Recommendation 73-6

Procedures for Resolution of Environmental Issues in Licensing Proceedings

(Adopted December 19, 1973)

The new environmental legislation, especially the National Environmental Policy Act, has imposed on licensing agencies responsibility to consider environmental values in licensing that involves major Federal action significantly affecting the environment. The new responsibility has created new difficulties and has exacerbated old problems for the agencies.

The nature, complexity and sheer number of the issues to be considered make it desirable that the agencies, in appropriate cases, treat generically issues common to more than one proceeding. In addition to promoting agency efficiency, such treatment will permit more effective presentations by interested organizations which may lack the necessary resources for appearances in all the individual cases in which the same generic issue is present. It is especially important, given the wide public interest in environmental issues, that the public be given adequate notice of the generic proceeding and of the issues being considered.

Recommendation

A. *Generic Proceedings.* 1. Each licensing agency should analyze the activities subject to its jurisdiction to identify environmental issues common to more than one application and appropriate for across-the-board treatment. Issues so identified should be made the subject of "generic" proceedings, with the conclusions published and binding in subsequent cases, subject to departure or reexamination only in accordance with paragraph 3.

2. Each licensing agency should exercise discretion consistent with its governing statute to define the format of such a generic proceeding. Opportunity should be afforded for the presentation of oral testimony and cross-examination where required by law or where the agency considers it desirable for the development of an adequate record relevant to the particular issues.

3. Each licensing agency should select such form of procedure as will enable it ordinarily to apply generic decisions in subsequent licensing proceedings (a) without departure except

where special local circumstances justify individualized treatment, and (b) without reexamination except where changed circumstances, e.g., material information not previously available to the agency, or a change in applicable law, raise a substantial question as to the continuing validity of the decision. Where the agency determines to reexamine the generic decision in whole or in part, it should consider the advisability of suspending final disposition of the licensing proceeding pending the conclusion of a new generic proceeding, and should, in any event, provide to affected interests adequate notice and opportunity to participate in the reexamination.

4. The agency should recognize a duty to reexamine generic decisions from time to time, as, for example, where technology is changing, or where currently available information indicates the need for modification.

5. The giving of binding effect to generic decisions creates potentially serious problems for the general public, who will not ordinarily be aware of the existence of a proceeding. Accordingly, the agency must be careful to structure requirements of notice in such a way as to ensure that persons in areas likely to be affected by future licenses and environmental groups who have exhibited interest in related problems receive adequate notice.

B. *Public Information.* 1. Each licensing agency should make it a standard practice to disclose and make available to the public at the earliest practicable date all of the basic studies, reports and other documents, not excepted by law or privileged against disclosure, upon which the application or any recommendation or position of the agency or its staff is based and which the agency may reasonably anticipate will be sought to be obtained during the proceeding; and the agency should require applicants to follow a similar practice at the time an application is filed.

2. Environmental statements should be drafted in terms understandable to laymen and regulations for license applications should stress as a major goal provision of information to the public on environmental questions.

Citations:

39 FR 4848 (February 7, 1974)

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Separate Statement of Kenneth Culp Davis

Recommendation 73-6 may be the least distinguished recommendation the Administrative Conference has adopted. It tells agencies what their practices should be, without a report of what those practices are or why they are what they are. It is unsupported by a factual study either of the subject matter of the recommendation or of a representative portion of that subject matter.

Even though the provisions of 73-6 that I regarded as most objectionable were deleted from the proposal during the plenary session, I should like to explain why I joined a substantial minority of the Conference in voting against the adopted version. My principal reason is that each of the three main provisions is based on uninformed thinking in the abstract rather than on a careful study of the relevant facts and the relevant law, as I shall now show.

One main thrust of 73-6 is toward more rulemaking ("generic proceedings") under the National Environmental Policy Act. Yet the Conference had no information whatsoever about the extent of rulemaking under NEPA. For all that the Conference knew, the rulemaking might in fact be excessive instead of deficient.

If the Conference had known how far the agencies have responded to the prodding of the Council on Environmental Quality to engage in more rulemaking (see CEQ 1972 Ann. Rep., page 228), its recommendation might have been the opposite: It might have commended the agencies for doing more rulemaking under NEPA than they have done apart from NEPA. At all events, the recommendation was based on factual guesses and not on information about agencies' practices.

Without facts about hearings, lack of hearings, or kinds of hearings under NEPA, the Conference favors "oral testimony and cross-examination." The push is indeed gentle, but it is unmistakably *for* such procedure and not against it. Yet the only factual report the Conference had before it was about the Atomic Energy Commission, whose procedure is governed by a unique statute requiring trial-type hearings even in absence of issues of fact or of policy. If the Conference had had facts about licensing procedures for housing projects, oil well drilling, pipelines, grazing, waterway structures, and use of national forests, its mild push might have been in the opposite direction: It might have quoted with approval from Professor Walter

Gellhorn, 48 A.B.A.J. 243, that "some of this country's gravest administrative deficiencies stem from lawyer-induced overreliance on courtroom methods to cope with problems for which they are unsuited." With no information as to whether hearings are held in 95 percent of NEPA cases or in only 5 percent, and with no information as to whether hearings that are held are public meetings or involve oral testimony and cross-examination, the Conference has thrown its weight on the side of trial procedures, *whether or not the governing statute requires a hearing.* The position is quite the opposite of that of the courts, as the Conference did not know but should have known. The courts generally hold in NEPA cases that public meetings suffice, without oral testimony subject to cross-examination, *even when a statute requires a hearing.* E.g., Citizens Airport Committee *v.* Volpe, 351 F. Supp. 52 (E.D.Va. 1972) (airport approval); Keith *v.* Volpe, 352 F. Supp. 1324 (C.D. Calif. 1972) (highway approval). See ch. 28, on "The National Environmental Policy Act," and more particularly section C, on "Procedural Problems Relating to Party Participation and Right to Be Heard," in K. Davis, Administrative Law Cases-Text-Problems (5th ed. 1973) 598-602.

The recommendation that in subsequent licensing proceedings an agency should "ordinarily" neither depart from nor reexamine its "generic decisions" seems directly contrary to the holding in Calvert Cliffs' Coordinating Committee *v.* Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), that an AEC rule could not govern a licensing proceeding because "NEPA mandates a case-by-case balancing judgment on the part of federal agencies." 449 F.2d at 1123. The law of the Calvert Cliffs case may "ordinarily" apply; the Conference had before it no legal analysis to the contrary. Nor did the Conference have before it any study of such relevant legal questions as (a) whether an agency may make "generic decisions" binding even when they are not binding under the law of res judicata, (b) what agencies that are subject to NEPA lack a statutory grant of power to make rules having force of law, (c) whether an agency lacking such a statutory grant of power may legally refuse in a subsequent proceeding to reexamine a "generic decision," or (d) what procedure, *if any,* an agency may use in a "generic proceeding" that will allow it to refuse to reexamine its conclusions in a subsequent proceeding. Acting without studies of such questions seems to me to be a headlong jump into the darkness.

My principal assertion is not that the positions the Conference has taken in 73-6 are unsound but that they are unsupported by needed studies of the facts and the law. Of the 45 recommendations the Conference has made in its first six years, I have voted for almost all, and this is the only one that has seemed to me to be based on insufficient understanding. A record of 44 out of 45 is fairly good, but are my standards too high if I insist that 45 out of 45 should be based on studies of the relevant facts and the relevant law?

Separate Statement of David Sive

During several of the meetings of the Committee on Licenses and Authorizations at which we considered the matters involved in Recommendation 73-6, I indicated my disagreement with several details of both the Recommendation itself and the Committee's supporting statement.

It is my view that:

1. The re-examination permitted of agency generic decisions should be less restricted than the Recommendation suggests;

2. The Recommendation should more clearly mandate—as it did in an earlier Committee draft—earliest possible disclosure by the concerned agency of environmental reports. On the other hand, I want to emphasize my agreement with the substance of each principal aspect of the Recommendation. Some comments were made in the plenary session debate to the effect that certain aspects of the Recommendation should have received longer and deeper study, and that consideration by the Committee might have been too heavily based upon Professor Murphy's excellent study of the licensing activities of the Atomic Energy Commission. It is, of course, correct that the subject matter of Recommendation 73-6 could have received longer study. It is also true that any matter of the nature of those which come before the Conference or any of its Committees can be studied for three, five or even ten years without enabling the Conference, the Committee or its consultants to state definitively at the end of such period: "This concludes all helpful study of the subject matter."

Recommendation 73-6 was considered thoroughly and at length by the Conference Committee, whose membership reflected broad agency representation and considerable experience in dealing with environmental problems. The Recommendation was circulated for comment to all agencies likely to be affected, and comments from nearly all those agencies were received and considered. While several of the agencies expressed doubt that generic proceedings would be helpful in their licensing proceedings, there was sufficient favorable response to the major points of the Recommendation to justify our conclusion that the Recommendation was broadly pertinent to federal licensing activities which affect the environment. Of course, nothing in the Recommendation calls for any agency to employ generic proceedings where in the agency's judgment such proceedings are inappropriate.

We must bear in mind that environmental law is a rapidly evolving field. The National Environmental Policy Act is itself a relatively new statute, and the problems it poses for many agencies cannot await post mortem analysis. I think it is no ground for criticism that this Recommendation attempts to extrapolate from an admittedly limited body of experience in order to provide guidance for agencies in dealing with these problems in the future. The Administrative Conference was created to provide an advisory body whose membership is "specially informed by knowledge and experience with respect to Federal administrative procedure." 5 U.S.C. § 573(b)(6). The members are entitled and expect to rely on their knowledge and experience in evaluating any proposal before them and did so in this case. It seems to me that by using such expertise to act with a promptness that permits affected agencies to profit from the recommendation instead of from their own mistakes, the Conference is doing precisely what its statutory charter intended.

Editorial Note: The second sentence of paragraph A.1, as published in the Federal Register, read as follows: "Issues so identified should be made the subject of "generic" proceedings, with the conclusions published and binding in subsequent cases as set forth in paragraph 3." 39 FR 4848 (February 7, 1974)