waters without the consent or permission of the state unlawful.

47. FPC, Survey of State Regulatory Controls and Recent Initiatives, July 20, 1970 (revised internal memorandum on file with the *Washington Law Review*).

48. For a discussion of several bills pending at the federal level see Ramey, *Planning for Environmental Protection in Siting Nuclear and Fossil Power Plants*, 11 ATOMIC ENERGY L.J. 59 (1970); Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 DUKE L.J. 25. Hearings on the siting question have been held in 1971 before a subcommittee of the House Commerce Committee. 1 BNA, ENV. REP. 101 (May 29, 1970).

49. WASH. REV. CODE §§ 80.50.010-.900 (1970).

50. *Id.* § 80.50.010(2), (3).

location of power plants.[51] Another member is appointed by the county legislative authority for deliberations on a site located within its jurisdiction.[52] The Council is given general rule-making powers[53] and is instructed specifically "[t]o develop and apply topical, environmental and ecological guidelines in relation to the type, design and location of thermal power plant sites and associated transmission line routes."[54] It is authorized to receive applications for site locations,[55] conduct hearings,[56] and prepare written reports to the Governor "which shall include (a) a statement indicating whether the application is in compliance with the council topical guidelines, (b) criteria specific to the site and transmission line routing, and (c) a council recommendation as to the disposition of the application."[57] Within 60 days of the receipt of the Council's report, the Governor is obliged to approve or reject the application for site certification.[58] If approved, the chairman of the Council must compose and submit a certification agreement for execution by the governor and the applicant.[59] Denial is final as to that application,[60] but judicial review is available.[61] A certification may be revoked for material misrepresentations or for non-compliance with the Act, the Council's regulations, or the terms of the certification.[62] Violations also can be punished criminally,[63] civilly through injunctive relief, or by the imposition of civil penalties of up

51. *Id.* §80.50.030. Members of the Council include representatives of the following state authorities: Water Pollution Control Comm'n, Department of Water Resources, Department of Fisheries, Department of Game, State Air Pollution Control Bd., Department of Parks and Recreation, Department of Health, Interagency Committee for Outdoor Recreation, Department of Commerce and Econ. Development, Utilities and Trans. Comm'n, Office of Program Planning and Fiscal Management, Department of Natural Resources, Planning and Community Affairs Agency, Department of Civil Defense, Department of Agriculture. Since the statute was passed the Water Pollution Control Commission, the Department of Water Resources and the State Air Pollution Control Board have merged into the Department of Ecology. WASH. REV. CODE § 43.20A.020 (1970). The new department, as statutory successor, retains three votes on the Council.

52. *Id.* § 80.50.030(4).
53. *Id.* § 80.50.040(1)
54. *Id.* § 80.50.040(3).
55. *Id.* § 80.50.040(7).
56. *Id.* § 80.50.040(9).
57. *Id.* § 80.50.040(10).
58. *Id.* § 80.50.100(2).
59. *Id.* § 80.50.100(4).
60. *Id.* § 80.50.100(3).
61. *Id.* § 80.50.140(1).
62. *Id.* § 80.50.130.
63. *Id.* § 80.50.150(2).

to $25,000 "per day for each day of construction or operation in material violation of this act, or in material violation of any site certification agreement issued pursuant to this act."[64]

Once created, the Council moved quickly to implement its mandate. Rule-making hearings on proposed siting guidelines and rules of practice were held on April 3 and May 4, 1970. The regulations were formally adopted on May 7.[65] Of crucial importance are the guidelines for the applicant, who is given general directives to furnish a legal land description of the site, an identification of access roads and proposed transmission lines, a planning and construction schedule flow chart, and assorted environmental studies.[66] Additional obligations are imposed to supply plans ensuring health and safety,[67] the preservation of the land,[68] compatability with water[69] and air[70] quality standards, and the protection of natural resources, including fish and wildlife.[71] Separate sections impose minimal obligations for aesthetic design,[72] preservation of recreational opportunities[73] and disclosures with respect to the economics of the project.[74]

Some of the knotty problems created by the new Act are plain on the face of the legislation, others are obscured by inevitable compromises in the legislative process. The discussion which follows will concentrate on the utilities' sine qua non, the environmentalists' quid pro quo and the shortcomings of the finished product.

A. The Utilities' Sine Qua Non

For the power interests, no legislation was worth bargaining for that did not offer a "one stop" service. The notion was clearly responsive to the heavy casualties, in terms of delay and added costs, that have been claimed by roaming regulatory agencies and environmental groups whose increasing activity has made building a power plant an

64. *Id.* § 80.50.150(1).
65. WASH. ADMIN. CODE §§ 463-08 to -12 (1970).
66. *Id.* § 463-12-010.
67. *Id.* § 463-12-015.
68. *Id.* § 463-12-020.
69. *Id.* § 463-12-025.
70. *Id.* § 463-12-030.
71. *Id.* § 463-12-035.
72. *Id.* § 463-12-040.
73. *Id.* § 463-12-045.
74. *Id.* § 463-12-050.

unpredictable and hazardous venture. In recent years, fragmentation of the site certification process has given environmental interests significant, if not arbitrary and negative, authority over siting decisions. What had been a series of "rubber-stamped" permits endorsing the company's decision has become a progression of booby traps, each one capable of killing or maiming a project through extended delays and additional obligations. If the objective is to defeat, delay, or frustrate, the more chances for doing so the better. On the other hand, if the objective is to enable industry to build a power plant wherever it pleases with as few concessions to the environment as possible, success consists of a "one stop" procedure that would effectively neutralize parties most likely to cause difficulties. The possibility of sacrificing an investment costing several hundred million dollars to the whims of an inspector from the Department of Fisheries or a self-styled ecologist representing a local citizens' group was the hazard utility representatives were determined to remove. Absolute approval authority in a single regulatory agency was the power industry's objective.

For the utilities, the heart of the legislation is sections 11 and 12, which say in many ways what they wanted no one to forget.[75] Thus, subsection 11(1)[76] insists, somewhat redundantly, that in the event of conflict with any other provisions of state law, the siting act "shall govern and control" and such other law "shall be deemed superceded." Subsection 11(2)[77] declares that the state "preempts the regulation and certification of thermal power plant sites and thermal power plants." Similarly, subsection 12(1)[78] states that certification "shall bind the state or any of its departments. . . .," and subsection 12(2)[79] insists that plant construction and operation "shall be subject only to the conditions set forth in such certification." Subsection 12(3)[80] goes on to declare that "[t]he issuance of a certification shall be in lieu of any permit, certificate, or similar document required" by any other state agency.

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75. So fundamental was the "one stop" notion to utility lobbyists that they bargained for, and secured, an unusual provision in the boiler plate savings clause stating that the invalidation of sections 11 and 12 would void the entire statute. Governor Evans vetoed the qualifying language.
76. WASH. REV. CODE § 80.50.110(1) (1970).
77. *Id.* § 80.50.110(2).
78. *Id.* § 80.50.120(1).
79. *Id.* § 80.50.120(2).
80. *Id.* § 80.50.120(3).

The "one stop" sections create confusion. In principle, few quarrel with the general proposition that regulating the design and location of power plants through thirty or more special interest agencies is sheer nonsense.[81] Beyond this generality, however, the scope of authority of the "one stop", and especially the mechanism by which it operates, are not easily specified.

By declaring that a certification from the Council supercedes all other state permits, the plain meaning of the legislation leaves open the possibility that the Council can authorize environmental intrusions over the objections of a number of responsible regulatory agencies. Further compounding the problem is the failure of the legislature to specify the process by which the Council would reach a decison affecting environmental quality controls or design features. Early drafts anticipated that a vote would be taken among council members on certification conditions.[82] The vote-taking scheme was abandoned, in part because it created anticipatory head counting that made legislative agreement on the make-up of the Council difficult, and in part because it was assumed by representatives of state government that any conditions insisted upon by a regulatory agency routinely would be incorporated in the certification during the planning process.

The utilities were quick to exploit this loophole that threatened to turn the "one stop" into a shield that could immunize power plants from environmental considerations. The Council, on March 23, 1970, released proposed regulations (Guideline IE) specifying a crucial obligation requiring utilities to "submit evidence of satisfying existing statutory criteria, requirements, standards and regulations of those state agencies which, prior to certification, have any legal au-

81. It is astonishing but true that officials are fully capable of mandating water pollution control technology that invariably will produce a serious air pollution problem. The "textbook" blunder in Washington State is the settlement between the Scott Paper Company and the Water Pollution Control Commission. The Commission approved, apparently without consideration of air pollution problems, a permit for the control of sulfite waste liquor by an incineration process at Scott's Everett mill that poses a threat to air quality. *See* WASH. WATER POLLUTION CONTROL COMM'N Permit No. T-3344 (March 31, 1970) (details the obligations imposed on the company).

Putting a halt to single-disciplined, ad hoc, and fragmented environmental planning was the primary impulse that produced a consolidation of authorities to deal with all aspects of environmental planning and control. *See, e.g.,* WASH. REV. CODE § 43.21A.030 (1970) (creating Washington's new Department of Ecology).

82. *See, e.g.,* H.B. 194, § 10, 1st Ex. Sess. (Wash. 1970).

thority over conditions or activities related to the site."[83] In a statement submitted at the April 3, 1970 hearing,[84] interested utilities argued that the proposal was incompatible with the "one stop" concept that authorized the Council to override existing regulations, and that all that should be required was information "as to the extent of the compliance" with existing statutory criteria.[85] At a subsequent hearing on May 4, 1970 essentially the same arguments were made.[86] The point sought to be preserved was the possibility that the Council, by an undisclosed process, could excuse an applicant from compliance with certain environmental standards. In opposition, environmentalists argued that the regulations should eliminate the possibility that a power crisis of the future might stampede the state into authorizing a plant without the usual pollution control features.[87]

The issue is largely foreclosed by the regulations adopted by the Council. The final version of Guideline IE hedged only slightly by requiring the applicant to "submit plans relating to satisfaction of existing statutory criteria, requirements, standards and regulations of those state agencies which, prior to certification, have any legal authority over conditions or activities related to the site."[88] The minor ambiguity as to whether evidence "relating to satisfaction" requires satisfaction of existing standards is removed elsewhere by provisions plainly insisting upon compliance with health,[89] water[90] and air[91] quality standards. That the administrative determination to preserve existing state power is no *tour de force* without statutory support is shown by the explicit commitments in the Act to the maintenance of

83. A copy of this document is on file at the Washington State Thermal Power Plant Siting Council, Olympia, Washington.

84. Statement of Kenneth Billington, Executive Director, Washington Public Utility Districts' Association, Before the Washington Thermal Plant Siting Council, April 3, 1970. A copy of this statement is on file with the *Washington Law Review*. Subscribers to Mr. Billington's statement were the Seattle Department of Lighting, Public Utility District No. 1 of Snohomish County, the Tacoma Department of Public Utilities, Puget Sound Power and Light Co., and the Washington Public Utility Districts' Association.

85. *Id.*

86. Minutes of Public Hearing No. 2 Concerning Guidelines for Thermal Power Plant Site Certification, Olympia, Washington, May 4, 1970, at 20-21. A copy of these minutes is on file with the *Washington Law Review*.

87. *Id.* at 28.

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

89. *Id.* § 463-12-015(2).

90. *Id.* § 463-12-025(2)(a).

91. *Id.* § 463-12-030(1).

high standards of environmental quality.[92] The Council, then, sits not to write a new code for power plants but to coordinate various state authorities now exercising fragmented powers.

Synthesizing the contributions of participating agencies is the predominant challenge of power plant siting legislation. Interagency agreements are common at the federal level and often are administered with disappointing results due to the regulator's demonstrated reluctance to modify his statutory responsibilities upon suggestions from without.[93] Obstacles in Washington State are perhaps even more imposing, especially in view of the number of agencies involved in this reciprocal venture.

Nevertheless, the fact that the Council is a new institution, instead of a patchwork intrusion into the jurisdiction of a single agency with a dominant authority, offers some encouragement. It is submitted that the Council should function as a coordinating mechanism, with each authority retaining and exercising its existing statutory powers to prescribe conditions for—and perhaps to veto—design features of a particular facility or perhaps the location itself. That is to say, the Water Pollution Control Commission (now the Department of Ecology) could flatly forbid once-through cooling and condition a site certification, as it would a permit, upon the installation of dry or wet cooling towers necessary to minimize the effects of hot water discharges.[94] The Department of Game or the Department of Fisheries, pursuant to an existing statutory mandate,[95] could refuse to authorize the diversion of water that would jeopardize the support of "food fish and game fish." The Department of Health could insist upon an essentially zero-release waste treatment system[96] to protect against radiological haz-

92. WASH. REV. CODE § 80.50.010 (1970).

93. An illustration is disclosed by the utter disregard of Department of Health, Education and Welfare objections in cases of pesticide registrations by the United States Department of Agriculture despite an interagency agreement clearly forbidding registration over objections from another responsible department. *See* HOUSE COMM. ON GOVERNMENTAL OPERATIONS, DEFICIENCIES IN ADMINISTRATION OF THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT, H.R. REP. No. 637, 91st Cong., 1st Sess. 36 (1969).

94. WASH. REV. CODE §§ 90.48.035, .160 (1962). Considerable debate over this issue arose at the public hearings on the Council's proposed guidelines. Originally, the Council proposed a rule that apparently would forbid once-through cooling. *See* note 83, *supra*. The guidelines as adopted defer the decision on this question.

95. WASH. REV. CODE § 75.20.050 (1962).

96. *See* note 12 and accompanying text, *supra*.

ards.[97] In practice, conditions prescribed by a given agency should be incorporated into the site certification agreement.

This working principle means that, to the extent a state agency effectively can veto unilaterally a proposed site under its present jurisdiction, it still can do so within the Council, although the deliberations of the group would be likely to modify the opinions of stubborn hold-outs. Through its broad representation from among the spectrum of state interests, the Council is designed to be a unifying forum where parochial departmental interests must be evaluated against the composite needs of the state.

A close analogue to how the Council would function appears in the 1970 amendments to the Federal Water Pollution Control Act.[98] Under section 21(b)(1):[99]

> [a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance, as determined by the State . . . agency that such activity will be conducted in a manner which will not violate applicable water quality standards.

The power to certify, it would appear, assumes a fortiori the power to prescribe conditions, including design and process changes, treatment commitments and continuous monitoring, to be routinely incorporated into federal licenses or permits. What the state water authorities can demand with respect to an AEC license for a nuclear plant, or a FPC license for a hydro-electric facility, they should be able to demand from the Council in the certification agreement. Nor, in principle, as the Council's guidelines indicate, should there be differences between the treatment of water quality standards and others of similar import. Incorporating each agency's requirements into a comprehensive certification will be the chief responsibility of the Council.

From the utilities' point of view, what the legislation accomplishes is the elimination of unilateral regulation outside of the framework of the Council. The various "one stop" sections would forbid, for example,

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97. WASH. ADMIN. CODE §§ 402-12 to -36 (1969).
98. Water Quality Improvement Act of 1970, 33 U.S.C.A. §§ 1151 *et seq.*
99. *Id.* § 21(b)(1), 33 U.S.C.A. § 1171(b)(1).

water pollution control authorities from later requiring a permit in terms inconsistent with the provisions of the site certification. It would bar fisheries officials from insisting on fish guards of a design that deviated from those specified in the certification. It would prevent the Department of Natural Resources from demanding the reclamation of excavation by means other than those certified. State agencies are required to do their bargaining over the terms of the site certification within the Council, under penalty of being foreclosed from second-guessing.[100] What is supposed to emerge from the deliberations is a single document reflecting the composite judgment of the Council about the utility's responsibilities. Thus the "one stop" would produce one document spelling out all the legal obligations of the utility to the state.

Unlike the relationship between the powers of state agencies and those of the Council, the effect of local land use requirements is not left to surmise. Section 9[101] declares that, within sixty days of receipt of an application for site certification, an initial public hearing must be held to determine "whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances." Thereafter, changes in zoning restrictions are permissible to invite a power plant in, but not to keep one out if the original application would pass muster under local land use rules.[102] The important point, however, is that satisfaction of local zoning requirements is a sine qua non to construction.

B. The Environmentalists' Quid Pro Quo

Acquiescing to the utilities' insistence upon a "one stop" service, the environmentalists demanded that the "one stop" be a full, fair stop,

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100. This is not to say, of course, that the terms of a certification are to remain static over the life of a plant. No irrational commitment to res judicata is intended and a reservation to this effect should routinely appear in site certification agreements. *See* text accompanying note 15, *supra*. For example, scientific advances dictating the installation of improved pollution control technology for, let us say, sulfur oxides, which would be acted upon by the responsible state agency (now the Department of Ecology) under the Act would be initiated within the Council through revisions of the certification agreement. Implicit in the power of the Council and the Governor to deny or confirm a site application is the power to condition approval upon action consistent with recent scientific learning and its engineering application.

101. WASH. REV. CODE § 80.50.090 (1970).

102. *Id.* § 80.50.090(2).

with the public interest fully protected and environmental precautions strictly prescribed. True, the environmental impact of a proposed site was to be decided at the single stop, but it was to be decided correctly with each interested state agency and the public at large fully represented in the process.

An innovation in the Act is the provision for "independent consultants," who are defined as "those persons who are retained by the Council to evaluate the applicant's proposals, supporting studies or to conduct additional studies."[103] Under the Act, a fee of $25,000 is exacted from the applicant to be applied toward the cost of a study of each site.[104] After receiving an application:[105]

> the council shall commission its own, independent consultant study to measure the consequences of the proposed power plant on the environment for each site application. The council shall direct the consultant to study any matter which it deems essential to an adequate appraisal of the site.

The full cost of the study is to be paid by the applicant, but costs in excess of $25,000 "shall be payable subject to the applicant giving prior approval to such excess amounts."[106]

No one who has experienced public hearings on environmental issues could underestimate the value of this provision. Invariably, the corporate polluter is backed by a phalanx of experts from several disciplines explaining why the project must proceed forthwith with little or no change at the selected site according to immutable design specifications.[107] What opposition there may be is unsophisticated, poorly financed and ill equipped to supply constructive suggestions, even if the decision-makers are open to new ideas. Hearings before the AEC, cynically observes Commissioner James T. Ramey, are populated by nervous housewives, professional "stirrer uppers" and an occasional young scientist speaking outside of his field of competance.[108] With a few notable exceptions he is right, but it is also true that AEC hearings are so conducted that it would be extremely difficult for a

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103. *Id.* § 80.50.020(8).
104. *Id.* § 80.50.070(1).
105. *Id.* § 80.50.070(2).
106. *Id.*
107. *See* Eipper, *Pollution Problems, Resource Policy and the Scientist,* 169 SCIENCE 11 (1970).
108. *Joint Committee Hearings, supra* note 32, pt. 1, at 129.

non-industry group to present the type of in-depth inquiry demanded, even if it had the necessary resources.[109] To compound the problems, too often the university scientist who should be free to evaluate major projects objectively is serving as a paid consultant to the utility which may choose to suppress—or refuse to pay for—relevant data. Whether he knows it or not, the consultant's financial stake in an adversary setting jeopardizes his objectivity and, especially, his credibility. This symbiotic relationship between corporate polluter and academic apologist is firmly established, highly unfortunate, and in need of reformation.[110]

The provisions in the new statute calling for "independent consultants" wisely institutionalize the objective scientific inquiry that is fundamental to a well-informed decision. It protects both consultant and applicant from the suspicion of collusion by effectively "sanitizing" the funds through the medium of the Council. An anecdotal, but persuasive, indication of the legitimating force of objective scientific opinions is the decision of Northern States Power Company to accept the site proposed by a committee of its severest critics appointed to recommend an alternative.[111] Under the Washington Act, research support for important inquiries thus comes from the state, which must make the ultimate judgment, and should successfully interrupt the familiar pattern of an undermanned governmental agency rubber stamping the findings which the applicant presents.[112]

The effectiveness of this approach is limited in practice, under the Act, by the authorization of expenditures above $25,000 only with the consent of the utility. The figure is a ludicrous ceiling to assess the technology of a project that may cost several hundred million dollars.[113]

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109. *See* Cavers, *Administrative Decision Making in Nuclear Facilities Licensing*, 110 U. PA. L. REV. 330 (1962); Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAWYER 633 (1968).

110. For starters, a university regulation—or state law—might require full disclosure of all academic consulting work for private persons engaged in regulatory proceedings before governmental bodies. Indeed, principles of full disclosure need not stop at the university.

111. *See* N.Y. Times, July 6, 1971, at 24, col. 3-4. Another example is cited in CHASE MANHATTAN BANK, ACTION REPORT (Spring, 1971), which discloses that Northeast Utilities, of New England, has contributed $180,000 to an independent committee of residents to study site proposals.

112. Cavers, *Administering That Ounce of Prevention: New Drugs and Nuclear Reactors*, 68 W. VA. L. REV. 109, 233 (1966). *See* SENATE COMM. ON PUBLIC WORKS, NATIONAL ENVIRONMENTAL LABORATORIES, 92d Cong., 1st Sess. (Comm. print 1971).

113. Moreover, the value of this independent scientific evaluation is undermined further by the requirement that the Council is to report its recommendations to the

Respectable filing fees—up to one-half million dollars—were mentioned during the deliberations, but certainly not by the utility spokesmen. Nor can their acquiescence in the $25,000 figure be read as indicative of a commitment to submitting proposed sites for an in-depth evaluation by persons not of their own choosing. The view, instead, was that a modest down payment would help to secure increasingly scarce sites from advances by other industrial raiders.[114]

No less important than objective scientific inquiry is the full disclosure of the results of these studies, together with other data and correspondence associated with a site evaluation. Information is the currency of power; without full disclosure the opportunity for illegitimate considerations affecting the decision are enhanced. The Act, in section 16,[115] contains a pro forma freedom-of-information section requiring public availability of "any information filed or submitted pursuant to this act." Surprisingly, the utilities were prepared to acquiesce in a more sweeping disclosure section that, among other things, would make available "interdepartmental memoranda and other recorded material related to the regulatory function of the commission."[116] It was the state officials, however, conforming to the usual practice of protecting the political flank, who opted to close the doors on what they were doing to administer the Act.

Plainly, discussion of disclosure misses the point when, as manifested by the Washington Act, the open door extends only to the tail-end of the planning process. A meaningful planning mechanism—the absence of which is a major deficiency of the statute—should establish a horizon ten to fifteen years in advance of the commencement of construction of the planned facilities. The Energy Policy Staff of the Office of Science and Technology wisely recommends the compilation of an inventory of suitable alternative sites at least five years before construction is to commence.[117] Only this kind of complete

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Governor within one year after the utility applies for a site certification. WASH. REV. CODE § 80.50.070(2) (1970). Spending a few dollars to conduct a study lasting less than a year would scarcely yield a thorough investigation. *See* Comment, *Thermal Electric Power and Water Pollution: A Siting Approach*, 46 IND. L.J. 61, 96-97 (1970).

114. *See Lake Michigan Hearings, supra* note 11, at 26-27 (indicating that utilities are reluctant to disclose proposed sites for fear of encouraging speculation in the land).

115. WASH. REV. CODE § 80.50.160 (1970).

116. H.B. 194, § 14, 1st Ex. Sess. (Wash. 1970).

117. ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT vii (1970).

candor can assist the long-term evaluative process that must be undertaken.

Paralleling the independent scientist in the Act is the "independent lawyer" or "counsel for the environment," required by section 8,[118] to "represent the public and its interest in protecting the quality of the environment for the duration of the certification proceedings." This provision received the greatest fanfare while the Act was being publicly debated, and deservedly so. Here approved is a professional advocate, financed by public monies, whose sole function is to protect the public interest. The principle is on a par with *Gideon v. Wainwright,*[119] which made qualified representation an essential of due process in a felony case. The public interest, no less than the personal freedom at stake in *Gideon,* demands equally diligent protection where the decision affects both society's energy lifeline and the quality of the environment. It is misleading to suggest, however, that the Washington State legislature is unequivocally committed to a position beyond Ralph Nader's fondest expectations—that the state has a responsibility to assure adequate representation of public concerns at all points in the legal system where important rights are at issue.

The potent legal and scientific representation prescribed by the Act is a hollow gesture if no forum is available where its full impact can be evaluated. Strong hearing features preserve this opportunity. Within 60 days of the receipt of a site certification application, the Council is obliged to hold an "informational" hearing in the county of the proposed site.[120] Substantive decisions also are to be there resolved, however, since, as indicated earlier, an initial judgment must be made as to "whether or not the proposed site is consistent or in compliance with county or regional land use plans or zoning ordinances."[121] "If it is determined that the proposed site does conform

118. WASH. REV. CODE § 80.50.080 (1970). Politically, the "counsel for the environment" provision was eased into the final package largely because the idea was attributed to Charles Luce of New York's Consolidated-Edison, an eminent name in power circles, who acknowledged that securing "one stop" also necessitated precautions to guarantee that all issues were fully explored. Speech by Mr. Luce before the Association of the Bar of the City of New York, Nov. 18, 1969, at 12-13 (a copy of this speech is on file with the *Washington Law Review).*

119. 372 U.S. 335 (1963).

120. WASH. REV. CODE § 80.50.090(1) (1970); WASH. ADMIN. CODE § 463-08-035 (1970).

121. WASH. REV. CODE § 80.50.090(2) (1970).

with existing land use plans or zoning ordinances in effect as of the date of the application," continues the provision, "the county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site." This method of preventing counties from changing the rules of the game to bar a power plant avoids the converse—and more critical—situation where local authorities approve a plant that should be barred under their local land use rules. The variance or rezone, of course, is a time-honored mechanism for reducing local planning to shambles. Where, as in the case of a power plant, the cost of the facility is likely to exceed the entire assessed value of all property in the county,[122] economic pressures to open the doors are irresistable. Nevertheless, under the Act, prior to filing for certification, a utility must satisfy local land use plans or zoning ordinances, even if that only means bringing pressure to bear on local planning officials until they yield and grant a variance.[123] The Council's power to determine compatibility with local zoning laws presumably requires deference to local judgments about the meaning of those rules.

All remaining issues are to be fully explored at a subsequent hearing. Section 9(3)[124] requires that a public hearing prior to the issuance of a certification on each proposed site be conducted as a "contested case." Preserving full rights of discovery and cross-examination is something of a novelty for public hearings on environmental matters, but it is a change for the better. Experienced environmental lawyers have documented how the formal judicial process is an essential mechanism for delving into the complex scientific and economic assumptions in litigation affecting the use of natural resources.[125] In sum, under the Washington Act, the public now has a lawyer, independent scientific representation, and a fair hearing process to contest the pros and cons of proposed sites for thermal power plants. In these respects, the state has set precedents to be followed across the country.

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122. In the state of Washington, for example, a $450 million investment in a power plant would exceed the overall assessed valuation in three separate counties. *See* WASHINGTON STATE RESEARCH COUNCIL, STATE AND LOCAL GOVERNMENT IN WASHINGTON 588 (3d ed. 1968).

123. *See* E. BANFIELD, POLITICAL INFLUENCE (1961).

124. WASH. REV. CODE § 80.50.090(3) (1970).

125. *See* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

C. *Shortcomings of the Finished Product*

The Act is wide of the mark in some particulars. Specifically, it does not apply to any "thermal power plant presently operating, or under construction, and its associated transmission lines."[126] This unexceptional—and, in principle, apparently justifiable—"grandfather" exclusion has special meaning for the State of Washington. The exception was written primarily for the Centralia power plant, a mammoth coal-burning facility backed by several utilities and due to begin operation in September of 1971. Despite the usual claims about "low sulfur" coal,[127] that plant alone promises to produce a vast sulfur oxides output in excess of the total generated by the entire supply of fuel oil burned in the state during 1969.[128] It is ironic that the Council has approved air quality standards for future plants requiring the use of "the highest and best practicable contaminant emission control technology,"[129] while the Centralia plant will avoid the large investments in sulfur oxides control technology that are about to be made by other utilities across the country.[130] The plant will be one of the last of a generation to sneak by with debatable controls, a decision citizens of the area will recall for decades to come.

A more fundamental defect in the Act is the incomprehensible decision to give the Governor the ultimate responsibility for approving or rejecting the certification.[131] What this means is that after an elaborate legal and scientific evaluation of the proposed site by experts inside and outside of state government, the chief political officer of the state makes the final decision. The Governor wanted this power; nobody else wanted him to have it. In practice, it may be that bringing pressure to bear upon the Governor to approve what his Council rejects is politically impossible, so that his functional role would be only to add conditions, never to relax them. But the Act does not read that way. The Governor's formal decision-making role is indefensible.

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126. WASH. REV. CODE § 80.50.060(1) (1970).

127. CENTRALIA STEAM-ELECTRIC PROJECT, A STORY OF RESOURCE DEVELOPMENT 6 (1970) (promotional pamphlet prepared by the project, available from its sponsors, and on file with the *Washington Law Review*).

128. This conclusion is based on data supplied by Mr. George Cashman, Oil Heat Institute of Washington State.

129. WASH. ADMIN. CODE § 463-12-030(3) (1970).

130. *See* Squires, *Clean Power from Coal*, 109 SCIENCE 821 (1970); Harrington, *Current Status of SO_2 Control Technology*, Paper presented at Symposium on SO_2 Abatement Chemistry, Berkeley, California, May 21, 1971.

131. WASH. REV. CODE § 80.50.100(2), (4) (1970).

Another fundamental failing is the recognition that Washington has not enacted a planning authority, even in the limited area of thermal power plants. The Council sits only to rule upon proposals advanced by the utilities, according to their timetable and within their order of priorities. Making long-range judgments about suitable alternative sites is a process still controlled, in the Pacific Northwest, by the power companies operating through the Joint Power Planning Council under the auspices of the Bonneville Power Administration.[132]

Deficiencies in planning for the location of power plants, in Washington State and elsewhere, apply a fortiori to planning about other major land use decisions of heavy industry. Both the administration[133] and Senator Henry Jackson,[134] through his Senate Committee on Interior and Insular Affairs, have advanced federal proposals to encourage state intitiatives with respect to land use decisions. Washington's siting legislation is manifestly unresponsive to this urgent need that already has become an active political issue across the country.

CONCLUSION

Washington's Thermal Power Plant Siting Act sets no records for farsighted thinking with respect to the placement of industrial complexes which afford the standard of living we all want and the pollution none of us want. Yet the Act recognizes that the location of energy generating facilities will have a significant impact upon the future quality of life and the dependability of the energy supply. It recognizes a state interest in the decision-making process and a public interest in these same decisions that is not dismissed with lip-service, but is made viable by scientific data, legal representation and an oppor-

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132. The Council, which includes all public and private utilities in the Northwest, is formed to develop

> . . . between publicly owned and privately owned utilities and the Federal Government a joint policy with respect to regional thermal power planning and development; study in joint Working Groups the region's power requirements, the timing location, and size of thermal plants required, transmission technology, marketing arrangements, and all other pertinent or developing problems.

Letter from Yvonne Mosich, Bonneville Power Administration, to the author, Aug. 31, 1970. The role of the Washington State Thermal Power Plant Siting Council in no way threatens the planning predominance of the Joint Power Planning Council.

133. *See* COUNCIL ON ENVIRONMENTAL QUALITY, THE PRESIDENT'S 1971 ENVIRONMENTAL PROGRAM 207 (1971).

134. *See Hearings on National Land Use Policy Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. (1970).

tunity to explore alternatives at meaningful public hearings. It expressly concedes that the best informed decision requires the invocation of intelligence from many academic disciplines and responsible political authorities. By going this far, the state has supported procedures that are essential to the wise use of our dwindling resources and the responsible stewardship of an expanding economy.