1976

Industrial Site Selection: Existing Institutions and Proposals for Reform

James Nearhood

University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation

Available at: https://digitalcommons.unl.edu/nlr/vol55/iss3/5

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
As this country's technological and industrial complex continues at its exponential rate of growth, new and greater demands are constantly being placed on the environment and our natural resources. Recent environmental concern has been drawn to the problem of industrial expansion as it relates to those natural resources traditionally considered "free," such as waterways and airsheds. Because the marginal value to any one additional user of these "free" resources is close to zero, there has been little incentive to establish a system of planning and allocation designed to force users to internalize the social costs of such uses. However, as the sources of society's polluters continue to multiply, these "free" resources are likely to become overloaded and will acquire an ever-increasing worth.  

The inevitable increasing conflict between industrial growth and environmental preservation makes the need for comprehensive land use regulation and industrial site control even more apparent. While, traditionally, the value of technological growth has been assessed without serious concern for consequences such as social or ecological detriment, as modern understanding regarding the complex relationship between pollution and the environment develops, traditional concepts begin to break down. Today it is recognized that industrial growth and environmental preservation are not bifurcated values, but instead are inherently interrelated. The traditional choice between development and the environment is

---

now being reformed by decisions based upon balancing of ecological and developmental alternatives.

Most states do not currently possess comprehensive environmental legislation designed to facilitate industrial site selection pursuant to a program of general land use control. However, even where such legislation exists, it has generally proven to be inadequate to handle complex environmental and developmental problems because of hopeless inter-agency fragmentation and procedural overlap or delay.

In recognition of the inadequacy of existing regulatory structures and the need for comprehensive land use regulation and industrial site control, the Special Committee on Environmental Law of the American Bar Association undertook a three year study which culminated in its final report, entitled “Development and the Environment: Legal Reforms to Facilitate Industrial Site Selection.” The report outlines proposals for administrative reform of existing regulatory structures at both the federal and state level so as to better provide for industrial site selection pursuant to the overall public interest. A resolution approving in principle the final report of the Special Committee was adopted by the American Bar Association at its annual meeting in August, 1974.

This article will examine in detail the ABA Committee report in relation to currently existing governmental structures for environmental regulation. Present law at both the federal and state level will first be discussed, focusing on those governmental institutions which have a direct impact on industrial site selection. Next, there will be a discussion of both the procedural and substantive aspects of the Committee reform proposals. Finally, conclusions will be drawn and recommendations made with respect to specific Committee proposals and existing institutional needs.

II. STATE AND LOCAL REGULATION

Mechanisms for regulating industrial siting at the state level currently range from little or no regulation to comprehensive environmental and land use regulatory controls. Although almost one-fourth of all states have enacted comprehensive legislation

2. See notes 6-10 and accompanying text infra.
3. Comprehensive environmental legislation facilitating industrial site selection has been enacted by the federal government and by several state governments. See notes 11-26 and accompanying text infra.
which in some way brings them into active participation in the sit-
ing of industrial facilities, a majority have no such direct adminis-
trative program.\textsuperscript{5} The critical need for legislation reform of cur-
rent procedures for land use and industrial siting regulation be-
comes apparent after looking at a summary of existing state regu-
lations.\textsuperscript{6}

In those states which have no comprehensive system for land use regulation, existing institutional arrangements are generally not equipped to balance the growing demand for industrial growth with environmental preservation. Consequently, numerous state agencies make environmental decisions in a piecemeal fashion. In some states, problems arise because several agencies have concurrent jurisdiction, and this results in administrative duplication and "instant veto power.\textsuperscript{7}" In other instances, a lack of agency authority, manpower or funds causes slipshod administration. The cumulative result is a general lack of comprehensive decision-making which causes delay and failure in adequately integrating and re-
fecting overall state policy.

Even in states where a single agency is responsible for construc-
tion certification,\textsuperscript{8} environmental values are often not adequately protected. Most do not have a program for long-range planning which realistically predicts and plans for future industrial expansion and power consumption; therefore, as consumer needs become critical, the result is often an "all or nothing" industry construction proposal which compromises environmental values. To com-
licate the problem many states do not require pre-construction cer-

\begin{itemize}
\item \textsuperscript{5} ABA Special Comm. on Environmental Law, Industrial Develop-
ment and the Environment: Legal Reforms to Improve the Deci-
\item \textsuperscript{6} This discussion is not intended to be an exhaustive examination of current state regulatory schemes, but is rather a brief summary of current legislation designed to illustrate the existing problems in industrial site selection. See generally Van Baalen, Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act—Advance or Retreat?, 11 LAND & WATER LAW REV. 27 (1976); Best, Recent State Initiatives on Power Plant Siting: A Report and Comment, 5 NATURAL RESOURCES LAW. 668 (1972); Review Draft, supra note 5.
\item \textsuperscript{7} "Instant veto power" occurs when several agencies have overlapping licensing jurisdiction concerning one industrial project. One agency in its sole discretion can "veto" the development by refusing to grant a license, even though the project may prove beneficial to the overall state interest.
\item \textsuperscript{8} An example of a single state agency with preemptive licensing author-
ity would be a state power commission having regulatory jurisdiction over the certification of electrical generating facilities.
\end{itemize}
As a result, industry can invest great sums of money and inflict substantial environmental harm before an "objective" evaluation of the project is made. Finally, environmental preservation may not even play a significant role in the decision-making of various state regulatory agencies, since they often have no legislative guidelines and traditionally have been primarily oriented toward short range goals such as maintaining reliable production and cheap power supplies.\(^9\)

Within the past few years several states have taken the initiative and adopted comprehensive environmental legislation designed to facilitate site selection for major industrial developments.\(^10\) The statutory provisions which have been adopted are sufficiently similar so that a "trend" regarding modern state land use regulation can be identified.

The most predominant strain found in this legislation is the requirement that new industrial developments obtain pre-construction certification.\(^11\) Although states are not uniform in the types of industrial facilities that are regulated nor in the the administrative criteria used in decision-making, they are interested in ensuring governmental regulation prior to any substantial commitment of resources. Often pre-construction certification is tied in with long range planning, particularly in the case of electrical utilities which may be required to submit consumption and construction forecasts for up to twenty years into the future.\(^12\)

Another common statutory scheme involves consolidating administrative proceedings in an effort to simplify decision-making procedures and eliminate duplication. Legislatures generally confer sufficient authority in one siting agency to ensure the primacy

---


10. This statement refers primarily to the regulation of electrical utilities. *See* Best, *supra* note 6, at 674.

11. Among these states are New Hampshire, Connecticut, South Carolina, Arizona, New Mexico, California, Oregon, Washington, Florida, Maine, Maryland, New York, Vermont, Hawaii and Wyoming.


13. Requirements for long range plans for proposed facility development vary from six years in Florida to twenty years in Connecticut. The most commonly required time frame for long range planning is ten years. *Review Draft, supra* note 5, at 3-10.
of its decisions over those of other state and local governmental agencies and thereby inject a degree of finality into the administrative process. For example, South Carolina achieves administrative consolidation by requiring that certain specified state agencies that have an interest in industrial siting be parties to the single certification proceeding before the state industrial certification agency. The final decision of the siting agency must incorporate those inter-agency recommendations and conditions deemed appropriate into the specific industrial construction certification. No other license or agency approval is required once this certificate is issued. Following this procedure results in consolidated decision-making and ensures administrative expediency and procedural finality.

Despite the similarities in existing legislation there appears to be no consistency among the several states regarding the physical composition of the assorted agencies entrusted with industrial siting certification. A few have created an entirely new board or commission, sometimes composed of members with a broad range of interests. Several have delegated the responsibility to existing state agencies such as the Public Service Commission or the Secretary of Natural Resources. And other states have established interagency industrial siting commissions consisting of the administrative heads of existing state regulatory agencies. Connecticut has created a hybrid siting agency, which combines the heads of existing state regulatory agencies with appointees from the general public and members of the legislature; Oregon's siting agency has only appointees from the general public; and Florida has delegated administration of its land use act to the governor and his cabinet.

In those states with comprehensive environmental programs legislation has been enacted which sets forth specific criteria to be considered by the industrial siting agency when reviewing a siting application. While guidelines vary, they generally require consid-

15. Id. § 58-1815.
16. Id. § 58-1830.
22. ORE. REV. STAT. § 469.450 (1975).
eration of all environmental, economic, and health issues, as well as historical, cultural and aesthetic impact. Maryland has enacted the most comprehensive system for power plant site location, requiring that its public service commission promulgate a ten year prediction for state electrical consumption and that the state acquire title to not fewer than four appropriate site locations. For each electric company generating 1000 MV or more of electricity, a minimum of one site is to be held in bank for lease or sale to the electrical power facility.

A final trend found in most states with comprehensive legislation which is worth noting is that they allow full public participation in the decision-making process, usually in the form of public hearings prior to the granting of an industrial site certification or a development permit. Public notice requirements vary. Once a siting decision is finalized most states allow administrative or judicial review.

Most local and regional land use regulation exist primarily in the form of zoning ordinances. However, they are inherently deficient as a method of adequate land use regulation because zoning is a negative devise; it decrees what cannot be done rather than what should be done. Zoning regulations are usually not promulgated in conjunction with a comprehensive community growth plan: variances are often easily obtained by pressure from developers or from a "stacked" zoning board; zoning regulations are often compromised in favor of industrial development which broadens the local property tax base. Furthermore, the vast majority of local zoning boards operate extemporaneously with a parochial perspective and do not have the expertise nor the resources to make complex environmental decisions.

25. Id. § 3-305.
26. There is no uniformity among the various states on the question of whether administrative remedies must be exhausted before judicial review is allowed. New Mexico allows judicial review regardless of whether administrative review was sought, while Hawaii allows judicial review only after completion of the administrative review process. Oregon has no administrative review; judicial review is direct. See generally Review Draft, supra note 5, at 3-24 to 3-25.
27. This exists when the membership of the regulatory board has a disproportionate number of land developers or development interests. BNA Environment Rep. Monograph No. 20, at 11-12 (Nov. 8, 1974).
28. It has been reported that sixty-five per cent of all local revenue is derived through property taxation. Id. at 13. Thus, small, rural, and poor communities are especially susceptible to unrestricted land development as a means of broadening the tax base.
III. FEDERAL REGULATION

Federal environmental regulation has taken the form of legislation designed to regulate specific uses of the environment rather than to promulgate a federal program of comprehensive land use regulation and industrial site control. Congress appears content to categorize industrial site regulation as an aspect of the larger problem of land use control, which has traditionally been a matter of local concern. Regulation and licensing of federal industrial projects has been fragmented among various agencies in accordance with several statutory arrangements for environmental regulation.

A. National Environmental Policy Act

The single most important piece of federal environmental legislation is the National Environmental Policy Act of 1969 ("NEPA"). It seeks to implement a policy of environmental awareness throughout the federal bureaucracy by directing that the laws and policies of the United States be administered pursuant to the specific goals set out in the Act.

NEPA requires that all federal agencies conduct a comprehensive environmental evaluation and prepare and file an Environmental Impact Statement ("EIS") in conjunction with "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment...." Integrated within this system is the provision that all federal decision-makers review the EIS and consider all environmental consequences of and alternatives to the proposed federal action. The result is that under NEPA, federal decision-making agencies must now balance environmental protection considerations with the overall desirability of the proposed project, weighing resource allocation and environmental alternatives against the project's immediate and long range consequences. Because of this, NEPA has prima facie applicability for industrial projects.

30. Essentially, the policy declaration [of NEPA] states that ways and means must be found whereby man and nature can exist in productive harmony, that "each person should enjoy a healthful environment," and that the national goal should be a balance between population growth and resource use in order to maintain a "high standard of living and a wide sharing of life's amenities."

B. Clean Air Act

The Clean Air Act\(^3\) exemplifies fragmentary federal legislation of narrow scope which can have a significant impact on industrial siting. Its single purpose is maintaining air quality and this is achieved primarily by the issuance of national ambient air quality standards for individual air pollutants by the Administrator of the Environmental Protection Agency ("EPA").\(^3\) Implementation and enforcement of these air standards is delegated to the states under the supervision of the EPA. These regulations can provide a back door approach to industrial site regulation through a framework of standards and controls within which a state regulatory system can be defined. This can be accomplished by requiring new industrial projects to comply with the Air Quality Act standards prior to construction and operation.\(^4\)

C. Federal Water Pollution Control Act

The Federal Water Pollution Control Act as amended in 1972\(^5\) may have an impact on industrial siting by providing for regulation of effluent discharges into all the navigable waters of the United States.\(^6\) EPA guidelines define navigable waters broadly enough to include within the jurisdiction of the act almost any body of water within or bordering the United States.\(^7\) Generally speaking, the act provides that the EPA promulgate effluent limitations with pollution control and enforcement left to the states or to the relevant federal agency.\(^8\) Thus, an applicant for industrial siting will have to obtain an operational certification or discharge permit from the appropriate state or federal agency prior to commencing opera-

---

34. Currently, responsibility for assurances that industrial emissions will meet air quality standards falls on individual industries. Each new industry may find compliance with clean air standards increasingly difficult as new plants add to air pollution, moving air quality out of compliance with the act.
37. Quailles, Jr., Memorandum, 3 BNA ENVIRONMENT REP., CURRENT DEVELOPMENTS 1240 (Feb. 9, 1973).
38. The statute is designed to require the federal government to provide grants-in-aid and water quality guidelines to the individual states for development of water pollution control programs. If the states fail either to develop a control program within federal guidelines or to maintain the program once developed, the EPA has authority to assume jurisdiction. In water quality regulation of navigable waters the Corps of Engineers may also have jurisdictional control. See note 44 and accompanying text supra.
tions, certifying that the industrial project complies with water quality standards.

D. Noise Control Act

A fourth example of federal environmental legislation which may influence industrial site selection is the Noise Control Act of 1972. It does not provide for comprehensive noise abatement regulation, but instead limits EPA jurisdiction to control of "new product emissions" distributed in interstate commerce. The EPA is to publish noise criteria and promulgate emission limitations for individual source categories. Federal preemption exists in the control of new products, but state regulation of their use is allowed.

E. Other Means of Federal Environmental Regulation

The federal statutes previously discussed all fall under the administrative jurisdiction of the EPA. Other federal agencies, however, possess environmental regulatory authority, and thus may have an impact on industrial site selection. For example, the Coastal Zone Management Act of 1972 gives the Department of Commerce the statutory authority to regulate coastal waters and adjacent shorelands. Similarly, the Atomic Energy Commission has exclusive authority to regulate production and use of nuclear fuels and facilities. Federal control of non-federal hydroelectric power facilities on navigable waters is exercised by the Federal Power Commission under the authority of the Federal Power Act. Finally, the Corps of Engineers, acting under the authority of the Rivers and Harbors Appropriations Act of 1899, has regulatory authority over all construction within the high water line of the navigable waters of the United States.

Several items of legislation currently pending before Congress seek federal regulatory authority over land use control and the

42. 16 U.S.C. § 817 (1970). The Commission also has the authority to regulate hydroelectric developments on non-navigable waters on federal land.
45. Several bills designed to establish a national land use policy are currently before Congress. The most notable is S.268, commonly referred to as the Jackson Land Use Bill. On June 21, 1973 it passed the Senate, but later failed to be reported out of committee in the House. 119 Cong. Rec. 20,631 (1973).
siting of power generating facilities. While discussion of the provision of each specific congressional bill is beyond the limited scope of this article, the reader should be aware that legislation of this nature is pending before Congress, and that enactment of some of it appears likely within the next several years.

IV. THE ABA COMMITTEE REPORT

The report of the Special ABA Committee on Environmental Law was promulgated in response to what the Committee considered to be inadequate and overlapping environmental decision-making at both federal and state levels regarding site selection of industrial facilities with major environmental impact. The study was specifically intended to make recommendations designed "to improve regulatory procedures, to reduce unnecessary multiplicity and overlap of regulatory regimes, and to establish some point of finality in the decision-making process. . . ." These goals were framed within the broad objective of achieving environmental quality.

The Committee prefaced its report with an appeal for implementation of statewide planning to regulate general land use. It recommended that land use regulation be a continuing process, with local and regional authorities being responsible for local land use control. In areas of critical state concern state interests would be superior. Land use regulation would have two aspects: regulatory control (zoning), which would be rigid and not readily amendable, and resource allocation (basic planning), which would be highly flexible to meet changing demands. The Committee regarded land use planning as the basis for any valid consideration of specific

46. The most important electrical power siting bill is S. 935, which is designed to assure protection of environmental values while facilitating construction of needed electrical power supply facilities. For a general summary of all pending congressional legislation, see REVIEW DRAFT, supra note 5, at 2-41 to 2-52.

47. REPORT, supra note 4, at 25.

48. The Report made it clear that land use planning was not a specific topic of the final report, and thus did not feel obligated to recommend legislative reform of general land use mechanisms. However, the Committee recognized the importance of basic planning in any statutory scheme for industrial siting, and for this reason included a brief discussion of land use planning in the final report. See REPORT, supra note 4, at 29.

49. Basic planning was defined as "a general but flexible plan for the allocation and use of air, water, land, minerals and other natural resources. . . ." Id.
industrial demands upon the environment: defective planning would only magnify subsequent environmental conflicts.  

To better facilitate site selection in relation to environmental values and industrial needs, the ABA Special Committee recommended specific governmental agency reform at the state, federal and federal-state levels. Due to the wide variety of statutory programs presently existing at the state level, the proposed state reforms were not directed toward solving any particular administrative deficiencies, but were intended merely to illustrate existing problems. The Committee's proposals, therefore, involve a generally defined "ideal" recommended administrative framework, which could be applied to the existing statutory system of each state.

The Committee suggested that substantive administrative reform at the state level be based on a new and independent state agency to be called the Industrial Siting Council ("ISC"). This "super-agency" would have broad jurisdiction over all siting applications of major industrial facilities within the state and responsibility for resolving all environmental and developmental conflicts in a "one-stop" administrative proceeding.

The Report made it clear that in some states the demand for broad institutional modification is not as great as in others. For example, states with currently existing comprehensive environmental and land use legislation could satisfy Committee recommendations with a simple reorganization of existing agencies. Thus, responsibility for industrial siting might fall on a modified state planning agency, natural resources department, or environmental quality council. However, in the majority of states where scant

50. Id. The Report, however, did not go so far as to require absolutely that basic land use planning be a prerequisite to industrial site selection. See note 97 and accompanying text infra.

51. See notes 6-25 and accompanying text supra.

52. The Committee conceded that the name Industrial Siting Council may not be entirely satisfactory and that the entity just as easily could be referred to as the Environmental Review Council, or something else. Report, supra note 4, at 42.

53. The Committee stated these reasons for requiring a consolidated one-stop administrative proceeding:

In some States there are virtually no requirements for environmental evaluation, while other states require repetitious and overlapping procedures and hearings. . . . If responsibility for environmental evaluation and decision-making were to be placed within a single agency, the decision-making process would be expedited and all environmental values could be considered.

Id. at 5.

54. See notes 11-25 and accompanying text, supra.

55. Thus the composition of the "single state agency" would vary from
environmental regulation currently exists, the creation of a new, independent siting agency would be required.

The Committee recommended that the ISC have inclusively broad jurisdiction over all industrial siting applications of major facilities. This would ensure that specific land development and industrial facility construction would not escape regulation because of underinclusiveness and that projects posing insignificant environmental threat would not require regulation because of overinclusiveness. Specific exemptions from ISC jurisdiction could be implemented by legislative fiat or by administrative order on a case-by-case basis.

The ISC would have sole responsibility for conducting an environmental evaluation and site assessment and for considering the desirability of the particular industrial development in view of the overall public interest. ISC decision-making would preempt the regulatory authority of all local and state agencies. This broad authority would provide for one-stop certification of all industrial siting applications and the consolidation of the decision-making process into one body with statewide responsibilities.

---

56. The Report used "facilities" broadly to include "all development in areas of critical state concern, and . . . all other non-residential construction or development. . . ." Id. at 57 (emphasis in original). Thus ISC jurisdiction would cover the siting of such major developments as condominiums, apartment houses, and office buildings, as well as power plants, factories, and other industrial undertakings. The Report specified, however, that the basic concern of the Committee regarding ISC jurisdiction was "major manufacturing, processing, or distributing facilities which pose a serious, significant, or substantial threat to the environment. . . ." Id. at 58.

57. With broadly defined jurisdiction, ISC could, at its discretion, deny administrative jurisdiction whenever it concluded that the project under consideration would pose no serious environmental threat. In cases where ISC jurisdiction was denied, regulation and certification would be left to the usual individual state regulatory agencies. Id. at 57-58.

58. Preemption would apply both to factual determinations (violation of basic environmental standards) as well as to policy considerations (granting of variances). Id. at 48.

59. The Committee outlined three specific justifications for ISC preemption of local and state agency decision-making: (1) it could be vested with authority to make decisions pursuant to a statewide public interest; (2) it could best balance all environmental issues (bio-physical, social, cultural and economic); (3) preemption would make possible a consolidated proceeding. Id.
Although the ISC would have authority to preempt local and state environmental regulation, it would be required to consider all local and state interests as represented before the council. The Committee recommended the promulgation of legislation requiring those agencies normally entrusted with certification jurisdiction over the industrial project to participate in the decision-making process by presenting recommendations to the ISC.60 Furthermore, local and statewide land use and zoning ordinances would be adhered to by the ISC unless superceded by specifically enumerated state policy considerations. A local or state environmental regulation could be overridden by variance only if the agency which normally had jurisdiction had the power to grant such a variance and variance was in the best public interest; however, minimum environmental and health standards would not be subject to variance.

In making its environmental assessment, the Committee proposed that the ISC be required to consider within the scope of its study not only bio-physical factors, but also social, cultural and economic considerations. Furthermore, it should be guided by specific legislative criteria which define the public interest, identify values and give them priority.61

The Report recommended that the ISC be composed of five independent, experienced and objective members generally familiar with the environment and industrial development. The Council members should be adequately suited to represent the overall public good in industrial siting and should be appointed by the governor, with the consent of the legislature.62

60. The Report proposed that the state and local agencies which, except for ISC preemption, would have jurisdiction over various certification aspects of the industrial siting, be designated “action agencies.” These action agencies would be required to conduct an administrative review of the proposed industrial siting and to report their conclusions and recommendations to the ISC. The action agency, however, would not perform a balancing function but would be responsible for licensing and enforcement of environmental regulations within its jurisdiction upon siting approval by the ISC. Id. at 46-47.

61. The Committee promulgated a list of sample criteria suitable as legislative guidelines for the ISC balancing decision. Id. at 12-14.

62. The Report also briefly discussed three alternative methods to compose the ISC: (1) a hybrid agency composed of the heads of existing state agencies which had any interest in industrial site selection; (2) a composition of representatives of industry and environmental groups; (3) a modification of an existing state agency to handle ISC responsibilities. The Report found general disadvantages in all three alternatives, and, therefore, recommended the creation of a new and independent siting agency. The duties of the ISC were felt to be of such significance that its objectives should not be compromised by anything
Procedurally, it was suggested that the ISC have exclusive responsibility for conducting the environmental evaluation of the proposed industrial development and for making the final environmental balancing decision. The watchwords of all proceedings before the ISC would be openness and informality, which would in turn promote maximum public participation.

Once ISC jurisdiction were established, the ISC staff would prepare a preliminary environmental study design and budget. With the results of this, plus input by all interested parties and the guidance of legislative criteria, the staff would next prepare a draft environmental impact statement. After another series of public hearings, it would promulgate and submit to the ISC the final environmental impact statement along with staff recommendations regarding the industrial siting application.

If no material disputes remained upon submission of the final environmental impact statement to the ISC, a final decision would be immediately rendered. However, if material disputes over the environmental impact of the industrial siting continued to exist, the ISC would have to conduct a formal adjudicatory-type hearing on the record allowing full public participation. The administrative decision of the ISC would be subject to judicial review by the highest court of the state, although only those persons who participated in the formal proceeding before the ISC would have standing to initiate appeal. Collateral attack would be barred.

At the federal level, the ABA Special Committee recommended the creation of an independent governmental agency which would review industrial siting decisions made by other independent

short of a completely independent and objective composition. Id. at 44-45.

63. The budget is intended to predict the agency cost of conducting the environmental impact study. These agency study costs would be paid by the applicant through a variable siting application fee. Id. at 63-64.

64. The Committee suggested that the environmental study for each individual project be conducted over a period of one to two years. This would allow in-depth study of the industrial site over all seasons of the year. Id. at 67-68.

65. See note 61 and accompanying text supra.

66. It is at this point that the ISC itself first participates in the decision-making process. The Committee determined that maximum objectivity could be best achieved by restraining full ISC participation until the final decision-making process. REPORT, supra note 4, at 70-1.

67. All prior hearings would be informal legislative-type hearings before the ISC staff.

68. "Federal level" is used in this context to denote the preemptive scope of federal environmental regulation in areas of federal concern.
federal agencies. Among the problems this proposed administrative arrangement seeks to remedy are: the overlapping authority between federal agencies; lack of complete objectivity in internal decision review; lack of jurisdiction of some existing agencies to authorize alternative construction; inadequate staffing and funding; and the limited jurisdiction of some agencies over specific parts of the overall industrial project.

The Report suggested that current federal administrative procedures be revised to designate as "lead agency" the federal licensing agency with primary jurisdiction over the industrial siting application. This agency would prepare the environmental impact statement and would make the final environmental balancing decision. Other interested federal agencies would be subordinate in the sense that they would not be involved in the balancing process but would only have licensing authority within the parameters of existing environmental quality standards. Thus, only one balancing decision would be made in each construction application.

The independent review agency would have jurisdiction to hear administrative appeals from the decision of the lead agency and could substitute its decisions for those of a lower federal agency, even where no balancing function was performed. It would examine the application de novo and make its decision on the basis of administrative criteria followed by the federal agencies having jurisdiction, with full participation by the agency staffs.

69. Federal administrative reform proposals were based on two underlying assumptions. First, the Committee concluded that specific legislative reform was best left to Congress, and, therefore, its recommendations were general in nature and intended merely to illustrate the deficiencies of existing federal institutions. Second, the report recognized that sweeping reform was not necessary at the federal level since comprehensive federal environmental legislation already existed, and federal agencies were experienced in environmental decision-making. Report, supra note 4, at 76-77.

70. For example, the Atomic Energy Commission presently possesses preemptive federal authority to license nuclear power facility construction, yet cannot license alternate forms of power generation in the event that nuclear generation proves uneconomical or undesirable.

71. As an illustration, the Federal Power Commission would be the designated "lead agency" in siting decisions involving hydroelectric generating plant construction since that agency has primary statutory authority to regulate hydroelectric facilities. The same analysis would apply to the Atomic Energy Commission regarding licensing of nuclear power generating facilities.

72. The federal review agency should be required to consider all relevant issues, including such nonenvironmental factors as economics, safety and antitrust implications. Report, supra note 4, at 80-1.
The Committee felt that this administrative arrangement would have three advantages over existing industrial siting procedures. First, this program would provide for a single form administrative hearing and would avoid unnecessary duplication. Second, it would vest final decision-making authority in an agency with the power to authorize construction alternatives. Third, the proposed arrangement would ensure complete objectivity by insulating the reviewing agency from preliminary licensing decisions.

All public hearings before the lead agency and other interested federal agencies would be informal legislative-type hearings. However, the hearing before the review agency would be formal, adjudicatory and on the record. At all levels full public participation would be allowed. Judicial appeal of the administrative review agency's final decision would be to the federal court of appeals.

The Committee recommended that the independent review agency have a physical composition similar to that of the state ISC. Appointment would be made by the President with the advice of the Senate and each individual would have a term of ten years.

Recognizing that many industrial siting questions involve both federal and state licensing and regulation, the ABA Committee report briefly touched upon legislative reform at the federal-state level. It recommended that general land use regulation be left to state and local government with Congress enumerating those facilities of paramount national concern for which there should be federal industrial siting preemption.

---

73. Currently, Section 5 of the Administrative Procedures Act requires that hearings before such agencies as the Atomic Energy Commission and Federal Power Commission be adjudicatory in nature. Adoption of the Committee Report would necessitate amending these requirements.

74. As with proceedings at the state level, judicial appeal could be initiated only by those who participated in the formal hearing before the federal review agency, and collateral attack would be barred. See note 67 and accompanying text supra.

75. See note 62 and accompanying text supra.

76. In many cases of industrial siting there is overlapping federal and state environmental regulation. For example, the Atomic Energy Act gives the federal government preemptive regulatory authority over nuclear power plant construction. However, state environmental regulation may also be applicable in the form of water resource regulation, building codes, zoning ordinances, and land use planning control.

77. The Committee gave the following examples of facilities of paramount national concern for which federal preemption could apply: nuclear power plants, large oil refineries, and offshore tanker ports. Report, supra note 4, at 96.
In cases where federal and state jurisdiction were co-extensive and no federal preemption existed, the Committee made no specific recommendations but acknowledged the need for legislation to remedy unnecessary administrative duplication. It summarily listed three methods which state and federal governments could study as means to consolidate administrative decision-making: (1) the creation of joint federal-state entities, either on a permanent or an ad hoc basis; (2) federal review of state environmental decisions; or (3) the enactment of reciprocal congressional and state legislation.\(^7\)

Although not included as a part of the final Committee report, the review draft had discussed in some detail the proposal for enactment of reciprocal legislation at the federal-state level.\(^7\) It proposed legislation which would eliminate federal-state duplication and provide for one-stop decision-making. This would be accomplished by giving the appropriate federal agency initial authority to screen all construction siting applications to determine whether federal preemption existed, and if so, whether it should be exercised. If the federal question were minor and state and local issues remained, jurisdiction would be passed to the state ISC. Normal ISC decision-making procedure would then apply, with full participation by all interested state and federal agencies. The state siting decision would be binding upon the federal government.

V. DISCUSSION

The single most important aspect of the Committee Report is its recognition of the need for comprehensive administrative decision-making for industrial site selection. To satisfy this need, the Committee recommended the establishment of an independent agency at both the federal and state level which would consolidate both procedure and decision-making. The responsibility for balancing competing environmental interests on a scale weighted by statutory criteria would thus be delegated to a single agency, assuring the efficient implementation of programs and policies pursuant to the public interest.\(^8\) Preemption of other regulatory agencies would ensure economy of procedure through one-stop decision-making.\(^8\) Finally, by broadly defining the certification jurisdic-

---

78. Id.
79. Review Draft, supra note 5, at 5-48 to 5-54.
80. The inherent dangers of consolidated decision-making are also apparent. Failure to ensure objectivity of the siting agency, either through legislative negligence in drafting agency guidelines, or less than judicious administrative appointments, may serve to defeat the goal of decision-making in the public interest.
81. Many commentators have advocated one-stop decision-making in
tion of the industrial siting agency overlapping jurisdiction would be eliminated and the administrative superiority of the independent agency would be established, subject only to legislative exception.

As recognized by the Committee Report,\textsuperscript{82} judicious decision-making which serves "the best public interest" is achieved through maximum objectivity. The Report guarantees the maintenance of objectivity in industrial siting decisions by providing for the siting agency's complete administrative independence. Decision-making by the siting board would be by first impression with the board itself having no responsibility for either background research or promulgation of the EIS.\textsuperscript{83} Furthermore, the agency would have no promotional duties nor would it supervise construction or enforcement.\textsuperscript{84} Bias on both the personal and agency levels would, therefore, be eliminated. Agency discretion would be limited only by the promulgation of comprehensive legislative guidelines defining the public interest and giving priority to general environmental values.

The scope of the environmental balancing decision made by the independent siting agency is broadly defined to include not only bio-physical environmental aspects, but also social, cultural and economic issues. The directive to consider these factors is significant because traditionally environmental evaluation has dealt primarily

\textsuperscript{82} REPORT, supra note 4, at 45, 71.

\textsuperscript{83} All the preliminary administrative procedures, including research, drafting of the EIS and conducting draft review hearings would be the ISC staff's responsibility. \textit{See} notes 63-67 and accompanying text supra.

\textsuperscript{84} A major criticism of existing environmental regulatory agencies is that they are administratively biased because they are responsible for both promotion and regulation of industry development. Specific criticism has been leveled at the Atomic Energy Commission alleging that the Commissioners' dual role as supervisors of both regulation and research and development implies a lack of objectivity. \textit{Tarlock, Tippy & Francis, supra note 1, at 523 n.91. See also Green, Safety Determinations in Nuclear Power Licensing: A Critical View, 43 NOTRE DAME L. REV. 633 (1968); Like, Multi-Media Confrontation—The Environmentalists' Strategy for a "No-Win" Agency Proceeding, 13 ATOMIC ENERGY L.J. 1 (1971).}
with the immediate biological ramifications of industrial pollution in relation to economic benefits, rather than a balancing of the "overall" ecological costs and benefits. This aspect of the Committee Report exemplifies a total commitment to the consideration of long range environmental interests as opposed to short term economic benefits.\footnote{Additional evidence of the Committee's commitment to long range environmental interests is its proposal that industrial projects with "significant" environmental impact provide advance notice of application to the ISC of between two and twenty years in order to allow "lead time" for public discussion of the proposed project. \textit{REPORT, supra} note 4, at 62.}

Also, illustrative of the Committee's commitment to long range environmental interests is its recognition of the need for statewide land use planning. Few states now have a program of comprehensive land use control, thus compounding the conflict between environmental considerations and substantially unrestricted land development. Site assessment without reference to a general land use plan tends to evaluate only the environmental impact on or near the proposed industrial site, whereas assessment that is influenced by land use planning would allow consideration of broader social and environmental values on a regional or statewide basis. This interdependence of land use planning and industrial site control necessarily confirms the Committee's general position that implementation of any program of regulated industrial siting should be contemporaneous with the creation of a system of comprehensive land use control.\footnote{For further discussion see note 97 and accompanying text \textit{infra}.}

Finally, the Committee Report demonstrates a strong commitment to complete public participation at all levels of the administrative process. Public notice of all applications for industrial siting certification is required, as well as publication and distribution of the pertinent EIS. Open hearings before governmental regulatory agencies and the ISC staff would be kept informal so as to encourage full public participation. Also, the appropriate environmental review agency would be required to hear all public comment in a formal proceeding and would have to give adequate consideration to such input when making its balancing decision. Open proceedings with complete public participation is a necessary first step toward ensuring balanced decision-making in the overall public interest.

Despite these areas where the Committee's proposals are praise-worthy, there are several others which merit a critical review. The
general difficulty with the Committee Report is its unstated, yet apparent, assumption that land use and industrial site selection issues are of such primary importance to the general public and their legislative representatives that resolution of these problems should tend to override the process of site selection for all future land uses in general, even to the point of establishing a separate governmental agency for such selection. However, states with existing comprehensive environmental legislation will tend to resist broad legislative revision which will only add but another layer to the administrative bureaucracy, while those with no existing administrative framework for environmental regulation may balk at a recommendation for broad bureaucratic expansion and corresponding fiscal expenditure. This is a conceptual problem, and has no solution since the fault lies primarily with human nature. A recommendation for institutional reform that occurs within the framework of existing state agencies appears to be a partial solution, since it would allow easy and relatively inexpensive implementation of industrial siting procedures within an existing administrative framework.

The recommendations made by the Committee Report for agency reform at the federal level are also not altogether satisfactory. The Report generally outlined three justifications for federal administrative reform: (1) to ensure independence and objectivity of the decision-maker; (2) to provide for administrative review; and (3) to vest in the decision-maker authority to make positive decisions on alternative proposals which agencies of limited jurisdiction may be powerless to do. To achieve these goals, it was recommended that an independent review agency with jurisdiction to review de novo the environmental decision-making of lower federal lead agencies be created.

This process seems complicated, especially when viewed in light of the Report's underlying objective which is to remedy administrative duplication and procedural delay. A more expeditious

87. States with no existing program for state-wide land use planning or industrial site selection would be required, under the Committee recommendations, to create two new administrative agencies—a state planning board and an ISC. This probably would require much costly state administrative reform.

88. The Committee Report briefly discussed, but did not recommend, alternative ISC compositions which could be adapted more easily to present state statutory arrangements. See note 62 and accompanying text supra.

89. Report, supra note 4, at 17-8.

90. See note 47 and accompanying text supra.
reform proposal and one which would not compromise basic values would be a plan to revise the industrial siting procedure within the existing federal administrative structure, without creating a new overlapping federal siting agency. One-step decision-making and procedural consolidation could be achieved by assigning to the federal “lead agency” on an ad hoc basis administrative powers similar to that of the proposed state ISC. A single adjudicatory hearing would be held by the lead agency in which all interested federal licensing and regulatory agencies would be required to participate and report their recommendations. At this administrative hearing all environmental issues including alternative proposals would be resolved. Independence and objectivity could be assured by requiring adherence to specific congressional guidelines defining national environmental policy values. This alternative administrative arrangement would preserve the idealistic goals of the Committee Report while requiring only relatively modest administrative modification within the existing bureaucracy.

There are also problems in the Committee recommendation that the ISC have discretionary preemptive authority over local and regional land use regulation. It was proposed that the ISC be required to incorporate into its balancing decision local and regional land use plans and ordinances, except where it determined that the public interest would be better served by departing from the provisions of local regulation. Such a departure would be justified only by specific public interest considerations.

This procedure for preemption of local land use regulation poses a serious threat to local sovereignty and individual property interests. The term “public interest” not only involves overall state environmental and industrial interests, but also implies protection of local land use and property rights. Local regulation of property and its uses is the base upon which a comprehensive system of land use should be founded. Providing for easy amendment of local regulatory criteria serves only to undermine the entire system.

91. The “lead agency” would be the federal agency with primary regulatory jurisdiction over the proposed industrial project. Under this alternative proposal, the agency would be vested with authority to consolidate all regulatory and procedural aspects of the siting process, and would be responsible for drafting the EIS and for making the final environmental balancing decision.

92. Because all interested federal agencies would participate in the final adjudicatory hearing, one-stop decision-making would be preserved in situations where alternative development is desirable by transferring regulatory jurisdiction to the appropriate participating agency.

93. Report, supra note 4, at 7-8. See notes 60-61 and accompanying text supra.
The public interest is defined by the Committee Report as "the greatest net benefit to the public." There are situations where this policy of utilitarianism could easily be used so that the outstanding cumulative benefit to a populous urban community already polluted to the tolerable limit would prey upon the relatively minor cumulative harm that the siting of an industrial polluter would have on a pristine rural environment. Under the Committee criteria, rural siting could be authorized even though the rural community derived no overall benefit from the proposed development, and in fact, suffered some degree of harm.

The solution to this problem is to draw a compromise between the sanctity of local land use regulation and the need for state pre-emption in justifiable circumstances. Before the state could pre-empt local or regional land use regulation, it should be required to establish that there is an overriding or compelling state interest in the proposed development, or that local interests will be the primary beneficiaries of the development. This standard would protect the relative security of local property interests from arbitrary state action and would allow the state a sure method of regulation in the proper circumstances. The procedure should not, of course, be used only to allow development; the state should also have the authority to promulgate protective state land use regulation for specific land areas and to deny industrial development in areas that are locally regulated whenever a compelling state interest is demonstrated.

Another problem area in the Committee Report is its failure to require basic land use planning as an absolute prerequisite to industrial site selection. Ideally, land use planning and industrial site selection should be promoted as an integral part of the siting process. The absence of such planning can lead to poor decisions and cause irreparable harm. The Committee recommendations for legislative reform to facilitate industrial site selection were premised on the assumption that a basic statewide land use plan should be promulgated contemporaneously with the creation of an industrial siting agency. However, although recognizing that the establishment of a basic plan would take several years (the Committee suggested a maximum of five years), the Committee nonetheless proposed that the industrial siting council be made to proceed without a detailed plan.
selection are two parts of a larger holistic process. Planning on a broad scale permits the gross assessment of the cumulative impact of land uses in various locations and delineates the necessary infrastructure to support such uses. Site assessment confirms or reverses determinations with respect to a particular location and facilitates detailed design regulation appropriate to the particular industrial site. Basic land use planning and industrial site selection are inherently interdependent; industrial siting without reference to basic planning necessarily means arbitrary decision-making. For these reasons, industrial site selection on a broad scale should not precede the promulgation of a basic land use plan.

The Committee Report also failed to recognize the importance of private long range industrial planning in the total scheme of land use planning and industrial site selection. Although private industry is not necessarily linked to the independent state or federal industrial siting agency for supervision, it should be required to assess long range consumer demands and predict corresponding future industrial expansion. This prediction, which should be the most accurate one available from an esoteric point of view, should be submitted to the appropriate state agency for integration into the basic land use plan.

Finally, the report does not specify whether industrial expansion of existing facilities which results in significant environmental impact should be regulated by an industrial siting agency. It speaks in general terms and thereby impliedly provides siting jurisdiction only for applications to construct new industrial facilities. Expansion of an existing facility potentially poses the same environmental impact as construction of a new facility and deserves similar regulatory treatment. Furthermore, post-licensing modification of construction plans should require reapplication to the industrial siting agency for a new evaluation of the environmental impact of the modified industrial development. These features are missing from the Committee Report and should not be overlooked.

VI. CONCLUSION

Discussion of the ABA Committee Report in relation to currently existing statutory structures for industrial site selection leads to the conclusion that there is a great need for legislative reform along broad social and ecological guidelines. In general, the Report is commendable because it substantially achieves its primary objective of proposing a system of legislative reform at both the federal and state levels of government designed to facilitate more operational immediately and function for several years without the guidance of a basic land use plan. REPORT, supra note 4, at 5.
adequately the siting of industrial developments which have signifi-
cant environmental impact. It is not a proposal for model legis-
lation, but rather identifies the failures of current administrative
procedures and proposes specific legislative remedies which can be
accomplished by amending the present statutory structure of the
individual governmental body.

Despite its strong points, the Report does have its deficiencies.
However, when they are balanced against the need for legislative
reform and when one considers the adequacy of the Report in
general to satisfy this need, these deficiencies appear minor or at
least reparable. Nonetheless, they deserve close attention by judi-
cious legislative bodies, as does the entire Report. Nationwide
adoption of the Committee proposals will not solve this country’s
enormous environmental problems but will certainly serve to facili-
tate the wise use of man’s environment as it relates to the ever
increasing demands for both economic development and envi-
rmental preservation.

*James Nearhood ’76*