

ECOLOGY DECISIONS— IS DUE PROCESS REALLY ENOUGH?

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ABSTRACT

Man is blessed with the ability to utilize the resources of the earth on a scale granted to no other living creature. But this blessing requires that these resources must somehow be distributed among all men. This has traditionally been done by economic systems, but now a discontentment with the existing system has led to a hope that "technology" can assist in the process of deciding how the earth's resources are to be developed and distributed.

"Due process of Law," an old concept in the Anglo-American legal system has been the traditional catchphrase used to describe "fairness" in the decision process. It is still a viable concept in the new technological age of quantitative crutches and bureaucratic clichés and is still of value in the protection of the environment.

Ecology: Some Concepts

Through the centuries, man has faced many challenges to his existence. Some have been of his own doing and others beyond his control. Few have been so perplexing and illusive as the current problems of ecology.

Ecology has traditionally been defined as that branch of biology concerned with the study of inter-relationships between organisms and their environment. For many years it was a quiet, respected science. However, over the last decade, public concern has tended to "socialize" the scientific connotation and emphasize the crisis aspect of ecological change on society. An increasing number of environmental issues are now construed as "crises of human survival." Man seems to be faced with the challenge of guiding an evolving technological society through an environmental world which he neither fully understands nor controls.

Although the universe functions in a consistent and intelligible way, the laws of environmental balance are difficult to abstract and the mechanisms of natural balance often seem harsh and disastrous to the eyes of the mortal man. Yet, man must operate in this world of uncertainty. He has no alternatives for even outer space is unknown. Thus he has tried to balance individual costs and benefits by formulating socially desirable regulations governing the ecological environment. Nevertheless the interpersonal conflict over cost and benefit and problems of agreement on social goals continue to spawn many of today's ecological problems. We shall consider the legal basis for social regulation of the ecology and assess the effectiveness of our existing administrative system to satisfy public sentiment. This will then imply certain conclusions with respect to the process of managing ecological change in the future.

Societal Structure For Due Process

It has been stated in the manifestos of both capitalist and communist nations that natural resources belong to the people. But when the people number many millions, how is it that any one individual claims a right to control allocation decisions? How is distributive justice to be attained?

CONSTITUTIONAL JUSTIFICATION

In a democratic society, the people exercise control over natural resources by giving authority for their distribution and use to freely elected governmental representatives. This constitutionally delegated control is constrained by the requirement that the various department and agency civil servants cannot be arbitrary, discriminatory, or capricious in their decision making. Further, they must take into consideration the interests of those citizens who can show sufficient legal interests in the decision to gain the right to be heard. This right of due process is guaranteed by the fifth and fourteenth amendments to the United States Constitution. It is further refined to be dependent upon "standing" before the courts or through the agencies. Standing is largely dependent upon one's private economic and property interests, but it also serves to protect the rights of the general public.

DUE PROCESS IN PRACTICE

Although the "practice" of due process has developed within judicial proceedings, it has spilled over into administrative processes. Due process is easily satisfied in the context of judicial litigation where all parties are identified and personally brought before the jurisdiction of the court. The issue of standing i.e., who has the right to be a plaintiff, has gradually been resolved as the courts have come to realize that interest can far exceed direct pecuniary interest and that class action can represent persons whose personal

inertia prevents them from pressing their own claims. However, the notification methods suitable for the adversary process have not always applied equally well to the administrative process. Pecuniary interest does not typically apply when the rights of large segments of the public are involved. In addition, notice by direct "personal service" is usually not feasible, so alternative means of advertising and posting must be substituted.

Present Condition: Bureaucratic Ecology

Whereas the due process mechanism functions satisfactorily for judicial proceedings, major projects having an ecological impact have tended to be administered by a bureaucracy. This "bureaucratic ecology," while perhaps satisfying the letter of the law, has not altogether satisfied the intent of due process.

As applied to administrative decisions involving large segments of the public, due process has been circumvented by three major accountability escapes: (1) quantitative crutches, (2) "legal" notification and (3) "democratic" expressions of opinion.

QUANTITATIVE CRUTCHES

Administrators have found it is one thing to recognize broad general rights of the public but quite another to apply those generalities to specific cases. Similarly, the lawyers who litigate conflicts and the courts who must judge vague issues all suffer from a lack of definitive, tangible standards. It is not surprising that the lure of the quantitative peg became eagerly sought by those trying to ease the burden of discretionary authority. Various quantitative crutches, such as cost benefit analysis, and other economic or mathematical allocation schemes, have been seized in hopes of quantifying a "public" input that typically extends beyond the objectivity of the quantitative model employed. Cost benefit analysis, for example, inherently assumes that all costs and values of a project can properly be reflected in quantitative (usually monetary) terms. By utilizing sophisticated techniques, specialists can derive monetary values for benefits such as the number of man days of fishing, that are assumed to be just as unquestionable as a competitively established price for a bushel of wheat. Once quantitative measures are established, the go-no-go decisions can and are based upon simple numerical ratios. Many governmentally financed projects, having significant ecological impact, are analyzed, evaluated, and approved on a cost benefit basis.

The cost benefit criteria and various other bureaucratic procedures, such as outlined in the U.S. Senate Document 97 of the 87th Congress¹ offer

¹ Senate document 97 is the principal economic guideline established for the development of water resource projects in the United States.

administrators a security of a procedure that can easily become institutionalized. The layman who is unfamiliar with the rules learns only that they are very complex, they "must be followed," that the real decision making authority always resides at a higher (non-local) level, and that he certainly has a right to be heard if he will only take his complaint to the proper authority, i.e., someone somewhere else. In effect the formalized procedures stifle inquiry on the local level and violate the intent of due process.

LEGAL NOTIFICATION

The constitutional basis for due process notification is well recognized, and has served the judicial processes well, but as applied to administrative decisions involving natural resources, it is often exceedingly difficult to meet and has had harsh effects. Unfortunately "legal" notification does not necessarily imply "actual" notification. The *Federal Register* is not widely read in local areas, legal notices in the local newspapers do not excite wide readership, and even the "news" stories in local newspapers may be ineffective in alerting the local populace of impending development of the resources in their area. Where large segments of the public are involved, notice by direct "personal service" is not feasible, so alternative means of advertising and posting are substituted.

The ineffectiveness of substitute notification techniques to inform interested parties of relevant resource decisions affecting local ecology is demonstrated by a study conducted on a \$3.6 million water resource project in Western Oregon.² Statistical samples revealed that only forty percent of the sample claimed to have an awareness of the project prior to the bond issue vote authorizing \$85,000 for purchase of land and easements to get the project underway. Of all the residents who claimed knowledge prior to construction of the project, 34 per cent learned about it primarily through newspapers, 34 per cent through organizations to which they belonged, and 16 per cent from relatives and friends. Many first learned of it when they noticed the new assessment in their tax statements. The intent of the due process requirement clearly had not been achieved.

DEMOCRATIC EXPRESSIONS OF OPINION

Individual expressions of opinion are not automatically democratic. So that the democratic process may function effectively, the voter must be informed about the issues and the vote should constitute an expression of the preference of the majority. This "democratic" criteria is not necessarily met in the public decision making mechanism.

The Western Oregon study revealed that of the 2,151 landowners who were eligible to vote in the initial authorizing election, only 306 voted and only

² Brown, Carl, Joseph G. Monks, James R. Park, *Decision Making in Water Resource Allocation*, Lexington Books, Lexington, Massachusetts, 1973.

196 voted in favor of the project. The initial approval was thus accomplished by less than 10 per cent of the eligible voters. A second election for a tax levy held the following year had a voter turnout of only 4 per cent. This election was held on the same day (November 5, 1968) as the national election, for which the state of Oregon voter turnout was over 70 per cent. An investigation into the reasons for this discrepancy revealed that the polling places differed and separate books were "required" by law. In essence, legal and bureaucratic requirements had hampered rather than facilitated a democratic exercise of opinion. The administrative assumption that a public vote on an ecological issue implies due process is simplistic and erroneous.

The Challenge: Participative Ecology

In a society that seems concerned with the distributive justice of ecological balance, we find that the public input to the decision processes is ineffective or perhaps even stifled. Although the concept of due process is widely acclaimed, its intent can be circumvented by bureaucratic administrations that exhibit quantitative sophistication, rely only upon "legal" notification, or are satisfied that most any voting exercise represents a democratic expression of opinion. As ecological issues become ever more crucial (or perhaps even threatening) society faces the challenge of overcoming these barriers and effectively participating in ecological decisions. Why is participation so vital, and what does it entail?

PARTICIPATION—A NATURAL DESIRE

The urgent need for involvement and participation in environmental matters stems from the rational nature of man. Man is an intelligent being and he operates purposefully in a scientifically consistent world. His major faculties are his intellect and his will, which have natural objectives of knowledge and love respectively. He naturally seeks knowledge that will explain the laws of existence to him and enable him to live a "better life." He is also cognizant of his own individuality and expresses a natural respect, or love for his fellow men.

As a social being, man is concerned with both himself and his progeny. But as he utilizes his technology to extract environmental resources, convert and consume them, and ultimately lay them to waste, he magnifies the problems of existence passed on to future generations. Fortunately, however, he has recognized the need for a better understanding of the earth's ecosystems and the necessity for moderating and controlling human intervention, so that both he and his offspring enjoy a future existence.

The natural inclination to responsibly participate in decisions that profoundly affect oneself and his heirs cannot be satisfied without knowledge of two basic types. First, man needs a basic, perhaps even abstract, understanding of the natural and social environment and of the feasible ways of managing ecosystems. This theoretical knowledge is now receiving increased emphasis in general and

specialized educational curriculums. The second type of knowledge relates to empirical knowledge of the existing social state, such that public needs are identified not on the piecemeal basis, but within the context of entire ecosystems. Only through knowledgeable identification of long run public interests and accurate conveyance of public sentiment, can man hope to manage ecosystems in his best interests. In view of the difficulties that bureaucratic approaches have experienced in identifying public needs and communicating public sentiment, these areas present the greatest challenge to democratic society.

IDENTIFYING OF PUBLIC NEEDS—SYSTEMATICALLY

An attack on the problem of assessing public needs must focus upon such questions as who is the public, what is a “need,” and how might the assessment activity be accomplished more effectively.

The relevant public consists of all those citizens affected by a decision. In ecological decisions it is especially important that the public be defined to include not only those persons having an economic or legal interest in the decision, but also those with other cultural interests. Those expressive (e.g., artistic), religious, educational, technological and political interests should also be included in the set of those affected.

A need is an individual or group desire whose validity is measured in terms of cultural standards. All men require food and shelter and share the same human essence. But they possess diverse appetites for spiritual and material goods and have different value systems. After basic needs are met, it would appear that further agreement on social goals would be increasingly difficult, if not impossible. This is not necessarily the case. Let us see why.

Men share a common interest in understanding the environment and utilizing it for a better life. Serious problems of allocation arise because men and societies do not all agree on the ingredients for a “better life.” But they do share an informal ethic containing a basis for agreement, an ethic having its foundations in the essence of humanness. The basis is that:

1. Everyone should enjoy essential needs and if some members of society do not enjoy a minimum level of welfare, public resources should be allocated to them.
2. Beyond the minimum level, costs should be borne by those who benefit.
3. Resource distribution and ecological conditions that benefit more members of society are preferred to those that benefit fewer members.

Given man’s intellectual knowledge base, and the informal ethic based upon his respect for others, further agreement would seem to rest upon a systematic approach to the problem.

How might the assessment of public needs be systematized so that ecological impacts receive the “proper” amount of emphasis relative to other

objectives? This is obviously a value laden question which lends itself to a multitude of subjective answers. Systems analysts would be quick to highlight the need for identifying goals and establishing measurable relationships between components within the system. They would point out that ecosystems, business systems, governmental systems, etc. all form part of our overall cultural and social system. Independent and short range decision making is likely to result in conflict. A systems approach toward attaining national goals implies that private and public activities within the environment be consistent within a hierarchical plan of national objectives. The very absence of planned goals invites political, economic and social uncertainties that generate short term crisis and longer run imbalances in society.

The idea of national goals does not mean that the public must universally agree upon a single unwavering ultimate national objective. Numerous cultural objectives may be sought simultaneously. But it does mean that cultural directions are established, some system of priorities is known, and the incongruities of subordinate goals are openly recognized. A system of national priorities would hopefully reduce the waste of resources which occurs when they are independently managed toward conflicting and suboptimal goals. Even in the absence of goal congruence, the very discussion of goals would generate fruitful inquiry into the critical area of value system differences. And an understanding of differences is a prerequisite to cooperative social progress.

Assessing public needs is the first vital step toward meeting the challenge of making effective ecology decisions. It necessitates that all affected persons be properly informed and aware of the hierarchical importance of the given problem *vis-a-vis* other social objectives. Only through comprehensive knowledge can society make informed democratic resource allocation decisions. Given this public knowledge, we turn now to the problems of communicating public sentiment to responsible decision makers in a timely manner.

MEASUREMENT AND COMMUNICATION OF PUBLIC SENTIMENT

No people can knowingly progress toward a goal without first having the goal in mind, for without goals social advance is left largely to chance. Once people have mutually established goals, an orderly progress toward them can be facilitated by planning, organizing and controlling relevant activities. We have seen that people must be knowledgeable about the environment and environmental versus other social priorities if ecological objectives are to receive appropriate consideration.

But the mere possession of knowledge by the public at large is not sufficient; it is only a basis for evaluating the impact of proposed

environmental changes on oneself and his community. The enlightened views of the public must be effectively communicated to decision makers who can take action. Improved mechanisms for the accurate measurement and rapid communication of public sentiment are necessary and feasible.

For many citizens, their first, last, and only input on an environmental issue is a dichotomous “yes” or “no” on a ballot. In view of today’s technology, this limited expression of preference seems to be most stifling. Social scientists and statisticians have devised numerous methods of surveying and synthesizing public opinion. The physical sciences have also contributed measurably by spawning development of two way communication systems that could permit national surveys to be conducted on an individual response basis.

The Solution: Due Process in Action

Although our society has a solid foundation for reaching fair and equitable social decisions via a due process mechanism, our bureaucratic procedures have circumvented it. Has constitutional due process failed—or have we failed it? Have we effectively guided it into bureaucratic organizations, supported it with newer quantitative methodologies, and in general given it the benefits of modern technology? These concerns are particularly relevant in ecological decisions because man sees his future at stake. Ill considered decisions can lead to unalterable changes in our natural environment. The dichotomy of viewpoints on whether ecology is a necessity or a luxury represents a battlecry for some and a plague for others.

Ecology issues have become so politically sensitive that they often connote a crisis situation. Furthermore, those skilled in mass persuasion are able to use its umbrella to guide public support to their choice of land, air, water and noise pollution controls and waste disposal projects. Some leaders seem intent upon capitalizing upon issues like the “energy crisis” or “ecology crisis” as a key means of management.

MANAGEMENT BY CRISIS

Theories of management are almost as numerous as managers themselves. A traditional perspective views managers as planners, organizers, directors and controllers whereas behaviorists hold that managers are people who work through other people to get things done. Modern management scientists identify managerial activity with the scientific method. They say managers are decision makers and the correct decisions depend upon logical analysis and testing of data. Countless other theories also abound and among them are prescriptive as well as descriptive methodologies of management. Some recommend management by objective, others management by exception, and still others, management by goals.

In essence a manager is a controller of resources, (human and/or material) who operates to achieve some goal. His *modus-operandi* may not fit neatly into an academic classification; indeed he may not even be conscious of one. But he is generally charged with effectively utilizing his resources in a socially responsible way. He can usually best accomplish this by employing a planned, systematic effort.

Many of our nation's most fundamental and vital issues appear to be managed by crisis. Whether this is a consciously chosen methodology, or simply the result of a lack of centralized planning is difficult to conclude. But one need only recall such occurrences as the campus and ghetto riots, peace demonstrations, civil rights conflicts, energy crisis, etc., to realize that the crisis label is frequently employed to change the course of our nation. In essence we are reacting to short term crisis rather than following an organized plan of development.

The essence of a crisis situation suggests one of three prerequisites: either the situation is 1) not anticipated or 2) anticipated and deemed to be a satisfactory means of resolution of a problem or 3) anticipated and unavoidable. The management by crisis philosophy suggests a conscious selection of (2) above. While this may be an expedient political method, it does not imply much progress on the part of man to utilize his knowledge of himself and the universe to improve his level of existence.

Man cannot create ecosystems nor has he yet fully understood all of them. He is a limited finite being incapable of comprehending the total system we refer to as the universe. His brain cannot fully understand such apparently simple notions as matter or space. No man can visualize what it means to go to the very edge of space and then "take one step beyond" into nothingness. Nor have philosophers or scientists been able to sufficiently probe the nucleus of an atom as to give man transformation powers over the matter-vs.-energy balance.

Yet he enjoys an unprecedented existence within the system whose boundaries he cannot control. His inherent intellectual and physical capabilities give him limited control over an environmental system. It is as if he were a frontiersman floating on one of his own rivers in search of an ocean. Though he knows little of the source of the sink he had best keep his ship afloat lest he be completely lost enroute. Conscious navigational effort would appear to be preferred to uncontrolled drifting which may suddenly find him at the head of a waterfall.

Similarly, in ecosystem management, a policy of delaying action until a crisis occurs is an especially dangerous approach. The ecological systems all exist in a delicate balance. Though man lacks understanding of the total system, he does experience a vivid "here and now" existence and he does operate purposefully to achieve individual and social objectives. Of high

priority among these must be the preservation of the level of existence he has thus far attained. A management of ecology by crisis philosophy would seem to be contrary to these goals.

MANAGEMENT BY DUE PROCESS

For a democratic society, due process methods of management would seem to be preferred to management by crisis. Although administrative due process has some practical weaknesses, the theory has worked well in judicial proceedings. Furthermore, social and technological advances indicate that improved methods of gaining public input could be available in the foreseeable future.

In some respects, management by due process is the antithesis of management by crisis. The very notion of due process embodies a thoughtful, deliberate planned process, by which goals can be met. Perhaps this very slowness has been one of its saving features. It tends to average out the nodes and reduce the rate of change. It has been slow, and perhaps even nonresponsive, in the past due largely to problems of communication and data transmission. With computerized data banks and two-way closed circuit communication from individual offices and residences, the "timeliness" problems can be overcome and the large size of the response could maintain the same degree of safety that was previously accomplished by the slowness of the system. In addition, the accuracy and breadth of participation in administrative decisions can be enhanced.

Summary

Man is blessed with an environment of natural resources that exist according to laws and principles which provide him with an endless challenge of discovery. Although he does not claim complete knowledge or control over his environment, man does attempt to use its natural resources to give him a "better life." In some cases this development is accomplished by individuals or private organizations but often it is controlled by governmental units. Whatever the case, a person is guaranteed the right of a voice in ecological decisions that will significantly affect him.

Unfortunately, the constitutional right of due process does not function as satisfactorily in administrative cases involving natural resources as it does in judicial proceedings. Problems have arisen in using surrogate criteria for decisions, in informing affected persons of the issues and in achieving a democratic expression of the preference of the majority.

Improved public knowledge is vital to the solution of these problems. Initially, the ecological objectives must be formulated, publicly recognized and prioritized with respect to other social goals. Then public desires must be accurately measured and communicated to decision makers in a timely manner. Finally, ecological plans should be implemented on a comprehensive basis, with full realization of the impact on other cultural values.

Ecology is neither a luxury nor a necessity. In these days it is a term which attempts to convey one aspect of man's complicated existence. Some advocates would have everyone believe we must direct all resources toward preserving our environment as it is or we will surely dig our own national grave.

Although crises prompts action, it is not necessarily the most effectively oriented action. A more sound philosophy rests upon reliance on the notion of due process. While administrative due process admittedly has not functioned in an ideal manner, the representative and orderly aspects of change accomplished by due process far outweigh the revolutionary flavor of change through crisis. Revolutions are applicable where the existing society has nothing to lose by the pitfalls of crisis management.

Research data suggest that natural resource decisions that have significant ecological impact do not presently really satisfy the intent of due process. It also reveals that social and technological developments have been made which could measurably improve the democratic expression of opinion so lacking in our current administrative decision making structure. Rapid development of these mechanisms would seem to be strongly preferred to some current trends of management by crisis.³

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