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Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act - Advance or Retreat

Jack L. Van Baalen

University of Wyoming
College of Law
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A growing number of states are adopting industrial siting legislation. Wyoming joined this trend in 1975 with the enactment of the Wyoming Industrial Development Information and Siting Act. Professor Van Baalen exhaustively examines the jurisdictional reaches of the Wyoming Act, its unique procedural structure, the relationship between the newly created Siting Council and other state agencies, and the Act's provisions with respect to parties who may participate in siting permit proceedings.

INDUSTRIAL SITING LEGISLATION: THE WYOMING INDUSTRIAL DEVELOPMENT INFORMATION AND SITING ACT--ADVANCE OR RETREAT?

*Jack L. Van Baalen**

INDUSTRIAL siting legislation has been adopted by several states as a method of attempting to reconcile the need for commercial and industrial development with the concerns of various elements of society respecting the possible adverse effects of this development. Some of the state statutes have confined themselves to the siting of electricity generating plants;[1] others extend to some additional industrial activities;[2] one statute deals with a broad range of residential and

*Professor of Law, University of Wyoming College of Law; A.B., Dartmouth College, 1952; LL.B., University of Pennsylvania, 1955; Member of the Pennsylvania Bar.

1. ARIZ. REV. STAT. ANN. §§ 40-360 to -360.12 (1974); CAL. PUB. RES. CODE §§ 25500 to 25542 (West 1975); MD. NAT. RES. CODE §§ 3-301 to -307 (1974); MINN. STAT. ANN. §§ 116C.51—.69 (Supp. 1975); N.Y. PUB. SERV. LAW, bk. 47, §§ 120 to 149-b (McKinney Supp. 1975); S.C. CODE ANN. §§ 15-1801 to 58-1832 (Cum. Supp. 1974); VT. STAT. ANN. tit. 30, § 248 (1970); WASH. REV. CODE ANN. §§ 80.50.010—.901 (Supp. 1974).
2. ARK. STAT. ANN. §§ 73-276 to -276.18 (Cum. Supp. 1973); CONN. GEN. STAT. ANN. §§ 16-50g to -50y (Cum. Supp. 1975); MONT. REV. CODES ANN. §§ 70-801 to -823 (Cum. Supp. 1974); N.H. REV. STAT. ANN. §§ 162-F:1 to -F:13 (Supp. 1973); NEV. REV. STAT. §§ 704.820—.900 (1973); OHIO REV. CODE ANN. §§ 4906.1—.99 (Baldwin 1974); ORE. REV. STAT. §§ 453.305—.575 (1974).

commercial developments other than electricity generation.[3] All of the statutes delegate to new or existing state agencies the authority to control the location and nature of these developments with a view to expediting the permit process and minimizing probable adverse impacts upon environmental and other socially recognized values.

Initially the need for siting legislation was recognized as a result of inadequacies in the delivery of electrical power to major metropolitan areas in the eastern United States.[4] Electricity shortages focused public attention upon the need for reliable sources of electric power to fill projected demands which are increasing at a prodigious rate.[5] Bcause a large number of new, high capacity electricity generating facilities will be required to meet ever-growing consumer demands, both industry spokesmen[6] and other commentators[7] have expressed concern over extended delays in the construction of generating facilities. Many have concluded that the necessity of obtaining construction permits from several agencies regulating diverse aspects of a proposed project has resulted in fragmentary and repetitive consideration of the many different aspects of each proposed project, as well as possible judicial review of each agency decision, thereby contributing significantly to these delays.[8]

3. ME. REV. STAT. ANN. tit. 38, §§ 481 to 488 (Supp. 1973). Other states have incorporated permit requirements into land use planning statutes, for example, *see* UT. STAT. ANN. tit. 10, § 6001 (Cum. Supp. 1975).

4. Luce, *Power for Tomorrow: The Siting Dilemma*, 25 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 13 (1970); Rodgers, *Siting Power Plants in Washington State*, 47 WASH. L. REV. 9, 12 (1971); New York Times, June 7, 1970, at 52, col. 3.

5. OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT 2 (1970); *Hearings on H.R. 5277 before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess, ser. 92-31, pt. 1, at 238 (1971) (Testimony of Secretary of Interior Rogers C.B. Morton on Powerplant Siting and Environmental Protection); Starr, *Energy and Power*, SCIENTIFIC AMERICAN, Sept. 1971, at 37.

6. 111 CONG. REC. 13437 (1965) (statement of Joseph C. Swidler, Chairman, Federal Power Commission); Case & Schoenbrod, *Electricity or the Environment: A Study of Public Regulation Without Public Control*, 61 CAL. L. REV. 961, 964 (1973); New York Times, June 7, 1970, at 52, col. 3.

7. 111 CONG. REC. 13437 (1965); Case & Schoenbrod, *supra* note 6, at 964; Ross, *Power and the Environment: A Statutory Approach to Electric Facility Siting*, 47 WASH. L. REV. 35, 41 (1971).

8. *Hearings on H.R. 5277*, *supra* note 5, at 238; Case & Schoenbrod, *supra* note 6, at 962, 972; Luce, *supra* note 4, at 22; Rodgers, *supra* note 4, at 11-12; Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257, 284 (1972); Note, *State Regulation of Power Plant Siting*, 47 IND. L.J. 742, 747 (1972).

At the same time, representatives of environmental and other interests have also evidenced concern with the many uncoordinated agency proceedings in which permits are issued[9] and with the lack of public participation in the decision making process.[10] They point out that segmented proceedings often fail to provide adequate consideration of environmental and other values because some matters of concern may not be subject to the jurisdiction of any existing regulatory agency.[11] Moreover, permit issuing agencies, having been created in many instances for the express purpose of fostering industrial development or insuring adequacy of supply to the consumer, may be expected to evidence greater concern with developmental goals than with other competing values.[12] Conversely, more recently created environmental protection agencies may accord greater importance to protecting environmental values than to fostering developmental ones, to the detriment of developmental needs.[13]

Faced with the problems inherent in the existing systems of diverse and sometimes redundant permit requirements of different agencies, both industry spokesmen (intent upon performing their obligations of supplying consumer demand) and representatives of environmental and other interests (concerned with the adverse effects of inadequately planned development) have pressed for the creation of "one stop" permit proceedings, in which all issues relating to the construction and operation of new facilities could be considered and finally determined by a single agency.[14] Implicit in the call for "one stop" permit proce-

9. Rodgers, *supra* note 4, at 25-26; Note, *State Regulation of Power Plant Siting*, *supra* note 8, at 744.
10. Hanes, *Citizen Participation and its Impact upon Administrative Action*, 24 S.W.L.J. 731, 736 (1970); Journey, *Power Plant Siting—A Road Map of the Problem*, 48 NOTRE DAME LAWYER, 273, 298 (1972); Rodgers, *supra* note 4, at 26; Ross, *supra* note 6, at 42.
11. *Id.*
12. *See* the dissenting opinion of Mr. Justice Douglas in Sierra Club v. Morton, 405 U.S. 727, 745 (1972); Moss v. CAB, 430 F.2d 891, 893 (D.C. Cir. 1970); SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, HEARINGS ON MANAGEMENT PRACTICES ON THE PUBLIC LANDS, pt. 1, 7 (Comm. Print 1971) (Remarks of Senator Gale McGee). Case & Schoenbrod, *supra* note 6, at 972; Stone, *Power Siting: A Challenge to the Legal Process*, 36 ALBANY L. REV. 1, 23-24 (1971); Willrich, *supra* note 8, at 283-84.
13. Stone, *supra* note 12, at 24-25.
14. *See* authorities cited in notes 8 and 9 *supra*. *See also* ABA SPECIAL COMM. ON ENVIRONMENTAL LAW, DEVELOPMENT AND THE ENVIRONMENT: LEGAL REFORMS TO FACILITATE INDUSTRIAL SITE SELECTIONS 45-46 (1974).

dures are three distinct objectives. First, the licensing procedure should encompass all aspects of the proposed project so that, at its conclusion, the siting agency may issue or deny a single permit, preempting the jurisdiction of all regulatory agencies which might otherwise have licensing or approval authority over any aspect of the proposed project, and also binding upon all other interested parties. The final action of this agency should be reviewable, at the instance of any party to the permit proceeding, in a single judicial review. Second, recognizing that the expertise of many governmental agencies may be essential to evaluate various aspects of a proposed project, the single proceeding should combine and coordinate the activities of all governmental agencies with respect to the project in order to avoid both overlapping and fragment any review which may be in some respects redundant and in others inadequate. Third, in order to achieve an appropriate balancing of the desirable aspects of the project (essentially those involving the benefits of industrial and commercial development) against its undesirable effects (those involving adverse impacts upon existing environmental, social and economic conditions), the single permit agency should be authorized to balance the project's benefits against its possible detriments and, in reaching its permit decision, should be empowered to override decisions or recommendations of other governmental agencies which may retain jurisdiction over only one or a few aspects of the proposed project.[15] While most of the commentary respecting industrial siting problems has related to power plant siting, a recent report of an American Bar Association Committee recommends extension of these concepts to virtually all activities which may significantly affect existing environmental, social or economic conditions.[16]

In its 1975 session, the Wyoming Legislature enacted the Industrial Development Information and Siting Act.[17] The Act creates a new agency, the State Office of Industrial Sit-

15. ABA SPECIAL COMM., *supra* note 14, at 47-48.
16. *Id.* at 56-59.
17. WYO. STAT. §§ 35-502.75—.94 (Supp. 1975) [hereinafter referred to as the Siting Act or the Act].

ing Administration,[18] and an Industrial Siting Council of seven members appointed by the Governor[19] and directs the Council to promulgate rules and regulations implementing the Act.[20] A permit must be obtained prior to commencement of construction of any industrial facility.[21] Industrial facilities for which siting permits are required are certain facilities for electricity generation, synthetic gas production, liquid hydrocarbon production, uranium enrichment and other facilities having an estimated construction cost of fifty million dollars or more.[22] With the addition of this last category of facilities, it appears that the Act's jurisdictional scope may be broader than most other state siting statutes. Although the broadening of jurisdictional scope appears desirable in principle, this provision of the Siting Act raises questions respecting the nature of facilities it is intended to encompass, the method of determining estimated construction cost and the appropriateness of the monetary classification as a means of distinguishing between activities included and those excluded from the Act's application.

The Wyoming Siting Act also contains a unique procedural structure requiring that the Siting Council conduct an initial hearing shortly after filing of a permit application and that it grant a siting permit without further proceedings if the applicant carries the burden of demonstrating compliance with certain specified requirements.[23] If the applicant fails to carry this burden at the initial hearing, an intensive investigation of the proposed facility, followed by a second hearing, is required before a permit may be granted.[24] The specified requirements entitling the applicant to a permit after initial hearing appear to differ from those which govern the permit grant after a full study of the pro-

18. WYO. STAT. § 35-502.77 (Supp. 1975) [hereinafter referred to as the Siting Office].
19. WYO. STAT. § 35-502.78 (Supp. 1975) [hereinafter referred to as the Siting Council].
20. WYO. STAT. § 35-502.79(b) (Supp. 1975). After public hearings, the Siting Council promulgated the Industrial Development Information and Siting Rules and Regulations which became effective on September 30, 1975. These rules and regulations are hereinafter cited as the SITING REGS.
21. WYO. STAT. § 35-502.80 (Supp. 1975).
22. WYO. STAT. § 35-502.76(c) (Supp. 1975).
23. WYO. STAT. § 35-502.82(e) (Supp. 1975).
24. WYO. STAT. §§ 35-502.82(e)(iv), -502.84 (Supp. 1975).

posed facility, raising the question whether a permit may be granted after preliminary evaluation for a facility which would not meet the Act's permit requirements if a complete evaluation of its probable impacts were conducted.

The Siting Act appears to embrace a modified "one stop" approach by denying most, but not all, governmental agencies other than the Siting Council jurisdiction to require permits or approvals respecting a proposed facility which is subject to the Act's provisions.[25] It nevertheless requires referral of portions of the permit applications for review by other state agencies which would otherwise have had jurisdiction over the subject matter;[26] the Act then renders those agencies' decisions binding upon the Council.[27] This rejection of some of the essential ingredients of the "one stop" concept raises both procedural and substantive questions respecting reviewing methods to be employed by other agencies and the effect of their decisions upon the functions of the Siting Council.

The Siting Act mandates that the parties to a siting permit proceeding shall include the applicant, governing bodies of local government primarily affected by the proposed facility, persons residing within the areas encompassed by those local governments and various specified Wyoming nonprofit associations.[28] In this respect, questions arise concerning the identification of primarily affected local governments and regarding what other interested persons, if any, may be entitled to intervene in the proceedings.

This article examines and, whenever possible, suggests answers to the above questions. Where appropriate, reference is made to other state siting statutes for comparative purposes.

Two aspects of the Siting Act which will not receive further attention in this article should be mentioned. Although this article treats the Act in terms of grant or denial of a siting permit only, the Siting Council is also authorized

25. WYO. STAT. § 35-502.89 (Supp. 1975).
26. WYO. STAT. § 35-502.78(g) (Supp. 1975).
27. WYO. STAT. § 35-502.78(g) (Supp. 1975).
28. WYO. STAT. § 35-502.85(a) (Supp. 1975). Other persons are authorized to make a limited appearance in the proceeding by written statement which becomes part of the record. WYO. STAT. § 35-502.85(c) (Supp. 1975).

to grant a permit subject to conditions imposed by it.[29] With two exceptions[30] the Act omits any specification of the nature or extent of the conditions which may be imposed, leaving to the Council the task of navigating an uncharted course in this respect. It seems apparent, however, that the imposition of conditions can be an important tool in mitigating possible adverse effects of proposed facilities, thereby enabling the Council to grant permits which it might otherwise be required to deny.

In setting out the standards for permit issuance after intensive investigation, the Siting Act requires that a permit be granted if seven enumerated criteria are satisfied.[31] It then enumerates three criteria which, if not satisfied, preclude the issuance of the siting permit.[32] The obligatory issuance of a permit if all criteria are met, coupled with the obligatory denial of the permit if the three specified criteria are not met, creates a discretionary area within which the Siting Council is authorized, but not obligated, to grant a permit. The Act offers no guidelines to be followed by the Council in exercising this discretion. It is suggested, however, that, within this discretionary area, the Council should grant a permit only if it expressly determines that the social and economic benefits to be derived from the proposed facility will outweigh its adverse effects.

JURISDICTIONAL PROVISIONS

The "Industrial Facility"

By its definition of the terms "industrial facility" and "facility," the Siting Act attempts to delineate those pro-

29. WYO. STAT. §§ 35-502.82(e)(iii), -502.87 (Supp. 1975).
30. Sections 35-502.82(e)(ii) and 35-502.87(d), WYO. STAT. (Supp. 1975), permit the Council to condition a permit with respect to the time of commencement of construction. Section 35-502.87(e), WYO. STAT. (Supp. 1975), permits the Council to condition a permit upon the filing of a bond to reimburse local governments for expenditures in preparation for impact if the proposed facility is not completed.
31. WYO. STAT. § 35-502.87(a) (Supp. 1975). Two of the criteria relate to general environmental impact; the others deal with public health and safety, compatibility with land use plans, compliance of design with state and local laws and regulations, violation of state and federal environmental standards, and environmental, social and economic well-being of people in the area.
32. WYO. STAT. § 35-502.87(b) (Supp. 1975). These criteria are that the facility will not exceed state and federal environmental standards, violate land use plans, nor substantially impair human health, safety and welfare.

posed activities for which it will be necessary to obtain a permit from the Siting Council.[33] These jurisdictional terms are defined essentially as follows:

> (c) "Industrial facility" or "facility" means:
>
> (i) Any energy generating and conversion plant:
>
> (A) Designed for, or capable of, generating one hundred (100) megawatts of electricity or more . . .;
>
> (B) Designed for, or capable of, producing one hundred million (100,000,000) cubic feet of synthetic gas per day or more . . .;
>
> (C) Designed for, or capable of, producing fifty thousand (50,000) barrels of liquid hydrocarbon products per day or more by any extraction process . . .;
>
> (D) Designed for, or capable of, enriching uranium minerals from U308 (yellow cake) in quantities exceeding five hundred (500) pounds of U308 per day.
>
> (ii) Any industrial facility with an estimated construction cost of at least fifty million dollars ($50,000,000.00). . . .[34]

While some may be tempted to take issue, as a judgmental matter, with the production levels specified in subsection (c)(i), the definitions themselves are fairly straight forward, creating few interpretive problems. The formulation employed in subsection (c)(ii), however, appears to raise almost as many questions as it answers. First, does the term "industrial facility" refer to activities wholly unrelated

33. Section 35-502.94, WYO. STAT. (Supp. 1975), exempts from the permit requirements nonmineral processing facilities in existing industrial parks, state and local governmental units and agencies, construction of railroads, electric transmission lines under 115,000 volts, oil and gas pipelines, coal slurry and natural gas pipelines and oil and gas producing, drilling and field processing facilities but requires filing of certain information respecting these exempt proposed facilities. The requisite information for facilities of state and local governmental units and agencies is required only if they will result in annual daily average employment specified in Section 35-502.76, WYO. STAT. (Supp. 1975), an obvious inadvertence since the average employment provision of this latter section appeared in the bill as introduced but was deleted before final passage.

34. WYO. STAT. § 35-502.76(c) (Supp. 1975). Subdivisions (A) through (C) also include additions, other than approved pollution control facilities, having production capacities as large as the original facilities covered by the definitions. Subsection (c)(ii) also includes a provision for annual adjustment of the $50,000,000 by reference to construction cost indices.

to energy production or conversion, or does it merely add to subsection (c) (i) energy-related activities having a construction cost of fifty million dollars or more even though their capacity is less than, or their nature differs from, that specified in subsection (c) (i)? Second, if the Act's application is not limited to energy-related activities, are all other activities involving construction costs of fifty million dollars or more subsumed by the term "industrial facility"? Third, what costs are included in the "construction cost" which will determine the Act's applicability to an activity? And finally, does there exist a rational relationship between the fifty million dollar figure and the probable impact of the proposed activity on environmental, social and economic conditions?

Subsection (c) (ii) of the Act advises that an "industrial facility" to which the provisions of the Act will apply is an "industrial facility" having an estimated construction cost of fifty million dollars or more. While the dollar amount is instructive, by utilizing in the definition the very term which the section is seeking to define, the draftsmen have failed to furnish any guidance with respect to the seminal question of the nature of the activities to which the dollar limitation shall be applied. One general group of activities specifically included in the Act's definition of what constitutes an "industrial facility" is those activites involving energy generating and conversion. It could be argued, therefore, that the industrial facilities encompassed by subsection (c) (ii) include only those activities which involve the generation or conversion of energy. This relatively restrictive interpretation of subsection (c) (ii) finds support in the contention that the Legislature may have added this subsection merely to include under the Act's coverage facilities which do not meet or exceed the minimum capacities set forth in subsection (c) (i) but which cost fifty million dollars or more and facilities engaged in forms of energy generation and conversion not specifically enumerated in subsection (c) (i). Yet, if the purpose of subsection (c) (ii) had been to include those smaller facilities and generating and conversion activities other than those enumerated in subsection (c) (i), this purpose could have been accomplished simply by adding an ad-

ditional subdivision to the first subsection to include all other energy generating and conversion facilities having an estimated construction cost of fifty million dollars or more. Instead the Legislature added to the Act, as a distinct category of activity, other facilities involving the requisite estimated construction cost.

Additional support may be found, however, for the view that the Act is intended to apply to energy generating and conversion to the exclusion of other activities. The progenitor of the Act was originally introduced in and adopted by the House of Representatives. As adopted and sent to the Senate, the bill contained an additional provision, subsection (c)(iii),[35] which would have included in the definition of the term industrial facility "Construction or operation of any business, enterprise or venture, or exploration for or development of natural resources . . ." requiring employment of a number of persons equalling certain percentages of the population of the county in which such activities were proposed to be located. The quoted language would appear to indicate that the House of Representatives intended the abortive subsection (c)(iii) to have a much broader scope than the above-quoted provisions of subsection (c)(i) and (ii). By inference, therefore, one might argue that subsection (c)(ii) was intended to be limited to activities involving energy generation or conversion. An equally consistent inference, however, would be that there exists some intermediate territory, broader than energy generation or conversion on the one hand, yet narrower than all businesses,

35. Section 35-502.76(c)(iii) of House Bill No. 125A, as adopted by the House on February 14, 1975, provided as follows:

> (c) "Industrial facility" or "facility" means:
>
> . . . .
>
> (iii) Construction or operation of any business, enterprise or venture, or exploration for or development of natural resources which will require an annual daily average employment equivalent to one and one-half percent (1½%) of the population of those counties with a population up to forty thousand (40,000) or one percent (1%) of the population of those counties with a population greater than forty thousand (40,000) as established by the most recent official U.S. census in a county, whichever is greater.

Presumably this subsection, later deleted by the Senate, constituted a recognition by the House of Representatives that a new economic activity which might introduce into a county a relatively large number of additional residents would have the potential to create at least some of the problems at which the Act is directed.

enterprises or ventures on the other, which subsection (c) (ii) is intended to occupy.

The view that the ambit of subsection (c) (ii) is in fact broader than the rather restricted area of energy generation and conversion finds support from other quarters. House Bill No. 18, a precursor of the Siting Act, introduced during the 1974 session of the Wyoming Legislature, was patterned upon the Montana Utility Siting Act of 1973.[36] Neither the Montana Act nor House Bill 18 contained a provision comparable to subsection (c) (ii), both limiting their definitions of covered industrial facilities to energy generation and conversion, and related transmission facilities.[37] Subsequently the House Committee on Mines, Minerals and Industrial Development reported out to the House of Representatives House Bill No. 18A which replaced Bill No. 18 in its entirety and which contained new subsection (c) (ii) broadening the scope of the bill's coverage. One of the major changes effected by House Bill No. 18A was said to be the expansion of the definition of "facility" to include industrial facilities rather than just power facilities.[38] This conclusion also finds confirmation in the fact that, in the same session during which the predecessor of subsection (c) (ii) was added to House Bill 18A, the title of the bill was changed from the "Power Siting Act" to the "Industrial Siting Act"[39] thus

36. MONT. REV. CODES ANN. §§ 70-801 to -823 (Cum. Supp. 1974). Representative Rex O. Arney, a sponsor of House Bill No. 18 in 1974 and one of the sponsors of House Bill No. 125 in 1975, has indicated that the Montana Act was the model for the 1974 bill. Minutes of Joint Mines, Minerals and Industrial Development Interim Committee, April 18, 1974, at 3.

37. Separate reference to transmission lines was deleted from the definition of "industrial facility" prior to passage of the Wyoming Siting Act. While it might be argued that this deletion evidences an intention to exclude transmission line siting from the applicabilty of the Wyoming Siting Act, it seems more likely that they were considered a necessary part of any electricity generating facility making the separate reference superfluous. Furthermore, Section 35-502.94(e) exempting transmission lines having a capacity of less than 115,000 volts implies that larger lines are included. The Siting Regulations appear to take this view. *See* SITING REGS. § 2(k) (1) (a) (1975).

38. Minutes of Joint Mines, Minerals and Industrial Development Committee, April 18, 1974, at 1 (testimony of Representative Rex O. Arney). Since the substance of this added provision, amended in certain respects which do not appear relevant to the question under consideration, has been carried forward into the Act adopted by the Legislature in its 1975 session, it would seem appropriate to give weight to this explanatory statement in interpreting the provision.

39. Amendment to House Bill 18A proposed by Representative Arney and adopted on February 8, 1974.

indicating an intent to expand the scope of the Bill beyond energy generating and conversion to include other industrial activities.

The Siting Regulations, adopted to implement the Act, indicate that the members of the Siting Council interpret subsection (c)(ii) to include activities other than energy generating and conversion. Elaborating on the Act's definition, the regulations provide that the term "industrial facility" includes any plant or facility, having the requisite estimated construction cost which is "Designed for the commercial extraction, mining, processing, handling, or manufacturing of raw materials, component materials or finished products. . . ."[40] In view of the legislature's direction that the Council shall promulgate implementing rules and regulations,[41] considerable deference should be accorded to the Council's interpretation of any ambiguous provision of the Act. Its interpretation of "industrial facility" evidenced in the Siting Regulations appears to be a reasonable resolution of the Act's ambiguity and should, therefore, prevail over a more restrictive reading of this term.

Notwithstanding some confusion which might arise from the manner of articulating the definition, the foregoing discussion suggests that the Act should be applied to all industrial activities involving the requisite construction cost.

The conclusion that the term "industrial facility" extends beyond energy generating and conversion, although enlightening, does not answer what other types of activities are to be included within the statutory characterization. It may readily be agreed that, at one end of the spectrum, activities such as farming or ranching, retail sales of goods or provision of services and most residential construction, as well as other similar types of activities, do not fall within the ambit of industrial facilities. It may also be admitted that, at the other extreme, mining operations and many, if not all, of those activities usually grouped under the general heading of manufacturing do constitute facilities of this type. Between these two rather easy extremes, however, lie

40. SITING REGS. § 2(k)(2) (1975).
41. WYO. STAT. § 35-502.79(b) (Supp. 1975).

a number of enterprises whose characterization with reference to the term "industrial facility" appears questionable. For example, on which side of the definitional line is the assembly of components which are not produced by the assembler, or which are produced by it at some other location? How are warehousing and distribution systems to be classified? In which category does animal slaughter and meat packing belong?

Recognizing that the meaning of a word in one state statute cannot be relied upon to provide insight into the meaning of that same word in another statute, some clues might still be provided by inquiring what types of activities have been referred to as "industrial" or "industry" in other Wyoming legislation. A survey of all Wyoming statutes adopted up to and including the Wyoming 1973 legislative session[42] has revealed that, although neither the term "industrial" nor "industry" have been defined in any statute,[43] the term "industry" has been utilized to refer to a broad and diverse area of activities. Agricultural, livestock, mining, oil and gas, lumber, electrical wiring and transportation activities have all been statutorily described as industries.[44] It is not asserted that all of the foregoing activities, and others described in legislation as "industries," are therefore necessarily included within the meaning of the term "industrial" as used in the Siting Act. The many and varied activities described as industries suggests, however, that the term "industrial facility" may cover a broad range of activities some of which may not ordinarily be described as industrial as that term is employed in other statutes or in everyday, common usage.

42. This survey was made by computer search which referenced the words "industrial," "industries" and "industry" contained in any Wyoming Statute adopted up to and including 1973.
43. The Outdoor Advertising Act defines "commercial and industrial activities" as "those activities generally recognized as commercial or industrial by zoning authorities in this state," exempting various specified activities such as agricultural, forestry, grazing, farming and others. WYO. STAT. § 24-112 (Supp. 1975). A statute dealing with working conditions indicates that, for its purposes, "industrial establishments" includes "manufacturing establishments, hotels, stores, workshops, theaters, halls and other places where labor is employed." WYO. STAT. § 27-14 (1957).
44. WYO. STAT. §§ 11-125.2, -319(c) (Supp. 1975); WYO. STAT. § 11-448 (1957); WYO. STAT. §§ 11-668, -675, -691(b) (Supp. 1975); WYO. STAT. § 30-43 (1957); WYO. STAT. § 30-216(a)(1)(l) (Supp. 1975); WYO. STAT. § 27-49(c) (1957); WYO. STAT. §§ 35-436.33, 37-142.1(h) (Supp. 1975).

Every lawyer will recognize the widely accepted rule of statutory interpretation that, absent some indication of legislative intention to the contrary, words used in a statute are to be given their plain or literal meaning.[45] Nevertheless, another interpretative rule of no less universal application instructs that terms utilized in a statute are to be interpreted in the light of the Legislature's overall purpose in adopting the law.[46] Although, unlike some other recent Wyoming statutes,[47] the Siting Act does not contain any general statement of its overall purposes, a review of the Act makes clear that one of its primary objectives is to provide a vehicle for the assessment and control of probable adverse impacts of proposed facilities upon existing environmental, social and economic conditions.[48] While the consideration of these purposes will not always provide clear lines of demarcation in applying the term "industrial facility" to a particular activity, it will furnish some helpful guideposts. It is suggested that the Council and the courts should lean toward including under the Act's coverage all activities which are likely to have a significant impact upon environmental, social or economic conditions.

With these criteria in mind, such activities as livestock feeding, slaughtering and packing, assembly of components, and warehousing and shipping of goods might all be seen to come within the scope of the Siting Act. The construction of large housing developments, or perhaps completely new municipalities, will present more difficult interpretative problems. Ordinarily one would not consider these to be industrial activities. Yet they will unquestionably present

45. *See* SUTHERLAND, STATUTORY CONSTRUCTION §§ 46.01, 46.02 (4th ed. 1973).

46. *Id.* at § 54.05.

47. *E.g.*, Wyoming Environmental Quality Act, WYO. STAT. § 35-502.2 (Supp. 1975).

48. For examples of provisions establishing that these are the principal areas of concern of the Siting Act, *see* WYO. STAT. §§ 35-502.81(a)(vii), (xii) (Supp. 1975) (application items dealing with environment, health and safety, social and economic information); WYO. STAT. § 35-502.82(c) (Supp. 1975) (applicant's burden of proof at initial hearing respecting threat of injury to environmental, social and economic conditions, health, safety and welfare); WYO. STAT. §§ 35-502.84(a)(i), (viii) (Supp. 1975) (additional study provisions respecting environmental and resource use impacts, social and economic impacts); WYO. STAT. §§ 35-502.87(a), (b), (e) (Supp. 1975) (criteria for grant or denial of permit and for the imposition of conditions upon permits granted).

impact problems of significant proportions. Moreover, a residential construction project costing fifty million dollars or more, or the construction of a completely new municipality, would undoubtedly be necessitated only to accommodate the influx of large numbers of persons attracted to Wyoming by its burgeoning industrial development. Considered in relation to the purposes of the Siting Act, therefore, they might be seen to fall within the orbit of industrial facilities which should be subjected to the administrative and public scrutiny which the permit proceedings require.

The Siting Regulations' elucidation of the term "industrial facility" appears, at least in part, to confirm the foregoing suggested interpretation. They include within this term any facility "Designed for the commercial extraction, mining, processing, handling, or manufacturing of raw materials, component materials or finished products, if the estimated construction cost for such facility exceeds fifty million ($50,000,000) dollars . . . ."[49] In addition to activities commonly classified under the umbrella of mining and manufacturing, employment of the words "processing" and "handling" would appear to include activities such as warehousing and shipping as well as livestock slaughtering and packing. Whether these terms are broad enough to include livestock feed lots[50] or component assembly activities is not entirely clear. It could be contended that livestock feeding constitutes processing of the finished product and that assembly of component parts involves both processing and handling. On the other hand, the Council's proposed definition does not appear to accommodate activities such as residential or municipal construction. Perhaps it would have been preferable for the Council to adopt a broader, or more flexible, definition of "industrial facility" or, in the alternative, to parrot the statutory definition (as it has done with respect to other defined terms) and develop the precise para-

49. SITING REGS. § 2(k)(2) (1975).

50. In view of the $50,000,000 minimum, a feed lot would probably be excluded in any event unless constructed in conjunction with a slaughtering, processing and storage plant.

meters of the term by an ad hoc application to each specific activity as it arises.[51]

"Estimated Construction Cost"

As previously indicated the industrial facilities subject to the Act's provisions include only those having an estimated construction cost of fifty million dollars or more;[52] those which cost less will escape its application entirely, unless included among the activities specifically identified in Section 35-502.76(c)(i). In determining whether this monetary threshold is reached, or exceeded, is the measuring rod to be applied solely to the cost of acquiring land and erecting buildings and other similar structures and their necessary accessories? Or is the measure to be extended beyond mere bricks and mortar to include the machinery and equipment to be employed in the facilities' operations? The Act itself offers no guidance, omitting any definition of the essential term "construction cost."[53]

Focusing solely on the words "construction cost," it would appear that the cost items to be included in calculating the monetary minimum might be limited to those costs directly or indirectly related to the acquisition of land and erection of buildings, togeher with equipment which is an integral part of the structures themselves, such as heating, air conditioning, electrical and similar equipment. Occupations generally categorized within the construction industry are those which concern themselves with the erection of structures of this nature, rather than with the sale and installation of production or mineral extraction machinery and equipment.[54]

51. It appears that the Council anticipates making ad hoc decisions of this nature in view of the Siting Regulations' provision for the filing of applications of certificates of insufficient jurisdiction. *See* SITING REGS. § 3 (1975).
52. WYO. STAT. § 35-502.76(c)(ii) (Supp. 1975).
53. A search of the Act's rather meager statutory history also failed to shed any light on the Legislature's intention regarding the content of this term.
54. For statistical reporting purposes, the U.S. Office of Management and Budget classifies under the heading "Construction" contractors and subcontractors engaged in the erection of dwellings, office buildings, stores, farm buildings, as well as highways, streets, bridges and tunnels, docks and piers, dams and water projects and other projects including heavy industrial facilities. OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 45 (1972).

Although, when considered in the abstract, terms may appear to lend themselves readily to a general definition, they frequently assume a different connotation when construed in relation to the purpose of the statute in which they are employed.[55] As heretofore indicated,[56] the purpose of the Siting Act is the assessment and control of adverse effects of major activities upon existing environmental, social and economic conditions in the state, or the region where they are proposed to be located. The concern of the Act clearly reaches substantially beyond the effects which might result solely from the erection of buildings and structures. Many provisions of the Act address themselves to consideration of the probable impact of the ongoing operations of the proposed facility in addition to the impact of its initial construction. The permit application required to be filed with the Council must specify the estimated number of persons to be employed by the applicant during operation of the facility as well as the number of employees who will be involved in construction.[57] The application must also include information concerning anticipated discharges, emissions, wastes, proposed control and disposal programs, and procedures proposed to avoid endangering health and safety of humans and domestic animals, flora and fauna, and recreational facilities.[58] The Act's evident concern with the probable effects of a facility in the operational stage, as expressed in these and other[59] provisions, suggests that the cost of construction of an industrial facility for this purpose is the entire cost of constructing and equipping the operational facility, including machinery, equipment and fixtures necessary for the conduct of the business for which it is intended.

The Siting Council has concluded that "construction costs" extend beyond bricks and mortar to include machinery and equipment employed in a facility's operation. As defined by the Siting Regulations the term " 'estimated construction costs' means the anticipated total costs and expenses attributable directly or indirectly to the planning, de-

55. SUTHERLAND, *supra* note 45, at § 54.05.
56. See discussion and citations in note 48, *supra*.
57. WYO. STAT. § 35-502.81(a)(iv) (Supp. 1975).
58. WYO. STAT. §§ 35-502.81(a)(viii), (xi) (Supp. 1975).
59. WYO. STAT. §§ 35-502.81(a)(xii), -502.84(a) (Supp. 1975).

signing, erection and construction of the applicant's proposed facility to a degree of being substantially operational . . . . The proposed facility will be substantially operational when the facility is capable of producing its first salable or marketable product."[60] Although the Council's definition then proceeds to enumerate specific cost items which appear more closely related to building costs than to machinery, equipment and fixtures, it expressly provides that the enumerated cost items are not intended to exclude additional, unlisted items encompassed by the more general statement of the term's meaning. The Council's definition, therefore, clearly establishes that "construction cost" includes all of those costs and expenses necessary to the erection and equipping of a fully functional industrial facility.

In view of the Act's applicability to possible adverse effects of operation as well as construction of a facility, and its omission of any definition of "construction cost," the Regulations' interpretation of this term should be considered controlling.

The $50,000,000 Classification

In specifically enumerating certain types of energy-related facilities to which the Siting Act's permit procedures are applicable, the Legislature has determined to exclude from the Act's coverage facilities of these types which will not exceed certain predetermined productive capacities.[61] It may be assumed that these statutory classifications represent informed legislative judgments that facilities of these types, but entailing lesser productive capacities, do not pose a likelihood of significant, adverse impacts upon environmental, social and economic conditions. Although one might question the merit of these judgments, due deference must be accorded to informed legislative determinations. When the device of statutory classification is employed with respect to a virtually infinite galaxy of unidentified activities, and that classification is founded solely upon the estimated cost of a facility's construction[62] rather than its productive

60. SITING REGS. § 2(m) (1975).
61. WYO. STAT. § 35-502.76(c)(i) (Supp. 1975).
62. WYO. STAT. § 35-502.76(c)(ii) (Supp. 1975).

capacity or other relevant factors, the justification for the legislative judgment becomes less apparent.

Although it has long been recognized that statutory classification is an essential legislative function,[63] constitutional equal protection provisions nevertheless require that classifications which result in regulation of some members of a class while excluding others must be based upon factors bearing some reasonable relation to the purposes of the legislation.[64] In applying this latter principle, however, the judiciary has customarily accorded wide latitude to the exercise of legislative discretion, particularly in the regulation of economic activities, with the result that legislative classifications in this field have rarely been held to violate constitutional guarantees of equal protection.[65] Viewing the pur-

63. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Barbier v. Connolly, 113 U.S. 27, 32 (1885); In re Trent's Claim, 68 Wyo. 146, 231 P.2d 180, 185 (1951) *quoting* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

64. Morey v. Doud, 354 U.S. 457, 466 (1957); Cotting v. Kansas City Stockyards Co., 183 U.S. 79, 112 (1901); Bell v. Gray, 377 P.2d 924, 926 (Wyo. 1963). The narrow scope of application of the U.S. Supreme Court decisions cited is indicated by the fact that in two of them, *Morey* and *Cotting*, the statute in question excluded or included only one corporation while in the *Wheeling* case, involving an ad valorem property tax, the statute discriminated against some taxpayers solely because of their foreign residence, thus creating a discrimination against interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States. In this latter respect, *see* the concurring opinion of Mr. Justice Brennan in Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959).

65. In an oft-quoted opinion, the U.S. Supreme Court said, "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise a wide scope of discretion in that regard, and avoids what is done only when it is without reasonable basis and is therefore purely arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The court further stated that "when the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Id.* at 78. *Accord*, McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955); Railway Express Agency v. New York, 366 U.S. 106 (1949); Continental Baking Co. v. Woodring, 286 U.S. 352 (1931); Engel v. O'Malley, 219 U.S. 128 (1911); Tussman & Tenbroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 368-73 (1949).

One U.S. Supreme Court watcher has recently identified a trend toward a somewhat expanded scrutiny of legislative classifications. Gunther, *The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Prior to the 1971 Term, Professor Gunther concluded, the "mere rationality" application of equal protection signalled virtual judicial abdication in all cases except those where the Court found that the involvement of fundamental rights required strict scrutiny. When fundamental rights were found to be affected, suspect statutory classifications were invalidated. In the 1971 Term, however, Gunther detected a revitalization of judicial intervention under the "mere rationality" banner with the Court finding equal protection violations when classifications failed to exhibit

pose of the Siting Act to be the control of proposed industrial activities involving the potential for substantial impact, the fifty million dollar classification appears to be defensible against an attack based upon constitutional equal protection grounds. The Legislature may have reasonably anticipated that an industrial facility having a construction cost of fifty million dollars would be more likely to embody the potential for one or more of the types of impact with which the Siting Act exhibits concern than a less costly facility. At a minimum, the Legislature may have thought that the construction of such a facility could involve the employment of a sufficient number of people to create the potential for problems in furnishing necessary governmental services to an increased population, even if those problems were of a purely temporary nature. While one may take issue with the precise dollar amount selected by the Legislature, in applying the constitutional requirement of equal protection, the courts have not insisted that classifications be made with mathematical nicety[66] nor that regulatory statutes apply to all persons in the same business regardless of size.[67] Hence the exclusion of industrial facilities having an estimated construction cost of less than the monetary minimum does not appear to violate the equal protection provisions of either the United States or Wyoming Constitutions.[68]

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a rational relationship to actual statutory purposes rather than to any purposes which "reasonably can be conceived." It should be noted that, while Professor Gunther saw this revitalization of judicial intervention as being applicable to economic regulatory legislation, none of the cases discussed in his article involved regulation of economic activities. Moreover, some question respecting the continuation of this trend arose when the Court subsequently refused to intervene with respect to a Texas school tax statute under circumstances indicating that the 1971 Term developments would have made intervention appropriate. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 68 (1973) (dissenting opinion); Tribe, *The Supreme Court 1972 Term—Forward: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

66. Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). While the language of these opinions is broad, it might be noted that the facts adverted to indicate that, in each case, there appeared to be data before the legislature establishing a rational relationship between the purpose of the statute and the classification. No indication has been found concerning what data, if any, was considered by the Wyoming Legislature which tended to establish that a rational relationship exists between the purposes of the Siting Act and the fifty million dollar classification.

67. Miller v. Strahl, 239 U.S. 426 (1915); Engel v. O'Malley, 219 U.S. 128 (1911). *See* Morey v. Doud, 354 U.S. 457 (1957).

68. U.S. CONST. amend. XIV, § 1; WYO. CONST. art. 1, §§ 2, 17.

Notwithstanding the conclusion that the Legislature's monetary classification lies within its constitutional prerogatives, the question may nevertheless be raised whether this chosen method of classification is best calculated to achieve the statutory goals. There seems to exist no necessary correlation between contruction cost and probable impact, either during the construction phase or thereafter. Depending upon construction schedules, complexity of the proposed facility, apportionment of cost of the facility between buildings and other structures on the one hand and machinery and equipment on the other, the number of construction workers to be employed and thus their impact upon governmental services and adjacent communities during the construction phase might differ markedly. Moreover, depending upon the nature of the activity to be conducted, an operating facility entailing a lesser construction cost may present substantially greater impact problems than a more costly one.[69]

While the monetary standards may often achieve the desired distinction between activities requiring the Siting Council's scrutiny and others with respect to which such scrutiny is unnecessary, there may be many situations which do not lend themselves to this distinction. Although the preliminary, expeditious procedures of the Siting Act[70] may facilitate identification of the costly facility not requiring in depth scrutiny without imposing an excessive burden upon the applicant,[71] the Act provides no vehicle for identifying

69. For example, a strip mine may affect environmental, cultural and social values significantly more than other types of mining operations; a mineral extraction process of one type—which utilizes extraordinary quantities of water, involves processes possibly dangerous to the surrounding environment and humans, or substantial quantities of heavy transportation equipment—may represent impacts far greater than those threatened by an extraction process of another nature; a manufacturing facility which is relatively inexpensive to construct but employs large numbers of production and supporting personnel may result in substantially greater impacts than a more costly but largely automated facility.

70. WYO. STAT. § 35-502.82 (Supp. 1975).

71. Although the cost may not be excessive in relation to the total construction cost of fifty million dollars or more, the burden of time and expense upon the applicant might still be considerable. The information required to be included in an application may be extensive and, in addition, the applicant must prepare for and attend the hearing at which the burden of establishing the requisite facts is on the applicant. If those facts are not established, the Act requires the Siting Council to reject the application pending further study and an additional hearing with their attendant costs in time and additional expense including a fee payable by the applicant to defray the cost of the further study. WYO. STAT. §§ 35-502.82—.87 (Supp. 1975).

and extending its terms to the less than fifty million dollar facility of which careful scrutiny may be needed to prevent or control precisely the types of impact problems to which the Act's provisions should be applied. In fact, the monetary classification employed by the Act may encourage the construction of less costly facilities which entail greater impact problems but avoid the necessity of complying with the rather rigorous and costly siting procedures.[72]

Recognizing that the monetary standard for triggering the Siting Act's applicability has inherent shortcomings, what other criteria might be employed to ameliorate these difficulties? While the answer to this question is not a simple one, some suggestions for redefinition of the term "industrial facility," or simply "facility,"[73] are worthy of consideration. Any redefinition should attempt to identify those attributes of proposed activities which are most likely to involve significant environmental, social or economic impacts.

Some of the attributes of a proposed activity which may indicate the need for scrutiny by the Siting Council are the following:

1. Number of Employees.

The employment by a proposed facility of a predetermined number of persons either during the construction phase or the operational phase might be sufficient to require permit proceedings.[74] Since one of the major concerns of the Siting Act is the alleviation of the burden of providing increased governmental services required by the rapid influx of population,[75] the number of people which a proposed

72. It is recognized, of course, that the considerations entering into the planning, design and construction of a large industrial facility will be numerous and complex in their nature. Nevertheless, while avoidance of the Siting procedures may not often be a controlling consideration, it seems reasonable to assume that avoiding these administrative proceedings and possible appeals, with their attendant court proceedings, will be weighed carefully by prospective builders.

73. Omitting the term "industrial" and retaining only the term "facility" would have the advantage of removing the necessity of determining what activities fall within the "industrial" category. The difficulties of making this determination are discussed above.

74. Since impact problems resulting from population influx may differ during the construction and the operational phases, it might be desirable to utilize a different number of employees with respect to each phase in determining the Act's applicability.

75. *See* WYO. STAT. § 35-502.76(g) (Supp. 1975) (defining impacted area in terms of sudden or prolonged population growth); WYO. STAT. § 35-502.81

activity is likely to bring to an area is a direct measure of certain types of probable impact problems. It might be desirable, therefore, to include in the definition of "facility" a simple numerical minimum of employees which, if exceeded, would require compliance with the Siting Act; or in the alternative, a provision could be included relating the number of proposed new employees to the existing population of a municipality or county. This latter formulation would be more directly related to the relative magnitude of the probable impact resulting from increased population.[76] Recognizing the importance of population influx in determining those activities to which the Siting Act should apply, the Wyoming House of Representatives originally included in the Siting Bill's definition of "facility" any activity requiring employment equal to certain prescribed percentages of county populations.[77] However, the Senate deleted this entire provision from the Bill.[78]

(a)(iv) (Supp. 1975) (requiring applicant to provide information respecting number and job classification of employees); WYO. STAT. § 35-502.81 (a)(xii) (Supp. 1975) (requiring applicant to furnish evaluations of or plans for alleviating various impacts upon local government); WYO. STAT. § 35-502.87(d) (Supp. 1975) (empowering the Siting Council to require delay in commencement of construction to enable local government to implement procedures to alleviate impact).

76. While a variation of this formulation which would relate directly to the number of proposed new employees moving to the area from other locations might be theoretically desirable, such a formulation may well present difficult practical problems of distinguishing between those employees who are likely to be drawn from within the area and those who would be attracted into the area from other locations. This information must be furnished, however, in the permit application. SITING REGS. § 5(h) (1975).

77. H.B. 125A, 43d Wyo. Leg. § 35-502.76(c)(iii) (1975), provided:

> (c) "Industrial facility" or "facility" means:
>
> . . .
>
> (iii) Construction or operation of any business, enterprise or venture, or exploration for or development of natural resources which will require an annual daily average employment equivalent to one and one-half percent (1½%) of the population of those counties with a population up to forty thousand (40,000) or one percent (1%) of the population of those counties with a population greater than forty thousand (40,000) as established by the most recent official U.S. census in a county, whichever is greater.

An earlier version of this subsection, contained in the Bill as reported to the House by its Mines, Minerals and Industrial Development Committee, would have included activities requiring "an annual average employment of at least one hundred (100) individuals in a county." This version was replaced by the subsection in the form quoted above.

78. In view of the paucity of records of debates conducted during Wyoming legislative session, no information was discovered which might explain the reasoning which convinced the Senators to delete this provision. Section 35-502.76(c)(iii) was deleted by amendment offered on February 25, 1975, by Senator Ostlund.

2. Nature or Type of Activities.

Certain types of enterprises might be identified which, by their very nature, are more likely than others to create significant or substantial impacts upon environmental, social, cultural or economic conditions. This approach to the jurisdictional problem has been employed by the Siting Act in relation to energy generating and conversion activities; electricity generation, synthetic gas and liquid hydrocarbon production and uranium enrichment have been specifically enumerated.[79] A similar approach would appear desirable with respect to those non-energy production activities which could be agreed to pose significant impact problems. Certain types of major activities which might fall within this category include, among others, paper manufacturng, cement plants and quarries, livestock feed lots above a specified capacity, mining and mineral processing, chemical manufacturing, residential subdivisions exceeding a specified number of units, and textile mills and tanneries.[80] Activities such as these, together with other major activities which might be considered appropriate, could be specified in the definition of the term "facility." However, since it would be impractical to determine and enumerate in advance every type of activity to which the Siting Act should apply, it would be desirable to authorize the Siting Council, under its rulemaking power, to add to the list of specified major activities for which a siting permit would be required.

3. Area of Land Use.

Another indicia of activities which may be deemed likely to present significant impact problems is the area of land to be employed in connection with the proposed activity. Impacts related to area employed will ordinarily impinge more directly upon environmental and cultural values than on social or economic conditions. Thus the utilization of relatively large land areas in connection with a proposed activity may embody the potential for adverse effects upon flora and fauna, scenic and recreational considerations and other nat-

79. WYO. STAT. § 35-502.76(c)(i) (Supp. 1975).
80. ABA SPEC. COMM., *supra* note 14, at 58.

ural systems.[81] Other state siting statutes have employed the land area measure as the principal criterion of their siting acts' applicability.[82]

4. Location of Proposed Site.

In addition to criteria based upon the other considerations referred to above, certain locations might be identified in which possible impact problems will be of increased concern merely because of the unique nature of the area itself. Areas exhibiting special cultural, scenic or recreational values, or areas peculiarly suited for wildlife habitats, such as parks, wilderness areas, rivers and streams, will frequently constitute such unique areas. Activities proposed to be situated in these locations may require special scrutiny. Areas such as these might be separately classified as areas of critical concern[83] and the provisions of the Siting Act applied to virtually all proposed new activities whether or not they would be encompassed by the Act if they were to be conducted in other locations.

5. Inclusive Jurisdictional Authority.

In addition to those listed above, other criteria could also be suggested which may assist in determining the likelihood that a proposed activity may adversely affect existing environmental, social or economic conditions. The common shortcoming of the listed criteria, as well as others that could be suggested, is that applying any one, or all of them in combination, will not necessarily identify all proposed activities which may require Siting Council scrutiny. It is this conclusion which has prompted the American Bar Association's Special Committee on Environmental Law to recommend a more comprehensive alternate to the utilization of any one or combination of these criteria in establishing the jurisdic-

81. All of these considerations are concerns of the Siting Act. *See* WYO. STAT. §§ 35-502.84(a)(ii), -502.87(a)(i)-(ii) (Supp. 1975).

82. ME. REV. STAT. ANN. tit. 38, § 482(2) (Supp. 1973); VT. STAT. ANN. tit. 10, § 6001(3) (Cum. Supp. 1975). The Vermont statute is a land use planning statute which contains permit requirements for all development involving more than a specified land area.

83. The concept of creating areas of critical concern which, because of their peculiar attributes are of more than local interest, has found acceptance in land use planning statutes. *See, e.g.*, ME. REV. STAT. ANN. tit. 12, § 685-A.I.A. (Supp. 1974); ORE. REV. STAT. § 197.405(2) (Baldwin 1974); WYO. STAT. § 9-850(b) (Supp. 1975).

tion of a state siting council.[84] The Committee's report on development and the environment recommends that a siting council be granted jurisdiction over virtually every type of new construction or enterprise with the exception of those activities, to be enumerated in the statute, which the legislature determines do not pose any significant likelihood of adverse impacts, such as single structure residential building[85] and other activities generally agreed to be of an innocuous nature.[86] If this broadly based approach were adopted, the statute should authorize the council to exempt activities from permit proceedings in two ways. First, the council may be directed, after appropriate public hearings, to exempt additional categories of activities to be situated in noncritical areas. Second, the council might be authorized, upon filing of a simplified form of application, to grant exemptions on an ad hoc basis, without any hearing, for a proposed activity which clearly does not require further scrutiny. The Committee suggests that these procedures would avoid excluding from a siting act's scope activities which may pose a significant probability of adverse impact while retaining sufficient flexibility so that other activities which do not require scrutiny will escape the burdens of needless permit proceedings.

THE TWO-STEP PERMIT PROCEEDING

The Wyoming Siting Act is unique in its adoption of a two-step permit proceeding. Within sixty days after the filing of a permit application, the Council is required to hold a public hearing[87] and, within an additional sixty days after completing this hearing, it must make an initial determination either issuing a permit or rejecting the application pending further study.[88] If further study is required, an in-

84. ABA SPEC. COMM., *supra* note 14, at 56-59.
85. Housing developments would not be statutorily excluded. Even the building of a single home would be included within the Council's jurisdiction if it were to be located in an area of critical concern.
86. A statute which adopts this broadly based jurisdictional approach might specifically exclude farm and ranch activities (other than commercial feed lots) and residential and commercial building in existing municipalities.
87. WYO. STAT. § 35-502.82(b) (Supp. 1975). While this section appears to provide that the Director of the Siting Office holds the hearing, this is probably unintentional since subsections (c) and (d) of this section clearly envision that the Council will hold the hearing.
88. WYO. STAT. § 35-502.82(e) (Supp. 1975).

tensive investigation is conducted with respect to matters designated by the Council after which a second public hearing is held before final decision to grant or deny the siting permit.[89] At the initial hearing the applicant is accorded the opportunity to demonstrate

> (i) That the proposed facility complies with all applicable law;
>
> (ii) That the facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the affected area; and
>
> (iii) That the facility will not substantially impair the health, safety or welfare of the inhabitants.[90]

Provision is also made for presentation of evidence at the initial hearing by state agencies respecting environmental, social and economic conditions and projected changes therein.[91] If the applicant succeeds in demonstrating the facts specified in the quoted provision, a permit is to be issued without additional study of the proposed project.[92] If the applicant fails to demonstrate the requisite facts and further study is ordered, however, the Council is required to grant a permit only if it finds, among other things,

> (i) [That] [t]he nature of the probable environmental impact is acceptable, including a specification of the predictable adverse effect on the normal environment, public health and safety, aesthetics, scenic, historic and recreational value, forest and parks, air quality, water supply and quality, fish, wildlife and agricultural resources;
>
> (ii) That by the design and location of the facility, any adverse environmental impact is reduced to the extent deemed acceptable considering:
>
> . . .

89. WYO. STAT. § 35-502.84 (Supp. 1975).
90. WYO. STAT. § 35-502.82(c) (Supp. 1975).
91. WYO. STAT. § 35-502.82(d) (Supp. 1975). The Act does not specify whether the changes to which the agencies are to address themselves are those which will be caused by the proposed facility or generally those changes projected to occur in the area where the facility is to be situated. Perhaps both are intended in order that the Council may appreciate not only the changes which a facility itself may cause but also whether the proposed facility will be compatible with other projected changes.
92. WYO. STAT. § 35-502.82(e)(iv) (Supp. 1975).

> (C) Preservation of historic sites, forest and parks, fish and wildlife, air quality, water supply and quality, agriculture resources and land areas possessing sensitive ecological conditions;
>
> . . .
>
> (iii) That the facility is compatible with public health and safety;
>
> . . .
>
> (vii) That the facility represents an acceptable impact upon the environmental, social and economic well being of the municipality and people in the area where the facility is proposed to be located . . . .[93]

The apparent inconsistencies between the provisions relating to permit grant at the initial determination stage and after additional study and hearing raise the question whether the Council can be required to issue a permit after the initial hearing for a facility which would not comply with the criteria governing permit issuance after additional study and hearing.

The initial determination requirements would appear to entitle the applicant to a permit if he demonstrates that the facility will not pose a *threat of serious injury* to the environment, whereas issuance of a permit after additional study and hearing is not required unless the Council finds that the facility's probable impact upon virtually all aspects of the environment *is acceptable* and its design and location reduces any adverse environmental impact *to an acceptable extent.* Grant on initial determination appears to require only that there be no *threat of serious injury* to inhabitants, while issuance after additional study and hearing is not required unless it is determined that the facility represents an *acceptable impact* upon the social and economic well being of the municipality and people in the area. Grant on initial determination appears to require only that the facility will not *substantially impair* the health, saftey and welfare of inhabiants, even though an applicant would not be entitled to a permit after additional study and hearing unless the facility *is compatible* with public health and safety. Although it

93. WYO. STAT. § 35-502.87(a) (Supp. 1975).

stretches credibility to conclude that the Legislature intended to authorize construction of a facility after preliminary consideration, upon short notice to other interested parties, based on standards substantially more lenient than those with which the same facility must comply after intensive study and complete hearing, the evident conflicts between these two permit issuance requirements are not easily reconciled.[94]

One approach to an uneasy reconciliation might be to read the words "acceptable" and "compatible" used in the after study permit provisions as being essentially synonomous with "threat of serious injury" and "substantially impair" used in the initial determination permit requirement. Thus the rather elaborate requirements for findings requisite to a permit grant after study would be reduced to a mandate that the Council find acceptable environmental, social and economic impacts so long as they do not constitute a threat of serious injury to the environment, nor to the social and economic condition of inhabitants; that it also find the facility compatibile with public health and safety so long as it will not substantially impair health, safety or welfare. The first, and most obvious, objection to this search for synonymity is founded on the universal rule of statutory interpretation that when the legislature uses different words in different parts of the same statute it intends them to convey different meanings. Furthermore, it hardly seems reasonable to suppose that the Legislature would have framed this rather carefully worded set of detailed instructions for findings which must be made by the Council after intensive study if it really intended to communicate the conclusion that everything is acceptable which does not pose a threat of serious injury, and everything is compatible which does not substantially impair.

94. Logically it would be possible to infer a legislative intention that the Siting Council determine after investigation whether a threat of serious injury presented by a facility is acceptable and whether the substantial impairment which it would involve is compatible with health and safety. This interpretation seems so extreme on its face as to be unworthy of serious consideration. Furthermore, even though logically possible, this inference is negatived by Section 35-502.87(b)(iii), WYO. STAT. (Supp. 1975), which prohibits issuance of a permit if the cumulative effect of the facility together with others will substantially impair health, safety and welfare.

The converse approach to an only somewhat less uneasy reconciliation is to conclude that, in adopting the terms "threat of serious injury" and "substantially impair," the Legislature was employing a rough shorthand for the more elaborately drawn standards of the after-study grant requirements. This reading would require that the Council satisfy itself at this early stage of the proceeding, based upon inquiry of a preliminary nature, that there is little likelihood of the proposed facility involving unacceptable impacts or being incompatible with the standards for approval after intensive investigation, if the additional study were required. Under this view, if the applicant is unable to demonstrate the probability that the proposed facility would meet the post-study permit standards, the Council would reject the application pending further study. Again the same objection to the search for synonymity asserted above, based on the same generally accepted tenets of statutory interpretation, seems in order. Yet, in spite of this objection, the explanation that the Legislature was here indulging in a form of legislative shorthand offers some appeal. At least it has the virtue of avoiding an interpretation which would render a substantial portion of the statute a mere nullity in many cases. A statutory interpretation which relieves the permit applicant from inquiry into the environmental, social and economic acceptability and the health and safety compatibility of a proposed facility merely upon demonstration that the facility poses no threat of serious injury to the environment and no substantial impairment of health, safety and welfare seems to insure that the study requirements and standards for permit issuance after study will in some cases never be applied to a facility even though it would violate these standards. Nor does it seem excessive to place upon an applicant who would avoid the additional study and hearing requirements the burden of demonstrating, based upon preliminary evidence which it shall make available at the initial hearing, that the facility's probable environmental, social and economic impacts will be acceptable and that it will be compatible with health and safety. The strain that this interpretation admittedly inflicts upon statutory language

seems preferable to the inflexible adherence to a rule of statutory construction which would produce what appears to be an untenable application of a statute importing remedial objectives.

This suggested view of the Legislature's intended application of the initial determination provision appears to have been adopted by the Siting Council. To establish that a proposed faclity does not pose a threat of serious injury, it will require the applicant to demonstrate that "granting a permit will not result in a significant detriment to, or impairment of, the environment or the social and economic condition of present or expected inhabitants."[95] Establishing that the facility will not substantially impair health, safety or welfare will require a demonstration that "health, safety or welfare during and after construction would [not] be significantly diminished or weakened relative to present levels."[96] The Council view seems to be the preferable one.

THE SITING COUNCIL AND OTHER STATE AGENCIES

One of the major goals achievable by industrial siting legislation is the creation of an administrative procedure which enables a siting agency to assess the benefits and detriments of a proposed facility and to finally determine the acceptability of its environmental, social and economic impacts. Achievement of this goal should benefit not only the applicant, but also other parties having an interest in the probable effects of the proposed facility. Among other things, this benefit would stem from replacement of numerous application and permit proceedings before different, unrelated state and local government agencies[97] with one, coordinated proceeding before a single agency empowered to issue or deny a siting permit covering all aspects of construction and oper-

95. SITING REGS. § 6(b) (1975). In addition to the provision quoted above, this section also provides that any significant decrease in the quality or quantity of social services or facilities may be considered a serious injury to social conditions and that any material, net deterioration of various indicia of economic well being "will be weighed negatively."

96. SITING REGS. § 6c(2) (1975).

97. In 1970, Mr. Charles F. Luce, Chairman of the Board of Directors of Consolidated Edison Company, stated that the construction of a fossil fueled bulk electric power supply facility in New York would require three approvals by federal agencies, four by New York State agencies and twenty by New York City agencies. Luce, *supra* note 4, at 19.

ation of the proposed facility. To achieve this goal, siting legislation must authorize the siting agency to conduct a single, coordinated proceeding which supersedes all other state or local permit or approval proceedings that would have been required in the absence of the siting statute.

Apparently recognizing the desirability of all-inclusive permit proceedings which supersede all, or most, other state and local permit and approval requirements, several states have included in siting statutes a provision rendering requirements for prior approval by other governmental bodies inapplicable to the construction or operation of facilities subject to the application and permit requirements of their siting statutes.[98] Other state siting statutes provide that issuance of a permit by their siting authority is binding upon and supersedes the jurisdiction of all other government bodies except their environmental protection agencies.[99] A few states have omitted any reference whatever regarding the effect of issuance of a siting permit upon permit or approval requirements of other laws,[100] presumably indicating that activities governed by their siting statutes nevertheless require permits or approvals in separate proceedings under all other applicable laws.

The Wyoming Siting Act, in Section 35-502.89, contains the following limitation upon the application of other

98. CONN. GEN. STAT. ANN. § 16-50x (Cum. Supp. 1975) (but provides for certain municipality determinations which may be appealed to siting council); N.H. REV. STAT. ANN. § 162-F:7 (Supp. 1973); N.Y. PUB. SERV. LAW, bk. 47, § 149-a (McKinney Supp. 1975); ORE. REV. STAT. § 453.395(5) (Baldwin 1974) (provides for issuance of permits by other agencies subject only to the condition that the site certificate is issued); S.C. CODE ANN. § 58-1830 (Cum. Supp. 1974); WASH. REV. CODE ANN. § 80.50.110 (Supp. 1974) (provides all conflicting laws superseded and that preempts regulation of thermal power sites and plants).

99. ARK. STAT. ANN. § 73-261.12 (Cum. Supp. 1973); MONT. REV. CODES ANN. § 70-817 (Cum. Supp. 1974); OHIO REV. CODE ANN. § 4906.13 (Baldwin 1974). It is believed that, having filed implementation plans with the Federal Environmental Protection Agency which provide for compliance determinations and enforcement by their respective environmental agencies, these states concluded that the jurisdiction of these agencies should not be disturbed. Implementation plans are required by the Clean Air Act, 42 U.S.C. § 1857c-5 (Supp. III, 1973) and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1342(b), (c) (Supp. III, 1973).

100. ARIZ. REV. STAT. ANN. §§ 40-360 to -360.12 (1974) (no provision generally withdrawing jurisdiction, but Section 40-360.06 permits overriding of master plans and regulations if unreasonably restrictive); ME. REV. STAT. ANN. tit. 38, §§ 481 to 488 (Supp. 1973); NEV. REV. STAT. § 704.820 (1973); VT. STAT. ANN. tit. 30, § 248 (Cum. Supp. 1975).

permit or approval proceedings to facilities granted a permit by the Siting Council:

> Notwithstanding any other provision of law, no state, intrastate regional agency or local government may require any approval, consent, permit, certificate or other condition for the construction, operation or maintenance of a facility authorized by a permit issued pursuant to the provisons of this act . . . except that the department of environmental quality shall retain authority which it has or which it may be granted to determine compliance of the proposed facility with state and federal standards and implementation plans and to enforce those standards and the public service commission shall retain authority which it has or may be granted relative to certificates of convenience and necessity, rates, interchange of services and safety regulations. Nothing in this act shall prevent the application of state laws for the protection of employees engaged in the construction, operation or maintenance of such facility.

Two conclusions seem to be required by this section. First, jurisdiction over the proposed facility will be retained by the Department of Environmental Quality and the Public Service Commission thereby requiring wholly separate application and permit proceedings before these two agencies.[101] Second, all other state and intrastate regional agencies and all other local governmental bodies are denied any jurisdiction to require permits or approvals with respect to a proposed facility governed by the Siting Act. Aspects of the proposed facility which would have required permits or approvals from these agencies or bodies are now under the exclusive jurisdiction of the Siting Council. This latter conclusion would be justified but for another provision of the Siting Act. In creating the Siting Council, the Act provides, among other things, that:

101. The Wyoming Siting Act clearly contemplates other separate and independent permit proceedings before other state agencies since it requires that the siting permit application indicate what other state permits or approvals are required by the facility and whether application has been made for them. WYO. STAT. § 35-502.81(a)(xiv) (Supp. 1975). The Siting Regulations also call for this information and copies of permits or approvals issued by other agencies must be filed; if these other permits have not yet been applied for, the substance of the information required in the applications must be furnished to the Siting Council. SITING REGS. § 5.i. (1975).

> If construction of a facility would have required approval from any state agency but for the provisions of this act . . ., the council shall authorize that agency to review that portion of the application formerly subject to the jurisdiction of the agency and request the agency to render a decision relative thereto which is binding on the council but only as to that portion of the application formerly subject to the jursidiction of the agency. . . .[102]

Reading these two provisions together, they seem to say that, with the exceptions noted, whenever a permit proceeding is required under the Siting Act, all other state agencies are denied permit or approval jurisdiction (Section 35-502.89), except that those same agencies shall review the aspects of a proposed facility over which they are denied jurisdiction and render a decision thereon, which decision binds the Siting Council (Section 35-502.78(g)). A curious contradiction indeed.[103] Nor is the contradiction made to appear less curious when one considers that seven other state siting statutes which contain provisions similar to the Wyoming Siting Act's section denying jurisdiction to other governmental agencies do not contain such a contradictory provision.[104]

If the legislature intended to preserve to all state agencies their jurisdiction over those aspects of the construction and operation of proposed facilities notwithstanding the adoption of the Siting Act, it might have been preferable either specifically to provide that the jurisdiction of those agencies would be unaffected by the Siting Act or to follow the example of some other states which have simply omitted from their siting statutes any mention of the jurisdiction

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102. WYO. STAT. § 35-502.78(g) (Supp. 1975).

103. It must be conceded that the contradiction is not complete since the referral for review evidently relieves the applicant of the burden of filing separate application with the reviewing agencies, nor does Section 35-502(g) give back to intrastate regional agencies or local governments that which Section 35-502.89 has taken away.

104. ARK. STAT. ANN. §§ 73-276 to -276.18 (Cum. Supp. 1973); MONT. REV. CODES ANN. §§ 70-801 to -823 (Cum. Supp. 1974); N.H. REV. STAT. ANN. §§ 162-F:1 to -F:13 (Supp. 1973); N.Y. PUB. SERV. LAW. bk. 47, §§ 120 to 149-b (McKinney Supp. 1975); OHIO REV. CODE ANN. §§ 4906.01—.99 (Baldwin 1974); ORE. REV. STAT. §§ 453.305—.575 (1974); S.C. CODE ANN. §§ 58-1801 to -1832 (Cum. Supp. 1974).

of other agencies.[105] Either of these two possible courses would have made clear that anyone proposing to construct and operate any new facility would remain subject to all permit and approval requirements of all state agencies from which such permits or approvals would have been needed in the absence of the Siting Act. By denying jurisdiction to other agencies with one hand and giving it back with the other, however, the Siting Act raises some vexing questions.

Substantive Questions

In according or reserving to state agencies other than the Siting Council jurisdiction to render binding or conclusive decisions respecting various aspects of a proposed facility, the Siting Act raises, and leaves unanswered, questions respecting the scope of the binding effect of these other agency decisions. Binding decision authority is accorded or reserved to the Department of Environmental Quality,[106] the Public Service Commission,[107] and any other state agency which would have been required to approve construction or operation of any aspect of a proposed facility but for the provisions of the Siting Act.[108] One effect of this division of decision-making authority seems abundantly clear; in the event that the decision required of another agency is adverse to the applicant, the Council is precluded from granting a siting permit.[109] If the other agency's decision approves an applicant's proposed activity, however, the scope within which that decision is binding or conclusive seems less evident. Does a favorable decision by another agency preclude the Council from considering any aspect of the subject matter

105. ARIZ. REV. STAT. ANN. §§ 40-360 to -360.12 (1974); ME. REV. STAT. ANN. tit. 38, §§ 491 to 488 (Supp. 1973); NEV. REV. STAT. §§ 704.820—.900 (1973); VT. STAT. ANN. tit. 30, § 248 (Cum. Supp. 1975).
106. WYO. STAT. §§ 35-502.89, -502.87(a)(vi) (Supp. 1975).
107. WYO. STAT. §§ 35-502.89, -502.78(g) (Supp. 1975).
108. WYO. STAT. § 35-502.78(g) (Supp. 1975).
109. This provision for binding decisions of other state agencies substantially rejects the view that the function of a siting council should be the balancing of all benefits of a proposed facility against its probable detriments based upon all available evidence including recommendations, but not binding decisions, of other governmental bodies. As suggested above, however, this balancing function may still be performed by the Wyoming Siting Council when a facility falls within the limited discretionary area created by Section 35-502.87. *See* text following note 32, *supra*. Further, a limited balancing function may be performed by the state agencies, such as the Public Service Commission, within their jurisdictional areas.

comprehended within that other agency's decision or does the Council, notwithstanding that decision, retain authority to consider the environmental, social and economic impacts of these same aspects of the proposed facility as they have been approved by the other agency? Since the Siting Act employs the terms "binding" and "conclusive" in providing for these other agency decisions, one's initial reaction must surely be that all further consideration of these matters by the Siting Council is foreclosed. Additional study of the Act's provisions, however, leads to the conclusion that this initial reaction is at least questionable and possibly erroneous.

1. Decisions of Department of Environmental Quality.

The posited initial reaction may be most easily tested by reference to the functions which the Act accords the Department of Environmental Quality. Rather than providing for referral for review of matters within the Department's jurisdiction, the Siting Act envisions a wholly separate application and permit proceeding in the Department respecting matters within the purview of the Environmental Quality Act.[110] That act provides for standards governing air, water and land quality and solid waste management. One of the Siting Act's prerequisites for the grant of a siting permit is

> That the department of environmental quality has determined that the proposed facility or cumulative effects intensified by the facility will not violate state and federally established standards and implementation plans. The judgments of the department are *conclusive* on all questions related to the satisfaction of state and federal standards. . . . (emphasis added).[111]

Although the conclusive nature of the Department's decision supports the view that its compliance determination precludes the Council from denying a siting permit on the same grounds that form the basis of the Department's determination, other provisions of the Siting Act apparently contradict this conclusion. The first of these contradictions appears in the same section of the Siting Act which renders the Depart-

110. WYO. STAT. §§ 35-502.1—.56 (Supp. 1975).
111. WYO. STAT. § 35-502.87(a)(vi) (Supp. 1975).

ment's compliance decisions conclusive. A siting permit must be granted if the Department's decision is favorable and the Council finds, among other things, that "[t]he nature of the probable environmental impact is acceptable"[112] and "[t]hat by the design and location of the facility, any adverse environmental impact is reduced to the extent deemed acceptable."[113] In making these findings, the Council must specify the facility's predictable adverse effect on numerous environmental factors including air quality and water quality.[114] The Council, therefore, is obligated to evaluate a facility's probable impacts upon air and water quality, both of which are also governed by the Department's compliance decision. Does the Act require two decisions respecting the same subject matter, or can this possible duplication of effort be avoided?

One possible approach to the avoidance of apparent duplication of decision-making would be to require that the Council merely adopt the Department's conclusive decision in reaching its air and water quality finding. This approach, however, seems inconsistent with the Siting Act's requirements that the Council, not the Department, shall find the environmental impact acceptable. Perhaps an even more convincing rejoinder to this possible approach is that the Siting Act, again in this same section, specifically requires denial of a siting permit notwithstanding the Department's compliance decision if "[t]he cumulative effect of the facility on the environmental, social and economic conditions in the area in conjunction with other facilities will substantially impair the health, safety and welfare of people . . . ."[115] Furthermore, the Siting Act's additional study provisions[116] tend to reinforce the conclusion that the Council may deny a siting permit upon consideration of the same matters which are constituents of the Department's compliance decision. The additional study, to be made if the permit is not granted after preliminary

112. WYO. STAT. § 35-502.87(a)(i) (Supp. 1975).
113. WYO. STAT. § 35-502.87(a)(ii) (Supp. 1975).
114. WYO. STAT. §§ 35-502.87(a)(i), (ii) (Supp. 1975).
115. WYO. STAT. § 35-502.87(b)(iii) (Supp. 1975).
116. WYO. STAT. § 35-502.84 (Supp. 1975).

evaluation and hearing, authorizes the Council to investigate erosion, scouring and wasting of land; effects of effluents on receiving waters and relationship to water quality standards; air emissions and controls and relationship to present and projected air quality; and solid waste inventory, disposal program and relationship of disposal practices to environmental quality.[117] While the Council's investigation with respect to each of these study areas also includes other matters, the matters referred to here would seem to be similar, if not identical, to those forming the basis of the Department's compliance decision. In conducting this investigation, the Council is required to obtain information and recommendations from the Department,[118] but the Act specifies that these are not binding upon the Council in arriving at its siting permit decision.[119]

The inclusion of these matters in the authorization for additional study, coupled with the above-discussed criteria for permit issuance, seem to prescribe for the Council a more active role than simple adoption of the Department's conclusive judgments. Although the Council must accept a Department decision that a proposed facility will comply with state and federal environmental standards, it must nevertheless evaluate independently whether impact of air, water and land quality degredation and of waste disposal problems upon environmental, social and economic conditions require denial or conditioning of a siting permit.

2. Decisions of Public Service Commission.

A second provision of the Siting Act accords binding effect to a decision rendered by the Public Service Commission respecting the public convenience and necessity of a proposed facility subject to its jurisdiction. The Act provides:

> The finding in the certificate of the public service commission as to the present or future public convenience and necessity of the proposed facility shall be binding on the council, but such finding shall not

117. WYO. STAT. §§ 35-502.84(a)(ii)-(v) (Supp. 1975).
118. WYO. STAT. § 35-502.84(b)(xi) (Supp. 1975).
119. WYO. STAT. § 35-502.84(b) (Supp. 1975).

> be binding on the council with respect to issuance or denial of a permit under this act.[120]

The necessity of including this provision in the Siting Act at all seems questionable since it immediately follows, as part of the same subsection, the mandate for review of portions of the siting application by other state agencies whose decisions resulting from that review are binding on the Siting Council. But, as in the case of the Department of Environmental Quality, the Act appears to require wholly separate proceedings before the Commission[121] rather than referral for review. This sentence may have been added, therefore, simply to clarify that the Commission's convenience and necessity decision will bind the Council even though reached in a separate proceeding rather than in a review upon referral provided for in the first sentence of the subsection.[122]

Assigning the foregoing *raison d'etre* to this sentence concerning the convenience and necessity decision, the provision's superficial inconsistency (the Commission's convenience and necessity finding shall be binding on the Council, but such finding shall not be binding on the Council) may be more easily explained than the provisions relating to the conclusive Department of Environmental Quality decisions. It may be read as a direction that the Council shall not consider public convenience and necessity since this chore is reserved for the Commission, but a favorable Commission decision[123] does not obligate the Council to grant a siting

120. WYO. STAT. § 35-502.78(g) (Supp. 1975).

121. *See* note 101, *supra.*

122. The Legislature apparently did not perceive a similar necessity for clarification of the separate hearing requirement with respect to matters within the jurisdiction of the Department of Environmental Quality. In view of the express reservation of the Department's jurisdiction by Section 35-502.89, WYO. STAT. (Supp. 1975), and the recognition by Section 35-502.81 (a)(xiv), WYO. STAT. (Supp. 1975), that some permits or approvals from other state agencies are required, however, it is assumed that a separate and independent proceeding before the Department is also anticipated.

123. If the decision required of the Commission is whether the present or future convenience and necessity of Wyoming residents requires the construction of additional electricity generating capacity, it is difficult to see how this requirement can be found to exist. The thirtieth biennial report of the Commission indicates that the total installed capacity of Wyoming electric generating plants in 1974 was 1758.225 megawatts compared with peak load and energy requirements in 1973 of 554.650 megawatts. The total additions scheduled for completion before 1980 (not including tentative additions of 2031.400 megawatts) will add another 2690 megawatts of generating capacity, making a total capacity of 4448.225, while the total

permit if grounds other than convenience and necessity would preclude that grant; this conclusion might have appeared self-evident even in the absence of the qualifying clause. This interpretation may be buttressed by the absence from the Siting Act of any requirement that the Council make its own findings regarding the convenience and necessity of a proposed facility, a feature which distinguishes this situation from the Act's treatment of the Council's obligations in relation to environmental concerns delegated to the Department of Environmental Quality. Here again some doubt is cast upon this interpretation by the additional study provision of the Siting Act authorizing the Council to designate for further study the matter of consumer demand and future energy needs. However, since the siting permit requirements apply to energy production activities which do not require a certificate of public convenience and necessity[124] as well as to those which do, this authorization might be limited to those not requiring such a certificate. It appears, therefore, that there will be no occasion for Council consideration of public convenience and necessity with respect to proposed public utility facilities.

3. Decisions of Other State Agencies.

The third provision of the Act which accords binding effect to decisions of other state agencies is the requirement that portions of the siting permit application be referred for review to those agencies which would have had permit or approval jurisdiction but for the provisions of the Siting Act.[125] In discussing the scope of the binding effect of this provision, reference will be made for illustrative purposes to the Wyoming permit requirements relating to beneficial

projected peak demand in the year 1982 is 1470.740. PUBLIC SERVICE COMM'N, THIRTIETH BIENNIAL REPORT OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF WYOMING (Utilities Dept. Statistical Supp., Tables No. 1 and 2). If all electricity generated by a facility will be transported in interstate rather than intrastate commerce, however, it is questionable whether a certificate of public convenience and necessity must be obtained from the Commission. *Cf.* Continental Pipe Line Co. v. Belle Fourche Pipeline Co., 372 F. Supp. 1333 (D. Wyo. 1974).

124. The production of liquid hydrocarbons and synthetic gas and enriching uranium, as well as many activities included in the general provision relating to facilities costing fifty million dollars or more, would not require the issuance of a certificate by the Commission.

125. WYO. STAT. § 35-502.78(g) (Supp. 1975).

use of the state's surface waters.[126] These requirements condition appropriation of surface waters upon obtaining a permit from the State Engineer. If an application in proper form were filed directly with the Engineer, as it would be in the case of a proposed appropriation that is unrelated to a facility to which the Siting Act applies, the Engineer would be required to determine that the waters will be applied to a beneficial use, that unappropriated water exists in the proposed source of supply, that the proposed use does not conflict with existing rights and that the use does not threaten to prove detrimental to the public interest.[127] For the purpose of this discussion, it is assumed that the same criteria would govern the Engineer's approval of a proposed appropriation which he is required to review upon referral of the relevant portion of a siting permit application.[128] If the Engineer renders a favorable decision, is consideration of all matters relating to water use foreclosed or are there water use decisions still to be made by the Siting Council?

Here the interpretative waters are perhaps more murky than in either of the other two cases considered. Much may be said in support of the view that all consideration by the Council is foreclosed. The first quarter from which this support may be drawn is no less an authority than the State

126. WYO. STAT. §§ 41-201 to -216 (Supp. 1975). A permit from the State Engineer is also required for other water uses. *See, e.g.*, WYO. STAT. §§ 41-26 to -46 (Supp. 1975) (construction of reservoir); WYO. STAT. §§ 41-138 to -147 (Supp. 1975) (use of ground water). Moreover, a change in use or in the place of use of an existing water right must be approved by the Board of Control. WYO. STAT. § 41-4.1 (Supp. 1975). In view of the limited quantity of surface waters available in Wyoming, acquisition of existing water uses and conversion of those uses to new ones will probably be more frequent than new appropriations. While the procedure for obtaining approval of use changes differs somewhat from that applicable to permits for new appropriations, it is believed that the problems of applying the Siting Act to these two types of situations will be essentially similar.

With the exception of permits from the Department of Environmental Quality and the certificate from the Public Service Commission, discussed above, few other requirements for permits or approvals from Wyoming state agencies have been found which appear likely to relate to facilities covered by the Wyoming Siting Act. *See* WYO. STAT. § 36-11 (Supp. 1975) (permit for excavation on certain public lands from Board of Land Commissioners); WYO. STAT. § 36-202 (Supp. 1975) (permit for utility rights of way from Board of Land Commissioners). It does not seem unreasonable to expect that, as economic development expands within the state, additional statutes containing agency permit and approval requirements will be enacted.

127. WYO. STAT. § 41-203 (Supp. 1975).

128. The nature of the decision required of a state agency to which a portion of the siting permit application is referred for review is discussed below. *See* text accompanying notes 143-92, *infra*.

Constitution. This document creates a state Board of Control and prescribes that it "shall . . . have the supervision of the waters of the state and of their appropriation, distribution and diversion."[129] Furthermore, the constitution itself establishes the office of State Engineer, appoints him president of the Board of Control and accords to him the general supervision of the state's waters.[130] Yet, even though this constitutional base of authority is impressive, it might be noted that the constitution does not expressly preclude the Legislature from delegating to another state agency authority touching upon water use, at least where the touching is ancillary to other state concerns—concerns which are not likely to have been foreseen in 1889 when the constitution was framed.[131] Nevertheless, one cannot ignore the fact that the constitution accords supervision of the state's waters to the Board of Control under the direction of the State Engineer.

Additional support for this side of the dialogue can be drawn from the permit provisions of the water use statute. In addition to determinations respecting beneficial use, the existence of unappropriated water and the nonexistence of conflicting water rights, the Engineer is charged with responsibility to insure that the proposed use does not threaten to prove detrimental to the public interest. Although the statute contains no definition of public interest,[132] the suggestion that the term may encompass the environmental, social and economic impacts of the proposed use of water (especially in Wyoming where the supply is not abundant) does not seem to be extreme. Other states have specifically recognized the importance of considering environmental effects of water use by adopting statutory requirements for the consideration of these factors in con-

129. WYO. CONST. art. 8, § 2.
130. WYO. CONST. art. 8, § 5.
131. *See* Wyoming Environmental Quality Act, WYO. STAT. §§ 35-502.18—.19 (Supp. 1975), delegating authority over water quality to the Department of Environmental Quality.
132. Apparently the only Wyoming decision recognizing the State Engineer's duty to consider public interest in granting a water use permit is Big Horn Power Co. v. State, 23 Wyo. 271, 148 P. 1110 (1915), in which the court's opinion mentions that the State Engineer considered the public's interest in maintaining a railroad bed in connection with his grant of a reservoir permit. At 1112.

nection with water use applications.[133] Perhaps the best indicator that the Wyoming Legislature views the impacts of private activity (including water use) upon environmental values to be a matter of public interest is its adoption of the Wyoming Environmental Quality Act[134] and the Siting Act, both of which deal extensively with these problems. If the probable environmental impact of a proposed water use, as well as its social and economic impact, is to be considered by the Engineer in determining whether the use threatens to prove detrimental to the public interest, his approval of a proposed water use would seem to foreclose consideration of these same issues by the Siting Council.

One who would argue that, despite the State Engineer's approval of proposed water use, the Siting Council should evaluate the probable impact of intended water use by a proposed facility will find considerable support for this contention in the Siting Act. Having declared that decisions of other state agencies rendered within the area of their prior permit jurisdiction will bind the Council, the Act nevertheless specifically charges the Council to consider water supply in determining whether the probable environmental impact of a proposed facility is acceptable and that its design and location have reduced environmental impact to an acceptable extent[135]—both findings being prerequisites of a permit grant. While it might be suggested that this finding merely requires adoption of the Engineer's water use decision, it would seem that, if this were intended, a general statutory requirement that approval shall have been obtained from all reviewing agencies would have sufficed. Moreover, the additional study provisions authorize intensive investgation of water resources impacts relating to

> (A) . . . adequacy of water supply and impact of facility on stream flow, lakes, reservoirs and underground waters;

133. ALASKA STAT. § 46.15.080 (1971); CAL. WATER CODE § 1257 (West 1971); ORE. REV. STAT. § 537.170(3)(a) (1974); WASH. REV. CODE ANN. § 90.54.020 (1975).

134. WYO. STAT. §§ 35-502.1—.56 (Supp. 1975).

135. WYO. STAT. §§ 35-502.87 (a)(i), (ii) (Supp. 1975).

> (B) . . . impact of facilities on ground waters and underground waters;
>
> . . .
>
> (G) Effects of changes in quantity and quality on water use by others, including both withdrawal and in situ uses; relationship to projected uses; relationship to water rights;
>
> (H) Effects on plant and animal life, including algae, microinvertebrates and fish population.[136]

Remembering that the referral of the water use portion of a siting application might be characterized as a part of the siting proceeding itself, reference to these items could be explained as permitting the Council to designate these matters for additional study only upon request by the Engineer, with the study to be conducted by him. Certainly, this interpretation is supported by inclusion in the above list of "relationship to water rights," a matter specifically entrusted to the State Engineer by the water permit statute.[137] If it were intended that designation of water use problems for additional study be delegated to the State Engineer, however, this could have been accomplished by a general direction to the Council to designate for further study any matters requested by a reviewing agency. Instead the Siting Act authorizes only the Council to designate matter for additional study and provides for conduct of the ensuing investigation by the Siting Office, albeit with the assistance of information and recommendations of other state agencies.

Some further contentions favoring the Council's involvement with questions of environmental impacts of water use might be derived from differences between both substantive and procedural provisions of the Siting Act and the water permit statutes. The Siting Act's specific requirements that the Council make findings with respect to the effect of a facility upon virtually all aspects of environmental, social and economic conditions,[138] compared with the water permit statute's general reference to the Engineer's consideration of the public interest,[139] might be seen as a determination

136. WYO. STAT. § 35-502.84(a)(iii) (Supp. 1975).
137. WYO. STAT. § 41-203 (1957).
138. WYO. STAT. §§ 35-502.87(a)(i), (ii), (vii) (Supp. 1975).
139. WYO. STAT. § 41-203 (1957).

that the Council should itself evaulate impacts of water use. The Siting Act's hearing provisions and rights of rather broad public participation,[140] compared with the absence of hearing requirements and any clear right of public participation in water use permit proceedings,[141] might make the siting proceeding a preferable forum when the water use issue may have extensive public implications. Moreover, the specific duty of the Council to consult with and consider recommendations of all other state agencies which might represent interests affected by the proposed facility[142] may result in a more catholic consideration of diverse interests than might be expected from the Engineer.

The only conclusion that seems possible from the foregoing analysis is that the precise scope within which the Engineer's water use decision should be binding upon the Council will be difficult to define. Certainly the constitutional delegation to the State Engineer, coupled with the requirement for consideration of public interest and the Siting Act's referral for review and binding decision, weigh on the side of foreclosing all consideration of water use by the Council. Nevertheless the Siting Act's authority for Council investigation and its findings requirements respecting water resource impacts, as well as its procedural protections in which some might find comfort, strongly favor the Council's evaluation of probable impacts of intended water use by a proposed facility.

Procedural Questions

In addition to the questions discussed above concerning the scope of the binding or conclusive decisions made by

140. WYO. STAT. §§ 35-502.82, -502.84(e), -502.85 (Supp. 1975).

141. The surface water permit procedures do not require any hearing prior to permit issuance, although the applicant may appeal a denial of a permit to the Board of Control. Upon appeal the Board must hold a hearing in which "All parties directly interested . . . and those who claim an adverse interest" are entitled to participate. WYO. STAT. § 41-216 (1957). Furthermore, if a permit is issued, after completion of all construction required, the applicant submits proof of appropriation and any person claiming an interest in the water may contest the adjudication of the appropriation at a hearing before the superintendent of the appropriate water division. The superintendent then transmits all evidence taken to the Board for its decision. WYO. STAT. § 41-211 (Supp. 1975); WYO. STAT. §§ 41-176 to -179 (1957). This hearing evidently relates only to the question of whether other appropriators have prior conflicting rights. Moreover, since it cannot be held until after the construction is completed, it must be subsequent to the issuance of a siting permit which is required before construction commences.

142. WYO. STAT. §§ 35-502.78(f), -502.82(d), -502.84(b) (Supp. 1975).

other state agencies, the referral for review arrangements of the Siting Act[143] raise some perplexing problems of a procedural nature. Though perhaps not all-inclusive, the following problems present themselves for consideration:

1. Is the decision required of the reviewing agency the same as it would have made upon an application filed with it in the absence of the Siting Act?
2. In reaching its decision, will there be adequate information available to the reviewing agency?
3. In reaching its decision, is the reviewing agency required or permitted to hold hearings?
4. If hearings are required or permitted, who is entitled to participate in those hearings?
5. Whether or not hearings are required or permitted, what rights, if any, are available to obtain judicial review of the reviewing agency's decision?
6. What is the effect of a permit application filed with another state agency prior to the filing of the siting permit application?

1. What is the Nature of the Decision Required of the Reviewing Agency?

Preliminarily one might ask whether the decision to be made by the reviewing agency will be the same one that it would be obligated to render if a permit application were filed directly with it; is the agency to determine whether it would have granted a permit had the application been filed under its own governing statute or is its decision to be of a more limited nature? Standing by itself the requirement for review by other agencies seems to imply something less than a decision whether a permit would be granted by those agencies. It might be suggested, for example, that the use of the word "review" connotes an intention that the Siting Council is to reach a decision whether the other agency's permit requirements have been met; this decision could then be "reviewed" by the agency which would have had jurisdiction but for the provisions of the Siting Act.

143. WYO. STAT. § 35-502.78(g) (Supp. 1975).

This review could be intended simply as a precaution to insure that the Siting Council had not gone astray in its application of the other agency's permit requirements, rather than a mandate for an *ab initio* permit decision by that agency. When tested against the language of the referral provision, however, this intention does not seem likely since that language calls for review of a portion of the application, not of a decision rendered initially by the Siting Council. The question nevertheless lingers whether the services of the reviewing agency are invoked only to render some summary sort of decision. Perhaps its function is limited to making a cursory evaluation of that information contained in the application which relates to its area of jurisdiction rather than engaging in the type of in-depth considerations which might have been required if the Siting Act were not applicable to the proposed facility. This suggestion accords with the view that the Siting Council itself may be obligated to evaluate in some respects the same subject matter required to be considered by the reviewing agency.[144]

The view that the decision required of the reviewing agency is the same as it would be with respect to an application filed directly with it if the Siting Act were not applicable also finds support in the Act. If this were not intended, the Act's referral requirement might not have been confined to those cases in which a permit or approval would have been required from that agency but for the enactment of the Siting Act. Instead review might have been deemed appropriate by all other agencies whose expertise relates to any aspect of the siting application. Moreover, other requirements of the Siting Act direct that the Council shall hear relevant evidence presented by all other state agencies[145] and if an additional study is conducted shall obtain information and recommendations from various specified agencies within their areas of expertise.[146] This evidence, information and recommendations, however, does not have the same binding effect as the decision of a reviewing agency when referral is required. It might be inferred from these

144. *See* discussion *supra* at notes 125-38 and accompanying text.
145. WYO. STAT. § 35-502.82(d) (Supp. 1975).
146. WYO. STAT. § 35-502.84(b) (Supp. 1975).

provisions for non-binding participation by other state agencies that, when a portion of the siting permit application is referred to another agency for review, the decision required is whether that agency would have granted a permit or approval were the proceeding initiated directly with it. To the extent that the reviewing agency's decision will bind the Siting Council, this seems the better view since no reason appears why these reviewable aspects of the proposed facility require any less scrutiny when the Siting Act is applicable than when it is not.

2. Will There be Adequate Information Available to the Reviewing Agency?

Since the referral provision envisions a review of some portion of the application filed with the Siting Council rather than the filing of a separate application with another agency pursuant to its own requirement, what information will be available to the other agency in making its decision? Neither the Act nor the Siting Regulations expressly address themselves to this question. The provisions of the Siting Act which specify the content of an application[147] emphasize information relating to the probable environmental impact of the proposed facility, the likelihood that additional social services may be needed as a result of its construction and operation and its probable impact upon the economy of the affected areas. The Siting Regulations amplify these requirements, calling for additional information of the same nature.[148] Neither contains any general provision regarding information which may be considered essential by other agencies in reviewing any portion of the application, although the Act does authorize the Council to require by rule or regulation information other than that which the Act specifies.[149]

Will the information contained in the siting permit application be adequate to enable the reviewing agency to do

147. WYO. STAT. § 35-502.81(a) (Supp. 1975).
148. SITING REGS. § 5 (1975).
149. WYO. STAT. § 35-502.81(a)(xvi) (Supp. 1975). The Siting Regulations require that the applicant file with the Siting Council copies of permits issued by, or information to be included in applications required to be filed with, other agencies from which separate permits must be obtained. SITING REGS. § 5(i) (1975). No provision is made, however, for information which may be needed by a reviewing agency.

its job? If not, may the reviewing agency require that it be provided with additional information for this purpose? In considering these questions, reference may again be made, for illustrative aid, to the Wyoming statutes governing use of surface waters.[150]

But for the provisions of the Siting Act the builder of a proposed facility which requires the appropriation of surface water would have filed directly with the State Engineer an application for a permit permitting this water use. Now, under Section 35-502.78(g), the portion of the siting permit application which relates to this water use will be referred for review to the State Engineer. If the application had been filed directly with the State Engineer pursuant to statutes providing for the issuance of a permit by him, the information required would have included, among other things, the source of the water supply, the nature of the proposed use, the location and description of the proposed ditch, canal, or other work, the time within which the applicant will begin construction, and the time required for completion of the project,[151] together with a map containing specified information.[152] The State Engineer may require that an applicant furnish such additional information as will enable him properly to guard the public interest,[153] and also certain plans in addition to the required map. The Siting Act application requirements do not expressly mention information respecting anticipated water use although they do require a specific description of the nature of the facility, which description might include information of this type.[154] The Siting Regulations do address themselves to water use, but require only a statement respecting water consumption rate in connection with the requisite description of the operating nature of the proposed facility[155] and an estimation of the date of commencement of construction of the facility

150. WYO. STAT. §§ 41-201 to -213 (1957, Supp. 1975).
151. WYO. STAT. § 41-202 (Supp. 1975).
152. WYO. STAT. § 41-207 (1957).
153. WYO. STAT. § 41-205 (1957).
154. WYO. STAT. § 35-502.81(a)(ii) (Supp. 1975).
155. SITING REGS. § 5(e)(2) (1975).

and estimated construction time.[156] While it is difficult to judge in advance whether any particular application filed pursuant to these regulations will in fact contain sufficient information for the purpose of the State Engineer's decision, it is submitted that the content of the regulations provides scant assurance in this regard.[157]

If the State Engineer is limited to consideration of the information required in the siting permit application, the required decision may have to be made without the type of information which would have been available in a separate permit proceeding subject to the provisions of the water use statutes. That this result would be undesirable seems obvious since it would require a decision based upon information less complete than the legislature apparently considered essential when it adopted the legislation governing issuance of a water use permit. While one is tempted to cut this Gordian knot with the observation that the Engineer should simply deny approval of the siting applicant's proposed water use until the requisite information is furnished, it is questionable whether this would be appropriate where the applicant has furnished all information required by the Siting Act and the Siting Regulations governing the content of the siting permit application. Yet neither the Siting Act nor the Siting Regulations make explicit provision for the production of additional information which may be considered essential by other agencies for the purpose of their decisions.

It would seem, however, that the problem could be solved with relative ease by the Council's exercise of its authority to adopt rules and regulations requiring that applications contain information other than that required by the Siting Act.[158] Pursuant to this authority, the Council

156. SITING REGS. § 5(g) (1975). The date of commencement of the facility and estimated construction time may not be the same as the commencement and completion dates of the works required for the proposed water use.

157. It is recognized, of course, that an applicant's desire to expedite a favorable decision which is requisite to issuance of a permit by the Siting Council will usually provide a strong practical motivation to furnish requested information even though the applicant may not be required to do so under the terms of the Siting Act and the Siting Regulations. It must also be recognized, however, that many industrial managers are loathe to disclose publicly any more information than absolutely necessary because of their concern that competitors may utilize it to their disadvantage.

158. WYO. STAT. § 35-502.81(a)(xvi) (Supp. 1975).

might either expressly incorporate in its rules and regulations the information requirements of all other state agencies to which it is likely that a portion of applications may be referrable, or more simply, it might adopt a regulation providing that, whenever any portion of an application is referable to another state agency for review, the applicant shall furnish all information which would have been required in a permit or approval proceeding initiated directly with that other agency.[159] In the absence of coverage by the rules and regulations, however, the question of what information must be furnished to other agencies reviewing portions of the siting permit application may in some cases become a source of dispute and delay in permit proceedings and may require resort to the courts for an interpretation with respect to which the Siting Act affords little helpful guidance.

3. Is the Reviewing Agency Required or Permitted to Hold a Public Hearing?

Turning again to the state water permit requirements, reference to statutory provisions relating to proposed beneficial utilization of underground water in a location designated by the State Engineer as a controlled area[160] provides a useful illustration of the problems which may arise. If the intended water utilization were not to be made in connection with a proposed facility subject to the Siting Act, the new appropriator would be required to file a permit application with the State Engineer.[161] Public notice of the filing of that application would be published by the State Engineer and, if timely objection to issuance of the requested permit were filed alleging either that there is no unappropriated water in the proposed source of supply or that granting the application would be detrimental to the public interest, the statute would require a hearing before the State

159. In view of the Wyoming Administrative Procedure Act requirement that rules be adopted after notice and public hearing (WYO. STAT. § 9-276.21 (Supp. 1975)), it would be impractical to adopt a specific rule each time it is determined that additional information is required.

160. WYO. STAT. §§ 41-138 to -147 (Supp. 1975). To date only two controlled areas have been designated. It does not appear unreasonable to expect that, as water demands attendant upon industrial development within the state increase, additional controlled areas will be designated.

161. WYO. STAT. §§ 41-138 to -147 (Supp. 1975).

Engineer and the Control Area Advisory Board.[162] A hearing may also be required by the State Engineer under certain circumstances even in the absence of the filing of an objection.[163] After hearing the Engineer, upon the advice of the Advisory Board, determines whether to grant the requested permit. The permit is to be issued only if various specified criteria are satisfied, including a finding by the State Engineer that the proposed use will not be detrimental to the public interest.[164] What procedure is to be pursued, however, when a siting permit application filed with the Siting Council envisions the use of underground water in a controlled area and, therefore, the review of this portion of the application by the State Engineer?

If a hearing would have been held upon an underground water permit application filed directly with the State Engineer pursuant to the foregoing requirements, is the same hearing required upon review of the water use portion of a siting application? Here again, the Siting Act provision for review of a portion of the siting application invites the interpretation that the procedure before the State Engineer is to be something less than the full dress hearing which would be necessary if a water permit application were required. Since one of the cardinal benefits achievable by siting legislation appears to be the avoidance of multiple permit proceedings, and their resultant hearings, the view that a hearing should not be required before the reviewing agency possesses substantial appeal. If a hearing is held by the reviewing agency, it will constitute yet another hearing added to the one, or possibly two, which must be conducted by the Siting Council.[165] Furthermore, while the issues to be determined will not be identical, it is likely that much of the same evidence presented to the State Engineer will have to be developed by the Siting Council in connection with its evaluation of environmental, social and economic impacts of

162. WYO. STAT. § 41-140(a) (Supp. 1975).
163. WYO. STAT. § 41-140(b) (Supp. 1975).
164. The other criteria are "that there are unappropriated waters in the proposed source, that the proposed means of diversion or construction is adequate, that the location of the proposed well or other work does not conflict with any well-spacing or well-distribution regulation. . . ." WYO. STAT. § 41-140(c) (Supp. 1975).
165. WYO. STAT. §§ 35-502.82(b), -502.84(e) (Supp. 1975).

the proposed facility.[166] Although this duplication of effort may be mitigated by the availability to the Siting Council of information in the possession of the State Engineer,[167] some duplication appears inevitable since parties to the siting permit proceeding might present additional evidence at the Council hearings respecting probable effects of the proposed water use.

Granting the desirability of reducing the total number of hearings required with respect to the authorization of any proposed facility, substantive arguments do exist to support the contention that, if a hearing would otherwise have been held prior to issuance of a permit or approval, a similar hearing should be required in connection with a reviewing agency's deliberations. If the issue to be decided by the Engineer is whether he would have granted a permit for the proposed water use in the absence of the Siting Act, it is difficult to understand why a hearing would be required to make this determination had the permit application been filed directly with him, but not when the relevant portion of the siting permit is referred by the Siting Council for review. Furthermore, some judicial pronouncements suggest that a person aggrieved or adversely affected by agency action is at least entitled to judicial review of that action and that effective review requires that an adequate record be created at some appropriate hearing.[168] In the absence of an agency hearing, assuming judicial review is available, the district court could receive relevant evidence on the water use issue.[169] It would seem desirable, however, that a hearing be conducted by the administrative

166. This conclusion assumes that the Council must make its own decision respecting the environmental, social and economic impact of the proposed water use rather than being foreclosed from making these decisions by the determination of the State Engineer. *See* discussion *supra* at notes 125-38 and accompanying text. While that discussion related to surface water use where no provision for a hearing is made by the water use permit statutes, the other factors mentioned in that discussion seem equally applicable to the relationship between the Engineer's decision and the obligations of the Siting Council.

167. WYO. STAT. §§ 35-502.78(f), -502.84(b) (Supp. 1975).

168. *Cf.* Pan American Petroleum Corp. v. Wyoming Oil & Gas Conservation Comm'n, 446 P.2d 550 (Wyo. 1968). *See* cases and authorities cited in note 224, *infra.*

169. WYO. R. CIV. P. 72.1(n), (i). Thornley v. Wyoming Highway Dep't, 478 P.2d 600 (Wyo. 1971).

agency charged with the responsibility for approving the proposed water use.

Perhaps, in order to avoid separate hearings before both the Siting Council and the State Engineer and Control Area Advisory Board, the Siting Act might be interpreted to permit the combination of the hearing required by the water use statute with those to be held by the Council. In this event the Engineer and the Board would join with the Siting Council in those portions of its hearings pertaining to issues of water use. This procedure would enable the Engineer and the Board to obtain the requisite information for their approval decision during the course of the siting hearings and obviate the necessity of a separate hearing relating to the proposed water use. While the utilization of a combined hearing may result in participation by parties to the siting proceeding who might not otherwise be entitled to participate in the State Engineer's review process,[170] this broader participation might not be undesirable in view of the potential importance of the Engineer's water use decision. Although combined hearings, as here suggested, are not specifically authorized by the Siting Act, neither are they prohibited. In view of the Act's omission of any clear guidance and the apparent desirability of avoiding numerous separate proceedings, combined hearings among the Council and reviewing agencies might be seen as an acceptable method of expediting and simplifying the siting permit process. If combined hearings are considered desirable, provision therefor should be inserted in the Council's rules for practice and procedure.

4. If Hearings are Required or Permitted, Who is Entitled to Participate?

If, in the illustrative situation posed above, the State Engineer is to hold hearings as part of his review procedure, what parties should be entitled to participate? The water permit statute does not specifically enumerate parties to that proceeding, but does indicate that the applicant (who would be the same as the applicant for the siting permit) and any

170. *See* discussion in text accompanying notes 171-74, *infra*.

person filing an objection to issuance of the requested water permit would be parties to the proceeding. The Siting Act, on the other hand, provides that the parties to the siting permit proceeding include the applicant, local governments which will be primarily affected by the proposed facility, persons living within the area encompassed by those local governments and various specified types of Wyoming nonprofit associations.[171] The Siting Act refers to these governments and persons as parties to the permit proceeding rather than parties only to the hearings before the Council. Since the State Engineer's review may be viewed as a part of the siting permit proceeding, arising as it does from the Council's referral of a portion of the siting application, it might be concluded that all parties to the siting permit proceeding are automatically entitled to participate in any review proceeding conducted by the Engineer.

Broadly based participation in a "review" proceeding might be justified by the fact that the reviewing agency's binding decision may not be challenged before the Council by any party to the siting proceedings. This justification loses some force, however, when referrals for review are compared with the Act's provision for totally separate application and permit proceedings before some other state agencies,[172] in which the participants would clearly be governed by other statutes, but which nevertheless result in binding decisions unassailable before the Council. Furthermore, if the legislature had intended that all parties to the siting permit proceeding be entitled to participate in any other agency's review process, one might have asked that this right be more clearly specified in the Siting Act. Recognizing that the review and binding decision of the Engineer encompasses only a single, perhaps relatively narrow, aspect of the far reaching siting permit proceeding,[173] it might be appropriate to limit participation in the review proceeding

171. WYO. STAT. § 35-502.85(a) (Supp. 1975).

172. The Siting Act envisions separate permit proceedings before the Department of Environmental Quality and the Public Service Commission. *See* WYO. STAT. §§ 35-502.89, -502.81(a)(xiv) (Supp. 1975).

173. In Wyoming where water is not plentiful, however, its availability may be a determinative factor respecting the feasibility of a proposed facility.

to those who would have been accorded party status by the water permit statute.[174]

5. What Rights, if any, are Available to Obtain Judicial Review of the Reviewing Agency's Decision?

Irrespective of whether a hearing is required or permitted in the State Engineer's review process, will judicial review of his decision be available, and if so, at what stage of the siting permit proceeding? The Wyoming Administrative Procedure Act[175] authorizes judicial review of any final agency decision in a contested case and of agency action or inaction unless precluded or limited by statute or common law.[176] Although the Siting Act provides only for judicial review of final decisions of the Council[177] and is silent with respect to judicial review of determinations made by reviewing agencies to which a portion of the siting permit application is referred, it does not preclude judicial review of these determinations. Nor does judicial review appear to be precluded by any principle of common law. If a hearing is required before the Engineer makes his determination, judicial review becomes available whether or not that determination is characterized as a grant or denial of a permit.[178] If it is assumed, however, that the Engineer's decision upon review of a portion of the siting permit application is not required

174. When limited to the chosen illustrative situation, the distinction between parties to the siting proceeding and the reviewing agency process may be of small practical effect. If any person may participate in the State Engineer's review by filing an objection that the proposed water use would be detrimental to the public interest (WYO. STAT. § 41-140(a) (Supp. 1975)), presumably every party to the siting permit proceeding who opposes grant of a permit may also become a party to the Engineer's review by filing an appropriate objection. If the right to file objection is more narrowly construed, however, limiting objection to those residing in the immediate area or immediately affected by the proposed water use, many parties to the siting proceeding may be excluded from participation as parties to the Engineer's review. Even if this narrow interpretation were adopted, however, other interested persons may be entitled to participate as intervenors, but the right to intervene and the extent of the intervenor's participation may be more limited than those of other parties. *See* discussion of intervention in text accompanying notes 232-38, *infra*.

175. WYO. STAT. §§ 9-276.19 to -276.33 (Supp. 1975).

176. WYO. STAT. § 9-276.32(a) (Supp. 1975).

177. WYO. STAT. § 35-502.88 (Supp. 1975).

178. If the decision of the Engineer is characterized as the grant or denial of a license after hearing (by definition, license includes a permit, WYO STAT. § 9-276.19(b)(3) (Supp. 1975), the contested case provisions of the Wyoming Administrative Procedure Act apply. WYO. STAT. § 9-276.31(a) (Supp. 1975). If the decision is not a grant or denial of a license, but simply a decision after hearing, the contested case provisions also apply. WYO. STAT. § 9-276.19(b)(2) (Supp. 1975).

to be preceded by a hearing, the decision would nevertheless appear to constitute judicially reviewable agency action.[179]

Given the right of judicial review of the State Engineer's decision, at what stage of the siting permit proceeding may this review be obtained? If the decision were rendered in a proceeding initiated directly with the Engineer under a water permit statute, it would constitute a final decision or action entitling any aggrieved or adversely affected person to immediate judicial review.[180] Is immediate judicial review available when the Engineer acts as a reviewing agency with respect to a portion of the siting permit application or must judicial review await the final decision of the Siting Council respecting grant or denial of the siting permit? The answer would seem to depend upon whether the Engineer's decision is a *final* decision or constitutes final agency action or inaction[181] of which review is authorized by the Wyoming Administrative Procedure Act. Viewing this decision simply as one the ingredients of the final siting permit decision to be made by the Siting Council, it may be analogized to an interlocutory decree rendered during the course of any adversary proceeding, with the result that no immediate review would be available.[182] The desirability of this result is obvious; it avoids piecemeal or multiple review proceedings by postponing review until the Siting Council renders its final decision upon the siting permit application as a whole.

Postponing judicial review until the Siting Council issues its final decision appears appropriate in those cases in which the reviewing agency decision is favorable to the ap-

179. Thornley v. Wyoming Highway Dep't, 478 P.2d 600 (Wyo. 1970). Cases decided under the Federal Administrative Procedure Act, 5 U.S.C. § 702 (1970), have reached a similar conclusion. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). While the Wyoming Administrative Procedure Act is similar to the federal act, Section 10 of the latter act refers only to agency action. Since it makes no reference to an agency decision in a contested case, it might be argued that the federal cases are inapposite on this point.

180. WYO. STAT. § 9-276.32(a) (Supp. 1975).

181. While the Wyoming Administrative Procedure Act does not use the word "final" in referring to agency action, it is assumed that finality is intended since any action would involve the attributes of finality.

182. The problems inherent in immediate judicial review of decisions by reviewing agencies would become particularly acute if there were several agencies to which the Siting Council were required to refer portions of the siting application for their review. This could result in a number of separate reviews of different agency decisions.

plicant since, if the Council nevertheless denies the siting permit on other grounds, appeal of the Engineer's decision by persons opposing issuance of the permit will become unnecessary. If the Engineer's decision is adverse to the applicant,[183] however, the Council will be precluded in all events from granting a siting permit since the Engineer's decision is binding upon the Council. Postponement of the right of judicial review under these circumstances may require the parties and the Council to pursue the balance of the siting proceeding in vain.

Cases involving questions of the time when a decision rendered during the course of administrative proceedings becomes judicially reviewable provide little assistance in resolving this problem. The cases refusing to allow immediate appeal generally relate to situations in which, notwithstanding an adverse interim decision, the affected party may nevertheless prevail in respect of the agency's ultimate determination.[184] Cases permitting immediate appeal of an interim decision usually involve some irreparable economic or personal harm which will be suffered pending the agency's ultimate decision.[185] None seem directly apposite to the situation in which an interim decision will foreclose a party from prevailing when another agency's ultimate decision is rendered. In the absence of any direct precedent relating to administrative proceedings, Rule 72(a) of the Wyoming Rules of Civil Procedure,[186] prescribing what is a "final order" for purposes of appeal of court orders, may provide a helpful analogy. Among other things, this rule designates as a final, appealable order "an order affecting a substantial right in an action, when such order in effect determines the action

183. The matter is somewhat further complicated in a permit proceeding initiated directly with the State Engineer by the fact that the applicant would have the right to appeal the State Engineer's adverse decision to the Board of Control. WYO. STAT. § 41-216 (1957). It is also unclear whether this appeal would be available in a review proceeding under the Siting Act and, if available, whether the decision of the Board would be subject to immediate judicial review. For purposes of this discussion, we will continue to refer to judicial review of the Engineer's decision, recognizing that an administrative appeal to the Board of Control may be required before resorting to judicial review, if the latter is available at this stage of the siting permit proceedings.

184. *See* DAVIS, ADMINISTRATIVE LAW TREATISE § 20.05 (1958 & Supp. 1970).

185. *Id.*

186. WYO. R. CIV. P. 72(a).

and prevents a judgment."[187] If the quoted rule of civil procedure can be applied to judicial review of administrative determinations, a decision of the State Engineer adverse to the applicant's proposed water use, which will prevent the issuance of a siting permit, should entitle the applicant to immediate judicial review. Difficulties arise, however, in attempting to apply Rule 72 to agency decisions.

The most obvious difficulty encountered is that nothing in Rule 72 purports to relate to administrative decisions, the rule dealing expressly with court actions only. Further, Rule 72.1, which is a separate rule specifically governing procedure upon judicial review of administrative action, does not employ the term "final order" but instead adopts the terms "final decision" and "agency action or inaction" utilized by the Wyoming Administrative Procedure Act pursuant to which it was adopted.[188] The discrepancy might be explained by expediency, these latter terms being more in keeping with administrative terminology than the term "order" which is usually employed to denote judicial decisions. However, the failure of separate Rule 72.1 to define final decision and agency action in a manner similar to Rule 72's definition of final order, coupled with the absence from both Rules 72 and 72.1 of any explicit provision indicating that the former's more liberal definition is intended to apply to agency decisions and actions, leaves some question respecting that definition's applicability. Furthermore, the mandate of the Wyoming Administrative Procedure Act that administrative remedies be exhausted prior to judicial review[189] might require that all siting permit proceedings be completed as a condition precedent to review of any decision rendered during the course of those proceedings, with the referral to the State Engineer being seen as a decision rendered during the course of the siting permit proceedings. This view might be countered, however, by the observation that, since the Engineer's decision is binding on the Council, the applicant has exhausted its remedies respecting the ap-

187. WYO. R. CIV. P. 72(a). No Wyoming cases have been found interpreting this provision.
188. WYO. STAT. § 9-276.32(b) (Supp. 1975).
189. WYO. STAT. § 9-276.32(a) (Supp. 1975).

proval of proposed water use. An additional objection to immediate review might also be raised on grounds of possible duplication of effort. If some of the evidence presented to the State Engineer must also be considered by the Siting Council in making its decision on the environmental, social and economic impact of the proposed facility,[190] this duplicate evidence might also become the subject of two separate judicial reviews rather than the single one that would occur if judicial review is postponed until the Council's decision is made.

In the face of considerations which favor postponement of judicial review until the Siting Council renders its final decision on the siting application, the most compelling countervailing factors appear to be those of useless effort and expense. Since a Siting Council decision favorable to the applicant is precluded by the binding decision of the State Engineer, this latter decision compels the applicant's resort to judicial review unless it is content to abandon the proposed facility or is able to redesign the facility to obviate the necessity of the water use as proposed. Assuming that the first alternative is unpalatable and the second infeasible, postponing judicial review will necessitate completion of the siting permit proceeding which may entail considerable time, effort and expense for all parties as well as the Council.[191] In the event of subsequent judicial affirmation of a siting permit denial based upon the Engineer's negative action, the balance of the proceeding will have been pursued in vain. Nor does it seem a satisfactory answer to this practical consideration that, under other state siting statutes requiring the siting agency to determine all component issues relating to a permit grant, it may be necessary to conclude the entire siting permit proceeding before the applicant learns that the ultimate decision will be adverse. Under the procedure prescribed by the Wyoming Siting Act, it is known that the

190. *See* discussion in text accompanying notes 125-42, *supra*.

191. In addition to the time devoted to hearings, the intensive study can extend for 300 days. WYO. STAT. § 35-502.84(d) (Supp. 1975). The maximum filing fee is 0.5% of the facility's estimated cost, but not more than $100,000. WYO. STAT. § 35-502.81(b) (Supp. 1975). The maximum study fee is 0.5% of the first $100,000,000 estimated cost and 0.25% of any additional estimated cost, but not more than a total of $1,000,000. WYO. STAT. § 35-502.83 (Supp. 1975).

ultimate decision will be adverse as soon as the decision of the reviewing agency is rendered. Perhaps there should be found in the adoption of this referral procedure by the Legislature an implicit intention that a decision by the reviewing agency adverse to the applicant constitutes a final decision or agency action entitling the applicant to immediate judicial review.[192]

6. What is the Effect of a Permit Application Filed with Another State Agency Prior to the Filing of the Siting Permit Application?

In providing for referral for review, the Siting Act apparently assumes that applicants for siting permits will not have filed applications with "reviewing agencies" before the siting permit application is filed. When an early filing with another agency may affect the substantive rights of the applicant, however, it may desire to file an application with another agency before the siting permit application can be filed with the Council. For instance, since, under Sections 41-144 and 44-212 of the Wyoming Statutes, the priority of a water use appropriation dates from the filing of a permit application in the State Engineer's office, the applicant may desire to file a water use application with the Engineer as early as possible. If an application is filed with the Engineer for a water use permit in connection with a facility which appears to be subject to the jurisdiction of the Siting Council, questions will arise respecting the Engineer's jurisdiction and obligations. May he proceed to issue or deny a permit or should he decline to act on the ground that the proposed use must be included in the siting permit application, to be reviewed by him upon referral by the Siting Council? Section 2 of the Siting Act, appearing in chapter 169 of the Session Laws of 1975, providing that the Act's provisions

192. Another method by which the applicant might seek to obtain a judicial reversal of the State Engineer's adverse decision is by writ of mandamus. Rule 72.1(c) specifically recognizes the availability of actions for mandamus to compel administrative action. WYO. R. CIV. P. 72.1(c). While mandamus is usually considered available only to compel ministerial acts, in some extraordinary cases, courts have employed the writ to reverse an interlocutory order of a lower court which they find involves an abuse of discretion. *E.g.*, La Buy v. Howes Leather Co., 352 U.S. 249 (1957); Burke Concrete Accessories, Inc. v. Superior Court, 8 Cal. App. 3d 773, 87 Cal. Rep. 619 (1st Dist. 1970).

supercede any conflicting law, rule or regulation, might be read to require that the Engineer decline to act on the application filed with him. If so, it is unclear whether the mere filing of the water permit application will nevertheless fix the priority of the applicant's later water use appropriation.

If the Engineer does process the water use application and renders a decision before referral by the Council in accordance with the Siting Act's direction, what is required of him when the referral is made? Must the Engineer conduct a new appraisal of the proposed water use or should he merely advise the Council that he has previously approved this use? Are additional parties now entitled to present their views for consideration by the Engineer and, if so, for what purpose? May the Engineer reconsider the proposed use and reverse his prior determination? Further, what effect should the Engineer's prior issuance of a permit, if permissible, have on the scope within which his decision is binding upon the Siting Council? While neither the Siting Act nor the Siting Regulations appear to address themselves to any of these questions, clearly the Siting Act and the water use statutes should be interpreted in such a way that the order of filing applications will not affect the rights or duties of the parties to the siting permit proceeding.

PARTIES TO THE SITING PERMIT PROCEEDING

The Statutory Parties

Siting statutes adopted by the states have varied widely in providing for participation in permit proceedings. Some siting statutes provide for participation by all interested persons,[193] or by all persons whom the siting agency deems appropriate, together with certain specified parties.[194] Some statutes specify that the parties shall be, or shall include, the applicant, governing bodies of local governmental subdivisions in the area in which a proposed facility will be located or the area affected by that facility, persons residing in the

193. ME. REV. STAT. ANN. tit. 38, § 484 (Supp. 1973); MONT. REV. CODES ANN. § 70-808 (Cum. Supp. 1974); WASH. REV. CODE ANN. § 80.50.090 (Supp. 1974).

194. ARIZ. REV. STAT. ANN. § 40-360.05 (1974); CONN. GEN. STAT. ANN. § 16-50n (Cum. Supp. 1975); N.Y. PUB. SERV. LAW, bk. 47, §§ 124, 144 (McKinney Supp. 1975).

specified area and interested domestic nonprofit organizations;[195] some of these accord party status to persons or nonprofit organizations only upon a showing of good cause.[196] Frequently statutes provide for limited appearance by other persons, such persons often being limited to filing written statements and denied the right to present oral testimony or cross-examine witnesses.[197] One siting statute accords party status to any state agency with jurisdiction over some aspect of the proposed facility[198] while some others name various state agencies as parties to the permit proceedings.[199]

The importance of party status in the Wyoming permit proceeding inheres not only in the rights which that status accords the party to participate in all aspects of hearings,[200] but in the fact that a party may be entitled to participate also in other aspects of the proceeding. In its provision according party status to certain specified persons or entities, the Wyoming Siting Act declares that they shall be parties to the "permit proceeding"[201] rather than to the hearings before the Council. In making the chosen persons or entities parties to the proceeding, the Legislature has accorded them the right to participate, or at least be represented, in informal conferences between the applicant and the Siting Office

195. ARK. STAT. ANN. § 73-276.6 (Cum. Supp. 1973); MONT. REV. CODES ANN. § 70-808 (Cum. Supp. 1974); NEV. REV. STAT. § 704.885 (1973); N.Y. PUB. SERV. LAW, bk. 47, §§ 122, 144 (McKinney Supp. 1975); OHIO REV. CODE ANN. § 4906.08 (Baldwin 1974); S.C. CODE ANN. § 58-1813 (Cum. Supp. 1974).

196. ARK. STAT. ANN. § 73-276.6 (Cum. Supp. 1973); NEV. REV. STAT. § 704.855 (1973); OHIO REV. CODE ANN. § 4906.08 (Baldwin 1974); S.C. CODE ANN. § 58-1813 (Cum. Supp. 1974).

197. ARIZ. REV. STAT. ANN. § 40-360.05 (1974); ARK. STAT. ANN. § 73-276.6 (Cum. Supp. 1973); NEV. REV. STAT. § 704.855 (1973); N.Y. PUB. SERV. LAW, bk. 47, §§ 122, 144 (McKinney Supp. 1975); OHIO REV. CODE ANN. § 4906.08 (Baldwin 1974); S.C. CODE ANN. § 58-1813 (Cum. Supp. 1974).

198. ARIZ. REV. STAT. ANN. § 40-360.05 (1974).

199. ARK. STAT. ANN. § 73-276.6 (Cum. Supp. 1973); CONN. GEN. STAT. ANN. § 16-50n (Cum. Supp. 1975); MONT. REV. CODES ANN. § 70-808 (Cum. Supp. 1974); NEV. REV. STAT. § 704.885 (1973); N.Y. PUB. SERV. LAW, bk. 47 §§ 122, 144 (McKinney Supp. 1975); OHIO REV. CODE ANN. § 4906.08 (Baldwin 1974); S.C. CODE ANN. § 58-1813 (Cum. Supp. 1974).

200. WYO. STAT. §§ 9-276.25, -276.30 (Supp. 1975).

201. WYO. STAT. § 35-502.85(a) (Supp. 1975). Most of the other state siting statutes also provide that the persons or entities which they specify are parties to the permit or certification proceedings. *E.g.*, ARIZ. REV. STAT. ANN. § 40-360.05 (1974); ARK. STAT. ANN. § 73.276.6 (Cum. Supp. 1973); MONT. REV. CODES ANN. § 70-808 (Cum. Supp. 1974); N.Y. PUB. SERV. LAW, bk. 47, §§ 122, 144 (McKinney Supp. 1975); OHIO REV CODE ANN. § 4906.08 (Baldwin 1974).

staff as well as in formal hearings held by the Council.[202] Since the complex nature of the subject matter frequently involved in the permit proceedings may encourage, or even necessitate, the resolution of problems by negotiation between the applicant and the staff rather than at the public hearings,[203] representation of other parties at informal conferences may be crucial if they are to play a meaningful role in the permit process.[204] As participants in the total permit proceedings, therefore, those accorded party status may enjoy a unique opportunity to affect the nature of the facility ultimately presented for Council approval.

In spite of the inclusion of a provision concerning parties to the proceeding, the Wyoming Siting Act fails to provide a clear guideline for establishing who shall be entitled to become parties. Section 35-502.85(a) of the Act provides that:

> The parties to a permit proceeding include:
>
> (i) The applicant;
>
> (ii) Each local government entitled to receive service of a copy of the application[205] . . .;

202. For example, in designing the intensive study (WYO. STAT. § 35-502.84(a) (Supp. 1975)); or working out changes or modifications in the construction, operation or maintenance of the facility (WYO. STAT. §§ 35-502.82(e)(iii), -502.87(a) (Supp. 1975); or negotiating an appropriate delay in commencement time (WYO. STAT. §§ 35-502.82(e)(ii), -502.87(d) (Supp. 1975)), many informal conferences may be required between the applicant and the Siting Office staff.

203. *See* the enlightening discussion respecting private negotiations between permit applicants and agency personnel in Case & Schoenbrod, *supra* note 6, at 979-88.

204. One of the impediments to effective participation in informal conferences by other parties to the proceeding is that at least some of these may occur before the application is filed. For example, the Siting Regulations recommend that, prior to filing an application, the applicant consult with the Siting Office and its Director respecting identification of the areas of site influence and areas or local governments primarily affected by the proposed facility. SITING REGS. § 5c (1975). While consultation upon this and other matters may be desirable and, perhaps, even necessary for the guidance of the applicant, in view of the importance of public participation in the informal aspects of the siting proceeding, prefiling consultations should be utilized sparingly. The Director and his staff should avoid irrevocable commitments whenever possible.

205. This subsection refers to Section 35-502.82(a)(i), WYO. STAT. (Supp. 1975), which provides for service of notice of the application upon "the governing bodies of local government which will be primarily affected by the proposed facility." It is assumed that reference in Section 35-502.85(a)(i), WYO. STAT. (Supp. 1975), to service of a copy of the application while Section 35-502.82(a)(i) provides for service of notice of application was inadvertent. Otherwise, since neither Section 35-502.82(a)(i) nor any other section of the Act requires service of a copy of the application on local governments, no local government would be authorized to become a party to the proceeding—a result which is clearly not intended by the Act.

> (iii) Any person residing in a local government entitled to receive service of a copy of the application . . . and any nonprofit organization with a Wyoming chapter, concerned in whole or in part . . . [with various specified environmental, social or economic matters].[206] In order to be a party the person or organization must file with the office [of industrial siting administration] a notice of intent to be a party not less than ten (10) days before the date set for the hearing. (footnotes added).[207]

The local governments entitled to receive notice of the application are those which will be primarily affected by the proposed facility.[208] These primarily affected local governments and those persons residing within their geographic boundaries are entitled to become parties to the permit proceeding. Unfortunately, however, the Act includes no standards to assist in determining what is a primarily affected local government. Perhaps this omission may be ascribed to the fact that the types of activities regulated by the Siting Act are so diverse that no single, all-inclusive standard could be formulated. Nevertheless, when each application is filed, the applicant,[209] the Director[210] and the Siting Council[211] must

206. The nonprofit organizations entitled to participate are those with a Wyoming chapter, concerned in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be located.

207. WYO. STAT. § 35-502.85(b) (Supp. 1975) further provides that:

> Any party identified in W.S. 35-503.85(a)(iii) waives his right to be a party if he does not participate orally at the hearing.

The Act does not specify whether failure to file the required notice and participate in the initial hearing precludes these persons or organizations from participating as parties in the final hearing.

208. WYO. STAT. § 35-502.82(a)(ii) (Supp. 1975).

209. The Siting Regulations require that the application identify what it deems to be "the area(s) or local governments primarily affected by the proposed facility." SITING REGS. § 5e (1975). While this section specifies that this identification is not binding on the Council, it recommends that the applicant confer in this respect with the Siting Office and the Director and indicates that the Director's recommendation, as agreed to by the applicant, will be considered by the Council. Nothing is said as to the force of the Director's recommendation if the applicant and Director fail to agree.

210. The Director must determine initially what local governments will be primarily affected since he is obligated to serve notice of the application upon the governing bodies of those governments. WYO. STAT. § 35-502.82(a)(i) (Supp. 1975).

211. Since, under WYO. STAT. § 35-502.85 (Supp. 1975), local governments primarily affected and persons residing therein are entitled to participate in the permit proceeding as parties, it seems clear that they are not bound by the determination of the Director. It may, therefore, become necessary for the Siting Council to determine whether a local government has been properly included, or excluded, by the initial determination of the Director. *See* SITING REGS. § 5c (1975).

identify the primarily affected local governments in order that the parties to the proceeding may be determined.

Since the local governments referred to are those primarily affected, not every local government is accorded party status, even though it (and its residents) will be affected to some degree by the proposed facility. In view of this limitation, it might be argued that only the governing bodies of local government located within the county where the proposed facility will be situated are "primarily affected." If this were the Act's intent, however, it may be assumed that this provision would have referred specifically to the county or counties in which all or part of the facility is to be physically situated. Another possible interpretation of "primarily affected" might be that, in order to be the primary local government affected, a local government must be shown to suffer a greater portion of the impact of the proposed facility than other local governments. The only local government included by this interpretation would be the one which will be more substantially affected than all others—that is the most substantially affected. That such a narrow reading of "primarily affected" was not intended may be inferred from the Act's reference to "the local government, most substantially affected by the proposed facility,"[212] in authorizing the Siting Council to delay commencement of construction under certain circumstances. By comparison with this provision the choice of the term "primarily affected" in the notice provision implies an intention to extend party status beyond the local government, and its residents, most substantially affected by the proposed facility.

The question remains how far beyond the most substantially affected local government this provision extends. Expounding upon the Act's use of primarily affected, the Siting Regulations find that the term includes:

> (1) Any unit of local government in which any part of the proposed facility will be physically located; or
>
> (2) Any defined geographical area or unit of local government in which the construction or oper-

212. WYO. STAT. § 35-502.87(d) (Supp. 1975).

> ation of the facility may significantly affect the environment, population, level of economic well-being, level of social services, or may threaten the health, safety or welfare of present or expected inhabitants.[213]

While the Siting Council may not, by regulation, either expand or restrict the statutory prescription of parties to the permit proceeding, the Council's interpretation of any provision should be sustained if reasonable in relation to the purposes of the statute. As the foregoing analysis suggests, a local government may be considered primarily affected even though the facility will not be situated within its territorial borders and the effect upon it will not be greater than that on any other local government. In view of the Act's purpose to evaluate and regulate the impact of proposed, major, economic activities upon environmental, social and economic conditions, the Regulations' attempt to define "primarily affected" in terms of a facility's effect upon these conditions seems to satisfy the "reasonable" requirement. Even though application of the Regulations' "significantly affect" test[214] will not automatically resolve all of the problems concerning which affected local governments and residents are entitled to party status, it will avoid the interpretative difficulties inherent in the Act's "primarily affected" formula. Beyond this, the Siting Council and its Director will be faced with the task of determining, as each application is filed, which areas will be significantly affected.

The Intervenors

Persons who do not reside within a local government deemed by the Siting Council to be primarily affected by the proposed facility, and others not included within the statutory party provision, may nevertheless consider that their

213. SITING REGS. § 2(p) (1975).

214. Inexplicably Section 2(p) of the Siting Regulations varies its definition of "primarily affected" areas depending on whether the effect is upon environmental, social and economic conditions or upon health, safety and welfare. An area is considered primarily affected if a facility may *significantly affect* environmental, economic and social conditions; the same area is considered primarily affected by a facility if it may *threaten* health, safety and welfare of the area's present or expected inhabitants. No justification for this distinction is apparent.

interests will be adversely affected.[215] Some areas within the state may have such unique environmental, aesthetic, scenic, historic or recreational value that concern with developments which may affect them will extend far beyond the geographic areas of local governments primarily affected. The possible effect of a proposed facility may be of sufficient importance that one or more federal or state agencies whose areas of responsibility are affected may wish to intervene in the permit proceedings.[216] Although the Siting Council is required to obtain information from and consider recommendations of other state agencies specified by the Siting Act,[217] in some cases, this advisory role may not be considered as effective as formal participation in the proceeding, which enables the participant to propose issues for consideration, present evidence in the context of the hearing, cross-examine witnesses, present oral argument, brief specific issues and otherwise support its position.[218] Even the Director of the Siting Office may, on some occasions, deem intervention desirable.[219] May any of these persons or agencies intervene or is their intervention precluded by the Siting Act's enumeration of parties?

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215. These persons, while not accorded party status by the Siting Act, are permitted to submit written statements of their views to the Council. WYO. STAT. § 35-502.85(c) (Supp. 1975).

216. State and federal governmental bodies and local governmental bodies which are not statutory parties to the permit proceedings are evidently precluded even from submitting written statements; that right is accorded to "persons" and the Siting Act excludes those bodies from its definition of the term "persons." WYO. STAT. § 35-502.76(m) (Supp. 1975). Whether state and federal agencies are governmental bodies for this purpose is not clear. This exclusion is significant only with respect to federal agencies, however, since the Council is required to consider the views of other state agencies. WYO. STAT. §§ 35-502.78(f), -502.82(d), -502.84(b) (Supp. 1975).

217. WYO. STAT. §§ 35-502.78(f), -502.84(b) (Supp. 1975).

218. WYO. STAT. § 9-276.25 (Supp. 1975).

219. It seems curious that the Siting Office was not named as a party since, having participated in all other aspects of the proceeding, the Director may well possess valuable information respecting the proposed facility. The omission was evidently not inadvertent because the Montana Siting Act, upon which the Wyoming Act was patterned, does include its siting department as a party. MONT. REV. CODES ANN. § 70-808(1)(d) (Cum. Supp. 1974). In an apparent effort to rectify the most obvious shortcoming of this omission, the Siting Council's procedural regulations authorize the Chairman or presiding officer at a hearing to offer evidence necessary on behalf of the Council. RULES OF PRACTICE AND PROCEDURE OF THE WYOMING INDUSTRIAL SITING COUNCIL § 15(g) (1975). This appears to place the Siting Council in the anomolous position of sitting in a quasi-judicial capacity and, at the same time, authorizing its Chairman or presiding officer to present evidence which the Council must consider in arriving at its decision.

Although the Siting Act specifies certain persons entitled to become parties to the permit proceeding, it does not purport to exclude participation by all others, providing only that "The parties to a permit proceeding include" the specified persons. Moreover, the Siting Act incorporates the contested case provisions of the Wyoming Administrative Procedure Act[220] which, in addition to setting forth rules governing participation by parties, accords to any interested person the right to take part in administrative hearings if the conduct of orderly business permits.[221] While this latter provision reposes substantial discretion in the hearing agency,[222] cases decided under the Federal Administrative Procedure Act [223] have held that persons who would have standing to obtain judicial review of administrative action should ordinarily be permitted to intervene in the agency proceeding in order to insure proper representation of their interests.[224] Under both the Federal and the Wyoming Administrative Procedure Acts, any person adversely affected or aggrieved by agency action may obtain judicial review,[225] but the Wyoming Administrative Procedure Act denies the right of review if precluded or limited by statute or common law.[226] Any person whose right to obtain judicial review is precluded or limited by the Siting Act, therefore, may be foreclosed from reliance upon this basis for intervention.

While the Siting Act specifically accords the right to obtain judicial review to any of the Act's enumerated parties

220. WYO. STAT. § 35-502.86 (Supp. 1975).
221. WYO. STAT. § 9-276.25(j) (Supp. 1975).
222. The exercise of this discretion, however, should be limited to the question whether a person's participation will disrupt the orderly conduct of the permit proceedings.
223. 5 U.S.C. § 551 to 559 (1970). The Federal Act was the source of the REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT on which the Wyoming Act was patterned. The provisions of the federal and Wyoming acts respecting parties, interested persons and persons entitled to obtain review of administrative action are essentially similar except as indicated in connection with the following discussion of the federal court cases.
224. Nat'l Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1965); American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962). DAVIS, ADMINISTRATIVE LAW TREATISE § 8.11 (Supp. 1970); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 704, 710 (1972).
225. Federal Administrative Procedure Act § 10, 5 U.S.C. § 702 (1970); WYO. STAT. § 9-276.32(a) (Supp. 1975).
226. WYO. STAT. § 9-276.32(a) (Supp. 1975).

who is aggrieved by a final decision of the Council,[227] it does not purport to limit the right of review to these persons nor does it expressly preclude others from obtaining judicial review. In a case decided in 1970 under the Federal Administrative Procedure Act,[228] the Court of Appeals for the District of Columbia considered the right of a public interest group to intervene in a proceeding before the Secretary of Health, Education and Welfare. Finding that a statute which accorded party status only to affected states did not preclude the adversely affected public interest group from obtaining judicial review, the court held that the group should have been permitted to intervene in the agency proceeding. The court reasoned that according review (and intervention) rights to persons in addition to those named by the statute was not contrary to the purpose for which the statute had granted these rights to the persons specified. A similar rationale would seem applicable under the Siting Act. While many diverse interests may be represented by those whom the Act designates as parties, in some cases, others who are not so designated may represent additional or differing viewpoints. The diversity of possible interests affected by a decision predicated upon environmental, social and economic implications of a proposed facility would suggest that access to the proceeding should be liberally granted to insure a full public debate of all issues.

An additional problem arises in applying the Wyoming statutes to a petition for intervention by a state agency. The agency may be precluded from basing its intervention on the theory that it could obtain judicial review of a decision rendered by the Siting Council because the Wyoming Administrative Procedure Act accords review rights to "persons" and, in defining that term, excludes an agency.[229] It would appear that this exclusion is necessary to avoid the incongruity which would flow from according to an agency con-

227. WYO. STAT. § 35-502.88 (Supp. 1975).

228. Nat'l Welfare Rights Organization v. Finch, *supra* note 224.

229. WYO. STAT. § 9-276.19(b)(6) (Supp. 1975). It might also be asserted that intervention by a federal agency could not be predicated on the right of review analysis since the Siting Act expressly excludes the federal government from its definition of person (WYO. STAT. § 35-502.76(m) (Supp. 1975)) and the Wyoming Administrative Procedure Act's person definition

ducting a proceeding all of the rights and protections intended for "persons" participating in the proceeding. The exclusion is not expressly limited to the agency conducting the proceeding, however, and in a recent case involving the right of an agency to appeal a decision of the Career Service Council reversing the agency's dismissal of an employee, the Wyoming Supreme Court predicated denial of the agency's right of appeal upon the Wyoming Administrative Procedure Act's exclusion of an agency from its definition of "person."[230] The posture of appellant in that case seems distinguishable from that of the intervening agency since that case was before the Career Service Council upon appeal of the agency's decision while an agency intervening in the siting permit proceeding would occupy a status similar to any other party appearing before the Council. The desirability of agency intervention to represent public interests in its area of expertise may justify treating the agency for this purpose like other persons; yet a would-be agency intervenor will nevertheless have to contend with the Wyoming Administrative Procedure Act's exclusion of state agencies from its definition of the term "person." Notwithstanding the outcome of this issue, however, it should be recognized that the considerations governing standing to obtain judicial review differ markedly from those governing intervention[231] so that intervention may be appropriate even if review is not available.

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does not appear to include the federal government. (WYO. STAT. § 9-276.19 (b)(6) (Supp. 1975)). It is suggested, however, that the former provision is intended to relieve the federal government from the obligation of all persons to obtain a siting permit before construction of a facility. With respect to the latter provision, a liberal construction of the term "person" might nevertheless be appropriate where a federal agency seeks to represent a public interest in the siting proceedings. Furthermore, since the factors governing intervention and right to obtain judicial review are not identical (see note 231, infra), intervention may be appropriate even if it were found that the federal agency were not a person entitled to judicial review.

230. Pritchard v. State, ... P.2d ..... (Wyo. 1975).

231. While court decisions have predicated the right of a party to intervene in agency proceedings upon the right to obtain review, it has been pointed out that the considerations governing intervention and review are not identical and that intervention should be permitted when the intervenor's participation will contribute to adequate consideration of the interests which it represents, regardless of whether that intervenor would have standing to obtain review of the agency's ultimate decision. *See, e.g.*, 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22.08 (1958); Comment, *Public Participation in Federal Administrative Proceedings, supra* note 224, at 730-31.

Even though an administrative agency may be required in appropriate circumstances to permit intervention, both the right to intervene and the extent of an intervenor's participation in the agency proceeding are subject to limitation. Some authorities indicate that intervention may be denied altogether if the interest which the intervenor seeks to represent is already adequately represented by other parties to the proceeding.[232] Whether predicated upon these or other grounds, disallowance of intervention may often be motivated by an agency's concern that a permissive intervention policy will encourage a great influx of participants in proceedings before it, with the result that hearings will be unduly lengthened and complicated by redundant testimony, cross-examination and argument. This concern appears to be unfounded when one recognizes that, as a practical matter, all but the most highly motivated are likely to be deterred from intervention by the difficulties and expense of involvement in protracted legal proceedings.[233] Nor is it necessary that intervention of additional parties, when permitted, result in the feared lengthening and complication of the proceeding. Many mechanisms are available to avoid this result. The presiding officer at the hearing is empowered to exclude irrelevant, immaterial and unduly repetitious evidence,[234] to limit cross-examinations[235] and otherwise control hearings to avoid undue expansion and delay.[236] Furthermore, the right to intervene does not automatically carry with it participation in all phases of proceeding or in the presentation of all issues under consideration. Unlike other parties, an intervenor may be excluded from participation in aspects of the proceeding other than formal hearings[237]

232. *See* Comment, *Public Participation in Federal Administrative Proceedings*, *supra* note 224, at 710. The Comment indicates, however, that this is a narrow exception to the current rule favoring intervention.

233. *See* Nat'l Welfare Rights Organization v. Finch, *supra* note 224, at 738; Office of Communication of the United Church of Christ v. FCC, *supra* note 224, at 1006; Scenic Hudson Preservation Corp. v. FPC, 354 F.2d 608, 617 (2d Cir. 1965).

234. WYO. STAT. § 9-276.26(a) (Supp. 1975).

235. WYO. STAT. § 9-276.26(c) (Supp. 1975).

236. Nat'l Welfare Rights Organization v. Finch, *supra* note 224; Office of Communications of the United Church of Christ v. FCC, *supra* note 224; Scenic Hudson Preservation Corp. v. FPC, *supra* note 233.

237. Nat'l Welfare Rights Organization v. Finch, *supra* note 224, at 739.

and may be limited to participation in those portions of the hearings involving the specific issues which form the basis for his intervention.[238]

For the purpose of facilitating decisions upon petitions for leave to intervene, federal administrative agencies have often adopted procedural rules specifying the factors which they will consider in acting upon those petitions.[239] It seems unfortunate that a similar approach has not been followed by the Siting Council in the preparation of its rules of practice and procedure.[240] A rule of this nature could provide valuable guidance to anyone seeking to intervene in Siting Council proceedings and should serve to standardize the Council's determination in respect to such petitions. Whether or not the Council chooses to adopt a rule for this purpose, it is suggested that the goals of the Siting Act will be served by a liberal allowance of intervention whenever it appears that the intervenor may represent interests not otherwise adequately represented by the parties to the permit proceeding.

CONCLUSION

In enacting the Wyoming Siting Act the Legislature has recognized the need for an administrative mechanism capable of reconciling the aims of industrial development with widespread public concern for the possible adverse effects of that development upon environmental, social and economic conditions prevailing in the State. While the Legislature's decision to broaden the Act's scope beyond the rather narrow area of power plant siting seems commendable, the method of achieving this goal raises questions about the nature of activities included by the term "industrial facility" and about those costs to be considered in determining estimated construction cost. Appropriate answers to these questions will be found if due regard is accorded the remedial purposes of the Siting Act; where clarity is lacking, or terms

238. *See* Note, *Intervention by Third Parties in Federal Administrative Proceedings*, 42 NOTRE DAME LAW. 71, 72-74 n.23 (1966).

239. *Id.* at 72 n.10.

240. RULES OF PRACTICE AND PROCEDURE OF THE WYOMING INDUSTRIAL SITING COUNCIL (1975).

left undefined, substantial weight should be accorded to reasonable interpretations supplied by the Siting Regulations. The utilization of the fifty million dollar jurisdictional minimum seems unfortunately arbitrary. It might be desirable to replace this provision with a more flexible standard, relating the Siting Council's jurisdiction more directly to probable adverse effects of a proposed facility.

If judiciously administered, the Act's two-step hearing approach will permit identification of the occasional situation in which a proposed facility is unlikely to involve sufficiently adverse effects to warrant the intensive investigation and second hearing required for most facilities. As enacted, however, the authority for early permit grant will produce an undesirable result if facilities which might not have qualified for a permit after full investigation are approved upon only a preliminary review. Care must be exercised to employ the early permit authority only when the Council is convinced, upon preliminary evaluation, that the facility will involve no significant adverse effects, thereby renderng further study and investigation unnecessary.

By rejecting the "one-stop" siting mechanism and providing instead for additional proceedings before other state agencies, the Siting Act creates problems respecting both the scope within which other agencies' decisions bind the Council and the procedure to be followed in review proceedings before other agencies. Resolution of these problems will require an appreciation of the need for expeditious permit proceedings and for adequate consideration of a proposed facility's possible adverse effects. In this connection appropriate public participation in the various aspects of the proceedings should be insured.

Problems will sometimes arise in determining who should be entitled to participate in the permit proceedings. Many of these may be solved by flexible liberality in identifying those local governments which will be primarily affected by the proposed facility. Moreover, in order to achieve representation of all legitimate interests, the Council should permit intervention by any person who might otherwise be

excluded whenever the intervenor's interest is not otherwise fully represented by persons who are already parties to the permit proceedings.

While one may occasionally succumb to the temptation to characterize the Siting Act as a morass of discouraging, internal conflicts and inconsistencies, careful analysis encourages the conclusion that, administered with a watchful eye upon its overriding purposes, the Act will facilitate rational reconciliation of the many diverse interests inevitably affected by the coming economic development in Wyoming.