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THE ROLE OF LITIGATION IN ENVIRONMENTAL POLICY: THE POWER PLANT SITING PROBLEM†

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THE *WHETHER* QUESTION

It is unfortunate that in virtually all of the literature and discussion of problems of power plant siting and the environment, the very denomination of the problem entraps the environmentalist. To escape from that trap, the very statement of the problem must first be broadened to pose what I call the *whether* question, as well as the where and how questions. By this I mean that in connection with any particular proposed plant—atomic, fossil fuel or pumped storage —the alternatives we want considered include that of not building the plant at all and not supplying at all the particular power.

I hasten to add that this does not mean that I take the position that no additional power is needed. In most areas, if only because of population increases, *some* additional power is needed. But if that additional amount is represented as "X," and the portion of it to be supplied by any proposed plant by "Y," the alternative I want considered is simply that the total additional amount that is to be supplied be "X" minus "Y," or that the "Y" portion be postponed.

Asking the *whether* question, considering the no-plant alternative, is not simply an environmentalist's plea. It is a sound, currently applicable rule of law. In the leading Supreme Court case of *Udall v. Federal Power Commission*, generally referred to as the "High Mountain Sheep" case,[1] the Supreme Court found that the question of "whether *any* dam should be constructed" as distinguished from the question of whether a private or federal agency should construct the High Mountain Sheep Dam, was unexplored in the record.[2] The Court held that the public interest required a consideration of the more basic issue.

The Court observed that:

> The issues of whether deferral of construction would be more in the public interest than immediate construction and whether preservation of the reaches of the river affected would be more desirable and in the public interest than the proposed development are largely unexplored in this record.

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†Portions of this article were presented to the National Academy of Engineering the "Committee on Power Plant Siting."

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1. 387 U.S. 428 (1967).
2. *Id.* at 436.

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> A license under the [Federal Power] Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, and public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.[3]

Another recent judicial recognition of the *whether* question is set forth in the case of *Department of Water and Power v. Hearing Board of the Air Pollution Control District of the County of Los Angeles.*[4] The court, recognizing the need in the city of Los Angeles for additional electricity, stated:

> It is reasonable to hold, therefore, that the public interest in preventing any increase in the levels of air pollution and in seeking a diminution in the current levels of air pollution in the Los Angeles Basin, is an overriding public interest which must stand paramount and supreme when contrasted with the public interest of the residents of Los Angeles in obtaining all the electrical power they may desire. No substantial evidence has been presented to prove that the residents of Los Angeles are in any real danger in the foreseeable future of having an insufficient amount of electric power to supply their *basic* needs. They may not have sufficient electrical power to supply all of their peripheral needs or demands created by good and effective advertising copy put out by the Department of Water and Power. But if the residents of the Los Angeles Basin are ever to live in an atmosphere having air of a satisfactory quality, it may be essential that they be willing to make some sacrifice in the amount of electricity they use and enjoy over the next few years.[5]

The refashioning of national priorities which poses the whether question, as a matter of law in important resources disposition cases, is also manifested in the National Environmental Policy Act of 1969,[6] Title I of which sets forth a "Declaration of National En-

3. *Id.* at 449.

4. No. 971, 991 (Cal. Super. Ct., Los Angeles County, Jul. 9, 1970), 1 Environment Reporter 1580 (1970).

5. *Id.* at 1624-5.

6. 42 U.S.C.A. 4321 (Supp. 1971).

vironmental Policy" and a mandate that federal agencies effect that policy, and Title II, creating the "Council on Environmental Quality" ("CEQ"). The declared purpose is broad:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[7]

The Act further directs that "the Congress authorizes and directs that, to the fullest extent possible (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."

My last citation with respect to the whether question is perhaps more authoritative than the strictly legal sources. The August, 1970 Report of the Energy Policy Staff, Office of Science and Technology,[8] in its basic conclusions and recommendations, sets forth as the last of its "Conclusions and Recommendations" the following comments on "The Role of Growth in Demand":

> 1. The rapid growth in demand for electricity and energy and materials generally will continue to exacerbate the environmental problems even though part of the growth will be needed to utilize electricity for uses such as sewage treatment plants, rapid transit systems, and recycling wastes which effect major improvements in the quality of the environment. The issue is often raised: "Is this plant really needed?" But the basic question of whether electricity use is growing too rapidly cannot be answered on an individual plant basis. It is but part of the much larger and fundamental question of the pattern of growth for the nation's future. An answer requires a broad examination of the significance of all forms of energy to the economy and the public welfare, including analysis of the form and amount of energy that would be used if the projected increases in electricity consumption were materially curtailed. It would also involve an examination of pricing policies, rate structures, advertising programs, tax policies, and other factors in the economy affecting growth.
>
> 2. The relative costs and benefits of present policies as contrasted

7. The Act declares a number of other policies and objectives in great detail. Its first two subsections (a) and (b), are replete with references to the need for harmonizing Man and Nature. Subsection (c) sets forth a congressional declaration, "that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. *Id.*

8. *U.S. Office of Science and Technology, Electric Power and the Environment* (1970) [hereinafter cited as O.S.T. Report].

> with a policy of discouraging growth in energy use should be carefully evaluated. *It may well be timely to re-examine all of the basic factors that shape the present rapid rate of energy growth in the light of our resource base and the impact of growth on the environment.* We raise the issue here for further study and discussion.[9] (emphasis supplied)

The foregoing is proof that the *whether* question is a legitimate one. Perhaps the single most important aspect to environmentalists of any proposed resolution of the problems which are the subject of your Committee's study is the capacity to litigate fairly that whether question. What is meant by "litigate" and why that procedural aspect of our complex of problems is so important leads me to a short discussion of adversary proceedings and their place in the resolution of those problems.

THE PLACE OF ADVERSARY PROCEEDINGS

The historical place of adversary proceedings in the development of the problems and controversies to which we now apply ourselves need not be documented at length. That such private litigation, meaning litigation by responsible organizations of what constitutes the public interest in important environmental cases, is an important environmental enforcement technique, was officially determined by the Internal Revenue Service in its resolution of the question it itself raised approximately six months ago with respect to the proposed denial of the right to deduct as charitable contributions grants by foundations and other grantors to public interest law firms. IRS officially sustained the place of public interest law firms (which include the legal arms of the principal national conservation organizations) as long as they follow certain guidelines fashioned primarily to prevent the representation of the "public interest" from becoming a device for private profit.

Why do environmentalists regard the adversary process and the role of the courts so highly? The first reason is the adversary proceeding has been most successful, particularly in the early years when the environmentalist cause was more wilderness oriented, more provincial, than today. The second and more important reason involves both a philosophical proposition and a basic look at techniques for arriving at truth and wisdom in cases where both unreasonable and reasonable minds may differ.

The philosophical proposition is, at the heart of the democracy versus plutocracy argument. How often have all of us heard the

9. *Id.* at 5.

suggestion that we could solve our difficult environmental problems —power versus natural beauty, downhill skiing versus wilderness, and others—if only we would get the right people around a quiet table, to talk it over in cocktail-softened tones, and compromise? The answer given is that (1) the problems are too complex, (2) they need the clarification of a clash, and (3) nobody can really tell by whom and how it is to be determined who are the "right people."

There is no set of "right people" to make important environmental decisions. Those basic and general enough to call for legislative or other political resolution require the melting pot of our traditional political processes. Not wanted is an environmental aristocracy of Weyerhausers, Udalls, or Charles Reich's, any more than one wants a foreign policy dictated solely by a few generals or Yale or Harvard professors. Important environmental controversies not basic or general enough to be susceptible of express legislative determination should be aired and enlightened by a litigating process. That process has as its principal features examination and cross-examination and reasoned exclusion of what is irrelevant from the bases of determination.

Part of the environmentalist's philosophy of faith in adversary proceedings is the rejection of the expertise of administrative agencies in the resolution of important environmental disputes. Succinctly stated, it is believed that in any environmental controversy involving the weighing of conflicting values, the weigher should be a court, a generalist, rather than an administrative agency whose outlook is organically developmental and provincial. It is beyond the scope of this article to state with any more particularity why environmentalists do not want a single purpose administrative agency to weigh the conflicting values.[10]

The litigation process should not alarm us. It need not, and conducted by responsible attorneys and principals generally is not, hostile or bitter. The capacity of groups representing different interests to present their views forcefully and even passionately, but with tolerance and appreciation of opposing views, is, fundamental to the very survival of our political and judicial processes. Much of the explosive force of the environmental movement results from the at first small and now growing number of important litigations. Litigation has inherent drama. Claims and counterclaims somehow achieve legitimacy and importance when made within the bounds of

10. The best statement of this is in the detailed eloquence of Professor Sax. J. Sax, Defending the Environment (1971). *See also* William O. Douglas, Points of Rebellion (1969). My own analysis of the subject is in Sive, *Some Thoughts of an Environmental Lawer in the Wilderness of Administrative Law,* 70 Colum. L. Rev. 612-15 (1970).

a legal proceeding. Whatever the explanation, an environmental lawsuit can be and has frequently been an effective political instrument. The conservationist may lose the case and win the war. The examples are legion. I cite only the one that was my first court involvement for the Sierra Club or a similar group. Three years of legal effort resulted in the defeat in court of individuals and corporations seeking to enjoin the construction of a cafe in the southeastern corner of Central Park, New York, which was to be financed by a gift of Huntington Hartford, Jr., by which, I have always assumed, he sought to set out the intimations of his own immortality. By the time of the final turndown of the opponents of the cafe by the highest Court of Appeals of New York State, however, Lindsay became Mayor, and the son of one of the plaintiffs, Thomas Hoving, Jr., became Park Commissioner. Mr. Hartford's fame rests primarily on a museum a few blocks west and out of the Park.

The possibilities of litigation as a political instrument in our environmental cause pose some dangers. Courts should not be used as political ploys, for reasons which go much beyond the breach of lawyers' professional ethics which may be involved. Their functions are far too important and their difficulties far too great to subject them to being turned into such instrumentalities. On the other hand the fact that there may be a political means of resolving a legal issue, particularly one involving important public environmental claims, should not forbid resort to the litigating process. The use of litigation as a part and parcel of corporate proxy fights has always seemed to me to raise similar questions. Perhaps environmentalists should have the same rights as corporate empire builders.

My upholding of the litigating process does not mean that I am satisfied with present procedures. I think most environmentalists are as dissatisfied as power proponents with the length and complexity of present procedures, particularly those before the regulatory commissions. While delay in one sense serves the purposes of those who oppose any building projects, it should be clear that the resources of the environmentalist opponents are a tiny fraction of those of the proponents, and that the opponents do not have the ready vehicle of rate charges by which they pass their costs on to consumers.

SOME SUBSTANTIVE AND PROCEDURAL CHANGES

There is widespread demand, perhaps stronger among power proponents than opponents, for reform of power plant siting proceedings, to simplify and shorten the processes. One of the longest and most complex, and one which is in many respects the very womb

of our power plant siting problems and environmental law as a separate field of law, is, of course, the *Storm King Mountain* case. Seven years is, of course, too long to resolve most power plant controversies. It is not too long, in my opinion, for a landmark case, if we can assume that there are not more than a few of such character.

Perhaps the principal plea of power proponents and many of the public regulatory bodies is to simplify and speed up the permit process. One of the suggested ways of doing so is to have a "one-stop" proceeding, meaning, one proceeding in which all of the aspects of a particular project, including the environmental aspects, can be heard and determined. The clearest and sincerest plea for this reform is that made by Charles Luce, President of Consolidated Edison, summarized in the Interim Report of the New York Temporary State Commission on the Environmental Impact of Major Public Utility Facilities:

> After reviewing the many questions involved, that executive suggested "better mechanisms were needed to resolve the conflict between these two incompatible goals." He further concluded: "the shortcoming, I believe, is that there is no coordinated, systematic review by a single regulatory agency in which all of the factors necessary to a wise decision can be considered: the need for the new power supply, the reliability of the proposed project, the relationship of the project to other new power projects to be constructed in the region, the cost of the project, its impact on the environment and the available alternatives."[11]

The coordinated, systematic review by a single regulatory agency is the one-stop process. The one-stop process is suggested to avoid a horizontal profusion of administrative agencies and the vertical profusion of state, local and regional authorities.

Most responsible environmentalists would agree that there should be a one-stop process, with the following provisos: (1) that the determination by the "single regulatory agency" is subject to adequate judicial review, assuming that the single regulatory agency is an administrative agency of the traditional public utility commission type; and (2) that there is also, both at the administrative, regulatory agency level, and on the judicial review level, private representation of the public environmental interest, of the type and in the manner that such representation has developed in recent years.

There is a certain skepticism concerning the sincerity of some of the advocates, not including Mr. Luce, of the single regulatory

11. Interim Report of the New York Temporary State Commission on the Environmental Impact of Major Public Utility Facilities, Dec. 15, 1970 [hereinafter cited as McGowan Commission].

agency suggestion and the underlying plea for some speed-up of the procedures. It is not uncharitable to express the view that some of the cries for such simplification result from the difficulties of the present system. Use of long drawn out legal proceedings by corporate enterprises, including public utilities, to serve their own purposes, is not a new idea of mine. The merits of the plea for a single regulatory agency and speed up of the procedures cannot and should not, however, be determined by speculation as to the motivation of some of the pleaders.

Support of a one-stop process, eliminating the power of small municipalities to prevent the construction of important power plants or transmission lines by the exercise of their zoning powers, is stated with full knowledge that in several cases presently pending, zoning power has been exercised by municipalities with the fervent support of environmental groups to prevent such construction. It is my sincere conviction that environmentalists cannot call for regional planning to prevent the authorization by municipalities of garbage dumps in the center of lovely rural areas, and at the same time be against regional planning with respect to power plants and transmission facilities.

Environmentalists also support simplification and speed-up of the actual proceedings. Any discussion of the means by which this can be done is beyond the scope of this article.

Any speed-up of procedures should not, however, be at the expense of the full and fair presentation of their positions by all responsible parties and agencies. That full and fair presentation requires, in my opinion, a basic addition to the quasi-judicial process of determination of power plant applications and controversies—provision for adequate discovery of all of the relevant information, in substantially the same manner provided by most codes of civil procedure, the best example of which is the Federal Rules of Civil Procedure for discovery in all plenary suits.

There is little use to an environmentalist group or any other person or group with the right to intervene to have simply 30, 60 or 90 days' notice of the hearing at which the issues will be tried. If one side to the controversy, the applicant-company side, is permitted to take as many months as necessary in the preparation of the application and case, with all of the information in thier possession only, the other side can not be expected to make any effective presentation of their case on such notice. Far longer notice is necessary, together with the right to examine all of the underlying documents and data and to question the proponents of the project by written interrogatories or oral depositions, substantially in the same manner

as that which is deemed indispensable in the trial of most civil actions.

The grant of such discovery rights is not inconsistent with speeding up the entire process. What is necessary is a far earlier disclosure by the applicant utility company of its long-range plans and of its specific plan for any particular project. Such disclosure should not be resisted. The information, as well as every other asset of the utility company, belongs to the public who are its subscribers and consumers. There should be no place for what lawyers call the "supporting theory of justice" in power plant proceedings.

A second reform environmentalists seek is substantive. It goes to the heart of the *whether* question and our national priorities. The basic criteria by which the to-build-or-not-to-build question is determined must be stated so as to avoid a presumption that what an applicant seeks to build should be built. The environmental effects should be given at least equal weight with the desire for more power in the determination of whether to build or not to build. The clearest statement of the problem of the basic criteria and priorities is detailed in *Comments on Legislation to be Proposed Regarding Procedures to Regulate Siting of Major Public Utility Facilities.*[12] Drafted initially by Albert Butzel, Esq., it describes "three different policy determinations that might be made in connection with siting legislation for major public utility facilities," to wit:

> A. *The importance of meeting the demands for more electricity may be regarded as paramount.* In this event, the demand for electricity would be the controlling factor, requiring the construction of new facilities even if the environmental impact were serious and substantial. Environmental factors would still be relevant insofar as it was possible to minimize the adverse impact, and, in this connection, the availability of alternatives, together with their relative costs, would be an important consideration. But given a choice between unmet demand and substantial damage to the environment, the demand factor would control.
>
> B. *The importance of preserving the environment from substantial damage may be regarded as paramount.* In this event, preservation of the environment from serious and substantial damage would be regarded as the controlling factor, requiring that no facility be built if such were the impact even though this resulted (or might result) in compulsory restrictions on power consumption.
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> C. *The importance of meeting power demands and protecting the environment may each be regarded as basic concerns, with neither*

12. Committees on Administrative Law, on Atomic Energy, on Environmental Law and on Science and Law of the Bar Association of the City of New York, submitted to the McGowan Commission.

> *given priority over the other.* In this event, no single consideration would be regarded as controlling as a general policy. The demand for electricity, the relative economics of meeting this demand, the adverse effect on the environment and other relevant social costs and benefits would be considered on a case-by-case basis, with authority in the certifying agency to balance all the pertinent factors and, in effect, to establish priorities in the light of all the circumstances, including the quality of the environmental resource involved and the adverse impact of construction upon such resource. A determination of policy along these lines should make it clear that, depending upon the particular circumstances, power demands might be regarded as controlling in one instance even though the adverse environmental impact were substantial, whereas in another case the protection of the environment might be given priority even though this might result in compulsory restrictions on power consumption.[13]

Most of the organic statutes creating and describing the powers and jurisdiction of utilities commissions adopt the first of the policy determinations described above. The power demands are regarded as paramount; the environmental considerations are secondary and often limited to dressing up the affected terrain by the planting of vines, painting concrete green, and other deceptions. Federal law now places environmental considerations on or close to a parity. The parity, however, should be clearly and expressly stated in the organic statute, and not left to deduction.

The McGowan Commission has prejudged this issue. A quote from its Interim Report of December 15, 1970, demonstrates this, expressing not only such pre-judgment but some barbs at environmentalists not becoming a supposedly quasi-judicial body at all cognizant of the crisis that brings us together in a search for environmental wisdom:

> Electric energy requirements are known to be growing rapidly. New York State generating companies and agencies had capability for supplying electric energy at a rate of 11.6 million kilowatts in 1960. This capability had increased about 100% to 23 million kilowatts by mid-1970. It is estimated that this capability *must be* 41 million kilowatts by 1980, *55 to 65 million kilowatts by 1990* and substantially more than that by the turn of the century, although quantitative projections beyond 1990 are considered to be nebulous at best. The utility facilities required to supply these needs are recognized to have important, in some cases dramatic effects on the environment in the localities where they are built and operated. That is particularly so in cases of large generating stations.
>
> Air, water and land pollution and aesthetic factors are significant in this regard. Some, perhaps including a few who most desire the

13. *Id.*

> convenience of electric service, decry and would even seek to forbid creation of the necessary facilities because of these factors. Within the framework of existing statutory, administrative and judicial procedures means have been found whereby major utility plant construction projects have been delayed, some for many years, beyond initial planned operating dates and some have been cancelled notwithstanding demonstrable requirements for added capability.
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> As is indicated in further detail below, this is in part due to the existence of an overlay of regulatory jurisdiction affording, in some cases, as many as thirty agencies of government an opportunity to refuse to approve or to delay a proposed project. Some have been delayed at the federal level; at least one, in New York State, at the municipal level. Companies affected are concerned over their future ability to provide service unless there is created a new governmental mechanism qualified to recognize the needs of a community for additional electricity, and authorized to provide for that need, notwithstanding contrary views from many persuasive elements of society. Others, perhaps no less concerned, suggest an agency so authorized could infuriate such elements of society and make matters more difficult.[14]

The McGowan Commission should have read the O.S.T. Report.

A final comment on statutory reform relates to the definition of the scope of review by courts of the regulatory agency's power plant determinations. I strongly support review somewhat broader and deeper than that under the traditional arbitrary and capricious rule.[15] How much broader and how much deeper I do not know. Nor do I have the expertise to attempt to draft a different rule, or to determine whether the common law can work out refinements necessary in this environmental age. I leave that to the law and public administration scholars such as Professors Louis Jaffe, Walter Gellhorn, Kenneth Culp Davis, and Joseph Sax.

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14. *Id.*

15. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *See generally* Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and L. Jaffe, Judicial Control of Administrative Action (1965).