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ADMINISTRATIVE LAW—The Scope of Judicial Review of Administrative Actions, Laramie River Conservation Council and Powder River Basin Resource Council v. Industrial Siting Council of the State of Wyoming and Basin Electric Power Cooperative, 588 P.2d 1241 (Wyo. 1978).

Eight years ago, the Missouri Basin Systems Group invited regional power suppliers¹ to participate in building joint generation facilities. This invitation matured into the Missouri Basin Power Project² to construct the Laramie River Station,³ a 1.3 billion dollar,⁴ 1,500 megawatt, three unit coal-fired steam electric generating station⁵ with attendant facilities.⁶ Once the magnitude of the project was determined, the construction period was calculated to be seven and one-half years.⁷ However, construction was delayed by the enactment of the Industrial Development Information and Siting Act⁸ on June 1, 1975. Even though a sizable investment⁹ had already been made on the project, the proposed Laramie River station fell within the Act's proscription.

No person shall commence to construct a facility, as defined in this act, in the state without first having obtained a permit issued with respect to such facility by the council.¹⁰

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1. Lincoln Electric System of Lincoln, Nebraska, Hartland Consumers Power District, Missouri Basin Municipal Power Agency, and Basin Electric Power Cooperative began the planning process. Tri-State Generation and Transmission Association, Inc. and the Wyoming Municipal Electric Joint Powers Board joined later. Cox, MISSOURI BASIN POWER PROJECT CHRONOLOGY 1971-1978 (unpublished document for the Powder River Basin Resource Council). See also, Brief for Appellee at 5, Laramie River Conservation Council v. Industrial Siting, 588 P.2d 1241 (Wyo. 1978). [hereinafter cited as Laramie River].
2. The appellee, Basin Electric Power Cooperative is the designated project manager of the Missouri Basin Power Project. Transcript of Trial Proceedings at 49, Laramie River.
3. This facility is to be located in Platte County, Wyoming, on the south bank of the Laramie River, approximately five miles northeast of Wheatland, Wyoming. Laramie River at 1244.
4. Brief for Appellant at 2, Laramie River. In 1975 dollars, the anticipated total cost of the Laramie River Station and its appurtenant facilities is approximately \$975,927,758. Laramie River at 1244.
5. Brief for Appellee at 4, Laramie River.
6. "Attendant proposed facilities include the Grayrocks Dam and Reservoir, with a design storage capacity of 104,000 acre feet covering a surface area of 3,547 acres at normal high water level (TR-188), and numerous transmission lines radiating from the plant." Brief for Appellee at 4, Laramie River.
7. Brief for Appellant at 2, Laramie River.
8. WYO. STAT. §§ 35-12-101 - 35-12-121 (1977).
9. From January through October of 1973, the project authorized the purchase of lands and water rights for the Laramie River Station and the Grayrocks Reservoir. NEWS FROM THE LARAMIE RIVER CONSERVATION COUNCIL, FOR RELEASE OCTOBER 10, 1978 (unpublished document). In August of 1974 the Rural Electrification Administration executed a loan commitment agreement with the Federal Financing Bank (Department of the Treasury) for \$1.5 billion of which \$1.2 billion was ultimately committed to the construction of the project. MISSOURI BASIN POWER PROJECT CHRONOLOGY, *supra* note 1.
10. WYO. STAT. § 35-12-106(a) (1977).

The permitting process set out in the Siting Act was designed to provide Wyoming with a comprehensive scheme to maintain control over location, size and operation of a proposed facility so as to protect the physical environment and mitigate the social and economic impacts of natural resource and industrial development. The regulatory powers described in the Siting Act are primarily vested in the Industrial Facility Siting Administration¹¹ but the final decision¹² on permit applications is made by a seven person citizen council appointed by the Governor.¹³

A complete application for a siting permit was filed by Basin Electric Power Cooperative with the Industrial Siting Council on December 22, 1975.¹⁴ Four months later,¹⁵ at the end of Stage I¹⁶ and after the requisite¹⁷ notice and public hearing,¹⁸ the council approved the application and issued a permit subject to conditions. In so doing, the council found that Basin Electric Power Cooperative adequately met the statutory requirements:

(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 con-*

11. WYO. STAT. § 35-12-103 (1977).

12. The council does not select the location of facilities or evaluate alternative sites. It does, however, pass judgment on the adequacy of the site selected by the development company and it may impose conditions on and monitor the construction of the facility.

13. WYO. STAT. § 35-12-106 (1977).

14. In the Matter of Basin Electric Power Cooperative, Docket No. WISA-75-3 at 3 (April 26, 1976).

15. April 29, 1976, *Id.* Permit No. ISC-00-02-76.

16. The Siting Act establishes a two stage permitting process. Stage I requires the submission of the application, staff review and council consideration and determination as to:

“(i) Approving the application and issuing a permit with no conditions;

“(ii) Approving the application and issuing a permit conditioned upon commencing the construction at a reasonable time specified by the council;

“(iii) Approving the application and issuing a permit conditioned upon specified changes in the application;

“(iv) Rejecting the application pending further study as required by the council if the applicant is not able to demonstrate to the council that the requirements of subsection (c) of this section have been met.” WYO. STAT. § 35-12-109(e) (1977).

Stage II decisions are governed by WYO. STAT. § 35-12-114 (1977) which requires intensive investigation, study and evaluation of the proposed facility, its purpose, and seven “impact” elements. WYO. STAT. § 35-12-111 (1977). The cost of this study is borne by the applicant and may be as much as one million dollars. WYO. STAT. § 35-12-110 (1977).

17. WYO. STAT. § 35-12-109 (1977).

18. A prehearing conference was held on the application on February 12, 1976. The evidentiary hearing was conducted on February 23-27 and March 2-4, 1976. Basin Electric Power Cooperative, *supra* note 14, at 4-5.

dition 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.¹⁹

Contending that the council should have rejected the application pending further study in the Stage II analysis, Laramie River Conservation Council and Powder River Basin Resource Council appealed the decision to the district court for judicial review under the Wyoming Administrative Procedure Act.²⁰ The district court affirmed the final order of the Siting Council granting the permit.²¹ On appeal, the Wyoming Supreme Court defined the proper standard for judicial review of the council's decision to grant the permit. Limited by this standard, the court affirmed the order of the district court and held that the record was sufficient to support the factual determinations made by the Industrial Siting Council.²²

SCOPE OF REVIEW

The Industrial Siting Act establishes the right of an aggrieved party to obtain judicial review when a decision is issued after a hearing on an application for a permit.²³ The Siting Act requires the standard for review to be the same standard used in all contested cases under the Wyoming Administrative Procedure Act.²⁴

Specifically the Court's review is limited to a determination that:

- (i) the agency acted without or in excess of its powers;
- (ii) the decision or other agency action was procured by fraud;
- (iii) the decision or other agency action is in conformity with law;

19. WYO. STAT. § 35-12-109 (1977).

20. WYO. STAT. §§ 9-4-101 - 9-4-115 (1977).

21. Laramie River at 1244.

22. Laramie River at 1245.

23. WYO. STAT. § 35-12-115(a) (1977).

24. WYO. STAT. § 35-12-115(b) (1977).

(iv) the findings of facts in issue in a contested case are supported by substantial evidence; and

(v) the decision or other agency action is arbitrary, capricious or characterized by abuse of discretion.²⁵

This standard limits the scope of judicial review into the agency action and such a limit is necessary both as a practical and legal matter. As a practical matter, the court's role in reviewing agency action should not put the courts and the agencies in competition. It should allow the court to recognize and protect the integrity and autonomy of the administrative process and yet still function as supervisor of the administrative agencies in furtherance of the public interest.²⁶ As a legal matter, if a court tries the issues anew, exercising its independent judgment on the merits, facts, or evidence, or substitutes its judgment and discretion for that of the administrative agency, such court action would be in excess of its constitutional powers.²⁷ Such action would be to perform duties, administrative or legislative in nature, assigned by law to administrative agencies,²⁸ in violation of the doctrine of separation of powers.

Inasmuch as the scope of review is limited by the standard set out in the Administrative Procedure Act, it is essential that a reviewing court understand and correctly apply this standard. The purpose of this note is to evaluate the court's scope of review in the instant case as an expression and application of the standard for review. This evaluation requires a discussion of the scope of the court's power to scrutinize the product of the administrative process by inquiring into: (1) the lawfulness or legality of the administrative action or order, and (2) the reasonableness of the administrative action or order.

An inquiry into the legality of the administrative order under the Wyoming Administrative Procedure Act may involve determining whether the agency acted in excess of its

25. WYO. STAT. § 9-4-114(c) (1977).

26. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. den., 403 U.S. 923 (1971).

27. 2 AM. JUR. *Administrative Law* § 613.

28. *Sweetwater Co. Pl. Com. For Org. Sch. Dist. v. Hinkle*, 493 P.2d 1050, 1052 (1972).

powers²⁹ or whether the action was procured by fraud.³⁰ It also may raise the question of whether the administrative action or order is in conformity with the procedures mandated by the Administrative Procedure Act.³¹ The Laramie River case does not examine this aspect of the proper scope of judicial review. Therefore, the issue of the legality of the agency action will not be further explored.

An inquiry into the reasonableness of the administrative action or order is not the power "to determine whether the action is right, correct, wise, advisable or best fitted to the situation involved."³² Rather, it involves the examinations of three statutory issues:

1. review the agency's determinations of law under the standard of whether the decision is in conformity with law;³³
2. review the agency's findings of fact under the standard of whether the findings are supported by substantial evidence;³⁴ and
3. review the validity of the agency's inferences (i.e. the agency's discretionary determinations that the law applies to the facts as proven), under the standard of whether the decision is arbitrary, capricious or characterized by abuse of discretion.³⁵

The Laramie River case explores the reasonableness aspect of the scope of judicial review. As stated above, this note will evaluate the court's scope of review in determining the reasonableness of the agency action under the standards set out in the Wyoming Administrative Procedure Act. The conclusion of this note will be that, under the proper standard for review, the scope of judicial review is dependent upon the type of agency determination being reviewed (law, fact, or inference). However, the instant case illustrates the court's tendency to commingle these three aspects of review, and migrate to a middle position of the "substantial evidence" rule for all three determinations. To this extent meaningful judicial review in Wyoming is impaired.

29. WYO. STAT. § 9-4-114(c)(i) (1977).

30. WYO. STAT. § 9-4-114(c)(ii) (1977).

31. WYO. STAT. § 9-4-114(c)(iii) (1977).

32. 2 AM. JUR. *Administrative Law* § 611.

33. WYO. STAT. § 9-4-114(c)(iii) (1977).

34. WYO. STAT. § 9-4-114(c)(iv) (1977).

35. WYO. STAT. § 9-4-114(c)(v) (1977).

FINDINGS OF FACT AND THE SUBSTANTIAL EVIDENCE RULE

The Wyoming Administrative Procedure Act limits court review of findings of fact by an agency to the question of whether the findings are supported by substantial evidence.³⁶ This codifies the general rule that "the findings of an [administrative agency] as to the facts, *if supported by substantial evidence*, shall be conclusive."³⁷ The meaning of "substantial evidence" is explored in the Laramie River case:

[I]t may be less than the weight of the evidence, but it cannot clearly be contrary to the overwhelming weight of the evidence. More is required than a mere scintilla of evidence or suspicion of the existence of a fact to be established.³⁸

This definition is as clear and as vague as it should be.³⁹ The substantial evidence rule must be sufficiently flexible in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in the decision-making process, yet limit the review consistent with effective administration of the substantive legislation.⁴⁰ The main inquiry then is whether, on the record, there was such relevant evidence as a *reasonable* mind might accept as adequate to make the finding of fact.⁴¹ The test, is reasonableness, not rightness. The rule does not permit the rejection of agency findings simply because a reasonable mind might have arrived at a different conclusion.⁴² So long as the evidence is competent and the best available, the findings based on the evidence are respected as determined on the basis of the expertise and experience of the agency in such matters.⁴³

At this point, it is important to note that the court in the Laramie River case over-applied the substantial evidence rule. The court primarily relied on the rule to uphold the council's *conclusions*, not its findings of fact. There was not

36. WYO. STAT. § 9-4-114(c)(iv) (1977).

37. E. I. DuPont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55, 97 S.Ct. 229, 53 L.Ed. 2d 100 (1977).

38. Laramie River at 1249.

39. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

40. 2 AM. JUR. *Administrative Law* 621.

41. *Id.*

42. MEZINES, STEIN AND GRUFF, 5 ADMINISTRATIVE LAW § 51.01 (1978).

43. Pan American Petroleum Corp. v. Wyoming Oil and Gas Comm'n, 446 P.2d 550, 554 (Wyo. 1968).

any significant dispute over the majority of the findings of the council.⁴⁴ The dispute arose because of the council's determination "that the facility will not pose a threat of serious injury to the environment nor to the social and economic condition of the inhabitants or expected inhabitants in the affected area."⁴⁵ This is a statutorily required conclusion which must be demonstrated in the siting permit application based on facts about the location, size and operation of the proposed facility. Therefore, the disputes were not about any finding of fact, but about the sufficiency of those facts in justifying the statutorily required conclusion. The issue of whether a conclusion is justified on the basis of the facts found is not to be tested by the Administrative Procedure Act's rule of substantial evidence. Rather, it should be judged both by a determination of the soundness of the facts found, under the "substantial evidence rule", and by a determination of the validity of the inferences which are drawn from the facts and used to reach the conclusion.

INFERENCES AND REASONABLENESS

An inference is a process of reasoning by which a conclusion is reached and affirmed on the basis of one or more facts accepted.⁴⁶ The question of the validity of the inference does not rest on the truth of the initial and end points of the process (the facts and the conclusion), but rather on the nature of the process itself. The analysis of the process involves deciding whether the conclusion reached follows from the facts accepted. This is essentially an inquiry into the necessary relationship required between the facts and the conclusion.

The general rule for the review of agency inferences is that, just as the fact-finding process is a function for administrative agencies, so also is the drawing of inferences from the evidence.⁴⁷ The scope of review for the exercise of discretion in applying broad statutory language to varying fact

44. One issue raised by the Appellant with regard to the council's findings deals with the effect of the proposed facility on the agricultural community. The argument is that the council failed to make complete findings and conclusions from uncontradicted evidence regarding economic effects on the inhabitants in the affected area. Brief for Appellant at 61, Laramie River.

45. WYO. STAT. § 35-12-109(c)(ii) (1977).

46. COPI, INTRODUCTION TO LOGIC, at 5 (4th ed. 1972).

47. *FTC v. Pac. States Paper Ass'n.*, 273 U.S. 52, 63, 47 S.Ct. 255, 71 L.Ed 534 (1927).

patterns is usually stated in general terms of action found to be "arbitrary, capricious, or characterized by an abuse of discretion."⁴⁸ However, these terms do little to articulate the process of review by which the issue of the existence of the necessary relationship is to be decided.⁴⁹ Wyoming cases provide limited guidance for establishing a meaningful standard for judicial review of agency inferences.

[A]rbitrary and capricious action on the part of an administrative agency is wilful and unreasoning action, without consideration and in disregard of facts and circumstances.⁵⁰

[A]n action . . . will be considered arbitrary when taken without the [agency] having before it sufficient information upon which to make a proper decision.⁵¹

[A]rbitrary, capricious or characterized by an abuse of discretion . . . [involves] whether the Council's decision was based on a consideration of the relevant factors or whether the Council committed error so clear as to deprive its decision of a rational basis.⁵²

From the above cases, the test of the relationship between facts and conclusions appears to be whether the conclusions reasonably or rationally may be based upon the relevant factors. This test is reinforced in the instant case: "[E]xamination [of all the evidence] must lead the reviewing court to the conclusion that there is present such relevant evidence as might lead a reasonable mind to the conclusion manifested in the questioned agency finding."⁵³

Therefore, to uphold the council's conclusion that the facility will not pose a threat of serious injury, the reviewing court must find a reasonable or rational relationship between the relevant evidence and the statutorily required conclusion. This process examines both the validity of the inferential process and the facts from which the process begins. Furthermore, the test for a reasonable relationship appears

48. WYO. STAT. § 9-4-114(c)(v) (1977).

49. BRODIE AND LINDE, *State Court Review of Administrative Action Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 550 (1977).

50. *Marathon Oil Co. v. Pan American Petroleum Corp.*, 473 P.2d 575, 577 (Wyo. 1970).

51. *Monahan v. Bd. of Trustees, etc., Co. of Fremont*, 486 P.2d 235, 237 (Wyo. 1971).

52. *Tri-State Generation and Transmission Assoc., Inc. v. The Environmental Quality Council of the State of Wyoming*, ___ P.2d ___ (Wyo. 1979).

53. *Laramie River* at 1249.

to be whether the facts proven are logically sufficient upon which to base the conclusion, and whether the conclusion was, as a matter of fact, made with a full consideration of the facts. If these inquiries are made⁵⁴ into the inferential process, and the facts are based upon substantial evidence, the reviewing court is not free to set aside the agency's conclusions, even though the court "might have come to a different conclusion than the one drawn by the agency."⁵⁵

STATUTORY CONSTRUCTION-CONCLUSIONS OF LAW

An analysis of the evidence supporting the findings of fact and the validity of the inferences from these findings has no significance without a determination of whether the agency has inferred the "correct"⁵⁶ conclusion from the facts.

The conclusion which is required by the Siting Act is "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."⁵⁷ This is different from the conclusion that the facility will not *cause* serious injury. An agency can legitimately draw the latter conclusion from the slightest evidence in favor of the assertion that there will be no injury. Furthermore, the conclusion is justified even if there is a reasonable possibility that there will be injury.⁵⁸ However, one could argue that "pose a threat" cannot be satisfied if there is a reasonable possibility that there will be injury, inasmuch as injury is, therefore, threatened.

From the distinction between "cause injury" and "threaten injury" it is important to inquire whether the applicant proved and the council found that the facility will not

54. It is not clear that the court in the instant case addressed itself to these issues.

55. *Laramie River* at 1250.

56. The term "correct" is used not normatively but factually to indicate the conclusion required by the substantive legislation.

57. WYO. STAT. § 35-12-109(c)(ii) (1977).

58. This argument has some weight upon review of Regulation 6b. which sets forth the following rule of decision:

In order to demonstrate that the facility does not pose a threat of serious injury, the applicant must demonstrate that the granting of a permit will not result in a significant detriment to, or impairment of, the environment or the social and economic conditions of present or expected inhabitants.

However, the language may be consistent with the legislation as an administrative express of the legal principle that the law is not concerned with trifles. Brief for Appellee, Industrial Siting Council at 29, *Laramie River*.

cause serious injury, or that the facility will not *pose a threat* of serious injury. If the evidence justified only the former conclusion and the council, on the basis of a regulation interpreting the statute, held that to be sufficient, one could argue that the correct statutorily required conclusion was not made on the siting permit application. Evidence which left open a reasonable possibility of injury would satisfy the test of “will not cause serious injury,” but not the statutory mandate of “will not pose a threat of serious injury.” Therefore, the facts and the inferences, even though justified by substantial evidence and reasonableness, are not sufficient to arrive at the correct statutorily mandated conclusion.

Appellants' Burden of Proof Argument

The Appellants, Laramie River Conservation Council and Powder River Basin Resource Council, used this distinction between “cause injury” and “threaten injury” to challenge the council’s conclusions on the application. They concluded that this distinction required the applicant to bear a heavier burden of proof than the preponderance of evidence test⁵⁹ to obtain a permit in the first stage of review.⁶⁰ This is not a correct conclusion to draw from the distinction. The burden is raised above preponderance of evidence to prove that the facility will not *cause* injury. However, this is because the applicant is proving “threaten” and not “cause.” A preponderance of evidence is still the correct burden so long as the preponderance goes to prove that the facility will not threaten injury.

The Necessity for Review of Statutory Construction

Unfortunately, neither the court nor the appellants recognized the fallacy in the burden of proof argument. The court’s attention was never directed toward whether the council had misconstrued the statutory language of “will not pose a threat” to mean the lesser requirement of “will not

59. In Wyoming, the preponderance of evidence test denotes the following:

That where the evidence justified either of two reasonable inferences, one favorable to the party having the burden of proof and the other favorable to his opponent, the trier of the facts should be allowed to determine which, if either, of the two inferences is more reasonable or probable, and make his findings accordingly. *White v. Maverick Production Company*, 182 P.2d 818, 822 (Wyo. 1947).

60. Brief for Appellant at 17, Laramie River.

cause." However, had this issue been directly addressed by the court, the case still may have been decided along the same lines. The court, in rejecting the burden of proof argument, said the standards suggested by the council's rules and regulations on "pose a threat" did not conflict with the Siting Act. In the court's words, "We can find no inherent irrationality or unreasonableness of these standards, and consequently, we hold that these standards, not the standard of no reasonable possibility suggested by the appellant shall govern."⁶¹

The problem with the court's discussion of the council's rules and regulations is that the standard for the review of an agency's interpretation of its statute is not that of "inherent irrationality or unreasonableness." The interpretation of a statute involves a question of law which ultimately is for the courts. This is a duty which must be exercised and cannot be surrendered, waived⁶² or even, as some cases hold, restricted by the legislature.⁶³ The general rule is that the courts may justifiably rely on the aid of practical administrative construction of an ambiguous statute.⁶⁴ Substitution of judicial judgment on all questions that are literally or analytically "law" is undesirable, for many questions of policy which, through adjudication or rule-making, become crystallized into law are peculiarly within the agency's competence and not especially within the competence of the reviewing court.⁶⁵

This philosophy on statutory construction is reflected in a recent 1978 Supreme Court case:

The construction put on a statute by an agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law. But the courts are final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsis-

61. *Laramie River* at 1242.

62. 2 AM. JUR. *Administrative Law* § 251.

63. *Id.* at § 656.

64. *Id.* at § 251.

65. DAVIS, *supra* note 39, at § 30.01. See also *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed. 2d 370 (1958).

tent with a statutory mandate or that frustrates the congressional policy underlying the statute.⁶⁶

Therefore, the important issue with regard to the review of the agency construction of "pose a threat" is not whether the standard is inherently irrational or unreasonable as suggested in the instant case. Rather, the task is to inquire into the correctness of the administrative construction judged by the agency's compliance with the fundamental rule in the construction of a statute: "to ascertain, if possible, what the legislature intended by the language used, viewed in light of the objects and purposes to be accomplished."⁶⁷ Only by such an inquiry can the courts restrict agencies to their basic role of executing legislative policy. Agencies are no more authorized than are the courts to rewrite substantive legislation.⁶⁸

Scope of Review of Statutory Construction

The necessity for judicial inquiry and the minimum scope of the inquiry into agency statutory construction depends upon the history, terms and purposes of the legislation and the extent these are mirrored by the agency interpretation. Therefore, to ascertain the full scope of judicial review in the area of statutory construction, one must determine the reviewing court's willingness to independently scrutinize the history, terms and purposes of the legislation and how close the court's decision must parallel the product of the administrative process. This involves the question of whether the court will require the agency's construction to be right (representing a close fit with the court's judgment), or merely reasonable.

The Court's Independent Scrutiny

The general limitation on administrative construction requires the court to independently scrutinize the terms of the legislation to determine whether the statute is ambiguous, and thus subject to construction by the agency. If a statute is not ambiguous and its construction is not doubtful, the rule that courts will give weight to an administrative

66. SEC v. Sloan, ___ U.S. ___, 98 S.Ct. 1702, 1712, 56 L.Ed. 2d 148 (1978).

67. School District Nos. 2, 3, 6, 9 & 10 v. Cook, 424 P.2d 751, 756 (Wyo. 1967).

68. Tallay v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977).

construction determining the true meaning of a statute is not applicable.⁶⁹ The agency has no duty to interpret that which the legislators have made clear.

The court in the instant case made a limited inquiry into the ambiguity of the Siting Act. The court concluded that the statute is not ambiguous with regard to whether granting a permit after the initial hearing is the exception and limited to low impact facilities, at the small end of the jurisdictional scale, with no potential for a problem.⁷⁰ Even though the analysis concluded no ambiguity, the court not only allowed, but completely deferred to the construction placed on the statute "by the Industrial Siting Council and the direction and the staff all of whom are charged with the administration of the . . . Siting Act."⁷¹ This deference, even though inappropriate, does indicate that, had an inquiry been made into the ambiguity of the statutory language "pose a threat," the court probably would have deferred to the construction placed on the phrase by the council's regulations.

This willingness to defer to the agency's construction of law precludes any meaningful judicial review and abrogates the court's duty to assure that the legislative policies underlying the Siting Act will be executed. Surely an administrative agency cannot finally decide the limits of its own statutory authority, for that is peculiarly a judicial function. Furthermore, the history of administrative law in Wyoming is not in accord with such a deferral to the agency. The Supreme Court of Wyoming did not hesitate to substitute its judgment for that of the agency in *Ruby v. Schuett*⁷² or in *Bosler v. McKechnie*⁷³ after a determination that the agencies misinterpreted certain statutes. The matter of statutory construction must not be finally entrusted to administrative agencies, but decided ultimately by the courts.⁷⁴

The Right vs. The Reasonable Construction

Once a court conducts an independent judicial inquiry into legislative intent, how willing is it to substitute its judg-

69. *Demos v. Bd. of Cty. Comm'rs of Natrona County*, 571 P.2d 980, 981 (1977).

70. *Laramie River at 1250*.

71. *Id.*

72. 360 P.2d 170 (Wyo. 1961).

73. 362 P.2d 809 (Wyo. 1961).

74. 2 AM. JUR. *Administrative Law* § 656.

ment for the agency's reasonable but not parallel decision? The suggestion in the Laramie River case is that the agency's regulatory interpretation should be upheld unless irrational or unreasonable.⁷⁵ Prior to this case, the test of agency construction of the law it administered was expressed as a "clearly erroneous" test whereby the agency's construction, while not controlling, was entitled to great weight and would not be disregarded except when it was clear that such construction was erroneous.⁷⁶ The reasonableness test has found expression more often in the United States Supreme Court. Under this test, the agency's determination of a broad statute is accepted if it had "warrant in the record" and a reasonable basis in law.⁷⁷

An analysis into the distinction between a finding of "clearly erroneous" and "unreasonableness" is probably less helpful than a view into what the courts in this area need *not* find. To sustain an agency's determination, the court need not find that [the agency's] construction is the only reasonable one, or even that it is the result that [the court] would have reached had the question arisen in the first instance in judicial proceedings. Particularly, this respect is due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, or making the parts work efficiently and smoothly while they are yet untried and new.⁷⁸

In conclusion, the court is not demanding a close fit between the court's interpretation of the statute and that of the agency. That the court would have construed the statute differently and such construction is itself reasonable is not determinative. Rather, the court, with an eye on its own interpretation of the history, terms and purposes of the legislation, must hold that the agency's construction is itself reasonable and not clearly erroneous.

75. Laramie River at 1249.

76. *State v. Board of Land Commissioners*, 58 P.2d 423, 431 (Wyo. 1936) and *State v. Hunt*, 57 P.2d 793, 799 (Wyo. 1936).

77. *NLRB v. Hearst Publications*, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1070 (1944). See also *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977), a more recent case where the court upheld an agency determination as a reasonable interpretation of the statute.

78. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed. 2d 616 (1965).

External Factors

The "form" of the particular agency interpretation may support a legislative intent to vest primary responsibility with the agency for interpreting the statutory terms. This analysis requires the characterization of the challenged regulation as either a substantive regulation, issued by an agency pursuant to statutory authority to implement the statute, or an interpretive regulation. Substantive regulations are those the drafting of which is specifically entrusted by the legislature to the agency. The agency has primary responsibility for interpreting the statutory terms involved. Such regulations have the force and effect of law. The reviewing court therefore is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.⁷⁹ By way of contrast, a court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded administrative interpretations, based on such factors as timing and consistency of the agency's position and the nature of its expertise.⁸⁰

The regulation involved in the Laramie River case appears to be more interpretive than substantive. It was drafted pursuant to the council's general authority to "promulgate rules and regulations . . . implementing this act."⁸¹ It interprets and thereby gives content to the general phrase "pose a threat" requiring, by regulation, a full consideration of the pluses and minuses that will result from construction of the facility. By way of contrast, it does not function as a regulation which supplements the relevant and necessary factors to be considered in the intensive investigation, study and evaluation of the proposed facility and its effects in the Stage II analysis.⁸² The latter is clearly substantive and could be set aside only if the agency exceeded its "authority or if the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸³

General or ambiguous statutory terms may indicate a legislative intent to rely on the practical application of the

79. *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2999, 53 L.E. 2d 448 (1977).

80. *Id.* at n. 9.

81. WYO. STAT. § 35-12-105(b) (1977).

82. WYO. STAT. § 35-12-111(a) (1977).

83. *Batterton v. Francis*, *supra* note 79, at 426.

statute to achieve effective administration. If such a statute is involved, the courts should allow greater flexibility to the agency to interpret the statute. This recognizes the agency's unique opportunity to discover statutory inaccuracies and deficiencies and, in the practical working of the statute, improve it.

The court may regard the agency with sufficient respect to view it as uniquely qualified to appropriately interpret the statute. In determining whether an agency's interpretation of its statute should be upheld, the court should consider the character of the particular agency. This consideration includes the nature of the problems with which the agency deals, the consequences of its administrative action, the agency's expertise, experience and the confidence which the agency has won.

A final factor which should not be overlooked is the court's own general philosophy of the proper division of functions between courts and agencies. State courts, more than the United States Supreme Court, probably take for granted that the correct interpretation and application of the terms used in a statute fall within their province.⁸⁴ This view is not reflected in the Laramie River Case but it has surfaced in a more recent Wyoming case.⁸⁵

This attitude has also been reflected in Wyoming legislation. Two recent Wyoming statutes illustrate the modern tendency to seek methods to curtail the discretion of administrative agencies to ensure due execution of legislative policy. The Administrative Regulation Review⁸⁶ provisions in the Wyoming Statutes allow the legislative management council to examine the administrative rules and regulations of any agency to determine if they properly implement legislative intent, are within the scope of delegated authority, and are lawfully adopted.⁸⁷

A product of the 1979 legislative session was an act amending the Administrative Procedure Act by providing

84. BRODIE AND LINDE, *supra* note 49, at 546.

85. *Tri-State Generation and Transmission Assoc., Inc. v. The Environmental Quality Council of the State of Wyoming*, ___ P.2d ___ (Wyo. 1979).

86. WYO. STAT. §§ 28-9-101 through 28-9-108 (1977).

87. WYO. STAT. § 28-9-102(a)(i) (1977).

new guidelines for the scope of judicial review of administrative proceedings.⁸⁸ With some omissions, it adopts almost verbatim the scope-of-review provisions⁸⁹ of the Federal Administrative Procedure Act.⁹⁰ The act expressly recognizes the function of the reviewing court to decide all relevant questions of law and interpret constitutional and statutory provisions.⁹¹ It also arguably alters the applicability of the substantial evidence rule. The amended provisions appear to make the rule applicable not only to findings of fact, but conclusions of law and other agency action taken in a hearing provided for by statute.⁹² Inasmuch as the court in the Laramie River case applied the substantial evidence rule to the agency's conclusions, the act as amended is consistent with the court's discussion.

CONCLUSION

The past and the newly amended provisions in the Wyoming Administrative Procedure Act on the scope of judicial review of administrative orders both reflect a statement that proper judicial review is an essential safeguard of fairness and correctness in the administrative process. This legislative statement alone should prompt the court not only to make a careful review, but to carefully state the scope of the review made. Only by such care can the proper balance be struck in each case between judicial review which is so cur-

88. 1979 ENROLLED ACT No. 47 (45th Legislative Session):

9-4-114. *Judicial review by district courts; rules of supreme court to govern; scope of review.*

(c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

(i) Compel agency action unlawfully withheld or unreasonably delayed; and

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege or immunity;

(C) In excess of statutory jurisdiction, authority or limitations, or lacking statutory right;

(D) Without observance of procedure required by law; or

(E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

Section 2. This act is effective May 25, 1979.

89. 5 U.S.C. § 706 (1976).

90. 60 STAT. 237 (1946), as amended by 80 STAT. 392 (1966), 90 STAT. 2721 (1976).

91. WYO. STAT. § 9-4-114(c) (1979).

92. WYO. STAT. § 9-4-114(c)(ii)(E) (1979).

sory or remote that it fails to supply an adequate corrective for arbitrary administration and judicial review which is so all pervasive as to run counter to the basic idea of delegation of responsibility to administrative agencies. This balance accomplishes two essential goals. It ensures both the legitimacy of the agency action and the positive solution of the agency's problems. Neither goal has been significantly secured by the decision in the Laramie River case.

NANCY D. WOOD