Public Participation in the Point Conception LNG Controversy: Energy Wasted or Energy Well-Spent?*

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INTRODUCTION

In 1974, California's major gas supplying utilities sought permits to import liquefied natural gas (LNG). The utilities ambitiously proposed liquefying Alaskan and Indonesian natural gas by chilling it to its condensation point and shipping it via supertankers to newly constructed receiving terminals on California's coast. The utilities proposed to meet approximately thirty percent of California's total natural gas demand from this project by 1982. They initially planned to construct two receiving terminals in urban areas, which they thought would be the most efficient locations because of relatively easy access to existing natural gas pipelines and other support services needed for a large industrial facility. Midway through administrative hearings on whether to permit LNG importation, the California state legislature passed legislation which prohibited LNG terminal construction in populated areas. The utilities then amended their plans, asking for permission to build one large facility in rural Santa Barbara County, near Point Conception.

In 1982, eight years after first applying for permits, having spent

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1. Natural gas condenses at -260 degrees Fahrenheit. WESTERN LNG TERMINAL CO., LNG: TODAY'S LINK WITH TOMORROW'S ENERGY 3 (undated).
2. Id. at 1.
3. The site was four miles east of Point Conception on Santa Barbara County's east-west running shoreline, on a coastal inlet known as Little Cojo Bay. The site was often referred to as either "Point Conception" or "Little Cojo."
$350 million without beginning construction, and still lacking final administrative approval, the utilities tentatively shelved their project. Administrators had held thousands of hours of public hearings and considered numerous written submissions in which utility executives, accountants, engineers, and various other consultants argued for the project's approval, while environmentalists, local landowners, Chumash Native Americans, surfers, kelp harvesters, and fishermen pressed for its defeat. From hearing transcripts, written comments and briefs, and staff reports, agencies compiled a record thousands of pages long, representing incalculable hours of public, governmental, and industry deliberation over whether California needed LNG and where a receiving terminal could be located.

Was this lengthy administrative process a rational means to resolve disputes over the siting of an LNG facility? Paradoxically, the answer is yes. Did the administrative process allow public participation to become a filibuster? The answer is a qualified no. Why, then, did administrators take eight years and still fail to decide whether to permit LNG importation? While environmentalists used all available weapons, including procedural delay, to thwart the project, the most important inhibiting factors proved to be legislative intervention, late discovery of key facts which worked against the utilities, and factual complexity. Moreover, delay would not have been fatal without a dramatic, unanticipated change in the supply of and demand for natural gas in the early 1980's.

The history of the LNG project does not demonstrate that public rights hold major energy projects hostage. Rather, this history shows that public participation in administrative decisionmaking can delay major energy projects only when the public points out issues of legitimate concern (such as whether an earthquake fault risks destroying the proposed facility and releasing hazardous substances). In so doing, public participation beneficially publicizes costs, especially costs external to the project's sponsors, that administrators might otherwise overlook. Moreover, projects are inevitably improved when these costs are identified. Public participation slows decisionmaking, but the pause for reflection is well worth the environmental protection gained.

Administrative law reforms that have expanded public participation are often criticized by business leaders, politicians, and some scholars as unduly delaying approval of needed projects. This Comment uses the LNG controversy to demonstrate that their criticism is an inapt description of why one major facility siting project failed. This Comment hypothesizes that careful examination of how procedures are actually working in particular cases, such as the Point Conception controversy, is the best way to separate rhetoric from reality. The Point Conception case serves as an example why public participation need not be curtailed in order to expedite development projects. Further research will reveal
whether additional examples confirm or refute the lessons of this particular controversy.

Defense of public participation requires explication of why it has expanded in the past few decades and how it is supposed to work. Thus, in Part I, this Comment explores the misgivings of political scientists, public activists, and even elected politicians, with administrative procedures which are unaccountable; this dissatisfaction prompted public participation reforms in the 1960's and 1970's. Part II first describes the types of environmental advocates who wanted an opportunity to comment to agencies. This Part then explores various attempts to accommodate environmentalists' participation; these efforts appear in both case law and such statutes as the federal Administrative Procedure Act and the California Environmental Quality Act. Criticism of these reforms is also discussed. Part III of this Comment discusses attempts to streamline administrative public participation procedures. This Part examines a negotiated compensation model that rejects incremental adjustments to the existing system, instead favoring sweeping reorganization of facility siting procedures. Following this background discussion of law and policy, Part IV analyzes the theoretical arguments for and against expanded public participation in the context of the LNG project at Point Conception, and concludes that if the LNG project is a model, then the reforms of the 1960's and 1970's have been worthwhile. This Comment concludes in Part V by suggesting some proposals for preserving meaningful public participation while expediting agency decisions.

I

THE DILEMMA OF MODERN ADMINISTRATIVE POWER

The dilemma of the modern administrative state is that although legislatures must delegate some discretionary power to administrative agencies if government is to meet its ends, the legitimacy of this power is questionable. For administrative agencies to be efficient, legislatures must delegate the equivalent of legislative and adjudicative, as well as executive powers. Today, administrators often promulgate rules of general application, then police compliance, and finally adjudicate individual

cases of alleged rule violation. At first glance, administrators seem to be a fourth branch of government unchecked by the constitutional restraints applicable to the legislative, executive, and judicial branches. The most objectionable aspect of concentrating power in administrative bodies is their insulation from popular review. If the people of California, for example, are opposed to the quasi-legislative administrative regulations adopted by the California Public Utilities Commission, they cannot recall CPUC commissioners or elect new commissioners running on a preferable platform. They might elect a new governor in the hope that they could hold him or her to appointing more amenable commissioners. Yet, because a governor’s race is likely to turn on a number of more salient issues than the composition of the CPUC, this check is not very effective.

Federal administrative rulemaking discretion began with the creation of the Interstate Commerce Commission in 1887. During the New Deal era, agencies and administrative power proliferated, as Congress and the Roosevelt administration struggled to maintain aggregate production and fair resource allocation in the face of widespread market failure. Political officials and political scientists described the new administrators as expert managers who could study and then remedy market failure. Presumably, expert managers did not make value judgments, but instead advanced the implicitly expressed values of Congress and the nation. Early statutes empowering administrators might have appeared vague, but a national consensus on the goals of government, as demonstrated by the massive electoral victories of Roosevelt and the Democratic Party in Congress, adequately fleshed out ambiguities. Congress and the nation were united in wanting more output and fairer distribution of output—which would occur normally but for unnatural concen-

5. S. Breyer & R. Stewart, supra note 4, at 41-68; see President’s Comm. on Administrative Management, Report with Special Studies (1937) [hereinafter cited as Brownlow Report].

6. As early as 1937, the Brownlow Report was terming multimember regulatory commissions “a headless fourth branch” unduly insulated from presidential review. The report recommended that agencies be governed by a single executive head rather than multimember commissions. These executives, the report contended, should be directly accountable to the president. The panel also recommended removing adjudicatory functions from existing agencies and assigning these functions to an independent administrative tribunal. Brownlow Report, supra note 5. These recommendations were never implemented. See S. Breyer & R. Stewart, supra note 4, at 31 n.45.


8. See J. Landis, The Administrative Process (1938); Reich, supra note 4, at 1618; Frug, supra note 4, at 1318-34.

9. For example, the standard in the Federal Communications Act for the Federal Communications Commission to decide on license applications by radio (and later television) broadcasters was whether the “public interest, convenience, and necessity would be served” by granting the application. Ch. 652, § 309, 48 Stat. 1085 (1934) (current version at 47 U.S.C. § 309(a) (1982)).
tration of private economic power.\textsuperscript{10}

This value consensus, however, proved illusory. Behind the crisis of the Great Depression, and the limited consensus that production and employment urgently needed augmentation via government intervention, lurked differences between American political factions. Eventually, the factions who felt overlooked by administrators made their complaints heard: administrators were not technicians, but political operatives wedded to dominant factions.\textsuperscript{11} While critics of agency power existed from the time administrative agencies were created,\textsuperscript{12} it was not until the 1960's that political and scholarly opinion united on the proposition that agencies were out of control and reforms were necessary. The unifying theory behind this reforming response was the agency capture theory, which contended that agencies had become the servants of the very groups that agencies were created to contain.\textsuperscript{13} Agency capture had occurred, said critics, because of "standardless" legislation that gave vast discretion to agencies to choose whose interests to advance. Well-organized and well-financed interest groups, critics argued, enjoyed natural advantages in less visible administrative fora.\textsuperscript{14}

Reformers were of two minds as to how properly to control administrative power. By one theory, administrators could be made accountable by procedural law mandating access to administrators by all competing interest groups.\textsuperscript{15} By a second theory, administrators could be placed at least partially above politics by becoming experts in discovering true public preferences.\textsuperscript{16} The former theory, that of interest group mediation, takes its inspiration from traditional notions of pluralism. The latter, that of net benefit maximization, results from an affinity for classic liberal economic theory and cost benefit analysis.

\begin{footnotes}
\item[10] See, e.g., J. LANDIS, supra note 8; but see McGuire, supra note 4; J. BECK, supra note 4 (critics of new administrative power charging agencies with antibusiness bias).
\item[11] See S. BREYER & R. STEWART, supra note 4, at 30-31. For historic criticism that administrators are not value-neutral technicians, but biased political operatives, see McGuire, supra note 4, and J. BECK, supra note 4; cf. BROWNLOW REPORT, supra note 5.
\item[12] See supra note 4.
\item[13] See R. FELLMETH, THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC (1970); T. LOWI, THE END OF LIBERALISM (1969); Magat & Schroeder, supra note 4, at 312 n.48; Reich, supra note 4, at 1619; Rodriguez, Regulating Pesticides: Is Food & Agriculture Too Friendly With Industry?, 16 CAL. J. 401 (1985) (discussing charges that the California Department of Food and Agriculture has been too partisan toward agribusiness in allowing pesticide use).
\item[14] See, e.g., T. LOWI, supra note 13.
\item[15] See S. BREYER & R. STEWART, supra note 4, at 1186-228; Frug, supra note 4, at 1355-77; Reich, supra note 4, at 1619-20; Stewart, The Reformation of Administrative Law. 88 HARV. L. REV. 1667, 1679 (1975).
\end{footnotes}
The interest group mediation model follows a traditional view, dating from Madison's *Federalist No. 10*, that American politics is characterized by faction. According to Madison and his adherents, collusion between the more powerful groups in society threatens the minority factions with oppression. Madison's solution was procedural; the Constitution he advocated divided government's powers, making their exercise cumbersome and hence less likely to be abused by temporarily dominant factions. Madison influenced generations of American political thinkers, instilling enthusiasm for procedural solutions to political problems. This is one explanation why the predominant solution to containing administration is procedural rather than substantive. Legislatures have diffused administrative power by creating layers of review and public access mechanisms. As in classic pluralist theory, mandatory procedures for interest group access are supposed to pressure administrators to compromise between the interests of competing groups when formulating policies.

The alternative net benefit maximization model reflects a lingering fascination with technical solutions to human problems; this approach follows from the belief that scientific method can rationalize societies the way it has the natural world. According to the model, the means to this end is reliance upon economics as a science of human preference in resource allocation. The model assumes there is an optimal resource allocation that would provide the highest sum of individual benefits. The administrative challenge is to determine when and how markets fail to provide this optimal resource allocation. Administrators should then intervene to redistribute resources in the way individuals would truly prefer without market failure.

The net benefit model has some advantages over the interest group mediation model. The net benefit model, unlike the interest group mediation model, does not require administrators to be politically responsive decisionmakers. Instead, according to the net benefit model, insulation from political pressures is an asset that allows administrators to perform

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18. Id. at 81-84.
19. See S. Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 7 (1984): The . . . impact statement approach [under ]the National Environmental Policy Act is a case of substituting analysis for reorganization: since the statute's sponsors lacked sufficient power to change the decision premises of all agencies directly, they tried to change agency policies indirectly by requiring a different type of information to enter the decision-making process.
[Ed. note: Professor Taylor's book is reviewed by Professor Daniel Mandelker in this issue of the Ecology Law Quarterly.] See also Reich, supra note 4, at 1619; Schuck, When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process, 1984 Duke L.J. 163, 294-97 (criticizing the focus upon procedure).
20. See Reich, supra note 4, at 1621-23; Conse, supra note 16; Calabresi. supra note 16.
21. See Reich, supra note 4, at 1622.
Yet, the net benefit model has two important shortcomings. Its most significant weakness is that its proponents have not shown how to prioritize various individual preferences for resource allocations. The core problem is that if person X prefers one resource allocation and person Y prefers another, no widely accepted theory can justify weighing X’s preferences more than Y’s. Without such a theory, assumptions about value preferences are political choices, and if administrators make them, they are exercising political power. Classical welfare economics takes account of this problem and attempts to deal with it by the simplifying assumption that willingness to pay market prices, which can be compared between individuals, demonstrates the relative weight individuals attach to the outcomes that they prefer. Thus, if X will pay more than Y for a resource, the resource should go to X as the user who values the resource more.

Problems arise, however, with this simplifying assumption. The most serious of these problems is that a market approach to evaluating individual preferences only compares allocations of marketable commodities between competing consumers. That is, the market model might defensibly tell society whether producers should produce guns for X or butter for Y. When numerous groups oppose a factory because it will increase air pollution, harm wildlife, and decrease the aesthetics of the landscape, administrators cannot, however, rely upon a market approach. Traditionally, air, wildlife, and open space are “commons” resources, neither owned nor traded between private parties, meaning there are no market prices by which to evaluate their worth. They are likely to remain “unvalued” because, whereas in theory those valuing commons preservation could band together to pay exploiters to leave the

22. See id. at 1621-22.
23. Id. at 1623 & n.38. For analysis of the economists’ assumption that the utility of alternatives is a function of the welfare each alternative produces for individuals, but that a change in one person’s welfare cannot be directly compared to that of another, see generally K. ARROW, THE PROBLEM OF SOCIAL CHOICE (1951); R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 99-107 (1978); B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW xi-xiv (1975).
24. Reich, supra note 4, at 1622.
25. See supra note 23.
26. Some environmentalists, as discussed infra note 43 and accompanying text, object to the utilitarianism and anthropocentrism inherent in classic welfare economics. Aldo Leopold, one of the most eloquent critics, declared that “[w]e abuse land because we regard it as a commodity belonging to us. When we see it as a community to which we belong, we may begin to use it with love and respect.” A. LEOPOLD, A SAND COUNTY ALMANAC xviii (1949). For parallel views, see Hamill, The Process of Making Good Decisions About the Use of the Environment and Man, 8 NAT. RESOURCES J. 279 (1968); Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 476-78 (1972); Nash, Do Rocks Have Rights, in PRINCIPLES OF ENVIRONMENTAL LAW 6, 17 (J. McGinnes ed. 1980).
commons intact, transactions cost barriers will continue to make this impossible except in limited instances.

An additional problem with the traditional welfare economics assumption is that wealth effects distort the market’s ability to serve as a practical mechanism for society to pursue the greatest good for the greatest number. Generally, when \( X \) has greater accumulations of wealth than \( Y \), \( X \) will have greater willingness to pay even when the welfare gain to \( X \) or \( Y \) from using the resource would be the same. For example, when society assigns the initial entitlement to a resource to one party, it makes that party relatively wealthier, giving him or her more market power. Thus, if \( X \) has the right to build a factory until \( Y \) buys it, then this entitlement allocation makes \( X \) relatively wealthier and more able to prevail when competing with \( Y \) for resources. Another wealth distortion could occur when \( X \) has produced a product, such as natural gas, at a time when society valued gas highly, allowing \( X \) to accumulate relatively great wealth. Meanwhile, \( Y \) could have been growing organic produce when society did not value this product much, allowing \( Y \) to accumulate relatively little wealth. This historic accumulation of wealth would prevent \( Y \) from buying a plot of land for organic farming that \( X \) wanted for natural gas production, even if society’s values had shifted in favor of organic farming.

Because of the inability to assign market values to all resource uses, as well as the distortions of wealth effects, willingness to pay market prices is not a widely accepted measure of society’s value preference for allocating resources between environmental protection and industrial development.

II

PROCEDURAL AND SUBSTANTIVE ATTEMPTS TO ADDRESS THE DILEMMA OF ADMINISTRATIVE POWER

The above discussion of criticism of administrative power, and the divergent theories for checking it, lays the foundations for analyzing the public policy responses by courts and legislatures. Public policy responses to containing administrative power from the New Deal to the present fall into two categories, procedural and substantive. A procedural response does not limit the policies that agencies can choose; it

28. Coase, supra note 16.
29. See Komesar, Housing, Zoning, and the Public Interest, in Public Interest Law 218, 219-221 (B. Weisbrod, J. Handler & N. Komesar ed. 1978); Calabresi, supra note 16.
30. See R. Stewart & J. Krier, supra note 23, at 105-06; Demsetz, Wealth Distribution and the Ownership of Rights, 1 J. Legal Stud. 223, 228 (1972); Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. Cal. L. Rev. 669 (1979).
31. Demsetz, supra note 30, at 228; Kelman, supra note 30.
32. See R. Stewart & J. Krier, supra note 23, at 105-06.
only limits the steps they must take in formulating those policies. A substantive response, on the other hand, forces agencies to choose certain policies regardless of the steps taken to justify the choice. Given the substantive intricacy and political controversy of the policy alternatives faced by administrators, legislatures and courts have generally relied upon procedural requirements to limit agency power. This Part discusses the four procedural devices for checking administrative power which simultaneously institutionalized the rights of environmentalists and other public groups to participate in administrative decisions: environmental impact reporting, expanded public hearings, increased visibility of administration, and requirements to demonstrate that decisions are reasoned. This Part then examines the limited substantive law restrictions which restrict agencies' discretion in environmental controversies.

Before analyzing how the public has used these reforms, a theoretical taxonomy of environmentalist interest groups will facilitate an understanding of the clash of values that agency decisionmaking must confront.

A. Environmentalist Interest Group Types

The values, capabilities, and strategies of environmentalist interest groups differ. A number of continua can be drawn to illustrate these differences. The first can be characterized as an elite to populist continuum and the second as an expert to emotionalist continuum. "Technocratic" environmentalists on the elite and expert ends of these spectra acknowledge, even argue, that public policy is best made by the few in society with environmental expertise. These technocrats think that solutions to environmental problems require using the right technologies to secure the "efficient" level of environmental protection as determined by intricate cost-benefit analysis. According to the technocratic environmentalist, administrators will only respond to expertise offered to compete with that of industry. Such expertise inevitably will be vested in a small class of people.

"Grassroots" environmentalists on the populist and emotionalist ends of the above spectra disagree that environmental problems will be

33. These environmental interest group types are placed on a continuum, rather than divided into categories, to reflect that in the real world, individuals fall somewhere in between these polar opposites.

34. On the technocratic or elitist environmentalist view, see generally Pollack. Reimagining NEPA: Choices for Environmentalists, 9 HARV. ENVTL. L. REV. 359, 368-83 (1985). Compare this with U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY (1973). The Council on Environmental Quality describes the technical complexity of attaining water quality and interprets the Federal Water Pollution Control Act as directing administrators to hold industry to the level of discharge "technologically and economically achievable." Id. at 217.

35. See supra note 34.
solved only, or even primarily, by the techniques of experts. Populist-emotionalist environmentalists criticize the search for technical solutions with observations such as:

In passing [the Clean Air Act], we were responding to a vague recognition that our machines were running away from us. After a decade's hard work, we have only managed to parody our initial predicament: we have tried to solve our problems with machines simply by building more machines. But there is no such thing as a purely technological solution to a social problem.

Populist-emotionalists argue that instead of searching for technological solutions, the polity must seek either new patterns of social organization or new moral, aesthetic, and welfare values. As for the former task, populist-emotionalists might concede that social reorganization can benefit from social science theory, but argue that because social science is not as esoteric as natural science, lay participation should be allowed and heeded. As for the second endeavor, populist-emotionalists postulate that experts cannot tell others what is morally correct or aesthetically pleasing. Accordingly, a legitimate political system must canvass all of the governed on such value questions. Administrators should listen to the evocative, emotional presentations of the average citizen, for this is how moral, aesthetic, and welfare concerns are phrased.

Other environmentalist continua include the anthropocentric to land ethic spectrum and the related conservationist to preservationist spectrum. The latter continuum is more familiar in American politics, dating to such classic splits as that between conservationist Gifford Pinchot and preservationist John Muir over the development of an reservoir and aqueduct in the Sierra's Hetch Hetchy valley to service San Francisco. Conservationists hold that the natural world should be managed carefully to sustain indefinitely a variety of human economic activities. Preservationists hold that some land should be spared eco-

36. Stephanie Pollack calls the people on this end of the spectrum "grassroots environmentalists." She explains: "[t]he concrete and everyday nature of the grassroots view of the environment makes a description worth a thousand scientific facts. Grassroots environmentalism appeals at the gut level, whether the reaction sought is fear or joy... one sign of a judge or court sympathetic to grassroots causes is the use of descriptive, evocative language." Pollack, supra note 34, at 385-86. For examples of grassroots advocacy in the LNG project debate, see infra notes 298-315, 324-339 and accompanying text.


38. Pollack, supra note 34, at 383. See Hardin, supra note 27, at 1243: "A technical solution may be defined as one that requires a change only in the techniques of the natural sciences, demanding little or nothing in the way of change in human values or ideas of morality." According to Hardin, the problem of pollution, however, has no technical solution, but must instead be solved by changes in social organization or moral constraints.

39. Pollack, supra note 34, at 385-86.


41. The conservationist ethic was enacted into law with such federal statutes as the Mul-
nomic development because of the importance to humankind of having wild places to enjoy.\textsuperscript{42}

The anthropocentric view could be classed as either conservationist or preservationist in believing that the natural world should be put to the use that maximizes human utility. Wilderness areas of special value to hikers, bird-watchers, and other naturalists would be preserved; but otherwise, development would proceed on conservationist principles. The land ethic spectrum, on the other hand, sees the natural world as having intrinsic value apart from its instrumental value to people. Many trace the development of a modern land ethic to Aldo Leopold, who wrote in \textit{A Sand County Almanac} that humanity should extend its concepts of ethical obligation not to harm others to the natural world itself.\textsuperscript{43}


\textsuperscript{43} Leopold wrote: "quit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and esthetically right." He added: "[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." A. LEOPOLD, \textit{supra} note 26, at 262.

For discussion of Leopold's influence, see Pollack, \textit{supra} note 34, at 401; Nash, \textit{supra} note 26, at 10-18. From the ideas of Leopold and other writers in the new land ethic tradition, a "Deep Ecology" movement has emerged. Deep Ecology professes that only with fundamental shifts in perception and values will modern industrial societies avert environmental catastrophe. The movement contends that people must stop seeing themselves as atomistic individuals struggling to make themselves comfortable and happy by acquiring as much as possible of the planet's resources. Instead, people must see themselves as inseparable from a whole which consists only of relationships. Over their individual comfort and happiness as they have traditionally understood it, people must seek harmonious relationships between themselves and other parts of the whole, which includes other people, other animals, plants, and the inorganic world. In so doing, people will learn that others can yield a certain amount of service, but that to push for more than this limit will create disharmony between those making demands and their targets, to the detriment of both. See generally B. DEVALL & G. SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED (1985); Devall, \textit{The Deep Ecology Movement}, 20 NAT. RESOURCES J. 299 (1979); Pollack, \textit{supra} note 34, at 401-08; R. JEFFERS, THE SELECTED POETRY OF ROBINSON JEFFERS (1959); Stone, \textit{supra} note 26.

A Native American, however, would point out that these ideas were long ago expressed— and embodied—by his or her culture. As one Native American opposed to the LNG project wrote: "We saw the Great Spirit's work in almost everything—sun, moon, trees, wind and mountains." And, he added, they strove not to disturb the Great Spirit's work, but to live in harmony with all creations as the pathway to seeing God. L.A. Times, Mar. 11, 1979, § VI, at 5, col. 3. See Fed. Energy Regulatory Comm'n (FERC), Western LNG Project Fi-
How one would design administrative law reforms depends on which of the above values one wishes to promote. If environmental issues are primarily technical, then standards for information flow, public hearing and record keeping, as well as substantive decision standards, should foster the participation of elite, expert environmentalists more than that of populist-emotionalist groups. Accommodating the views of the conservationist-preservationist and anthropocentric-land ethic continua is less a matter of procedural and more of substantive law.

The effect of administrative law reforms upon these different spectra is an important underlying theme in the discussion of such reforms below.

B. Environmental Impact Reporting

Public information needs for participation in agency decisions fall into two categories. First, public groups need to know enough about proposed administrative decisions to understand how the decisions will affect them. Second, they need information to support their arguments. Agencies have two reciprocal information needs. If administrators are to attempt to respond to public demands, they need to understand public values. Moreover, for administrators to be expert decisionmakers, they need the best data available.

The public advocacy method of the populist-emotionalist environmentalist is to band together with other like-minded individuals, seeking political strength in numbers. From a populist-emotionalist perspective, lengthy (and to the average person, unreadable) government reports are less valuable than widely circulated short pamphlets generally reciting the qualitative effects of a project. These groups want broad information flow in order for the maximum number of people to know generally that a proposed facility will harm marine life, rather than a deep information flow informing a few people how incremental adjustments to marine life mortality rates could be acquired by various manipulations of control technologies at varying costs.

Elite-expert environmentalists, on the other hand, strive to present detailed technical arguments why environmentally harmful projects are not cost-beneficial. Therefore, these environmentalists need depth of information flow. To assist them in developing expertise, elite-expert environmentalists want the government to give detailed information useful for developing expertise and care less whether the government disseminates such information widely.

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**National Environmental Impact Statement (Vol. III: Comments and Appendices)** (CP75-140) 166 (1978) [hereinafter cited as III FEIS]; Pollack, _supra_ note 34, at 403.
Act of 1969 (NEPA)\textsuperscript{44} and analogous state "little NEPA's," which have been adopted by about one-half the states.\textsuperscript{45} The California Environmental Quality Act (CEQA),\textsuperscript{46} enacted in 1970, is one such NEPA analog. The language, administration, and adjudication of NEPA and CEQA are similar, though not identical. One difference is that CEQA explicitly requires agencies to adopt "feasible" environmental mitigation measures.\textsuperscript{47} NEPA requires agencies to report on such mitigation measures, but the Act creates only a vague duty to account for environmental values: "it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony."\textsuperscript{48} The differences between NEPA and CEQA are more in form than in substance, however, due to case law indicating that agency decisions under either statute will be reviewed by a deferential substantial evidence test.\textsuperscript{49} The result is to render both statutes procedural rather than substantive.\textsuperscript{50} Thus, discussion of either statute suffices for the purposes of this Comment, which will focus on CEQA.\textsuperscript{51}

\textsuperscript{44} 42 U.S.C. §§ 4321-4370 (1982).
\textsuperscript{48} 42 U.S.C. § 4331; see also id. § 4332.
\textsuperscript{50} R. Stewart & J. Krier, supra note 23, at 777-80 (1978); Lecture by Jack Cohen and Jed Bebe, County Counsel of Santa Barbara (Apr. 30, 1983).
\textsuperscript{51} Focus on CEQA is appropriate here because the most extensive environmental review of the LNG terminal occurred under CEQA, and NEPA is analyzed frequently enough in the literature that a discussion of CEQA minimizes redundancy. See generally R. Stewart & J. Krier, supra note 23, at 733-810; S. Taylor, supra note 19. For favorable commentary on NEPA, see, e.g., Andrews, NEPA in Practice: Environmental Policy or Administrative Reform?, 6 Env't. L. Rep. (Envtl. L. Inst.) 50,001 (1976); L. Caldwell, Science and the National Environmental Policy Act: Redirecting Policy Through Procedural Reform (1982); D'Amato & Baxter, The Impact of Impact Statements upon Agency Responsibility, 59 Iowa L. Rev. 195 (1973); Magat & Schroeder, supra note 4, at 320 n.69. For criticism of the Act or the way it is implemented, see, e.g., Bardach & Pugliaresi, The Environmental Impact Statement vs. the Real World, 49 Pub. Interest 22, 25 (1977); Comment, The National Environmental Policy Act: How It Is Working, How It Should Work, 4
CEQA requires agencies to develop information via environmental impact reports (EIR's). When private industry proposes a major energy facility or other industrial development which may have significant adverse environmental impacts, a “lead agency” orders an EIR prepared. EIR’s, which are usually prepared by outside consultants chosen by the lead agency and paid for by the industry applicant, are written to inform the public and administrators of a project’s adverse environmental effects and “feasible” mitigation measures, including alternatives to the project.

The information in EIR’s comes from four sources: the independent research of consultants hired by government to prepare EIR’s, agency staffs, industry applicants, and public interest groups. Unless a lead agency’s staff has prepared the EIR itself, the bulk of an EIR’s text is based on the research of independent consultants. These consultants prepare a draft EIR which the lead agency circulates to “responsible agencies” and the general public (including the applicant) for comment. Agencies, the applicant, and the public can submit written comments during a comment period, or, often, they can state their positions to administrators in public hearings. Although CEQA does not require

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52. Under CEQA, the lead agency is the one with the most authority over a given project or decision. Normally, agencies with some jurisdiction over a project sort out amongst themselves which is to be the lead agency. The Office of Planning and Research breaks impasses if the need arises. CAL. PUB. RES. CODE §§ 21067, 21069, 21080.1, 21165; CAL. ADMIN. CODE, tit. 14, R. 15050-15051 (1986).

53. See, e.g., CAL. PUB. UTIL. CODE § 5586 (Deering Supp. 1986) (this LNG Terminal Act provision directs the CPUC to “charge each person who applies for a permit pursuant to this chapter a fee which will be sufficient to reimburse the commission for the costs incurred in processing the application and rendering a decision as required by this chapter.” These costs included fulfillment of CEQA responsibilities); CAL. ADMIN. CODE tit. 14, R. 15045 (“All Lead Agencies preparing EIR’s . . . may charge and collect a reasonable fee from” applicants for private projects). See generally Taylor & Hopper, Platforms, Pipelines and Planning Coming Together in Santa Barbara, CAL. PLANNER, Aug. 1979, at 4, 7, 10; Fulton, The Environmental Push and Pull, CAL. LAW., Mar. 1985, at 51, 52.

54. CAL. PUB. RES. CODE §§ 21002, 21002.1, 21003, 21061.

55. The California Public Utilities Commission hired consultants to prepare the EIR on the LNG terminal project. CPUC Order No. 89,177 (July 31, 1978) at 15 [hereinafter cited as PUC Order I]. FERC’s staff, however, prepared the federal environmental impact statement on the project. FERC, WESTERN LNG PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT (VOL. I) (CP75-140) iv (1978) [hereinafter cited as I FEIS].

56. “Responsible” agencies are those that have some jurisdiction over a project, but less than that of the lead agency. CAL. PUB. RES. CODE §§ 21069, 21105.

57. Draft and final EIR’s are kept in agency offices and can be viewed at public request. EIR’s are also often sent to public libraries, and members of the public can request personal copies at their cost. CAL. PUB. RES. CODE § 21105. The public comment period on draft EIR’s lasts from 30 to 90 days. CAL. ADMIN. CODE tit. 14, R. 15105. Responsible agencies have 45 days to comment. Id. R. 15106.
it, agencies frequently hold hearings on the draft EIR. CEQA requires agencies to incorporate agency, applicant, and general public comments into the analysis of a final EIR, or to reproduce or summarize public contentions in an appendix indicating why they were rejected.

The information flow mandated by CEQA is complete when an agency certifies that it has read and approved the final EIR. Ostensibly, the knowledge gained from reading EIR's then guides administrative decision.

Elite-expert environmentalists claim that EIS's prepared pursuant to NEPA and EIR's prepared pursuant to CEQA are an invaluable means for low-budget public interest groups to gain data concerning the impacts of proposed agency actions. Expert environmentalists spend significant time digesting EIS's and EIR's and pointing out the reports' specifics to administrators. In theory, this is one way to awaken indifferent administrators to the documented adverse effects of projects. Moreover, environmental impact reporting serves a public education function. Environmental impact reporting builds a literature which addresses the environmental degradation from new development projects. This literature makes it easier for at least some citizens to become, over time, more educated on environmental issues—making it more likely administrators will listen to, profit from, and respond to these people's testimony.

While the extent to which EIS's and EIR's promote useful environ-

58. Some administrative regulations and local ordinances, however, require agencies to hold public hearings on draft EIR's. For example, the CPUC's procedural regulations adopted pursuant to California Government Code section 11380 provide that the CPUC must grant a public hearing on draft EIR's upon receiving a motion from an interested party for such hearing. CAL. ADMIN. CODE tit. 20, R. 17.1(g), (e)(1)(C)-(e)(1)(D); Lecture by Jack Cohen & Jed Bebe, supra note 50. The California Public Utilities Commission held public hearings on the draft EIR prepared in the LNG case. PUC Order I, supra note 55, at 151.


60. For contentions that administrators pay pro forma attention to EIR's or EIS's to avoid being sued but change their decisions little because of EIR or EIS analysis, as well as rebuttal of those contentions, see supra note 51. For in-depth analysis of the point, see S. TAYLOR, supra note 19.

61. The effectiveness of this self-adopted role of highlighting EIS's and EIR's for better administrative consumption is difficult to assess without knowing what would have happened in its absence. This author has worked for environmental public interest law firms which have, in effect, highlighted portions of EIS's and EIR's to administrators. The subsequent administrative decisions seemed at least in small measure to respond to the concerns so raised. Whether there is a cause and effect relationship cannot be proved, but is at least plausible.

For additional evidence that environmentalists think that EIS's and EIR's provide information useful for public advocacy, see Atchison, Topeka & Santa Fe Ry. v. Callaway, 431 F. Supp. 722 (D. D.C. 1977). In that case, the district court granted standing to plaintiffs who complained that an inadequate EIS hindered their attempts to lobby Congress not to continue to fund the project in question.
mental expertise is debatable, most people probably do not read them. Yet, this does not mean that environmental reporting is useless for providing broad information flow. A few influential people could read an EIS and or an EIR and remark upon its contents in the media. Thus, the general public might indirectly benefit by the effect of EIS's and EIR's on informed mass media reporting. Of course, administrators could do more to directly inform the mass public than produce documents that people think are "long, boring, [and] unreadable." Agencies could publish colorful pamphlets or place conspicuous informative posters in public places. With a few exceptions, they do not presently do so.

There might be some problems if agencies were to try to publish pamphlets and posters designed, like modern business advertising, to catch the attention of even casual observers. Administrators might attempt to portray projects in a favorable or unfavorable light, thereby providing government sponsored advertising for the causes of one interest group or another. In anticipation of such a possibility, statutes could specify that posters and pamphlets should neither explicitly nor implicitly favor or oppose a project, but should, at most, indicate that different interest groups might feel differently about a given project. While no statute could entirely prevent administrators from conveying subtle or unsubtle biases, the gains from better informing a wide number of people would exceed the possible risks of administrators gaining a new tool for the advancement of their personal predilections.

C. Public Hearing Requirements

Public hearings allow speakers to relate in person their factual claims and value arguments to administrators. This undoubtedly entails some psychological satisfaction not provided by sending written correspondence. Additionally, live testimony could alert administrative decisionmakers to values or fact allegations that they might otherwise overlook. Moreover, public hearings are especially important to populist-emotionalists as a means for both conveying the depth of their feeling to decisionmakers and galvanizing public attention. Public hearings can be theatrical events far more interesting than EIR's. They attract media

64. For discussion of an attempt by EPA to broadly inform the community of Tacoma, Washington about the consequences of an agency decision, see infra note 355. The Coastal Commission's regulations require the agency to post notices of pending coastal development permit approvals near the property to be affected. CAL. ADMIN. CODE, tit. 14, R. 13054(b). The Commission transcends the frequent lack of bureaucratic creativity by putting an attractive wave logo on these posters. Whether the logo attracts readers is an unanswered empirical question, but the gesture seems sound.
coverage when they are particularly lively and thus spread mass public awareness.

Various statutes and administrative regulations require agencies to hold “public hearings” while deliberating many of their decisions.\textsuperscript{65} One such relevant statute is the federal Administrative Procedure Act (APA),\textsuperscript{66} which federal agencies must follow unless other statutes provide to the contrary. The APA has different hearing procedures for “informal rulemaking,” “formal rulemaking,” and “formal adjudication.”\textsuperscript{67} In informal rulemaking, agencies follow “notice and comment” procedures—first providing notice to the interested public by publishing proposed rules in the Federal Register and then allowing a public comment period before the rules take effect. Under either formal rulemaking or formal adjudication, affected parties have the right to a trial-type hearing conducted by an administrative law judge (ALJ) and the right to appeal an ALJ’s decision to agency heads.

The APA allows but does not mandate oral hearings in informal rulemaking or informal adjudication.\textsuperscript{68} When engaging in such proceedings or when researching environmental issues pursuant to NEPA and CEQA, agencies often hold “quasi-legislative” hearings.\textsuperscript{69} Agencies also


\textsuperscript{66} 5 U.S.C. §§ 551-559, 701-06, 1305, 3105, 3344, 5372, 7521 (1982). The federal APA will be used in this Comment as a model of the hearing and decisionmaking procedures required of administrators. In the LNG controversy, the federal APA guided the decisionmaking of FERC. The California Public Utilities Commission followed the analogous California Administrative Procedure Act, \textit{Cal. Gov't Code} §§ 11370-11528 (Deering 1982).

\textsuperscript{67} The APA implicitly defines “formal rulemaking” and “formal adjudication” as the processes required “[w]hen rules [or a case of adjudication] are required to be made [or to be determined] on the record after opportunity for an agency hearing.” 5 U.S.C. §§ 553, 554. When an agency deliberates permits for new energy facilities such as the Point Conception LNG Terminal, this is a “formal adjudication.”

“Informal rulemaking” is promulgation of general rules, via “notice and comment” procedures, when an agency’s organic statute or other relevant statute does not require “on the record” decisionmaking. 5 U.S.C. § 553. Agency actions that do not rise to the level of binding general rules can be taken without the agency affording “notice and comment” procedures. The judiciary has been instrumental in developing the distinction between agency rulemaking and “general statements of agency policy,” which agencies can announce without following notice and comment procedures. \textit{See} American Mining Congress \textit{v.} Marshall, 671 F.2d 1251 (10th Cir. 1982); Pacific Gas & Electric \textit{v.} Federal Power Comm’n, 506 F.2d (D.C. Cir. 1974). The APA does not treat “informal adjudication.”

\textsuperscript{68} 5 U.S.C. § 553.

conduct such hearings along with "adjudicatory" hearings to allow the
general public to participate during legally required formal adjudications.
Presentation in quasi-legislative hearings is informal, often open to the
general public, and, except for the prerogative of hearing officers to ex-
clude "unduly repetitious" statements, unlimited by rules of evidence.70

In adjudicatory hearings, the right to speak is limited to formal in-
tervenors.71 The federal APA directs agencies to respect certain proce-
dural rights when conducting adjudicatory hearings. First, agencies
must inform "entitled" persons of the time, place, and nature of the hear-
ing as well as "the matters of fact and law asserted."72 Under this last
requirement, private intervenors must give other parties notice of factual
and legal contentions in advance of hearings. Agencies can require re-
sponsive pleading.73 Second, agencies must allow parties "to present [their] case or defense by oral or documentary evidence, to submit rebut-
tal evidence, and to conduct such cross-examination as may be required
for a full and true disclosure of the facts."74 The APA authorizes agen-
cies to administer oaths and affirmations, issue subpoenas, rule on offers
of proof, receive relevant evidence, and provide for discovery by deposition.75

Thus, adjudicatory hearings are more formal than are quasi-legisla-
tive hearings. They are likely to appear imposing to populist-emotional-
ist environmentalists uninitiated into the rules of procedure, who are
likely to be excluded from participating by failure to file timely interven-
tion motions. To the expert-elite environmentalist, however, adjudica-
tions provide considerable tactical advantages. Discovery rights provide
the opportunity to gather data from opposition industry applicants. The
opportunity to submit written briefs, present expert oral testimony, and
cross-examine opposing parties allows expert environmentalists to build

668 P.2d 664, 194 Cal. Rptr. 357 (1983) (discussing whether failure to appear in quasi-legisla-
tive hearings constituted failure to exhaust administrative remedies).
70. See, e.g., 5 U.S.C. § 556(d); CAL. ADMIN. CODE tit. 14, R. 13064-65 (Coastal Com-
mission regulations providing for conduct of hearings and receipt of evidence). For compari-
son, the CPUC's rules of procedure for formal adjudications provide "[a]lthough technical
rules of evidence ordinarily need not be applied in hearings before the Commission, substantial
rights of the parties shall be preserved." CAL. ADMIN. CODE tit. 20, R. 64.
71. See generally S. BREYER & R. STEWART, supra note 4, at 546.
72. 5 U.S.C. § 554(b).
73. Id.
74. 5 U.S.C. §§ 556(d), 554(c). Most of the rules of evidence applicable in judicial pro-
ceedings, such as the hearsay rule, do not apply in administrative adjudications. Instead, ad-
mnistrators may receive and rely upon "any relevant evidence." Even this creates more
evidentiary formality than in legislative hearings if "relevancy" is given its usual term-of-art
meaning: "having any tendency to make the existence of any fact that is of consequence to the
. . . action more probable or less probable. . . ." FED. R. EVID. 401. While this is not an
exact standard, it introduces an analytical criterion not typically applied to legislative
hearings.
75. 5 U.S.C. § 556(c).
their case and persuade agencies to adopt different fact assumptions.  

D. Increased Decisionmaking Visibility

Environmentalists on the above discussed spectra see various advantages to opening up administration to public scrutiny. Populist-emotionals want increased visibility of administrative decisionmaking to make the public more aware of the values administrators are advancing. If those values are at odds with those of the public, visibility will (theoretically) spur an angry public to take its servants to task. Elite-experts, on the other hand, want increased administrative visibility to expose administrative factual assumptions. They can then point out erroneous fact assumptions to administrators, who conceivably might adjust decisions accordingly. Also, awareness of agency assumptions is crucial for allowing elite-experts to challenge agency action in court under the APA's standards of review—whether agency action is beyond agency jurisdiction, is arbitrary and capricious, or is unsupported by substantial evidence.

Legislation has increased the visibility of administration by requiring agencies to open their meetings to the public, keep records of their

76. Of course, environmentalists could submit lengthy arguments in briefs during "legislative hearings," but the culture attendant to the adjudicatory style of decisionmaking provides a more receptive environment for such documents. Also, the requirement that adjudicatory decisions be on the record, discussed more below, in theory holds administrators more accountable to having considered presented briefs. See 5 U.S.C. § 557.

77. The District of Columbia Circuit Court of Appeals gave this as a supporting reason for setting aside the rules adopted by the Federal Communications Commission following extensive ex parte contacts in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). The court explained that it had the obligation . . . to test the actions of the Commission for arbitrariness or inconsistency with delegated authority. . . . [T]he public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. Id. at 54. In Home Box Office, the court set aside the agency's promulgation of rules. Other cases indicate, however, that courts will not do so in all rulemaking situations where ex parte contacts have "tainted" agency proceedings. See Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

For the APA provisions authorizing judicial review, see 5 U.S.C. §§ 702 (right of judicial review for a person "aggrieved by agency action"), 706 (scope of judicial review). For the case law interpreting the APA's judicial review standards, see infra note 102.

proceedings and make these records and other documents available to
the public at request, and avoid ex parte contacts. The theory is that
public perusal of well-kept records, public attendance at open meetings,
and bans on ex parte contacts will decrease the probability of agency
capture by traditional insiders, such as well-financed business interests.
When administrators know they are being watched, they will shy away
from behavior that opens them to charges of being industry's servants.

Both populist-emotionalist and elite-expert environmentalists want
to prevent agencies from discounting public value-based arguments or
slanting their factual analysis because the agencies have been pressured
or rewarded in private by industry. Therefore, both support open
meetings and ex parte contact limitations. Record-keeping requirements,
though, primarily benefit elite-expert environmentalists, who will spend
the time to scrutinize agency records for questionable fact assumptions.

E. Requirements that Agencies Demonstrate Reasoned Deliberation

Many, perhaps most, federal and state statutes that create adminis-
trative responsibilities delegate considerable discretionary authority to
agencies. The statutes creating the most agency discretion are those, typ-
ical of the 1930's growth of administrative power, that do little more
than direct agencies to regulate "in the public interest" without defining
that phrase. In comparison, statutes which impliedly order agencies to
pursue "feasible" environmental protection goals constitute a reform,
but still leave vast discretion to the agency. The typical statutory definition
of "feasible" indicates legislative intent to allow administrators to balance
competing concerns and thus administratively form ad hoc policy: "Feasible" means capable of being accomplished in a successful manner

81. See S. BREYER & R. STEWART, supra note 4, at 129.
82. Id. at 129; R. FELLMETH, supra note 13; Stewart, supra note 15, at 137-40; Wilson, The Dead Hand of Regulation, PUB. INTEREST, Fall 1971, at 39-58.
83. See, e.g., the Federal Communications Act, supra note 9. An additional example is
the Federal Trade Commission Act, which provides that the FTC "is empowered and directed
to prevent persons . . . from using unfair methods of competition . . . and unfair or deceptive
acts or practices . . . . [i]f it shall appear to the Commission that a proceeding by it in respect
thereof would be to the interest of the public [it] shall issue a complaint" and hold an adjudica-
tion to determine whether to order the charged party "to cease and desist from using" such
84. For statutes establishing a "feasible environmental mitigation" standard, see, e.g.,
CEQA, CAL. PUB. RES. CODE §§ 21002.1, 21081, 21085; California Coastal Act of 1976, CAL.
PUB. RES. CODE §§ 30001.5, 30212.5, 30213, 30230, 30233, 30234, 30236, 30250, 30251, 30260, 30261, 30263. For cases establishing a deferential "substantial evidence in the record"
standard of judicial review, see infra notes 93-94, 102. The standard is codified in CAL. CIV.
within a reasonable period of time, taking into account economic, environmental, social, and technological factors.\textsuperscript{85}

Lest statutes creating significant administrative rulemaking and adjudicatory power also create unbridled administrative discretion, Congress, state legislatures, and courts have required administrators to articulate reasons for their decisions and to support these with factual evidence.\textsuperscript{86} For example, the federal APA directs reviewing courts to "set aside agency action, findings, and conclusions found to be unsupported by substantial evidence in the record."\textsuperscript{87} Judicial interpretation of this provision indicates that whereas courts will not themselves evaluate the merits of factual issues, they will examine closely whether agencies have evidentiary support for fact conclusions that support formal rulemaking or adjudications. The courts have even extended their scrutiny of whether agency decisions are well-reasoned to informal rulemaking and adjudications.\textsuperscript{88} Judicial review of the reasonableness of all types of agency decisions reached its apex with the development of the "hard look" doctrine in the 1960's and 1970's. The doctrine, closely associated with several leading cases out of the District of Columbia Circuit Court of Appeals, requires agencies to develop evidentiary records and explain in considerable detail how these records support agencies' intermediate findings and ultimate decisions. The courts also require agencies to demonstrate "adequate consideration" of public comments.\textsuperscript{89}

When agency decisions raise environmental issues, NEPA and its state equivalents, such as CEQA, supplement the APA and administrative case law.\textsuperscript{90} Under CEQA, an agency must make certain written find-
ings for each significant environmental effect identified in an EIR. These findings must state that the effect has been mitigated when feasible, is the responsibility of another agency to mitigate, or cannot feasibly be mitigated. Projects with unavoidable environmental impacts can then be approved only if the agency further finds that their benefits outweigh their harms. These findings must support the agency's resulting decision, and in turn these findings must be supported by substantial evidence on the agency's record, taken as a whole. Ostensibly, this findings requirement assures the public that its servants have first considered public comment and then balanced a project's economic benefits against its environmental harms. To vindicate this public interest, courts will set aside agency decisions unsupported by adequate findings.

Courts will not, however, review the substantive merits of agency factual determinations or policy preferences inherent in "feasibility" determinations.

F. Limited Requirements of Substantive Responsiveness

Most administrative law reforms are designed to satisfy objections to administrative power by increasing public access to agencies and requiring agencies to demonstrate that they have not ignored public presentations when reaching reasoned decisions. Yet, environmentalists may find these protections to be of little comfort if agencies follow them and then proceed to make decisions that ignore environmental concerns. Legislators can address such worries by attempting direct control of substantive administrative decisions. For example, they can limit wetland development permits to measures designed to protect wetlands. Or, they can

the extent permitted by law consider" a "Regulatory Impact Analysis" studying the costs and benefits of proposed regulation. After so doing, agencies "shall not [undertake regulation] unless the potential benefits to society from the regulation outweigh the potential costs to society." Executive Order 12,291 differs from NEPA, though, in that the order does not create a judicial cause of action. See S. Breyer & R. Stewart, supra note 4, at 110-11.

94. For example, in San Francisco Ecology Center v. City and County of San Francisco, the court upheld the San Francisco Board of Supervisors' determination that the benefits of expanding the city's airport outweighed "its significant environmental risks." 48 Cal. App. 3d 584, 596, 597, 122 Cal. Rptr. 100 (1975). The court explained, "[s]ince the [Board's] resolutions adequately expose the agency's mode of analysis, they must be sustained if supported by substantial evidence." Id. at 596. The court then recited the evidence demonstrating the economic and community service benefits of expanding the airport, indicating that it would not itself balance these benefits against environmental harms. Id. at 597.
95. See The California Coastal Act of 1976, CAL. PUB. RES. CODE § 30233(c) (Deering
limit permits to construct shoreline protective devices to those devices that will protect existing structures.96

Even before the consensus developed in the 1960’s that administrative discretion was harming the public interest, the judiciary had made some halting moves to prompt legislatures to control administrative agencies with substantive standards. In two cases decided in the 1930’s,97 the United States Supreme Court used a “nondelegation doctrine” to refuse effect to administrative regulations under the National Industrial Recovery Act of 1933 (NIRA).98 The Court found NIRA and the administrative regulations promulgated under it inconsistent with Article I, Section 199 because NIRA delegated rulemaking power to the

Supp. 1986), which provides: “diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of [nineteen specified priority wetlands] shall be limited to very minor incidental public facilities, restorative measures, [and] nature study . . . .” Administrators might restrict wetlands development more or less stringently according to their definitions of, for example, “incidental public facilities.” This, however, is a far less discretionary task than limiting environmental degradation to the extent “feasible.” Compare CAL. PUB. RES. CODE § 30260, which provides:

where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the general welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.

Such language creates a good deal more administrative discretion.

96. For example, the California Coastal Act, CAL. PUB. RES. CODE § 30235, provides:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger of erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline supply.

97. In Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the Court voted 8-1 to refuse effect to the NIRA’s Petroleum Code and a presidential order under section 9(c) of NIRA. The Court found section 9(c) objectionable because that section provided that “the President is authorized to prohibit the transportation in interstate commerce” of oil produced in violation of state-imposed production quotas without telling when the President could or should do so.

In A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the Court voted unanimously to refuse effect to a “Live Poultry Code” promulgated under the NIRA provision for codes of fair competition. The test the Court applied was

whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others . . . . [The question] is whether there is any adequate definition of the subject to which the codes are to be addressed.

Id. at 530-31. The Court found there was not. Justice Cardozo, the lone Panama dissenter, justified his vote in Schechter by stating, “[t]his is delegation running riot.” 295 U.S. 553 (Cardozo, J., concurring). Cardozo’s statement captures what now seems true: Schechter was essentially an ad hoc reaction by the Court that the Roosevelt administration had gone too far in getting carte blanche approval to experiment with solutions to the Depression. The case was not a principled defense of separation of powers. This accounts for the Court’s failure subsequently to use the nondelegation doctrine. See S. BREYER & R. STEWART, supra note 4, at 90.

98. Ch. 90, 48 Stat. 195 (1933).

99. Article I, Section 1 of the United States Constitution provides in part, “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.”
The nondelegation doctrine has not been used again, however, and probably lacks vitality today. If courts have done little to prompt tighter legislative delegation, they have also avoided reviewing the substantive merits of agency decisions. Thus, legislative initiative has determined the extent to which administrators are subjected to substantive controls.

A few federal and state statutes specify how environmental controversies should be resolved. For example, the federal Endangered Species Act would prevent placement of an energy facility on the last remaining

100. See supra note 97.
101. See S. Breyer & R. Stewart, supra note 4, at 90. For some judicial hints that the doctrine is not, or should not be, moribund, see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (Rehnquist, J., concurring, quoted at supra note 85); Fort Worth & Denver Ry. v. Lewis, 693 F.2d 432, n.8 (5th Cir. 1982).
102. The federal APA's provisions for judicial review suggest some form of substantive review of agency findings. Under 5 U.S.C. § 706(2)(A), (E)-(F), courts are directed to:

set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law... unsupported by substantial evidence in a case... reviewed on the record of an agency hearing provided by statute; or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In Citizens to Preserve Overton Park, Inc. v. Volpe, however, the Supreme Court indicated that it would interpret these APA provisions narrowly to afford a limited judicial review of the substance of agency determinations. 401 U.S. 402 (1971). The Court stated that determining whether agency findings were arbitrary and capricious required some evaluation of the agency's judgment, but added, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Id. at 416. Instead, the Court would examine only whether the administrator had shown plausible reasons for the decision under review. Thus, judicial review even of the "substance" of agency decisions has become a procedure-like inquiry. Courts neither determine for themselves the facts at issue before the agency, nor do they evaluate policy issues. Courts evaluate whether agencies have documented reasons for their policy choices.

Overton Park only interpreted the APA's "arbitrary and capricious" standard, finding the "substantial evidence" and "unwarranted by the facts" tests inapplicable to that case's circumstances. Id. at 414-15. Other cases, however, have indicated an Overton Park-type approach to applying those latter standards, signifying no independent judicial evaluation of facts or underlying policy issues. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966); SEC v. New England Elec. System, 390 U.S. 207 (1968).

The judicial approach to agency interpretation of statutes further indicates deference on policy issues. For example, in Chevron, U.S.A. v. Natural Resources Defense Council, the Court permitted EPA to interpret the term "stationary source" in the Clean Air Act to include an entire plant, thereby allowing EPA to consider whether increased emissions from one part of a plant were offset by reductions elsewhere in the same plant. 467 U.S. 837, reh'g denied, American Iron and Steel Inst. v. Natural Resources Defense Council, 105 S. Ct. 28 (1984). The Court reasoned that when a statute "is silent or ambiguous," the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. Whether this "concept is inappropriate in the general context of a program designed to improve air quality" is irrelevant, what matters is "whether the administrator's view that it is appropriate... is a reasonable one." Id. at 845.
habitat of a listed endangered species. The federal Clean Water Act directs administrators to halt the pollution of the nation’s waters by certain deadlines, though this effort has been less than successful. And in California, state statutes prevent agencies from authorizing wetlands development or shoreline protective device construction except in limited circumstances. As discussed in Section E above, however, most federal and state statutes affecting agencies create vast administrative discretion.

Some environmentalists might perceive some advantages to the approach discussed above of requiring administrators to articulate reasons for decisions, while allowing agencies substantive flexibility. Political realists in the environmental movement might claim that phrasing statutes vaguely, though creating administrative discretion problems, allows for the enactment of some environmental legislation which might otherwise be blocked by stalemates over substantive policy details. Elite-expert environmentalists may view administrative insulation from political pressures as necessary to allow administrators to formulate policies.

103. One environmental attorney characterized the Endangered Species Act as “in some ways the most powerful weapon in our arsenal, so powerful that we use it sparingly so as not to lose it.” Interview with Michael Sherwood, Staff Attorney, Sierra Club Legal Defense Fund, in San Francisco (Aug. 6, 1985). As the Supreme Court explained its reversal of the Tennessee Valley Authority's decision to weigh the benefits of Tellico Dam completion more heavily than preservation of the endangered snail darter:

One would be hard pressed to find a statutory provision whose terms were any plainer than those of section 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies ‘to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence’ of an endangered species or ‘result in the destruction or adverse modification of habitat of such species.’ 16 U.S.C. § 1536. This language admits of no exception. . . . The plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, whatever the cost.


For a second example, see the California Coastal Act of 1976 which contains provisions that mandate specific outcomes. See supra notes 95-96.

104. According to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376, 1251(a)(1), “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” As of this writing, the deadline has passed but the goal has not been met. Perhaps the problem is that Congress did not go far enough in specifying the means to obtain this goal, thus allowing administrators to evade it. Alternatively, this might be one instance of Congress establishing aims that were unrealistic unless the United States was to abandon an industrial economy. The experience of the FWPCA indicates that if legislatures are to follow the approach of mandating substantive standards, they should begin by listing specific, narrow goals realistically obtainable.

105. See supra notes 95-96.

106. See Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J. L. ECON. & ORG. 85 (1985) (discussing P. ARANSON, E. GELLHORN & G. ROBINSON, A THEORY OF LEGISLATIVE DELEGATION (1982)). Of course, such a reason reflects more disgust with legislative capabilities than enthusiasm for delegation. The authors also discuss the still more cynical attitude that legislators phrase legislation vaguely so they can take credit for administrative success but blame unpopular regulations upon agencies. See id.
advancing the long-term public interest, rather than reflecting the tempo-
ral concerns of powerful factions.107

Anthropocentric-conservationists are also likely to have some en-
thusiasm for delegation as a means to free administrators to perform
cost-benefit analysis.108 The language of CEQA and similar statutes
which require administrators to adopt “feasible” mitigation could be in-
terpreted as mandating such a decision methodology.109 The same might
be said for other statutes that direct administrators to consider costs of
regulations.110 Anthropocentric-conservationists support cost-benefit
analysis because the methodology assumes that utility to people is the
appropriate criterion for public policy, and the analysis has the practical
effect, given the difficulties of quantifying wilderness values, of favoring
commercially marketable uses of resources.111

Anthropocentric-preservationists would not quarrel with the philos-
ophy behind cost-benefit analysis, but they would contest uses of the

107. According to this theory, it is legislatures, rather than agencies, that are more prone
to capture by powerful elite factions. See id. at 95-99.
108. See id. at 91-95.
109. See supra notes 85, 93-94 and accompanying text (courts holding that “feasibility”
statutory language grants administrators discretion to balance costs and benefits). The case
law, however, indicates some judicial ambivalence about what “feasible” means. Whereas Just-
ice Rehnquist in Industrial Union AFL-CIO thought the word expressed no legislative stan-
dard at all, see supra note 85, the Court in Overton Park thought that

the requirement in [the Federal-Aid Highway Act of 1968 that the administrator not
approve highway construction through a public park when “feasible and prudent”
alternatives exist] admits of little administrative discretion . . . . Congress clearly
did not intend that cost and disruption of the community were to be ignored by the
Secretary. But the very existence of the statutes indicates that protection of parkland
was to be given paramount importance.
401 U.S. at 402.

110. For example, the Federal Water Pollution Control Act as amended in 1972 required
all industrial point sources of water pollution to utilize, by July 1, 1977, “the best practicable
control technology currently available as defined by the Administrator” (Pub. L. No. 92-500,
§ 301(b)(1)(A), 86 Stat. 816, 844-45 (1972)), and by July 1, 1983, “the best available technol-
ogy economically achievable for such category or class [of source]” (Pub. L. No. 92-500,
§ 301(b)(2)(A), 86 Stat. 816, 845 (1972)). In its requirement that polluters utilize “practica-
ble” or “economically achievable” technologies, the FWPCA charged administrators with a
two-part inquiry: discovering various mechanisms for controlling industrial pollutants and
then calculating the costs and benefits of such mechanisms to arrive at the efficient level of
pollution control.

One of the key sponsors of the FWPCA, Senator Edmund Muskie, tried to downplay the
significance of “cost-benefit analysis” for FWPCA implementation: “[t]he balancing test be-
tween total cost and effluent reduction benefits is intended to limit the application of technol-
ology only where the additional degree of effluent reduction is wholly out of proportion to the
costs of achieving such marginal level of reduction for any class or category of sources.”
Rauch, The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control
Device, 10 HARV. J. ON LEGS. 565, 581 (1973). Elsewhere, Senator Muskie even suggested
that under some circumstances administrators should not take into account the costs of pollu-
tion control at all. Other legislators, however, contradicted this interpretation of the Act they
voted for. And, despite Muskie’s remarks, administrators implementing the Act inevitably
undertake some form of cost-benefit analysis. Id. at 525-28.
111. See Comment, supra note 41, at 10,198-99.
methodology that fail to account for wilderness values. Conservationists and preservationists both would fear captive agencies that are unable to calculate costs and benefits disinterestedly.\textsuperscript{112} For this reason, both groups are apt to favor tempering agency discretion with the procedural safeguards of increased information flows, enhanced visibility, and findings requirements.

Populist, emotionalist, and land ethic environmentalists are likely to think that administrators hold biases against their groups that can only be corrected by substantive restrictions. These environmentalists might fear that administrators will discount emotionalist, land ethic, and even populist pleas as unrepresentative of the larger public. Administrators might do so even when public opinion favors environmentalist goals because industry-captured agencies have a skewed view of their critical audience.

For similar reasons, these environmentalists feel that their interests will receive scant recognition when administrators opt for cost-benefit analysis. While some economists contend that calculating how much people would be willing to pay for given alternatives reveals society's "true" preferences, these environmentalists object on various grounds. Populists believe that because development interests control a greatly disproportionate share of wealth, any methodology measuring social preferences by willingness to pay is biased in favor of development.\textsuperscript{113} Emotionalists and preservationists argue that emotional values, such as the pleasure gained from wilderness experiences, are hard to quantify and therefore slighted in cost-benefit analysis.\textsuperscript{114} Land ethic environmentalists consider applying theoretical market prices of alternatives to be a morally and aesthetically flawed means of deciding how to use natural resources.\textsuperscript{115}

\textsuperscript{112} See S. Breyer & R. Stewart, supra note 4, at 162 (some agree that market failure creates some need for government regulation, but assert that agencies are incapable of discovering and ordering efficient solutions to market problems and should therefore be dismantled); Wilson, supra note 82 (noting that scholars as diverse as radical historian Gabriel Kolko and conservative economist George Stigler have decried agency capture. The former sees it creating agency favoritism for dominant classes, the latter, agency interference with market efficiency).

\textsuperscript{113} See supra notes 30-32 and accompanying text.

\textsuperscript{114} NEPA does specify that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(B). Yet, given reluctant administrators, this might be little more than an expression of sentiment. It is not a self-executing provision that provides a basis for judicial remedy on substantive issues as opposed to merely procedural requirements. See supra note 49 and accompanying text. NEPA notwithstanding, some environmentalists still balk at adopting cost benefit methodology out of fear that preservationist concerns will be neglected. See Pollack, supra note 34, at 397; S. Breyer & R. Stewart, supra note 4, at 167.

\textsuperscript{115} One scholar phrased the land ethic view this way:

\textquote{When we protect an invention, we can at least speak of a fair market value for it, by
Elite-expert environmentalists might not insist as much as the above
groups that substantive standards are the only means by which legisla-
tors can direct administrators toward sound environmental policies. Elite-experts might believe that their more fact-oriented approach will
influence administrators where emotional appeals fail. On the other
hand, elite-experts must dread the captured agency which automatically
prefers the views of regulated industries. This preference could be based
on the good faith belief that experienced industrialists better understand
technical issues than less schooled environmentalists. Alternatively, a
cynic might believe that administrators are responding to rewards the
industries are offering, such as pressure upon legislators to protect and
increase agency budgets, and future employment for administrators at
salaries vastly exceeding their current government wages.116

Elite-experts are likely to favor more explicit substantive statutory
standards as a partial solution. They might add, however, that specifying
the methods and technologies to solve environmental problems in de-
tailed statutes is probably impossible because of these problems’ com-
plexity. Thus, they are likely to favor both preserving the procedural
reforms discussed above and increasing oversight of agencies by environ-
mentally sensitive elected executives and legislators.117

In summary, statutes such as APA and NEPA and judicial doc-
trines such as the “hard look” responded to criticisms of agency power
by entrenching public participation procedures. Congress also has im-
posed some substantive checks on administrative power with statutes
that direct agencies to undertake specific action, such as block wetlands
development, stop projects that would harm endangered species, and
seek the end of water pollution by a deadline.

Congress’s policy is thus a hybrid of procedural checks and substan-
tive directions. This policy is somewhat inconsistent in that it institu-
tionalizes procedural checks designed to make agencies politically
responsive while simultaneously directing the agencies to decide substan-
tive issues on ostensibly non-political criteria, such as cost-benefit meth-

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117. See Mashaw, supra note 106, at 95-99. Breyer and Stewart note that many observers
have stated that administration can be improved with better administrators. For example,
James Landis, former dean of the Harvard Law School, claimed in his report to President
Kennedy: “Good men make poor laws workable; poor men will wreak havoc with good laws.”
Breyer and Stewart are, however, critical of such claims, finding them attractive on their
surface, but either substantively vague or unworkable when applied. S. BREYER & R. STEWART,
supra note 4, at 168-72.
odology.\textsuperscript{118} If the policy reflects more than just confusion, perhaps it is congressional suspicion that neither approach can be fully trusted to control administrative power, and that both methods together have a better chance than either alone.

III

ALTERNATIVES TO EXISTING FACILITY SITING PROCEDURES

The administrative law reforms discussed above, which have greatly expanded public participation in administrative decisionmaking, have recently been criticized by industry, academics, and politicians. This Part discusses some of the problems that critics perceive, as well as the conventional and the novel reforms they suggest.

A. The Backlash Against Procedural Delays

The utilities which tried to import LNG into California complained that a "permitting net" made approval of their project difficult, perhaps impossible.\textsuperscript{119} The net consisted of the numerous construction and operating permits required by various agencies with differing mandates and divergent views on how to regulate LNG siting.\textsuperscript{120} Here, the utilities echoed complaints of some industrialists,\textsuperscript{121} scholars,\textsuperscript{122} press editorialists,\textsuperscript{123} and political leaders\textsuperscript{124} that multiple permit requirements coupled with cumbersome procedures often defeated meritorious projects by delaying them to death.\textsuperscript{125}

\textsuperscript{118} See Reich, supra note 4, at 1624-25.
\textsuperscript{120} Id.
\textsuperscript{121} E.g., Letter from Keith McKinney, President of Western LNG Terminal Associates, to author (July 31, 1984); LNG in Southern California, supra note 119, at 75 (comments of Greenberg).
\textsuperscript{122} See, e.g., M. O'Hare, L. Bacow & D. Sanderson, supra note 62; R. Ellickson & A. Tarlock, supra note 45, at 331-32, 338-39.
\textsuperscript{123} L.A. Times, June 4, 1978, § IV, at 3, col. 3c.
\textsuperscript{124} See Senate Subcomm. on Envtl. Pollution, Senate Comm. on Env't and Public Works, Energy Development Project Delays: Six Case Studies, S.R. Doc. No. 7, 96th Cong., 1st Sess. (1979) [hereinafter cited as Energy Project Delays]; Democratic Nat'l Comm., Democratic National Platform 13 (1980); L.A. Times, Mar. 26, 1978, § VI, at 1, col. 1 (Los Angeles City Councilmember Braude claiming that, after spending millions on EIR's, the Los Angeles community gets "[i]t is little but several more filing cabinets full of government paperwork" while "vested interests" use the "endless procedural stumbling blocks" created by environmental review to their own ends).
\textsuperscript{125} For example, Keith McKinney, President, Western LNG Terminal Associates, the utility subsidiary responsible for constructing the LNG receiving terminal at Point Conception, answered the author's request for comment: [a]s to ... the efficacy of the hearing process and how it might be changed for the better, I would only observe that a challenge exists for those who are concerned with the regulatory and permitting arena to somehow devise a way in which specious
While these critics do not object to environmental protection or public participation in administrative decisionmaking per se, they claim that repeated inquiries by several agencies serve mostly to re-hash the data reviewed by the first agency to conduct hearings. They also charge that environmental impact reporting produces information of little practical value, and that numerous public hearings add little to public or administrative understanding. EIS's and EIR's, critics claim, are typically read only by potential litigants looking for procedural gaffes upon which to base a cause of action.

Another problem these critics see with the current system is that adjudicatory hearings modeled after the adversary system used in common law courts make protagonists testy and uncompromising, encouraging them to care as much about triumphing over their opponents as about vindicating a substantive position. Because protagonists have come to place such a high premium on defeating their opponents, they testify in public hearings not to inform, but to build a record to either facilitate or resist litigation or to cause sufficient delay to render a project's approval moot. When proponents, opponents, and administrators are caught up in adversary contests, they will not explore the mutually beneficial alternatives lying between defeat or approval of projects without any modifications. For these reasons, critics believe that the re-

opposition which wins by delay rather than merit can be controlled while preserving the rights of due process. I can only say the present system is not capable of striking this balance.

Letter from Keith McKinney, supra note 121.

126. See LNG in Southern California, supra note 119, at 50-52 (comments of E.R. Island, Senior Counsel for Pacific Lighting Corp., a major sponsor of the LNG project).

127. One group of scholars evaluated EIS's this way:

Environmental impact statements have significantly increased the volume of available information concerning proposed facilities. However, the documents have tended to be long, complicated, poorly referenced, filled with unsupported conclusive statements, and very technical.

The major unanticipated effect of NEPA has been its value as a bargaining tool for those opposing proposed projects. NEPA requirements, vaguely worded, have become a ticket to sue; information's value to decision-making becomes secondary to its leverage potential in litigation.

M. O'HARE, L. BACOW & D. SANDERSON, supra note 62, at 47, 49.

128. See, e.g., LNG in Southern California, supra note 119, at 84-86 (comments of Jeffrey Liss, attorney representing the Fred H. Bixby Ranch Co., questioning the ability of administrative adversary hearings to produce balanced information and reasoned decisionmaking), 87 (comments of John Geesman, Executive Director of the California Energy Commission, that his agency "[t]ry[s] to keep the adjudicatory, adversarial type of proceedings to as small a number as possible . . . and to only resort to [them] after extensive quasi-legislative hearings, where the technical staffs of the applicant, the agency, and members of the public get together and attempt to narrow down what disagreements they actually have"), 89 (comments of Greenberg stating that it would be "unfortunate for the lawyer to take the lead role" in how society balances its concerns in facility-siting issues).

129. See LNG in Southern California, supra note 119, at 87 (comments of Geesman); M. O'HARE, L. BACOW & D. SANDERSON, supra note 62, at 6-25; C. DUERKSON, DOW VS. CALIFORNIA, A TURNING POINT IN THE ENVIRONMENTAL BUSINESS STRUGGLE 129 (1982).
requirement that administrative adjudications be supported by findings which are in turn supported by substantial evidence on the record does not force administrators into reasoned deliberation, but rather creates the opportunity for time-consuming judicial review.

B. Conventional Attempts To Streamline Permitting Procedures

The federal government and the states have attempted to respond to criticism that facility siting is overly slow and expensive. The Carter administration, for example, contemplated creating an Energy Mobilization Board, with authority to preempt state and other federal agency decisions on selected energy projects of national concern. While that idea never materialized, many states have increased the authority of a single existing agency or created a new one with preemptive facility siting authority.

California, for example, has granted sole authority over new electric generating plants to the new California Energy Commission (CEC). In so doing, the state has eliminated CEQA environmental review, and preempted the permit authority of local government and other state agencies over these plants. California has also attempted to design the energy facility citing procedures of the CEC to be a comprehensive and rational three phase policy process. In the first phase, the CEC undertakes general statewide planning for meeting electricity needs while considering environmental values. In the second phase, the agency preliminarily screens sites. In the third phase, it performs detailed analysis of sites which it has tentatively deemed acceptable. The CEC provides opportunities for public, industry, and other agency participation during all phases of site-specific review in general information-gathering "discovery" hearings and in subsequent adjudicatory or non-adjudicatory decisional hearings.

130. 1980 PUB. PAPERS 417.
131. For example, Vermont, like many eastern states, has designated its utility regulatory commission, the Vermont Public Service Board, to have final authority over new electricity generation and transmission facilities. Washington consolidated the authority for new energy facilities in a newly reorganized Energy Facility Site Evaluation Council. M. O'HARE, L. BACOW & D. SANDERSON, supra note 62, at 60-62.
132. The CEC prepares a Biennial Report forecasting the need for new electric generating facilities, balanced against statewide considerations of environmental protection. This report becomes the background planning document used when industry files "Notices of Intentions" to seek power plant approval with the CEC. After these documents are filed, the CEC screens alternative sites. Sites tentatively found acceptable then are reviewed further when industry submits detailed design documentation accompanying an "Application for Certification." CALIFORNIA ENERGY COUNCIL, OVERVIEW: CALIFORNIA ENERGY COMMISSION'S POWER PLANT SITING PROCESS (1984).
133. The system is a "certified regulatory program." The California Public Resources Code provides that such programs, when approved by the California Resources Agency, are the "functional equivalent" of CEQA review. CAL. PUB. RES. CODE § 21080.5(a); CALIFORNIA ENERGY COUNCIL, supra note 132, at 8.
States have also sought to speed up decisions by establishing timetables for agency actions. The CEC, for example, has one year to complete initial screening of proposed power plant sites and another year either to permit or deny plant sites. In 1977, the California legislature amended CEQA to mandate deadlines for the completion of environmental review.

Another strategy employed by the states to ease the burden of administrative process is to better coordinate the permitting activity between existing agencies. Coordination efforts have included joint hearings before agencies with shared authority over a project and the creation of central state agencies to assist other agencies and applicants to comply with administrative procedures. For example, California has created an Office of Permit Assistance to advise industry on how to secure state permits. Also, the California Office of Planning and Research coordinates administration of CEQA by assisting agencies in determining which among them should prepare an EIR, by circulating EIR’s for state agencies’ comments, and by drafting guidelines for EIR preparation.

In the LNG terminal controversy, the California state legislature experimented with a streamlined permit procedure which consolidated permitting authority in a single state agency. The move received mixed reviews from environmentalists and industry groups affected by the statute. From a theoretical perspective, streamlining has also been criticized for addressing only the symptoms of administrative delay. Proponents of a negotiated compensation model of administration have criticized legislation similar to the LNG Act for offering only incremental adjustments to existing procedures when wholesale revision was needed. Before discussing the specifics of the LNG controversy, this Comment discusses the theories of these critics.

C. The Negotiated Compensation Model of Administration

According to theorists favoring a negotiated compensation model of administration, the procedural formality of existing facility siting ob-
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structs satisfactory outcomes to permitting controversies. These theorists criticize such reforms as consolidating agency authority, preempting local authority, imposing timetables on agencies, and sponsoring joint hearings and other interagency coordination. These critics note that while such measures “reduced the number of ways concerned citizens could challenge [administrative] decisions,” such reforms did not reduce citizen desire to do so.\textsuperscript{142} Instead, facility “opponents have felt pressured to step up the magnitude and sophistication of their activities.”\textsuperscript{143} And, while opposition groups have lost some of their procedural arsenal, they effectively use what remains and still delay projects.\textsuperscript{144} Moreover, those facilities that are built over environmentalists’ and neighbors’ objections have poorer cost benefit ratios than these facilities would have if compensation for disadvantaged groups were negotiated.

These theorists advocate replacing existing facility siting mechanisms with a “compensated negotiation” model. By this model, administration would facilitate negotiated compensation “payments” from facility proponents to opponents.\textsuperscript{145} Negotiated compensation theorists assume that environmentalists oppose facilities out of general concern for the quality of life. These theorists also assume environmentalists object to the external costs of projects being passed on to groups that do not profit from the new facilities. The solution is for government-sponsored negotiations between the developer and its opponents to facilitate a transaction missing in the market: the payment of compensation to opposition groups for the harms they have suffered.

Government assistance in securing these payments would be good public policy because the transactions would serve both equity and efficiency. Equity would be advanced when environmentalists and other opposition groups do not have to bear without compensation the costs of other people’s profit-making; efficiency would be served when activities have to bear external as well as internal costs.\textsuperscript{146}

\textsuperscript{142} M. O’HARE, L. BACOW & D. SANDERSON, supra note 62, at 63-64.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} See generally M. O’HARE, L. BACOW & D. SANDERSON, supra note 62; C. DUERKSON, supra note 129, at 128-33; Dorsey, Coastal Management as a Bargaining Process, 11 COASTAL ZONE MGMT. J. 13 (1983); LNG in Southern California, supra note 119, at 82 (comments of Greenberg).
\textsuperscript{146} According to classic economic theory, an activity is efficient if its benefits exceed its costs. A problem arises, however, when an activity has significant external costs, which are those aspects of the activity that decrease social welfare, but not the welfare of the individual who causes the harm. In such a case, it is rational for the individual to continue his activity, but this is not true for society if the external costs exceed the social benefits of the activity. In such a case, society should charge the individual for society’s harm (“internalize the externality”), leading to the socially efficient result of the individual reducing his activity to the point where the marginal benefit he receives is equal to his activity’s marginal social cost. See R. STEWART & J. KRIER, supra note 23, at 225-26; M. O’HARE, L. BACOW & D. SANDERSON, supra note 62, at 89 n.*.
Compensated negotiation theorists would begin reorganizing permit administration by abandoning environmental impact reporting as it is now done. They argue that, whereas EIS's and EIR's are designed to be objective, "there is no operational definition of 'objectivity' and hence no such information." All authors of environmental reports or other informational documents prepare their analysis from a perspective, giving facility opponents reason to distrust EIS's and EIR's that do not support these opponents' views. Opposition groups can justify their distrust by pointing out that reports are prepared by agencies and consultants with reasons to be friendly to industry. As environmentalists point out, industry pays for EIS's and EIR's. It also hires former agency staff at considerably higher than government salaries.

These theorists postulate that participants in a land use controversy want to know how the project will affect them and what alternatives might reduce its adverse effects upon them personally. A single document will perform this role poorly because it will be too large to wade through, will omit information relevant to some groups, or both. These theorists favor requiring the government to continue providing information relevant to all groups, such as the project plan and general information about the types of impacts anticipated. Otherwise, they believe that detailed information should be prepared by the "consumer," the public advocate who will use it in presentations to agencies.

A problem often unaddressed by these theorists is how the various groups will obtain the funding necessary to produce their own information. One group of scholars suggests the following procedures. First, a developer should research and write a draft environmental impact report, without being legally required to make the draft "objective." Instead, the draft "would only have to present the issues well enough so as to serve as a basis for debate and for further information gathering." This draft would adequately alert the community to possible controversies because opposition groups, knowing the biases of industry, would

147. M. O'HARE, L. BACOW & D. SANDERSON, supra note 62, at 115-16.
148. Id.
149. See supra note 53.
150. See R. FELLMETH, supra note 13, at 311-25.
152. Id. at 112-13.
153. Many observers point out that the complexity of environmental issues, combined with the scarce resources of public groups opposed to industry projects, makes it very difficult for such groups to be informed sufficiently to defend their positions in a manner impressive to administrators. This point is probably uncontroversial. Yet, often observers are at a loss to know how to equalize information resources between industry and groups such as environmental organizations. See, e.g., LNG in Southern California, supra note 119, at 84-85 (comments of Liss). The typical solution is thought to be countervailing government expertise. See, e.g., id. at 86 (comments of Thomas Clarke, counsel for Pacific Lighting Corp.).
know how to read between the lines of the report. Second, "the community should be provided with funds with which to hire consultants to provide a variety of services as the local government sees fit—criticizing the developer's impact report, gathering information not included therein, [or] expanding the analysis on issues of special concern to the community." 

This proposed procedure would not significantly change the way information is currently gathered. When local government bodies are lead agencies under CEQA, they do have money to hire consultants to research and write environmental analysis because they bill the applicants for the costs of environmental impact reporting. Moreover, consultants must listen to and incorporate community comments into EIR's. The only difference between current practice and these scholars' proposal is that under the new procedure, the consultants would not undertake to release a single objective analysis. Instead, they would strive to provide the reasoned support for community views. The problem with this suggestion is it fails to see that "the local government" does not, cannot, speak for an entire community. At least some community groups usually feel neglected by local government leaders when major development projects are approved, as demonstrated by the frequent lawsuits between community organizations and local government over such approvals.

In any case, negotiated compensation theorists want interested community groups to learn from trusted sources how a proposed facility will affect them. Before negotiations can even begin, groups disposed to be antagonistic must believe that they are not being misled into thinking a project will be less harmful than it will be.

These theorists think that if initial suspicions and hostilities between facility proponents and opponents can be overcome, these protagonists will be able to find something to trade. Industry will want community opposition and attendant administrative delays and lawsuits to end, leaving industry free to pursue its projects unharrassed. Community groups might want various concessions in return for tendering their acquiescence in a project. For example, nearby landowners whose property val-

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155. According to these scholars, "parties to [a] dispute often have more influence with frankly self-serving statements and reports, since a user can correct them for known bias and doesn't fear deception by indeterminate distortions." Id. at 115-16.
156. Id. at 173 (emphasis added).
157. See supra note 53.
158. See supra notes 92-94.
159. See Dorcey, supra note 145, at 30-33. Dorcey notes generally that well-informed participants in environmental issue bargaining are important because "such bargaining processes can be extremely cost-effective mechanisms for identifying the range of alternative decisions and their consequences, and for exploring the best possibilities for compromise." Id. at 33. Dorcey supports his contentions with anecdotes about poor resource management of estuaries and fisheries in British Columbia, which occurred because the public and agency officials who could have negotiated with industry were inadequately informed.
ues would be depressed might be satisfied with money compensation. Environmentalists, however, might want industry to buy and set aside or restore wildlife habitat or open space areas as replacement in kind for lost environmental resources.

The reason such bargaining does not naturally occur in the market is because of the high transaction costs of arranging exchanges between industry and disparate community groups. Even when industry can find community group leaders willing to trade opposition for compensation, such leaders cannot contract for their fellow group members. Developers have no guarantee that the members of that group will not reject the compromise and form their own splinter opposition group. The only sure prevention of splinter opposition, signing contracts with each individual opponent, is infeasible for the sponsors of large facility projects.

To overcome these transaction barriers, negotiated compensation theorists want government to conduct negotiations between developers and appropriate community representatives. For these negotiations to be effective, any settlements reached would necessarily have to remove all legal obstacles to projects in exchange for adequate compensation for disaffected community groups. Yet, say these scholars, opposition groups have insufficient incentive to bargain away their rights to oppose facilities in administrative and judicial proceedings because these opponents reasonably believe “successful intransigent opposition” to be their “best alternative to a negotiated settlement.” Therefore, these theorists recommend that local, general-purpose government officials, such as mayors, be empowered to represent all community groups in the negotiations and then bind all groups to the settlements reached. The one check these theorists would add is a proviso of legislative ratification of the agreements reached by these officials.

Thus, negotiated compensation theorists want local government to generate information about a proposed facility’s impacts upon the community and then conduct negotiations on the community’s behalf. Perhaps it is efficient for local officials both to gather information from the community and to represent the latter in negotiations. Moreover, listen-

160. See R. Stewart & J. Krier, supra note 23, at 107-09; M. O’Hare, L. Bacow & D. Sanderson, supra note 62, at 96.
161. See M. O’Hare, L. Bacow & D. Sanderson, supra note 62, at 96-97. The authors point out that Friends of the Earth split off from the Sierra Club in 1969 due to differences over nuclear power plant siting.
162. For discussion of this “hold-outs” or “strategic behavior” problem in bargaining, see Cooter, The Cost of Coase, 11 J. LEGAL STUD. 1, 20 (1982).
163. M. O’Hare, L. Bacow & D. Sanderson, supra note 62, at 169-70.
164. Id. at 171-72.
165. The authors suggest that, for a major facility in a small community, the chief negotiator could be the mayor, with his or her settlement subject to legislative ratification. Id. at 167.
ing to community sentiments might sensitize these officials to community concerns. Yet, this proposal is based on the questionable premise that local officials can disinterestedly advance the concerns of diverse groups, an assumption this Comment criticizes when discussing the LNG controversy.

IV

PUBLIC PARTICIPATION AND THE LNG CONTROVERSY

The administrators presiding over where to locate an LNG terminal on the California coast utilized the procedures which legislatures and courts had created in response to concerns about unchecked agency power. Yet, these procedures were also somewhat streamlined, following the trend toward efficiency reforms discussed in Part III. Therefore, the LNG controversy offers a good setting in which to evaluate existing procedures and some of their reforms. Beyond this, studying the controversy is the foundation for speculating how untried reforms might have affected the LNG project and may affect similar energy siting controversies in the future. Before reaching these issues, however, it will be useful to know the background pressures administrators faced as they deliberated what to do about LNG.

A. Setting the Stage: Natural Gas Shortages and Safety Worries; The Legislative Response

In the winter of 1976-77, harsh weather and the resulting increased demand for natural gas left many areas of the eastern United States without adequate supplies to heat homes and fuel factories.166 Meanwhile, in California, the most pressing problem was a drought; unseasonably warm temperatures were keeping natural gas demand well within available supplies. Yet, Californians had cause for alarm when warned that without new natural gas supplies in the near future, they might suffer, even more than easterners, from "the worst, and most personal energy crisis so far—the shortage of natural gas."167 At the time, California used a great deal of natural gas.168 Indeed, one press analysis characterized southern California as "the most natural gas dependent society in the world."169

California's natural gas utilities, Pacific Gas and Electric Company

168. See PUC Order I, supra note 55, at 81-84.
169. According to the L.A. Times, at the time, natural gas heated 92% of southern California homes and 95% of its hot water and fueled 76% of its cooking stoves. Feb. 5, 1978, § I, at 1, col. 1.
(PG&E) in the north and Pacific Lighting Corporation in the south, warned that only liquefied natural gas imports from Alaska and Indonesia would head off a critical natural gas shortage in the state by 1980 or 1981.¹⁷⁰ Pacific Lighting claimed repeatedly that without LNG, 700,000 existing jobs would be lost and fourteen percent unemployment would be generated in southern California.¹⁷¹ Critics derided the utilities for predicting such specifics as the number of jobs that would be lost if the LNG project were delayed.¹⁷² Yet, the warnings created effective political support for the project. Organized labor protested to the California legislature that delay of the LNG facility would cost 700,000 jobs;¹⁷³ press editorials echoed the gas companies' claims;¹⁷⁴ and the California Public Utilities Commission's order approving an LNG terminal assumed that without LNG, gas shortages and economic disruption would occur.¹⁷⁵

The utilities' claims were critically viewed by environmentalists and some state officials, however, who doubted the pressing need for LNG and claimed that LNG might be an extremely dangerous technology.¹⁷⁶ California's unfamiliarity with LNG provided fertile breeding ground for worries about LNG safety. In the mid-1970's, the domestic natural gas industry already was using the liquefaction technology, but primarily for

¹⁷¹ See, e.g., L.A. Times, Mar. 22, 1977, § II, at 6, col. 5.
¹⁷² For example, Robert Solomon of the California Energy Commission saw grounds to predict natural gas shortages, but thought the utilities guilty of hyperbole. He observed in 1978, "frankly, last year there was a lot of hysteria spread by the gas companies, Pacific Lighting in particular. And that was all part of the pressure to get approval of LNG and get us off the dime on regulatory action on all these projects." L.A. Times, Feb. 5, 1978, § I, at 1, col. 1.
¹⁷⁵ The CPUC order approving the Point Conception terminal found: California cannot reasonably rely on receipt of supplemental gas supplies from Canada, Algeria, Mexico or the North Slope of Alaska as a substitute for supplies of LNG from Indonesia and South Alaska. . . . The Point Conception is the only site where an LNG terminal could be constructed and operational in sufficient time to prevent curtailment of high priority requirements for natural gas, thereby maintaining employment, essential residential consumption levels, and air quality.
PUC Order I, supra note 55, at 310, 320.
¹⁷⁶ For example, the chair of the California Assembly Subcommittee on Energy. Assemblymember Terry Goggin, publicly stated that the utilities' claims were "emotionally charged." He felt that any gas shortages would not materialize until 1984 and that supply alternatives, such as Mexican imports, might make LNG importation unnecessary. L.A. Times, Mar. 9, 1977, § III, at 10, col. 6. Goggin believed LNG importation would be "at best" a high-cost insurance policy for California industries using natural gas as a boiler fuel; that insurance might hurt California consumers in the long run by reducing federal allocation to California of cheaper domestic natural gas. He advocated delaying LNG approval pending a one-year study of alternatives. L.A. Times, Feb. 4, 1977, § I, at 3, col. 1; id., Mar. 9, 1977, § III, at 10, col. 6.
"peak shaving"—storing natural gas when demand was low and releasing it during peak demand.\textsuperscript{178} The utilities' proposal, unlike on-site peak shaving storage, involved LNG transportation. The domestic industry already transported LNG, but only to receiving terminals on the east coast, which had smaller capacities than the planned Point Conception facility.\textsuperscript{179}

A public unfamiliar with LNG heard opponents speak of the "catastrophic" consequences if a supertanker laden with LNG ran aground and spilled its cargo. Opponents pointed out, with a metaphor designed to evoke images of mass devastation, that LNG tankers would store the energy equivalent of "approximately 55 Hiroshima bombs."\textsuperscript{180} An LNG spill from the California project, opponents claimed, could create a vapor cloud of up to 150 square miles in size.\textsuperscript{181} They described the ensuing scenario:

Should LNG spill out of any of its containment vessels, it begins to vaporize into a colorless gas, which hugs the ground or water surface, freezing or asphyxiating. When mixed in air with portions of about 5 to 15%, it becomes flammable. Exposed to a flame [vaporized LNG would ignite] and the resulting fire would race back to its point of origin, possibly as far as 50 kilometers away, incinerating everything in its path.\textsuperscript{182}

\textsuperscript{178} In the mid-1970's, there were 46 major LNG facilities in the United States. Three of these terminals were used to receive transported LNG; the remainder were peak shaving facilities. \textit{Western LNG Terminal Co., supra} note 1, at 4; L.A. Times, Sept. 28, 1979, § I, at 1, col. 5; \textit{LNG in Southern California, supra} note 119, at 59 (comments of Charles Warren, former chair, President's Council on Environmental Quality, and occasional consultant to the Fred H. Bixby Ranch Co.).

\textsuperscript{179} The three existing LNG receiving terminals were at Everett, Massachusetts; Cove Point, Maryland; and Elba Island, Georgia. Their respective capacities were 42, 130, and 130 billion cubic feet of natural gas annually. The Point Conception facility was designed to have a receiving capacity of 328.5 billion cubic feet annually. \textit{LNG in Southern California, supra} note 119, at 59-60 (comments of Warren); Pacific Alaska LNG Co., Nos. CP 75-140, CP 74-160, CI 78-453, CI 78-452 (F.E.R.C. Aug. 13, 1979) at 22 [hereinafter cited as FERC ALJ Order].

\textsuperscript{180} G. Allen, The Case Against An LNG Terminal at Point Conception 3 (Nov. 5, 1979) (unpublished memorandum prepared for use by Santa Barbara community groups opposed to the Point Conception terminal).

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{LNG in Southern California, supra} note 119, at 63 (comments of Warren). These comments seem to have been lifted, with a little embellishment, from the federal EIS on the project:

\textit{As a cryogenic liquid, LNG will rapidly cool materials upon contact, causing extreme thermal stresses on normal containment materials and, in the case of contact with humans, immediately freeze (burn) human skin.}

\textit{LNG is a liquefied flammable gas which readily vaporizes when exposed to external heat sources . . . In a mixture of 5 to 15 percent vapor and air, it is flammable. Within enclosed spaces, in such concentrations, and in the presence of an ignition source, it can explode. The primary danger present in a large-scale LNG spill is a very intense fire at the spill site. A more remote hazard is that the vapor plume could drift downwind, possibly into enclosed spaces, and explode or catch fire. Once the air-vapor mixture has been ignited, the fire would probably propagate back to the fuel source.}

\textit{FERC, Western LNG Project Final Environmental Impact Statement (Vol. II) (CP75-83-2) 255-56 (1978) [hereinafter cited as II FEIS]. This is some evidence, the claims of}
The press lent credibility to opponents' charges that LNG could travel in low-lying vapor clouds for long distances before igniting.\textsuperscript{183} Media accounts warned that LNG has explosive properties and recounted LNG spills causing fatal explosions and fires.\textsuperscript{184} The Government Accounting Office and the California Energy Commission indicated that because of risks of fire and explosion LNG should not be transported through populated areas.\textsuperscript{185} The chair of the California Assembly Subcommittee on Energy, Assemblymember Terry Goggin, increased media attention to LNG safety by sponsoring hearings on the subject.\textsuperscript{186} Goggin's subcommittee issued a report critical of industry safety standards, which concluded, "the safety of LNG is, at best, indeterminate at this time. In light of the tremendous unknowns of LNG, coupled with the equally tremendous risks to the public, the state must establish an extensive quality control system before large-scale importation of LNG is commenced."\textsuperscript{187}

The industry defended its safety record and argued that LNG was a proven technology,\textsuperscript{188} but failed to persuade the public or the California legislature that LNG safety was not questionable. Thus, two opposing notions enjoyed substantial political support in California. On the one hand, industry, labor, and some politicians believed that new natural gas supplies were urgently needed to avoid shortages. On the other hand, environmentalists, residents near proposed terminal sites, and other politicians contended that an LNG facility would pose significant risks to its neighbors.

O'Hare, Bacow, and Sanderson to the contrary, that facility opponents do read EIS's and make use of them.

For other criticisms of LNG safety, see L.A. Times, May 16, 1978 § I, at 21 (full page ad by Citizens to Protect Point Conception, warning of hazards of LNG); Washington Post, Nov. 4, 1979, § C1, at 31 (guest editorial condemning LNG importation in California and impending federal approval as insensitive to safety concerns).


184. L.A. Times, Aug. 1, 1978, § I, at 1, col. 5; Barron's, Nov. 19, 1979, at 11. 24. Barron's reported that on October 6, 1979, a small LNG leak at the Cove Point, Maryland terminal led to an explosion that killed a worker and so extensively damaged a transformer building that the facility would be inoperative for perhaps six months to a year. See LNG in Southern California, supra note 119, at 59 (comments of Warren). The LNG industry's worst mishap occurred in 1944 when an LNG storage tank ruptured and vaporizing LNG ignited and exploded. One hundred thirty people were killed and 300 injured. Another disaster occurred in 1973, when a fire in a nearly empty LNG tank killed 40 workers on Staten Island. WESTERN LNG TERMINAL COMPANY, supra note 1, at 12, 15; Barron's, supra, at 24.

185. L.A. Times, Aug. 5, 1977, § II, at 1, col. 6 (California Energy Commission considering requiring an unpopulated buffer zone around LNG facilities to minimize public risks); id., Aug. 1, 1978, § I, at 1, col. 6 (GAO report detailing LNG transportation risks).


In the early 1970's, PG&E and Pacific Lighting Corporation formed a consortium to seek administrative approval of their LNG importation project. This consortium, Western LNG Terminal Associates (Western LNG),\(^{189}\) applied in 1974 to the Federal Power Commission to construct receiving terminals at Terminal Island near Los Angeles and at Oxnard.\(^{190}\) In the ensuing months, Western LNG began to seek the other approvals it would need from the Cities of Los Angeles and Oxnard, the California Coastal Commission, and the California Public Utilities Commission (CPUC). When the federal government abolished the Federal Power Commission and divided its functions between the Federal Energy Regulatory Commission (FERC) and the Department of Energy's Economic Regulatory Commission, Western LNG had to seek approvals from those new agencies.

Western LNG protested that government had made approval of its project difficult, if not impossible, by requiring the company to deal with this formidable array of regulators. By mid-1977, the Los Angeles City Council had approved the Terminal Island site, but the federal agencies, viewing the area as too populated for a terminal, would not grant a permit.\(^{191}\) The federal agencies preferred an Oxnard site, but local and Coastal Commission approval of that site was not assured, principally because Oxnard residents were unenthusedastic and because the Coastal Commission had some doubts about placing a terminal in a populated area.\(^{192}\) Eventually, Western LNG picked Point Conception as the location for its receiving terminal. This site ultimately proved acceptable to both the federal agencies and the CPUC, but the Coastal Commission had strong reservations. Although the Coastal Commission had doubts about an LNG terminal in a populated area, it was even more strongly concerned with protecting the environmentally sensitive Point Conception area from industrial development.\(^{193}\) Santa Barbara County officials

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189. This consortium was originally called Western LNG Terminal Company, but in a later reorganization it became Western LNG Terminal Associates. For simplicity, this Comment refers to the consortium as Western LNG.

190. Actually, Western LNG applied to construct facilities at a third site, Point Conception, as well. Its parent companies planned to import southern Alaska LNG at Terminal Island, Indonesian LNG at Oxnard, and Alaskan North Slope LNG at Point Conception. Early in 1977, however, the parent companies abandoned the North Slope project when President Carter chose an overland method to transport North Slope gas. They then dropped their request for approval of a Point Conception terminal. By late 1977, when the California legislature interfered with their plans, the utilities were only interested in Los Angeles and Oxnard.


192. *Id.;* L.A. Times, Apr. 13, 1977, § II, at 4, col. 5 (letter to the editor by Oxnard resident, claiming "[t]he people of Oxnard want to help the nation solve its energy problems, but we don't want to be the 'guinea pigs' for LNG." The resident wanted an LNG terminal placed in a remote location).

also had misgivings about a Point Conception LNG terminal.\textsuperscript{194}

The California legislature intervened on behalf of the beleaguered utilities by enacting the Liquefied Natural Gas Terminal Siting Act of 1977 (LNG Terminal Act),\textsuperscript{195} in September of that year. The Act was designed to speed up terminal siting by preempting the authority of local governments, limiting the authority of the Coastal Commission, and placing final permitting authority over LNG terminal siting with the CPUC.\textsuperscript{196} Because of concerns about public safety, however, the Act required administrators to limit a terminal to a remote area.\textsuperscript{197} The Act specified permissible population densities in the vicinity of an LNG terminal that effectively eliminated both the Los Angeles and Oxnard locations.\textsuperscript{198}

The Act also removed the Coastal Commission’s normal permitting power. Instead, the Commission would study potential LNG terminal sites and then forward to the CPUC a ranking of these sites along with recommended construction and operation conditions by May 31, 1978.\textsuperscript{199} The Coastal Commission was further hampered by the Act’s requirement that the Commission rank the site for which the gas utilities had an on-file CPUC permit application. This site turned out to be Point Conception.\textsuperscript{200}

While legislators wanted to expedite approval of a facility, thinking this necessary to avoid economic crisis in the state,\textsuperscript{201} they also wanted to provide for some enforcement of the California Coastal Act’s environmental protection policies.\textsuperscript{202} Permitting review by the Coastal Commis-

\begin{thebibliography}{9}
\bibitem{194} See PUC Order I, \textit{supra} note 55, at 23-24.
\bibitem{196} \textbf{CAL. PUB. UTIL. CODE} §§ 5600-5602.
\bibitem{197} \textit{Id.} §§ 5552, 5582.
\bibitem{198} The Act defined a remote site as one where population densities within one mile of an LNG terminal did not exceed 10 persons per square mile, and within four miles, 60 persons per square mile. \textit{Id.} § 5582. At the time the Act was passed, the only qualifying site which the utilities had design studies for and ownership rights to was the Point Conception site, which had four persons per square mile within one mile of the terminal site and 3.3 persons per square mile within one to four miles of the plant. PUC Order I, \textit{supra} note 55, at 197; FERC ALJ Order, \textit{supra} note 179, at 4-5.
\bibitem{199} \textbf{CAL. PUB. UTIL. CODE} § 5612.
\bibitem{200} \textit{Id.} § 5611. Without this provision, the Commission would have dropped Point Conception from consideration because of on-site earthquake faults. \textbf{CALIFORNIA COASTAL COMM’N, FINAL REPORT EVALUATING AND RANKING LNG TERMINAL SITES} 11 (May 24, 1978) [hereinafter cited as \textit{COASTAL COMMISSION LNG REPORT}].
\bibitem{201} The utilities themselves had a deadline under the Act; they were ordered to submit their application to the CPUC for an LNG terminal by October 17, 1977. \textbf{CAL. PUB. UTIL. CODE} § 5600.
\bibitem{202} \textit{See} \textbf{CAL. PUB. UTIL. CODE} § 5551(c) (the legislature found "[t]hat an initial liquefied natural gas terminal may be currently needed in order to permit the importation of sufficient natural gas to prevent shortages which have been predicted to occur in the early 1980's.").
\bibitem{203} \textbf{CAL. PUB. RES. CODE} §§ 30000-30900.
\end{thebibliography}
sion or by local bodies which have adopted Local Coastal Programs pursuant to the Coastal Act are the usual mechanisms for enforcing Coastal Act policies. The LNG Terminal Act abrogated these procedures, but did enact a substitute. The Act directed the Coastal Commission to rank sites and recommend terminal construction and operation conditions in a manner respecting Coastal Act policies. Next, the CPUC could disregard the Coastal Commission’s ranking and recommend conditions only to avert natural gas shortages or after finding that a condition recommendation was not supported by substantial evidence or that it would adversely affect public health or welfare.

Following passage of the LNG Terminal Act, Western LNG applied, in the fall of 1977, to the CPUC for permission to build its terminal at the only remote location for which Western LNG had design studies, Little Cojo Bay near Point Conception. It also amended its federal applications to substitute Point Conception for Los Angeles and Oxnard. Even environmentalists who might not have opposed LNG importation at Los Angeles or Oxnard saw a disaster in the making when the utilities announced this substitution. In the view of environmentalists, the Point Conception area was the last coastal refuge from urbanization in southern California, a place of unique scenic and biological value. They agreed wholeheartedly with the description of the Point Conception region in the Santa Barbara County General Plan:

The shoreline that extends from Jalama Beach to Gaviota Beach [the Point Conception area] is some of the most scenic in the county. At Point Conception, the view of rocky and rugged shoreline is comparable with any in the nation. In other sections there exist quiet coves with gently sloping beaches.

In addition to its beauty as an open space area, the Point Conception region was valuable as a marine and terrestrial wildlife habitat. Cold northerly and warmer southerly waters meeting and mixing at Point Conception, together with upwelling of nutrient-laden colder waters and thick kelp beds, produce unusually diverse and abundant marine life in

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203. See id. §§ 30330 (the Coastal Commission has primary responsibility for implementing the Coastal Act), 30500-25 (procedures for Local Coastal Program approval), 30600, 30601 (requirement of a coastal development permit from either the Coastal Commission or locality with approved Local Coastal Program), 30200-30265.5 (coastal resource management policies).


205. PUC Order I, supra note 55, at 4.

206. FERC ALJ Order, supra note 179, at 6.

207. For example, the California Coastal Management Program, adopted in 1977 pursuant to the federal Coastal Zone Management Act, described a 25-mile stretch of coast around Point Conception as "the last open space segment of the southern California coast" and indicated it should be left undeveloped as "a significant coastal area." Coastal Commission LNG Report, supra note 200, at 30.

208. II FEIS, supra note 182, at 135.
the area. 209 In addition, while Western LNG’s site was not a uniquely sensitive terrestrial habitat, the uninterrupted open space of the Point Conception area increased its habitat value for the flora and fauna that are becoming increasingly scarce in southern California. 210

Western LNG planned to bring into this area a large industrial facility. Buildings and paving for the terminal would have been clustered on a 120-acre portion of a 209-acre site. 211 A concrete trestle extending 4600 feet from the shore and forty feet in height would have served as a supertanker berth. 212 LNG would have been stored onshore in two 145-foot tall by 240-foot diameter tanks. 213 A seawater exchange system would have used 108,000 to 160,000 gallons of seawater per minute to warm and revaporize LNG, returning seawater to the ocean twelve degrees cooler than when extracted. Chlorine injected into the seawater intake pipe would have prevented marine growth from fouling the system. 214 This seawater vaporization system would have harmed marine life with thermal and chemical pollution and the physical trauma of entrainment. 215 Western LNG also would have constructed facilities for fueling tankers, bringing electrical power to the site, supplying water, and treating sewage. The company would have built a 112-mile pipeline to Gosford, in California’s Central Valley, to ship gas to markets. It would also have built an improved access road through the Hollister Ranch. 216

Various interest terminal groups quickly opposed Western LNG’s proposal to switch the terminal site to Point Conception. Before discuss-

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209. For example, the Point Conception area is considered the northerly or southerly range limit of fourteen fish and twenty invertebrate species. II FEIS, supra note 182, at 102, 107; COASTAL COMMISSION LNG REPORT, supra note 200, at 27.

210. II FEIS, supra note 182, at 102, 104; COASTAL COMMISSION LNG REPORT, supra note 200, at 30.

211. PUC Order I, supra note 55, at 95.

212. Id. at 93. Supertankers, 960 feet in length, would have arrived at Point Conception approximately 129 times yearly. FERC ALJ Order, supra note 179, at 17-18.

213. Western LNG applied to FERC for permission to build a terminal with .9 billion cubic-feet-per-day throughput capacity, for which two tanks would have been sufficient. Western LNG applied to the CPUC, however, for 1.3 billion cubic-feet-per-day capacity, for which three tanks would have been needed. This was the largest terminal size allowable under the LNG Terminal Act. Western LNG planned to construct the smaller plant, leaving itself the option to expand. FERC ALJ Order, supra note 179, at 21 n.1.

214. PUC Order I, supra note 55, at 94-95; II FEIS, supra note 182, at 9-10.

215. III FEIS, supra note 43, at 217. The most certain harm from the system to marine life would have been entrainment and destruction of fish and plankton. Whether thermal pollution would have been harmful was a matter of strong contention between Western LNG and opposing groups. See FERC ALJ Order, supra note 179, at 293-301.

216. PUC Order I, supra note 55, at 95-100. Generally, construction and operation of the terminal and its supporting facilities involved several unavoidable adverse environmental effects such as destruction of plant life, increase in sedimentation of stream runoff, loss of wildlife habitat, disturbance of archaeological sites and artifacts, decrease in air quality, increased release of toxic pollutants into the ocean, loss of open space, and impairment of scenic views. See generally III FEIS, supra note 43, at 289-97.
ing why they opposed the project and the influence they had upon administrators, a brief outline of the jurisdiction and decisions of the various involved agencies will help the reader to understand the events in the LNG controversy.

B. Administration of the LNG Controversy

The California Coastal Commission, pursuant to its authority under the LNG Terminal Act, examined eighty-two potential terminal sites along the 1100-mile California coast, but found just five suitable for ranking. The Commission later eliminated one of these sites, Las Varas in Santa Barbara County, when consultants discovered an earthquake fault on the site. The Commission had a difficult time finding both safe and remote sites because of adverse wind, wave, and fog conditions on the rugged northern California coast and urbanization on the gentler southern California coast. Adding to these difficulties, the California coastline is criss-crossed with earthquake faults. As ordered by the LNG Terminal Act, the Commission held public hearings in each of the four cities near ranked sites. After these hearings and shortly before the LNG Terminal Act's May 31, 1978 deadline, the Commission forwarded its ranking to the CPUC: Horno Canyon on the United States Marine Corps' Camp Pendleton first, Rattlesnake Canyon in San Luis Obisbo second, Point Conception third, and Deer Canyon in Ventura County fourth. The Coastal Commission reported to the CPUC that it had serious reservations about placing a terminal at any of the four sites because of the harm to marine and terrestrial plant and animal life, loss of open space, impairment of coastal views, and decreased public recreational opportunities it believed would inevitably result from placing the terminal in a remote onshore location. It implied that the CPUC should consider delaying approval altogether to consider offshore locations. If

217. The Commission would have eliminated Point Conception for the same reason, but the LNG Terminal Act required the Commission to rank that site because it was the one named by Western LNG when the company applied for a CPUC permit. Cal. Pub. Util. Code § 5611; Coastal Commission LNG Report, supra note 200, at 11, 16.


221. Coastal Commission LNG Report, supra note 200, at 12.

222. The Commission, after noting the several adverse environmental effects of any onshore LNG terminal, "urge[d] the Public Utilities Commission to give these adverse impacts heavy weight in its decision whether to approve the proposed LNG project." Id. Later in its report, it added, "it is possible that one or more offshore sites and terminal types could prove more appropriate than the best onshore site and terminal type. . . . If an onshore LNG terminal is not approved by July 31, the Governor and Legislature should establish a procedure
the project was to proceed, however, the Coastal Commission preferred a Homo Canyon terminal because, of the four sites considered, the site had the lowest biological diversity and productivity, the least aesthetic value as open space, and the least value for recreation because the Marine Corps prevented public access to the area. The Commission ranked Point Conception third because it found the latter had, relative to the other sites, the highest biological diversity and productivity, the most spectacular aesthetic value, and strong potential for greater public recreational use. It ranked Deer Canyon lower than Point Conception because it found that site had some important biological values and the greatest recreational value of the four sites because of its proximity to state parks.223

Under the LNG Terminal Act, the CPUC had two roles. First, it was the lead agency for environmental review under CEQA.224 Accordingly, the CPUC hired consultants who prepared a massive nine-volume EIR on the project, which the CPUC certified as complete and accurate on July 31, 1978.225 Second, the CPUC had sole permitting authority over the project—and a July 31, 1978 deadline for deciding whether to issue a permit for an LNG terminal. To meet its obligations as the permitting agency, the CPUC scheduled overlapping hearings before three administrative law judges on LNG safety, natural gas supply and demand, and terminal siting.226 These ALJ’s held both trial-type hearings and quasi-legislative hearings open to the interested public in various cities near proposed terminal facilities, including Santa Barbara.227 The CPUC, acting upon the record built by its ALJ’s, rejected the Coastal Commission’s ranking and conditionally approved a Point Conception LNG terminal on July 31, 1978.228 The CPUC felt that Homo Canyon or Rattlesnake Canyon terminals could not be built in time to avert natural gas shortages, would be more expensive, and would not be...

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223. *Id.* at 11-37. The Coastal Commission found this ranking mandated by the Coastal Act, including the Coastal Act provision that “in carrying out the provisions of this division . . . conflicts [between Coastal Act policies] be resolved in a manner which on balance is the most protective of significant coastal resources.” *Cal. Pub. Res. Code* § 30007.5.
226. *Id.* at 11-22.
228. PUC Order I, *supra* note 55.
229. The CPUC worried that the Marine Corps would prevent federal approval of a Homo Canyon terminal, which the Marines opposed. The CPUC correctly noted that California had no authority to compel the Marines to make the site available. PUC Order I, *supra* note 55, at 139-43. The Coastal Commission defended its ranking, however, noting: the military does not necessarily exercise final control over the use of federal property. . . . Consideration of national energy priorities and a federal LNG terminal siting policy to locate such terminals where they will be least damaging to the envi-
appreciably better environmentally than a Point Conception facility. The Commission, however, withheld final approval of the site because of uncertainties about seismic and wind, wave, and fog conditions at Point Conception. It ordered further studies to resolve these issues.

In addition to this state permitting process, Western LNG faced review by federal regulators. Western LNG first sought permits from the Federal Power Commission until that agency was abolished in October 1977 and its functions divided between the Federal Energy Regulatory Commission and the Department of Energy's Economic Regulatory Commission. After 1977, FERC had jurisdiction over the Alaska to California aspects of the LNG project. The Economic Regulatory Commission had jurisdiction over the Indonesian importation aspect of the LNG project.

Originally, Western LNG asked the Federal Power Commission to approve Oxnard and Los Angeles terminals. After California passed the LNG Terminal Act, however, Western LNG decided to cooperate with California rather than ask federal agencies to attempt to preempt the California law that had ruled out Oxnard. Accordingly, in November 1977, Western LNG amended its federal applications to seek approval only for a terminal at Point Conception. The Economic Regulatory Commission, which inherited the Oxnard application from the Federal Power Commission, refused to substitute Point Conception for Oxnard without a full evidentiary record justifying action on Point Conception. Instead, the Commission granted a permit to import Indonesian LNG at Oxnard in December of 1977 and temporarily set LNG aside.

FERC, however, accepted and proceeded to adjudicate Western LNG's amended application. FERC had two responsibilities: to conduct an environmental review of the receiving terminal and Alaskan portions of the LNG project pursuant to NEPA, and then to decide whether to issue a permit for the facility. To comply with NEPA, FERC com-

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230. PUC Order I, supra note 55, at 136-49.
231. Id. at 240, 270-71.
233. The Department of Energy Reorganization Act provides that the Department of Energy has authority over natural gas transactions between the United States and foreign countries, which the Department has delegated to its Economic Regulatory Commission. FERC ALJ Order, supra note 179, at 4, 23-24, 26-27.
234. Id. at 4-5.
235. Id. at 6.
236. Id. at 8.
completed a draft EIS in April 1978 and a final three-volume EIS in October 1978. In meeting its permitting responsibilities, FERC held both trial-type hearings for intervenors and quasi-legislative public hearings open to the general public in Santa Barbara and other cities near proposed terminal facilities. On August 13, 1979, FERC's ALJ, like the CPUC, conditionally approved a Point Conception terminal pending further studies of seismic hazards and wind, wave, and fog conditions at the site. FERC's commissioners concurred with the ALJ on October 12, 1979.

Rather than conduct its own adjudication or insist on an Oxnard site, the Economic Regulatory Commission deferred to FERC without further adjudicatory proceedings of its own and conditionally approved the Point Conception site in September 1979.

Seismic investigation resumed after these federal approvals, but administrators found the issue both too complex and too controversial to resolve without consulting independent experts. Accordingly, in July 1980, the CPUC created an independent seismic review panel, which held public workshops during the spring and summer of 1981. In November, the panel released its report concluding that a Point Conception LNG terminal would be seismically safe. FERC and the CPUC arranged a joint hearing on the report in January 1982. The CPUC concurred with the panel's conclusions and voted final state approval of the Point Conception site on October 6, 1982. The presiding FERC ALJ agreed with the panel's conclusions and approved the Point Conception site on June 23, 1982. FERC's commissioners voted for approval on October 4, 1982.
Ironically, by the time the utilities obtained these final approvals, natural gas supply and demand in California had changed dramatically. A Los Angeles Times headline proclaimed the news, "Forecasts Flop; Southland is 'Awash' in Natural Gas." In light of this unexpected development, the LNG project's sponsors had indefinitely shelved the project even before final administrative approvals.

C. The Role of Interest Group Opposition in Administrative Deliberation

Having discussed how the agencies processed Western LNG's application to import LNG, this Comment now examines how public participation influenced administrative decisionmaking.

A diverse and impressive array of groups opposed the Point Conception project: the adjacent landowners, national and local environmentalist organizations, Chumash Native Americans, surfers, kelp harvesters, permit was "meaningless because of significantly changed circumstances," but allowed the utilities to keep the site and account for the expense as part of an ongoing project until 1987. Id. at 75. FERC responded by announcing that for the future, it would consider the site seismically safe, but leave additional non-seismic issues unresolved pending renewed interest on the utilities' part. Pacific Alaska LNG Co., 25 F.E.R.C. ¶ 61,005 (1983). Local landowners, however, sued and got the District of Columbia Circuit Court of Appeals to reverse this FERC order. Hollister Ranch Owners' Ass'n v. FERC, No. 84-1010, slip op. (D.C. Cir. Apr. 16, 1985).

The utilities still publicly maintain that a Point Conception LNG terminal might someday be needed. SOUTHERN CALIFORNIA GAS CO., ENERGY PROSPECTIVE: LIQUEFIED NATURAL GAS, WHERE ARE WE? (Dec. 1984); Letter from Keith MacKinney, supra note 121; Letter from Linda Criner, PG&E, to author (Aug. 6, 1984). The chances that the LNG project will be revived are slim, however. As the Chief of the Siting and Environmental Division of the California Energy Commission wrote to the author, "early indications are that natural gas will be available for most users well into the 1990's. Only if demand were to reach unexpectedly high levels and conventional gas supplies do not become available as expected, would the LNG facility become needed." Letter from E. Ross Deter to author (Dec. 18, 1984).

In the meantime, the site is being committed to at least one alternative industrial use: Chevron Oil Co. has approval to run a crude oil pipeline through the property. Santa Barbara News-Press, July 26, 1985, at A-1. Also, a supply base to serve offshore oil platforms has been proposed for Little Cojo Bay.

245. The article stated: "instead of facing the dire shortage predicted just a few years ago, [southern California] is all but awash in natural gas. The gloomy forecasts of a sharp drop in supplies from conventional sources were off by a staggering 50%." L.A. Times, Jan. 12, 1981, § I, at 1, col. 1. With congressional enactment of the Natural Gas Policy Act, which provided for phased decontrol of domestic natural gas prices, new domestic supplies of natural gas were rapidly being found. Supply from Canada was also turning out to be greater than expected. Added to this, demand had grown at only half the rate projected by the CPUC and the utilities. Id.; L.A. Times, Oct. 5, 1982, § I, at 3, col. 1; see LNG in Southern California, supra note 119, at 74 (comments of Thomas D. Clarke, Assistant General Counsel, Pacific Lighting Corp.)

and local fishermen. The motives, styles, and arguments of these groups varied widely.

1. **Local Landowner and National Environmentalist Opposition: Elite-Expert Advocacy**

The Bixby Ranch Company and Hollister Ranch Owners Association owned extensive parcels of land surrounding the proposed terminal site. The Point Conception area owed its semi-wild character to these two landowner associations, both of which had permitted their members to build a few dwellings and engage in some agriculture and cattle-raising, but otherwise had left the area undeveloped. Thus, the few people living on the Bixby and Hollister Ranches resided in expensive oceanside homes surrounded by open space. For the landowners, "the Ranch," as the area is known, was more than simply investment property or a nice place to live. They had paid high prices, but felt they had obtained something unique in southern California—a refuge from urbanization and a small community atmosphere. They spoke of these qualities as priceless.

Ranch landowners bitterly opposed the LNG terminal because they feared it would diminish their property values. Also, the terminal would have the even worse effect of irretrievably destroying their coastal sanctuary.

National environmental groups, the Sierra Club and the Friends of the Earth opposed the terminal because it would disrupt wildlife, especially marine life, reduce open space, and mar the scenic beauty of the...
area. They also thought the California legislature's preemption of local and Coastal Commission authority to facilitate placing energy development in remote areas set a dangerous precedent in land use planning.\textsuperscript{251}

The advocacy style of Ranch landowners and the environmentalist organizations puts them both within the elite-expert model. They extensively used administrative law public participation procedures to challenge the technical information advanced by Western LNG. During environmental review, they commented on EIS's and EIR's; in CPUC and FERC adjudicatory proceedings, they intervened and introduced evidence.\textsuperscript{252} They brought litigation to force administrators to comply with the requirement that administrative decisions must be supported by substantial evidence in the record.\textsuperscript{253} These groups had what other opponents lacked—the money to send counsel and expert consultants to administrative hearings in Sacramento, Washington D.C., and the various California cities near the proposed terminal sites.

Environmentalists and landowners challenged the gas industry's contention that the unavailability of alternative supplies coupled with demand growth made LNG importation necessary. They also challenged the accounting conventions used by the utilities to demonstrate the financial feasibility of the project.\textsuperscript{254} They presented their own evidence concerning LNG safety, focusing on wind and wave and seismic conditions at Point Conception.\textsuperscript{255} Administrators, however, gave little weight to any of these alternative factual presentations except those relating to claims about seismic hazards at Point Conception.

In April 1978, a seismologist hired by the Hollister Ranch testified to the CPUC that he had discovered a small earthquake fault on the

\textsuperscript{251} Some landowners held convictions that could have earned them the "environmentalist" tag; environmentalists and landowners supported each other on environmental issues for reasons of principle as well as expediency. The only antipathy between environmentalists and Ranch owners was over the Ranch's public access policies. The Ranch repeatedly has resisted Coastal Commission efforts to overturn the Ranch's locked gate policies which exclude public access. Environmentalists shared some reservations that increased public access to the environmentally sensitive Ranch might be a mixed blessing, but generally favored greater public enjoyment of the area's resources. See COASTAL COMMISSION LNG REPORT, supra note 200, at 53-54 (Coastal Commission acknowledging "[u]nlimited public access might damage the natural resources of the Point Conception area," but "limited and controlled public access to the beach and bluff top area of Little Cojo Bay" could allow for both public enjoyment and protection of the coastal environment).

\textsuperscript{252} See PUC Order I, supra note 55, app. A 1-2; FERC ALJ Order, supra note 179, at vii. Bixby, Hollister, and the Sierra Club intervened before both agencies. Friends of the Earth intervened before the CPUC but not before FERC, though it did comment on the federal EIS prepared by FERC. III FEIS, supra note 43, at 161.

\textsuperscript{253} See supra note 244; infra note 266 and accompanying text.

\textsuperscript{254} FERC ALJ Order, supra note 179, at 81-86, 107-109; PUC Order I, supra note 55, at 55.

\textsuperscript{255} See FERC ALJ Order, supra note 179, at 150-229; PUC Order I, supra note 55, at 193-245.
Little Cojo Bay site. This testimony prompted the single most time-consuming aspect of the administrative investigation into the suitability of the Point Conception site. Following Hollister's discovery, the CPUC ordered Western LNG to trench the site to investigate the extent of the faulting. In June, the CPUC held hearings on these explorations during which experts employed by Hollister and Western LNG disputed the fault's significance. After these hearings, the CPUC determined the investigations were inconclusive and ordered further trenching.

In July, the CPUC, bowing to the pressure created when Chumash Native Americans occupied the site to protest the trenching, reversed itself and ordered the trenching indefinitely suspended. By the time Western LNG secured a court order forcing the Indians off the site, the CPUC had halted trenching for eight months. This delay helped to ensure that no definitive administrative action would occur by the LNG Terminal Act's July 31, 1978 deadline. When the deadline arrived, the CPUC issued a decision as mandated by the Act, but this decision left the project in limbo. The CPUC decided that the most it could do was "conditionally" approve the Point Conception site, declaring it provisionally acceptable unless further research revealed additional seismic hazards. The CPUC ordered Western LNG to continue geological investigation, conditioning final approval on the outcome of those studies.

The Ranch landowners and environmental groups also argued before FERC that Point Conception was seismically unsuitable. After

256. PUC Order I, supra note 55, at 228.
257. "To simply recount that Hollister's May 4 presentation resulted in a subsequent enlargement of the scope of the evidence received in this proceeding would grossly understate the impact of Dr. Asquith's testimony." PUC Order I, supra note 55, at 228; see also COASTAL COMMISSION LNG REPORT, supra note 200, at 16; FERC ALJ Order, supra note 179, at 181.
258. PUC Order I, supra note 55, at 228-29.
259. Id. at 229-30; see also id. at 231-41.
260. See infra notes 284-95 and accompanying text.
261. See id.
262. PUC Order I, supra note 55, at 270-71, 324-26. In the investigation following Hollister's discovery, geologists discovered two additional faults on Western LNG's building site and a fourth nearby. Three other faults were located two to five miles from the site. Western LNG disputed the significance of these faults with consultants retained by Hollister and the other opposition groups. As the evidence stood, the CPUC found the off-site faults capable of generating the greatest stress upon the facility. The CPUC felt that the terminal could be built to withstand the 7.5 magnitude earthquake and on-site ground acceleration of .6 to .68 g that the CPUC deemed the off-site faults capable of generating. Yet, with trenching unfinished, the CPUC held that it remained unanswered whether the on-site faults could produce greater stress than this. Id. at 232-44.
263. Id. at 240, 270-71. The CPUC expressed less regard for Hollister's contentions that wind and wave conditions around Point Conception made the site unsuitable for an LNG terminal but found the applicant's evidence on the issue inconclusive. The CPUC thought that the existing evidence tentatively demonstrated the site's suitability, but it also conditioned final approval on the results of additional sea and weather observations to be conducted through December 1979. Id. at 218-26.
hearing testimony, FERC's staff recommended to the FERC ALJ that Point Conception be automatically rejected because of on-site faulting. They further recommended that federal preemptive authority be exercised to place the terminal at Oxnard.264 The FERC ALJ, however, rejected the staff's view and, following the lead of the CPUC, conditionally approved the Point Conception site in August 1979. The ALJ supported his decision, in part, by arguing that deference to the state agency was appropriate because of the CPUC's familiarity with the needs of California and that agency's extensive study of the LNG issue. The ALJ added that federal respect for the policies expressed by California legislature in the LNG Terminal Act was also appropriate.265

The Bixby Ranch appealed FERC's conditional approval of the Point Conception site to the District of Columbia Circuit Court of Appeals.266 In April 1980, that court set aside FERC's order until FERC studied the seismic data in a newly released United States Geological Survey study of the area. FERC's conditional order had indicated that it would further study seismic issues before issuing final approval, but the court agreed with Bixby that even a conditional finding as to the suitability of the site was premature. Thus, opponents won a judicial order directing administrators to study a particular report—and even more importantly, a decree implicitly warning administrators to weigh all arguments before issuing any project approvals.

Meanwhile, the CPUC was proceeding to investigate the seismic issue further by establishing an independent seismic review panel. This panel conducted its investigation from July 1980 to November 1981. To expedite their proceedings (and to allow FERC to comply with the court order), FERC and CPUC held joint hearings on the review panel's report in January and deliberated the significance of the report until the following fall, when both agencies approved the Point Conception facility.

By the time administrators had sorted out the seismic issue, the utilities had shelved their project indefinitely. If the faults had not been discovered, the project probably would have been approved in 1978 and would have been under construction when natural gas became abundant in the early 1980's. By discovering an earthquake fault and debating its significance with industry in agency adjudications, these expert-elite environmentalists delayed the project until market conditions made it infeasible. Although the Ranch landowners and environmentalists used all

265. FERC ALJ Order, supra note 179, at 190, 187, 326; see also L.A. Times, Sept. 28, 1979, § I, at 1, col. 6 (FERC Chairperson Charles Curtis commenting upon the LNG Terminal Act, "[h]owever imperfect the legislative process may be, it does constitute the ultimate expression of the public interest").
266. Fred H. Bixby Ranch Co. v. FERC, No. 79-2248, slip op. at 2 (D.C. Cir. Apr. 17, 1980); see 25 F.E.R.C. ¶ 61,005, supra note 242.
procedural devices at their disposal to defeat the project, any of their arguments or motions that were merely dilatory did not significantly delay the outcome, because administrators readily dismissed any such maneuvers.\textsuperscript{267} If administrators had found that the argument about seismic danger at Point Conception lacked merit, the terminal would have been approved after a few months.

Extensive administrative review in the Point Conception case seems justified when the result is compared with the siting of the Chula Vista, California LNG peak-shaving plant ten years earlier, before administrative procedures were well developed. The project needed only CPUC approval and a city building permit, which San Diego Gas and Electric Company secured in 1966 without extensive environmental review. With such scant administrative review, it was possible to finish construction of the Chula Vista plant in 1966 two years after it was proposed. The plant has two storage tanks of roughly the same size and dimension as the proposed Point Conception terminal. It also is located near three faults that might generate an earthquake of greater magnitude than the plant was built to withstand. The plant is near a major interstate freeway and is only eight miles from downtown San Diego; four to five thousand people live within one mile of the plant.\textsuperscript{268} Those who approved the plant violated the common sense adage reflected in the law of negligence, "look before you leap."\textsuperscript{269} A similar mistake would be much less likely today because of public participation procedures.

CEQA-type review benefits society because it reveals environmental hazards to decisionmakers. The remaining question, however, is how to administer such review efficiently and fairly. The LNG Terminal Act

\textsuperscript{267} For example, Bixby successfully filed suit against FERC's 1979 conditional approval of Point Conception, perhaps winning more administrative scrutiny of seismic issues than would otherwise have occurred. \textit{See Fred H. Bixby Ranch Co., supra} note 266. This, however, was one of the more meritorious uses of available procedures. Some of the motions opponents made during administrative adjudications bordered on the frivolous. For example, Bixby and Hollister contended before the CPUC that the agency had failed to comply with CEQA by not disclosing its proposed decision and choice of priorities in the LNG draft EIR. Bixby also objected to the CPUC hiring consultants to prepare the EIR. Bixby's and Hollister's motions, however, took little of the CPUC's time and thus contributed in no measurable way to the project's delay. In four pages, the CPUC correctly concluded that "[the landowners'] contentions are without merit," after citing the applicable California Administrative Code sections supporting its view. PUC Order I, \textit{supra} note 55, at 152-56.

\textsuperscript{268} L.A. Times, Dec. 1, 1981, § IV, at 1, col. 2.

\textsuperscript{269} The phrase is a favorite of J. Marc McGinnes, an environmental attorney active at the Santa Barbara Environmental Defense Center during the LNG controversy. \textit{See PRINCIPLES OF ENVIRONMENTAL LAW} 137 (J. McGinnes ed. 1980):

The National Environmental Policy Act of 1969 and similar state legislation subsequently enacted on its model impose a duty on governmental agencies to assess and try to avoid adverse environmental impacts of projects they intend to carry out or approve. The duty reflects basic common sense: "look before you leap." The basis for such a duty, only recently imposed by enacted law, derives from the common law concept of negligence.
provided one approach: to place facility approval on a “fast track,” it altered normal review procedures by consolidating permitting authority in the CPUC and imposing deadlines. 270 Without these measures, Ranch landowners and environmentalist organizations would have prevailed before the Coastal Commission. If the public interest demanded an LNG facility, the Act served this interest by freeing the facility from the gridlock created by various permitting agencies having different ideas of where an LNG facility should go. 271 Also, the Act still required the CPUC to comply with CEQA. Consequently, the CPUC had to allow public comment during adjudicatory proceedings, and also demonstrate reasoned decisionmaking on the record of its proceedings. The facility’s opponents, therefore, got at least one chance to fully present their contentions.

LNG opponents criticized the Act, though, contending that multiple hearings before numerous agencies better inform both the public and administrators of the costs and benefits of facilities than would one hearing before a single agency. 272 Generally, this view is correct. Because agencies’ expertise and interests vary depending on their statutory mandates and customary missions, one agency will analyze facts differently from another. In the LNG case, however, the opponents’ charges are weakened because the Act required the Coastal Commission to develop an extensive alternative record. Thus, if environmentalists objected to the LNG Terminal Act, it was not because the Act obliterated their hearing rights, but because it gave consolidated authority to the CPUC.

Compared to the Coastal Commission, the CPUC was a much less environmentally sensitive agency. The CPUC demonstrated its energy orientation when it chose Point Conception, which the Coastal Commission had ranked third, and by modifying or abandoning many of the Coastal Commission’s recommended construction and operating conditions. The Coastal Commission recommended that Western LNG replace a seawater vaporizing system with gas-fired vaporizers. For the Coastal Commission, this was a justified additional expense because gas-

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270. CAL. PUB. UTIL. CODE § 5551(d); see LNG in Southern California, supra note 119, at 79-80.
271. An editorialist in the Los Angeles Times praised the Act, declaring: “as a result [of the Act], the LNG terminal is not likely to be delayed to death.” L.A. Times, June 4, 1978, § IV, at 3, col. 3c.
272. Two editorialists in the Washington Post, for example, called the Act “a fast-track blunder” that had led administrators, without the proper procedural safeguards, to approve possibly the most objectionable site of any that could be found—uniquely sensitive environmentally, plagued by faults and hazardous marine conditions, and sacred to Native Americans. Washington Post, Nov. 4, 1979, § 1C, at 1, col. 1. See also LNG in Southern California, supra note 119, at 79-80 (comments of J. Marc McGinnes, attorney, Santa Barbara Environmental Defense Center, contending that fast-tracking in the LNG case had led administrators astray. An industry representative answered McGinnes’ contentions, “if this is a fast-track, I’d hate to see a slow one.”).
fired vaporizers would neither entrain and kill marine life nor release a cold water plume and chlorine into the ocean.\textsuperscript{273} The Commission viewed this mitigation to be required by Coastal Act provisions providing for stringent protection of environmentally sensitive marine habitats, and maximum feasible mitigation of adverse environmental impacts when overriding public welfare concerns require new facilities to be located in such areas.\textsuperscript{274}

The CPUC reversed the Coastal Commission, holding that the gas-fired vaporizers would waste natural gas and contribute to air pollution.\textsuperscript{275} Generally, the CPUC lowered the Coastal Commission’s standard that the applicant use “best available technology”\textsuperscript{276} to requirements that Western LNG use “feasible” means to avoid environmental harm.\textsuperscript{277} The CPUC thought the former language would discourage investors and endanger the project.\textsuperscript{278} Certain Coastal Commission conditions, such as the partial ingrounding of LNG tanks to minimize the aesthetic intrusion of the plant\textsuperscript{279} and the replacement of lost wildlife habitat,\textsuperscript{280} were also weakened by the CPUC.

\begin{itemize}
\item \textsuperscript{273} COASTAL COMMISSION LNG REPORT, supra note 200, at 52.
\item \textsuperscript{274} Id. The Coastal Commission relied upon sections 30230, 30240, and 30260 of the Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900.
\item Section 30230:
\begin{quote}
Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance . . . .
\end{quote}
\item Section 30240:
\begin{quote}
(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed with such areas. (b) Development in areas adjacent to environmentally sensitive habitat areas . . . shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.
\end{quote}
\item Section 30260:
\begin{quote}
Coastal-dependent industrial facilities shall be . . . permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted . . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.
\end{quote}
\item \textsuperscript{275} PUC Order I, supra note 55, at 175-78.
\item \textsuperscript{276} See COASTAL COMMISSION LNG REPORT, supra note 200, at 41-56.
\item \textsuperscript{277} PUC Order I, supra note 55, at 249.
\item \textsuperscript{278} Id. at 249.
\item \textsuperscript{279} Whereas the Coastal Commission allowed no flexibility in the tank ingrounding requirement, the CPUC left open the possibility of Western LNG convincing the CPUC to modify the condition after “taking into account such factors as operational feasibility, safety, cost, and environmental consequences.” Compare PUC Order I, supra note 55, at 263-63a, with COASTAL COMMISSION LNG REPORT, supra note 200, at 54.
\item \textsuperscript{280} The Coastal Commission required Western LNG to “provide terrestrial and marine habitat equivalent in value to that lost” by facility construction. The CPUC, however, only required habitat replacement “to the extent feasible.” Compare PUC Order I, supra note 55, at 258, with COASTAL COMMISSION LNG REPORT, supra note 200, at 45.
\end{itemize}
Assuming that the public interest required expedited consideration of LNG terminal approval, the legislature could have accomplished this by consolidating permitting authority in the California Coastal Commission instead of the CPUC. This resolution would have ensured greater protection for environmental values but perhaps created a greater risk of project delay and natural gas shortages. Determining which agency should have had authority requires weighing the moral, aesthetic, and welfare considerations of minimizing risk of energy shortages against those of protecting marine life and open space. This raises a new topic: how administrators should account for values.

Even elite-experts have values which they hope their technocratic arguments will vindicate. In the LNG case, Ranch landowners were somewhat preservationist, and environmentalists were even more so. They both wanted limited use of Point Conception’s resources. The landowners wanted to continue low density residential use, thus preserving a serene and beautiful living environment. The environmentalists, who wanted the Ranch to resemble a public park and nature preserve, favored minimal development and low intensity recreational use.

Ranch landowners and environmentalists lost their battle to persuade administrators to adopt a preservationist perspective, and would have lost their war against the terminal, except for a fortuitous change in the supply and demand of natural gas. Therefore, the opportunity to present expert testimony to administrators did not, in itself, ensure opponents of getting the results they wanted. When administrators hear dueling experts, as they typically do in any major environmental controversy, even applicable law only requires agencies to listen to, not to believe, the facility opponents’ experts. In the LNG case, CPUC and FERC listened and even partially responded to opponents’ experts by requiring, for example, the terminal to adhere to a more rigorous seismic design standard than the applicant contended was necessary. In the end, however, administrators believed most of the applicant’s expert testimony to be credible and approved the Point Conception site with less rigorous environmental mitigation than opponents argued was necessary.

Perhaps administrators disregarded opponent testimony because it was factually erroneous. If this had been the only reason opposition groups lost, then the public interest would have been fully protected by

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281. For example, when the Environmental Protection Agency brought Reserve Mining Company to court in the mid-1970’s, opposing experts claimed that taconite, a mineral found in the mining slurry released by Reserve Mining Company into Lake Superior was, alternatively, a cancer-causing asbestiform substance contaminating drinking water supplies, or a harmless mineral at most muddying waters slightly. Reserve Mining Co. v. United States, 498 F.2d 1073 (8th Cir. 1974); see C. Sproul, The Reserve Mining Controversy: Environmental Protection Goes to Court (1982) (Master’s Thesis, Special Collections, University of California Santa Barbara Library).

282. PUC Order I, supra note 55, at 239-44; FERC ALJ Order, supra note 179, at 213-29.
the procedural guarantees of current administrative law. Yet, administrative decisionmaking in the LNG case did not depend solely on an objective determination of "facts." At least in part, administrative preference for economic values over environmentalist and other concerns explains the outcome. New procedures alone do not reorder the value preferences of administrators. To force administrators to weigh values differently, LNG opponents would have needed self-executing substantive statutory standards. Alternatively, they could have prevailed if administrators were willing to interpret applicable Coastal Act sections restrictively.

In the LNG case, negotiated compensation theorists would have claimed that better protection for the interests of LNG opponents could have been provided even without these last mentioned remedies if administrators had followed the negotiated compensation model. Even if LNG opponents would not have secured a more satisfying result, such theorists would claim that adherence to their model would create better public policy. These theorists' first premise is that their system would provide better information flows than current facility siting systems, and that well informed participants who can both perceive and protect their interests are a prerequisite for satisfactory facility siting.

The LNG deliberations, however, did not suffer from poor information flow. The environmental impact reporting adequately detailed the various adverse effects of the project. The LNG project EIR and EIS were rigorously scrutinized by LNG opponents, who found them valuable sources of information.\(^\text{283}\) The opponents also contributed to the information flow to government by commenting upon the EIR and the EIS.\(^\text{284}\) As a result of scrutinizing these reports, far from being uninformed, even lay opponents knew a great deal about such matters as sea life entrainment in the vaporizer system, the existence of on-site faults, and the cut and fill damage resulting from new road construction.\(^\text{285}\)

Environmental review conducted under CEQA and NEPA also made administrators aware of the various impacts of the project. Once aware, administrators responded. The Coastal Commission was the most responsive, ordering such modifications as gas-fired vaporizers, but the CPUC and FERC also addressed the environmental and safety concerns raised by environmental review. FERC, for example, referred to the federal EIS in rejecting the applicant's assessment of the seismic risks to the

\(^{283}\) Interview with Charlie Eckberg, supra note 248.

\(^{284}\) See generally III FEIS, supra note 43.

\(^{285}\) See generally id. at 161-64, 215-29, 404-15. Opponents to facilities rely a great deal upon environmental impact reports in drafting their arguments; this has been the author's personal experience in working for the Sierra Club Legal Defense Fund and the Santa Barbara Environmental Defense Center. For interesting similarity between the contents of an EIS and the phrasing of an opponents' arguments, compare id. at 255-56 with G. Allen, supra note 180, and LNG in Southern California, supra note 119, at 63 (comments of Warren).
facility, and then ordered that the plant be built to withstand stress levels higher than those suggested by either the applicant or staff. While the CPUC did not require gas-fired vaporizers, it did require the applicant to modify the seawater vaporizer to lessen sea life entrainment and chlorine release—suggestions that came from environmental review. If there was a problem with the facility siting system in the LNG case, it was not information flow.

The second premise of negotiated compensation theory is that adversary adjudications inhibit negotiated bargains. The negotiated compensation model assumes that problems of who gets what, when, and how are essentially market problems and that through market transactions, the best solutions are reached. Although a few individuals might occasionally suffer from an unfair bargain, society as a whole will end up with the maximum net welfare when people are encouraged to trade. Occasionally, private markets might fail to provide those transactions that will produce the highest net social welfare. In that event, government should intervene by attempting to duplicate what would happen in a world without transaction barriers.

A precondition for negotiated transactions, however, is some overlap in the value parties place upon the considerations to be exchanged. For example, assume that the Ranch owners did not truly value their property as priceless, but placed a minimum $100 million price upon it, thinking they could replace it at that cost. Western LNG would have had to pay this amount before the Ranch owners would have surrendered their opposition. Western LNG, however, might have valued an end to the Ranches' opposition only at $25 million, assuming that this was the opportunity cost of the capital they would otherwise spend overcoming Ranch opposition. Under this scenario, a mutually profitable transaction between the protagonists would have been impossible.

In the LNG case, such a lack of overlap existed. Collectively, the Ranch owners were fairly affluent and the national environmental groups had substantial financial assets. Yet, they lacked the $350 million that Western LNG had invested in the project before abandoning it. On the other hand, Western LNG was backed by utilities with enormous financial assets, but lacked the freedom to use those assets without calcu-

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286. FERC ALJ Order, supra note 179, at 199-202, 221-22; see PUC Order I, supra note 55, at 241: "We believe that in siting an LNG terminal in an active seismic region our approach to resolving seismic issues should be conservative. Consequently, we believe that the proper maximum peak acceleration standard to be employed at the site should be 0.7g rather than the 0.6g recommended by staff."

287. PUC Order I, supra note 55, at 175-79.

288. The assumption here is that the value of Point Conception to Western LNG would have been the cost of finding a replacement site if it abandoned Point Conception. The cost of site acquisition and design studies at the replacement site could have varied, of course, making the figure a rough approximation at best.
lating opportunity cost. If buying out Ranch owners and environmentalists would have increased the cost of LNG to the point where other sources of energy became cheaper, then the utilities would have abandoned the project before paying the compensation. With enough money, perhaps Western LNG could have bought replacement retreats for Ranch owners on another undeveloped coast and bought a sufficiently large undeveloped piece of land for a wildlife sanctuary to satisfy environmentalists. Yet, under the circumstances, Western LNG would not have paid the price. Even without such additional costs, the company abandoned its facility for cheaper alternatives.

Negotiated compensation theorists might concede that the protagonists in a facility siting contest might not be able to agree on a profitable exchange. Basing their argument on cost-benefit analysis, however, they would contend that public policy should be designed only to reflect the social value of resources. In the LNG case, they might argue that the compensation price for the facility should not have been the idiosyncratic value of the Ranch to its owners but the difference between the Ranch's market price with and without the facility. This would reflect the social consensus of how much "saving" the Ranch was worth. Under this theory, if the Ranch were unwilling to negotiate, then a government official, such as the mayor of Santa Barbara, should have represented the owners in binding arbitration that would have removed all legal obstacles to the plant's construction. When Western LNG agreed as a result of arbitration to pay compensation to the Ranch owners, the facility would have internalized its external costs, and the Ranch owners would have received equitable compensation.289

Environmentalists and landowners, however, would not have accepted the view that the market appraisal approach would objectively establish the costs of the LNG project. Instead, they would claim that market prices do not reflect the value of commons resources such as wildlife and open space. They would have been especially suspicious if the CPUC had supervised the appraisals. Environmentalists and landowners were disappointed when the LNG Terminal Act placed final authority with the CPUC, an agency which they thought at best was more concerned with natural gas demand than with the environment, and at worst was so captured by the utilities that it would accept their views uncritically.290

289. Western LNG should only have been allowed to proceed if it could have paid the compensation and still operated its facility profitably. If it could not, then its project would have used resources inefficiently and should have been denied a permit.

290. Interview with Charlie Eckberg, supra note 248; cf. LNG in Southern California, supra note 119, at 88 (comments of Geesman, discussing the inevitable personal bias of CPUC commissioners), 50 (comments of Lionel Wilson, CPUC staff member, acknowledging the importance to the CPUC of the impact of its decisions upon the California ratepayer).
The fact that LNG opponents had such reservations underscores a significant reality: feelings in contemporary America about the benefits of industrial projects vary profoundly. These deep-rooted feelings exist before agencies hold adversary hearings—hearings which are a product of the influences upon and pressures faced by different groups. In the LNG case, utility executives professed a good faith belief that their project was integral to the continued health of an industrial economy. As is to be expected of leaders of large industrial enterprises, they assumed that industrialism, with its mass-produced consumer goods and services, makes the world a better place. Moreover, even if these executives were inclined to promote preservationist or land ethic ideals, the profit maximizing culture and even the legal regime in which they serve limits their ability to do so. Corporate directors and managers have legally enforceable duties to the shareholders they serve to maximize earnings per share and not to waste corporate assets—duties incompatible with preservationist and land ethic philosophy.

In contrast, preservationist and land ethic thinkers such as Aldo Leopold, Edward Abbey, John Muir, and the dean of the American

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291. See, e.g., L.A. Times, Feb. 20, 1977, § VII, at 4, col. 5 (letter to the editor by Harvey Proctor, chair of the board of a Pacific Lighting Corporation subsidiary, calling natural gas shortages in the East a "tragedy" that can only be averted in California with LNG); cf. L.A. Times, § IV, at 3, col. 1 (the senior vice-president of General Electric for power systems contending that "growth is essential to our society of expanding economic opportunity" and that energy is the key to growth).

292. See, e.g., Berle, For Whom Corporate Managers are Trustees, 45 HARv. L. Rev. 1365, 1367-68 (1932). The doctrine by which courts judge the conduct of corporate directors and managers, the "business judgment rule," provides for substantial judicial deference to director-manager discretion. See REVISED MODEL BUSINESS CORP. ACT § 8.30 (1984); ABA Comm. on Corporate Laws, Comment on Amendments to Sections 35 and 48 of the Model Business Corporation Act, 30 Bus. LAW. 501, 503-09 (1975) (explaining language in superseded, but analogous section). Nevertheless, even if few director or management decisions to protect the environment at profit's expense would create legal liability to shareholders, corporate culture substantially limits such moves. Top managers would not last long in their positions if they embraced on their own initiative the views of the Sierra Club, causing corporate profits to plummet. Compare C. Duerkson, supra note 129, at 131. Duerkson, after observing the behavior of Dow Chemical Company in a widely publicized attempt to build a petrochemical processing facility on the Sacramento River in Solano County, concluded:

Until middle-level executives get the message that environmental considerations are important, they will continue to look at the short-term bottom line—and to most, practicing environmental conservation doesn't appear to add much to the equation. Fundamental changes in corporate organization will be necessary so that project planners and plant managers are not penalized for making the long-term environmentally preferable choices in a particular situation. Until they do, future disputes with regulators and environmentalists are inevitable.

293. For examples of Edward Abbey's witty, sardonic musings about the follies of industrial growth and eloquent paens to the splendor of the unspoiled American desert, see Desert Solitaire (1975). Abbey criticizes "industrial tourism," or the phenomenon of visitors to the National Parks "rumbling in . . . their sand-pitted dust-choked iron dinosaurs" before returning to the smoky jungles and swamps of what we call, in wistful hope, American civilization. I can see them now in all their millions jamming the freeways, glutting the streets, horns bellowing like wounded steers, hunting for a place to park. They have left me alone here in the wilderness, at the center of things, where all that
school, Henry David Thoreau,295 who spent or have spent much of their lives observing the natural world and recording their reflections in published writings, have fundamental doubts that industrialism is a blessing. Aldo Leopold summarizes their view:

Like winds and sunsets, wild things were taken for granted until progress began to do away with them. Now we face the question whether a still higher ‘standard of living’ is worth its cost in things natural, wild and free. For us of the minority, the opportunity to see geese is more important than television and the chance to find a pasque-flower is a right as inalienable as free speech.

These wild things, I admit, had little human value until mechanization assured us of a good breakfast, and until science disclosed the drama of where they come from and how they live. The whole conflict thus boils down to a question of degree. We of the minority see a law of diminishing returns in progress: our opponents do not.

Nothing could be more salutary at this stage than a little healthy contempt for a plethora of material blessings.

Perhaps such a shift of values can be achieved by reappraising things unnatural, tame, and confined in terms of things natural, wild, and free.296

Procedural reforms alone will likely not budge these groups from world views so deeply shaped by their respective sensibilities and life experiences.297

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294. For samples of John Muir’s philosophy, see J. MUIR, supra note 40. Muir’s view of industrial progress is exemplified by his remarks on the plans to build a reservoir and aqueduct in the Sierra’s Hetch Hetchy valley to service San Francisco:

A great political miracle this of “improving” the beauty of the most beautiful of all mountain parks by cutting down its groves, and burying all the thickets of azalea and wild rose, lily gardens, and ferneries two or three hundred feet deep. After this is done we are promised a road blasted on the slope of the north wall, where nature-lovers may sit on rustic stools, or rocks, like frogs on logs, to admire the sham dam lake, the grave of Hetch Hetchy.

Id. at 437.

295. See H. THOREAU, WALDEN: OR LIFE IN THE WOODS (1854). In Walden, Thoreau praised a life lived as simply as possible because such a life would be lived close to the natural world. He criticized mechanization for chaining people to an unnatural existence:

The very simplicity and nakedness of man’s life in the primitive ages imply this advantage, at least, that they left him still but a sojourner in nature. When he was refreshed with food and sleep, he contemplated his journey again. He dwelt, as it were, in a tent in this world, and was either threading the valleys, or crossing the plains, or climbing the mountain-tops. But lo! men have become the tools of their tools.

Id. at 41.

296. A. LEOPOLD, supra note 26, at xvii, xix.

297. C. DUERKSON, supra note 129, at 132-33 (discussing, inter alia, former Governor Jerry Brown’s reservations about the ability of procedural reforms alone to bring satisfactory outcomes to facility siting contests).
The contest between land ethic environmentalism and industrialism is best exemplified in the LNG case by Chumash Native American opposition to the Point Conception terminal.

2. Chumash Opposition: Emotionalist, Land Ethic Advocacy

The Chumash, a dwindled band of the original inhabitants of Santa Barbara County,298 opposed the LNG terminal because they felt it would interfere with, or even destroy, a special spiritual significance they attached to the Point Conception region. While the Chumash religion considers all land sacred, Point Conception is especially significant as the "Western Gate" through which souls enter and leave this world. The Chumash generally object to industrialization because it despoils the earth. They were especially upset by the LNG project because they thought the terminal, by scarring the land around Point Conception, would interfere with the transit of souls to and from this world.299 They were also upset because the Little Cojo site was formerly an Indian village, and the grading for the terminal might have unearthed ancestral

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298. The Chumash are an ancient Native American tribe who inhabited the Santa Barbara Channel coast, at one time numbering approximately 20,000 people. Estimates of their current numbers vary widely. The Chumash claimed before FERC that over 1,000, and perhaps several thousand, persons of mostly Chumash descent remain. Western LNG claimed that the numbers were closer to a few hundred. At the time of the LNG controversy, the Chumash had organized into the Santa Barbara Indian Center and the Brotherhood of the Tomol. FERC ALJ Order, supra note 179, at 230-32.

299. During proceedings before the CPUC, and more notably the FERC, there was much controversy about the extent of the "Western Gate," and how far from Point Conception industrial construction would interfere with the transit of souls. The FERC ALJ noted his impatience with what seemed to be the Indians' confusion. He noted:

Some [Chumash] testified that the sacred area included the entire western quarter of the world . . . others, that it included the area 'North to Casmalia and south to Gaviota, and as far back in as U.S. Highway 101' . . . an area of some 300-500 square miles . . . others, that it was impossible to put boundaries on the area . . . . [Such testimony] takes on an awesome meaning when it is considered that some Chumash believe that all land is sacred and that the scarring of the earth [by] an industrial complex would destroy the religious and spiritual balance. On this basis, most of the United States, and clearly the 300-500 square mile area described above, would constitute a religious desecration in the view of at least some Chumash. FERC ALJ Order, supra note 179, at 239.

Based on this author's contact with the Chumash and what they publicly maintained at the time, they would answer that the concept of the Western Gate is vague or inconsistent only to European descendants. The Chumash might not be able to draw the Western Gate on a map, but intuition or revelation tells them when they are there. By inspiration, they knew that a Little Cojo Bay facility would be close enough to Point Conception to interfere with the Western Gate's spiritual integrity. See L.A. Times, July 10, 1978, § II, at 1, col. 5; id., Sept. 28, 1979, § 1, at 1, col. 1; id., Oct. 14, 1979, § II, at 1, col. 1; id., Nov. 4, 1979, § V, at 1, col. 1.

Perhaps the Chumash are not alone in relying upon intuition. Justice Stewart once explained his vote to reverse an obscenity conviction: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography not entitled to First Amendment protection]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
burial grounds.\textsuperscript{300}

The tactics of the Chumash made them emotionalist, and to a lesser extent, populist environmentalists. They were emotionalists in not offering technical assumptions to compete with those of Western LNG, but instead challenging the values that ranked natural gas supplies above preservation of their Western Gate. They were to some extent populist in appealing for public support via demonstrations and civil disobedience—tactics open to the common person who lacks either the expertise or privileged access of an elite group. Yet, the Chumash were not wholeheartedly populist because they were a small minority whose religious views were not widely shared. Accordingly, they did not characterize protection of Point Conception as a vindication of the popular will, but rather as protection of the rights of a "discrete and insular minority."\textsuperscript{301}

The Chumash spoke in quasi-legislative hearings before the California Coastal Commission, the CPUC, and FERC. Their testimony, however, was unlike the fact-laden presentations of Bixby's and Hollister's counsel. For example, at a January 17, 1979 public hearing held in Santa Barbara before the FERC ALJ, about 500 Native American demonstrators, after marching several miles, strode into the hearing room carrying placards and shouting slogans. The ALJ described the resulting atmosphere as "heated and emotional."\textsuperscript{302} Generally, Chumash contributions to administrative records dealt with emotions, beliefs, and values. This excerpt from Chief Greywolf's written comments is illustrative:

My Grandfather told me of Point Conception, when I was a little boy. He told me it's the most sacred place to all Indian Spiritualists, that if I was to ever go there, I would first have to fast, and then I must always remove my shoes before walking upon that sacred ground.

\ldots

Now you say, what does an Indian know about twentieth century tech-

\begin{itemize}
\item \textsuperscript{300} II FEIS, supra note 182, at 140-41; III FEIS, supra note 43, at 235; L.A. Times, July 10, 1978, § II, at 1, col. 5.
\item \textsuperscript{301} In United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Chief Justice Stone speculated that prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [than when a statute affecting economic interests is challenged as a violation of substantive due process]. The Chumash, attempting to borrow from the jurisprudence of Chief Justice Stone, argued that administrators owed the Native Americans a duty to protect the Indians' First Amendment rights to the free exercise of religion regardless of the demand for natural gas by the consuming public. III FEIS, supra note 43, at 165-69. Administrators, however, rejected such arguments pointing out that the free exercise clause does not require government to sacrifice important interests to facilitate religious practices. FERC ALJ Order, supra note 179, at 236-61; see PUC Order I, supra note 55, at 174, 151 (declaring its order to be a "statement of overriding considerations," or an official proclamation that the benefits of the project outweighed its adverse impacts).
\item \textsuperscript{302} The administrative law judge noted that, while he was not impressed, the media was. FERC ALJ Order, supra note 179, at 243 n.1.
\end{itemize}
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nology? Remember we Indians always knew the world was round. Why? from our Indian Spiritual teachings.

But the white man had to build primitive technology before he could understand this, and then he didn’t believe [it] until he tested it. Is this going to happen at Point Conception? The California state public utility commissioners will not believe without testing . . . . Please don’t let our organization write a letter sometime later on, and remind you or your office, that we told you our Spiritual Indian teachings tell us not to allow this plant upon Point Conception, because it will endanger the welfare and the safety of the GENERAL PUBLIC.

And most important to the Indians on this planet, our religious liberty is being denied, this Point Conception land has been an Indian Religious church site from time unremembered.303

More effective than their public hearing testimony, however, were the Native Americans’ demonstrations and civil disobedience activities, including an eight-month occupation of the Point Conception site from late June 1978 until March 1979.304 The demonstrations attracted media attention; news reports portrayed the Chumash as angry, highly motivated, even desperate. As quoted by the press, Indian spokespersons declared:

What we are going to do very simply is lay down our lives [to stop the terminal] . . . . If [Point Conception] were destroyed tomorrow, I feel so strongly about it, I would want to die today so that I could pass through the Western Gate . . . . We do not invite violence; we will not pick up a gun. But if it’s a confrontation that they [the utilities] want, they will get it. Every Indian in this country knows what’s going on here; if one drop of Indian blood is spilled, that’s it. There’ll be more Indians here than they can shake a stick at.305

303. III FEIS, supra note 43, at 166-67. The Chumash also intervened in the CPUC’s and FERC’s adjudicatory proceedings, where they were represented by attorneys from the Santa Barbara Environmental Defense Center. These attorneys advanced the Chumash’s contentions that the Point Conception facility would violate Chumash First Amendment rights. As noted, the regulatory agencies rejected these contentions. See supra note 301. While legal arguments had little success for the Chumash, demonstrations and civil disobedience had more tangible effects; thus this Comment focuses upon the Chumash’s use of the latter tactics.

304. The occupiers’ numbers fluctuated at around 80 persons who built and occupied traditional Chumash hut structures on the site, which they renamed Shisholop in honor of the Chumash village that once existed there. L.A. Times, July 10, 1985, § II, at 1, col. 5.; id., Aug. 24, 1978, § I, at 3, col. 2. This was not the only public demonstration staged by the Indians; they also participated in legal demonstrations in the city of Santa Barbara. See, e.g., L.A. Times, Jan. 17, 1979, § I, at 34, col. 4; id., Jan. 18, 1979, § II, at 1, col. 2; FERC ALJ Order, supra note 179, at 243 n.1.

305. L.A. Times, July 10, 1978, § II, at 1, col. 5; id., Nov. 4, 1979, § V, at 1, col. 1. Some people involved in the LNG controversy felt that there was more than just rhetoric behind the Indians’ words. The Indians’ attorney warned that a violent confrontation could be sparked if the project went ahead. In one incident at the Point Conception site, the Santa Barbara Sheriff’s Department indicated that they worried about Chumash intentions. Late in October 1979, the Chumash staged a one day re-occupation of the site. They arrived at the site in a caravan, and the lead vehicle drove through and knocked a hole in Western LNG’s fence. The
The site occupation was the most dramatic of the Indians' tactics, winning extensive press coverage and helping to spur interest from the Santa Barbara community.\textsuperscript{306} The Chumash moved onto the site to protest Western LNG's trenching after the discovery of the on-site fault. The Chumash viewed the trenching as a desecration of the Western Gate.\textsuperscript{307} They also feared, with some supporting evidence, that the trenching would disturb ancestral burial sites.\textsuperscript{308}

While Western LNG eventually forced the Chumash to leave by court order,\textsuperscript{309} the Chumash occupation halted the trenching in the interim. To ensure protection for cultural artifacts, the CPUC required an on-site archaeologist to monitor trenching. Western LNG was, however, unable to find a local scientist to supervise the trenching because the state archaeological profession's code of ethics precludes excavation opposed by local Indians.\textsuperscript{310} The company eventually found an out-of-state archaeologist. In the meantime, the CPUC was subjected to strenuous lobbying by the California Native American Heritage Commission, which opposed the Point Conception terminal.\textsuperscript{311} Also, the CPUC doubted that the federal government would ever approve the site\textsuperscript{312} because FERC's staff had made public its opposition to a Point Conception terminal.\textsuperscript{313} These factors made the potential of a violent confrontation with the Indians even more unattractive, and in mid-July 1978, the CPUC ordered the seismic trenching indefinitely suspended.\textsuperscript{314} Seismic investigation did not resume until after federal approval of the facility in the fall of 1979.\textsuperscript{315}

This delay in seismic investigation precipitated by Chumash opposition was an important factor in the project's defeat. The delay, however, was not caused by skillful Chumash manipulation of public hearing requirements. Instead of responding to procedural constraints, the CPUC

Chumash then instructed the sole security guard to leave. The Sheriff feared that the Indians had weapons, remembering a shooting incident during the previous Chumash occupation (non-Chumash American Indian Movement activists had shot a drunk and disorderly Indian in the foot for showing disrespect for the sacred ground). The Sheriff approached the site with 14 squad cars, a helicopter, and a SWAT team sent via nearby railroad tracks. The occupiers, however, were unarmed. The police arrested the leader who had driven through the fence, and the re-occupation ended peaceably. Interview with Charlie Eckberg, supra note 248; L.A. Times, Nov. 1, 1979, § II, at 1, col. 1.

308. III FEIS, supra note 43, at 234; see II FEIS, supra note 182, at 140-41.
311. III FEIS, supra note 43, at 752.
313. See id.; FERC ALJ Order, supra note 179, at 187-88.
314. PUC Order I, supra note 55, at 230.
exercised its discretion to delay the trenching, bowing to the political pressures created by the Chumash. Thus, a relaxation of procedural restraints upon administrators would not have hastened the LNG project, and the CPUC would have remained free to respond to exogenous pressures.316

As for the possibility of negotiated compensation solving the conflict between Western LNG and the Chumash, Western LNG did attempt to bargain with the Chumash, offering to donate land on the north side of Point Conception for Native American spiritual use.317 The Chumash, however were intransigent: "[t]hey [the utilities] have offered money, land—everything. But there's no possibility of compromise. We're not in a position to bargain for the Indian spirits that are out there."318 If the mayor of Santa Barbara or any other general jurisdiction government official had sat down at a bargaining table and asked Western LNG to offer compensation to placate the Chumash, Western LNG could only have repeated offers that the Chumash had already rejected. The Native Americans were not in a bargaining mood—and not because adversary proceedings had made them testy. They simply objected to the project as an invasion of what they held sacred.

In arguing that the land has inherent, sacred value which excessive industrialization would destroy, the Chumash advocated land ethic environmentalism. Like land ethic environmentalists generally, they were in the minority.319 Administrators rejected the argument that the holiness of the land prohibited the terminal, implicitly deciding that other values outweighed preservationist or land ethic concerns.320 Accordingly, administrators first conditionally approved and eventually gave final approval to the facility.

Agencies were not entirely unresponsive, however, to the political pressure brought by the Chumash. The CPUC ordered Western LNG to contract for an independent survey of Native American archaeological artifacts that might be disturbed by the project. It further directed that,
should artifacts be discovered, construction must cease until Western LNG consulted with the Coastal Commission, the State Historic Preservation Officer, and Chumash representatives to devise a plan approved by the CPUC for mitigating damage to the resources. The CPUC indicated that the plan should adopt feasible construction methods and configurations for avoiding historical Indian sites and artifacts as well as preservation methods for unavoidably disturbed sites and objects. It also ordered fencing around cultural resources located near construction sites, Chumash access to religious sites "consistent with security and resources protection," and protection, "[t]o the extent feasible [of] the religious sanctity of the site." In ordering these conditions, the CPUC was vindicating the policy of the California Coastal Act that required reasonable mitigation of adverse effects upon archaeological resources. Yet, this statutory standard did not constrain the CPUC from adopting a finding that the project's benefits outweighed unavoidable harms to spiritual values.

The Chumash considered the above measures inadequate. Instead, they would have deemed the rejection of the Point Conception terminal to be the only appropriate CPUC response. More neutral observers might think that the CPUC reached a compromise responsive to the demands of various interest groups. A further exploration of whether the administrators in the LNG case responded to public demand should await consideration of the populist-emotionalist participation of surfers and local environmentalist groups.

3. Surfer and Local Environmentalist Opposition: Populist-Emotionalist Advocacy

Surfers objected to the Point Conception terminal because it would have placed a large industrial facility on one of the state's best surfing beaches. Western LNG's planned trestle would not have interfered with Little Cojo Bay's best surfing waves, but would have prevented surf-
ing at a reef in the center of the Bay occasionally used by surfers.\footnote{25} Surfers were more worried, however, that a breakwater would be constructed to protect the terminal from wind and wave conditions which they contended made the site otherwise unsuitable for LNG.\footnote{26} Moreover, even without the breakwater, surfers were upset because they viewed remote Little Cojo Bay and the surrounding Ranch beaches as “classic California’s last stronghold,” a refuge where surfing still resembled what it was before crowds and urbanization turned southern California into a “a paradise lost.”\footnote{27} Surfers decried what the Coastal Commission acknowledged, “the presence of the 4600’ trestle would degrade the remote character of the Ranch surfing experience.”\footnote{28}

The concerns of local environmentalists overlapped in large measure with those of national environmentalists and therefore need not be recapitulated. Local environmentalists only had the added concern that the development was going to occur in their backyard.\footnote{29}

Surfers and local environmentalists were populist-emotionalists who attempted to mobilize large groups of people to pressure administrators to respect certain values.\footnote{30} For example, surfers used their own publication, Surfer magazine, to publish a report of the LNG project which con-

\begin{footnotes}
\item[25] II FEIS, supra note 182, at 133; III FEIS, supra note 43, at 252.
\item[26] See III FEIS, supra note 43, at 252. Cf. COASTAL COMMISSION LNG REPORT, supra note 200, at 31 (discussing whether breakwater would be needed).
\item[28] COASTAL COMMISSION LNG REPORT, supra note 200, at 27.
\item[29] It should be noted here that Santa Barbara is an atypical community in its environmental activism. Santa Barbara’s activism dates from the 1969 oil spill in the Santa Barbara channel, one of the catalytic events in the history of the American environmental movement. See Taylor & Hopper, supra note 53, at title page. That community includes several public environmentalist organizations, such as Get Oil Out, Network, Citizens Planning Association, Scenic Shoreline Preservation Conference, and South Central Coastwatch. These groups routinely challenge many of the development projects planned for the Santa Barbara area.
\item[30] These groups did not ignore the need to challenge the factual assumptions of industry and the administrative agency (just as Ranch landowners and national environmentalists did not entirely neglect value pitches), but they only challenged the overall qualitative conclusions and not the methodology and detailed factual findings. Surfers Woody Woodworth and Tom Kampas explained why:

We are . . . sitting before a stack of technical volumes almost three feet in height. These were prepared by the joint efforts of numerous scientific minds. The contents of these volumes cover in great depth subjects so broad and complicated that . . . [u]nless you have Ph.D’s in subjects like terrestrial biology, oceanography and archaeology . . . it is highly unlikely that you would comprehend this material at all . . . . [T]hose who prepared the reports have sifted each grain of sand, analyzed the sea water, taken earth core samples, measured the wind velocities, and divided the waves down to 1/10th of a foot.

Their response was to point out how the terminal posed threats “that cannot be weighed or judged by scientific devices.” They rhetorically asked, “[h]ow do you express the sense of awe when sheets of glowing sunlit water pour over you,” offshore from a land covered with wildflowers. The quality of that experience cannot be measured, but it was one that the terminal would destroy. Woodworth & Kampas, supra note 327, at 79.
\end{footnotes}
cluded with "a cry for mass response concerning the liquefied natural gas terminal at Point Conception," and listed the addresses of the agencies with authority over the project. Surfers responded in mass, and with value-laden, emotional appeals. They argued that the project would be "another hideous, scathing blight on the land" pushed by "certain men in powerful positions . . . void of human sensitivity and emotion."

Local environmentalists formed the Citizens to Protect Point Conception, an umbrella organization of several community groups, to coordinate their activities. This organization staged rallies and marches to coincide with public hearings in Santa Barbara, took out full page ads in newspapers, made public statements to the press, and distributed leaflets and bumper stickers.

Both surfers and local environmentalists charged that the LNG project was a boondoggle that would destroy an environment valued primarily for the profit of a few. They argued that administrators who could approve such a project would be the captives of a monied elite. The CPUC and the federal agencies disregarded arguments that responsiveness to the public required rejecting the Point Conception site. Instead, these agencies implied either that the gas consuming public constituted a silent majority in support of Point Conception approval, or that the administrative role legitimately involved some paternalistic protection of the public from the harms of a natural gas shortage. Yet, administrators were not entirely unresponsive to the demands of surfers and local environmentalists when the administrators imposed operating and construction conditions for Western LNG. The environmental mit-

332. COASTAL COMMISSION LNG REPORT, supra note 200, at 27; PUC Order I, supra note 55, at 250, 263, 276; III FEIS, supra note 43, at 159, 170, 201-02, 205, 240-41, 329-34.
333. Woodworth & Kampas, supra note 327, at 80, 87.
334. The ongoing organizations backing Citizens to Protect Point Conception included Get Oil Out, the Los Padres Chapter of the Sierra Club, Network, Santa Barbara Citizens for Environmental Defense (the parent organization of the Santa Barbara Environmental Defense Center), Scenic Shoreline Preservation Conference, South Central Coastwatch, and the Commercial Fisherman's Association of Santa Barbara. L.A. Times, May 16, 1978, § I, at 21.
335. Rock and roll musicians played at rallies, boosting mass participation and assisting fund-raising. The Chumash also participated in these rallies and marches. These events were well-advertised and well-attended. See L.A. Times, Jan. 17, 1979, § I, at 34, col. 4; id., Jan. 18, 1979, § II, at 1, col. 2; FERC ALJ Order, supra note 179, at 243 n.1.
337. The bumper stickers read "Keep Conception Immaculate" and "LNG Disaster!" and were seen all over autos in Santa Barbara. Even in the spring of 1985, when the terminal controversy was fairly moot, the author saw a Santa Barbara bumper sticker proclaiming, "I [heart with a 'no' symbol superimposed] LNG."
338. The author is depending in large part upon personal recollection of testimony at the hearings he attended in Santa Barbara. See also Woodworth & Kampas, supra note 327.
339. PUC Order I, supra note 55, at 328-30 (Commissioner Gravelle, concurring).
gation ordered by the agencies has already been discussed, so the focus here is on response to surfers' concerns.

The Coastal Commission, relying upon Coastal Act provisions protecting water-oriented recreational activities, suggested limiting Western LNG's interference with surfing at Little Cojo Bay "to the minimum extent feasible." The Commission also wanted Western LNG to construct new, artificial surfing reefs or provide public access to currently inaccessible surfing beaches should terminal construction and operation interfere with surfing. The Commission, relying upon Coastal Act public access policies, also suggested requiring Western LNG to provide limited public access to Little Cojo Bay for surfing and other recreation.

The CPUC, however, rejected the replacement artificial reef condition, finding it unsupported by substantial evidence in the record. Instead, the CPUC ordered that "[t]erminal operation shall not unreasonably interfere with nearshore recreational activities such as boating, surfing, or skin diving." It also provided that should unreasonable interference occur, Western LNG might be ordered to provide access to presently inaccessible surfing beaches. As for public access, the CPUC adopted the Coastal Commission's recommendation that Western LNG provide limited public access to Little Cojo Bay, but expressed reservations about doing so due to the remote siting policies of the LNG Terminal Act. The CPUC indicated, "[t]his public access requirement

340. See supra notes 254-60 and accompanying text.
341. California Coastal Act § 30220 provides: "Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses."
342. COASTAL COMMISSION LNG REPORT, supra note 200, at 55.
343. Coastal Act § 30212 provides in part:
(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:
(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
(2) adequate access exists nearby, or,
(3) agriculture would be adversely affected . . .
344. COASTAL COMMISSION LNG REPORT, supra note 200, at 53-54.
345. The CPUC explained its reversal of the Coastal Commission:
The concept of constructing, if necessary, an artificial reef for surfing is vague and impractical. There is no indication of whether it is feasible, where it might be placed, the cost, or what the environmental consequences of this structure might be . . . Further, the proposed location of the trestle is not in the actual area "renowned" for its surfing breaks. Consequently we believe surfing opportunity in the site vicinity will be at the same level after construction as it was before and that such situation is consistent with public health and safety.
PUC Order I, supra note 55, at 276. In defense of the Coastal Commission, it should be recognized here that the trestle probably would have interfered with surfing at Cojo Reef. Moreover, if a breakwater ever had been built to protect the facility, surfing would have been lost at Little Cojo Bay. The Coastal Commission recommendation provided a remedy should such recreational losses occur.
346. Id. at 250, 276.
may be waived if the Commission determines that necessary security or safety precautions so dictate.\textsuperscript{347}

Compared to the Coastal Commission, did the CPUC and the federal agencies respond appropriately to public demands or were they manipulated by the industry they regulate? Did the administrative law reforms creating public comment procedures contribute to ensuring agency responsiveness or were they impotent without substantive standards to narrow agency discretion? With the LNG controversy now summarized, some final perspectives on these issues are now possible.

V

TOWARD POLITICALLY RESPONSIVE AND EFFICIENT ADMINISTRATION

Adjacent landowners, national and local environmentalist groups, Chumash Native Americans, surfers, kelp harvesters and fishermen all opposed the Point Conception terminal. Yet, CPUC and federal agencies thought that LNG was the only alternative to crisis level natural gas shortages and that Point Conception was the only feasible site to receive LNG since the California legislature had limited an LNG terminal to a remote place.

Although administrators had great power in the LNG case, they were not held accountable through elections. As discussed, the public and its elected leaders have often felt uneasy with power such as this, yet have felt such power to be necessary if government is to exercise any control over the projects of private industry, such as the Point Conception terminal. Assuming this is the case, the only remaining issue is how to keep agency power within legitimate bounds. This Comment has discussed three alternative designs for doing so: the interest group mediation model, the net benefit maximization model, and the negotiated compensation model.

Administration in the LNG case tended to follow the interest group mediation model. Administrative power was primarily checked by procedural law providing public opposition groups ample access to agency decisionmaking. As for the substantive standards agencies were to apply, most statutes only directed agencies to adopt "feasible" mitigation measures while choosing a site where a terminal "feasibly" could be constructed in time to avoid predicted natural gas shortages. Some Coastal Act provisions were somewhat more specific, but still left much discretion to the agencies. In general, there were few substantive restraints on what agencies could have decided in the LNG case.

In applying the relevant statutes, agencies performed only the loosest of cost benefit analysis. Administrators did not quantify the cost of

\textsuperscript{347} Id. at 263.
diminished neighboring property values or the benefit of increased natural gas supplies, much less the cost of lost spiritual well-being to the Chumash.

If the agencies did not perform a rigorous cost benefit analysis, neither did they sponsor negotiations designed to obtain compensation for the opposition groups. Instead, agencies were arbiters who heard the evidence and then issued a decision purporting to balance competing interests.

Admittedly, there are problems in relying upon agencies’ interest group mediation to resolve conflicts such as the LNG controversy. The net benefit maximization model adherents would argue that cost benefit analysis could replace subjective, idiosyncratic agency evaluations. In cases like the Point Conception project, however, “objective” cost benefit analysis would have been impossible without widely accepted means of quantifying environmentalist values (even if one rejected the land ethic argument that cost benefit analysis is morally indefensible). The LNG controversy reaffirms the post-New Deal scholarly and political consensus that administrators do not have value-neutral expertise which would allow them to know paternalistically what is “best” for people. Whether one would have preferred to halt the terminal and risk natural gas shortages, or to allow the terminal with its foreseeable environmental harms, would depend on one’s values, not expertise.

In a society comprised of conservationists, preservationists, land ethic adherents, and those with less sympathy for environmentalist restraints, there can be no objectively preferable resolution of the problem of whose values should prevail in land use controversies. The task of agencies was to choose between the value preferences of competing interest groups: utility executives, labor unions, gas consumers, local landowners, environmentalists, and the other opponents. This task involved a resolution of the classic question of politics, “Who Gets What, When, [and] How.”

The compensated negotiation school thinks that bargained transactions between protagonists or their representatives are the best way to answer this political question. This method would have failed in the LNG case. The opposition groups were unwilling to bargain, and the government lacked preemptive authority to bargain for them. Even if the government had such authority in this case, the opposition groups would not have seen the decision as a negotiated settlement, but rather a government-industry collusion enforced by the coercive powers of government.

The only plausible theory of checking administrative power is the interest group mediation model. The model seeks ways to make administrators politically accountable. To date, procedural access to agency de-
liberations has been the primary means to create this accountability. The LNG case demonstrates that such measures have been effective. Because of these procedures, agencies learned about the existence of on-site earthquake faults, spiritual beliefs of Native Americans, prime surfing waves, and rich kelp beds at Point Conception: matters they otherwise might have overlooked. After public hearings and comment periods, the Coastal Commission found two sites preferable to Point Conception. The Commission also ordered various mitigations should the LNG project proceed, including protection of Native American artifacts and religious sites and, possibly, the construction of new surfing reefs.

The CPUC overturned the Coastal Commission's rankings and selected the Point Conception site. It still retained, however, some of the mitigation measures ordered by the Coastal Commission. Without the political pressure placed by the opposition groups, many of these project conditions probably would not have been imposed.

In the end, however, the opposition groups failed to persuade agencies to reject the Point Conception site. Moreover, they suffered an additional defeat when the CPUC and the federal agencies relaxed the stringent construction and operation conditions suggested by the Coastal Commission. These outcomes of agency deliberations demonstrate the limitations of public hearing procedures in securing interest group mediation. The defeated groups could not threaten to donate funds and labor to candidates opposing CPUC Commissioners in an election. A key assumption of pluralist theory is the electoral accountability of leaders, and without such accountability, it is doubtful that leaders will be forced into balancing, as opposed to magnanimously respecting, the concerns of competing interest groups.349

This observation calls into question the current reliance upon procedures over substantive standards as a means to secure administrative interest group mediation. To some extent, American legislatures have, like the sorcerer's apprentice, created agency after agency and have required the latter to give full hearings to all parties. With judicial concurrence, legislatures have, however, allowed their creations to escape their control. Agencies can lawfully reach a great variety of substantive outcomes after complying with procedures. The problem is that unelected agencies do not provide the same opportunities for interest group mediation as do elected leaders. At the same time, when many agencies have authority to permit or deny a given project, there is a danger the facility will be de-

feated, regardless of its merits, only because the numerous agencies cannot agree on a common approach to facility siting.

Some reforms of current procedural and substantive law could alleviate these problems. Dividing permitting authority between several agencies seems both unnecessary and insufficient to protect the concerns motivating public participation. To prevent permitting nets, final authority over major energy projects should be consolidated in a single agency, as required by the LNG Terminal Act and the new procedures, previously discussed, for siting electric power plants in California. To protect public participation opportunities, this single agency should follow the environmental review and adjudicatory hearing procedures of statutes such as CEQA and the APA. Authority should not be consolidated in an agency with a specific mission, such as the California Public Utilities Commission, which has the mandate to protect the gas consuming public (and, some would add, the gas producing industry). The problem is that an agency with a limited mandate will be biased in its weighing of competing interests.

Conceivably, a legislature could be fully aware of a bias built into a certain agency and then grant authority to the agency because legislators, and ultimately their constituents, prefer the reasonably foreseeable policies these agencies will enact. If this were true, then there would be nothing undemocratic or unwise about delegating sole permitting author-

350. The CPUC's value preferences were transparent in its findings approving the Point Conception terminal. The CPUC considered economic losses important, for example noting as justification for approval:

Delay due to selection of a site, other than the applied for site [Point Conception], . . . will lead to the risk of loss of the LNG gas supply contracts. . . . [and] would greatly increase the capital cost of the project and thereby would place an unjustifiable burden on the ratepayer or may even preclude financing of the project.

At the same time, the Commission ranked environmental harms of lesser importance, finding, "[t]he overall level of environmental impacts associated with this project are moderate in comparison with other energy related projects of similar value. . . . The benefits of the project outweigh its adverse environmental impacts." PUC Order 1, supra note 55, at 313.

The Coastal Commission's preference for environmental protection was likewise transparent. The Coastal Commission described the harms of the projects in dire tones and intimated that the project should be abandoned:

[T]here is no possible remote onshore terminal site that would not cause major adverse impacts to natural marine and wildlife resources and [and] public recreation areas . . . . The marine environment in these remote coastal areas will be disturbed by massive construction activities, including trenching, blasting, and pile driving. Regular LNG tanker maneuvers, fuel oil deliveries, and tug and line boat activity will continuously intrude noise and activity into areas used by sea birds and mammals, including the California grey whales. Onshore, because all sites are remote and relatively undisturbed, an LNG terminal will alter the character of the area and disturb valuable wildlife populations. The Commission urges the Public Utilities Commission to give these adverse impacts heavy weight in its decision whether to approve the proposed LNG project.

COASTAL COMMISSION LNG REPORT, supra note 200, at 26. The Commission pointed out that "construction and operation of an LNG terminal at Little Cojo would have the most significant adverse impacts of the four sites on natural resources and the comparatively unspoiled character of a unique and remote coastal area." Id. at 26.
ity to a special mission agency. Yet, delegation to a special mission agency is a way for legislatures to miss or to hide the implications of legislation. While few legislators are unaware of the biases of current agencies, these biases change. A given agency might start out as pro-environmentalist, but with new appointments, become considerably less so.\textsuperscript{351} Thus, legislative intent in delegating authority to a given agency might be thwarted by personnel changes. Also, legislators might be aware of the implications of delegating permitting authority to a certain agency, but their constituents might not. This is a means for legislators to enact policy that does not reflect popular preference.\textsuperscript{352}

Legislatures should vest final permitting authority in an agency given one job: siting facilities in a manner balancing various public interests. Legislatures should not, however, simply instruct this commission to site facilities "consistent with the public interest," creating unbridled discretion in a new agency. Instead, legislatures should enact substantive standards that perform some of the interest balancing now left for agencies.

Before discussion of what these substantive standards might be, some further procedural reforms are worth exploring. Dividing agency responsibility for oversight of coastal resource use, energy production by utilities, wildlife habitat, transportation problems, and so on, is essential if government is to have issue expertise. These special purpose agencies should be preserved, but new legislation should attempt to prevent them from having overlapping permitting authority over development projects, especially large industrial projects and planned unit developments that are likely to create policy divergences, and hence stalemates, among the agencies. The easiest way to accomplish this would be to strip these special agencies of permitting authority over such major land-use projects. Instead, like the Coastal Commission in the Point Conception case, they should rank their recommended decisions and forward these rankings to the general jurisdiction agency.

In the Point Conception case, the Coastal Commission, the CPUC, the California Department of Fish and Game, the California Native American Heritage Commission, and the California Department of Transportation could have held concurrent hearings, listened to their staffs and the interested public and then forwarded preference rankings

\textsuperscript{351} This seems to be the current fate of the California Coastal Commission. At one time, the agency was \textit{l'enfant terrible} among developers; today it takes a much more permissive attitude toward development. Lecture by Ronnie Rogers, Consultant to Avco on its Laguna Niguel, California hotel-residential development project during late 1970's (Feb. 13, 1986); telephone interview with Phil Seymour, Staff Attorney for the Santa Barbara Environmental Defense Center (Feb. 25, 1986) (discussing Coastal Commission approval of a Hyatt Regency resort complex in rural Santa Barbara County).

of decisions to a California Energy Facility Siting Commission (a facsimile of this process currently exists for electric power plant siting with the California Energy Commission). The special mission commissions would have the dual task of developing expertise and representing certain interest groups (such as gas consumers, Native Americans, coastal recreationalists, and wildlife enthusiasts) before the general jurisdiction permitting agency. The latter would only have the political task of balancing values.

Without substantive statutory standards more explicit than those currently existing, this general jurisdiction agency might still have too much power. To temper this agency's power (and even if substantive statutory standards are enacted this might still be worthwhile), the heads of this agency should be made accountable by electoral processes. This could be accomplished in one of two ways: first, by making commission seats elected offices; or second, by filling positions, ex officio, with elected officials such as legislative committee chairpersons and gubernatorial cabinet members (who are elected in California). Making commissioners stand for election will not remove all the obstacles to interest group mediation that exist when administrators are unelected, but will do more than any other purely structural change in the political system. Elections are not unsullied by the distorting effects of unequal distribution of money and prestige in American society, but in an election, groups such as environmentalists, surfers, and Chumash Native Americans have a fairer chance of turning their numbers and the sympathetic appeal of their value arguments into political power than in a hearing room before an unelected administrative board.

Whether administrators are elected or unelected, they could probably better reflect community preferences if they polled communities by

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353. In California, where state offices running on a continuum of importance from lieutenant governor and attorney general to controller and state board of equalization are elected, electing a statewide energy facility siting commission would not be too novel.

354. Enthusiasm for the ability of elections to make leadership accountable to the masses is venerable in American political thought. For example, Thomas Jefferson complained about the extent of unelected power in an age before the creation of vast administrative power:

[The United States] House of Representatives is mainly republican; the Senate scarcely so at all, as not elected by the people directly, and . . . the judiciary independent of the nation, their coercion by impeachment being found nugatory.

If, then, the control of the people over the organs of their government be the measure of its republicanism (and I confess I know no other measure), it must be agreed that our governments have much less of republicanism than ought to have been expected; in other words, that the people have less regular control over their agents, than their rights and their interest require.


For more modern theories of the value of elections, see DAHL, supra note 349. See generally G. POMPER, ELECTIONS IN AMERICA: CONTROL AND INFLUENCE IN DEMOCRATIC POLITICS (1968).
various informal or even formal devices. As an additional procedural safeguard, agencies could be required to demonstrate that they had polled affected communities and, if so, to divulge the polls' results. To make polls as representative as possible of true community preferences, administrators should expand upon the deep information flow of EIS's by distributing shorter packets of information to a wider audience.

In the LNG case, most of those people attending public hearings or submitting comments to agencies opposed the LNG project. Yet, for them to have prevailed upon more than just the fluke of natural gas supply and demand change, they would have needed either a substantive statutory standard making the plant illegal or administrators willing to interpret existing statutes, such as the Coastal Act, in a more environmentally protective manner. If these opponents were, as they claimed, the spokespeople for a majority sentiment, then perhaps the above procedural reforms would have given them more responsive administrators. Alternatively, the California legislature should have enacted substantive statutes which would have changed the Point Conception case outcome.

Perhaps those opposing the LNG terminal during administrative comment periods did not represent majority sentiment, and if the issue had been put to a statewide vote, perhaps gas consumers in Los Angeles would have outvoted Santa Barbara opponents. The LNG Terminal Act can be interpreted as some evidence on this point. The Act was passed by California's most representative political body. Many observers felt that, in passing the Act, the California legislature had targeted Point

355. The U.S. Environmental Protection Agency experimented with something like this approach in deciding whether to close down a copper smelter in Tacoma, Washington for releasing arsenic, a carcinogen, into the ambient air. Comment, Arsenic, ASARCO, and EPA: Cost-Benefit Analysis, Public Participation, and Polluter Games in the Regulation of Hazardous Air Pollutants, 12 ECOLOGY L.Q. 567 (1985). The EPA circulated public comment forms in the community at the same time it held local public hearings, deliberately attempting to find out whether the community preferred the jobs brought by the facility or the protection to their health from closing it down. EPA Administrator William Ruckelshaus explained his approach: "[f]or me to sit here in Washington and tell the people of Tacoma that [the cancer risk associated with arsenic emissions from the smelter] is an acceptable risk would be at best arrogant and at worst inexcusable." Id. at 574.

356. Perhaps this new requirement would not be coupled with a mandate that administrators strictly follow the results of their polls. For example, a statute might allow agencies to adjust the poll totals by intensity of preference, in order to reflect net benefit maximization concerns. Social science has not evolved to where this can be done rigorously, but in the meantime, the current administrative process does serve to measure intensity in a rough sense. It takes time and effort to attend hearings and submit written comments to agencies. Administrators could, as they probably do, interpret these as demonstration of greater intensity of preference than that existing in the public at large.

357. See Comment, supra note 355, at 574-75, 600-03 (EPA briefed community on effects of closing a copper smelter in their vicinity); Reich, supra note 4, at 1632-37 (agencies should assume the responsibility of educating the public to promote "public deliberation" as well as "public participation").

358. Of course, if the Coastal Commission had not been stripped of its power, it would have given the opponents the result they wanted.
Conception as the remote site the utilities would choose for their terminal and the place where a terminal could be soonest built. Yet, one CPUC Commissioner thought legislators, such as Assemblymember Terry Goggin, who opposed LNG importation intended to sabotage the project by targeting Point Conception. According to the Commissioner:

Point Conception was their choice because of their belief that there were so many known or potential problems with the site that they felt confident no facility could be constructed there in time to keep [the utilities'] Indonesian and South Alaskan contracts open—and that there was a great likelihood that no facility would ever be sited there.

Statutes, such as CEQA, which call upon administrators to adopt feasible environmental mitigation, are better than no environmental legislation or than statutes only directing agencies to regulate "in the public interest." Still, they allow obfuscation. The legislature should have expressed its policies clearly, thus assuming more responsibility for balancing the interests in the LNG case and in cases like it. In the LNG case, there are a number of substantive standards the legislature could have enacted to control better both where the terminal would have gone and what it would have looked like once there. If majority opinion truly favored preserving Point Conception, the legislature could have put portions of Santa Barbara's Local Coastal Program (such as those portions calling for low density development of the region) into the Coastal Act, or explored the possibilities of condemning some of the area for a park. Also, the LNG Terminal Act could have enacted seawater vaporization regulations, fish kill limitations, height limits for onshore tanks, a breakwater ban, or limits upon the permissible length of an onshore pipeline—thereby forcing administrators to search for a location closest to existing utility structures. Some expertise would have helped to set these standards. That expertise, however, could have been gained through legislative hearings, because the difficult issues to be resolved before standards could be set were not fact questions for which in-depth adjudicative hearings would have been essential. Instead, the salient issues were questions of value, for which legislative hearings are adequate, even preferable.

In 1970, the Congress of the United States declared "a national policy [to] encourage... harmony between man and his environment [and]
to promote efforts which will prevent or eliminate damage to the environment and biosphere.364 Ironically, these eloquent words parallel the agenda of land ethic thinkers, thinkers whose vision this author would prefer to see prevail. Yet, this declaration of policy has not, in itself, forced America's businesses and administrative agencies to respect a land ethic vision: discharge of pollutants into the nation's navigable waters continues, air quality continues to fall below levels thought necessary to protect human health and welfare, acid rain continues to damage streams and lakes, and wildlife habitat continues to vanish in favor of industrial and residential development.

These facts demonstrate that vague congressional encouragements alone will not reorder national priorities. Environmental degradation will end only when either of two developments occur. Positive law could outlaw the behavior that despoils the environment and such law could then be enforced with coercive state power. Or, environmental protection could be assured when people adopt personal ethics that will restrain them from environmental abuse.

Political leaders could try to enact environmentally protective positive law in advance of the development of a land ethic, or positive law could await the development of widespread moral objection to particular polluting activities. To date, the nation’s lawmakers have mostly waited for the development of widespread popular support before enacting substantive restraints on environmentally harmful conduct. As a result, the nation's waters are less pristine, its air more befouled, its wildlife less abundant, and its landscapes less beautiful.

Maybe the current extent of environmental damage does not reflect what would happen if the public will could be translated directly into policy without the intervening filter of representative government; perhaps legislatures habitually lag somewhat behind the popular consensus on how extensive environmental protection should be as they wait for repeated demonstrations of large majorities favoring new legislation before they act. On the other hand, the platform of Aldo Leopold, Henry David Thoreau, John Muir, and Edward Abbey would likely lose if put to a plebiscite. Thus, respecting democracy means accepting, lamentably, the lawfulness of extensive environmental damage.

Perhaps someday the public consensus will change and responsive legislators will enact positive law that reflects a land ethic. In the meantime, democratic values should prevail even if popular opinion does not reflect the ideal environmentalist philosophy. Respect for democratic values is the primary reason for requiring administrators to listen to the public. If administrators should respect public opinion, so should legislators—meaning substantive legislation should not try to force the

public to comply with standards of environmental protection that most people do not favor. Thus, even if land ethic values should never command majority support, the proper approach is still to trust the people and to enact substantive law that reflects their values.