

BACKGROUND REPORT FOR RECOMMENDATION 84-1

Report on Public Regulation of Siting of Industrial Development Projects

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July 1984

for the

Administrative Conference
of the United States
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Washington, D.C. 20037

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Public Regulation of Siting of
Industrial Development Projects

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I. INTRODUCTION

Industrial development projects pose complex problems for the government officials who must conduct reviews, issue permits, and approve the siting of projects. Most of these projects have significant environmental effects. Many of them raise difficult issues of safety and technical complexity. Review responsibility for these projects cuts across a variety of single-purpose agencies and across three levels of government, federal, state, and local. The administrative agencies that review these projects face problems very different from those faced by an official reviewing a single matter before a single agency.² These problems include coordinating environmental reviews, delineating the role of each agency, resolving conflicts between agencies, and working out agreements between agencies sharing responsibility for a type of review. In addition, the agencies must carry out the substantive review within their authority.

This article examines the question of what should be the optimal decisionmaking model for regulatory review of industrial development projects. A number of procedural reforms will be discussed. Also two alternative approaches will be examined, the so called single-stop permitting agency, as exemplified by the California Energy Commission, as well as similar agencies elsewhere, and the coordinating body model, as exemplified by the Colorado Joint Review Process.⁴ In the former approach, the review process is consolidated in one agency, the commission, which serves as a common forum but which has override authority over any state or local single purpose agency.⁵ In the latter approach, the coordinating body brings together the project developer, interested members of the community in which the project will be built, other interested groups, and all the various single purpose agencies that have review responsibility for the project. These groups work together throughout the review process facilitated by the coordinating body which possesses no permitting authority.⁶ These two examples illustrate the major alternative approaches adopted in recent years to deal with the complex issues posed by major projects.

These two approaches will be analyzed and evaluated using criteria developed by the author based on a case study of the SOHIO Pactex pipeline terminal case, and based on a survey conducted by the author in which he interviewed about 110 persons having experience in siting of industrial development projects. These persons included agency officials at all levels of government, public interest group members, and individuals who worked for project developers.⁸ The analysis focuses on not only the illustrative agencies but also on the various stages of the review process. Reforms are suggested for each stage.

The article proceeds from several basic assumptions. The first is that there are common problems in the reviewing of all industrial development projects regardless of the location of the site, the type of technology used, and the state in which the project is to be placed.⁹ The second assumption is that these projects are complex enough to require a different decisional

process and structure than is used in the less complex "single case before a single agency" model on which much of our current administrative procedure law is based. The final assumption is that a model can be developed for review of large-scale projects that is efficient, thorough, and provides accurate high quality review that is sensitive to environmental concerns.¹⁰

A variety of facilities are included within the definition of industrial development project. They include energy facilities such as nuclear power plants, conventional coal, gas, and oil fired power plants, oil refineries, oil pipelines and ocean terminals, mining and extraction of natural resources, new energy technologies such as geothermal, oil shale, coal slurry pipelines, and LNG terminals. They also include chemical manufacturing plants, metals, mining, and pulp and paper plants. These industries have the most environmental effects and raise the most troublesome siting issues. The article will differentiate among types of projects when necessary. However, the common themes in reviewing all projects will be emphasized. Furthermore, the recommendations that will be made will not apply to nuclear power facilities. Although nuclear power siting issues will be discussed somewhat, the special problems posed in regulating those facilities are unique enough to be excluded from this paper.

The article will start with a discussion of the average permitting and construction time for selected projects. It will then set forth the factors affecting permitting times. These will include the statutory requirements for agency environmental and permit reviews at the federal, state, and local levels that a large project must satisfy before construction may commence and the project begin operation. The survey results and case study insights will be integrated into that discussion. Problems with environmental and permitting reviews will be discussed. Solutions to those problems will be evaluated and recommendations will be made as to which solutions are better. The two alternative approaches, as exemplified by the California Energy Commission and the Colorado Joint Review Process, will be evaluated. Proposed recommendations will be made to improve the procedures for regulatory review and permitting of these projects.

II. Regulatory Review and Permitting Processes for Industrial Development Projects

A. Permitting and Construction Time

Industrial development projects require several years to proceed from conception of an idea for a project to on-line operation. One study of 39 coal-fired electric power plant projects exceeding 100 megawatts in capacity estimated that the average total permitting timeline was 38 months or slightly over three years in length.¹² This is broken down into a mean time of 23 months for federal permits (with two or three permits required) and 15 months mean time for state permits.¹³ The mean construction timeline for these projects was approximately 46 months.¹⁴ Combining the two time periods, it should average seven years from the date of first permit application to on line operation for a typical coal-fired electric power plant.

This study focused on three types of federal permits, the Prevention of Significant Deterioration (PSD) permit procedures under the Clean Air Act;¹⁵ the National Pollutant Discharge Elimination System (NPDES) permits under the Federal Water Pollution Control Act Amendments of 1972;¹⁶ and § 404 or other permit requirements enforced by the Army Corp of Engineers.¹⁷ The study found

that these permits were critical to power plant siting. The study also noted that there were other federal statutes that affected power plant siting, as well as state power plant siting laws, which explained the 15 month state permit extension to the timeline.¹⁸

This study is significant for several reasons. It is one of the few analyses of timelines for permitting and construction of a large enough number of power plants (39) for the mean or average times to be reliable.¹⁹ More frequently, the discussion of power plant siting timing issues focuses on a particular project which encountered problems specific to that project but which problems are not generally applicable to other projects.²⁰ The project specific nature of problems makes it difficult to develop generalized solutions. Second, the timeline study shows that there is a direct correlation between the number of permit processes and the time needed for review. The more permits that are required, the more time that is required to process those permits. The mean permit time for facilities with only one federal permit to be obtained was 7.36 months. The mean permit time for facilities with 2 or 3 federal permits to be obtained was 22.85 months.²¹ Finally, including state permit reviews added a mean time of 15 months to the total time.²² This adds an additional factor, federal-state regulatory interaction. Although the study was limited to power plant siting, its conclusions are applicable to most large industrial development projects that have significant environmental effects.

Establishing a realistic timeline for regulatory review, granting permits, and construction of a project is absolutely critical to a project developer. Most developers are private entities and thus have to fund capital construction costs out of accrued profits or debt financing. Before a developer will make a decision to commence a project, it must have some assurance that the project will be economically viable, that the benefits of the project will exceed the costs. To make that basic economic assessment, a developer needs to know a great deal of information. It has to know realistically how long is it going to take to permit and construct a project. To plot a reasonable timeline the developer's legal staff has to determine what statutes have to be complied with, what agencies have to review all or part of the project, what requirements each agency has for information in applications, what timing requirements agencies have for filing of applications, and what preliminary data must be collected by the developer before filing applications. In addition a careful project developer should have engaged in extensive preliminary planning before submitting any applications.²³

This kind of careful planning in advance can help solve a number of recurring problems or issues that can seriously affect the permitting timeline for a large-scale project. These issues will be discussed next.

B. Review for Environmental Effects: NEPA and State Environmental Quality Legislation

Industrial development projects in the energy, metals, mining, chemicals and paper industries almost always have significant environmental effects.²⁴ Coal fired power plants emit significant quantities of various air pollutants, cause water pollution through thermal discharges into cooling water, and cause acid rain thereby changing the pH level of lakes and rivers in surrounding areas.²⁵ If scrubber technology is used to control emissions of air pollutants, a significant solid waste problem is created.²⁶ Oil pipelines and pipeline terminals create air pollution²⁷ and water pollution concerns at the

point of loading oil from ship to pipeline terminal.²⁸ Pipelines also raise land use²⁹ and coastal zone concerns that can be very significant in some cases.³⁰ Oil drilling, especially enhanced oil recovery, causes air pollution, water pollution, and solid waste problems.³¹ Mining and mineral extraction projects can raise serious air quality, water quality, and land use control issues.³² In arid areas of the country such as the west, allocation of water among competing uses can create significant problems for oil shale development and coal slurry pipelines.³³ Nuclear power plants use cooling water and produce thermal discharges into surrounding bodies of water.³⁴ Nuclear power plants also produce, in spent fuel, highly toxic hazardous wastes that must be dealt with.³⁵ Nuclear power plants present special concerns of safety as citizens in communities close to existing and planned plants worry about the likelihood of a nuclear accident and about the long term effects of low level radiation emissions.³⁶ Other heavy industries create air and water pollution problems.

It is primarily because of these significant environmental effects that industrial development projects must comply with permitting requirements and agencies must require extensive information from developers about their projects. Most of the major federal and state permitting laws that apply to industrial development projects are authorized by environmental statutes ranging from the National Environmental Policy Act of 1969 (NEPA),³⁷ to the Clean Air Act,³⁸ the federal Water Pollution Control Amendments of 1972³⁹ and even the Atomic Energy Act of 1954,⁴⁰ which focuses the Nuclear Regulatory Commission's attention on "public safety and health" as the primary regulatory standard for licensing nuclear power plants.

It is appropriate to begin this discussion with NEPA, a non-permitting statute that requires all federal governmental agencies to prepare an environmental impact statement for "major federal actions significantly effecting the quality of the human environment."⁴¹ NEPA's environmental impact statement requirement is intended to be pre-decisional, to require agencies to consider impacts, alternatives, and mitigation measures before a decision is reached to commit resources to a project.⁴² The scope of NEPA includes federal programs, direct federal construction projects, federal grants given to states for construction projects, private projects crossing federal lands, and review of private projects by permitting agencies mandated by substantive environmental quality or other statutes.⁴³ NEPA review by these agencies must precede permit decisions.

Because of NEPA's scope, many federal agencies have environmental impact statement preparation responsibilities for a single industrial development project. These agencies often include the Bureau of Land Management of the Department of the Interior,⁴⁴ the Army Corps of Engineers,⁴⁵ the Environmental Protection Agency,⁴⁶ the Department of Energy,⁴⁷ and others. In addition, NEPA requires the responsible federal official preparing an EIS to obtain comments in the draft stage from "any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved,"⁴⁸ and from "appropriate federal, state, and local agencies, which are authorized to develop and enforce environmental standards."⁴⁹ Thus numerous federal, state, and local agencies are required to be included at a very early stage in the governmental review of a large project.⁵⁰

One problem that can arise in any major project review is how to divide the responsibility for preparing an Environmental Impact Statement. If all agencies that possessed substantive review responsibility over part of an industrial development project were required to and in fact did prepare EIS's,

the resulting documents would be duplicative and overlapping in content, in resources expended in writing reports, and in impacts discussed. Alternatively each agency could be assigned responsibility only for impacts within its substantive jurisdiction. However, assigning impacts to various agencies would lead to fragmented reports, and an inability to focus on overall impacts of a project as well as mitigation measures and alternatives.⁵¹ Thus another mechanism is necessary to ensure that efficient and thorough EIS's are prepared.

The Council on Environmental Quality (CEQ)⁵² developed regulations to implement NEPA which adopted the lead agency/cooperating agency approach to solve this problem.⁵³ A lead agency is designated to supervise preparation of an environmental impact statement whenever more than one federal agency has NEPA responsibilities in an action.⁵⁴ In a major industrial development project, there will be many federal agencies involved in permit or impact review.⁵⁵ Under the CEQ regulations, these agencies are required to informally agree as to which agency is to be the lead agency.⁵⁶ When there is disagreement among agencies over who should be the lead, five criteria for a designation are specified,⁵⁷ and CEQ, on request of an agency, is authorized to resolve a dispute and designate a lead agency.⁵⁸

Once a lead agency is designated other agencies are deemed cooperating agencies.⁵⁹ The lead and cooperating agencies must work together with the lead agencies having coordination responsibilities. Lead agencies are required to request that agencies with jurisdiction or environmental expertise participate in the preparation process and to designate those as cooperating agencies,⁶⁰ to include cooperating agencies in the EIS preparation process at the earliest possible moment,⁶¹ to use the analysis and expertise of cooperating agencies in preparing the EIS,⁶² and to meet with cooperating agencies on request.⁶³ Cooperating agencies must participate in the NEPA process generally⁶⁴ and in the scoping of issues process.⁶⁵ They must assume responsibility for preparing parts of a report on request,⁶⁶ and must make available agency staff and funds to assist in preparation of the EIS.⁶⁷

The CEQ regulations allocate responsibility among lead agencies, cooperating agencies, and commenting agencies throughout all aspects of the EIS preparation process.⁶⁸ The regulations are designed to effectively define roles for all of the multiple agencies that must participate in the environmental review process. These roles will be discussed for important stages of the EIS process.

A critical stage for environmental review of major industrial development project is the early identification of environmental issues. This is called the "scoping process" in the CEQ regulations.⁶⁹ Scoping is the means for identifying all significant issues in a proposed action before the draft EIS or final EIS is prepared.⁷⁰ Scoping is required to ensure thorough identification and consideration of all environmental impacts of a project, to avoid redrafting an EIS or preparing of a supplemental EIS to cover an issue overlooked initially, and to avoid challenges in court to the adequacy of an EIS. Agency officials who are experienced in the preparation of EIS documents consider the scoping process to be essential to high quality preparation of EIS's, and necessary to avoid these problems.⁷¹

The lead agency plays an important role in the scoping process including having responsibility for obtaining participation of other agencies, identifying issues, assigning preparation responsibilities among agencies, identifying and intergrating other environmental reviews, integrating environmental review and permit decisionmaking, setting time limits, and holding scoping meetings.⁷² The lead agency is also authorized to set time

limits for completion of all phases of the EIS process, and must do so when requested by an applicant.⁷³ The lead agency⁷⁴ may also designate an agency official as an expeditor of the NEPA process.

The EIS process must be started immediately after an application for review of a project is received by the relevant agency.⁷⁵ The EIS process includes preparation of a draft EIS based on the allocation of responsibility between the lead and cooperating agencies determined in the scoping process.⁷⁶ The draft statement must discuss environmental impacts arising from the project, alternatives to the project that are less detrimental environmentally, and mitigation measures.⁷⁷ The draft report (and the final report) must be circulated to a wide variety of groups for comments including federal agencies with jurisdiction or environmental expertise,⁷⁸ state and local agencies, the applicant, members of the public, and others.⁷⁹ The lead agency must ensure that the final EIS reflects the comments of agencies and others who reviewed the draft EIS.⁸⁰ Agencies have 45 days to make comments on the draft statement.⁸¹ The final EIS must be completed and issued before agencies with permit authority reach a decision to issue permits.⁸¹

The NEPA review process for major projects is complicated by state statutes such as the California Environmental Quality Act.⁸² These Acts, often called "little NEPAs," require state and local agencies reviewing a major industrial development project to prepare state environmental impact reports⁸³ that can duplicate efforts undertaken by federal agencies under NEPA.⁸⁴ However, many potential problems⁸⁵ can be resolved if state agencies are allowed, as are California agencies, to prepare joint state-federal EIS's. The CEQ regulations explicitly authorize federal agencies to cooperate with state and local agencies in many ways including holding joint hearings, preparing joint environmental impact statements,⁸⁶ and generally working to reduce duplication and overlapping review.

Joint federal-state EIS preparation can work very well when the agencies are cooperative. For example, the Bureau of Land Management of the Department of Interior has worked out memorandums of understanding (MOU's) with the California Energy Commission and other state agencies to prepare joint statements on a number of projects. These MOU's designate officials from each agency to be responsible for EIS preparation for a project, they define each agency's role, and they designate a lead agency and lead official. MOU's encourage an efficient cooperative effort by multiple agencies to prepare required EIS's without duplication and overlap⁸⁷ in their work. Working out such agreements is to be strongly encouraged.

A major issue with the CEQ regulations as they apply to major industrial development projects is whether there needs to be an agency or body, separate from the lead agency, to implement the regulations.⁸⁸ Critics of the environmental review process state that the CEQ regulations are not self-implementing and their effectiveness depends on the attitudes and practices of agency officials.⁸⁹ A number of specific criticisms made by oil industry representatives support this proposition. For example, agencies do not always utilize the scoping process most effectively.⁹⁰ In addition, agencies should be encouraged to hold interagency and public meetings before the formal scoping meetings for large or controversial projects. Furthermore, these critics say that agencies do not and should establish and publicly commit to clearly defined time schedules for preparation of the EIS. Also some federal agencies do not adequately coordinate with other federal and state and local agencies and this reduces the effectiveness of the scoping process. Coordination by federal lead agencies could be bettered by assigning a single individual within a lead agency to coordinate and push the EIS process.⁹¹

Many of these same criticisms are contained in a recent Bureau of Land Management (BLM) study of its energy facility permitting process.⁹² Even though BLM had fully applied the CEQ regulations to its permitting process and had established and used a coordinating body, the Office of Special Projects, the study found there was a continued need to develop interagency cooperation, particularly with the Federal Energy Regulatory Commission (FERC).⁹³ The study also noted a number of agency coordination problems including decisions as to which agency should be the lead for EIS preparation, difficulties with different environmental analysis requirements imposed by various agencies, lack of responsiveness by cooperating agencies with lead agency's needs, and lack of coordination by the lead agency with the cooperating agencies in some cases. It noted that lack of cooperation by FERC with BLM was a special problem. The study made several recommendations to respond to these problems. These included establishing a Department of Interior Wide Coordinating Committee to quickly resolve issues involving major projects. Also, project managers should be assigned to a project until it is completed and should be given commensurate responsibility and authority. Conflicts in project priorities should be resolved by BLM state office directors.⁹⁴

The BLM study recommended a number of measures to improve interagency cooperation and coordination. These included initiating high level meetings at the associate directorate level between agencies to encourage cooperation, designating one lead agency and not using joint lead agencies, getting specific time commitments from cooperating and other agencies involved in the process by means of MOU's and preparation plans, and obtaining input and comments from cooperating agencies in a timely manner. The study also recommended measures to expand currently inadequate involvement by state governments in the BLM energy facility siting process.⁹⁵

These criticisms suggest that much of the success of the CEQ regulations is dependent on the agency chosen as the lead agency. If that agency or a branch of the agency, such as BLM's Office of Special Projects,⁹⁶ places a high priority on implementing the CEQ process, then it will work quite well. If, on the other hand, the lead agency chooses to ignore the CEQ regulations, or wishes to pursue its own interests, or places a higher priority on its substantive mission, then the CEQ regulations will not work.⁹⁷

Cooperating agencies must also fulfill their responsibilities under the regulations. To do so, these agencies must be notified of the start of the EIS process.⁹⁸ If not consulted, a cooperative agency may be excluded from the process. Cooperating agencies may not respond if they have conflicting or different missions or a different set of priorities than the lead agency. Finally if a cooperating agency is fighting a turf battle (jurisdictional conflict) with the lead agency or with other agencies then the CEQ process will not work.⁹⁹

The CEQ regulations' effectiveness is dependent upon voluntary compliance by affected agencies and by the developer applicant. The regulations do not provide any formal enforcement mechanism or sanctions for noncompliance with various duties imposed on lead and cooperating agencies.¹⁰⁰ Even the time limit regulation, which is mandatory when requested by the applicant,¹⁰¹ is not self-enforcing so that a lead agency could fail to set a time limit for completion of an EIS, or more likely, could set a deadline, but be unable to meet that deadline.¹⁰²

An important question is what measures should be developed to encourage or require agencies with NEPA responsibilities to make implementing the CEQ regulations a priority. Various alternatives to be considered include amending NEPA to add statutory time limits enforceable in court, imposing

significant responsibility on the developer applicant working with the lead agency to "manage" the whole process of EIS development, designating a coordinating body within a government agency with a special mission of carrying out NEPA review under the CEQ approach, or utilizing a voluntary body such as the Colorado Joint Review Process,¹⁰³ whose sole responsibility is to organize and coordinate review by multiple agencies but which agency has no substantive permitting responsibility.

One alternative is to amend NEPA to impose statutory time limits for the completion of EIS's. This alternative could be based on similar statutory time limits contained in the California Environmental Quality Act which require completion of EIS's within one year.¹⁰⁴ A one year time limit could be added to NEPA with an 18 month time limit for large-scale projects in which the CEQ regulations applied and a lead agency was designated.¹⁰⁵ There are several advantages to this approach. A statutory time limit makes efficiency a priority and puts pressure on agencies that otherwise might take an excessive length of time to complete EIS responsibilities.¹⁰⁶ Furthermore, the time limit would apply in all cases not just to those in which the lead agency choose to adopt a time limit or schedule for a particular project.¹⁰⁷ Finally, a time limit statute would be more readily enforceable in court than would an agency developed decision schedule.¹⁰⁸

The CEQA time limits for EIR preparation have worked fairly well to produce timely EIR's in California. California agency officials generally felt that statutory time limits were something the legislature had a right to impose, that the agencies had to comply with them,¹⁰⁹ and that the agencies generally complied with the statutory deadlines.¹¹⁰ In contrast, developer representatives who were affected by the California time limit statutes were critical of agency utilization of time limits. They felt agencies would demand excessive or unreasonable amounts of information in an application and would reject applications as incomplete. This action suspends the starting of the time period which is defined as the date of acceptance of a complete application.¹¹¹ They also felt agencies would act to deny an application within the time period if there were insufficient time to thoroughly consider the issues. Finally, they felt applicant waivers of time limits or consents to extensions were essential to protect developers from such denials.¹¹²

Federal agency official were critical of and doubted the utility of time limit statutes. These officials felt that such statutes would not be effective in ensuring a prompt decision or would lead to prompt but poor or ill-conceived decisions. Also, agencies with narrow substantive missions would vigorously examine the impact of the project from their own statutory perspective but would not care whether that examination took a lengthy time or would not respond in a timely manner to a lead agency's direction. Furthermore, agencies often have many project applications under consideration at one time. They also have limited staff resources and are unable to push all projects at the same time. Agencies receive no guidance from the time limit statute itself as to how to set priorities among projects.¹¹³

A more serious problem for time limit statutes, in the eyes of all agency officials interviewed, state and federal, is based on the contention that government is not primarily responsible for delays in completing EIS's or permit reviews. Most government officials work very hard at their jobs and are not slothful. In the opinion of these officials developers are responsible for most of the delays. A variety of reasons were given for this. Some developers were unfamiliar with regulatory requirements that applied to their project. Other developers failed to provide adequate or complete information on their project applications or did not know what information was

required. Some developers presented applications that were ill conceived or not well planned or were for projects of marginal economic value to the developer. Finally, developers would slow down review and development of projects when economic circumstances changed for the worse.¹¹³ This point is illustrated by considering the eight project applications that are currently going through the Colorado Joint Review Process. Virtually all of these have been slowed down or put on hold because of external economic reasons or the developer's internal economic situation.¹¹⁴

If delay is caused by a developer's decision to slow down or stop a project's development, then a time limit statute mandating governmental action by a specified date is ineffective and unresponsive to the real problem. Short of imposing a statutory duty on developers to proceed with a project with all due speed, there is little that a governmental official can do to push an application to completion. Developers are likely to oppose such a due diligence requirement as an infringement on their managerial discretion. In addition some applications may not be worth pursuing to completion, particularly those that are not well planned or have marginal profitability. Forcing developers to diligently pursue these applications to decision would waste private and governmental resources. Thus statutory time limits may not be a very helpful solution.¹¹⁵

Time limit statutes¹¹⁵ have other problems. Judicial enforcement is often lacking because the statute fails to specify what consequence is to flow from failure to meet the time limit. Other statutes specify a consequence, the project is deemed approved, but that may be an unwise consequence if a project should not be approved for environmental reasons or without modifications.¹¹⁶ Specifying those consequences will often force lead agencies with permitting responsibilities to act within the time period and deny the application. Judicial enforcement is also ineffective in that it takes more time to solve a timing problem. Finally, time limit statutes for preparing EIS's may be waived by applicants. This is a desirable alternative to many developers since the EIS that is prepared must be thorough and complete before a permit can be issued. If the EIS is not thorough and complete because the agency was hard-pressed to meet a time deadline, there is a real risk of judicial challenges to the adequacy of the EIS, which would further delay the project.¹¹⁸ Thus time limit statutes should be considered only as a last resort for agency-caused delays.

The second alternative is to impose significant responsibility on the developer applicant working with the lead agency to "manage" the whole process of E.I.S. development. This approach was strongly advocated by several interviewees who were corporate officials or represented developers.¹¹⁹ There are several advantages to developer management of a project. Responsibility is placed directly on the party having the most control over decisions to go ahead or slow down a project. Another advantage is that developers frequently have much larger staff and monetary resources to devote to a project than does the government agency reviewing the project. A developer can allocate 25 people to work on a project E.I.S. or can hire a third party contractor to do the EIS preparation. By contrast the agency may be able to assign one or two staff to that project on a full time basis with other staff helping out on a part-time basis. Furthermore the developer often has a greater incentive to manage the process to completion. They have one project to manage, their own, whereas the agencies often have several or many project applications under review at any one time. Finally, the developer can actively participate in the agency process, can educate new agency staff when necessary, can monitor the progress at all agencies in a multiple clearance system, and can consult

agency managers or high level officials when problems arise at a lower permitting staff level.¹²⁰

There are, however, several significant disadvantages to developer management of the environmental review process. Some developers are unable, unwilling, or inexperienced so that they would not effectively manage the coordination of an agency EIS process. These developers would not provide sufficient help to agencies or would put distracting and countervailing pressure on the agencies to complete the process in the fastest manner possible. Furthermore, the relationship between some developers and some agencies is a hostile, adversary one with the agencies contending that these developers are uncooperative, will not provide adequate data, and will only disclose the information they think the agency should know. These developers, in return, contend that these agencies want too much information, including irrelevant data, that they are anti-business, and that the agencies are looking for opportunities to turn down an application. A developer will find it difficult to manage an EIS process if it has that type of relationship with the responsible agency.¹²¹

An even more difficult obstacle for developer management is the deep distrust that environmental groups and some members of local communities have for developers of major industrial projects. These groups often believe that developers are untruthful, cannot be trusted, and they will hide or minimize serious environmental effects from their projects.¹²² This problem of distrust is magnified greatly if siting of a large-scale project in a particular community is controversial because of location or due to the environmental effects of the project. If controversy surrounds a project, it is much more difficult to work through the process. Distrust of the developer is deeper, opposition to the project may develop and organize, and intervenor groups may want to participate in agency proceedings, or may threaten judicial challenges to agency decisionmaking. Local political leaders may join in the controversy and politically sensitive agencies will scrutinize a developer's application far more carefully and may try to put the brakes on the project. After developer initiated economic slowdowns, this factor, political controversy,¹²³ is the second most important cause of delay in project reviews.¹²³

Even in the best of circumstances the developer may not be the best choice for coordination manager. The developer has a stake in the process. It wants the project to be approved. That incentive can distort the developer's perspective, leading it to prefer pushing the process through to completion and deemphasizing careful consideration. After all one person's delay is another's thoughtful environmentally sensitive consideration of the issues.¹²⁴ This does not mean that the developer should neglect the "managing" process for EIS preparation. It only means that there needs to be some other mechanism for coordinating the governmental review and approval process particularly with controversial or potentially controversial projects. As Standard Oil of Ohio found out, controversy can kill a project and leave a developer wondering what happened to them.¹²⁵

The third alternative is to designate a coordinating body within a lead agency that would be primarily responsible for implementing the CEO regulations. A good example of this type of body is the now dismantled Office of Special Projects (OSP) of the Bureau of Land Management of the Department of the Interior.¹²⁶ During its life OSP played a major role in coordinating EIS preparation¹²⁷ for three major energy projects, the ETSI Project, the Northern Tier Pipeline Project, and the Alaska Natural Gas Transportation System. Each one of these projects involved pipelines crossing several states

and necessitated review by multiple federal, state, and local agencies. Furthermore, OSP played a role not only in EIS preparation but also in permitting pursuant to the BLM's right of way granting authority under the Mineral Leasing Act of 1920.¹²⁸

The OSP group was an integrated team of experts that could not only facilitate EIS drafting when BLM was the lead agency but could also coordinate cooperating and commenting agencies roles in the process. It was particularly useful in large cases that were controversial and that raised sensitive environmental issues. OSP carried out the scoping responsibilities for BLM when it was the lead agency, it identified all local, state, and federal agencies involved in an EIS process, and established coordination and agreement requirements. A project leader from OSP managed the project including preparation of draft and final EIS's and the decision document. An OSP EIS team was located in the Denver office of BLM and it worked closely with the Washington office.¹²⁹ In short, OSP worked well within the confines of BLM authority and participation. Because BLM is a critical federal agency more frequently involved in major energy projects than any other agency except EPA, OSP was located in an ideal place for coordinating EIS preparation in many large cases.¹³⁰ BLM's role is less important for nonenergy industrial development projects since they are less likely to be built on or to cross over federal lands. However, as explained herein a state level OSP-type body could serve the same purpose.

OSP was disbanded with the change of administrations in Washington. The Reagan administration intended to deemphasize and cut back on the role of the federal government in energy facility siting.¹³¹ OSP was a Washington headquartered office in a federal agency far removed from the local community in which projects were to be sited. Furthermore, OSP was likely to be perceived as another layer of bureaucracy, another procedural hoop through which which a developer would have to jump.¹³² In addition, the "new federalism" philosophy of the Republican administration emphasized a primary role for the states in regulating energy development.

Aside from these political objections, one could see other disadvantages to the OSP approach. First of all, if some agency other than BLM is designated the lead agency for a major energy project, OSP would play no role at all and that agency would need to set up an OSP like branch or itself emphasize coordination and project preparation. Another objection is that OSP is within an agency that has a dual role to play, coordinator of agency review and decisionmaker as to the adequacy of the developer's application at the permit stage. Some persons would object that OSP could not easily separate the two roles and that the permit decisionmaking role would conflict with and take precedence over the coordinating role. Even if no actual conflict occurred, developers might perceive a conflict or might distrust OSP because it was part of an agency that had a mandatory oversight role over a developer's project. Thus the argument goes, OSP would not have the neutral¹³³ posture necessary to effectively mediate or "broker" the various interests.

A final alternative is to utilize a state level body that would implement the CEQ process and would coordinate reviews by multiple agencies over a major project. Utilizing a state level body satisfies those persons who strongly advocate as a political goal implementation of the "new federalism" and return of more power to individual states. State level coordination is also more sensitive to local needs and concerns. State level bodies are closer to local communities than are Washington headquartered federal agencies. This is fairly important with siting of major industrial facilities since the local community in which a project is to be built has a strong

interest in the project. This interest is more easily reflected in local and state political bodies than it is in federal agencies. Some federal agencies, like BLM, have decentralized their operation and delegated power to state field offices that are sensitive to local concerns. Other agencies such as Department of Energy or FERC have maintained a more centralized structure and are susceptible to perceptions that they are much too removed from the local scene to be either sensitive to a community's concerns or responsive to local political leaders. A related problem is that developers who are secretive or uncooperative or fail to consider local communities concerns can also be perceived as insensitive. A lack of sensitivity can delay, or kill a project if it generates controversy or mobilizes the opposition.¹³⁴ A responsive state or local agency can mitigate some of these concerns of local communities.

The role of a state body will be extensively discussed, with the California Energy Commission and the Colorado Joint Review Process as alternative models,¹³⁵ in the final section of this paper. This next section discusses the substantive environmental quality statutes whose permit requirements apply to major projects and which have a major impact on the complexity and timing of review.

C. Permitting Review Under Substantive Environmental Quality Statutes: Clean Air, Clean Water, and Others

Because of significant environmental effects,¹³⁶ major industrial development projects must satisfy the standards of substantive environmental quality statutes administered by a variety of federal and state agencies. Each agency must review a project proposal to make sure that it satisfies the statutory standards it enforces. The proposal often must be modified before it is approved. Once approval occurs a permit is issued clearing the project under that statute. When all permits are received, then the developer may begin construction, assuming no permits are challenged in court. Depending upon the project, as many as ten or more agencies could have permit review authority. This section will discuss the various regulatory statutes applicable to major industrial development projects and the state and federal agencies administering them. It will identify permitting problems and responses to those problems.

Under the Clean Air Act Amendments of 1977,¹³⁷ a major project must satisfy either the new source review (NSR) standards for nonattainment areas¹³⁸ or the Prevention of Significant Deterioration (PSD) requirements if the air quality in the chosen location of the project meets or exceeds federal standards.¹³⁹ All new fossil fuel plants must also meet new source performance standards.¹⁴⁰ If a state implementation plan has been approved by EPA, then NSR and/or PSD review authority may be delegated to a designated state agency.¹⁴¹ If not delegated, EPA retains permitting authority.

Both the permit review and the substantive requirements of the Clean Air Act are complicated. The complexity of air quality review is illustrated by a typical developer in California whose project would need to comply with NSR standards to receive a permit from a regional air pollution control district,¹⁴² as well as with the California Air Resources Board which supervises the A.P.C.D. review,¹⁴³ if the project was to be sited in a nonattainment area within California.¹⁴⁴ If on the other hand, the project was to be sited in a PSD or clean air area, or it emitted a pollutant as to

which a standard had been attained, even though within a nonattainment area, EPA's region IX office would have to conduct a PSD review and issue a permit if the increment requirements were met.¹⁴⁵ Furthermore, because of the stringent nature of nonattainment area requirements and difficulty in obtaining emission offsets,¹⁴⁶ PSD areas are likely to be the exclusive sites for future major projects.

Air pollution was rated by interviewees as the most troublesome area for major projects.¹⁴⁷ There are many problems with air pollution regulation. First, it is not uncommon for a developer to have to obtain both a state N.S.R. review and permit under the nonattainment area standards and a federal E.P.A. PSD review and permit.¹⁴⁸ EPA and the state agency in California have different information collection and modeling requirements, both of which must be satisfied by a developer, at the pre-application data collection stage, in filing out applications, and in meeting ongoing monitoring requirements. These dual standards require more work, increase the complexity, and add additional costs, before a project can receive air quality permits.¹⁴⁹

Air pollution control is also an extremely complex technical subject with many uncertainties in measuring emissions and in designing effective control measures. Furthermore much of the data to be collected for air quality permits duplicates information required for pre-decisional EIS's. If the lead agency for EIS preparation is not an air quality agency, the same information may be collected or at least analyzed twice once by the EIS agency and once by the air quality agency. Finally California and some other states are allowed to have more stringent requirements for air pollution control than those mandated under the Clean Air Act. This increases the costs to developers of control technology and adds to uncertainty because a dual-review applicant has to satisfy two standards, state and federal.¹⁵⁰

Additional air quality problems identified in the interviews included a rapid turnover in staff and lack of experience by permitting staff at air quality agencies, reduction of governmental resources to process permit applications, and a large learning curve for companies and agency staff new to air quality permit processes. Finally, the complexity of air pollution control from the intricacies of the Clean Air Act to the engineering principles of scrubber technology make air permit review a very difficult and frustrating process.¹⁵¹ These problems contribute to a lengthy air quality permit review process taking up to three years in some cases.¹⁵² Permitting reforms directed to some of these problems are discussed in the next section of this report.

Water pollution control was considered to be less of a problem for major projects than was air pollution control.¹⁵³ Nevertheless, most projects require an NPDES permit under the Federal Water Pollution Control Act Amendments of 1972.¹⁵⁴ NPDES permit authority is often delegated to a state agency such as the state and regional water pollution control boards established in California.¹⁵⁵ If a project is built on navigable waters, then the Army Corps of Engineers must review the project and issue a section 404 permit or other permits.¹⁵⁶

Obtaining these permits requires review by additional agencies, more applications, and more data to be collected, but should not slow down the process unless any of the permits are on the critical path, which means that obtaining permit X is a prerequisite to applying for or receiving permit Y.¹⁵⁷ Section 404 permits issued by the Army Corps of Engineers often present these problems. Corps permits take on an average 23 months to obtain, a far longer time than air or water permits.¹⁵⁸ Furthermore, section 404 permits are among the last to be released in a multiple clearance system due to the lengthy

agency reviews required before their issuance and because other permits must be issued before the section 404 permits.¹⁵⁹ Otherwise water pollution permits are not as difficult to obtain as air permits. The federal water statute is not as complicated as the Clean Air Act. There are less disputes between industry and agencies over appropriate solutions and over what information is necessary to satisfy an agency.¹⁶⁰

Major projects in the arid western United States do raise serious questions as to allocation of water and competing uses for water. This is a significant, unresolved issue for oil shale development and coal slurry pipelines.¹⁶¹ It is the subject of interagency policy conflict in California.¹⁶² It is a source of controversy between energy developers, and farmers, ranchers, and other users of water in the west.¹⁶³ The problem is caused by the scarcity of water, the large amounts of water used in some projects, and the demands of others who want the same water supply for other uses. This controversy could generate considerable political opposition and cause as much trouble for developers in the form of agency and judicial challenges as have environmental or anti-nuclear groups caused for particular projects in recent years.

Other federal environmental quality statutes that can effect an industrial development project regulate toxic substances,¹⁶⁴ hazardous wastes,¹⁶⁵ solid wastes,¹⁶⁶ regulate types of fuel that can be used,¹⁶⁷ or protect endangered species,¹⁶⁸ or occupational safety and health.¹⁶⁹ Each one of these statutes can add another substantive standard to be satisfied and another agency to review a project. For example, hazardous waste disposal has become an increasingly important issue in the last three years.

If a project is built on or crosses federal land, the Bureau of Land Management must issue a right of way permit for the project.¹⁷⁰ It is not uncommon for developers of major projects to experience lengthy delays in the right of way permit and the preceding EIS preparation processes.¹⁷¹ These delays are frustrating and expensive. The BLM study of energy facility permitting referred to in this report found that several factors contributed to this delay. These included delayed responses by industry to agency information requests, and major changes by an applicant to the project proposal in the middle of review or late in the process right before a permit was to be issued.¹⁷² The BLM study also identified other factors contributing to delay, such as lack of coordination by multiple agencies, and recommended various changes to respond to those factors. It noted major improvements in streamlining the process resulted from full implementation of the CEQ regulations and establishing the Office of Special Projects to coordinate EIS preparation and permit reviews.¹⁷³

The BLM study recommended standardization of bureau right of way procedures, development of guidelines for information required and for scoping, provision of information on all federal permits required for energy projects, use of joint review by federal, state, and local agencies, establishing preapplication procedures, and identification of project problems early in the process. Adoption of these recommendations would be likely to streamline the BLM permitting review process.¹⁷⁴

One other federal agency has a significant role to play in any energy project that includes an interstate oil or gas pipeline or sales of interstate natural gas. That is the Federal Energy Regulatory Commission¹⁷⁵ (FERC) which was actively involved in reviewing the SOHIO Pactex Pipeline Terminal case and is still considering seismic safety issues in the Point Conception LNG Terminal Siting case.¹⁷⁶ FERC is the successor to the Federal Power Commission.¹⁷⁸ The FERC review process was lengthened in SOHIO and Pt.

Conception in both cases due to active participation of intervenors who opposed granting of approval for pipeline abandonment (SOHIO) and construction of the LNG Terminal (Pc. Conception).¹⁷⁹

In addition to federal permit reviews, most projects must obtain several state permits. Other than federally delegated state permit authority, the principal state permits to be obtained are a siting permit from a state facility siting agency¹⁸¹ and a certificate of convenience and necessity issued by a state public utility commission,¹⁸² if the developer is regulated by that body. These permits often must be preceded by an environmental impact analysis under a state environmental quality act.¹⁸³ It is important to note that many state siting statutes are limited to power plant siting only. Furthermore state P.U.C. review is limited to public utilities. Nonenergy developers will not have to deal with these agencies but may be in worse shape as to siting if a multitude of special purpose agencies must review these projects. See the third section of this report for a discussion of alternative siting approaches.

The siting agency review encompasses a broad range of issues. In California, the Energy Commission uses a two step process. First, the NOTICE OF INTENT or NOI stage, and second, the Application for Consideration, or AFC stage.¹⁸⁴ In the NOI stage, the applicant is required to present three alternative sites and facilities. The Commission must evaluate those three and find at least two sites and facilities acceptable. It must make a comparative merit determination among the sites.¹⁸⁵ At this stage, the Commission also would determine if the sites and facilities proposed comply with environmental, health and safety, need for power, and land use planning requirements.¹⁸⁶ The Commission must make findings as to each of these elements as well as to the relative merit of sites.¹⁸⁷ In the second or AFC stage, the developer applicant must complete an application for certification for a specific site and related facility.¹⁸⁸ The Commission must make site and facility-specific findings as to each of the NOI categories and must also prepare an environmental assessment.¹⁸⁹ When the Commission issues the certificate, the developer can ordinarily commence construction if other permits are also approved. The Commission's review is limited to power plant siting.

If the developer applicant is a regulated public utility, the state public utility commission will have to review the project proposal for economic, financial, rate, and system reliability factors. The PUC would then issue a certificate of convenience and necessity allowing the utility to construct the project and add it to the utility's rate base.¹⁹⁰

To effectively manage this process of multiple agency review, a developer has to identify at a very early stage all agencies that have review and permitting responsibilities over the project.¹⁹¹ These will include local agencies with land use planning responsibilities when the project involves a nonenergy industry. The developer must contact each agency and find out what information gathering requirements it has, what applications must be filed, and filing dates for those, and whether some applications must precede others¹⁹² as the environmental review process must precede permitting. This process is complicated enough so that advising developers as to regulatory requirements¹⁹³ is a principal function of California's Office of Planning and Research.

The regulatory review and permitting process takes additional time and contributes to the complexity of managing major project proposals.¹⁹⁴ Critics of permitting processes have identified a number of factors that contribute to lengthening or delaying permit approvals. One study identified federal agencies as causing more delays than state agencies due to federal rules and

regulations.¹⁹⁵ Other factors included duplication in environmental reviews between state and federal agencies. Even though state agencies had a less significant delay problem, causes of delay that were identified at that level included utilities changing proposals, revising load forecasts, and extending operation dates. Agencies were charged by utilities with expecting too much information or not certifying an application as complete which prevents the time limit statute from commencing.¹⁹⁶ Other studies indicated that lack of a commitment by agencies to timely processing of permits, interagency conflicts, regulatory uncertainty,¹⁹⁷ and lack of good management by agencies and developers are causes of delay.

One factor that can cause more problems for a project and increase the length of permit reviews is controversy over the desirability of a project, its location, or its environmental effects.¹⁹⁸ Project opponents can exploit the environmental review and permitting processes to halt a project.¹⁹⁹ They can intervene at the agency level, can apply political pressure to an agency, and can file lawsuits challenging the adequacy of permits. These challenges can tie up a project for several years while the validity of an EIS or the issuance of a permit is litigated.²⁰⁰ The threat of a lawsuit by an intervening group can cause an agency to be far more careful and cautious in its deliberations with a resulting slowdown in the agency process.²⁰¹ In addition, developers can contribute to delay by being secretive with information, giving too little information in applications, and for having unrealistic expectations for the start of a project's construction and operation.

D. Proposals for Procedural Improvements in Permit Review Processes

A variety of solutions have been proposed to streamline permit review processes. These solutions fall into several categories and will be discussed separately. One grouping is intra-agency consolidated information application and permit procedures. Related to this is time limits for the decisionmaking of one agency, and use of procedures to broaden participation of interest groups. Another grouping focuses on generic determinations for need for power, site banking, and developing clear policies for application of regulatory standards.

Beyond these single agency approaches are interagency proposals for coordinating review, using Memos of Understanding (MOU), collapsing all reviews into a single stop agency, and using a voluntary coordinating approach such as the Joint Review Process. Two final issues here are the use of special legislation tailored to a specific project and integrating judicial review into the administrative decisionmaking process in an efficient manner that preserves the rights of parties to have high quality judicial review.

One type of permit streamlining proposals focuses on the application process within an agency. These proposals include developing standardized information guidelines, common application requirements, and holding pre-application and initial application meetings between agency officials and the applicant. These meetings are designed to insure that agency and developer have a common understanding of what information is needed for a complete application thereby ensuring a quicker review on the merits of the application for a permit. These approaches can reduce confusion, can resolve conflicting information requirements, and can help smooth the application

process. They are designed to reduce conflict over whether an application is complete and ready to go or whether more information is needed. EIS preparation, including the crucial scoping process, and permit review processes can run more effectively if complete information is available at an early stage. Developing standards for permit procedures and for substantive requirements to guide applicants in knowing what prerequisites they must meet to receive permits would also help developers to plan projects with greater certainty as to requirements to be met.²⁰² All of these reforms should also help to reduce a serious problem of regulatory uncertainty as to required information and permit standards which lengthens the review process and increases the costs of development to project proponents.²⁰³

Another proposal is the consolidated permit program developed by EPA to coordinate permitting review under five separate statutes²⁰⁴ administered by EPA. This program includes consolidated applications for permits under all of the five regulatory statutes, issuance of a draft joint permit, common public hearings, and issuance of a joint final permit under some or all of the five statutes. If parallel state permits are required, joint hearings can be held for these permits.²⁰⁵ Because of the crucial role played by statutes EPA enforces in the permitting process for energy projects,²⁰⁶ this program could contribute significantly to reducing the costs of preparing data, completing applications, attending hearings, and could reduce the overall time for permitting which increases markedly in multiple permit cases as opposed to single permit cases.²⁰⁷ Unfortunately, much of the E.P.A. program has been abandoned because it became much too complex and unworkable.

Another idea is for an agency to prepare a decision schedule outlining all significant stages of an EIS preparation and permit review process. The schedule should contain target deadlines for each stage. This can ensure completion of each step in a timely fashion, can allow monitoring of compliance by agency management, and can be used as an early warning system when a deadline is not met for one stage. EPA has developed a variety of decision schedules with time lines that are charted from beginning to end.²⁰⁸ These can serve as models for other agencies.

If each agency that has responsibility for reviewing and permitting a major industrial project were to adopt these streamlining procedures, improvements could occur in the efficiency of the process. However, some agencies do not place a very high priority on efficiency and that is a cause of more lengthy permit reviews.²⁰⁹ Furthermore, one study²¹⁰ determined that agencies without legislatively mandated time limits to issue permits had the most serious delays.²¹¹ This study recommended that congress establish mandatory time limits for permit reviews.²¹²

Legislatively mandated time limits are controversial.²¹³ If the time limit is unreasonably short, the agency can not enforce its substantive mandate because it does not have adequate time and the quality of the resulting decision may be reduced markedly.²¹⁴ Furthermore, those decisions are likely to be challenged in court and possibly set aside. This would cause a net increase in the time required because the decision would have to be remanded to the agency for reconsideration.

Most of the federal agency officials interviewed for this study felt that time limit statutes were not very helpful or effective. At best such statutes might force the agency to place a higher priority on efficiency, but that is dependent on having adequate staff resources. Developers interviewed were skeptical of time limit statutes for another reason. They were concerned that, as a deadline was reached, the agency would feel compelled to make a decision even if it was not yet ready to do so. In that instance, the agency

would deny the permit if it felt there was not adequate time to reach a careful decision. This would force the developer to reapply and go through the process all over again, with more time and money expended. Developers wanted the statutes to contain waiver of time limit clauses based on a showing of good cause and applicant consent. This would allow the agency to take more time to reach a more careful decision hopefully approving the desired permit.²¹⁵

State officials in California who were interviewed and whose agencies were subject to time limit statutes had a different attitude. These officials felt that time limits were workable, and that the agencies could and did regularly reach high quality decisions within the required time limit. The success of these statutes is shown by legislative reduction of one time limit from 18 months to 12 months which was done with agency support. Legislative consultants interviewed noted that time limit statutes were working well enough that there was virtually no pressure put on the California legislature by industry in the recent legislative sessions to impose more stringent limits. This contrasts with the situation several years ago in which there was considerable lobbying by developers to impose the time limits now in force.²¹⁶

The California time limit statutes apply to environmental review under CEQA,²¹⁷ to California Energy Commission permitting reviews for thermal power plants²¹⁸ and, recently, to all other permitting processes²¹⁹ carried out by California state agencies. The statutes generally require the agency to establish a time deadline for²²⁰ specific type of decision, but a maximum time is specified in the statute. So long as the maximums are within a reasonable range based on actual agency experience, so long²²¹ as there are waiver provisions for good cause (i.e. unforeseen delays),²²¹ and so long as adequate budgetary and staff resources are supplied to the agency, these statutory time limits are a workable solution.

The California statutes also address two other problems with time limit provisions. The first problem is defining the starting date for the beginning of the time period. This is usually determined to be the date on which an application is accepted as complete. The second problem is requiring the agency to make a determination as to whether or not an application is complete. The statutes usually require²²² such a decision to be made within 30 days of the receipt of the application.²²² These problems result from disagreements between agency officials and applicants over how much information is necessary for an application to be complete. Applicants are concerned that agencies will reject applications as incomplete thus delaying the starting of the time period. Agencies are concerned that applicants will be secretive, uncooperative, and will submit applications with only minimal or inadequate information.²²³ Whatever time limit statute is adopted should address these issues specifically. Furthermore, the agency and applicant should be encouraged to meet early in the process to establish²²⁴ information guidelines, or these should be set by the agency generically.²²⁴

The recent ABA study on siting concluded that "The establishment of reasonable regulatory time limits and schedules, coupled with some measure of flexibility for the unforeseen, can be an important source of discipline in the process despite some inherent imperfections."²²⁵ This study also noted that twenty-one states have time limits on energy facility decisionmaking, ranging from 120 days to 24 months. Waivers for good cause are included in seven of the statutes. The study confirmed that problems can arise as to whether applications are complete and or whether time limits are mandatory or discretionary. Finally, it stated that sixteen states have recently

established new energy facility licensing agencies. Twelve of these sixteen states also have time limit statutes,²²⁶ suggesting a linkage between time limit statutes and siting agencies.

It is also desirable to encourage the participation of interest groups, ranging from citizens in the local community where a project is to be sited, to environmental and other potential intervenor groups, in the environmental impact and permitting review process. This may seem to be an unusual approach because adding new participants to an agency review process can frequently complicate and slow down the decisionmaking process, particularly when trial type procedure is used by the agency. However, excluding these groups from the agency process or maintaining secrecy about developer plans frequently creates or mobilizes project opponents. Those opponents can slow down the agency permit review process for a far greater length of time than would be added by their participation in the process. Furthermore, determined intervenor groups can tie up a project for years through challenging agency decisions in court, through political warfare, and through efforts to participate in the agency process.²²⁷

When a project is controversial, interest group participation in the process is even more important. Political controversy can stall or kill a project, often at the hands of opposition groups or local and state political leaders who are responsive to local concerns.²²⁸ While it is impossible to eliminate controversy, it is possible to reduce opposition, to consider local concerns, and to make a record showing consideration of opponents' objections which will withstand later scrutiny by the reviewing courts.²²⁹

Furthermore, absent pragmatic concerns, it is highly desirable to have local community input into a project, to respond to or reduce the "Not in my backyard" attitude of communities toward energy facility or industrial development projects. Also the community may be able to make useful suggestions which would improve the project or hasten the community's acceptance of the developer or its project. Environmental groups may be able to point out problems with the project or to suggest mitigating measures.²³⁰ If this is done early in the process, the developer's plans can be changed much more easily than later on.

Some developers are open to communities' input and public participation in the agency review process. This is often because of the reasons stated above. Other developers are not open, preferring to keep plans secret or undisclosed to the public until an application is formalized or even after that date. These differences are often a matter of corporate style. Some developers fear that releasing information will aid their competitors or will rally opponents. While it is difficult to entirely overcome this concern, developers are better off in the long run working with the local community in an open manner. Developers who work with the public can avoid sinking a lot of money into a project which must later be abandoned due to controversy or due to litigation challenging issuance of permits.²³¹

The ABA study supports interest group participation.²³² So do representatives of several major developers.²³³ However, a balance needs to be maintained so that interested persons can share information, and can have reasonable access to agency information and decisionmaking processes, but so that obstructionists, project opponents who are using the agency process to block the project at all costs without regard to whether environmental impacts can be mitigated, can not abuse the process and cause real harm.²³⁴ One of the risks here is that it may be difficult to discern who is an interested citizen and who is an obstructionist. That risk is probably worth taking and

it is essential that project developers be aware of that risk as the price of openness.

The California Energy Commission has a public advisor, whose role is to assist interested members of the public to understand and participate in the Commission's hearing process.²³⁵ Furthermore, the Commission holds many of its licensing hearings in the local community in which a proposed project is to be sited. These techniques make it easier for citizens to participate in the Energy Commission process. However, there are several barriers to citizen participation including the formality of commission hearings, and the technical complexities of many of the issues dealt with in those hearings.²³⁶ Finally, interviews with intervenor groups indicate that raising money to defray the cost of participation is a problem as is the attitude of some agencies and many developers that interest groups should not even be a part of the agency process.²³⁷

Another proposal is to determine generically many issues that otherwise would have to be individually litigated in every licensing case for a specific type of facility at a particular site. Reducing the number of issues that have to be adjudicated individually should shorten the decisionmaking process and will certainly simplify it. Generic determinations also promote uniformity and consistency. Generic proceedings are policy making sessions in which issues are resolved generally, using rulemaking or a public forum, and without regard to a specific applicant. The issues most easily determinable on a generic basis are "need for power" and "choice of technology." However, the generic approach could be applied to many other recurring issues such as plant design, pollution control technology, etc. As to these issues the generic proceeding should address a number of specific questions outside the context of a specific licensing proceeding. Because of the importance of generic determinations, there should be substantial involvement in the proceedings by interest groups and members of the public. Furthermore, for generic policy decisions to be effective, they should be cast into a format, such as substantive rules, that are enforceable in later licensing or certification proceedings for individual facilities.²³⁸

Site banking is another approach, used extensively in Maryland and Florida, by which a state designates sites suitable for industrial or energy facility projects in advance of a specific facility application. The advantages of site banking include reducing the time required for licensing, minimizing uncertainty in the facility licensing process, and avoiding repetitive consideration of similar siting issues in each new facility certification proceeding. Related to site banking are multiple site proposals used in New York and California, in which a developer submits environmental impact analyses for three alternative sites, one or two of which may later be approved.²³⁹ All of these approaches lessen the likelihood that a developer will pick an unsuitable site, pour a lot of money into facility planning at that site, only to have the project rejected because the site is unworkable. The Northern Tier Pipeline Project, with a pipeline proposed under Puget Sound, was rejected in substantial part due to such site related problems.

Another set of proposals respond to the problem of regulatory uncertainty. Uncertainty is very frustrating to developers because it frustrates planning and compliance efforts. These proposals include generically developed standards to govern the application of environmental statutes, to resolve disagreements between agencies over the nature and acceptability of environmental impacts, and to establish the conditions for receiving a permit in advance of a developer's filing an application for a permit. Such standards may be difficult to develop with a new policy, such as

the emission offset policy applied in the SOHIO case,²⁴⁰ but once an agency gains experience with a type of problem, it can and should develop specific standards governing permit approvals and interpretations of key terms in environmental statutes. Agencies should also work out a process with other agencies, using memorandums of understanding, whereby two (or more) agencies can reach agreement on environmental impacts and on appropriate permitting solutions in specific types of cases.²⁴¹ This would smooth the permit process when multiple agencies must review a project.

Discussion of procedural reforms in administrative law would not be complete without considering the role of reviewing courts that supervise agency decisionmaking. Agency environmental impact statements and permit decisions can be and are challenged in court. Litigation and the threat of filing lawsuits are potent weapons of project opponents. Court challenges can add two to four years time to the agency permitting process. Litigation makes agencies act more cautiously and can cause developers to abandon projects.²⁴² Nevertheless judicial review serves important functions of supervising agency decisionmaking, protecting the rights of private parties, and resolving a variety of legal issues. The goal here should be to balance the need for judicial review to serve these important purposes against the illegitimate use of court challenges as a device to block a project regardless of the merits of the challenge.

Reducing the number of agency decisions subject to court challenge is helpful. This is a real advantage of so-called "one stop siting agencies" in which only one permit is issued and only that permit can be challenged. Reducing the number of reviewing courts in a multiple tier judicial system is also helpful and can eliminate two years from the total time for judicial review.²⁴³ This is an advantage of direct state supreme court review of siting agency decisions, the system used in California for review of PUC and Energy Commission decisions.²⁴⁴ It is also desirable to specify a relatively short period of time, e.g. 30 days, after an agency decision is final, within which to file an action in court challenging the decision.²⁴⁵ Preference provisions are commonly also included in expedited judicial review statutes,²⁴⁶ but there are so many civil preference statutes, all of which cannot be equally entitled to priority, that preferences are not very helpful,²⁴⁷ particularly in light of the fact that criminal litigation takes precedence over all civil cases in most jurisdictions.

The most potent weapon in the litigant's arsenal is the injunction, granted by the reviewing court to stay the agency decision approving the project pending judicial review. Developers fear granting of an injunction or approval of a stay even more than the filing of a judicial review action.²⁴⁸ If the injunction is denied, it is often permissible for the developer to begin construction at its own risk pending the completion of judicial review and final approval of a project.²⁴⁹ The best way to prevent a reviewing court from granting an injunction or a stay is for the agency's decision to be solidly supported with a good record showing the reasonableness of the agency's decision. The developer can assist in this process of developing a good agency record by freely providing information to the agency, by allowing opponents to participate so as to show that their arguments were known to and considered by the agency, and by cooperating with the agency.²⁵⁰

Short of these measures, it is probably improper and surely undesirable for the legislature to mandate time limits for judicial decisionmaking. There is only one statute currently in force that sets a specific deadline for a court to reach a decision on a challenge to agency decisionmaking. This statutory provision is limited to constitutional or statutory claims involving

questions of law. Furthermore, the deadline provision in this statute can be extended if the reviewing court "determines that a longer period of time is necessary to satisfy the requirements of the U.S. Constitution."²⁵¹ This statute is probably constitutional because the court is free to take more time to decide constitutional issues thus minimizing the separation of powers argument. However, limiting the time for judicial decisionmaking is undesirable because it could reduce the quality of the court's decision. Furthermore, such a time limit on judicial review may be practically unenforceable.

Short of expediting judicial review, the best way to minimize or limit judicial challenges to agency decisions is to provide a fair and orderly procedure for agency review and approval of a project in which all interested parties can participate. The agency should strive to maintain its integrity and neutrality. Developers can contribute to an atmosphere of fairness by being open, cooperative and willing to make reasonable accommodations to other interested groups. These recommendations will not eliminate all challenges by diehard environmentalists ideologically opposed to any energy development. However, they should satisfy concerned community members and moderate environmentalists who are sincerely interested in mitigation of environmental impacts through having modifications made to proposals. Using these approaches should also decrease the likelihood that a judicial challenge will be successful and an agency decision set aside.²⁵²

The final topic to be discussed is the passage of special legislation by Congress or state legislatures to expedite administrative review of specific major projects. Since 1970 Congress has enacted special legislation on three different occasions governing respectively the Alaska Oil Pipeline from the north slope to Valdez,²⁵³ the Alaska Natural Gas Pipeline,²⁵⁴ and the Long Beach to Midland (SOHIO) and Northern Tier Oil Pipeline projects.²⁵⁵ The California legislature²⁵⁶ has enacted special legislation governing respectively the SOHIO Pipeline²⁵⁶ and Pt. Conception LNG Terminal projects.²⁵⁷ Such special legislation is a product of developer lobbying and pressure,²⁵⁸ coupled with legislative sentiment in favor of the project being approved.

Most of these statutes impose deadlines, often very short, for reaching a decision on a project.²⁵⁹ They sometimes include provisions waiving enforcement of specified environmental laws such as NEPA.²⁶⁰ The federal statutes transfer ultimate decisionmaking authority from the agencies that normally review those projects to the President, who must recommend approval of the project, and to Congress, which must adopt a resolution approving the project.²⁶¹ The California legislation delegated one stop siting authority to the PUC (Pt. Conception)²⁶² and in the other case (SOHIO) legislated expedited judicial review.²⁶³

These statutes are enacted because of developer pressure and legislatures' concerns that projects will get hung up in agency review processes unless the legislature intervenes by passing special legislation. These statutes' primary purpose is usually to expedite agency and judicial review to insure prompt approval of a project so that the developer can commence construction as soon as possible.²⁶⁴ Legislation is often enacted only when a project is well into the agency process²⁶⁵ or, in one case, when a successful judicial challenge²⁶⁶ set aside an agency decision approving a pipeline right-of-way permit.

These statutes are usually ineffective in that they do not achieve their intended purpose. Both the SOHIO Pactex Pipeline Project and the Northern Tier Pipeline Project were the subject of federal legislation enacted in late 1978. That statute, Title Five of the Public Utility Regulatory Policies Act

of 1978,²⁶⁷ was enacted too late in the process and did not prevent SOHIO from abandoning the project in 1979 because of problems with state agency permits not covered by the federal statute.²⁶⁸ The Northern Tier Pipeline project did not fare any better. The chosen pipeline route was rejected by Washington Governor John Spellman in February, 1982 based on recommendations from the Washington State siting agency made more than three years after title five was enacted.²⁶⁹

The California state legislation expediting judicial review of the SOHIO Pactex Pipeline Project was also passed too late in the process and did not prevent project opponents from threatening to and actually litigating the validity of permits issued to SOHIO by state agencies.²⁷⁰ Furthermore, the Pt. Conception LNG Terminal Siting Act,²⁷¹ which required the PUC to reach a decision on the project by July 1978 did not achieve its purpose. The PUC, exclusive siting agency for the project, reached a decision approving the project within the 1978 deadline. However approval was premised on two major conditions being satisfied, one of which concerned the seismic safety of the project.²⁷² That issue alone required further agency deliberations for several years. A final permit has not yet been issued although the PUC is about ready to finalize its approval of the seismic suitability of the chosen site. However, the developers of that project have put it on hold for several years for economic reasons, and some persons doubt whether the project will ever be built.²⁷³ As of summer 1983, the developers of the LNG plant are seeking PUC approval to include the cost of developing the plant in the rate base as "plant held for future use."

The federal statutes expediting agency approval of the Alaska Oil and Natural Gas Pipelines were effective in that they resulted in quicker decisions approving the projects than might otherwise have occurred if the agencies had made the decision rather than Congress.²⁷⁴ However, the Alaska Natural Gas Pipeline has never been built, due to financing problems. Thus only one of the five affected projects, the Alaska Oil Pipeline, was ever constructed and put into operation. Additionally, the costs associated with expediting those projects was substantial. These costs or negative consequences²⁷⁵ included a distortion of the normal agency process for reviewing projects, a severe limiting on the time for decision which could have affected the quality of the decision,²⁷⁶ the related use of crisis deadline time limits, which either do not work or result in timely but shallow decisions,²⁷⁷ and a legislatively forced determination not subject to judicial review that environmental impact statement requirements were met.²⁷⁸ This last disadvantage comes close to proposals advocating waiver of the application of environmental laws to these projects, another poor and unnecessary idea.

Related to these statutes was the ill-conceived proposal for an Energy Mobilization Board which would have designated projects of high national priority and put them on a fast track review process in which expedition and efficiency would reign supreme. At one point the EMB proposal included provisions for waiver of federal environmental statutes, and federal preemption of state laws.²⁷⁹ The EMB proposal has few defenders. Also, federal preemption in energy facility siting is undesirable unless there is some special reason for it, such as with nuclear power. In addition, the process for determining which projects are important enough to be put on the fast track creates another procedural layer or pitfall that can take more time or could be subject to challenge thereby defeating the purpose of the EMB. Finally, the EMB would have been used to force approval of controversial projects. If that happened, project opponents would have redoubled their

efforts to halt such projects by challenging EMB decisions in court or by lobbying hard in Congress to sidetrack the EMB or a favorable decision by it on that project.²⁸⁰ In the long run, the EMB could have generated so much political opposition that it probably would have not worked or the fast track would have been derailed.

Thus special legislation, whether project specific or fast track, is an undesirable alternative because it will not accomplish the goal of streamlining agency review or because it will speed up the process but will sacrifice rational environmental review. Nevertheless it is possible, utilizing some of the permitting reforms discussed herein, to accommodate both efficiency and substantive consistency, or both expedition and environmental quality without using such drastic approaches. The next section of this paper discusses two newer and less drastic approaches to accommodate both concerns. These approaches are different than previous proposals for streamlining agency procedures. However, both the California Energy Commission and the Colorado Joint Review Process use many of the procedural reforms previously discussed.

III. Alternative Models for Permitting Major Industrial Projects: One-Stop Siting Agencies and Coordinating Bodies

A. One-Stop Siting Agencies: The California Energy Commission As A Model

One solution to multiple agency review of industrial development projects is to consolidate most, if not all, environmental and permitting responsibilities into a so-called "one-stop siting agency." This approach has been quite popular in the last ten years. Sixteen states have recently established non-public-utility-commission siting agencies that are designed to provide comprehensive review of a project.²⁸¹ This approach is designed to allow a developer to obtain most, if not all, required reviews and permits by filing one application with one agency. These agencies are often based on the example of the Nuclear Regulatory Commission, a comprehensive reviewing agency for siting of nuclear power plants.²⁸² This alternative will be considered using the California Energy Commission as an example of such a siting agency.

The California Energy Commission was established by the Warren-Alquist Act of 1974.²⁸³ It has exclusive siting jurisdiction over thermal electric generating facilities and related transmission lines.²⁸⁴ In addition, the Commission has other responsibilities including preparing a biennial energy report with information provided by California utility companies. This report contains a prediction of the level of energy demand (i.e., load forecasts) in California in future years, it identifies fuel supply sources and facilities needed to meet that demand, it describes conservation and alternative technology efforts encouraged by the Commission, and it includes other matters.²⁸⁵ While the Energy Commission's jurisdiction is limited to power plants, the one stop siting approach is broadly applicable to any major industrial project. The approach includes in its essential elements the collapsing of many permit reviews into one agency which will issue one permit and act as a common forum for all affected interests while having the final decisional authority over the project. The Energy Commission includes these elements. It also performs the role of energy policy maker for the State of California helping the state adapt to changes in oil supplies that occurred in the 1970's. Thus, an examination of the Energy Commission will be generally helpful in this study.

Under the Warren-Alquist Act, the Energy Commission is required not only to make facility and site certifications but also to encourage conservation, more efficient use of current resources, and development of alternative technologies such as cogeneration and geothermal generation of electricity.²⁸⁶ The new geothermal technology is a preferred alternative that is subject to a simpler and shorter facility and site review process.²⁸⁷ In addition, the Energy Commission has required California gas and electric utility companies to shift company policy from the past exclusive emphasis on assuming that growth in electricity demand would continue and meeting that demand through building large-scale conventional coal or oil fired power plants. Utilities in California are now expected to be energy managers who use load management, who encourage customers to insulate their homes, or to install cogeneration technology at a plant, thereby reducing the demand for gas and electricity and saving customers money. This is a real shift in role for the state's utilities from supply providers to demand managers. Due to Energy Commission encouragement the state's utilities and oil companies have made real progress in the commercial development of geothermal, wind energy, and cogeneration as alternative sources of supply.²⁸⁸

This dual role, siting agency, and energy policymaker may explain some conflicts between the commission and California's utilities. Utility representatives have criticized the Energy Commission on several grounds. One criticism is that the Commission requires excessive information in applications for facility and site certification at both the NOI and the AFC stages.²⁸⁹ Agency officials respond to that criticism by saying that utilities deliberately submit incomplete applications to force the agency to specify what is needed in its application process.²⁹⁰ Another criticism is that the Commission's two stage site and facility certification process, called the NOI and AFC stages, is cumbersome, costly, requires duplicative review of the same issues in both stages, and takes an excessive length of time.²⁹¹

Energy Commission officials interviewed by the author maintained that the statutory time limits for completing review of all facility applications were met at the first or NOI stage.²⁹² This point is confirmed by data supplied by the Commission to the ABA for its study of power plant siting.²⁹³ The NOI stage review must be completed within 18 months under those requirements. The second or AFC stage must also be completed within 18 months, for a total time for review of 36 months, which is within the normal permitting time estimated for large plants in a recent study.²⁹⁴ Thus the excessive length of time criticism does not appear to be supported by the data. The Commission approved NOI's for several large power plants, the Sun Desert Nuclear Power Plant (sponsored by San Diego Gas and Electric), and the Fossil 1 and 2 coal-fired plants (sponsored by Pacific Gas and Electric Company). This experience suggests that time limits may be a viable option for expediting power plant siting review.

An additional factor to consider is developer timetables for moving a project proposal forward. Commission officials noted that several sites have been approved using the NOI process but the utility applicants have not taken the next step to apply for certification of a specific facility at a specific site, in the second or AFC stage. Thus, these officials say, it is not the Commission's responsibility that some power plant proposals have been put on hold. The utilities' are responsible because they have not gone forward with proposals in the AFC stage usually for economic reasons (large power plants are very expensive to finance) or because of reduction in forecasted energy demand.²⁹⁵

Utility representatives might not agree with this assessment but would argue that the three alternative site information requirements mandated for the NOI stage,²⁹⁶ and the two stage process, NOI and AFC,²⁹⁷ substantially increase the information required and the costs of regulatory review by the Commission.²⁹⁸ It is expensive to submit data for three alternative sites in the NOI stage and this criticism thus has merit. However, once a site is approved, it becomes available for a utility to file an application for a specific facility on that site in the subsequent AFC stage.²⁹⁹ The Commission must then determine whether the application complies with all the requirements of local, state, and federal law governing safety, need for power, environmental impacts, and land-use planning.³⁰⁰ In addition, the site basically remains available until such an application is filed.³⁰¹ The NOI stage can be viewed as a form of site banking, known as the multiple site proposal approach.³⁰² Thus, site suitable information need not be resubmitted or reconsidered in the second stage review. However, the Commission should strive to minimize duplicating review as to common siting issues in both the NOI and AFC stages. For example, the Commission must make specific findings as to need for power, safety, and compliance with local, state, and federal standards in its written decisions approving both the NOI and the AFC filed by a utility.³⁰³ The Commission should not redecide an issue at the AFC stage that has already been considered at the NOI stage. Also, it should allow a utility to present the same information on overlapping issues in both stages of the process.³⁰⁴

The problem of how much information should be required for an application to be complete should lessen as utilities and the Commission gain more experience. Most problems occur the first time a developer files an application with the Commission or the first time the Commission considers a new issue.³⁰⁵ Furthermore, the Commission specifies in general terms by regulations what information is required for each of the four types of applications.³⁰⁶ Finally, the regulations require the Commission to determine, based on the executive director's recommendation, made within 30 days of receipt of the notice or application (20 days for geothermal notices or applications), whether the notice or application is substantially complete in that its documentation satisfies the information requirements of the Commission.³⁰⁷ If it is complete, it is filed and the filing date relates back to the date of submission for purposes of triggering the running of the time period for reaching a decision. If the notice or application is determined not to be substantially complete, the Commission is required to specify the defects in the application and either return the application or conditionally file it if the developer promises in writing to supply the missing information.³⁰⁸ These regulations should help a developer to learn what information is needed. In addition, the responsibility is placed on the agency to specify what is needed, so that a developer is not left guessing as to what is wrong with its submission.³⁰⁹

A more serious problem for the Energy Commission, other state siting agencies, and those considering this approach is the relationship of the Commission with pre-existing established agencies. When the Commission was created in 1975, it was folded into an existing structure of California agencies that had previously regulated power plant projects on a piecemeal or fragmented basis. Many of these agencies enforce provisions of federal environmental or land use legislation that mandate state enforcement of federal standards.³¹⁰ These agencies include the Air Resources Board and local air pollution control districts (Clean Air Act),³¹¹ the regional water pollution control districts and state water resources control board (Federal

Water Pollution Control Act amendments of 1972),³¹² and the California Coastal Commission³¹³ (Coastal land development under state law and consistency with the federal Coastal Zone Management Act of 1972).³¹⁴ In addition, state agencies, such as the Public Utility Commission, exercise jurisdiction over public utilities under state law and must issue a certificate of convenience and necessity before a utility can put into its rate base money spent on developing a power plant as well as the value of the plant.³¹⁵ In addition, regional bodies, such as the Bay Area Conservation and Development Commission,³¹⁶ and local bodies such as counties carry out state and local land use planning laws.³¹⁷ These agencies must be considered by the Energy Commission. The Warren-Alquist Act recognized potential conflicts with these agencies and required the Energy Commission to consult and work with most of them in making power-plant siting decisions.³¹⁸ These existing agencies would possess more direct review authority over nonenergy industrial projects that are not regulated by the Commission.

A fundamental question to be answered by siting agencies such as the Commission is whether they can be and whether they should be the sole and exclusive decisionmaker for power plant siting decisions in their state. The one-stop siting idea was originally promoted as an approach which allowed the developer to obtain all permits with one application and consideration by only one agency of its project proposal.³¹⁹ However, this ideal is illusory. It is not possible for utilities in California to have one-stop siting because both the PUC and the CEC must approve a power plant project. Furthermore, it is extremely doubtful that any of the federal environmental quality or land use planning statutes would directly permit the Energy Commission process to preempt or override federal standards and the authority of the designated state agency that enforces those standards. The only way to integrate directly enforcement of those standards would be for the state of California to formally request that the enforcing state agency be changed to the Energy Commission and California's enforcement plans be amended accordingly.³²⁰ Furthermore, the California legislature would have to amend many state law provisions and make the Energy Commission a new super agency to fully consolidate all permitting and review functions under one roof.³²¹

Assuming that the California legislature had the time to go through that cumbersome process, and that it was politically feasible to do so, both of which are doubtful propositions,³²² the resulting agency would be much too large and unwieldy to function effectively. Also, the kind of conflicts that now occur between agencies over appropriate resolutions of problems would be transferred into the new agency and would become conflicts within the agency. Thus the super agency approach, which would be necessary for the Commission to fulfill the ideal of one-stop siting, is impractical. Also, the super agency would only consolidate state and local agencies and not federal agencies who must also review and approve large scale projects. The only value of such an approach is that the necessary staff, expertise in scientific disciplines would be concentrated in the super-agency.³²³

If the California Energy Commission is not a one-stop siting agency, what is it. Commission officials consider it to be a "common forum" or a broker of the various regulatory and other interests affected by power plant siting proposals.³²⁴ It is also a developer of California energy policy and a statewide demand and supply forecasting body.³²⁵ The Warren-Alquist Act emphasizes the "common forum" approach by requiring the Energy Commission to consult designated affected agencies and obtain their input as to compliance of a proposal with those agencies' substantive laws.³²⁶ This consultation is necessary in part because the Commission does not possess the technical

expertise and staff and budgetary resources to evaluate compliance with all applicable laws. It is also necessary because of the provisions of federal law which require enforcement of federal standards, and it is politically wise because it avoids fights with other agencies, or turf battles, which can lead to delays and litigation over projects.³²⁷ Probably because of these factors the Commission has exercised its override authority only once, in the Geysers 16 Geothermal Project. In that case it overrode an objection by the County of Sonoma to the placement of transmission lines running from the project. The county filed a lawsuit against the commission over the override which is still pending.³²⁸

The Energy Commission has recognized the potential for conflict between its permitting review authority and the authority of other California state agencies enforcing federal or state statutes. It has resolved some of these conflicts by adopting a joint policy statement between it and the California Air Resources Board governing compliance of power plant projects with air quality laws.³²⁹ It also has adopted a statement of common policy between it, the California Coastal Commission, and the San Francisco Bay Area Conservation and Development Commission governing siting of power plants in the California coastal zone.³³⁰ In the latter statement the three agencies agreed on a set of priorities for areas of the state in which new thermal power plants should be sited. In the air quality policy statement, the two agencies worked out procedures to smooth the air quality compliance determination process so as to avoid "any irreconcilable conflict between the needs for clean air and adequate electric power."³³¹ Because these policy agreements help to avoid or limit inter-agency conflict over policy and reduce turf battles and the resulting delay in agency review that those battles can cause, they are to be strongly encouraged.³³²

Critics of the one-stop siting approach have argued that creating such agencies is not helpful and merely erects another procedural barrier to approval of a project. This is particularly true when the siting agency does not in fact exercise exclusive authority, or when the agency allows all other relevant agencies to impose their own standards of compliance on the developer's project in addition to the siting agency's standards. Developers feel this is the worst of all situations because those other agency requirements would have applied to the project without the new agency's participation in the process, so that setting up the one-stop agency is not only a fruitless gesture, but creates additional red tape for a project developer.³³³

It is not possible to completely resolve the question of the value of special siting agencies. The Energy Commission performs valuable functions in developing energy policy for the state, in forecasting energy demand on a statewide basis,³³⁴ and in siting projects which otherwise would be the responsibility of local agencies at least as to the location of the facility. It is only in the area of permitting and determining compliance with environmental laws that the criticism of adding an additional layer of review is valid, but it is a significant criticism.³³⁵ Furthermore, the Commission is not a neutral body either in setting energy policy or in making siting decisions, and the Commission's decisions are sometimes controversial or opposed by developers and others.³³⁶ For example, the Commission's emphasis on alternative energy sources and conservation is opposed by some developers but it is required by the Warren-Alquist Act.³³⁷ Policy advocacy may affect the ability of the Commission to be a "common forum". Some interviewees felt that the "common forum" or broker approach required the forum agency to be a neutral mediator or to operate by consensus to effectively manage or handle a

multiple agency review process.³³⁸ To be neutral, the forum agency should probably not have policy making or permit review responsibility but should focus on getting the parties together and coordinating their efforts.³³⁹ Other state siting agencies do not play as extensive a role in energy policy. Unfortunately, the recession in the last 2½ years has slowed to a halt virtually all major projects and thus made a current evaluation of one stop siting agencies very difficult even in states such as Wyoming or Florida which have had active agencies.

On balance the Energy Commission probably provides a net benefit to the state of California. However it is questionable whether the Commission permitting process is superior to the other major alternative for large-scale review, coordination by a non-permitting body, such as the California Office of Planning and Research, which helps developers of refineries, pipelines, offshore and onshore oil drilling, and nonenergy industrial development projects.³⁴⁰ work their way through the maze of multiple agencies that must review their projects.³⁴¹ OPR possess no permitting or policy making authority. It provides information as to what permits are required. What agencies must pass on the project, what information may be required, and helps a developer to work through the multiple agency review process. The OPR model is very similar to the Colorado Joint Review Process which will be examined next as an alternative approach to permitting major facility projects.

B. The Colorado Joint Review Process

The Colorado Joint Review Process (JRP) is an innovative new approach for coordinating the permitting reviews by many agencies of major industrial projects.³⁴² In 1978, JRP was set up as a result of the combined efforts of the Colorado Department of Natural Resources and the AMAX Company, a Colorado mining corporation that wanted to develop a molybdenum mine in the vicinity of Mt. Emmons in Colorado. Since that time, the AMAX project has worked its way through JRP and a total of seven other projects have started under JRP. These projects range from mining to oil shale production facilities. Unfortunately due to the recession none of these projects have completed the JRP and all have been placed on hold or abandoned. JRP is an entirely voluntary process, that exists without statutory authority. JRP has no permitting or review responsibilities over energy projects. Its sole purpose is to act as a coordinating body to bring together the developer of a project, all relevant local, state, and federal agencies, members of the community in which a project is to be sited, and environmental groups.³⁴³

The Joint Review Process has three stages. The Process begins when a developer applies to have a project reviewed under JRP. Stage I of the Process consists of an evaluation of the project to determine whether it should be accepted under JRP. This determination is made by Colorado state agencies. The executive directors of these agencies consult other affected agencies at the local, state, and federal level as well as individuals and then reach a decision as to whether a project will be accepted. To qualify, the project must be a "major energy and mineral resource development project". It must also be offered for JRP review in an early stage of development, and state agencies who will be implementing Joint Review must be able to commit staff to the proposed project. The Stage I process takes from 24 to 31 days.³⁴⁴ While JRP is now limited to mining and energy projects, the concept is applicable to all big industrial projects.

Once a project is accepted for Joint Review, Stage II, the organizational phase, starts and it takes about eight months. In this stage, the Governor of

Colorado assigns a state lead agency for the project. Other levels of government are also contacted, lead agencies are designated at those levels, and commitments to participate in Joint Review are obtained from those governments. This organizational effort leads to signing a joint agreement by federal, state, and local governments to participate in Joint Review. Then the JRP team, consisting of one representative from each level of government, is put together, and team meetings are scheduled (usually six meetings are necessary) to organize and set up the Stage III process. Later Stage II tasks include holding several public participation meetings, negotiating and finalizing a "Statement of Responsibilities" setting forth specifically the obligations of the project developer and all agencies, and developing the important JRP Project Decision Schedule for that proposal.³⁴⁵

The Project Decision Schedule (PDS) is the heart of the Stage III process for implementing coordinated review under the JRP model. The PDS provides "detailed guidelines for coordinating regulatory processes, public participation events, and JRP administrative processes into one logical, interrelated sequence of events."³⁴⁶ There are four different model PDS's for different types of projects.³⁴⁷ The actual decision schedule that is prepared is project specific and is based on company and agency scheduling criteria. The decision schedule is plotted out on a time line that coordinates and sequences environmental and permitting reviews by major agency category. This is integrated with the company's planned schedule for completion of various phases of the project from the basic idea stage, through exploration, feasibility, design, application, government approval, construction, and operation. Public participation opportunities are scheduled within the PDS. JRP continues to hold regular meetings during stage three to continue the coordinating role, to stabilize management of the PDS process, and to minimize delays in governmental decisionmaking.³⁴⁸ JRP is a flexible process, that can be altered to meet project specific needs and can be used with other types of energy or industrial development project "such as coal gasification, coal liquification, coal fired power plants, petroleum upgrading facilities, refineries, pipelines, transmission lines."³⁴⁹

There are many advantages to this JRP approach. The Joint Review Process can be effectively used to coordinate multiple agency review of major projects because that objective is its major purpose. It can remain neutral and mediate various interests, thereby operating by consensus, because it has no policy making role, it is insulated from politics, and it has no substantive permitting or siting authority. It has the backing of the Governor of Colorado and high level state officials.³⁵⁰ It is supported by mining companies who have been willing to participate in this process. Because it expressly includes opportunities for public participation, it allows community input which can prevent controversy or reduce the likelihood that intervenor groups will feel excluded or feel that a project is being railroaded through the process. Because they can participate these groups are less likely to try and block a project through marshalling political opposition, or threatening to and actually filing lawsuits challenging the project.³⁵¹

The JRP process relies on frequent meetings throughout the entire process in which all the parties sit down together in one room to meet and talk with each other, establish lines of communication, and raise and deal with many issues. This process is quite effective for implementing the scoping of issues method³⁵² for preparing environmental impact statements under the CEQ regulations. It is also an open process, in a nonadversary setting, in which public members can more meaningfully participate and make their concerns known. Due to the early involvement of the JRP in a proposal's development,

these concerns can often be addressed before the developer has made a firm financial commitment to a specific design for its project. Furthermore, changes can more easily be made to the project in that early stage to reflect community concerns than is the case later on in the project.³⁵³

JRP is not the ideal solution that will solve all problems in energy facility siting. In fact, there is no such solution. Joint Review will not prevent diehard ideological opponents of energy development from opposing a project and filing lawsuits. However, Joint Review may help agencies win those suits through being able to make a good record. It will not ensure the most efficient development of energy projects, because developers are still in control of how fast those projects unfold. In fact, most of the seven or eight projects now in JRP have been put on hold for economic reasons unrelated to JRP. Joint Review will not eliminate all policy conflicts that may arise in the course of PDS implementation. It is not a perfect approach.³⁵⁴

However, the Joint Review Process is a significant breakthrough in development of a rational management process for coordinating multiple agency review of major energy projects, particularly those that are controversial or in which substantial public input is desired. The JRP approach is being tried in several additional states such as Utah and Illinois.

Other states should be encouraged to experiment by setting up Joint Review Processes similar to Colorado's. JRP preserves the enforcement authority of each reviewing agency, it does not require rewriting of state law, or changing state enforcement plans under federal environmental quality statutes, and it explicitly recognizes that no one agency can possess expertise in all areas or be all things to all people. Finally, the JRP is structured to fulfill more precisely the "common forum" or mediation model for coordination coupled with a deemphasis on adversary procedure. It does so without adding another procedural layer to the process. It is merely a more effective way to coordinate the current established agency procedures. However, in order for JRP to work the governor and other high level officials must be committed to the idea and must support implementation of it. Furthermore, other approaches can work depending on the role played by these same officials.

Conclusion

This report has examined the regulatory structure governing permitting and siting of major industrial projects in the United States. It has pinpointed problems with that structure based on interviews with approximately 110 persons experienced in regulation of siting at all levels of government, local, state, and federal, among public interest groups, and among energy project developers. It has also utilized studies prepared by others directed toward these same problems. It has pinpointed key stages of the process of regulation and problems with each stage. It has discussed proposed solutions to problems identified herein. It has examined two alternative models at the state level for regulating siting, the siting agency, exemplified by the California Energy Commission, and the non-permitting coordinating body, exemplified by the Colorado Joint Review Process. It has concluded that on balance, the coordinating body approach is better suited as an optimum approach for efficiently conducting the permitting and siting of major industrial projects. A summary of proposed recommendations are contained at the beginning of this report and are based on its contents.

**Appendix A: Survey Questionnaire and Explanation
of Survey Procedures**

Survey Procedures

The questionnaire was sent out by mail to approximately 110 individuals at all levels of Government, developers, and public interest groups. These individuals' names were identified through extensive checking by letter and telephone performed by two research assistants who worked for the author. They also scheduled all interviews, personal and over the telephone, and made sure that I had accurate phone numbers and mailing addresses for each interviewee. Each interviewee was instructed to look over the questionnaire prior to the interview. At the interview itself, I went through the questionnaire with each interviewee for an average one hour time period per interview. Most persons identified problems and commented on those problems. Interviewees also presented their own ideas and provided to me written studies, manuals, and papers relevant to the overall topic. Virtually all interviewees requested an opportunity to read and comment on the report. The survey produced a wealth of valuable information, in fact, more than could be utilized for the draft report. It also gave the author new insight into the real world of agency decisionmaking. Most of the interviews (90) were conducted in summer, 1982. A smaller group were conducted in summer, 1983 (20). Out of this group, 92 usable questionnaire responses were received and compiled in a survey (see Appendix B).

QUESTIONNAIRE

Prepared
by

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For Use With

"Public regulation of siting of
industrial development projects,"
a study for the Administrative Conference
of the United States.

I. INTERVIEW SOURCE INFORMATION

1. Name of Interviewee: _____
2. Position: _____
3. Company or Entity: _____
4. Address: _____
(Street Address)

(City) (State) (Zip Code)
5. Phone Number: _____
(Area Code) [Phone Number(s)]
6. Date of Interview: _____

II. INTERVIEWEE EXPERIENCE

Questions

1. Please state what current or past responsibilities you have had in regard to public regulation of siting of industrial development projects.
2. Please name particular projects for which you have had responsibilities.
3. Please state the capacity in which you were involved in those projects, e.g., as counsel for a reviewing agency, or as counsel for a project developer.
4. Please state the number of years for which you have had such responsibilities.

III. INTERVIEWEE COMMENTS

1. What problems, if any, exist in regard to public regulation of siting of industrial development projects?

2. Of the following possible types of problems, please indicate the ones that you feel are real problems and explain the nature of the problem.

Problem

- a. E.I.R./E.I.S. - (Environmental Impact Statement/Report) process:

Comments:

- b. Particular pollution control or other environmental requirements such as:

air pollution:
water pollution:
land use controls:
coastal zone restrictions:
hazardous waste
other (specify):

Comments:

- c. Federal-State relations (Federalism) such as a conflict between a national interest and the interest of a particular state or region:

Comments:

- d. The political environment such as substantial opposition to particular projects or to an industry by governmental officials or members of the public:

Comments:

- e. Delay by specific agencies in reviewing applications, holding hearings, and making permit approval decisions:

Comments: (Specify agency & nature of decision).

- f. Delay caused by multiple agencies who must review and approve permits for a particular project:

Comments:

- g. Delay caused by judicial challenges to permit approval decisions:

Comments:

- h. Delay caused by agencies exercising too much discretion in decision making/policy making, or too little discretions:

Comments:

1. Duplication or overlapping review by several agencies of similar issues in a particular project:

Comments:

- j. Inability or unwillingness of a single interest agency (e.g., the Air Resources Board) to consider broader issues relevant to a particular project but outside the agency's scope of delegated authority:

Comments:

- k. Lack of coordination or authority to coordinate by multiple agencies reviewing different aspects of a particular project:

Comments:

1. Conflict among local, state, and federal agencies having authority to regulate a particular subject (e.g., air pollution control) over what is an acceptable resolution of a problem with a particular project ("The Whipsaw Effect"):

Comments:

- m. Uncertainty by regulatory agencies as to what standards or policies to apply to a particular issue in a new project:

Comments:

- n. Substantive complexity of a particular project, either technical, or safety, or raises a variety of issues:

Comments:

- o. Developer related problems such as inadequate information given in applications or a project that is not well designed or well planned.

Comments:

- p. Problems with the location/site of the project:

Comment:

- q. Other problems (specify nature):

Comments/Nature:

3. SOLUTIONS TO PROBLEMS: Please state your ideas as to what solutions there are to any problems that you have previously identified:

4. Please evaluate the effectiveness of the following possible solutions:

- a. Time limit statutes which require agencies to decide cases within specified periods of time.

	1	2	3	4	5	
Not Effective						Very Effective

Comments:

- b. One stop siting agencies in which all permit approval processes are conducted in one agency.

	1	2	3	4	5	
Not effective						Very effective

Comments:

- c. The once proposed Federal Energy Mobilization Board:

	1	2	3	4	5	
Not effective						Very effective

Comments:

- d. Federal preemption and control as illustrated by the Nuclear Regulatory Commission and nuclear power plants.

	1	2	3	4	5	
Not effective						Very effective

Comments:

- e. The Colorado Joint Review Process or similar processes:

	1	2	3	4	5	
Not effective						Very effective

Comments:

- f. Other possible solutions (state the nature of any solution):

	1	2	3	4	5	
Not effective						Very effective

Comments:

Appendix B: Compilation of Survey Questionnaire Results

Appendix B

Questionnaire Survey Results

There were 92 total questionnaires usable for the survey out of 110 persons interviewed (approx.).

Table 1 contains positive responses to survey questions. Positive responses indicate some problem was identified in the subject probed by the question.

Table 1

<u>Responses by question in rank order</u>	<u>Number</u>
Political environment	60
Federal-state relations	59
Substantive complexity	49
Multiple agency review	46
Air Pollution	43
Judicial challenges	42
Local, state, federal agency conflicts	40
Regulatory uncertainty	38
Environment Impact Statement	37
Lack of coordination among agencies	36
Duplication and overlapping review by several agencies	35
Inability of single interest agency to consider broader issues	29
Delay by specific agencies	28
Agency discretion	27
Coastal zone regulation	21
Water pollution	16
Hazardous waste control	12
Location of site	10
Land use controls	8

Developer-related problems	
<u>Interviewee additions</u>	7
Not enough public involvement	4
Statutes not clear enough	3
Federal agency's too removed from site	2
Agencies requested too much data	2
Perception that government is only cause of delay	2
Industry seeks approval before it is prepared to go forward.	1
Lack of early planning	1

Table 2 contains responses to several proposed solutions and interviewee suggestions for solutions.

Table 2

1. Time limit statutes	39 favor	vs.	21 disfavor
2. One stop siting	42 favor	vs.	25 disfavor
3. Federal energy mobilization board	4 favor	vs.	34 disfavor
4. Federal preemption	22 favor	vs.	34 disfavor

Other suggested solutions:

- Colorado type Joint Review.	10 favored
- Enhance interdepartmental communication.	7 favored
- Clarify and simplify rules and procedures	2 favored
- Drop adversary stance (hire more engineers & less lawyers in government regulatory commissions).	1 favored

**Appendix C: Advice From the Office of Planning and Research
to Developers in California**

916/322-8515

May 1982

TEN PRACTICAL TIPS TO FOLLOW FOR GETTING A
DEVELOPMENT PROJECT APPROVED IN CALIFORNIA

by Ron Bass

Companies planning to expand their facilities or build new ones in California generally must obtain approval from various government agencies concerned with the environmental impacts of their project. These may include a City Council or County Board of Supervisors, as well as state and federal regulatory agencies. To help businesses learn which agencies are involved with a particular project, the Office of Planning and Research published the California Permit Handbook and Permit Handbook Summary. The Handbook lists most of the state's environmental agencies and explains their permit requirements.

After using the Permit Handbook to identify permits, many businesses have asked the Office of Planning and Research for practical advice on how to successfully get through the permit process. Consequently, we have put together the following ten tips based on our experience with hundreds of projects:

- I. CONSULT EARLY Consultation with environmental agencies should begin as early as possible in planning your project. Do not approach agencies with a project already designed.
- II. LEARN THE RULES Take time to study the plans and regulations of those agencies that must approve your project. Read your city or county general plans and zoning ordinance. Study state and federal agency permitting requirements that effect your project.
- III. KNOW THE PLAYERS Become familiar with the regulators and how they function. Attend meetings. Read staff reports and environmental studies for projects similar to yours.
- IV. CAREFULLY SELECT
 YOUR SITE Do not purchase a site without carefully studying the environmental constraints and surrounding land uses. Evaluate several alternative sites before making your choice. Use options that allow you to obtain permits before you close your deal.
- V. REDUCE ENVIRON-
 MENTAL IMPACTS Design your project to eliminate or reduce as many potential environmental impacts as possible. Consider environmentally superior alternatives. Incorporate the suggestions you learned during early consultation into the project design.

-2-

- VI. INVOLVE THE PUBLIC
Plan a public participation program. Learn who your potential opponents are (neighborhood groups, environmental organizations, community leaders). Meet with them, get their ideas and views. Use press releases and announcements to keep the public informed about progress of your project. Avoid surprises.
- VII. DO NOT APPROACH THE PROCESS WITH AN ADVERSARY ATTITUDE
It is generally counterproductive to resist the permit process as you are going through it. An adversary attitude often results in hostility and delay, and may even result in project denial.
- VIII. PAY ATTENTION TO DETAILS
Follow all the rules. Respond promptly to requests for information. Be on time for meetings with regulators. Do not cut corners.
- IX. BE WILLING TO NEGOTIATE
Recognize that government regulators have a great deal of authority to require changes in your project. But, they are willing to negotiate and you should be too. Remember, it may be better to get part of what you want rather than nothing.
- X. USE THE OFFICE OF PERMIT ASSISTANCE
This state level office was set up in the Governor's Office of Planning and Research to help businesses and government officials deal more effectively with the environmental laws. The staff of the Office will help identify the regulatory agencies and set up meetings with them.

For further information, you should contact the Office of Permit Assistance at 916/322-8515.

. Appendix D: EPA Model Decision Schedule

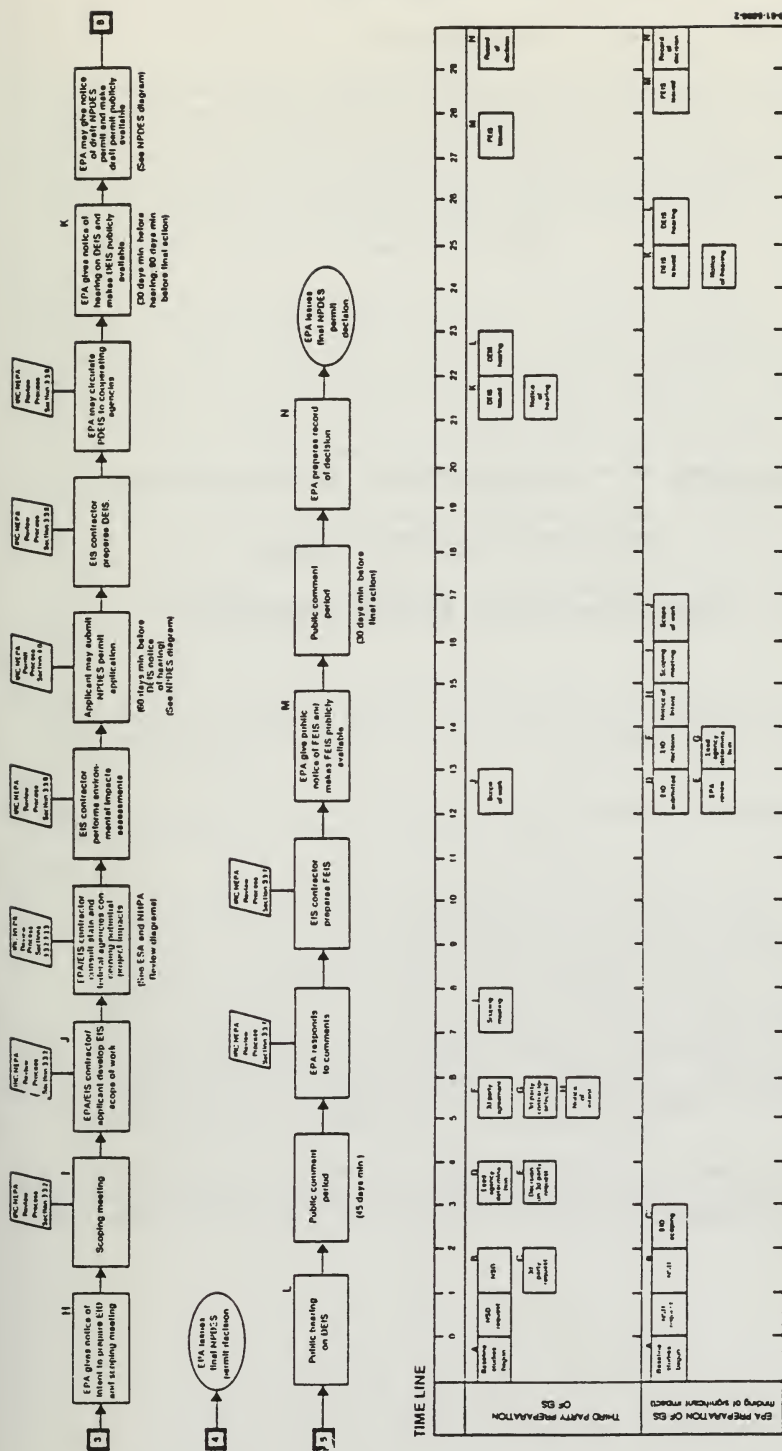


Figure 1-1. (Continued)

Appendix E: Colorado Joint Review Project

Model Decision Schedules

(See First Draft Report Appendix G)

FOOTNOTES

1. For example, the Geysers Geothermal Energy Project in northern California required review by the Bureau of Land Management (BLM), of the U.S. Department of the Interior, by the California Energy Commission, a state agency, and by the county of Sonoma, a local body. The county is currently litigating the validity of the Energy Commission's exercise of override authority on transmission line siting for the project. Interviews with Energy Commission officials were conducted by the author in July, 1982 and they discussed these matters.
2. The adjudicatory procedures required by sections 554, 556, and 557 of the federal Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, presuppose that a single agency is acting in a single adjudicatory proceeding. While the drafters of the APA no doubt contemplated that agencies would have many pending actions, and thus would need to use administrative law judges to hear testimony (see § 556(b)(3) the APA does not explicitly provide procedures to govern industrial development projects in which a developer applicant must file applications, and participate in permit hearings before multiple agencies within a level of government or in several levels of government, federal, state, and local. This is not intended as a criticism of the APA but only as an observation that the Act does not provide formal procedures to govern multiple agency reviews. While rulemaking under § 553 of the APA does encompass matters of "general applicability" affecting an entire industry, the focus of § 553 is on a single agency engaging in rulemaking. Furthermore, permit reviews for large-scale projects are adjudicatory in nature and are not within the scope of § 553.
3. The California Energy Commission was established in 1974 by the Warren-Alquist Act; Stat. 1974, C. 276, p. 501, § 2, operative Jan. 7, 1975, and is codified in Cal. Pub. Res. Code §§ 25000-968 (1977, as amended 1982 Supp.).
4. See Legal Times, Monday, June 31, 1982, "Joint Review Process Expedites Project Completion", by Don G. Scroggin, Esq.
5. Cal. Pub. Res. Code § 25500 (1977) provides that
In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law. (emphasis added).

This statute clearly confers override authority over state, local, or regional agencies, and federal agencies, when allowed by federal law. The wording of the statute illustrates the regulatory complexity of

siting energy facilities with agencies at multiple levels of government having responsibility for part of a project.

6. Interview with Adam Poe, Director, Colorado Joint Review Process, August, 1982.
7. Ogden "Problems in the Regulation of Energy Facilities: Lessons from the SOHIO Pipeline Terminal Case," Part I of a J.S.D. dissertation in the faculty of law, Columbia University (hereinafter referred to as "SOHIO paper").
8. See Appendix A, infra, for the survey questionnaire and an explanation of how the survey was conducted.
9. This assumption is subject to criticism. Some of the officials interviewed by the author in the summer of 1982 noted that environmental impacts of energy projects varied widely depending on the site, the technology chosen, and the output of the facility. Many interviewees made the observation that few general comments could be made because each large-scale project is unique. Nevertheless, as will be demonstrated herein, there are common elements in regulatory structure and permits required for all industrial development projects. This is principally due to the pervasive nature of federal environmental statutes such as the Clean Air Act, Pub.L. 91-604, 84 Stat. 1676 (1970) as amended Aug. 7, 1977, Pub.L. 95-95, 91 Stat. 691, codified in 42 U.S.C. §§ 7401-7642 (1979), that mandates nationwide pollution control efforts that all states must implement.
10. This assumption is very important. Some proposals, such as the ill-conceived Energy Mobilization Board, included provisions for the waiver of federal and state environmental laws. It is the author's position that environmental protection laws can and should be enforced when large-scale projects are reviewed and permitted. Furthermore, environmental protection laws do not directly prohibit the approval of most industrial development projects but are designed to require pollution control technology to be installed often at great cost. Also, review for compliance with environmental statutes increases the time needed to permit projects. Furthermore, the optimum model for quality review of these projects should include strict environmental review since most large-scale projects do have significant environmental effects. See discussion, infra, text at notes 12-25.
11. Interviews were conducted with officials at the Nuclear Regulatory Commission, utility developers of nuclear power plants, and public interest group intervenors. As could be expected, these individuals were quite knowledgeable about siting of nuclear power plants and problems with nuclear power but their knowledge was limited to that type of technology. The author is hesitant to join together analysis of problems of nuclear power plant siting with problems of non-nuclear siting because of the unique issues posed by the former. Furthermore, neither of the approaches examined, the California Energy Commission, or the Colorado Joint Review Process, have direct siting responsibility for nuclear power plants. That is the function of the Nuclear Regulatory Commission. However, the regulatory structure for nuclear and

non-nuclear power plants bears some similarity and nuclear power plants are subject to multiple agency permit processes as are non-nuclear plants. Thus the plant discussion will focus on nuclear power, to the extent of common problems of multiple agency review, coordination, and management of permit reviews.

12. Flores and Appleman, Analysis of Coal Electric Facility Permitting and Construction Timelines, Lewin and Associates, Inc. (1979) at 5,14-15 (hereinafter referred to as Flores and Appleman).
13. Id. at 14-15.
14. Id. at 18.
15. Pub.L. 91-604, 84 Stat. 1676 (1970), as amended Aug. 7, 1977, Pub.L. 95-95, 91 Stat. 691, codified in 42 U.S.C. §§ 7401-7642 (1979). The PSD statutes are set forth in 42 U.S.C. §§ 7470-7491. PSD requirements are designed to maintain good air quality in regions of the nation in which ambient air quality standards for particular pollutants have been attained. These include areas, such as national parks, that have pristine air quality and no significant air pollution problems. In addition they include regions that have reduced emissions of particular pollutants so as to achieve attainment.
16. Pub.L. 92-500, 86 Stat. 816, as amended December 27, 1977, Pub.L. 95-217, 91 Stat. 1581, codified in 33 U.S.C. §§ 1251-1376. 33 U.S.C. § 1342 is the statutory section that authorizes NPDES permits.
17. 33 U.S.C. § 1344 of the federal Water Pollution Control Act Amendments of 1972, supra, note 16, codifies the Army Corps of Engineers § 404 authority to issue permits for the discharge of dredged or fill material in navigable waters.
18. Flores and Appleman, supra note 12, at 8-14.
19. This study is limited to the type of technology used, coal fired electric power plants, and thus would not apply to nuclear power plants, oil pipelines and ocean terminals, and extraction of natural resources. However, its conclusions are still helpful in making two points, that energy facility siting is impacted by the permitting process, and that siting takes a lengthy time.
20. Illustrative "worst case" projects discussed in the literature include the "Storm King" Project, a pumped storage power plant planned for the Hudson River near Storm King mountain. This project was litigated in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir., 1965) and in Scenic Hudson Preservation Conf. v. F.P.C., 453 F.2d 463 (2d Cir., 1971). Administrative review and litigation over this project, which was eventually abandoned by Consolidated Edison of New York, spanned a six year time period. Two nuclear power plant projects which had lengthy reviews were: 1) the Diablo Canyon Nuclear Power Plant owned by Pacific Gas and Electric Co. in California. The initial construction license in that case was applied

for in 1967, and a low power operating license was granted in 1982 a 15 year time period. 2) The Vermont Yankee Nuclear Power Plant for which a construction license was granted in December 1967. A final U.S. Supreme Court decision deciding a challenge to the granting of an operating license was rendered in 1978 in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) an eleven year time period. Other examples include the SOHIO Pactex Pipeline Terminal Project, started in 1975 and abandoned in 1979, and the Pt. Conception LNG Terminal started in 1975, with administrative review still pending in 1982 before the Federal Energy Regulatory commission. One factor that is common to all of these projects is controversy. Each project generated organized opposition, and this lengthened the review process considerably. Another factor common to all of the projects is significant environmental effects which caused much of the opposition. In addition, two of the projects, Diablo Canyon, and Point Conception, posed significant safety issues.

21. Flores and Appleman, supra note 12, at 13.
22. Id. at 15.
23. Interviews with a number of company representatives and agency officials in July, 1982 provided most of this material.
24. The SOHIO Pactex Pipeline Terminal Project would have increased emissions of hydrocarbons, an air pollutant whose concentration already exceeded the maximum safe level in the Los Angeles Air Basin. How to minimize the impact of those increased emissions was the major environmental issue in the SOHIO case. See SOHIO paper, supra note 7, text notes at 400-423.
25. Energy Technologies and the Environment, Environmental Information Handbook, U.S. Department of Energy, June 1981, at 38-43. (hereinafter referred to as Energy Technologies). Air pollutants emitted from coal combustion include sulfur dioxide, which, when converted to sulfuric acid in the atmosphere, causes the problem of acid rain, nitrogen oxide, carbon dioxide, and particulates, microscopic solid particles. Major solid waste disposal problems are caused by deposits of fly ash, bottom ash, and scrubber sludge which are produced in large quantities from coal combustion. Water pollution problems are less significant with coal-fired plants but there can be problems with discharges of heated cooling water which raise the average temperature in the body of water to which the water is returned. Other water pollution problems are the result of cooling water blowdown and drift, and ash-handling waste waters. Id. The air pollution problems from coal use are significant enough that the California Energy Commission has expressed opposition to construction of coal-fired power plants. It stated: "The Commission does not view coal-fired power plants, located in California or elsewhere, as a preferred alternative because of the environmental problems, high capital costs, and long lead times that accompany the construction and operation of these facilities." Electricity Tomorrow, 1981 Final Report, California Energy Commission, January 1981, at 211.
26. Energy Technologies, supra note 25, at 40-41.

27. SOHIO paper, supra note 7, at notes 400-423.
28. The problem of oil spills is more acute from offshore drilling rigs, e.g. the Santa Barbara Channel oil spill, but there have been several cases of oil carrying tankers encountering difficulties which led to large oil spills and despoiling of water and beaches near the spill.
29. One major conflict in the SOHIO case was over the location of the oil storage tanks. The air pollution agencies, the California Air Resources Board, and the Southern California Air Quality Management District, wanted the storage tanks to be located on the coast to minimize air pollution effects due to emission of hydrocarbons from the storage tanks. The California Coastal Commission wanted the storage tanks to be located inland to minimize harm to coastal aesthetics. This issue was eventually resolved in favor of a coastal placement, but the conflict illustrates coastal zone land use concerns.

Another example of these concerns is illustrated in the rejection by the Governor of Washington, John Spellman, of the Northern Tier Pipeline Company's application to construct and operate an oil pipeline starting at Port Angeles, Washington, crossing Puget Sound underwater, traversing the state of Washington, and leading to midwestern refineries. Los Angeles Times, February, 1982. The Governor followed the recommendations of the Washington State Energy Facility Site Evaluation Council which gave two reasons for recommending rejection. The Council stated: "It's concerned about the safety of 22 miles of pipeline that would pass under Puget Sound, and doesn't think the company has studied bottom conditions in sufficient detail. And it thinks Port Angeles is the wrong place for an oil port, because that city is the only potential site on the Olympic Peninsula where a tanker fire or explosion could threaten an urban population." The Seattle Times, Sunday, January 24, 1982 at A14.

30. Energy Technologies, supra note 25, at 187-90.
31. Energy Technologies, supra note 25, at 18-14.
32. Id. at 22, 149-174.
33. Id. at 231.
34. Id. at 231-35, 245-56.
35. Id. at 234-35.
36. Pub. L. 91-90, 83 Stat. 852, January 1, 1970, codified at 42 U.S.C. §§ 4321 et. seq.
37. Pub. L. 91-604, 84 Stat. 1676, (1970) as amended, August 7, 1977, Pub. L. 95-95, 91 Stat. 691, codified in 42 U.S.C. §§ 7401-7491 (1979).
38. Pub. L. 92-500, 86 Stat. 815, as amended December 27, 1977, Pub. L. 95-217, 91 Stat. 1581, codified in 42 U.S.C. §§ 1251-1376 (1979).

39. Enacted August 30, 1954, c. 1073, 68 Stat. 921, codified in 42 U.S.C. §§ 2011-2294 (1978).
40. 42 U.S.C. §§ 2012(d), 2131(b), 2232(a), (1978). § 2232(a) provides in part that license applications contain information allowing the Commission to find that "the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public." (emphasis added).
41. 42 U.S.C. §§ 4322(2) states "all agencies of the Federal Government shall . . . (c) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on
- (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."
42. Kleppe v. Sierra Club, 427 U.S. 390 (1976). NEPA requires agencies to "consider" environmental impacts before reaching a decision but it is not a substantive statute mandating enforcement of environmental standards Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).
43. Scientist's Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).
44. The Bureau's authority is based on its responsibility to approve rights of way on all federally owned lands for many purposes including oil and gas pipelines. BLM's statutory authority is based primarily on the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1980). Each year, the Bureau processes hundreds of right of way applications including, on an average, 20 major applications for energy facilities such as for oil shale production, coal gasification, oil or natural gas pipelines, electric transmission lines, coal-fired electric generating stations, coal slurry pipelines, and wind power generating plants. U.S. Department of the Interior, Bureau of Land Management, "A Review of the Bureau of Land Management's Energy Facility Permitting Process," April, 1981 at 11. (hereinafter referred to as BLM permitting study).
45. The Army Corps of Engineers has responsibility for dredge and fill permits when material is discharged in navigable waters under 42 U.S.C. § 1344 (1979). It also possesses flood control and dam building authority on navigable waters under § 33 U.S.C. §§ 701-709 (1978).
46. The Environmental Protection Agency has primary responsibility for enforcing the provisions of the Clean Water Act, See 33 U.S.C § 1341,

1342, and the provisions of the Clean Air Act, 42 U.S.C. § 7401-7642 (1979).

47. The Department of Energy (DOE) was established by the Department of Energy Organization Act of 1977, Pub. L. 95-91, August 5, 1977, 91 Stat. 565, codified in 42 U.S.C. §§ 7101-7375 (1981). Within D.O.E., but independent of it, is the Federal Energy Regulatory Commission (FERC), which has authority to regulate interstate oil and gas pipelines and interstate sales of natural gas. FERC was established under 42 U.S.C. §§ 7171-77 (1981).
48. 42 U.S.C. § 4332(c) (1982).
49. 42 U.S.C. § 4332(c) (1982).
50. The Environmental Protection Agency developed a list of federal agencies, other than EPA, that might be involved in a major energy project. The list, dated November 27, 1979, named agencies and the various statutes or regulations that authorized their involvement. Twenty-six federal agencies, or departments within agencies, were listed. These included, in the Department of Agriculture, the U.S. Forest Service, Rural Electrification Administration, and Soil Conservation Service; in the Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), the Maritime Administration, and the Economic Development Administration; in the Department of Defense, The Army Corps of Engineers; the Department of Energy; the Federal Energy Regulatory Commission; in the Department of the Interior, the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Mines, the Bureau of Reclamation, the U.S. Geological Survey, the U.S. Fish and Wildlife Service, the National Park Service, the Office of Surface Mining Reclamation and Enforcement; the Department of State; in the Department of Transportation, the Coast Guard, the Federal Highway Administration, the Office of Pipeline Safety, Special Programs Administration, Federal Railroad Administration; the Interstate Commerce Commission; the Nuclear Regulatory Commission; the Tennessee Valley Authority; and various River Basin Commissions such as the Delaware River Basin Authority. Not all of the agencies would be involved in every case. However, EPA and BLM would probably be most frequently involved. In addition a number of state and local agencies would also have input into a major energy project. In California, these would be the California Energy Commission, the Air Resources Board, the Regional Air Pollution Control district, the State and Regional Water Quality Control Board, the Public Utilities Commission, and some local agencies.
51. NEPA requires consideration of alternatives to a project. 42 U.S.C. § 4332(c)(13) requires responsible officials to include in an E.I.S. "alternatives to the proposed action." It would be difficult to adequately consider alternatives without one overall report that discussed all impacts of a project.
52. The Council on Environmental Quality (CEQ) was established under NEPA, in 42 U.S.C. §§ 4341-466. CEQ is a three person body within the executive office of the President (§ 4342) that has a variety of responsibilities including helping to prepare annual environmental quality reports

(§ 4332), working with all federal agencies to develop methods and procedures to incorporate environmental values into governmental decisionmaking (§ 4332) and engaging in a variety of tasks to carry out its role as advisor on environmental policy for all federal agencies and programs (§ 4344). CEQ accomplishes its statutory responsibility through four methods: 1) advising the President and the Congress on major environmental issues and concerns; 2) coordinating the environmental efforts of federal agencies' programs; 3) acting as a clearing house for environmental information; and 4) formulating and issuing regulations for federal agencies to follow in reporting the environmental impacts of programs. "The Council on Environmental Quality: A Tool in Shaping National Policy" Report by the Comptroller General of the United States, U.S. General Accounting Office, March 19, 1981, CED 81, 66 at 10-14. CEQ fills an important role, is quite effective at what it does, and could not easily be replaced by another agency. Much of its strength lies in its advisory role; it has no substantive regulatory authority although it has promulgated NEPA compliance regulations. Id. at 17-18.

53. The CEQ regulations implementing N.E.P.A. were first promulgated in 43 Fed. Reg. 55990, Nov. 28, 1978, and are codified in 40 C.F.R. §§ 1500-1508 (1981). The CEQ regulations are discussed more extensively in Goplerud, NEPA at Nine: Alive and Well or Wounded in Action, 55 N. Dak. L. Rev. 497 (1979).
54. 40 C.F.R. § 1501.5(a)(1) (1981). The "lead agency" concept originally appeared in the California Environmental Quality Act, Cal. Pub. Res. Code § 21000-21176 (1977). Cal. Pub. Res. Code § 21067 states "'lead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the human environment." Under Cal. Pub. Res. Code § 21069, "responsible agencies" are "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." Lead agencies are designated to prepare environmental impact reports whenever two or more public agencies in California have responsibility for approving a project. In case of dispute over designating the lead agency, the Office of Planning and Research, a state body, will, on request, designate a lead agency. Cal. Pub. Res. Code § 21165 (1977).
55. See list of federal agencies, supra note 50, 26 were identified other than E.P.A. In addition, the U.S. Geological Survey ascertained that 102 permits, environmental and other types, would be required to develop oil shale in Colorado. Many but not all of these were federal permits. Report by the Comptroller General of the United States, U.S. General Accounting Office, "Possible Ways to Streamline Existing Federal Energy Mineral Leasing Rules" EMD-81-44, January 21, 1981, at 4.
56. 40 C.F.R. § 1501.5(c). It states in part: "If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay."
57. 40 C.F.R. § 1501.5(c). It states in part:
 - " If there is disagreement among the agencies, the following

factors (which are listed in order of descending importance) shall determine lead agency designation:

- (1) Magnitude of agency's involvement.
- (2) Project approval/disapproval authority.
- (3) Expertise concerning the action's environmental effects.
- (4) Duration of agency's involvement.
- (5) Sequence of agency's involvement."

58. 40 C.F.R. § 1501.5(e),(f).

59. 40 C.F.R. § 1501.6.

60. 40 C.F.R. § 1501.6.

61. 40 C.F.R. § 1501.6(a)(1).

62. 40 C.F.R. § 1501.6(a)(2).

63. 40 C.F.R. § 1501.6(a)(3).

64. 40 C.F.R. § 1501.6(b)(1).

65. 40 C.F.R. § 1501.6(b)(2).

66. 40 C.F.R. § 1501.6(b)(3).

67. 40 C.F.R. § 1501.6(b)(4),(5).

68. 40 C.F.R. § 1502, 1503.

69. 40 C.F.R. § 1501.7. Many governmental officials interviewed by the author emphasized the critical importance of the scoping process to identify key environmental issues early in the process. This was deemed to be an essential prerequisite to the later preparation of an adequate E.I.S. that would not be successfully challenged in court.

70. 40 C.F.R. § 1501.7.

71. Bureau of Land Management and other agency officials interviewed had extensive experience in preparing EIS's for major energy projects. These interviewees identified the problems listed in the text as ones to be avoided by a thorough early "scoping" of significant environmental issues. Interviews conducted by the author in July, 1982. Interview notes on file in author's office.

72. 40 C.F.R. 1501.7(a)(1)-(7).

73. 40 C.F.R. § 1501.8(a).

74. 40 C.F.R. § 1501.8(b)(3).

75. 40 C.F.R. § 1502.5(6).

76. 40 C.F.R. § 1502.9.

77. 40 C.F.R. § 1502.1.
78. 40 C.F.R. § 1502.19, 1503.1.
79. 40 C.F.R. § 1503.4.
80. 40 C.F.R. § 1503.2, § 1506.10.
81. 40 C.F.R. § 1506.1.
82. Cal. Pub. Res. Code §§ 21100-21176 (1977).
83. Cal. Pub. Res. Code § 21061 (1977). It sets forth the purposes of preparing environmental impact reports (EIR's) and states:
"An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."
84. For example, consider the BLM prepared EIS and the CEQA required EIR prepared by the Port of Long Beach and the California Public Utility Commission in the SOHIO Pactex Pipeline Terminal case. Both reports had to discuss the major environmental impact of that project, air pollution due to hydrocarbon emissions. Both NEPA and CEQA are interpreted to require the agency preparing the EIS/EIR to consider impacts outside its substantive jurisdiction and to consider the project as a whole. Because of that, the federal EIS and state EIR in SOHIO overlapped and duplicated each other on that major environmental issue. See discussion of Environmental Review Process, SOHIO paper, supra note 7, at notes 64-93.
85. Cal. Pub. Res. Code § 21083.5 requires use of NEPA prepared EIS's as a substitute for a CEQA prepared EIR if the EIS meets CEQA guidelines. § 21083.6 allows the waiver of CEQA mandated one year time limits when a joint EIS/EIR must be prepared for a project. Finally § 21083.7 requires substituting the EIS for the EIR, whenever a joint EIS/EIR must be prepared. Lead agencies are directed to consult with the federal agency preparing the E.I.S. All of these statutory requirements are designed to mandate cooperation by state agencies with federal agencies and to reduce duplication and overlapping review in environmental document preparation.
86. 40 C.F.R. § 1506.2.
87. "Memorandums of Understanding" (MOU's) are agreements entered into between agencies to allow cooperation and coordination in preparing environmental impact statement under NEPA or under state legislation such as CEQA, the California Environmental Quality Act. The California Energy commission (CEC) provided MOU's for four projects:
1) Northern California Power Agency's Geothermal unit 3 at the Geysers, Sonoma County, California; the agreement there was worked out between

CEC, BLM, and the U.S. Geological Survey (U.S.G.S.) to prepare the environmental review required by NEPA and CEQA. This review, called an environmental assessment, is conducted as part of the CEC permitting process, deemed the "functional equivalent" of preparing an EIR under CEQA; Cal. Pub. Res. Code § 21080.5 (1981); 2) Geothermal Unit #2, a separate unit of the same project with the same agencies and the Department of Energy. Furthermore, the Geothermal #2 agreement provided that the agencies would prepare a joint environmental study sufficient to satisfy NEPA and CEQA; 3) An MOU between the California Public Utilities Commission (PUC) and CEC to prepare a joint EIR, required under CEQA, for the Geysers 16 geothermal unit, specifically for the power plant transmission lines to transmit electricity from the unit to consumers; and (4) an MOU between BLM and the state of California to prepare a NEPA required EIS for the CalCoal (IVANPAH) Project, a proposed 1500 megawatt (with three 500 megawatt coal-fired units) electric generating plant to be built by Southern California Edison in the California desert. BLM and the state of California agreed that BLM would be the lead agency and the state the cooperating agency.

Other joint projects include: 1) BLM, Arizona, and the Cal. P.U.C. jointly preparing an EIS for a 500 kilowatt transmission line proposed to be built by San Diego Gas and Electric Company and Arizona Public Service between the Palo Verde Nuclear Generating Station in Arizona, and a substation site in Imperial County, California; and 2) a joint EIS/EIR preparation agreement between BLM, CEC, and the Riverside County Planning Department for wind generating projects in the California desert. Energy Report, U.S. Department of the Interior, Bureau of Land Management, California Desert District, Riverside, California, Quarterly Report for the first quarter, 1982.

88. Several interviewees thought the CEQ regulations were excellent but needed some entity to implement them. One person felt that the Colorado Joint Review process was the best way to implement the CEQ regulations.
89. Letter from Bruce Beyaert, Manager, Environmental Planning, Environmental Affairs, Chevron, U.S.A., Inc., dated January 14, 1982, to Mr. Alan Hill, Council on Environmental Quality (hereinafter referred to as Chevron letter).
90. Chevron letter, supra, note 89.
91. Chevron letter, supra, note 89.
92. BLM permitting study, supra, note 44.
93. Id. at 1, II 1-4.
94. Id. at III 1, 5-10.
95. Id.
96. See discussion, infra, text at notes 126-33.

97. Many officials interviewed made the point that special purpose agencies, such as air pollution control boards, get their political support and their statutory authority from being vigorous enforcers of the Clean Air Act and similar state laws. They get no support and have no mandate to lead the effort to expeditiously and cooperatively complete a complex EIS review process. Thus there is little incentive for those agencies to carry the ball as a lead agency or even to cooperate as a cooperative agency.
98. BLM permitting study, supra note 44, at III-10. The study noted: "Conversely, there have been cases east of the 100th meridian where BLM should have issued a right-of-way permit, but neither the applicant nor the federal agencies involved had informed the Bureau of the existence of the project." Id. (emphasis added).
99. Id. at III-10. The study noted that there are conflicts over who should be the lead agency. Another example of a battle occurred between the California Air Resources Board (CARB) and the southern California Air Quality Management District (AQMD) over which agency would decide air quality issues in the SOHIO Pactex Pipeline Terminal case. See SOHIO paper, supra note 7, at notes 305-323. When agencies are fighting with each other over who has responsibility for a project, then substantive review of the application is stopped until the agency conflict is resolved.
100. 40 CFR § 1507.1 (1981). This regulation makes compliance by all federal agencies mandatory ("shall comply") with a caveat that "it is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures. . . . to the requirements of other applicable laws." 40 CFR § 1507.2 specifies NEPA duties agencies must carry out, and § 1507.3 requires agencies to adopt procedures to implement the CEQ regulations. None of these regulations specify that they are judicially enforceable by an applicant developer or by the agency itself or members of the public. Furthermore, there are no sanctions for noncompliance other than those imposed when an EIS is deemed inadequate. Without enforcement and sanctions, the mandatory duties imposed in § 1507.1-3 are not obligatory. An agency can choose to ignore the process without a penalty being imposed.
101. 40 CFR § 1501.8 (1981).
102. There are no sanctions for failure to set or meet time limits in any of the CEQ regulations. Unless the lead agency includes sanctions in its applicant requested time limit, there will be none applicable. Thus the applicant is limited to judicial enforcement of unreasonable delay prohibitions in the APA (5 U.S.C. § 706(1); see Ogden, Judicial Control of Administrative Delay, 3 U. Day. L. Rev. 345 (1978) or is left without a remedy. It is unfortunately very difficult to develop an effective workable statute or rule providing for judicial enforcement of and sanctions for noncompliance with time limit statutes. See discussion in SOHIO paper, supra note 7, at notes 152-182.
103. See discussion, infra at notes 342-354.

104. Cal. Pub. Res. code § 21100.2 (1982) provides: "Each state agency shall establish, by resolution or order, time limits, not to exceed one year, for completing and certifying environmental impact reports." The time limit can be extended if the applicant consents and there are justifying circumstances.
105. The longer deadline is justified by the complexity of the EIS process and the number of participating agencies in a large-scale project.
106. Many of the agency officials interviewed, including both those who favored and those who opposed time limit statutes, felt that such statutes made efficiency a higher priority than it otherwise would be, and put pressure on agencies to complete review processes on time. Often without such pressure there was little incentive for an agency to be timely and much incentive to be thorough, complete, and careful in considering a developer's application. In the latter posture, the agency is an aggressive guardian of its statutory mandate.
107. 40 C.F.R. § 1501.8 does not require time limits to be set except when applicants so request. Otherwise, the lead agency has discretion to set or not set time deadlines.
108. This assumes that the time limit statute contains an enforcement mechanism and sanctions. See discussion, supra, note 102.
109. Interviews with California state agency officials, July 1982. These officials spoke positively of the value of time limit statutes and rated them as more effective than did federal officials. This may be because the state officials had greater experience under such statutes, and had learned to work with them. Most federal officials had not had such experience since most federal agencies, unlike their California state counterparts, are not bound by statutory deadlines for completing project reviews.
110. Cal. Pub. Res. code § 21100.2 governing state agencies provides that "all such limits shall be measured from the date on which an application requesting approval of such a project is received and accepted as complete by the state agency." This statute also allows "a reasonable extension of such time period in the event that compelling circumstances justify additional time and the project applicant consents thereto."
111. Interviews with developer representatives, July, 1982.
112. Interviews with agency officials, July, 1982.
113. Id.
114. Interview with Adam Poe, Director, Colorado Joint Review Process, August, 1982.
115. The various types of time limit statutes commonly used are discussed in Oden, Reducing Administrative Delay: Timeliness Standards, Judicial

Review of Agency Procedure, Procedural Reform, and Legislative Oversight,
4 U. Day, L. Rev. 71 (1979).

116. See discussion of such a statute in SOHIO paper, supra note 7, at notes 152-172.
117. Both developers and agency officials interviewed indicated that this would occur. The developers feared this consequence. The agency officials felt it was the only response they could make if the legislature imposed upon them too short a time period for decisionmaking.
118. This concern was expressed by a number of federal officials who prepared EIS's. It was a reason that they gave for being opposed to mandatory time limits. Interviews, July 1982.
119. These persons felt that it was the developer's responsibility to coordinate the review process. They also felt that any company with good management and good counsel could do a better job than government in monitoring and coordinating project reviews. They noted that agencies have many applications to consider at one time, and company X's application is just one of many. Company X, of course, is only interested in its own application and it therefore has an incentive to closely monitor the project through the agency review process, and to deal with any problems that may arise.
120. Based on interviews with corporate representatives and agency officials, July, 1982.
121. This type of adverse relationship is not widespread but the criticisms stated in the text on both sides were frequently made by developer and agency officials interviewed.
122. Interviews with agency officials, developers, and public interest group officials, and the SOHIO paper, supra note 7, at notes 374-75, support these points. One developer representative said that it was personally painful to him to have some project opponent disbelieve everything he said because of his official position with the company. Agency officials also described the warfare between project opponents and developers that reflected intense opposition and deep suspicion between the two groups in some cases.
123. This point was made many times by interviewees in all three sectors, government, industry, and public interest groups. The political environment factor in the author's survey (see appendix A, infra) was rated as having a very high impact with controversial projects. Some interviewees felt that political opposition was the deciding factor in the SOHIO Pactex Pipeline Terminal case and that the procedural traps SOHIO fell into were a smokescreen for political objections.
124. Agency officials interviewed felt that a developer's stake in a project gave them a narrow perspective and that some developers assumed wrongly that they could come into an agency, file an application, and push the agency rapidly through the process. Agencies resented and would resist this pressure. This would make the developers angry and lead them to

believe the agency was stalling, requiring too much information, and being uncooperative. Much of this conflict is due to misperceptions by industry and agency of each others role and function as well as being caused by miscommunication and distrust.

125. SOHIO paper, supra note 7, at notes 9-14.

126. BLM permitting study, supra note 44, at II 2, II 4, 5. The study describes the role of the Office of Special Projects (OSP) which was created in July, 1979. It notes:

"This office provides a core of professional expertise to write and coordinate EISs for complex, controversial, multi-state energy projects. OSP offers high-level coordination for these projects with direct line communication to the Director and the Secretary. In addition, the Office contains full time EIS teams consisting of various resource specialists, production staff, and team leaders." Id. at II-2.

127. BLM permitting study, supra note 44, at II-2. The study described early problems with NEPA compliance. It stated:

"Early attempts at compliance with NEPA resulted in voluminous EIS documents. Each proposed energy project usually resulted in an EIS being written. EIS teams were set up and team leaders appointed. Frequently, technicians had to be recruited from other BLM offices or hired from outside, thus causing delays from the outset. Direct reviews and approvals were required by BLM Washington Office and the Office of the Secretary, with final EIS approval given by the Secretary. Relations with State governments and knowledge of their respective requirements were limited. State and local laws often overlapped, creating a nearly impenetrable maze of environmental reviews and required permits. Major projects were abandoned and the government's environmental review and permitting process was blamed (at times unjustly) by the energy industry and the public."

The study noted that implementing the CEQ regulations and setting up OSP were two of six improvements that "have drastically improved and shortened the environmental review and permitting process by as much as 50 percent." Id.

128. U.S. Department of the Interior, Bureau of Land Management, Information Memorandum No. 80-126, "The Office of Special Projects" (March 6, 1980) (hereinafter referred to as OSP memo).

129. Id.

132. Some developer representatives interviewed distrusted any governmental coordinating body as being just another procedural layer and one more opportunity to cause problems for a project. State officials were opposed to remote Washington offices of federal agencies making decisions that affected states and local communities far removed from Washington.

133. Several interviewees felt that whatever agency was coordinating review or had major permitting responsibilities had to be a mediator or broker of the various interests or constituencies involved in a large-scale project. These interests included single-purpose agencies (e.g., in

California, the Coastal Commission, Air Resources Board, Water Control Board) developers, local politicians and community groups, and environmental groups. Other interviewees felt that decisionmaking by consensus would be a major improvement over the adversary system currently used in most agencies.

134. Various interviewees expressed the point that a project developer and the reviewing agencies must be sensitive to the concerns of local communities in which projects are sited. The federal agencies that, like BLM, delegated authority to state offices, recognized this concern.
135. See discussion, supra, text and notes, at notes 3-6.
136. See discussion in text, supra, notes 24-40.
137. Pub. L. 95-95, 91 Stat. 746, 42 U.S.C. § 7401-7642 (1979). The Clean Air Act is discussed in Rodgers, Environmental Law at 208-353 (West Pub. Co. 1978) and in Grad, Environmental Law, Sources and Problems, 3-83 to 3-253 (2d. ed. Matthew-Bender 1978).
138. 42 U.S.C. §§ 7501-08 (1979). See discussion in SOHIO paper, supra note 7, at notes 401-423.
139. 42 U.S.C. §§ 7470-79 (1979).
140. 42 U.S.C. §§ 7411 (1979).
141. 42 U.S.C. § 7410 (1979).
142. Cal. Health and Safety Code §§ 40400-40520 (West 1979).
143. Cal. Health and Safety Code §§ 39500-607 (West 1979).
144. The Southern California Air Quality Maintenance District (AQMD) recently issued new emission offset and new source review regulations that are even more stringent than the old ones and that may preclude construction of any new polluting industrial plants until attainment of air quality standards is achieved. Los Angeles Times, September, 1982.
145. This is because EPA has not delegated PSD permitting authority in all air basins in California. EPA also reviews PSD applications in other states, such as Arizona, within Region IX. Interviews with EPA officials, Region IX office, San Francisco, Ca, June, 1982.
146. Most of the coal-fired power plants proposed in the last 5 years by California utilities have been planned to be located in the California eastern desert (e.g. Cal. Coal (IVANPAH); Allen-Warner Valley) or were planned for sites in Nevada (Allen-Warner Valley) or Utah (Intermountain Power Project). All of these sites are located in rural areas with clean air. They are slated to be far away from the consumers of their power output in the heavily populated and polluted urban areas of Southern California.
147. Interviews, July, 1982.

148. This would be true in any air basin in which an air quality standard had been attained (achieved) for a specific pollutant (e.g. SO_2) even though air quality standards for other pollutants (e.g. hydrocarbons) were not attained. PSD review by EPA would focus on SO_2 in the example and the state agency, here AQMD, would focus its review on pollutants such as hydrocarbons for which federal standards were not met. The project application would thus have to satisfy both sets of standards.
149. Interviews, July, 1982.
150. Id.
151. Id.
152. See discussion, supra, at notes 12-24.
153. Interviews, July, 1982.
154. Pub. L. 92-500, 86 Stat. 816, as amended December 27, 1977, Pub. L. 95-217, 91 Stat. 1981, codified in 33 U.S.C. §§ 1251-1376. 33 U.S.C. § 1342 authorizes EPA to issue permits for the discharge of pollutants when consistent with the standards of the Act (33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1343). Section 1342 is entitled "the National Pollution Discharge Elimination System" [NPDES]. Permitting authority can be delegated to a state agency if the state program meets federal standards (§ 1342(b)).
155. Cal. Water Code §§ 13200-389, and especially §§ 13370-389 (1982).
156. 33 U.S.C. § 1344 (1979).
157. The "critical path" concept is used to identify those regulatory reviews or permits, in a multiple clearance system, that must be completed and approved before other permits can be issued. An example of this approach is the requirement that air quality permits may not be issued until the NEPA or state required environmental impact statement is prepared. Any holdup in preparing an EIS, or a successful challenge to the adequacy of an EIS, would also delay the air permit.
158. Flores and Appleman, supra note 12, at 8-15.
159. Schroeder, Wiggins, and Wormhoudt, "Five Design Applications of a Large Plant/Small Unit Power Plant Configuration: Research and Findings," at B-21-22, The Flex-Big Proposal, Berkeley Energy Facility Study Group, Methods and Applications in Planning (MAP), Berkeley, Ca; prepared for the U.S. Department of Energy, June 1, 1981.
160. Interviews, July, 1982.
161. "Synthetic Fuels and the Environment: An Environmental and Regulatory Impacts Analysis," U.S. Department of Energy, June 1980 at 4-14 to 4-16. (hereafter referred to as Energy Study).

162. Both the California Coastal Commission and the California Energy Commission have developed siting policies favoring inland locations for power plants and discouraging coastal locations. However, cooling water is abundantly available on the coast and is very scarce in the eastern desert areas of California that are preferable for power plant siting from an air quality standpoint. The state Water Resources Control Board has a contrary policy favoring coastal siting and opposing inland desert siting for water availability reasons. Interviews, July, 1982.
163. Interviews, July, 1982.
164. The Toxic Substances Control Act (TOSCA), Pub. L. 94-469, 90 Stat. 2003, Oct. 11, 1976, 15 U.S.C. §§ 2601-2629 (1976); TOSCA is administered by EPA; see also 42 U.S.C. § 300 F-J, the Safe Drinking Water Act, and Clean Water Act § 307a, 42 U.S.C. § 1317(a), authorizing EPA to identify and establish standards for discharges of toxic chemicals into the nation's waterways. See Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91 (D.C. Cir., 1978). EPA also administers these statutes.
165. Resource Conservation and Recovery Act, Pub. L. 94-580, Oct. 21, 1976, 90 Stat. 2796, 42 U.S.C. § 6921-6987; EPA is the implementing agency for RCRA. See also, The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (The "superfund" legislation) Pub. L. 96-510, 94 Stat. 2767, codified in 26 U.S.C. §§ 4611-4682, 42 U.S.C. §§ 6911a, 9601-9657(1982).
166. Most solid waste issues, other than hazardous wastes, arise in local land use planning and center on where to obtain landfills and how to manage and control the contents of landfills. Nevertheless the RCRA statute, supra, note 165, 42 U.S.C. §§ 6941-49, regulates solid waste and EPA has developed regulations for disposal of nonhazardous solid wastes. See 44 Fed. Reg. 32,915 June 7, 1979.
167. The Power Plant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289, 42 U.S.C. §§ 8301-8483 (1981). This statute is administered by the Department of Energy.
168. The Endangered Species Act, Pub. L. 93-205, 87 Stat. 884, Dec. 28, 1973, 16 U.S.C. §§ 1531-1543 (1981).
169. The Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, 29 U.S.C. § 651-678 (1981).
170. The Mineral Leasing Act of 1920, 30 U.S.C. 181-287. 30 U.S.C. § 185 governs right-of-way permits.
171. BLM permitting study, supra note 44, at VI, 1.
172. Id. at V 1,2.
173. Id. at II 2,3.
174. Id. at IV 1-12.

175. § 401, 42 U.S.C. 7171(a) of the Department of Energy Act, Pub. L. 95-91, 91 Stat. 565, Aug. 4, 1977, codified at 42 U.S.C §§ 7101-7352 (1981). Section 401 establishes FERC as an independent regulatory commission within the Department of Energy.
176. SOHIO paper, *supra* note 7, at notes 95-106. FERC had to review and approve conversion of an existing but unused natural gas pipeline to carry oil.
177. Interviews with F.E.R.C. officials, July 1982.
178. Section 402(d), 42 U.S.C. § 7172(D) (1981).
179. Intervenor representatives who were interviewed stated that they vigorously litigated the seismic safety issues before the California PUC and FERC. They also successfully challenged FERC's initial decision approving the LNG terminal in the District of Columbia Court of Appeals. That court reversed the initial decision and remanded the case back to FERC for more intensive consideration of seismic safety. This issue dealt with the propriety of constructing an LNG terminal in an area that has earthquake faults.
180. Many state agencies, such as the California Air Resources Board, and the regional Air Pollution Control Districts, are implementing permit authority delegated under the federal Clean Air Act and requiring enforcement of federal standards. Similarly, the regional Water Quality Control Boards in California implement NPDES permit reviews required under the Federal Water Pollution Control Act Amendments of 1972. NPDES authority has been delegated to them by EPA, the federal agency that administers both the air and the water acts.
181. E.g., The California Energy Commission, established under Cal. Pub. Res. Code §§ 25500-25986, must approve the siting (§ 25500) of any thermal power plant (over 50 megawatts) and electric transmission lines running from those plants (§§ 25110, 25120).
182. E.g., The California Public Utilities Commission was established pursuant to the Public Utility Act, Cal. Pub. Util. Code §§ 201-21-1 et. seq. (West 1981). The PUC is authorized to issue certificates of convenience and necessity to utilities. Cal. Pub. Util. Code §§ 1001-1011 (West 1981).
183. E.g., The California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-176 (1981).
184. Cal. Pub. Res. Code §§ 25516 (NOI) and 25523 (AFC).
185. Cal. Pub. Res. Code §§ 25503, 25516, 25516.1 (West 1981).
186. Cal. Pub. Res. Code §§ 25510-514 (West 1981).
187. Cal. Pub. Res. Code § 25514(c).
188. Cal. Pub. Res. Code §§ 25519-523.

189. Cal. Pub. Res. Code § 25519(c).
190. Cal. Pub. Util. Code §§ 1001-1011 (West 1981).
191. This point was made repeatedly by interviewees in and out of government. If an agency is overlooked, real problems can result, such as filing late applications for a permit with that agency, or failure to consider a significant environmental impact in the EIS which could require preparation of a supplemental EIS. For a good discussion of the issues related to identifying agencies and statutes, see Friedman, Environmental Checklist and Outline of Impacts of Clean Air Act Amendments of 1977, 14 Real Property, Probate and Trust Journal 873 (1979).
192. Interviews with Office of Planning and Research (OPR) officials, June, 1982. An OPR official, Ron Bass, presented the author with a copy of his "Ten Practical Tips To Follow For Getting A Development Project Approved in California," set forth in full, infra, appendix C. OPR developed a permit handbook, mentioned in the Bass materials, to guide developer's in knowing what permits are required, what agencies must issue those permits, and what requirements they have. OPR also provides assistance to developers in working through the permit process. This is quite helpful to sponsors of industrial projects, refineries, mining projects and other non power-plant facilities which are outside the scope of the Energy Commission's jurisdiction, limited to electric generating facilities.
194. Flores and Appleman, supra note 12, at 8-14.
195. American Bar Association, "The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities," June, 1981 at 12 (hereinafter referred to as A.B.A. study).
196. ABA study, supra note 195, at 16.
197. BLM study, supra, note 44; Wellborn and Williams, "Improving the Energy Facility Siting and Permitting Process," March, 1980, at 8-12, Policy Analysis Division, Office of the Environment, Department of Energy, prepared for the Seventh Energy Technology Conference, March 24-26, 1980, Washington, D.C. (hereinafter referred to as Wellborn and Williams); Energy Study, supra note 161, at 4-8 to 4-10; Friedman, "The Environmental Permitting Process: Some Thoughts on Procedure vs. Substance," speech, April 15, 1982.
198. Interviews, July, 1982.
199. Id.
200. SOHIO paper, supra, note 7, at notes 9-15.
201. Interviews, July, 1982.
202. BLM permitting study, supra note 44, at IV 1-6.

203. Report to the Congress of the United States by the Comptroller General, U.S. General Accounting Office, "The Effects of Regulation on the Electric Utility Industry," EMD 81-35, March 2, 1981, at 55-58.
204. The five subjects and governing statutes are: 1) Hazardous Waste Management, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-87, regulations codified in 40 CFR § 260-266; 2) Underground Injection Control Program, Safe Drinking Water Act, (CWA) 42 U.S.C. § 300F, regulations codified in 40 C.F.R. § 146; 3) National Pollution Discharge Elimination System (NPDES), Clean Water Act (CWA), 33 U.S.C. § 1251, 40 C.F.R. 125, 129, 133; 4) Dredge or Fill Program, § 404, 33 U.S.C. § 1251, 40 C.F.R. § 230; and 5) Prevention of Significant Deterioration (PSD), Clean Air Act (CAA), 42 U.S.C. § 7401, 40 C.F.R. 52.
205. Energy Study, supra note 161, at 4-32 to 4-34.
206. Wellborn and Williams, supra, note 197, note that
 "although environmental regulatory requirements are generally not the predominant cause of delay, they are beginning to play a more significant role. It is becoming increasingly difficult to obtain the siting approval and permits necessary to begin construction of facilities employing such environmentally controversial technologies as coal combustion conversion.
"Data collected by the Federal Energy Regulatory Commission indicate that permit requirements and legal problems have combined to cause 25% of all delays for new power plants. While most facilities are eventually completed, serious regulatory delays have been experienced in several cases. . . .
 "The growing difficulties faced in certifying, siting and permitting new energy facilities may, in large part, be attributed to several basic institutional, economic and social developments: (1) the large and growing body of environmental laws to deal with specific environmental, health and safety risks, many of which are associated with pollutants from coal and synthetic fuel processes; (2) competition from existing sources of pollution and users of resources -- including water resources; (3) the increasing geographic area affected by the environmental impacts and resource requirements posed by large new energy facilities; and (4) the increased willingness of public and private parties to oppose, by legal means, aspects of energy projects perceived as detrimental to their interests, environmental or otherwise. . . . The concern is that existing approaches to certifying, siting and permitting non-nuclear energy facilities significantly increase the delaying impacts of these procedures because they are inefficient in coping with them. In other words, the procedural aspects of siting and permitting programs need to be made more efficient in resolving concerns without undermining the substantive environmental protection they provide." Id. at 1 (emphasis added).
207. Flores and Appleman, supra, note 12, at 13-14. The median (mean) timeline for completed permit actions for new coal-fired facilities /units was 5(7.36) when one permit was required, 26 (22.85) when two or three permits were required, and 28 (22.67) when three permits were required. Id. at 13. Wellborn and Williams, supra note 197, at 8-9 note

that "redundant information requirements" add costs and time to the application process because the same information is submitted on several applications.

208. Zimmerman, *et al.*, "Draft Information Requirements Catalogue: NEPA Environmental Review Process for New Above Ground Energy conversion Technologies, Analysis of EPA Actions and Environmental Review Process for Major Non-Nuclear Energy Facilities," October 20, 1981, prepared for Stuart Sessions, Project Officer, Energy Policy Division, Office of Planning and Evaluation, U.S. Environmental Protection Agency, prepared by Lynn L. Zimmerman, *et al.* Radian Corporation at 1-3 to 1-4 (figure 1-1). See Appendix D. *infra*, for an example of such a decision schedule.
209. Interviews, July, 1982.
210. Report to the Congress by the Comptroller General of the United States, U.S. General Accounting Office, "Impact of Regulations--After Federal Leasing--On Outer Continental Shelf Oil and Gas Development," EMD 81-48 February 27, 1981 (hereinafter referred to as OCS study).
211. OCS study, *supra* note 210, at 14-17, 49-50. The study noted that Army Corps of Engineers and EPA permits were most often delayed.
212. OCS study, *supra* note 210, at 50. It noted: "Congress should enact legislation to establish a standard, reasonable time within which federal agencies, particularly the Department of the Interior, the Environmental Protection Agency, and the Corps of Engineers are required to complete approvals and issue permits. A maximum turnaround time should be the general rule, including the time for state consistency reviews."
213. The Administrative Conference, in Recommendation No. 78-3, 1 C.F.R. § 305.78-3 (1982), stated "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activities where a delayed decision would deprive both the applicant and the public at large of a substantial benefit." *Id.*
214. Several interviewees raised this objection. Interviews, July, 1982.
215. Interviews, July, 1982.
216. Interviews, July, 1982.
217. Cal. Pub. Res. Code § 21100.2 (State Agency), § 21151.5 (Local Agencies).
218. Cal. Pub. Res. Code §§ 25516.6, 25522, 25540.6 (1982).
219. The Permit Reform Act of 1981, Stat. 1981, c. 1087, operative Jan. 1, 1983, codified in Cal. Govt. Code §§ 15374-378 was enacted to "create a system of specific deadlines and procedures designed to expedite the process of obtaining permits and other forms of authorization and thereby

insuring the timely and efficient handling of permit applications." Cal. Govt. Code § 15374. All state agencies are required to adopt regulations with the following criteria:

"(a) A period dating from the receipt of a permit application within which the agency must either inform the applicant, in writing, that the application is complete and accepted for filing, or that the application is deficient and what specific information is required.

"(b) A period dating from the filing of a completed application within which the agency must reach a permit decision.

"(c) The agency's median, minimum, and maximum times for processing a permit, from the receipt of the initial application to the final permit decision, based on the agency's actual performance during the two years immediately preceding the proposal of the regulation."

Cal. Govt. Code § 15376.

220. Cal. Pub. Res. Code § 21100.2 provides: "Each state agency shall establish, by resolution or order, time limits, not to exceed one year for completing and certifying environmental impact reports. . . ." In contrast, Cal. Pub. Res. Code § 25540.6, governing applications for cogeneration and other favored technology, requires the Energy Commission to reach a "final decision on the application within 12 months."
221. Cal. Pub. Res. Code § 21100.2 provides: "The resolutions or orders required by this section may provide for a reasonable extension of such time period in the event that compelling circumstances justify additional time and the project applicant consents thereto."
222. See, e.g. Cal. Govt. Code § 15376, (a), (b) set forth in full, supra note 219.
223. Interviews, July, 1982
224. Interviews, July, 1982
225. ABA study, supra note 195, at 70.
226. Id. at 10-13.
227. Interviews with governmental officials, developers, and intervenor group representatives, July, 1982. Members of all three groups agreed that controversy and project opponents efforts to stop a project could be quite effective and could cause real problems for a project developer. All of the "worst case" examples discussed, supra note 20, had active project opponents mounting challenges at the agency level and on judicial review.
228. Interviews, July 1982. See, e.g. SOHIO paper, supra, note 7, at notes 9-15.
229. Legal Times article, supra, note 4.
230. Interviews, July 1982.

231. Interviews, July 1982. Standard Oil of Ohio spent 50 million dollars in preparation costs on the SOHIO Pactex Pipeline Terminal case in a four year period (1975-1979). SOHIO paper, supra, note 7, at note 2.
232. ABA study, supra note 195, at 70. The study stated: "Unless interested participants are given more reason to view the process as fair and unbiased, they will have every incentive to prolong the proceeding, using delay as a tactical weapon. The remedy is to take the steps necessary to assure basic procedural fairness without losing sight of the goal of reaching and enforcing decisions. Prominent among these steps must be the free flow of information among all participants." Id.
233. Chevron letter, supra note 89; Friedman speech, supra note 197. Mr. Friedman, Vice President, Health and Environment, Occidental Petroleum Corporation, Los Angeles, California stated:
"An area that many times is ignored in the entire permitting process is the involvement of a local community and indeed, the local environmental organizations. Nothing creates an environmentalist quicker than an action which affects someone's personal property values. Indeed, many people began their involvement in the environmental or conservationist movement this way. Local opposition should be defused as quickly and early as possible because the initial concern usually is not from an ideological commitment to stop a project, but rather a concern as to economic values. There is a rule of reason, of course, in determining when this discussion should begin. You don't want to begin too early and then get the local populace inflamed. Conversely, you don't want the process to begin so late that the population feels it is a fait accompli and the only answer is to pass the hat and start litigation. Rather, the time to make sure the populace and local groups are aware of the project is when you have a solid data base so that the various questions and legitimate concerns of the groups can be answered.
"Whether their concerns are legitimate or not, the local groups must be brought in early. This is particularly important in the energy and mineral areas, especially today when there seems to be a strong feeling by these groups that the only way of protecting vital energy and mineral resources, as well as scenic values, is by litigation."
234. Legal Times article, supra note 4; Friedman speech, supra, note 197. Several other interviewees also made this point.
235. The public advisor's role is mandated by Cal. Pub. Res. Code § 25217.1 (1982). The public advisor's duties are specified in Cal. Pub. Res. Code § 25222 (1982) and are basically to "insure full and adequate participation by all interested groups and the public at large" in all Energy Commission proceedings.
236. Interviews with Energy Commission officials, July, 1982.
237. Interviews with intervenor group representatives, July, 1982.
238. ABA study, supra note 195, at 65-67.

239. Wellborn and Williams, supra note 197, at 6-8.
240. SOHIO paper, supra note 7, at notes 401-423.
241. Interviews, July, 1982. Wellborn and Williams, supra note 197, at 8-10.
242. Legal Times article, supra, note 4, at note 2. See cases discussed therein in which project opponents delayed projects with court challenges. SOHIO paper, supra note 7, at notes 9-14.
243. Interviews, July, 1982.
244. Cal. Pub. Res. Code § 25531(a) (1981) provides that Energy Commission decisions on Applications for Certification (AFC's) "shall be subject to judicial review in the same manner as the decisions of the Public Utilities Commission. . . ." Cal. Pub. Util. Code § 1756 (1975) provides for direct review of PUC decisions in the California Supreme court.
245. Cal. Pub. Res. Code § 21167 sets time limits (§ 21167 (a) 180 days, (b) 30 days) for filing actions in court challenging preparation of environment impact reports.
246. Cal. Pub. Res. Code § 21167.1 states a preference "over all other civil actions . . . in the matter of setting the same for hearing or trial, and in hearing the same. . . ." for lawsuits challenging compliance with provisions of the California Environmental Quality Act.
247. Interviews, July, 1982.
248. Interviews, July, 1982.
249. Cal. Pub. Res. Code § 21167.3(b) provides:
"In the event that an action or proceeding is commenced as described in subdivision (a) but no injunction or similar relief is sought and granted, responsible agencies shall assume that the environmental impact report or negative declaration for the project does comply with the provisions of this division and shall approve or disapprove the project according to the timetable for agency action in Article 5 (commencing with Section 65950) of Chapter 4.5 of Division 1 of title 7 of the Government Code. Such approval shall constitute permission to proceed with the project at the applicant's risk pending final determination of such action or proceeding."
250. Interviews, July 1982. This approach is also advocated in the Legal Times article, supra, note 4.
251. The Alaska Natural Gas Transportation Act, Pub. L. 94-586, Oct. 22, 1976, 90 Stat. 2903, codified in 15 U.S.C. §§ 719-719o (1981). 15 U.S.C. § 719h contains the provision noted in the text. § 719h(c)(2) states:
"Any such proceeding shall be assigned for hearing and completed at the earliest possible date, shall, to the greatest extent practicable, take precedence over all other matters pending on the docket of the court at that time, and shall be expedited in every way by such court and such court shall render its decision relative to any claim within 90 days from the date such claim is

brought unless such court determines that a longer period of time is required to satisfy requirements of the United States constitution."

252. Interviews, July, 1982.

253. Section 28, Mineral Leasing Act of 1920, 30 U.S.C. § 185, amended by the Act of November 16, 1973, Pub. L. 93-153, 87 Stat. 576, codified in 30 U.S.C. § 185. This amendment modified a strict statutory standard defining the maximum width of a pipeline right-of-way, and allowed the agency to approve a right-of-way that exceeded the previous maximum width. In so doing, Congress neutralized the impact of the court decision in *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir., 1973) cert. den. 417 U.S. 917 (1973) in which the court set aside a decision of the Secretary of the Interior approving a pipeline right-of-way for the Alaskan Oil Pipeline that exceeded the maximum allowable width under Section 28. In the same legislation, Congress exempted the Alaska Pipeline Project from any further scrutiny under NEPA (See § 43 U.S.C. § 1652(d)), thus allowing the project to be constructed and put into operation in 1977.

254. The Alaska Natural Gas Transportation Act, Pub. L. 94-586, Oct. 22, 1976, 90 Stat. 2903, codified in 15 U.S.C. §§ 719-719o (1981).

255. Title five, Public Utility Regulatory Policies Act. (PURPA) of 1978, Pub. L. 95-167, Nov. 9, 1978, 92 Stat. 3157, codified in 43 U.S.C. §§ 2001-12 (1981).

256. Ch. 81, 1979 Cal. Stat. §§ 1-5, urgency, eff. May 24, 1979; not codified but listed after Cal. Pub. Res. Code § 21167 (1981).

257. Ch. 855, 1977 Cal. Stat., effective Sept. 17, 1977, codified in Cal. Pub. Util. Code §§ 5550-5650 (1982).

258. Interviews with persons familiar with such legislation, both state and federal, July, 1982.

259. See, e.g., 43 U.S.C. § 2009(b) which requires federal agencies to issue required permits for the two pipelines (Northern Tier and Long Beach to Midland) within 30 days after enactment of the Act on Nov. 8, 1978, with one 90 day extension of the deadline allowed if the President authorizes such an extension.

260. See, e.g. 15 U.S.C. § 719f(d),(e)(1981) which requires Congress (by joint resolution (subsection d) and the President (subsection e) to find that an environmental impact statement has been prepared and that it complies with NEPA requirements. In addition, under § 719f(g), the President can recommend and Congress adopt by resolution proposals to waive the provisions of applicable law "in order to permit expeditious construction and initial operation of the approved transportation system." See also 43 U.S.C. § 2008 (1981) which contains similar provisions.

261. Both the Alaska Natural Gas Transportation Act, 15 U.S.C. § 719-719o, in sections 719e and 719f, and Title Five of PURPA, 43 U.S.C. §§ 2001-12, in 2007 (presidential decisions only), use this approach. Under 43 U.S.C. §

2008, the President can recommend waiver of applicable provisions of federal law which recommendation Congress must then adopt by joint resolution. Id.

262. Cal. Pub. Util. Code §§ 5551(d), 5581 (1982).
263. Ch. 81, 1979 Cal Stat. §§ 1-5 effective May 24, 1979. This statute provided a short 30 day time period within which to file an action in the Superior Court challenging agency decisions relating to the SOHIO Project. It also gave a statutory preference to such litigation over other civil actions, required use of the substantial evidence and abuse of discretion standards of review, and requested the California Supreme Court to take jurisdiction over any lawsuits filed in the superior court challenging the PACTEX Project. For further discussion of this statute, see SOHIO paper, supra note 7, at notes 279-98.
264. Interviews, July, 1982.
265. Title five, PURPA, supra, note 255, was enacted in November 1978, in the fourth year of agency consideration of the SOHIO Project. See SOHIO paper, supra note 7, Appendix.
266. See discussion, supra, note 253.
267. See citation, supra, note 255.
268. SOHIO paper, supra, note 7, at notes 9-14.
269. See discussion, supra, note 29.
270. SOHIO paper, supra, note 7, at notes 9-14, 279-98.
271. Cal. Pub. Util. Code §§ 5550-5650 (1982).
272. Interviews with PUC officials, June 1982.
273. Los Angeles Times, Tuesday, October 5, 1982.
274. This is assumed to be the case because of the strict deadlines in such legislation and because of action forcing provisions. However, there is no hard data to support this assumption.
275. This distortion occurs because of the waiver of federal law provisions and because the project is treated differently than similar projects not covered by the special legislation and its use of presidential decisionmaking or presidential recommendation and congressional decisionmaking. See discussion, supra, notes 259-61. The agency that normally reviews pipeline right-of-way permits, the Bureau of Land Management of the Department of the Interior, can not enforce uniform and consistent policy in all cases because of the special legislation. This is true even though BLM is required to make recommendations to the President because, e.g., as in 43 U.S.C. § 1652(b), the Secretary of the Interior was required by law to issue all permits for the Trans Alaska Pipeline System (TAPS).

276. E.g., 30 days after enactment of title five, PURPA, see discussion, supra, note 259.
277. Title five, PURPA, was such a statute requiring an incredibly short period of time for decision on federal permits in the Northern Tier and SOHIO Pactex Pipeline Projects. These periods were measured from enactment on Nov. 8, 1978. See critical analysis of this crisis deadline approach in SOHIO paper, supra, note 7, at notes 201-223.
278. See 43 U.S.C. § 1652(d), discussed, supra note 253.
279. H.R. 4985, discussed in House Report, 96-410 part 2, September 21, 1979, House Committee on Interstate and Foreign Commerce.
280. Interviews, July, 1982. Interviewees were specifically asked to evaluate the EMB proposal in the questionnaire; see appendix A, infra.
281. ABA Study, supra, note 195, at 11.
282. The Nuclear Regulatory Commission (NRC) must issue a construction permit and operating license before a developer can build and operate a nuclear power plant. However, even the NRC does not possess exclusive authority to regulate all aspects of nuclear power plant siting and permitting. Utilities must obtain NPDES permits from state or regional water pollution control agencies for thermal discharges of cooling water from the plants, and must have emergency evacuation plans approved by the Federal Emergency Management Agency (FEMA).
283. Cal. Stat. 1974, Ch. 276, effective January 7, 1975, codified in Cal. Pub. Res. Code §§ 25500-986(1982). Section 25500 states: "This division shall be known and may be cited as the Warren-Alquist State Energy Resources Conservation and Development Act."
284. Cal. Pub. Res. Code § 25500 (1977) set forth in full, supra, note 5.
285. See 1981 Biennial Report, California Energy Commission, entitled "Energy Tomorrow, Challenges and Opportunities for California." This report is prepared by the Commission for the Governor and Legislature of California. Cal. Pub. Res. Code §§ 25300-22 requires the Commission to engage in forecasting of demand, to obtain information from utilities, and to present those forecasts and other information in its report.
286. Conservation, Cal. Pub. Res. Code §§ 25400-405, 480-486; alternative technologies, Cal. Pub. Res. Code §§ 25600-615.
287. Cal. Pub. Res. Code §§ 25540-540.6 (1982). The time period is 18 months (9 months NOI, 9 months, AFC) under § 25540, and 12 months under 25540.2 (AFC only).
288. Interviews, July 1982. See Cal. Pub. Res. Code § 25403.5 which requires electrical utilities to utilize specified load management practices including encouraging use of electrical energy in off-peak hours.

289. Interviews, July 1982; ABA study, supra, note 195, at 29-34, especially 29. See discussion, supra, notes 184-189 describing the two-stage process for Energy Commission decisionmaking.
290. Interviews, July, 1982.
291. ABA study, supra, note 195, at 29-34.
292. Interviews, July, 1982. ABA study, supra, note 195, at 34.
293. ABA study, supra, note 195, at 32-34.
294. Flores and Appleman, supra note 12, at 9-15.
295. Interviews, July, 1982.
296. This is required by Cal. Pub. Res. Code § 25503 (1977).
297. Cal. Pub. Res. Code §§ 25503-516 (NOI); §§ 25517-524 (AFC).
298. Interviews, July, 1982; see also ABA study, supra note 195, at 29-34.
299. Cal. Pub. Res. Code § 25519 (1977).
300. Cal. Pub. Res. Code § 25523 (1977).
301. Interviews, July, 1982.
302. Wellborn and Williams, supra, note 197, at 7.
303. Cal. Pub. Res. Code §§ 25514 (NOI findings), 25523 (AFC findings).
304. Interviews, July, 1982. ABA study, supra, note 195, at 29-34.
305. Interviews, July, 1982.
306. 20 Cal. Admin. Code § 1701-06, especially § 1704 (1981).
307. 20 Cal. Admin. Code § 1709 (1981).
308. 20 Cal. Admin. Code § 1709(b)(2).
309. Developer representatives who were interviewed for this project favored this approach.
310. See discussion, supra, notes 137-154.
311. See discussion, supra, notes 137-150.
312. See discussion, supra, notes 153-156.
313. Established pursuant to statutory authority in Cal. Pub. Res. Code §§ 30000-30900 (1977).

314. Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1280, codified in 16 U.S.C. §§ 1451-1456a (1982).
315. Cal. Pub. Util. Code §§ 1001-1011, especially § 1005 (1977).
316. Cal. Pub. Res. Code § 25508 (1982) requires the Commission to consult with and render advice to BCDC as to AFC's for sites and facilities in the San Francisco Bay area.
317. Most cities and counties have general plans and adopt and enforce zoning ordinance schemes that restrict the types of uses that land can be put to in designated areas.
318. The Act specifies that the Energy Commission shall consult or render advice or obtain the approval, in appropriate circumstances, of the California Coastal Commission, see §§ 25507, 508, 514(a), and 526; the California Public Utilities Commission, see §§ 25501(a), 501.3(a), 505, 506, 512, 514.3, 518, and 519(b). In addition, the Energy Commission must ensure compliance with other state and federal laws, and should consult enforcing agencies to ensure compliance, see § 25523. All references are to the Cal. Pub. Res. Code.
319. Interviewees were asked to evaluate one-stop siting agencies in the questionnaire used by the author; see Appendix A, *infra*. Most interviewees thought that one-stop siting was not very effective. Those who did think it effective often assumed it had a "one application at one agency" design.
320. E.g., the Clean Air Act requires states to develop State Implementation Plans (SIPs) which, when approved by EPA, would result in enforcement authority being delegated by EPA to a state agency designated in the plan. Any change in such a plan, including a change in enforcing agency, would have to be approved by EPA after a request to amend a state's plan was made. See 42 U.S. (§ 7410(a) (SIP)). Under subsection (a)(3)(A), revisions must be approved by the EPA administrator and must satisfy standards of the Clean Air Act.
321. E.g., The Legislature would have to amend the California Coastal Act, Cal. Pub. Res. Code §§ 30000-30900, to consolidate coastal zone protection and energy facility siting, or would have to amend the California Public Utility Act, Cal. Pub. Util. Code §§ 1001-1011 to consolidate the electrical utility certificate of necessity and convenience determination with energy facility siting under Cal. Pub. Res. Code §§ 25500-525.
322. Each existing agency has its own political constituency within the agency, the legislature, and among the public which would oppose any such change making it unlikely change would ever occur. Interviews, July, 1982. Also, the task of creating a superagency would be very complex requiring major rewriting of several statutory schemes.
323. Interviews, July, 1982. One of the criticisms of conventional siting agencies noted in interviews is that these lack the technical expertise and staff resources necessary to evaluate all of the environmental,