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All parties involved in site determination for a major industrial facility face the problem that such facilities may be unattractive and may create noises, odors, and other emissions. At the same time, however, a major industrial facility produces valuable commodities and creates jobs, an increased tax base, and economic stability for the community in which it is located. As a result of these competing concerns, every time such a facility is proposed, finding the most desirable location for that facility evokes deep-seated emotional support and opposition. This Article suggests, in practical terms, how public siting decisions might best be made under such circumstances.[1]

An example of how industrial siting decisions should *not* be made recently was provided by the Sohio Petroleum Terminal and Pipeline Project.[2] The Sohio project originally was conceived in 1974. The Sohio company immediately began consulting with a large number of environmental and governmental groups to determine the best site for such a facility. In 1975, after environmental studies had been performed by the Ports of Los Angeles and Long Beach, the Port of Long Beach was chosen as the most desirable site for the facility.[3] A dispute immediately arose over the designation of the lead agency which,

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1. The authors previously reviewed the background for industrial siting problems and certain general criteria relating to a number of proposals for industrial siting reform in Murray & Seneker, *Industrial Siting: Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301 (1978) [hereinafter cited as *Industrial Siting*].

2. *See* 10 ENVIR. REP. (BNA) 13-14 (1979); 9 ENVIR. REP. (BNA) 2099-2100, 2135, 2386-87 (1979); 9 ENVIR. REP. (BNA) 691-92, 1309 (1978).

3. Address by Charles E. Greenberg, Energy Law Symposium at Loyola Law School at 5 (Mar. 13, 1979) [hereinafter cited as Greenberg Address] (on file with *The Hastings Law Journal*).

under the California Environmental Quality Act[4] (CEQA), would prepare the environmental impact report[5] (EIR). After substantial negotiation, the Public Utilities Commission and the Port of Long Beach were chosen to serve jointly as lead agencies in the preparation of the EIR. This decision, however, subsequently was attacked by numerous groups opposing the project and resulted in extensive litigation.[6] The Sohio project also was caught in cross-fire between the California Coastal Commission, which wanted certain additional storage tanks located inland, and the South Coast Air Quality Management District, which viewed the inland location of these tanks as likely to cause more air pollution from the generation of the electricity required to pump oil inland.[7]

The problems with the Sohio project decisionmaking process were noted in a prophetic statement by Charles E. Greenberg in an address to an energy law symposium at Loyola Law School on March 3, 1979:

> The truth is that the economics of the Sohio Project are rapidly approaching a critical stage. If the Sohio project does not receive its required permits within the near future, there is no economic justification for the company constructing it. Yet, I predict that, if a year from now, for instance, the company abandons the project, it will be accused of having wasted inordinate amounts of time of inordinate numbers of government officials and studiers for some nefarious oil industry purpose. If this occurs, instead of blaming Sohio, perhaps it would be more constructive to look at our government permitting process. That process should make it possible, within what would then be a six-year period, to obtain permits for two berths in a port containing many other berths, eight oil tanks in an area containing thousands of oil tanks, and one pipeline in an area presently crisscrossed by existing underground pipelines. If six years is not enough time, we are truly in great trouble. The basic reason we would be in great trouble is that, while the average Californian won't know enough of the technical details of the project to understand why the governmental processes broke down, his instincts will tell him that the final test of the workability of any governmental system is its ability to make decisions. If decisions can't be made within reasonable times, he knows there is something fundamentally wrong.[8]

In March of 1979, Sohio announced that it was withdrawing its plans

4. CAL. PUB. RES. CODE §§ 21000-21176 (West 1977 & Supp. 1980).

5. CAL. PUB. RES. CODE § 21151 (West 1977).

6. Utter v. City of Long Beach Board of Harbor Commissioners, No. SOC 51445 (Super. Ct. Los Angeles County, CA, July 6, 1978); Citizens Task Force on Sohio v. Board of Harbor Commissioners, No. SOC 50044 (Super. Ct. Los Angeles County, CA, Mar. 9, 1978); Citizens Task Force on Sohio v. Public Utilities Commission, No. SF 23986 (Super. Ct. San Francisco County, CA).

7. Greenberg Address, *supra* note 3, at 9.

8. *Id.* at 12-13.

for constructing its Long Beach terminal facility and the pipeline. Public outcry over this decision was tumultuous, spreading from Long Beach to Los Angeles to Sacramento, and finally to Washington, D.C., where presidential dispensation of certain air quality standards was sought.[9] This outcry, and the subsequent attempt to circumvent environmental statutes, does not represent a positive step in public decisionmaking.

Arguably, Sohio's failure to secure the requisite permits was itself a decision by default, in effect a negative decision and indeed one representative of careful public decisionmaking. The position taken in this Article, however, is that the preferable system is one in which actual decisions are rendered rather than determined by attrition, assuming such a system can be achieved.

This Article discusses ways in which the decisionmaking process for major industrial facilities can be improved. The first section of the Article discusses the need for a master siting agency and a one-stop siting process.[10] The second section discusses who should make industrial siting decisions,[11] focusing on the need to have the decision made by those who will best represent public opinion. The third section considers the problems inherent in the conflict between state and local control.[12] Fourth, the Article reviews and rejects the concept of a master industrial siting plan.[13] Finally, the fifth section proposes specific procedures that should govern an industrial siting commission.[14]

One-Stop Decisionmaking

The goal of the industrial siting proposal espoused in this Article is to devise a system that will enable siting decisions to be made within a specified, reasonable period of time. We view this as the acid test of public decisionmaking; namely, that after a specified period of time, a decision is made upon which the involved parties can rely. A one-stop, master siting agency offers the best chance to achieve this goal.

The creation of another bureaucratic agency is not something to be taken lightly. The history of environmental and land use legislation makes one skeptical that such a master agency could accomplish any-

9. *See* H.R. 3243, 96th Cong., 1st Sess. (1979). *See also* 9 ENVIR. REP. (BNA) 2386-87 (1979).

10. See notes 15-28 & accompanying text *infra*.

11. See notes 29-30 & accompanying text *infra*.

12. See notes 31-46 & accompanying text *infra*.

13. See notes 47-51 & accompanying text *infra*.

14. See notes 52-65 & accompanying text *infra*.

thing except create another hurdle in the path of the construction of an industrial facility.[15] Indeed, the most ardent supporter of siting legislation may be the perceptive opponent of industrial expansion, perceiving a new agency as yet another forum in which protracted hearings can be scheduled and from which appeals can be taken. The present proposal, however, is designed to avoid these pitfalls.

A master permitting agency has not been a uniformily accepted concept.[16] As noted in our previous Article, there has been vigorous opposition to a master agency by those supporting local control.[17] Opponents of industrial expansion may rightly complain that a one-stop system unduly favors industrial interests who can offer the enticing carrot of economic prosperity, while the opponents of expansion are left arguing the long term and less tangible benefits of conservation and environmental preservation. The merits of this argument, however, are dependent on a number of related factors, including the make-up of the siting agency and the legal standards under which it must proceed. In any event, concern over unwarranted industrial expansion does not outweigh the disadvantages created by a system which fragments decisionmaking and diffuses accountability. The overriding argument in favor of radical change is that the present system has not been able to arrive at decisions within a reasonable period of time.[18]

Charles E. Greenberg commented on the present system's inability to arrive at timely decisions, and the consequences thereof, in his recent address to the Energy Law Symposium at Loyola Law School:

> After the '73 crisis, most nations with undeveloped oil resources quickly developed them. England, for example, identified, explored, developed, produced, and is now efficiently bringing to market its offshore North Sea oil. As early as 1969, we enjoyed a gigantic head-start on the English—we had, prior to that time, already explored and discovered our North Slope Alaskan oil. When our permitting system broke down, Congressional action in 1968 and 1974 approved the construction of the Alaskan Pipeline. The only task remaining

15. A review of federal and California environmental and land use legislation relating to industrial siting is contained in *Industrial Siting, supra* note 1, at 305-18.

16. F. BOSSELMAN, D. FEURER & C. SIEMON, THE PERMIT EXPLOSION—COORDINATION OF THE PROLIFERATION 59-60 (1976); OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, URBAN DEVELOPMENT STRATEGY FOR CALIFORNIA, REVIEW DRAFT 70 (1977). *See* Deal, *The Durham Controversy: Energy Facility Siting and the Land Use Planning Control Process*, 8 NAT. RESOURCES LAW. 437 (1975). *See also Industrial Siting, supra* note 1, at 318-19.

17. *See Industrial Siting, supra* note 1, at 318-19.

18. The most notorious examples of these problems in the western United States have been the Sohio project, discussed at notes 2-9 & accompanying text *supra*, and the Dow and Kaiparowits projects, considered in *Industrial Siting, supra* note 1, at 301-02.

> was to approve and construct an efficient way to bring Alaskan oil to market in the lower 48 states.
>
> Yet England, a country supposedly bedeviled by government bureaucracy and inefficiency, has completed its entire North Sea program while we are still enmeshed in a permitting maze for accomplishing one comparatively simple decision—where to land Alaskan oil on the West Coast and construct a pipeline from the West Coast to Middle America. Even if we approved the Sohio project today, it would still be 1981 or 1982 before the system could be constructed and put into operation—almost a decade since the Arab oil boycott.
>
> In the field of natural gas, both the United States and Japan, immediately after '73, began plans to contract for—and bring to market natural gas in a liquid state—LNG. Japan has conceived, permitted, built and placed into operation its LNG facilities. California is still arguing about the ideal best site for its first facility. Special legislation adopted over a year ago has not as yet been successful in accomplishing the identification and approval of our first LNG project. Yet, even if we approve an LNG site tomorrow, it would be a decade from the boycott before the facility could be constructed and put into operation.[19]

Significantly, recent major industrial projects in the West, such as the Kaiparowits project in Utah,[20] the Dow project in the San Francisco Bay Area,[21] and the Sohio project in Southern California,[22] have not died so much from negative environmental decisions as from the ponderous burden imposed by regulatory delay and protracted appeals. Based on this history, one-stop siting by a master permitting agency offers an attractive alternative to the present fragmented, often self-defeating system.

Even assuming the adoption of a statute that allows one-stop siting, substantial opposition to statutory implementation can be expected from local governmental agencies. Our previous Article held out hope for a new industrial siting statute then recently enacted in Wyoming[23] as an example of one-stop siting.[24] In practice, however, that statute has not lived up to its initial promise as an example of one-stop siting. The Wyoming Industrial Siting Commission does a laudable job in moving proposals through the existing regulatory framework and in

19. Greenberg Address, *supra* note 3, at 2-4.

20. Southern California Edison Co., Press Release (Apr. 14, 1976).

21. Dow Chemical Corp., Press Release (Jan. 19, 1977).

22. See notes 2-9 & accompanying text *supra*.

23. Industrial Development Information and Siting Act, WYO. STAT. §§ 35-12-101 to 121 (1977).

24. *See Industrial Siting, supra* note 1, at 325-28; Van Baalen, *Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act—Advance or Retreat?*, 11 LAND & WATER L. REV. 27 (1976).

speeding up the siting procedure in that state.[25] The Commission, however, leaves the most crucial environmental questions to the Wyoming Department of Environmental Quality.[26] Thus, although the Wyoming Act may help to coordinate the procedure for siting a major facility, the Act does not do as much as it could and does not seem to provide the answer for a major industrial state. In this respect, the Act has taken on more of the attributes of a clearinghouse statute similar to the one in effect in Washington.[27]

The issue of state versus local control is always one of the most difficult to resolve. By definition, however, projects which would come under the jurisdiction of the siting proposal discussed in this Article will have a regional or statewide impact.[28] Given this fact, it seems illogical to vest life or death control of a project in any agency which has only a limited jurisdiction or a limited constituency. The only viable alternative to the present gauntlet of single-purpose agencies is to vest a master siting agency with the authority to override the decisions of such agencies when making a siting decision.

Who Decides

The decisionmaking body of the siting agency, the "siting commission," should be made up of individuals appointed by the governor and approved by the legislature. Such individuals should serve for staggered terms so that they might represent a balance of political factions. The alternate approach of having the siting commission appointed on an *ex officio* basis by representatives of various state agencies and interest groups is here rejected, on the ground that to the greatest extent possible commission members should not have allegiances to special interest groups.

The question of who should make siting decisions also raises the issues of what type of review the siting commission's decisions should be subject to and how an accurate picture of public sentiment can be reflected in siting decisions. The controlling principle in deciding who should make resource allocation decisions should be the need to estab-

25. This statement is based on the authors' conversations with Dr. Blaine Dinger, Executive Director, Wyoming Industrial Siting Commission, and on a review by the authors of the rules of the Wyoming Industrial Siting Commission.

26. Conversations with Dr. Blaine Dinger, Executive Director, Wyoming Industrial Siting Commission.

27. Environmental Coordination Procedures Act, WASH. REV. CODE §§ 80.50.010 to .902 (Supp. 1978).

28. See notes 61-64 & accompanying text *infra*.

lish a balanced perspective. The decision should be made by those who are most responsive to the broad statewide and regional impact of a siting proposal without being unresponsive to local needs and concerns. This conclusion is not based on a belief that such individuals necessarily will make the best decision, but rather on the view that the use of natural resources is a public decision.

Judicial determination of siting issues is the antithesis of this principle of political, economic, and social responsiveness. By resorting to the judiciary for a siting determination, a complex resource balancing question is placed in the hands of one or more individuals who have no particular expertise in the field of siting and who themselves may not be affected by the decision. In addition, the delay created by numerous drawn out appeals can be the death knell for a project.[29] Thus, a central goal of the one-stop siting proposal espoused in this Article is to limit severely opportunities for judicial recourse.

A simple means of restricting judicial intervention in the siting process perhaps would be to put each siting decision to a statewide or regional vote after study and recommendations by a siting commission. While this proposal may be appealing in its simplicity, it has the disadvantages of causing delays, limiting the practical power of the siting agency, affording undue influence to those who have substantial financial resources to favor or oppose the siting proposal, and possibly of not giving an adequate voice to local interests.

A better proposal may be to require legislative approval or confirmation of major industrial siting decisions. Assuming that a satisfactory definition of a "major" decision is obtained,[30] such a procedure not only would have the advantage of limiting review to officials elected to represent the public, who therefore should be responsive to the public will, but also would avoid the complexities of submitting the issue to the ballot. Such a proposal would have the additional advantage of giving localities a stronger voice through their elected representatives. Finally, the required legislative action would be free from judicial scrutiny, except on constitutional grounds. On the other hand, a flaw of this proposal may be its inability to overcome parochial interests. Moreover, removal of resource issues to the political arena may

29. The Kaiparowits and Dow projects provide perfect examples of the lethal effect such delays can have on industrial siting projects. See notes 20-21 & accompanying text *supra*.

30. It is assumed that a major decision would be one which would grant or deny the siting of an industrial facility with regional or statewide impact. *Industrial Siting, supra* note 1, at 325-28. See notes 61-64 & accompanying text *infra*.

produce inconsistency in action and philosophy. As set forth below, this Article's proposal advocates a modified form of legislative approval.

The Role of Local Resource Agencies

One of the major practical obstacles to one-stop siting is the resulting loss of control over industrial siting suffered by local governmental bodies, such as planning commissions, city councils, local agency formation commissions, special districts, and others.[31] Admittedly, the type of industrial facilities discussed here have more than a local impact, but their effects, both positive and negative, are felt most heavily and directly in the immediate area in which they are located.[32] The only feasible way to address this problem, assuming the necessity for one-stop siting, is to allow local governmental agencies and other single resource agencies to hold advisory hearings on particular proposals and to make recommendations, including suggested conditions on the construction of a facility, to the industrial siting commission.[33] This view is in accord with the views stated in the American Bar Association's *Final Report by the Special Committee on Environmental Law*.[34] This approach would eliminate any right of appeal from the recommendations of such bodies and would bind the siting commission to these recommendations unless the commission found that public necessity and convenience required a contrary determination.[35]

The key point in this system is that if the siting commission found that public necessity and convenience required a contrary determination, it would be able to authorize or prevent the siting notwithstanding the opposition of a particular local or single resource agency. A similar provision is found in the enabling statute of the California Energy Commission.[36]

This consultation procedure for local and governmental resource agencies would not, however, encompass or supercede the responsibil-

31. *Industrial Siting, supra* note 1, at 314-18.

32. *See generally* Deal, *The Durham Controversy: Energy Facility Siting and the Land Use Planning and Control Process*, 8 NAT. RESOURCES LAW. 437 (1975).

33. *Industrial Siting, supra* note 1, at 331-33.

34. AMERICAN BAR ASSOCIATION, DEVELOPMENT AND THE ENVIRONMENT: LEGAL REFORMS TO FACILITATE INDUSTRIAL SITE SELECTION, FINAL REPORT BY THE SPECIAL COMMITTEE ON ENVIRONMENTAL LAW 46-47 (1974).

35. This procedure is somewhat similar to that mandated under the California State Energy Resources Conservation and Development Act. CAL. PUB. RES. CODE §§ 25506-25510 (West 1977 & Supp. 1980).

36. CAL. PUB. RES. CODE § 25514 (West Supp. 1980).

ity of the state under federal regulatory statutes such as the Clean Air Act[37] and the Federal Water Pollution Control Act.[38] Nevertheless, because state and local siting decisions potentially can conflict with federal mandates such as these, the siting process must provide for accommodation of federal requirements. A major, albeit as yet untested, step in facilitating the integration of air and water pollution control requirements into the siting process was made by the Air Resources Board and the California Energy Commission in their *Joint Policy Statement of Compliance with Air Quality Laws by New Power Plants*, issued January 23, 1979.[39] The *Joint Policy Statement*, which outlines steps for coordinating the siting procedures of the California Energy Commission with the air quality compliance procedures administered by the state Air Resources Board and local air pollution control districts under the Clean Air Act,[40] provides in pertinent part:

> If the noncompliance cannot be corrected or eliminated, the [California Energy] Commission shall determine whether the facility is required for the public convenience and necessity and whether there are not more prudent and feasible means of achieving such public convenience and necessity. Only when such determination is made and the proposed facility will meet all provisions and schedules required by the Clean Air Act, may the Commission certify the proposed new facility. When certifying a facility under such conditions the Commission shall require compliance with all applicable air quality requirements that can be met.[41]

Thus, when the more restrictive provisions of the California Air Resources Board or local air pollution control districts cannot be complied with, but the requirements of the Clean Air Act can be met, the Energy Commission will have the ability to override these other local or state agencies in deciding where to locate power plant facilities.[42] This is a major step in facilitating the location of power plants while simultaneously maintaining the requirements of the Clean Air Act.[43] Similar steps could be used in integrating the Federal Water Pollution Control Act[44] requirements and other federal legislation or regulations

37. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

38. 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978).

39. Air Resources Board-California Energy Commission, Joint Policy Statement of Compliance with Air Quality Laws by New Power Plants (1979) (on file with *The Hastings Law Journal*).

40. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

41. Air Resources Board-California Energy Commission, Joint Policy Statement of Compliance with Air Quality Laws by New Power Plants 6 (1979) (on file with *The Hastings Law Journal*).

42. *Id.* at 4.

43. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

44. 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978).

that may impact a project[45] into the siting of major industrial facilities.[46]

Planning

Our previous Article focused on the planning process as a step in facilitating industrial siting.[47] Having reconsidered that position, this Article views a statewide industrial siting plan as unnecessary and as a possible obstacle to effective siting decisions. There are two reasons for this reconsideration. First, such a plan has the potential for becoming a bureaucractic nightmare. Years of time and effort could be spent in developing the plan; during this period industrial siting would be in limbo. This is not to say that the industrial siting commission does not need guidance in making its siting decisions. Rather, such guidance can better take the form of general guidelines or criteria designated by the legislature in the industrial siting legislation. These criteria may or may not be mandatory; some may only be advisory for the siting commission.

Examples of potential criteria include a preference for facilities that would preserve prime agricultural land, use land already designated for heavy industry by local planning and zoning ordinances, be serviced by existing transportation systems, not require additional water or sewer capacity at taxpayer expense, avoid adverse impact on environmentally sensitive areas, minimize impact on existing resources of clean air and water, promote economic stability in urban areas, make maximum use of existing and potential port facilities, and internalize to the greatest extent possible any adverse environmental effects of the facility. Admittedly, these goals are general and may be contradictory as applied to a specific facility; the purpose of the criteria, however, is simply to give the siting commission a broad picture of how industrial development should proceed.

The second reason for this Article's rejection of a statewide industrial siting plan is based on the argument propounded by Charles E. Greenberg that identifying the "best" sites is a futile task given rapidly changing technology.[48] Hence the marketplace, rather than rounds of deliberations by local or regional governmental bodies, may provide

45. *See Industrial Siting, supra* note 1, at 305-14.

46. There is, of course, no way to avoid compliance with the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. II 1978), and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978), except by federal legislation.

47. *See Industrial Siting, supra* note 1, at 319-25.

48. Greenberg Address, *supra* note 3, at 4.

better information for choosing a site. This conclusion does not eliminate the necessity for the legislature to develop broad criteria regarding how industrial development should proceed. Instead, these criteria, once enacted, actually would be incorporated in the market forces at work. Reliance on the marketplace as a determining factor is dependent upon a continued effort by local, state, and regional governmental officials to force industries to internalize the environmental costs of each facility.[49] Once these costs are internalized, *i.e.*, once the price of a site facility reflects its impact on the environment, market forces can indeed suggest the preferable sites.

In moving away from comprehensive planning, there is no intent to discourage or in any way denigrate those laudable planning efforts that have been made in this area, many of which can be harmonized in an industrial siting proposal. Notable among these is the industrial siting inventory contained in the *Industrial Siting Pilot Project* prepared by the Association of Bay Area Governments (ABAG).[50] This inventory includes a listing of industrially zoned sites in excess of five acres, along with information for each site regarding population patterns, housing, wastewater treatment potential, water availability, transportation, San Francisco Bay Conservation and Development Commission considerations, fish, wildlife, and vegetation, and other pertinent data.[51] Indeed, the ABAG project does a laudable job of designating criteria that may be important in identifying potential industrial sites. This type of inventory can be used by industries looking for locations for major industrial facilities to review the environmental problems in any particular location and to identify those locations that will best be able to support the facility contemplated. In addition, a siting inventory provides a data base from which regulatory bodies can determine both the impact of a facility and possible ways in which that impact can be internalized or otherwise mitigated. Industrial siting legislation should encourage or require regional governmental bodies to prepare inventories as an adjunct to an industrial siting program. Such inventories, however, should be advisory only.

49. *See Industrial Siting, supra* note 1, at 322-25. Certain sites thus would become uneconomical because the environmental compliance costs of using such sites would be too expensive.

50. ASSOCIATION OF BAY AREA GOVERNMENTS, INDUSTRIAL SITING PILOT PROJECT FINAL REPORT at app. A (1978).

51. *Id.*

The Process

The ABAG *Industrial Siting Pilot Project*[52] identified six major concerns relating to the industrial siting process: (1) centralized information relating to regulatory agencies and their permits; (2) coordination of agencies; (3) clarification of regulations, processing procedures, and design criteria; (4) faster permit decisions; (5) the appeal process; and (6) problems with CEQA and NEPA.[53] As suggested above, a one-stop siting commission with the limitation on appeal discussed below should take care of problems (4) and (5). The siting process is left to deal with the remaining problems.

The Master Application

One of the distinguishing features of a one-stop industrial siting program should be the master application form. The form should provide all of the information that normally would be required by each agency that, but for the siting legislation, would have jurisdiction over the project. With regard to the state resource agencies involved, each agency should by now have published lists of its requirements, pursuant to AB 884,[54] which could be kept on file at the siting commission office. With regard to county and city agencies, the applicant could be required to specify those agencies that it believed would have jurisdiction over the project but for the siting statute. After a review of this designation, the siting agency would request that each affected local agency, including any not listed by the applicant, prepare a list of the information needed for a complete application. The local agency would have a specified period, such as thirty days, within which to provide this information to the siting agency. Once submitted by the applicant, the completed application would be circulated to all affected local and resource agencies. These agencies would have an additional thirty days to request clarifying information consistent with their initial information requests. After such time, the application would be deemed complete.

Upon acceptance of the completed application, the time periods specified in AB 884 would govern the preparation of the EIR.[55] The siting commission would be the lead agency[56] in the preparation of the

52. ASSOCIATION OF BAY AREA GOVERNMENTS, INDUSTRIAL SITING PILOT PROJECT FINAL REPORT (1978).

53. *Id.* at 35.

54. Codified at CAL. GOV'T CODE §§ 65950-65957.1 (West Supp. 1967-1979).

55. CAL. GOV'T CODE §§ 65950-65957.1 (West Supp. 1967-1979).

56. *See* CAL. PUB. RES. CODE § 21067 (West 1977).

EIR.

Hearings

Following completion of the application and certification of the EIR, local and state resource agencies would have a limited period of time, perhaps ninety days, to hold informational hearings and to make specific recommendations for approval or disapproval of the project including any required conditions on the proposed project. In the event no recommendation were received within the ninety-day period, such failure would be deemed an affirmative and unconditional recommendation of the project by the local or resource agency. The local or resource agency could apply to the industrial siting commission for one sixty-day extension of the ninety-day period, to be granted only for good cause.

Experience has shown that a frequent perversion of legislative intent is the extension of statutory deadlines. Applicants often may be forced to agree to extensions under the threat of having a permit denied. The purpose of requiring that the extension come from the siting agency is to avoid putting the applicant in this situation. There should be no right of appeal from the recommendations of the local or state resource agencies because such recommendations are solely advisory.

Notably, the proceedings and actions of the local and state resource agencies must be consistent with those requirements of CEQA which mandate that, where feasible, adverse consequences to the environment must be mitigated.[57] The siting proposal delineated in this Article should not be inconsistent with CEQA in that regard.

Hearings before the industrial siting commission would commence upon the receipt of all of the recommendations from the resource agencies and should be completed within sixty days, but in any event prior to expiration of the AB 884 time constraints.[58] At the end of this period, the industrial siting commission would issue a siting permit with appropriate environmental and other conditions if the decision was in favor of siting the proposed facility. If the decision were against the application, the denial would be evidenced by a written order listing the basis or bases for the denial. In either case the permit or decision would be deposited with the legislature.

57. *See* CAL. PUB. RES. CODE § 21002.1 (West Supp. 1980) for CEQA's mitigation measures.

58. *See* CAL. GOV'T CODE §§ 65950-65957.1 (West Supp. 1967-1979).

Legislative Review

The legislature then would have sixty days from the date the decision or permit was deposited to act. In instances in which the siting commission was proposing to grant the siting permit, the legislature would have the following choices: (1) take no action, in which case the permit would be deemed approved at the end of the sixty-day period; (2) veto the permit, in which case the application would be deemed denied and the siting commission could take no further action on the application; or (3) conditionally approve the permit either by attaching specific conditions, or by referring it back to the siting commission to attach specific conditions consistent with general legislative directives.

In instances in which the siting commission was proposing to deny a siting application, the legislature would have the following choices: (1) take no action, in which case the denial would be deemed final at the end of the sixty-day period; or (2) veto the siting commission's action, in which case the siting commission would be required to submit to the legislature within sixty days of such veto a form of siting permit which they would find most acceptable under the circumstances. The permit would then be subject to the same legislative review described above for proposed permits.

The final right of approval for permits in this siting process thus rests with the legislature and not with an administrative agency. The siting legislation therefore should provide that there will be no right of appeal from the legislative siting decision, except on constitutional grounds.

Notice and Participation in Hearings

The procedural rules for the hearings conducted by the local and resource agencies should be generally the same as those for any other decision made by such agencies. Such local rules would govern notice and participation before the agencies. The siting commission's rules generally should be the same as those governing participation before state administrative bodies in the exercise of their rule making powers.

Importantly, all persons interested in the siting decision should have an opportunity to be heard without unduly delaying the siting process. While California courts generally have been liberal in defining interested persons for the purposes of participation in administrative proceedings,[59] in siting cases certain persons or entities should be

59. American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973). *See Industrial Siting, supra* note 1, at 335.

included specifically and given special notice and an opportunity to be heard. These persons or entities would include all agencies and local governments who normally would have permitting power over the proposed facility as well as certain special interest groups, including environmental and industrial groups. As in the case of zoning amendments,[60] contiguous landowners or landowners within a specified radius of the proposed facility also should be provided with specific notice and an opportunity to be heard. A streamlined industrial siting process is not one intended to limit the right of any individual or group to come forward and present its position; it is merely a process whereby delaying or obfuscatory tactics can be eliminated.

Jurisdiction

The principle that should govern the jurisdiction of the industrial siting commission is a simple one: only facilities that would have a significant regional or statewide impact should be subject to the commission's jurisdiction. Because there is undoubtedly a great deal of latitude in deciding what objective standards will be used to decide which facilities have a significant regional or statewide impact, the question of jurisdiction is an important one. If the siting statute were applied too broadly, it would unduly burden the siting commission, forcing it to consider facilities that could more appropriately be decided on a local basis. If the jurisdictional limits were drawn too narrowly, the whole purpose of the agency would be frustrated. If recent history is any indication, there should be no more than a half dozen facilities a year that ought to fall under the jurisdiction of the siting commission.

There are a number of factors that should be considered in defining jurisdiction. First, an absolute dollar amount may be a helpful limit. For example, if the total construction costs of a project exceed a certain dollar figure, such as $250,000,000, the project would come within the jurisdiction of the commission, assuming it also met other designated criteria.[61]

Second, specified levels of pollutants emitted could be established as criteria for the jurisdiction of the industrial siting commission.[62] The

60. Horn v. Ventura, 24 Cal. 3d 605, 615, 596 P.2d 1134, 1139, 156 Cal. Rptr. 718, 723 (1979).

61. *See Industrial Siting, supra* note 1, at 325-28. While the figure of $250,000,000 is of course somewhat arbitrary, the cost of a plant is a good indicator of its size, and hence in many cases the impact on its surroundings.

62. For example, one might consider using process pounds per hour ratios, pounds or tons per day of emissions of certain pollutants, the emission of certain hazardous wastes, or other standards appearing to have a regionwide environmental impact.

number of employees at a facility may be another relevant criterion. This is particularly true where the facility is proposed to be located in an area where a large number of new employees would have a disproportionate impact on local populations.[63] This criterion seems less important in a large industrial state such as California, but could be important for certain of California's rural areas. A final factor may be the type of industrial facility involved. The American Bar Association *Final Report by the Special Committee on Environmental Law* notes that because of their nature, such activities as oil refining, shale mining, processing pulp mills, chemical manufacturing, and canneries may warrant designation as major industrial facilities.[64] As a practical matter, satisfactory criteria for the jurisdictional limits of an industrial siting act likely would include a combination of all of these factors.

Staffing and Funding

Consistent with the principle that an industrial siting agency should not be a giant bureaucracy, the proposed siting agency should maintain a minimum level of staffing and funding. This could be accomplished by delegating the basic information-gathering mechanisms and many of the hearings and policing activities to the various state and local resource agencies. This delegation would require only a minimal siting agency staff, sufficient to process a limited number of applications and to conduct the functions of a lead agency preparing an EIR.

The funding of the industrial siting agency should come largely from application fees.[65] The facilities coming under the jurisdiction of the siting act will be extremely large; thus, not only should such projects be able to afford application fees set at the approximate level of the actual cost of processing the application, but payment of those costs would also force each project to internalize the price of protecting the environment from its impact. While the level of these fees is difficult to determine in advance, they probably would need to be in the $200,000-$300,000 range to accomplish this goal. The applicant also

63. In drafting the Wyoming Industrial Siting Act, WYO. STAT. §§ 35-12-101 to 121 (1977), it was proposed, although later rejected, that any facility should fall under the Act which employed the equivalent of over 1% or 1½% of the population of the county in which the facility would be located.

64. AMERICAN BAR ASSOCIATION, DEVELOPMENT AND THE ENVIRONMENT: LEGAL REFORMS TO FACILITATE INDUSTRIAL SITE SELECTION, FINAL REPORT BY THE SPECIAL COMMITTEE ON ENVIRONMENTAL LAW 58 (1974).

65. *See Industrial Siting, supra* note 1, at 330 & 330 n.133.

would be required to pay as an additional fee all funds necessary to prepare the environmental impact report.

Conclusion

The proposal outlined above suggests some substantial alterations to existing siting practices. These suggestions may be viewed by some as an attempt to make the siting process one which ensures the approval of major industrial facilities by avoiding careful consideration of environmental issues. Although limitations on the number of forums and on judicial review are a part of this Article's proposal, there is no intent to avoid or de-emphasize environmental issues. Indeed, the proposal assumes that the CEQA requirements relating to mitigation of impacts[66] would be fully applicable.

To understand the proposal one only has to go back to the Sohio example.[67] Industry and government spent five years looking at this project and could come to no decision. Such a system is wasteful and unacceptable. If society is to have an orderly system of resource use and conservation, it needs both certainty as to timing and public accountability of the decisionmakers. Hopefully this proposal achieves these goals.

66. *See* CAL PUB. RES. CODE § 21002.1 (West Supp. 1980).
67. See notes 2-9 & accompanying text *supra*.