

ENERGY DECISION MAKING
By
Joseph P. Tomain and Sheila S. Hollis
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Reviewed by

*Morton L. Simons**

From among the welter of “how-to” books that pass for current legal literature, it is refreshing to find Tomain and Hollis’ *Energy Decision Making*, a slim tome dedicated not to “how-to” but rather to the “how-come” and “why” of energy policies. Tomain is Joseph P. Tomain, Professor of Law at Drake University Law School, and Hollis is Sheila S. Hollis, former chief of FERC’s Office of Enforcement, and now in private practice in Washington, D.C. In a disarming introduction, the two describe themselves “as children of the sixties and as young lawyers of the seventies.” Indeed that description provides a clue to some of the book’s strengths and weaknesses.

Ambitiously exploring the big picture, *Energy Decision Making* begins with an analysis of the “structure” of decisionmaking (encompassing discussions of administrative law, the administrative agencies dealing with energy, and the role of judicial review), proceeds to decisional procedures (ratemaking techniques, both traditional and recent, cost-benefit analyses, and Hollis’ specialty, enforcement), and concludes, as any honest examination of the decisional process must, with a discussion of the values implicit in the process. Not all parts are equally successful. The several chapters do not always work together to produce an integrated whole. It is jarring to find highly sophisticated insights juxtaposed with rather elementary observations. Some parts of the book, for example the chapter on “Complexity and Uncertainty,” are essentially a survey of the academic literature rather than any original contribution — perhaps justifiable, but certainly less stimulating than the commendable and original analysis of “Energy Enforcement.”

Whatever its authors’ intent, the principal value of *Energy Decision Making* lies neither in its descriptions of the process nor in its implicit and explicit value judgments, but rather in the reactions it provokes in the attentive reader. For example, in the section on judicial review (Chapter 3), the authors, after repeating most of the unhelpful generalities (*e.g.*, “courts are not generally authorized to substitute their judgment for that of an agency”), conclude (p. 37), “The true test, the real scope of review of agency action by an adjudication or formal rule making, is grounded in the so-called substantial-evidence test.” This is simply not so, as even a casual glance at either the decided cases or the Administrative Procedure Act will reveal. The substantial-evidence test applies only to an agency’s findings of fact — which a court is obligated to sustain if they are supported by substantial evidence — but has nothing to do with the vast majority of review proceedings. The key issue in appellate review is whether the agency’s ultimate result is sustainable on the basis of the rationale articulated by the agency, *i.e.*, is the result “arbitrary,” within APA standards, or is it “reasonable.” Indeed, if one could distill judicial review down to a single “true test,” it is likely that the test would be pretty much what it has been for over a half-century: the agency must do what is reasonable under all the circumstances.

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Much of the law of judicial review of agency action has been devoted to fleshing out this bare-bones standard, for what is reasonable, and what are the relevant circumstances, vary over time. The APA, in large measure, represents a codification of prior case law, and the authors are on shaky ground when they assert, "The extent of court review is narrowly circumscribed by the APA" (p. 35). Yet, here, as elsewhere, the authors, after advancing a questionable premise, redeem themselves by suggesting a more appropriate conclusion, finally stating that the "reasonableness test" is the unifying standard (p. 38).

If one of the book's weaknesses is that its conclusions are occasionally incorrect and contradictory, it is one of its countervailing strengths that it usually presents — and presents fairly — just about every pertinent point of view. Thus, for example, a discussion of judicial deferral to agency expertise is followed with the important but oft-overlooked query whether, in fact, agencies do indeed possess expertise superior to the reviewing courts. And, to cite another example, while the authors express a clear preference for a "comprehensive national energy policy" — and hence endorse the Carter Administration's efforts to centralize energy decisionmaking in the Department of Energy — they recognize that centralized decisionmaking may be inconsistent with the values implicit in a pluralistic society, and that a process of decisionmaking that permits meaningful input by all affected interests and is responsive to changes in the underlying circumstances may be at least as important as the particular energy policy reached.

The book is particularly thought-provoking in its presentation of alternative approaches to decisionmaking, as in its discussions of cost-benefit analysis, and the use of a scientific process (and a Science Court) in lieu of, or along with, the legal process. Where the authors are perhaps the weakest — and their description of themselves as "children of the sixties" is probably the tip-off — is in their treatment of "ancient history," *i.e.*, any event prior to 1970. Their suggestion that, until the 1970's, the FPC was viewed "as a relatively insignificant 'backwater' agency" (p. 138) is dubious. Moreover, their discussion of FPC's approach to producer ratemaking in the 1950's and 1960's is incomplete.

Two minor quibbles with respect to style might be noted. Footnotes are not at the foot of the page, but rather are grouped at the end of each chapter — a stylistic format which requires the reader either to ignore the footnotes or to flip back and forth constantly. And for a serious and scholarly work, the three-page index is patently inadequate. Among other things, none of the material in the extensive footnotes appears to be indexed.

Energy Decision Making is an ambitious attempt to provide an integrated analysis and overview of the decisional process. Because the process itself is not integrated, because conclusions about the process, when scrutinized in cold print, look less than definitive, and, perhaps most of all, because the underlying energy situation changes so rapidly, the book is not wholly successful in persuading the reader of the correctness of its conclusions. It is, however, both successful and useful in providing a comprehensive framework for discussion and analysis and in forcing the reader, at every step of the way, to come up with answers of his own.