THE TEXAS FAILURE: A CRITICAL STUDY
OF THE POLITICS OF POLLUTION IN TEXAS

THESIS

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by

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The *Texas Failure* sets forth the thesis that environmental problems are essentially a product of political decisions and that in Texas the political system has failed to respond to environmental problems because it is dominated by polluter-oriented special interests. The argument advanced is that polluter-oriented interests are well protected by state politicians in both the legislature and the regulatory agencies of state government. The thesis is organized around an analysis of such political factors as ideology, leadership, decision making and law as they relate to a political consideration of Texas environmental conditions.

The material for the thesis was gathered from state statutes, environmental studies, legislative hearings and reports, state agency reports, various wire-service and newspaper accounts and interviews with state legislators and lobbyists.

Organized into six chapters, the study pin-points the salient impediments to meaningful environmental control in the Lone Star State. Chapter one describes some of the
pollution conditions which exist in Texas and isolates politics as the most important consideration in finding a solution to these problems. Chapter two presents a discussion of the important religious and economic ideas, values and beliefs which have influenced the thinking of Texans as they have dealt with their environment. The main contention in this chapter is that nineteenth century liberal ideas, rural orientations, and public opinion about environmental issues have led to neglect. Chapter three identifies problems associated with the functional ability of the legislature, leadership recruitment, powerful special interest groups and legislative ethics, and describes how these problems in the system hinder an adequate legislative response to pollution control. Chapter four analyzes state environmental legislation and notes a history of reluctance in drafting effective state laws concerning the protection of the environment. There is also a discussion of the inadequacies of present state statutes. Chapter five examines the state's regulatory process and administration of environmental laws and notes such weaknesses as the fragmentation in authority and the nature of executive appointments. Finally, chapter six sets forth several proposals for reform including legislative, administrative and civil rights reform.
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CHAPTER I

INTRODUCTION

Texas Pollution

Emanuel Ilkenhaus is an 80-year-old snowcone truck driver in Houston, Texas. On July 14, 1971, Ilkenhaus was arraigned before a Houston judge on a charge of driving 40 miles an hour in a 30-mile-an-hour zone. Ilkenhaus and his snowcone truck had been stopped near the Houston Ship Channel and ticketed for the traffic violation. He told the judge, "I had to hold my nose driving through that area the pollution was so bad. I thought trying to hurry through that area would be better than going to the hospital like some others have done. And," Ilkenhaus added, "I was on my way to a prayer meeting, and I was in a hurry to get there, too." The Houston magistrate agreed with Ilkenhaus that the pollution was bad, but said he had no choice but to fine him fifteen dollars. Ilkenhaus was fined as a threat to the driving public, but the threat and harm to the public from plants along the Houston Ship Channel presented an even greater "clear and present danger" during that hot and humid summer.

1Radio News Report, by Dan Clayton, KFJZ, Fort Worth, Texas (July 14, 1971).
In April, one hundred persons on two ships in the channel were overcome by toxic fumes. On June 29, fifty-three had to be removed with the assistance of ten ambulances because they had been seized with coughing and a burning sensation in the chest which one victim described as "just like taking a big mouth of hot sauce and being on fire." On July 8, 1971, a 66-year-old grandmother, Mrs. Kathlyn West of Brooklyn, her grandniece, and her three grandchildren had to be carried off a Yugoslavian ship in the channel and taken to Hermann Hospital for toxic inhalation. Mrs. West and her charges had left New York on an ocean cruise to escape the smog in their native city in New York. The family was treated for inhalation of toxic fumes which, as in the other cases, were alleged to have been emitted from the Stauffer Chemical Plant. Three days later, another thirty longshoremen fell victim to the environment of the channel.

Today, there are from 1,000 to 1,600 polluting industries, including refineries, rendering plants, chemical manufacturers, and paper mills along the Houston Ship Channel that collectively have turned Houston into a boom town and created what some observers consider the most polluted waterway on the planet. Environmental conditions along what the city's promoters call "Houston's Fabulous Fifty Miles," have drawn the attention of many studies, reports, articles and books.

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2Ecology in Texas, August 6, 1971, p. 3.

A Ralph Nader Task Force reported, in 1970, that 50 to 100 Houston polluters had applied to the Texas Air Control Board for variances by December of 1968, while the Harris County Air and Water Pollution Control Section roughly estimated that the number of violaters ranges from 1,000 to 1,600. In a "Sierra Club Battlebook" entitled Oilspill, author Wesley Marx notes that:

Effluents from industry, and from the city this industry has created, have purged life-giving oxygen from these waters for twenty-four miles. Wastes dumped into the channel require a half-million pounds of oxygen daily for their decay. While other parts of the nation are beginning to rebel against such gross pollution, the channel flows as lifelessly as usual. Owners and executives of channel industry, who often serve as city fathers, prefer to turn up their noses rather than revive the waters by reducing present waste loadings by 95 per cent.

The pollution problems are not confined to Texas' largest city, however. From Corpus Christi in the Coastal Bend, to Amarillo in the Panhandle, and from El Paso in extreme West Texas, to Fort Worth and Dallas in North Central Texas, air, water and solid waste pollution are creating special problems. Near Beaumont, Texas, for example, salt is being eaten out of the concrete at the Lamar University football stadium because of the pungent hydrogen sulphide fumes which pour from the stacks of the Olin Chemical Company. The situation, which was related in testimony at a Texas Air Control Board hearing,

5Marx, *op. cit.*, p. 11.
resulted in a whole section of seats in the stadium having to be replaced because the pollution had eaten the bolts from the chairs. Classes sometimes have to be dismissed because the odor and the smog are so bad.  

In Corpus Christi, Coastal States and Pittsburg Plate Glass pour tons of hot waste water, loaded with chemicals, into the ship channel which empties into Corpus Christi Bay. On October 29, 1970, the state reauthorized the polluting company to discharge seventy-five million gallons of the hot water into the ship channel daily.  

In the state capital, Austin, insoluble carbon black cleaning residues drain into Waller Creek from a laundry establishment owned by former mayor of Austin, Travis La Rue, and the State Commissioner of Agriculture, John C. White. The Texas Water Quality Board singled out La Rue as "a polluter 'flagrantly violating everything the board is trying to do.'" The Austin-Travis County Health Department, meanwhile, completely outlaws swimming in Town Lake, and warns the people that "it should be safe to swim in Lake Austin and Lake Travis as long as they don't swallow any of the water."  

In February, 1971, Clifford Murphy, a Texas Christian University biologist, conducting research on the Trinity River  

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7Texas Observer, November 13, 1970, p. 15.  
in the Fort Worth-Tarrant County area, revealed that pollutants entering the river at certain points kill fish in six to ten minutes. At that time, Murphy and his fellow researchers agreed that the pollution of the Trinity had to stop. Almost a year and a half later, by August of 1972, the situation had not improved. Murphy indicated that inadequate waste disposal practices had made parts of the river similar "to an open sewer in places." Fish which were placed in some samples of waste material, that supposedly had been treated and then dumped into the river, died in a matter of seconds.\textsuperscript{10} The city has air problems too. Texas Steel, three years in violation of the 1968 Clean Air Act according to James Webb of the pollution control division of the city health department, continues to pollute the Worth Heights area of the city. Traders Oil Mill Company fills the south side of the city along Hemphill Street with an acrid smell because loopholes in the air control laws exempt the processing of agricultural products from regulation. This entire area of the city has perhaps the highest incidence of health problems. At night thick choking smoke eats into the moonlight as a factory attempts to dodge the monitoring activity of the local air control agency. In the helicopter above, Jim Webb mumbles: "I guess they're turning off their anti-pollution machine at night. Isn't that a hell of a note?"\textsuperscript{11}

\textsuperscript{10}Fort Worth Star-Telegram, February 18, 1971, Sec. A, p. 4, Fort Worth Press, August 6, 1972, Sec. A, p. 23.

\textsuperscript{11}Fort Worth Star-Telegram, August 22, 1971, Sec. F, p. 5.
In El Paso, lead from a nearby smelting plant was found in the blood of a number of small children. Lead in human beings frequently causes serious brain damage.

State Senator D. Roy Harrington, of Jefferson County, citing Texas Railroad Commission reports, revealed in 1970 that within the past five years 23,000 barrels of oil have been dumped by faulty pipelines on Texas waterways. This represents more than twice the amount leaked in the Santa Barbara disaster, and yet the Railroad Commission, which is charged with the responsibility of seeing to it that such incidents are taken care of, has never punished a polluter.\(^{12}\)

At Freeport, Texas, Dow Chemical workers, from the Operating Engineers Local 564 were given orders to dump titanium tetrachloride in the sewer system at night because it makes smoke when it touches water and, therefore, would be easy to spot during the daylight hours.\(^{13}\)

There are more than 10,500 manufacturing establishments of various types located in Texas.\(^{14}\) These include processors and producers of petroleum, petrochemicals, natural gas, lime, cement, asphaltic and ready-mix concrete, carbon black, furniture, cotton, cotton-seed and cotton-seed oil, castings, vegetables and fruits, flour and cereals, other foods, grains, lumber, steel and other metals fabrications, lead, antimony, aluminum,


\(^{13}\)The Brazosport Facts, February 26, 1971, p. 12.

zinc, tin, manganese, magnesium, graphite, gypsum, lignite, mercury, oil, rock and table salt, organic chemicals, and others. The environmental impact of this industrialization has resulted in the creation of semi-permanent photochemical smog or smaze over some of the major urban centers of the state.\textsuperscript{15}

The Houston-Harris County area experiences the smaze problem regularly. El Paso is plagued by the situation particularly between October and March. Low-level temperature inversions which occur during that period trap pollutants between the low-level inversion layer and the ground, preventing the polluting particles from dissipating. Fortunately, these inversions normally break up and dissipate before noon and prevent build-up of the pollutants to the point where they might threaten the well-being of the area. The Fort Worth-Dallas metropolitan area is also subject to the photochemical smog. Secondary-lead smelters, those associated with the recovery of lead from lead storage batteries and scrap lead, are located in the metropolis and contribute emissions of lead and acid gases, such as oxides of sulfur. Recovery systems are provided to a limited degree, but they are directed primarily toward recovery of lead metal and not the prevention of the escape of these pollutants.\textsuperscript{16}

Pollution is so much a part of the Texas scene that radio and television weather broadcasts regularly report the air

\textsuperscript{15}Ibid.
\textsuperscript{16}Ibid., pp. 78-79.
pollution index in metropolitan areas. Special attention is drawn to clearing skies when a fast moving "norther" blows the smog and smaze from the cities. Daily newspapers also carry reports of air pollution standards. Pollution is a problem in Texas. And more, it is a problem not only of science or of economics, but a problem of politics.

The aim of this study is to show that pollution in Texas is a political problem, and in so doing, to illuminate the weaknesses and failures of Texas government in dealing with the solution. It is a critical analysis of ideology and behavior, of legislative and administrative leadership and of decision-making, and of the laws which set forth the framework of control and regulation of pollution in Texas. The conclusions and value judgments in this evaluation have been pieced together from interviews with state politicians and testimony given at legislative hearings, through reports originating in the state legislature and various administrative agencies, as well as numerous newspaper and wire-service accounts. Through all of this material, one unmistakable pattern emerges. Environmental problems in the Lone Star State are directly related to the way money is made in Texas and how Texas politicians make decisions to preserve that economic system. The tightly woven web of power and money which perpetuates the state political and financial system also perpetuates economic exploitation and political neglect of the state's environment. Political boondoggle and chicanery have been employed to defend and
preserve powerful economic interests that have been exploiting the environment of Texas for several years. And through all of this, the air, water and natural resources of the state have been taking powerful and damaging blows whose effects may now be measured on meteorological gauges and scales and in the biologist's test tubes.

Pollution as a Political Problem

Politics is the business of choice and decision. The various legislative, administrative and judicial leaders of a political system are involved daily in a determination of who gets what, when, where, and how. As public officials, their choices and decisions are expected to be "in the public interest." But how does a political leader identify the public interest? In a pluralistic society that is little more than a collection of private interests, how does the public official identify the common interest? That is the dilemma that makes politics what it is. It is the problem that strikes to the very core of every social question, including pollution.

The main obstacle to pollution control is not scientific or economic but political. Scientists generally agree that despite significant gaps in scientific and technological knowledge about pollution, the technology exists to control most pollutants. Jacques Cousteau, the world renowned authority on the sea and its many life-forms, has made the point that,
"It is not a technology problem, but a problem of consciousness."  

Many industrialists would agree but they claim that the cost of the new technology is prohibitive. However, in terms of the cost to society this does not appear to be the case. In strictly economic terms, the cost of repairing the damage caused by pollution is higher than the cost of eliminating it. Estimates in the Texas Law Review indicate that the financial loss in pollution damage is eleven billion dollars per year, while the cost of elimination runs to around three billion. The problem, however, is that the high cost of cleaning, repairing and medical costs resulting from pollution does not fall on the shoulders of the polluter but on those of the public. The market system does not provide the incentives to abate pollution because the cost of pollution is not borne by those who pollute.

Fundamentally, the problem of pollution is a political problem of choice and decision. To what extent may public areas such as rivers, streams, beaches and canals be utilized by private interests for private purposes? At what point does private use infringe upon and interfere with the public's shared use of the air and water? When does use become abuse?


19 Ibid.
In this context, the decision hinges on the concept of "human use." The critical consideration is how the environment is used. Understood in this manner, the definition of pollution shapes up less scientifically and more politically as "those substances which interfere with the use of air, water or soil for socially desired purposes." The question is immediately thrust into the political arena for arbitration and resolution. Diverging interests jockey for favorable positions in the decision-making process. Special interest groups, each seeking to advance its cause, lobby for interpretations advantageous to their point of view or activity. Real estate developers, wildlife conservationists, park and recreation activists, and corporations all compete for a decision—a definition of use—acceptable to their own interest. What is "socially desirable" and what is in the "public interest" is defined by a conflict and resolution of "numerous private interests." In the final analysis the ecology within which a community chooses to live is carved, girded, and cemented by the political system men have engineered to determine the priorities and activities of society. As one author described it, "politics is the making of decisions by human beings about the manipulation and utilization of the natural environment: it is an interaction among life forms."

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Increasingly and inevitably, politics is ecology."21 The environment is shaped by both the style and substance of man's political activities. That is the subject of this paper: How the environment of Texas has been shaped by both the style and substance of Texas politics. This is where the story of pollution in Texas lies.

CHAPTER II

TEXAS IDEOLOGY AND BEHAVIOR

The Framework of Religion, Philosophy and Experience

Texans think of themselves as practical people. They put great faith in a realistic view of life that is unencumbered by the trappings of ideology. Alexis de Tocqueville's observation of early America seems to apply to Texans. He wrote, in 1835, "I think that in no country in the civilized world is less attention paid to philosophy than in the United States."¹

Texans tend to ridicule the idealist as irrelevant and somewhat misguided, and they castigate the ideologue as somehow warped and perhaps dangerous. T. R. Fehrenbach in his history of the state notes that, "Texans could conceive of a society based on cotton, cattle, citrus, and oil, but not of a structure resting on techniques and ideas . . ."²

In such an environment, writes Fehrenbach, "Successful politicians, more often than not, ran on platforms pledging


greater opposition to the ideologue reformers in the North, who were called much worse terms.\textsuperscript{3} The common assumption running throughout the literature on Texas is that Texans are not ideologically oriented but are rather pragmatically inclined, responding to diverse situations and events in a tough-minded, practical fashion. In this tradition situation ethics, which change to meet the changing conditions, are more tenacious than ideologies. In Texas the measure of a man, therefore, is not determined by what he believes but rather by how he applies himself.\textsuperscript{4}

Despite the denial of ideology in Texas there is a Texas ideological framework, and it is possible to identify a set of accepted "operative myths" or "beliefs" or "attitudes" which (true or false) are held by most Texans, and which have had an impact on the environmental behavior of the people of the Lone Star State. For example, Texans are Fundamentalist Christians and are inclined to practice good Calvinist doctrine. They are thoroughly entrenched capitalists inclined to support a social darwinist view of economic life. They are essentially pessimistic about mankind and hopelessly frontier-oriented. And despite the growing urbanization of the state, Texans cling to their rural heritage. The political system is elite-centered and conservative, while the economic

\textsuperscript{3}Ibid., p. 175.

\textsuperscript{4}Ibid., pp. 709-710.
system is manipulative, individualistic, and motivated by self-interest. Texas ideology springs from these foundations and provides the framework for political, economic, social, and environmental behavior in the Lone Star State.

Judeo-Christian Values

Man's behavior towards the environment is deeply conditioned by his religion. In the Eastern religions, for example, man and nature are intimately bound together. There is a synthesis between man and the environment. There is, consequently, scrupulous respect and affection for nature. The people of the East love nature so much that they feel one with nature, they feel every pulse beating through the veins of nature. But in Western religion this synthesis is torn asunder. The ecological perspective of Western religion separates man and nature. According to Judeo-Christian tradition, nature was created by God for man. Scripture clearly indicated the "proper" relationship.

And God said, Let us make man, wearing our own image and likeness: let us put him in command of the fishes in the sea, and all that flies through the air, and the cattle, and the whole earth, and all the creeping things that move on earth.

Alienated from man, subject to man, nature exists only to be exploited and utilized by man. The Western notion has been,

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perhaps, nowhere better expressed than in the writings of the medieval theologian Thomas Aquinas. "Man has a natural dominance over external things," he writes, "because, by his reason and will, he is able to use them for his own profit, as they were made on his account, for the imperfect is always for the sake of the perfect." The divine right to rule over nature has been interpreted as a divine imperative to conquer and exploit. Exploitation is a divine imperative.

This religious perspective sometimes leaps prominently into view in Texas when utilization of the environment is discussed. United States Congressman Jim Wright of Fort Worth invokes the thoughts of Aquinas when he defends the Trinity River Canal Project. "The environment exists primarily to accommodate the human species. The earth exists for man, not the other way around." In true Texas fashion, and in the tradition of Judeo-Christian religious teaching, Wright puts man in the center of the universe as its lord and master. It is an atomistic point of view that sees a fundamental distinction between man and nature. It is a distinction that sets up a struggle between the forces of nature and the survival of man.

Frontier Texans were influenced deeply by this religious outlook. They interpreted the relationship between themselves

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8 Fort Worth Star-Telegram, December 8, 1972, Section A, p. 8.
and nature as a struggle. Unlike the American Indian, the white man had no scruples about exploiting the wilderness. Where the Indian lived for centuries with nature, talked to it and even prayed to it, the white man struggled with it and cursed it. As one writer assessed the situation:

The frontiersmen were Old Testament oriented. The Land they lived in had many parallels with the land of Canaan, and they themselves with the children of Israel. They were beset with dangerous heathen enemies. The land was scouraged by ravaging insects and burning drouth; the imagery of the Israelite deserts struck home in the Texan heart. The farmer endured plagues of grasshoppers; lost sheep and cows to cats and wolves; he saw green crops die and wells run dry.

The Dynamic Capitalists

But before they are Christians, Texans are dynamic capitalists. As David Nevin has written, "... Sunday ends and Monday comes and it is my impression that on Monday most of Sunday's smiling brothers leap up with sharp eye and hard face and set about assaulting their fellow man in search of profit." 10

As capitalists, Texans exalt the individual. Texans see man as acquisitive by nature and motivated by self-interest. This type of perception places emphasis on individual initiative, individual achievement, individual reward and individual failure.

Community welfare is secondary. Profit and competition are core values. The individualistic or atomistic strain of capitalism carries over the basic Judeo-Christian view of man and nature, reinforcing religious values from an economic perspective. The Texan could turn to the Bible or social and economic theories and find the same fundamental truth. Man is responsible only to advance his own self-interests and the environment exists to be fully utilized for profit.

The capitalism of Texas reflects the social darwinist emphasis of nineteenth century liberalism. Articulated by sociologist William Graham Sumner in the 1880's, this orientation emphasized competition and survival of the fittest in society. Life was interpreted as a tooth and nail existence, where men competed for survival. Self-interest was the regulator of human affairs. The influence of social darwinism was more profound during the frontier period of Texas history, when daily experience seemed to coincide with social theories. Today, the traces of the philosophy exist in a more mellow form; but most twentieth century Texans would still agree with Sumner's basic premise.

The struggle for existence is aimed against nature. It is from her niggardly hand that we have to wrest the satisfaction for our needs, but our fellow-men are our competitors for the meager supply. Competition, therefore, is a law of nature. Nature is entirely neutral; she submits to him who most energetically and resolutely assails her. She grants her rewards to the fittest, therefore, without regard to other considerations of any kind.  

Not only is "fellow man assaulted," to use Nevin's words, in the scramble for money, position and security, so too is the environment. The puritan ethic and the capitalist ideology converge in the Texan as he attempts to bridle the environment. Fehrenbach best describes the situation.

The Texan still believed subconsciously that work was the real virtue, and acquisition of property its reward; that ceaseless, aggressive action was the proper sphere for man, and God had given him the world for his arena; that social classification was wrong but status all important; and that the only logical, or moral, basis for status was acquired wealth. It was a cultural tradition that was literally civilized; it tore down forests and plowed millions of acres of virgin soil; it extracted billions of tons of petroleum and spread great cities over the land; it erected massive dams and paved countless highways to connect the whole. It was a cultural ethos that had no room for culture. 12

Several scholars have elaborated on the influences of these ideas in Texas politics, economics and society in general. Dan Nimmo and William E. Oden have characterized Texas as "individualistic" and "traditionalistic." 13 They observe that Texans emphasize material self-interest above notions of the public good. 14 Texas is described as an "action culture," where "the key is movement, accomplishment and building; action not reflection; the builder not the

12 Fehrenbach, op. cit., p. 709.
14 Ibid.
thinker." "The builder is supreme and his tool is money."\textsuperscript{15} V. O. Key, writing in 1949, noted: "The Lone Star State is concerned about money and how to make it, about oil and sulfur and gas, about cattle and dust storms and irrigation, about cotton and banking and Mexicans."\textsuperscript{16} Later, in 1970, a professor of classical literature at the University of Texas described the situation in this fashion: "The first commandment of Texas is, 'Thou shalt not interfere with thy neighbor's God-given right to turn a fast buck at the general expense lest the same right be some day denied to thee!'"\textsuperscript{17}

These ideas and values have molded political, economic, and social behavior since the earliest days of Texas history. Frontier conditions seemed to justify such beliefs. Life on the frontier was an individualistic situation. Isolation and self-reliance were the constant companions of the early Texas settler. With the blades of his axe and his plow, the frontiersman moved relentlessly across a bountiful wilderness. Locked in a daily struggle for survival with nature, individual acts had no consequence or significance beyond personal existence. The settler was a conqueror in a hostile world. Either he subdued the wilderness and bent it to his will or he would perish. Man was at war—he had to dominate so that he might prevail.

\textsuperscript{15} Ibid.
These ideas which explained frontier behavior on a philosophical basis, however, generated ecological problems on the physical level. The settling of the West was a movement in total disregard of both human and physical ecology. Indeed, some historians have recently raised the question: "Who was the real varmint, the bear or the trapper who killed him?" The frontier movement destroyed whole species of animals and endangered many others. It destroyed the indigenous tribes and cultures of the American Indian and the Mexican; and it ripped across the forests, rivers and soil with abandon. "The westward movement destroyed the old liberal ethical America; the nation exploded across the continent, killing Indians and Mexicans, building a vast economy and a dynamic industrial machine."19

The Lone Star State, steeped in these popular ideas, operated in its early years of independence with the same recklessness that characterized the early settlers. Faced with problems of security and finance, the state turned to its natural resources for relief. Through massive land give-a-ways and other programs, Texas political leaders financed the state's business.


19 Fehrenbach, op. cit., p. 308.
Land grants were used to stimulate settlement, as payment and reward for military service against Indians and Mexican marauders, and for roads, irrigation canals and ditches. As the "coin of the realm," 17,000 acres of land purchased seven river steamboats and eight oceangoing vessels. Land was used for water wells, and to encourage industry and the railroads to come into the state. The Texas legislature provided incentives for industry and established a pattern of using political power on the behalf of business when it passed an act on December 15, 1863, encouraging industrialization. On that date, legislators passed a bill which offered land as reward for initiation of new business enterprises requiring "the creation of certain machinery." That law offered 320 acres of land for each $1,000 valuation of any

... new and efficient machinery put into operation before March 1, 1865, for the manufacture of iron from ore, or for the manufacture of cotton or wool into thread or cloth, or for the manufacture of fire arms, nitre, sulphur, powder, salt, cotton, or woolen cards, and spinning jennies, paper and oil.

In various ways, the newly created state of Texas disposed of 216,314,560 acres of land. Utilizing the figures of Thomas Miller, who has spent more than fifteen years on the subject of Texas public lands, it is possible to account for most of

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the grants. Texas gave nearly 40,000,000 acres to settlers; granted almost 10,000,000 acres to Texas soldiers and their survivors; gave 32,000,000 acres to railroads, and another 5,000,000 acres for other internal improvements; sold for cash 4,500,000 acres; exchanged 3,000,000 acres for a red granite capitol building; and reserved 52,000,000 acres for public education. Another 3,000,000 acres still possessed by Texas comprises river beds, channels, lakes and submerged areas.\(^{22}\)

State land policies were not always made in the best interests of the environment or the people. Texas land grants conveyed to the grantee full timber rights to the land granted and, prior to 1879, there was insignificant legislation regulating timber cutting. No minimum values were placed on the timber nor were limits affecting cutting enacted. Under the 1879 land sales act, authority to value school lands for sale belonged to the county commissioners who often set the value far too low in order to oblige friends and neighbors who helped them get elected.\(^{23}\)

In 1903, Land Commissioner John J. Terrell, after making an on-the-spot inspection, revealed that much of the timber belonging to the state had been stolen. Reports from his agents in the field repeated over and over again

\(\text{\footnotesize 22}^{\text{\footnotesize Ibid.}}, \text{p. xii.}\)

\(\text{\footnotesize 23}^{\text{\footnotesize Gammel, op. cit.}, \text{p. 146.}}\)
the same findings. From Crockett County came a typical report:

Timber . . . On the heads of the breaks of Devil River Cedar timber abounds in considerable quantitives, and post oak wood contractors have been depredating on this timber and hauling it principally into Tom Green County for fence posts and building purposes . . . . From the best information that I can gather, about two hundred thousand cedar posts have been cut and carried out of Crockett County from the breaks of Devil River . . . 24

Miller noted that the overly generous and often careless management and sale of Texas land was the responsibility of the legislature which, he observed, more often considered the private interests of the settler and the purchaser than the interests of the public and the school fund for which purposes the land had been sold. 25 Such was the beginning of a familiar pattern for Texas legislators in dealing with the environment. Reforms eventually made their way into the system, but not before 279,022 of the original 300,000 acres of timber had been sold. Another ecological mistake, and what some have considered an economic mistake as well, was the practice of turning over mineral rights to private interests with the grants of land. Ninety-one per cent of Texas land was sold or given away without reservation of mineral rights.

Such was the philosophy and behavior of early Texas. But the old values and the old ways die slowly; and Texas today

24 Miller, op. cit., p. 156.
25 Ibid.
thinks and acts according to the same basic set of assumptions about man, the government and the environment. Men in the top levels of industry and government in Texas reflect frontier ideology in their daily deliberations and activities. These manipulators of power and money pride themselves on fifty miles of polluted ship channel in Houston because it generates untold wealth. Not satisfied with destroying this body of water, they now work in the state's financial and political circles to convert the Trinity River into a gigantic inland ship channel running up the middle of Texas from the Gulf of Mexico to Dallas-Fort Worth and points further north. Pursuing the values of exploitation and "bigger is better" plans for a superport twenty to thirty miles out in the Gulf of Mexico which would accommodate the biggest of the new supertankers, are discussed by politicians and industrialists. Three-hundred-thousand-ton ships with cargoes such as crude oil from the mideast and liquid chemicals from places like Dow Chemical could be handled by the port out in the Gulf. The old ways and the old values simply die hard.

The Texas Political Style

A fundamental characteristic of a political culture steeped in the values which permeate Texas is that the government is controlled by an "elite" which uses the government to advance private interests and to preserve the established

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social order. In Texas where the "established social order" means personal autonomy without social responsibility for business and industry, the fight against pollution encounters serious stumbling-blocks. Because self-interest and laissez-faire attitudes prevail, the issue of the general welfare and government regulation as it pertains to the environment is generally viewed with suspicion.

The tradition in Texas politics is to identify the "special interest" with the "public interest" and thus avoid controversy and government intervention. This political style has worked rather well for oil, gas, insurance and banking interests in the state. One writer is convinced that the people of Texas have been led to believe that "tax shelters for oil men and regulatory agencies, penetrated and overwhelmed by the private interests they are supposed to control, are in the public interest." When social issues like pollution arise, they are flicked from the page of the public agenda like bothersome but insignificant insects. The consequences are, in the field of environmental protection, a reluctance to pass anti-pollution laws and ineffective enforcement of those laws which do exist. Representative Rex Braun of Houston, long a fighter of the environmentalists' battles

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27 Nimmo and Oden, op. cit., pp. 16 and 82.
28 Cartwright, op. cit., p. 183.
in the state legislature, explains the situation this way:

Regulation of economic interest in Texas is best characterized by the classical example of the fox guarding the hen house . . . public apathy and indifference coupled with Texas's monolithic politico-economic structure has led to a permissive state of affairs that has allowed the special interest polluters to destroy the environment.

A typical situation is represented by an experience of the President of the West Texas Chamber of Commerce testifying at a hearing on proposed air pollution standards in Dallas.

Certainly we want clean air, but from our point of view, it would be devastating to eliminate thousands of jobs and interrupt the production and flow of production goods without solid evidence that the proposed rigid air standards are necessary for the health and welfare of our people.

The private interests of the West Texas Chamber define what is socially desirable in terms of the economics of the industries it represents. Clearly from the West Texas Chamber's point of view, it would not be either socially desirable nor in the public interest to establish rigid air standards. Coincidentally, stringent air standards would not be conducive to the business interests of the industries represented by the chamber.

This identification of special interest with the public interest and the making of public policy raises the question of industry's role in establishing environmental policies.

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Generally, the petrochemicals industry, manufacturers and other business enterprises have vacillated between grudging acceptance and open hostility in meeting environmental rules and regulations. The industrialists' arguments are grounded in the economic arguments of self-interest capitalism and in the philosophy of Ayn Rand. Concepts of "profit," "cost," and "industrial-growth-protection" lace the corporate defense. By identifying corporate interest with that of the general welfare of a community, the business leadership presumes to speak for the people. Their efforts have, as a result, prevented the growth of strong and vocal criticism of irresponsible environmental activity. Wesley H. Mowrey, executive vice-president of the American Association of Petroleum Landmen and an unsuccessful Republican candidate for the state legislature in 1972 from Tarrant County, explains industry's position in an article entitled "Oil Industry Vital to Area." He observes:

The petroleum industry is a vital contributor to the local economy in terms of the people it employs and their payrolls. In addition, many endeavors benefit directly from the industry--steel and aluminum, chemicals, cement, equipment, transportation, construction storage services, offices and countless others.

The hypothesis, long standing in Texas is: Whatever is good for oil is good for Texas.


\[32\]Fort Worth Press, January 31, 1971, Sec. C, p. 3.
Economic power protects itself by purchasing political power. Through the decision-making process of the political system, monied interests can create a favorable climate for pursuing and maintaining their wealth. The use of financial influence covers a wide spectrum of activities, more or less ethical, more or less legal. Campaign contributions for candidates, stock tips, special partnerships in business deals, bank loans, or the promise of a secure job with a grateful industry at the end of a career of public service, as well as the cold hard cash, have influenced more political decisions than the public will ever read about in the newspapers or hear about on television or over the radio.

Texas is so accustomed to the more cynical relations between money and political power that fifty per cent of the wording of the official constitutional oaths administered to new legislators and to all appointed officials is a denial of paying, offering, or promising anything of value to obtain the office to which they are being sworn. But the line between bribery and gifts and opportunity is sometimes extremely thin.

Every political decision has financial ramifications. The outcomes of those decisions will benefit some and perhaps harm, or at least not benefit, others. Deciding whether or not money of the state may be deposited in out-of-state banks,

33 The State Constitution of Texas, Article XVI, Section 1.
private banks, state banks, or only national banks will affect a particular segment of the banking community. Decisions about legislators renting office equipment under lease-purchase agreements will affect others. And decisions concerning how the air, water and the state's natural resources will be used either facilitate profits or losses, depending upon who is on the favorable end of the policy decision. It is logical, therefore, that economic interests try to get as close to political decision-making as possible.

As a friend of the business community, Texas government first extended the helping hand of political favor to the railroad companies. In state supported and financed geological surveys and in tremendous land grant programs, Texas politicians wrapped the protective arm of government around the railroad business. One-fifth of the total area of the state was turned over to the railroads to stimulate increases in railway mileage.\(^{34}\) As late as 1901, Texas government and the railroads were on such good terms that a powerful spokesman for the railroads and business, B. B. Paddock of Fort Worth, could boast to an eastern conservative presidential hopeful, David B. Hill, that "the legislature 'showed its liberality to corporations' by passage of a bill allowing the Houston and Texas Central and the International and Great Northern railroads

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\(^{34}\)Walter Keene Ferguson, Geology and Politics in Frontier Texas, 1845-1909 (Austin, 1969), p. 41.
to consolidate with branch lines, though such action tended to eliminate competition.”

Cattle and land companies were equally influential with the state's politicians. According to one representative of a cattle and land company: "It is astonishing how much you can do with the legislature if you go about it in the right way. Of course, it takes time and money, but if the object you are after is important enough to warrant the expenditure of time and trouble you can usually accomplish your object.”

As one economic endeavor piled upon another in the state, political favors pile higher. In fact, "throughout the economic boon years of the eighteen-seventies, the state government had never hesitated to extend support, whether in the form of land grants or a geological survey, to the private sector of the economy.”

Following the railroads in importance, the oil industry with its many subsidiaries assumed a privileged status. The new industry spent millions of dollars electing governors, senators and representatives. "The oil-appointed governors then packed the many state commissions, college boards, and other governor-controlled offices with men more interested in striving for the oil industry, than in serving the people.”

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36Ibid., p. 220.
37Ferguson, op. cit., p. 48.
A persistent and effective critic of oil men and Texas politics, H. M. Baggarly, editor of the *Tulia Herald*, describes oil's influence in Texas with bitterness:

... its [the oil industry's] tenacles extended into many of its subsidiaries--newspapers, banks, churches, colleges. It brain-washed the ignorant, the uninformed, the non-thinkers. It deceived many farmers and small town folks by planting misinformation. It successfully set group against group. It caused the farmer to hate the laboring man to hate the farmer.\(^{39}\)

The boom in oil spawned other associated industries, one of which was petrochemicals manufacturing, which in Texas today is becoming as powerful, politically, as was railroading. According to the Bureau of Business Research, "in the past decade, chemical manufacturing and oil refining have added more new revenue to the Texas economy than have any other industrial activities. There is every reason to believe that these two industries will lead all other manufacturers in value added by 1990 as they do today."\(^{40}\)

But the oil industry, petrochemical production and refining have, along with their growth, added to the state's serious pollution problems. Their political clout in the legislature serves to counter strong governmental action to curb pollution. The protective arm of the government fends off serious threats to pollution generating activities. The power, privilege and

\(^{39}\)Ibid.

profit these industries generate in the state place them in
a most secure position. It is a replay of an old Texas tale
about the alliance between money and politics in Texas.

Public Opinion, Rural Orientations and
Financing Environmental Programs

The old adage that a man will pay the price for what he
considers important is applicable to the issue of Texas public
opinion and the financing of state environmental programs. In
Texas, there appears to be a definite correlation between public
attitudes about the seriousness of pollution problems and the
amount of money the state is willing to spend on fighting pollution.

"The Texas Poll" conducted by Joe Belden in 1970 on the
issue of pollution revealed that: "The vast majority of people
in the state--eight out of ten--consider pollution over the
country a serious problem." But when it comes to their own
communities, "only half of Texans [51 per cent] think pollution
is serious."41 Maybe Texas public opinion is as Norman Mailer
has characterized public opinion in America as a whole: "the
direct intellectual victim of fifty years of polluted reporting
and vested editorial writing."42 In any case, Texans tend to

41Fort Worth Star-Telegram, May 10, 1970, Sec. C, p. 21. The percentages are taken from a poll conducted by Joe Belden. The representative sampling was among 1,000 adults. In Texas cities of 50,000 population or more, a total of 64 per cent considered the pollution problem serious.

see the pollution problem as someone else's headache. Dirty water and smog conditions are serious in New York, Chicago or out in California, but not here in Texas. Since the level of "political agitation" for pollution control is directly proportional to the level of "concern" on the part of the public about the problem, it is even more discouraging to find that only 19 per cent of the 51 per cent majority consider the pollution problem in Texas "very" serious.43

This attitude toward pollution problems naturally influences political environmental decisions. Since most people in Texas do not concern themselves with political decisions and even fewer are really disturbed by the pollution issue itself, Texas politicians are relatively free from the uncomfortable heat of outraged public opinion. Legislators can withstand the withering fire and pock-shots of a vocal but small group of environmentalists with little fear of reprisal being visited upon themselves at the polls in the next election. Like metal filings, the lawmakers gravitate to where the magnetic force of power and influence is located, and that is not with the environmentalists. Representative Neil Caldwell of Angelton, speaking at an Earth Day rally at the University of Texas, scored the problem when he told a group of students that: "The political truth is that special interests like the oil industry try to dominate politics. Special interests can knock off a legislator for opposing them."44

43Fort Worth Star-Telegram, op. cit.
The implications of this political situation can be traced in legislation and in the figures for state spending. Legislative response to the environmental crisis in the Sixty-Second Legislature was almost non-existent. Approximately forty-three environmental bills were introduced with only a few making it successfully through the legislative gauntlet. None of those bills which did survive was significant. Representative Fred Orr, of De Soto, who appeared at an environmental education conference with House Speaker Gus Mutscher and State Land Commissioner Bob Armstrong at the beginning of the Sixty-Second Regular Session, had warned environmentalists: "The legislature is in no mood to create a new agency such as the Office of Environmental Quality without hearing a clear public cry for it."45

The fiscal response by the state has been equally disappointing. Without adequate fiscal resources, the manpower and equipment needed for monitoring and enforcing anti-pollution laws are not available to state agencies such as the Texas Air Control Board and the Texas Water Quality Board. Table I indicates that since the TACB and the TWQB were created appropriations have been totally inadequate. Environmental quality enjoys a very low priority in the state budgetary system. Despite increasing expenditures by the state for environmental programs, Texas still spends less than one per cent of its

total appropriation for protecting its natural resources.\textsuperscript{46} Statistics released in 1972 by the U.S. Bureau of the Census indicated that in 1971 Texas ranked twenty-first out of the fifty states in the amount of government expenditures for conservation of natural resources. In that year the state spent $6,013,000 on activities to conserve, promote and develop agriculture, wildlife, forestry, parks, and soil and water resources. This capital outlay represented .8 per cent of the total state expenditure for 1971.\textsuperscript{47}

\textbf{TABLE I}

<table>
<thead>
<tr>
<th>Year</th>
<th>TACB</th>
<th>TWQB</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>4,909</td>
<td>42,533</td>
</tr>
<tr>
<td>1967</td>
<td>18,606</td>
<td>36,883</td>
</tr>
<tr>
<td>1968</td>
<td>21,959</td>
<td>20,595</td>
</tr>
<tr>
<td>1969</td>
<td>49,400</td>
<td>40,695</td>
</tr>
<tr>
<td>1970</td>
<td>77,049</td>
<td>40,695</td>
</tr>
<tr>
<td>1971</td>
<td>313,591</td>
<td>3,101,841</td>
</tr>
<tr>
<td>1972</td>
<td>427,136</td>
<td>4,422,305</td>
</tr>
</tbody>
</table>


\textsuperscript{47}Ibid.
At the beginning of the Regular Session of the Sixty-Second Legislature in 1971, House Speaker Mutscher of Washington County was telling environmentalists: "Be realistic. Be concerned about the cost factor." Governor Preston Smith proved extremely "realistic" about the cost factor and the problem of financing pollution control activities in his executive budget which he submitted to the session. The Texas Water Quality Board had requested $33,123,576 for 1972 and $33,883,894 for 1973 to finance its operations. The Governor's budget recommended $2,382,501 for 1972 and $2,447,922 for 1973. He slashed the Texas Air Control Board's (TACB) budget request in similar fashion. The TACB had requested $229,964 for 1972 and $259,670 for 1973; the Governor trimmed the figures to $94,852 for 1972 and $107,060 for 1973.49

Tight-fisted monetary policies are one part of the financial picture in Texas; another is the rural emphasis in state appropriations. Despite the fact that 79.7 per cent of the state's population is clustered into urban areas, with their rapidly increasing problems of education, crime, transportation, slums and pollution, the rural sections of the state receive a greater per capita share of state spending. Although the eight most populous counties in the state

48 Ibid.
49 State of Texas Executive Budget, 1972-73 Biennium.
generated fifty-seven per cent of the revenue from property taxes, general sales taxes, cigarette and alcohol, motor fuel consumption, and motor vehicle sales and registration fees, these same population centers, spread over 3.13 per cent of the state's land and containing 51.4 per cent of the population, received only 41.7 per cent of state appropriated expenditures for fiscal 1970.\textsuperscript{50} In fiscal 1970, for the seven taxes listed above, Harris, Dallas, Tarrant, Bexar, El Paso, Travis, Jefferson, and Nueces counties produced an estimated $804.5 million in revenues for the state. The central cities of these counties together collected $428.3 million from their own sources for the operation of their municipal governments.\textsuperscript{51} The ultimate result finds that per capita state expenditures directed to the non-urban counties exceeds that to the urban counties by forty-eight per cent.\textsuperscript{52}

Table II represents a comparison of state expenditures to urban and non-urban counties in Texas in fiscal 1970. These statistics indicated that state money is not placed where the problems and the people are located.

\textsuperscript{50}Institute of Urban Studies, "Characteristics of State Revenue and Expenditure Policies in Texas With Respect to Urban and Non-Urban Areas," Institute of Urban Studies Working Paper Series No. 1, The University of Texas at Arlington, April 1, 1972, p. 27.

\textsuperscript{51}Ibid., p. 26.

\textsuperscript{52}Ibid., p. 9.
TABLE II
STATE EXPENDITURES URBAN AND NON-URBAN
COMPARISON FISCAL 1970

<table>
<thead>
<tr>
<th></th>
<th>Population</th>
<th>Appropriation</th>
<th>Per Capita</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>11,196,730</td>
<td>$2,047,253,494</td>
<td>$182.40</td>
</tr>
<tr>
<td>Eight Urban</td>
<td>5,753,134</td>
<td>853,652,331</td>
<td>148.38</td>
</tr>
<tr>
<td>Counties</td>
<td>5,443,596</td>
<td>1,193,601,163</td>
<td>219.27</td>
</tr>
</tbody>
</table>


Political leadership in the House of Representatives has been singled out as a factor in this rural-urban conflict over financial resources. A report of the Institute of Urban Studies on the rural-urban financial situation noted that "the resolution or even consideration of urban problems is complicated in Texas by a basically rural orientation of the legislature and administrative agencies. As is the case in most states, the Texas state government has traditionally not been urban oriented." 53

Rural orientations, laissez-faire and social darwinist political ideas, the politics of exclusion and privilege and environmental exploitation characterize Texas ideology and

53 Ibid.
behavior today as in the past. This framework naturally interferes with the fight against pollution. Powerful economic interests nourish the old myths and continue to function in an irresponsible manner. Private interests are deliberately confused with the public interest. Public opinion lags behind the reality of the state's pollution conditions. And the political system alternates between flagrant protection of polluter interests against the public interest and simple neglect of environmental problems. How long Texans can continue with the luxuries of this life-style will be based on how fast the pollution index rises in the cities.
Called Session of the Sixty-First Legislature for what he considered their ineptitude and dereliction of duty.

We have been treated to a spectacle of petty quarreling, jealousies between houses, obstinace and self-serving positions, demogogic rhetoric, childish personalities and undue interference from the lobby . . . It is my belief that the people of Texas are sick and tired of it. I want you to know that I am . . . Some have dedicated themselves to placing the blame on the Governor. I say to those members--and they know who they are--'Don't push, don't shoyle; there will be blame enough for everyone.'

The essential truth of Smith's words go undisputed today. The aftermath of the stock fraud scandal resulted in a fifty per cent turnover in both the house and senate wings of the Sixty-Third Legislature. A new Speaker of the House of Representatives, pledged to reform was elected; and new men sat the offices of Governor, Lieutenant Governor and State Attorney General. But in retrospect, it is not the accuracy of the Governor's prophecy that impresses Texas political observers; it is rather the irony and apparent cynicism that the oracle eventually betrayed. For it was during that late summer special session of 1969, that the legislative aspects of the Frank Sharp stock fraud scheme were consummated.

The United States Security and Exchange Commission would later allege that Frank Sharp had arranged loans and stock purchases for Governor Preston Smith, Speaker of the House Gus Mutscher, House Appropriations Chairman W. S. (Bill) Heatly, Representative Tommy Shannon and two Mutscher aides, F. C.

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Schulte and Rush McGinty, in order to obtain passage of two banking bills that would have greatly aided Sharp. In 1972 Mutscher, McGinty and Shannon were convicted of conspiracy to accept a bribe in the labyrinthine political and financial deals. Smith was never indicted but did feel the wrath of the voters as he was defeated in a reelection bid for governor.

The stock fraud case, however, at least according to most reporters and observers of the Austin scene, appeared to be only the top of the iceberg. Later indictments left the distinct impression with already wary voters that political corruption reached high into the circles of power in Texas.

Former Representative Walter Knapp of Amarillo, on May 24, 1972, was sentenced to four years in prison without probation, for trading $1,200 worth of postage stamps from his legislative contingency fund for a used pick-up truck. One day later, four other legislators and former law-makers were indicted on theft and conspiracy to commit theft charges. Representative Tom Holmes of Granbury was indicted for theft in the middle of a run-off election for Democratic nominee for the Texas Senate. He was also charged with buying a pick-up truck with postage stamps from his contingency fund. Former Representative Hudson Moyer of Amarillo, in what was becoming a good year for postage stamp deals, was indicted for theft involving the

misuse of stamps. And Representative John Allen of Longview, along with Senator David Ratliff of Stamford, was charged with conspiracy to commit theft by employing each other's children with the intention of not requiring them to do any work.6

With legislative leadership apparently more interested in salvaging political reputations and careers, and maintaining control of the legislative process, the lawmaking process took a real beating in 1971. Three of the most important pieces of legislation from that session were declared unconstitutional. These dealt with legislative redistricting, extension of the franchise to eighteen-year-olds, and legislative ethics. The approach of the Sixty-Second Legislature to this latter issue was so poor that Jack Butler, Editor of the Fort Worth Star-Telegram, was moved to write:

The House had made a genuine farce out of ethics legislation introduced mainly, it seemed, to give legislators a little better image than had been left by the stock fraud scandal and the connection of some lawmakers and other state officials with it. The Legislature wound up passing an ethics measure good only by comparison with the one which the House had reduced to shambles and far less stringent than what a few conscientious legislators had sought to enact.7

Matters improved little in a special session called during the spring primaries. The session had been called by Governor Smith to consider only two items, the state financing of party primaries and highway beautification funds. Thirty words were

left off the Highway Beautification Act which meant that the $25 million in federal funds which had been snatched from oblivion by the special action of the legislature were once again in jeopardy of being lost. There were rumors that as a result of the error the campaigning legislators might have to be called back from the hustings to once again amend the bill.\(^8\) Opponents of the lawmakers in the primaries were having a field day with the incident. They argued that it was only one more example of an embarrassing legacy the legislature had established.

The condition of the state's lawmaking machinery was not spilled before the public only in printer's ink and reporters' stories. Scholarly and systematic analyses of the legislative process also indicated that the system was ailing. A national research group, the Citizens Conference on State Legislatures, released in the early part of 1971 a study which ranked the Texas legislature thirty-eight out of fifty on its overall legislative capacity, forty-five on its ability to function.\(^9\) The overall ranking reached in the legislative evaluation study was based on a combination of factors considered under the five major categories of "functional, accountable, informed, independent, and representative."\(^{10}\) When Texas was ranked

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\(^8\)To the relief of the incumbent candidates, it was determined that they would not have to be called back for another special session.


\(^{10}\)Ibid., p. 53.
In 1952, H. M. Baggarly was writing in his potent little newspaper, The Tulia Herald, that "our politics and our government are just as good as are the people who are willing to participate in them, no better and no worse."13 Later on that same year he would write further: "The government has to get its recruits from the human race—particularly, American citizens. Every effort is made to get and keep honest people, but it's difficult to line up a dozen 100 percent honest persons even when you know the people."14 Indirectly politicians, businessmen, and the voters are responsible for the system.

More directly, however, because they were elected by the people to take care of the public business, political leaders in the legislative system bear the primary responsibility for the condition of Texas politics. The legislative recruitment process, which is an expensive screening device, and the heavy handed influence of the special monied interests in the legislature have significantly affected decision-making in the interest of the public. In the field of environmental protection, the legislature has responded typically to power. It has placed the polluter's interest first, and has systematically ignored ecological problems by passing ineffective pollution control legislation. It all begins when a man decides to seek political power.

14 Ibid., p. 70.
Legislative Recruitment

The process of obtaining political power determines to a great extent how that power will be used. Lester G. Seligman has written on the subject that, "In every political system the parameters of recruitment structure and processes influence decision making processes and policy outputs."\(^{15}\) How political leaders achieve their positions of authority and the means they use to maintain that authority, and to what issues and to which groups they respond are all inextricably intertwined. It is critical to the study of Texas political leadership and environmental decision-making in the legislature to analyze the basic patterns of political recruitment to the legislature, for the pattern of environmental decision-making begins to take shape with the recruitment phase.

Recruitment to the legislature depends on the possession and utilization of certain key political resources. Critical to the Texas leadership recruitment process are such resources as financial support, organizational or group support, occupational independence, access to the mass media and political "contacts." Potentially these various resources are available on a democratic basis, but as a matter of political reality the possession and utilization of resources in Texas are more restrictive. The distribution of resources

\(^{15}\)Lester G. Seligman, "Recruiting Political Elites," General Learning Press, 1971, p. 3.
in Texas contributes to a political system dominated by an elite of money, influence and power.

The most important political resource in the Texas system is money. David Nevin, a native Texan who has observed the state's political scene for many years as a reporter for several of the state's newspapers, minces no words on this point. "I know of no voice in Texas that can influence, let alone command, that is not backed with money . . ." The only exceptions, according to Nevin, are "the paid administrators of great organizations like universities and hospitals, and the occasional maverick politician whose appeal to the people is so great that he can override and ignore the establishment."

Texas politicians are extremely sound investments. For the truly ambitious, elected officials represent financial pathways to government money and the benefits of government policy. Through campaign contributions, the special interest groups exercise influence that the average voter could not hope to have. Just as the average voter cannot turn the quick profit or make the big deal because he does not possess the financial resources, so the average citizen cannot effectively influence the politicians or political decisions because he does not have the financial power. This creates

16 Nevin, op. cit., p. 194.
17 Ibid.
an extremely closed political society. This system is what Representative Frances "Sissy" Farenthold, unsuccessful reform candidate for the Texas governorship in 1972 and "Den mother" of the "Dirty Thirty" coalition\textsuperscript{18} in the Texas House in 1971, was talking about when she said Texas has a "private government." The government, according to her, is in the control of private interests which contribute to campaigns, which control the editorial and news coverage of the daily newspapers and which can afford to spend thousands of dollars in shaping public opinion. Speaking in Dallas two days before the 1972 party primary run-off election, Farenthold told her supporters: "As long as I can remember people in Texas have been suffering under the tyranny of private interest."\textsuperscript{19} She lost to a millionaire and the biggest landowner in Texas, Dolph Briscoe.

It takes money to run for office. Candidates for the House of Representatives from Tarrant County may spend as much as $20,000 winning a party primary. The expense of winning a state senate race is usually higher. In San Antonio, the Democratic Primary race for Senator cost

\textsuperscript{18}The "Dirty Thirty" was a coalition of thirty liberal and moderate Democrats and Republicans organized to pursue legislative investigation of the Sharpstown Bank Bills and legislative reform. Representative Farenthold, the only woman Legislator in the House, became an unofficial rallying point for members of the coalition.

\textsuperscript{19}\textit{Fort Worth Star-Telegram}, June 1, 1972, Sec. A, p. 5.
Representative Nelson Wolff $25,269.53. He defeated incumbent Senator Joe Bernal, who spent $22,150.60, of which $5,919.84 constituted an unpaid debt. If there is a strong battle between a Democrat and Republican after the primary the figures accelerate rapidly. In Fort Worth, Republican Betty Andujar spent $68,325 defeating oilman and former Representative Mike Moncrief who spent $47,329.

One of the first tasks of a candidate is to "sell himself." Representative Dave Finney of Tarrant County shudders when he hears it put that way, but he reluctantly agrees. The candidate has got to get out and pound the pavement in search of contributions. Finney's advice for collecting contributions is simple. "You have got to find out who your opponent has voted for and go see the people he has voted against. If they don't lay any money on you, just duck your head and go right back after them." But contributions tend to be more than benevolent gifts given in a spirit of good will. Morton Mintz and Jerry Cohen have

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23 Statement of Representative Dave Finney to the writer, Fort Worth, Texas, February 5, 1972.

24 Ibid.
pointed out that "campaign contributions are really not that at all; they are investments in licenses to govern the government, or if you prefer, to translate economic power into political power."²⁵ The cardinal rule of campaign contributing is that you reward your friends and punish your enemies. Representative Farenthold claims that "there is also a great fear among legislators because if you don't go along with them, you don't get their contributions; instead they get you an opponent and he gets the contributions."²⁶ If a representative votes with the chiropractors, for example, he has probably voted against the medical doctors' interest. At election time, he will have the support, financial and otherwise, of the chiropractors and the opposition of the Political Action Committee of Texas (TexPac) and the M.D.'s. Voting against the trial lawyers is the same. If a legislator has voted against their interest on key votes, the Lawyers Involved for Texas (LIFT) will contribute money to the incumbent's opponent.

One story out of Tarrant County illustrates the nature of the problem. A young newcomer to Texas politics was challenging a lackluster first-term representative in the 1972 Democratic primary. The incumbent, who was a saccharine sweet character but not the brightest member of the Tarrant


²⁶Fort Worth Star-Telegram, June 1, 1972, Sec. A, p. 5.
County delegation, was a "safe" conservative whom the established interests really had no desire to see defeated. He had made one mistake, however. During the Sixty-Second Legislature, he had voted for a corporate profits tax. Although he later conceded the "error" of his ways, he had not been completely forgiven. The challenger needed about $3,000 for a county-wide mailing, so using the incumbent's vote for a corporate profits tax as leverage, a deal was cut with some disaffected members of the downtown establishment known collectively as the "Seventh Street Gang." The terms of the agreement required the challenger to go on record loud and clear as opposing any new taxes. No matter what the situation or the circumstance, his position had to be a blind stand against new taxes. The contributors' primary concern, of course, was the corporate profits tax, and the candidate was to steer well away from that. In return for his uncompromising commitment, the county-wide mailing would be financed. Everywhere the young candidate went, he reiterated the "$3,000-line": "I am opposed to any taxes at this time." "I just don't think we need them, the state needs to economize." Before rallies, in black churches, and on television panel shows it was always the same: "I am against any new taxes." Mouthing the words was critically important to his campaign war chest. On May 3, 1972, Tarrant County voters received the candidate's
This case, by no means isolated, is a perfect example of how financial power is translated into political muscle by private interests.

H. M. Baggarly, who has been a persistent critic of this situation in his West Texas paper, has complained that

For years, big oil companies in Texas have been ferrying governors and lawmakers around over the country in company owned planes, taking plane loads of Texas legislators to the horse races in Kentucky, paying for hotel suites for public officials, giving them costly gifts and making huge campaign contributions through their lawyers.28

Morton Mintz concluded, after investigating county and state campaign expenditure reports, that oilmen accounted for almost 46 per cent of the individual contributions of $5,000 or more listed in 1970 election records.29 They have extracted many commitments for their efforts.

One tale has it that when Governor John Connally flew down to the Big Thicket to look over an Indian reservation and to discuss ecological problems there, he arrived in an East-Tex Lumber Company plane. East-Tex is one of five lumber companies which owns the Big Thicket and has been exploiting and destroying the timber there.30

27 Confidential Communication to the writer, Fort Worth, Texas, April, 1972.
What this means for Texas is that those with money tend to dominate state government. As reporter Haynes Johnson of the Washington Post has written: "politics is largely a game for those who are affluent, or who, at the expense of the public interest, are prepared to use the affluence of special interests to obtain and perpetuate themselves in elective office."\(^{31}\) In the beginning, newcomers to the power game are rapidly socialized to the system as they make small concessions here and there in return for cash or checks or stamps or free printing for their campaigns. As the political socialization process proceeds the candidates begin to rationalize and justify their actions. The system of taking contributions on a nod and a handshake becomes more and more palatable. They realized what was involved and it bothered them. But the question remains that Farenthold raised publicly as she campaigned for governor. "When do campaign contributions cease and when does bribery begin?"\(^{32}\)

This weakness in the political system is exploited by the polluter interests. Notably, but not alone, the oil, gas, chemical and manufacturing interests have been able to define the boundaries of election success at the polls in the party primaries and the general election; and they exercise a heavy handed influence in leadership recruitment.


\(^{32}\)Fort Worth Star-Telegram, June 1, 1972, Sec. A, p. 5.
to the House and Senate. Chambers of Commerce, Junior Chambers of Commerce, the utility companies and the major and independent oil producers, in most cases effectively control the selection of candidates for public office. As a consequence, the institutional framework of running for the state legislature or for governor has been penetrated by political pressures which effectively block progressive pollution control legislation in Texas. If a candidate takes a tough stand against polluters, he runs the risk of incurring the wrath of interests that can immediately dump hundreds or thousands of dollars into his opponent's race.

A second essential political resource is occupational independence. Participation in Texas political leadership roles demands a certain level of mobility in occupations and at least minimal financial security. This means that people who cannot leave their jobs for extended periods of time without significant losses of income cannot afford to stand for office and, if elected, to serve. One former Texas Legislator, Dick Cherry, has called this the problem of "occupational elimination."

There are no occupational qualifications for a legislator except for constitutional provisions that "no Senator or Representative shall, during the term for which he may be elected, be eligible to any civil office of profit under this state." Nevertheless, the nature of a legislator's job and the pauper-level of his income result in the elimination of men, otherwise qualified, who cannot reconcile their family expense with the legislative pay. The factory worker, the average executive, the college professor or the retired person living on a fixed income, cannot afford the time and loss of money involved in waging a political gamble like a campaign. If elected, he cannot afford the cut in salary and the added cost of his new life-style.

Representative Mike Moncrief of Tarrant County was audacious enough to suggest to college students, during his 1972 senatorial primary campaign against Walter Steimel, that he could do a better job as a fulltime law-maker because he was an independent oil producer. He said he didn't have to worry about the Frank Sharps because he was independently wealthy. He wouldn't have to bother with clients as his lawyer opponent would have to do. His opponent could, of course, argue the issue differently. Lawyers are perhaps in the best position of any to run for public office. Steimel

34 The State Constitution of Texas, Article III, Sec. 18.
would usually, however, make reference to the fact that Moncrief "never worked a day in his life."\textsuperscript{35}

Statistics indicate that in Texas, the profession contributing most to the legislature is law. Figures compiled from 1935 to 1961 in the House of Representatives and from 1941 to 1961 on the Senate indicate that 39.7 per cent of the representatives and 69.0 per cent of the senators came from the legal profession.\textsuperscript{36} Characteristics of the Sixtieth legislature from 1967 to 1968 indicate that in the House, 40 per cent and in the Senate 65 per cent were attorneys.\textsuperscript{37} There are some very sound economic reasons for this trend. Win or lose, the lawyer benefits. Winning may mean more business for his firm in terms of cases needing representation before state agencies. Losing does not necessarily hurt. The sustained publicity during a campaign provides invaluable "personal advertising" lawyers and their firms would otherwise be denied.

Moncrief was partly right, however, because there are problems for lawyers. The young attorney of a large firm

\textsuperscript{35}Candidates Debate and Reception, Sponsored by the Student Activities Board, Student Union Building, University of Texas at Arlington, March 13, 1972.


must get permission from senior partners to run. If he practices alone, there is no one to take care of his clients. If he is a member of a partnership, he needs to have approval of his partners and the willingness to split fees with him which the firm earns in his absence. As one former legislator put it:

His partners are more likely to be willing to do so if he produces revenue for the firm which it would not otherwise receive. He can do this by accepting retainers from organizations interested in legislation, by becoming the firm's "specialist" who handles cases heard before state regulatory bodies, and by making available to the firm's clients his privilege of having the state courts postpone cases in which he is counsel until after the legislative session ends.38

And herein lies the rub. "Do the interests of his firm, his clients, and the organizations that retain him conflict with public interest?"39 Enough people, in and out of office, seemed to have thought so in 1971 and 1972 to seriously consider prohibiting lawyer-legislators from practicing before state agencies. Campaign rhetoric was keen on the subject during the party primaries. It became the stock reform answer. Lawyer-legislators handling pollution cases are most certainly susceptible to a conflict between the public interest which they are elected to represent and the private interest they are hired to defend.

38Cherry, op. cit., p. 178.
39Ibid.
A more direct influence on legislative politics is the presence of representatives who have dual constituencies: the people of their district and the industry for which they work. In this instance, businessmen present in the legislature provide the business community not only with a voice, but also a vote in the legislative process. Individuals with substantial business interests in oil and gas, banking and insurance fill many of the seats in both chambers of the legislature. Statistics on the Sixtieth legislature reveal that 35 per cent and 19 per cent of the membership in the House and in the Senate respectively were made up of businessmen.\textsuperscript{40} The result of all this is that the lawmaking power belongs to the dominant economic interests of the state, the same collection of interests that have fought most ardently against sound ecological legislation.

An intriguing account which highlights the problems of dual constituencies involved Representative Bill Clayton of Springlake, in Lamb County, in the arid region of far West Texas. Clayton was the principal sponsor of the legislation to implement the "Texas Water Plan," which involved a $3.5 billion bond program to finance the development of an extensive water plan to take water from the Mississippi River, move it across Louisiana to East Texas, where that water, plus "surplus water" that runs annually across that section of the

\textsuperscript{40}McCleskey, \textit{op. cit.}, p. 126.
CHAPTER III

TEXAS POLITICAL LEADERSHIP AND DECISION-MAKING:

THE LEGISLATIVE SYSTEM

The Legacy of Leadership

"Let him who is without stock throw the first rock." Thus spoke Governor Preston Smith as he began a self-deprecating speech before the Headliner's Club stag luncheon in Austin on February 6, 1971. The remarks were made in reference to the hottest political story of the year, "The Texas Stock Fraud Scandal." But Preston Smith, who like most Texas politicos rarely lets rhetoric stand in the way of action, had thrown the "first rock" approximately a year and a half earlier in what must surely be one of the most ironic if not hypocritical speeches in Texas political history.

On August 27, 1969, Governor Smith demagogically lashed out at state lawmakers in his opening address to the Second

1Sam Kinch, Jr. and Ben Procter, Texas Under a Cloud (New York, 1972), p. 52.

2Cf. Three worthwhile accounts of this episode are Sam Kinch, Jr. and Ben Procter, Texas Under a Cloud (New York, 1972); Harvey Katz, Shadow on the Alamo (New York, 1972); and a Texas Observer article, "The Trial of the Abilene Three," March 31, 1972, pp. 1-4.
in each of these separate categories, an interesting, but not surprising, set of statistics emerged.

Rated on "functional ability," (e.g., how well equipped the legislature is to deliberate, to design programs and to draft them into bills, to review and evaluate programs and administrative proposals, to settle differences effectively and to formulate public education policies), the Texas legislature ranked forty-fifth among the fifty state legislatures. On the factor "informed," the criteria of which were "how much time is available, how it is used, the number of committees and agenda, advance written testimony from organized groups and . . . the size and availability of meeting rooms and offices" the state lawmaking body was rated forty-third. In the area of "independence," meaning "control over its, the legislature's, own activities, its independence of the executive branch, its review and oversight powers, control of lobbyists and safeguards against conflicts of interest," the legislature ranked forty-fifth. These findings along with recent cases of political boondoggle and corruption lead such observers of the political scene as Jack Anderson, national syndicated columnist, to conclude that "the Texas political system is among the ten worst in the country."\footnote{Jack Anderson, News Conference, Texas State Network Convention, May 27, 1972, Sheraton Hotel, Fort Worth, Texas.}

\footnote{\textit{Ibid}. In the categories "accountable" and "representative" the Texas Legislature fared better. The legislature was rated thirty-sixth and seventeenth respectively for each of those classifications.}
state, would be collected in giant reservoirs (that would inundate an area of Texas equal to the size of Connecticut) for redistribution to agricultural West and South Texas. According to the plan for the project, one of the thirty-three proposed giant "surface water reservoir projects" would be located in Clayton's district as then constituted. The most obvious beneficiaries of the project initially would be construction firms building the system of canals, dams, and reservoirs; and eventually of course the agribusinesses and industries located in West Texas. To Clayton's district pork-barrel might never be better. The annual income in Clayton's district from agribusiness amounts to $203,472,000. The benefits would be staggering. As it turned out, Clayton had more than a passing interest in the great water project. Clayton was on the payroll of "Water, Inc.," as executive director, collecting $20,000 a year, since April, 1969. "Water, Inc." is a private water lobbying organization composed of such allies as agriculture, gas companies, telephone firms and privately owned public utilities, all with one objective which unites them: water for West Texas.

The "Texas Water Plan" has been opposed by a committee of 1,000, which is a loose collection of ecologists and ecologists and

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41 Figure is based on total farm income reported for Bailey, Castro, Cochran, Deaf Smith, Parmer and Lamb counties as reported in the Texas Almanac, 1970-1971, Dallas Morning News, pp. 243-325.

conservationists, who have steadfastly maintained that "the destruction this plan would visit upon the natural environment of the region would constitute an awesome cost."\textsuperscript{43} No professional ecologist was among the persons drawing up the plan, and the only ecological study requisitioned before the plan was published was largely ignored.\textsuperscript{44} It should be noted here that George R. Brown of Brown and Root Construction Company, perhaps the largest construction firm in Texas, was in on the development of the plan from the very beginning when Lyndon Johnson was still a United States Senator.

Several arguments have been thrown up against the plan. Economic reasons for opposing the plan are that water-users should pay the bills, not the general taxpayers through the selling of bonds; that the actual cost will double because of interest rates (it is estimated that the interest for $100 million would be $78 million); that even if the plan were financed from the "General Revenue" fund the result would still be inequitable because the main source of revenue for this is generated by the sales tax. Finally, some wonder if it is financially worth the effort to convert an arid land into a lush alluvial garden when there are so many urgent problems in the urban areas of the state. The Texas AFL-CIO Executive Board voted to oppose the plan because there are no

\textsuperscript{43}Texas Observer, August 1, 1969, p. 14.
\textsuperscript{44}Texas Observer, February 26, 1971, pp. 13-14.
provisions for enforcement of the state's prevailing wage laws. Since Brown and Root Construction has been in on the initial planning, they are expected to get significant contracts and they are notoriously anti-union. But the most significant arguments are those about the ecology of the proposal. It is argued that the state would be placing undue stress on already depleted water resources. The water that reached Texas after crossing Louisiana would be, like the Mississippi, polluted. There would be too much industrial use of the water. And what its long range effects would be, no one knows.

The supporters of the plan have a committee of 500 which reads "like a directory of the who's who in the Texas establishment." There is a lot of money involved in the plan for bankers, engineers, architects, and construction firms.

The question which must be raised, however, deals with Clayton's role in this legislation and his status as a paid lobbyist for "Water, Inc." According to the Texas Constitution,

A member who has a personal or private interest in any measure or bill, proposed or pending before the Legislature, shall disclose the fact to the house of which he is a member, and shall not vote thereon. Clayton denies that there was any conflict of interest. The 1969 Texas Water Plan Constitutional amendment passed the House on March 4, 1969, by a vote of 132-15. Final legislative

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46 The State Constitution of Texas, Article III, Sec. 22.
action was completed April 9 that year. Clayton says he did not go on "Water, Inc.'s" payroll until late April, 1969.\textsuperscript{47}

Despite this technicality, Clayton's actions represent a highly questionable stance. Clayton maintains that the organization of which he is the director represents the views of the people in his district; therefore, he sees no conflict of interest.

The \textit{Texas Observer} thinks that is not satisfactory:

\begin{quote}
May an elected state legislator take the position that he represents only the voters in his district and has no additional, official responsibility to all the voters of the state? And, is it proper that a state legislator be paid by private interest in connection with his activity on any legislative bill for which he is also active in the legislature?\textsuperscript{48}
\end{quote}

Edmund Burke could have probably answered the first part of the question. Only an ethics code could satisfy the last.

\textbf{Legislative Decision-Making}

The men with power in the Texas Legislature are collectively known as "The Team." The Team controls the business of the legislature from committee assignments to the process of considering legislation. In the past, this arrangement has meant that the important legislative decision-making has been dominated by a few powerful committee chairmen, appointed by the Speaker of the House or Lieutenant Governor in the Senate with the advice and consent of the more influential special

\textsuperscript{47}\textit{Texas Observer}, February 26, 1971, p. 13.

\textsuperscript{48}Ibid.
interest groups. The situation is elite centered and special interest oriented.

But to really appreciate the process of environmental decision-making in the legislature, it is important to appreciate the power of "The Lobby." The Lobby exercises great influence for two basic reasons. The first is that the lobbyists as a group have at their disposal more political resources than the average citizen. And the second reason is that the lobby uses its resources. The lobby is a participant; it is not apathetic.

The Houston Chronicle reported on February 21, 1971, that "there are now more than four registered lobbyists for each of the 181 legislators in Austin." The story went on to relate that the current total is 750 and "increasing almost daily." During the first week of the following month, 254 additional lobbyists registered, bringing the total to approximately 1,100. In 1961, 3,153 lobbyists registered; by 1965, the number was 2,022; and in 1967, it had dropped to 1,996. Lobbying activities range from such diverse interests as the Texas Restaurant Association, which has the

49 Idem., p. 69.


51 Ibid.

largest number of registered lobbyists, to Parents without Partners; and include the names of clergymen, professors, social workers, and a Deer Park oil worker.

While the words "lobby" and "corruption" are usually mentioned in the same breath, lobbying is a most precious right protected by both the United States and Texas Constitutions:

> The citizens shall have the right, in a peaceable manner, to assemble together for their common good and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.\(^5\)

The problems arise with regards to methods and circumstances and issues. Actually, the existence of pressure groups enhances the personal power and capacity of the individual to participate in the decision-making process of the political system by combining the separate energies of lone individuals into influential aggregates. Indeed, one Texas senator, Wayne Connally of Floresville, who was defeated by Houston Post publisher Bill Hobby for the Lieutenant Governorship in 1972, has suggested that "the lobbyist's profession is a very honorable profession. They provide this legislature with invaluable advice and counsel."\(^5\) Certainly interest groups provide the valuable input legislators need for decision-making, but that input is geared to protecting

\(^5\)The State Constitution of Texas, Article I, Sec. 27.

\(^5\)UPI Press Release, Austin, Texas, undated and unsigned. The copy was provided by David Day, Public Affairs Director for the Texas State Network, Fort Worth, Texas.
and promoting the interests of the various lobbies first and foremost. Even the prestigious and highly respected Texas Research League is not totally removed from this political reality.

Texas corporation and business leaders, recognizing the potential power of knowledge and information, some years ago organized and bank-rolled a business "think-tank" known as the Texas Research League. The league has done an outstanding job in many of its studies and is relied upon heavily by public officials for its research and reporting services. But even this organization tends to reflect an orientation typical of the conservative aims of the league's powerful backers.\textsuperscript{55} The nature of the power behind the Texas Research League is reflected in the list of officers and board directors. The 1970 officers of the league, for example, included Chairman C. I. Wall, Chairman of the Board of Pioneer Natural Gas Company; Vice Chairman E. Bruce Street, an independent oil operator; and Treasurer Grogan Lord, President of Telecom Corporation. The Board of Directors of the league in that year read like a collection of who's who in the Texas establishment. The directors represented economic interests in utilities, banks, oil, gas, cattle, grocery chains, manufacturing, telephone companies, savings and loan companies, and lumber. The power and influence of the

\textsuperscript{55}McCleskey, \textit{op. cit.}, p. 166f.
Texas Research League, and hence the business interests, extended directly into legislative committees. As Clifton McCleskey explains:

In effect, the league functions as a research arm of the state, and its staff will often sit at the right hand of the committee chairman in the legislature, and yet it is wholly financed and directed by private groups. 56

The main complaint in Texas is that the special interest groups seem to always take precedence over the interest and general welfare of the people. In the Texas pollution battle, the situation has been precisely this conflict between the public interest and the private interest. Representative Rex Braun, who has accused the "powers-that-be in the legislature" with playing with his "anti-pollution measures as if they were yo-yos," 57 explains:

The Texas Manufacturers Association, the Texas Chemical Council, and a host of individual industrial polluters like Armco Steel, have influential lobbyists in Austin during legislative sessions and they spend a great deal of money on political campaigns. Consequently, they have in the past been able to defeat every really effective bill to combat pollution that has been introduced. 58

Descending on hapless and harried representatives and senators with great sheafs of technical information on pollution abatement in industry, confusing and obfuscating polemics

56 Ibid.
58 Ibid.
about the extent and seriousness of pollution by industrialists, and bewildering statistics about the cost and the lack of know-how: These pressure groups have had a tremendous impact on the "informational" weaknesses of legislative policy-making. As the legislative evaluation study conducted by the Citizens Conference on State Legislature concluded, "If the legislature cannot make independent judgments, it must become a 'rubber stamp.'"\(^5\) The industrial and manufacturing hegemony on information and political influence coupled with the lack of staff for legislators or the means with which to acquire independent information, makes it extremely difficult for representatives to make objective and realistic policy decisions about what should be done in the field of pollution control.

Much of lobby activity is an extension of a corporation's public relations effort and its dominance of the media. "We're working to keep your trust." With those words, the Texaco Petroleum Company ends a sixty-second television commercial which tells the viewers how the oil corporation is working for a cleaner environment. It is a good spot, with plenty of fresh rolling surf and a romping child. It is good public relations and it lulls the people into believing that "pollution is not so serious after all." It serves to direct the anger and outrage of the citizen somewhere else.

\(^5\) Burns, op. cit., p. 124.
besides benevolent Texaco. The public relations approach to pollution problems is an effective and a popular alternative being utilized by the polluting firms. W. M. Rankin, plant manager at Armco Steel Corporation in Houston, claims that his company's biggest problem when it comes to pollution questions is not the fact that the company dumps approximately 1,000 pounds of cyanide a day into the Houston Ship Channel, but that the company does not have a good public relations firm to handle the public outrage which develops over such activities.  

Corporations have done a remarkable job of sedating the people into accepting the present ecological efforts of their personnel. Little wonder it is then, that while 82 per cent of the citizens of Texas consider pollution to be a serious problem across the United States, only 51 per cent consider conditions serious in their own state.  

State legislators and local politicians are among those whose attitudes and positions on the pollution issue are shaped by the industries' media campaign. As Frank Graham has observed, "the practical old-fasion device of buying the votes of state representatives and local politicians has recently been subverted to the equally effective public relations approach."

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According to figures published by the New York Academy of Sciences, "in 1966, major industrial polluters spent $1 billion to advertise their efforts at pollution control--10 times more than all U.S. companies spent for air pollution control devices that year."\(^6\)

The mobilization of public opinion for more stringent anti-pollution legislation is offset by the public relations efforts of the polluters. Consequently, legislators are not moved to respond to the problem, administrators do not feel compelled to crack down on violators, and the people are not stirred to demand adequate state action.

It was in this context that in 1971 during the Sixty-Second Legislature, efforts were made to enact the Environmental Protection Act. The regular session that year was torn by efforts to investigate the Sharpstown affair and attempts by the house leadership to silence and punish rebellious house members who were bold enough to challenge its authority. The legislative process, nevertheless, went on as usual with the same special interests continuing to reap the fruits of their labor. More laws were broken by the lawmakers who would later be prosecuted, and social issues like pollution control were left to languish. The last refuge of confidence in the system remained mainly with those with power.

\(^6\)Fort Worth Star-Telegram, February 10, 1971, Sec. F, p. 3.
The Failure to Respond to the Environmental Crisis

The story of the "Environmental Protection Act of 1971" illustrates the political dynamics of the Texas legislative process at work, and how powerful interest groups bring to fruition the efforts of their electioneering, lobbying, and propaganda activity in the state to successfully gut or kill meaningful environmental laws.

On January 25, 1971, the eighth day of the Sixty-Second Legislature meeting in regular session, the reading clerk of the House of Representatives read House Bill 56 by title and caption: "A bill to be entitled An Act relating to suits for declaratory and equitable relief to protect air, water, and natural resources and the public trust therein from pollution, impairment, and destruction; and declaring an emergency. Referred to Committee on State Affairs." 64

Essentially, the three-page Environmental Protection Act would have declared that the air, water, and all natural resources of the state would be held in public trust for all the people. 65 To enforce this trust, the bill further authorized "the attorney general, any political subdivision of the state, and instrumentality or agency of the state or of a political subdivision thereof, any person, partnership,


65Environmental Protection Act, House Bill 56, Sixty-Second Texas Legislature, Regular Session.
corporation, association, organization, or other legal entity" to file a suit against anyone (including the state or any corporation) who would do anything harmful to the public trust. The bill represented a sensible, fair and democratic approach to the problem of controlling pollution in the state; and it served as an important step toward removing the struggle for sound ecological policy-making from a political arena dominated by polluter-oriented interests to a more equitable and impartial forum. Unfortunately, the Texas political system was not prepared to move in that direction.

Representative Rex "the Tailor" Braun, of Houston, chief sponsor of the Environmental Protection Act, maneuvered for weeks to get a hearing for his bill before the State Affairs Committee. Braun, a one-time wrestling promoter, lobbied and cajoled Speaker Gus Mutscher and Representative Jim Slider, chairman of the committee. Braun also traveled across the state, stumping in Dallas and Houston, urging constituents to write their representatives expressing their support for the bill. Braun's difficulty in getting a hearing for his pollution bill was not an unusual experience. Back when Ben Barnes was Speaker of the House, Braun's bills would stay bottled-up in committee until Braun threatened to take the issue to the press. In the Senate, bills fared worse. Then Lieutenant Governor

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66 Ibid.
Preston Smith, according to Braun, let his bills die in committee "without even the decency of a hearing." This time Braun was successful. A public hearing on the bill was scheduled for Monday, March 15, at 7:30 p.m., on the floor of the House of Representatives.

Getting the public hearing proved to be the easiest hurdle to negotiate and the only one Braun would overcome. Part of Braun's trouble was the problem of all the legislators—the committee system. Committees in the Texas Legislature have life and death power over a bill. Ostensibly, the functions of committees are to study, analyze, criticize, evaluate and possibly modify legislation. In practice, however, the committees act as "little legislatures" sifting out undesirable bills and passing others along for final consideration by the larger legislative body. Bills not anointed with a favorable majority report simply die, never to be heard from for the duration of the session. Some bills die because they are not needed or because they are no good. Some die for personal or political reasons. A discharge report is available, but the two-third requirement during the first seventy-two days of the session and the simple majority thereafter is indeed very hard to achieve, as Braun later discovered.

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68 McCleskey, op. cit., p. 135.
Appointments to the various committees, consequently, are very crucial to the legislative process. Lobbyists know this and apply pressure at this stage of legislative organization. In Texas, the Speaker in the House and the Lieutenant Governor in the Senate appoint all committee chairmen and members to the committees. They frequently make their selections along political lines, in consideration of what the most influential pressure groups desire. The Speaker and the Lieutenant Governor also assign bills to committees with the same political considerations in view. This arrangement affords the most powerful groups valuable influence in the legislative process at one of its most critical phases, and it sets the general tone of legislative work for the rest of the session.

The system works fine if a legislator is a member of "the Team." If he has voted "correctly," scratched the right backs, supported the speaker, and if his bills do not alienate the wrong people, a representative can make the committee system work to his advantage. If, on the other hand, he has not played the game he becomes ineffective and his bills are doomed. Braun had fallen into the latter category.

Braun had not been a loyal Mutscher team member. He was a solid member of the "Dirty Thirty," a coalition of reform Democrats and Republicans, who had been constantly embarrassing the Speaker and the Speaker Pro Tem, Representative
Tommy Shannon, mild mannered leader of the Tarrant County delegation, over legislative reform and their involvement in the Sharpstown Stock Fraud incident. Now, Braun was proposing, what appeared to the establishment, "radical" environmental legislation. The full force and fury of the system would be lined up against him. Between the first reading of the bill and the public hearing, Braun, as a member of the "Dirty Thirty," had cast a lot of what were considered "personal votes" against the Speaker's leadership. The "Reform Voting Analysis" published by the "Dirty Thirty" reflected a near perfect record for Braun of 18 out of 19 "right" votes for reform. The votes included such reform measures as restrictions on the corrupt conference committee system, full financial disclosure, and investigation of the Stock Fraud Case. By contrast, the Speaker's supporters, typified by Representative Mike Moncrief, speaker-appointed "House Rookie of the Year," compiled a record of no "right" reform votes. But what was more important, Braun's legislation alienated the wrong interests. The oil and gas interests, the gravel pit operators, the shell dredgers and the sulfur and chemical interests did not like it.

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69 The "Dirty Thirty" Reform Voting Analysis, Sixty-Second Texas Legislature, Regular Session, mimeographed brochure.

70 Ibid.
The morning of the hearing, Braun was busy checking schedules, making arrangements for the people he had invited down as a tour-de-force and assembling Michigan court cases which dealt with the principles of his legislation which he would need for the confrontation with "the Speaker's Committee." 

"The Speaker's Committee," as Braun referred to it, was the powerful State Affairs Committee. That Committee is composed of twenty-one members with jurisdiction over "all questions and matters of state policy, all matters relating to the administration of state policy, all matters relating to the administration of state government, all matters relating to the organization, regulation and management of state departments and agencies, and all proposals concerning the compensation and duties of officers of state government." 

In short, "the Speaker's Committee" can consider whatever the Speaker wants it to consider. Like all other committees, this committee possesses virtually unlimited authority over all bills referred to it.

Braun's encounter with the committee was bound to produce a few sparks since Mutscher had packed the committee to satisfy major special interests, especially oil and gas. The committee

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71 The Michigan Legislature had passed a similar version of the Environmental Protection Act during its Seventy-Fifth Regular Session, in 1970.

72 Texas Legislative Manual, Sixty-First Texas Legislature, Regular Session, Rule VII, p. 16.
was stacked with either rural legislators and/or representatives from districts with substantial interest in natural resource regulation, where tampering with the oil and gas business was viewed with slit-eyed suspicion. Braun considered the situation only normal, since as he explained, "the Speaker is lobby oriented."\textsuperscript{73} That was how Mutscher got his position to begin with, and he was not about to forget it for a moment. Sometimes the situation of lobby influence is so ludicrous that it is laughable. Indeed, that same day as the House was wrapping up business, one representative took the front microphone to remind all the lawmakers of the oil and gas reception to be held at 8 o'clock that evening. "Ya'll be there!" the dutiful legislator cried through the mike to the scattering representatives. No one announced the fact that the State Affairs Committee was meeting at the same time to consider an important piece of environmental legislation. Someone, a bit paranoid, would have wondered at the coincidence of the two events.

A profile of the committee members and the districts they represented revealed that almost 66 per cent of the legislators

\textsuperscript{73}Statement by Rex Braun, State Representative, to the writer, Austin, Texas, March 15, 1971.
represented oil and manufacturing interests. The maps which follow reflect the economic interest in crude oil production represented in the State Affairs Committee. The shaded areas in Figure 1 are the districts represented by the various committee members on the State Affairs Committee. Figure 2 indicates crude oil production by county. A comparison of the two maps demonstrates how well Mutscher had seen to it that the petroleum interest was represented on the State Affairs Committee. Subsequent statistics released by the Texas League of Conservation Voters would later reveal that of the twenty-one members of the committee, eleven had perfect scores of voting "against" environmental legislation, eight members voted 50 to 75 per cent of the time against environmental bills, while only three had records which might be termed "good."

Committee Chairman, Jim Slider, district (2), rumored during the session as being groomed as Mutscher's replacement for the Speakership. Vice-Chairman, Joe Golman (33), Baker (66), Bynum (74), Clayton (72), Cruz (23), Floyd (57), Garcia (46), Hawn (33), Lovell (17), McKissack (33), Moncrief (52), Nabers (64), Parker of Jefferson (50), Pickens (49), Poener (49), Short (73), Solomon (1), Uher (30), Von Dohlen (42), Wyatt (43). The numerical designation for legislative districts has changed since the Sixty-Second Session. These, however, were the designations during that session.

Figure 1--Shaded area indicates Districts Represented by members of the Texas House of Representatives State Affairs Committee, Sixty-Second Texas Legislature, Regular Session.

Source: Texas Almanac 1972-1973, Dallas Morning News. Reapportionment, in 1971, rearranged these districts and the numerical designations. Only the district boundaries may be found in the almanac.
Figure 2--Texas Crude Oil Production

Braun was gloomy and rather quiet in an interview about the prospects of his legislation. His thoughts were obviously on the impending committee hearing as he talked. He had fought many legislative battles for pollution control and he usually came out poorly. He pulled a small blue legislative guide book on the state representatives from his cluttered desk and began recounting what he considered the main obstacle to the success of the bill. "The rural attitudes will be the big problem. Many of the committee members are from rural districts and they don't really understand our problem."76 Braun failed to mention, but must have been aware of the fact that in addition to not understanding the pollution problems of the urban centers of the state, rural legislators are notoriously conservative, and resist staunchly important changes in the status quo. This latter characteristic became keenly evident in the committee hearing. Then there were the special interest politics of oil and manufacturing that would be another significant factor in the controversy surrounding the bill.

That night at the committee hearing, the galleries were packed with a crowd estimated at some 600 people. There was standing room only, and people were sitting on the floor, in the aisles and in the window sills of the galleries. Young

76Statement by Rex Braun, State Representative, to the writer, Austin, Texas, March 15, 1971.
and old were there wearing conventional business suits and the more unconventional jeans and buckskins. Sierra Club members were present as were countless other ecology groups. It was a night of badges and buttons. They were usually green and white—universal ecology colors—and most made some reference to expressing support for "House Bill 56."

The House chamber was ablaze with the harsh klieg lights set up for the television cameras. Speaker Mutscher was even there and could be seen standing just off the floor of the chamber near the brass railing which surrounded the house floor. The Speaker spent the better part of the evening, however, joking with representatives in the "Speaker's Reception Room."

Braun had brought seven witnesses, the most notable of whom included Joseph L. Sax, author of Defending the Environment and "spiritual author," as Braun referred to him, of the Environmental Protection Act; Edward Fritz, a Dallas attorney, active in ECONOCT (Environmental Coalition of North Central Texas) and who had actually drafted House Bill 56; and Representative Thomas A. Anderson of the 28th district in the Michigan House of Representatives, who had successfully sponsored the Michigan Environmental Protection Act in 1970. Anderson was there to relate Michigan's experience with the new legislation.

Throughout the testimony and questioning, the basic objections of the committee centered around such issues as
the bill's vagueness, its apparent radical nature, and the inability as well as the undesirability of permitting the judicial system to handle such problems. Questions were raised about the proliferation of frivolous suits which might damage innocent persons and the economy of the state, and finally the implications that such a bill, if passed, would pose for oil and gas interests in Texas.77

To the last issue, Moncrief drew particular attention—not in the committee hearing—but in the hallway behind the Speaker's desk while the hearings were in progress. He questioned the public trust concept and its effects on the oil resources in Texas. "These are some of the key industries in this state,"78 Moncrief argued. Moncrief's concern was more than perfunctory; his occupation and heritage is oil. When he is not in Austin, he claims an occupation as an "oilman."

Moncrief's background was not the only one that seemed to play a part in the deliberations. Representative Uher also had a personal and political interest in the bill. When the committee began a detailed and in-depth inquiry of the bill, it was Uher who led the probe. Uher represents

77Hearings before the House State Affairs Committee on the Environmental Protection Act of 1971, Sixty-Second Texas Legislature, Regular Session, March 15, 1971, tape-recorded transcript.

78Statement of Representative Mike Moncrief to the writer, Austin, Texas, March 15, 1971.
district 30, which covers Wharton and Matagorda Counties near and on the Gulf Coast. The alluvial, black, sandy loam soils of Wharton County have produced 215 million barrels of oil since 1925. The economy in Wharton County is based naturally on oil and it includes sulphur and gravel operations. Matagorda County is one of the leading oil-producing counties in the state, with a daily crude oil production of over 25,000 barrels. Over 195 million barrels have been produced since 1904. Yearly income from crude oil, gas, sulphur, shell, sand, gravel and clay amounts to about $60 million.79 Thus, not only was Uher from a rural district, he was also a representative closely tied to the oil and gas and other assorted interests that would be most affected by Braun's legislation.

The main point Uher raised dealt with the phrases "public trust" and "quality environment." Undoubtedly visions of socialism may have been leaping into his brain. Uher said he found the terms "a little broad and quite a bit vague," and he asked Dr. Sax if he would suggest that "to make this section a little more clear that we define the terms of public trust and quality environment?"80


80 Hearings before the House State Affairs Committee on the Environmental Protection Act of 1971, Sixty-Second Texas Legislature, Regular Session, March 15, 1971, tape-recorded transcript.
Sax admitted that the bill was, indeed, unconventional but that in fact terms like "assault," "fraud," and "negligence" did not have statutory definitions. Sax's position was premised on the fact that he considers environmental law at the same point that the English law was with fraud six hundred years ago. "We're at the beginning. I think we've just got to have room to improve for these legal concepts to evolve in a flexible way; and not lock them up in a code." Sax went on to say the nuisance laws were the closest analogy to the bill at hand; and that the term "nuisance" had never been defined. Representative Uher was not satisfied and began to query the comprehensiveness of the bill:

This bill is a very far reaching bill. It is a bill that reaches into every home and every community in Texas. And when you start into a new area like this you're breaking new ground. We need to have some rules to play by, just as if you were playing dominoes. But that was what the bill was about; that was Sax's intention. He replied:

I'm not going to back away from you on this. You said it was a far reaching bill, and it is a far reaching bill.

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81 Ibid.
82 Ibid.
83 Ibid.
He explained that it was a "legal attempt to bring to bear the ecological perspective."

You dump pesticides on your land and it doesn't stop at your boundary line. You put something into the stream, and it doesn't stop at your boundary line. That's the reality of the physical world. And at some point the legislatures have got to bring their legal concepts into line with this reality.

The committee hearings continued late into the night with the bill finally being sent to a subcommittee made up of Representatives McKissack, Nabers, Cruz, Solomon, and Moncrief. In late March, Governor Preston Smith endorsed the bill saying the legislation "would speed up our efforts to end pollution at every level." Meanwhile, Speaker Mutscher had still not committed himself on the bill. There was little left for Braun to do. The committee was obviously attempting to bury the legislation in the subcommittee. So Braun tried the only alternative available: he moved in Wednesday, May 19, to instruct the State Affairs Committee to release the bill. It was a very hectic day. It was the type of day in the legislature, where Representative Farenthold was recorded as "present but not voting" because in the space of an hour, the legislature had managed to ram through approximately fifty pieces of legislation, almost one per minute. Representative Slider, chairman of the

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84Ibid.

State Affairs Committee, not willing to have his game-plan stopped, immediately moved to table the motion to instruct the committee. On the vote to table the motion, Braun lost. The vote was 76 to 58.\textsuperscript{86} The Environmental Protection Act had met the fate it was destined from the beginning to meet—the graveyard of a House subcommittee.

\textsuperscript{86}House Journal, Sixty-Second Texas Legislature, Regular Session (Austin, 1971), pp. 4102-4105.
CHAPTER IV

TEXAS ENVIRONMENTAL LAW

Special Interests and Texas Reluctance

Texas laws governing water and air pollution characteristically reflect the best interests of those they are supposed to regulate. State environmental laws, in some cases actually drafted by polluter-oriented interests, are filled with loopholes which allow special interests to escape meaningful regulation. Only with the entrance of the federal government into pollution regulation in the last decade has the state of Texas been forced to take more meaningful steps in pollution control. But even with federal pressure, the state's rules and regulations are still inadequate.

In 1969, Representative Rex Braun was asked what would happen in Texas if the federal government, with all of its pollution laws, turned out to be a paper tiger. "Hell, we'd be blown out of the box," he chortled. "You ought to look at the statutes and regulations we've got. They're incredible."¹ State environmental laws have been drafted in the shadow of various lobbyists who demand as much autonomy in their

pollution generating activities as they can obtain. The laws of the state bear the marks and bruises of successful arm-twisting and cajolery on the part of the Texas Manufacturers Association, the Texas Chemical Council and others. State legislators, under constant pressure from lobbyists such as Tony Price of the cotton ginners' lobby who practically camped in the Senate trying to convince senators to exempt cotton gins from regulation under the 1967 Clean Air Act of Texas, have written gaping loopholes and ridiculously impotent enforcement powers into the law.  

Texas politicians and the special interests in the state oppose federal regulation in state affairs. It is a pragmatic reaction reinforced by tradition and conventional ideology. From a political standpoint, their reasoning is sound. Special interests have greater success in the Texas political system, having greater access to the levers of political machinery. They can influence it, they can dominate it and they can control it with relative ease. The state political system is more dependable and considerably safer. And as far as the "establishment" is concerned, the most important quality of the state's political machinery is its dependability.

Although much of the impetus for new pollution regulation in Texas was a realization of the inevitable and the necessary, evidence suggests that Texas politicians started moving in the

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direction of environmental protection out of fear that the federal government would soon be encroaching upon the protected position of the manufacturing and industrial interests of the state, establishing tougher guidelines and more stringent standards. Charles Barden and Ted Wimberly, two employees of the State Health Department, realized after the United States Congress passed the 1963 Clean Air Act that state air pollution laws were urgently needed, not only to make pollution control effective but also to prevent federal control over Texas' air resources. They both believed that this latter consideration would be the impetus for change that Texas legislators would appreciate.\(^3\) As late as 1969, Representative Braun was telling "Nader's Raiders" that "the only thing that's gonna get this state moving is the threat of federal intervention."\(^4\) But the federal government was not plunging into this new area of government regulation with any great speed. In both policy and law, the federal government was trying to adhere to a report published on June 20, 1955, which made it clear that "anti-pollution efforts should be speeded up by local interests primarily, rather than by U.S. government."\(^5\) The federal emphasis at that time did not


\(^{5}\) *Congress and the Nation*, Report of the Study Committee on Natural Resources and Conservation, United States Commission on Intergovernmental Relations (Washington, 1965), p. 845. This commission was organized during the Eisenhower administration.
even mention state or local governments, but placed the emphasis on "local interests." It was a warning, to a certain extent, being issued to the polluters to police their own activities. Nevertheless, by the early sixties, paranoia was settling in and by 1965, time was running out. It was felt that if there was to be new anti-pollution legislation, it would be better to have it drafted in Texas where it could be manipulated rather than in Washington where pressure would be more difficult to exert and the outcome less certain. The result was that Texas legislators, responding to the polluter-oriented lobbyists and with only nominal deference to environmentalists, drafted legislation and passed laws which reflected polluter values.

State Water Pollution Laws

There are those in Texas who believe that the current body of state environmental law to regulate pollution is sufficient. One who shares this view is Angus S. McSwain, Jr., Dean of the Baylor School of Law. McSwain explains that "there are enough environmental laws on the statute books; the problem is enforcement."\(^6\) Research into those provisions of the Texas Penal Code and the Texas Civil Statutes providing for abatement of water pollution tends to, at least partially, substantiate McSwain's position. The research also indicates, however, that Texas law has

\(^6\)Statement by Angus S. McSwain, Jr., Dean of the Baylor School of Law, to the writer, Waco, Texas, December 20, 1972.
improved fitfully and only significantly since the federal government has become involved in controlling pollution.

The Penal Code Provisions

Statutory prohibitions against water pollution in Texas date as far back as 1860, in the Texas Penal Code. The 1860 water pollution provision was included under Title Twelve, "Offenses against public morals, decency and chastity," Chapter Six, "Of the crime against nature" of the Code of Criminal Procedure. Sandwiched between prohibitions against sodomy and gambling between free white persons and black people, the statute provided that anyone who polluted any watercourse, lake, pond, marsh or common sewer was "guilty of a misdemeanor and on conviction by indictment could be fined in any sum not exceeding five hundred dollars." In addition, upon conviction the judge trying the case was directed to "order the Sheriff to abate such nuisance at the expense of the defendant." Provisions of the law were enforced by the Game, Fish and Oyster Commission, and the district and county attorneys in Texas.

Until 1923, this nuisance statute was the principal provision prohibiting water pollution. By 1923, however,

8 Ibid., p. 97.
9 Ibid.
the oil boom was in full swing in Texas bringing with it serious problems of water pollution as a result of petroleum production. Pollution of watercourses from the practice of throwing, depositing and casting crude petroleum, oils and other similar substances associated with the production of oil was becoming particularly acute in the state. The 1860 article, it was felt, was no longer adequate to deal with the complexities generated by the thriving oil industry. The Thirty-Eighth Legislature, meeting in that year, responded to the problem by sharpening and refining the law. The new law specifically prohibited pollution resulting from petroleum production and municipal discharges which might affect water taken for "farm live stock, drinking and domestic purposes."\(^\text{10}\)

The new provision detailed liability and categories of violation. Violations of the law were punishable by a fine of "not less than one hundred dollars and not more than one thousand dollars."\(^\text{11}\)

One important element of the earlier law was removed, however, when the burden on the violator of financing abatement was eliminated from the statutes. Another weakness in the law dealt with exemptions for the premises of manufacturing plants whose discharges were not considered dangerous to public health or destructive of fish life. The Game, Fish and Oyster

\(^{10}\text{Laws of Texas, XXI, Chapter 85, pp. 177-178 (1923).}\)

\(^{11}\text{Ibid.}\)
Commission retained authority to regulate pollution affecting fish life. 12

Two years later, in 1925, the Thirty-Ninth Legislature relaxed certain provisions in the law by exempting municipal corporations situated on tidal waters as long as discharges did not become a menace to oyster beds, fish life or public bathing areas. 13 Except for these changes, the law remained basically the same.

The Forty-Second Legislature, in the First Called Session of 1931, introduced further changes in the water pollution law by amplifying provisions dealing with oil, salt water, and sulfur water pollution. Sections of the statute making it "unlawful to throw, cast, discharge or deposit crude petroleum, oil acids, sulphur, salt water, oil refinery wastes or oil well wastes" into or on any watercourse of the state were retained. But regulations covering the dumping of salt water and sulfur water into tidal and fresh waters (these regulations were first mentioned in this law) were specifically lax. The minimum for fines was increased from one hundred dollars to two hundred dollars. The Game, Fish and Oyster Commission was charged specifically with enforcement of the law. 14

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12 Ibid.
13 Laws of Texas, XXII, Chapter 57, pp. 200-201 (1925).
14 Laws of Texas, Chapter 42, pp. 88-89 (1931).
In 1943, the influence of the oil lobby was apparently being felt in the legislature. The Forty-Eighth Legislature in that year reversed the early trend toward tougher anti-pollution laws set by the 1925 legislature by repealing important provisions of the water pollution penal statute. The 1943 law repealed all specific references to pollution by oil, salt water and sulfur water. Indeed, what the Forty-Eighth Legislature constructed was a nuisance statute similar to the law of 1860. Fines were reduced to "a sum not less than One Hundred Dollars ($100), nor more than Two Hundred ($200)." The last change in the penal code was made in 1945 by the Forty-Ninth Legislature; only a minor correction in the statute was made at this time.

The penal statute was finally repealed in 1961, when the Fifty-Seventh Legislature passed the State Water Pollution Control Act which established the Texas Water Pollution Control Board and removed water pollution from the criminal statutes.

The repeal of the penal code water pollution statute appeared, at first glance, to have effectively de-criminalized water pollution until an opinion issued by the State Attorney

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15 *General and Special Laws of Texas, Forty-Eighth Legislature, Regular Session, Chapter 285, pp. 418-419 (1943).*

16 *General and Special Laws of Texas, Forty-Ninth Legislature, Regular Session, Chapter 240, p. 373 (1945).*

17 *General and Special Laws of Texas, Fifty-Seventh Legislature, First Called Session, Chapter 42, pp. 156-165 (1961).*
General's Office in 1968 changed the situation. In an opinion to Senator Criss Cole, Chairman of the Committee for the Study of Land Use and Environmental Control of the Sixtieth Legislature, Charles F. Aycock of the attorney general's staff opined that, "operating a business which results in . . . water pollution may be a violation of Article 862, V.P.C."\(^{18}\) This article, which had been on the books since 1903, provided that "no person shall . . . wash or bathe or in anyway pollute the waters of any lake, or pond, or stream therein . . ."\(^{19}\) (Emphasis added) Penal provisions had come full circle between 1860 and 1968. The statute provisions had begun with a general nuisance provision; they had become fairly specific and by 1968 ended up with a general nuisance provision once more.

The Sixty-First Legislature in 1969 strengthened criminal sanctions by passing the "Water Pollution Control Misdemeanor Act."\(^{20}\) The passage of this act amended the Texas Penal Code by providing that a discharge of waste in state waters that causes or will cause pollution and which was made, with or without a waste control order or permit from the Texas Water

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\(^{19}\) *Vernon's Penal Code*, Article 862.

Quality Board or the Railroad Commission, was a misdemeanor. The offense was punishable by a fine of ten to one thousand dollars.  

The Civil Statute Provisions

The oldest civil statute dealing with water pollution control dates from the Thirty-Third Legislature of 1913. The legislature specified liability and fines of not less than one hundred and not more than one thousand dollars. Upon conviction under this law, the court or the judge of the court was directed to issue "a writ of injunction, enjoining and restraining the person or persons or corporation responsible for such pollution from a further continuance of such pollution." In the event the injunction was violated, the court was empowered to fine or imprison "as for contempt of court." The Texas State Board of Health was charged with enforcement of the law and the governor was directed to appoint, by and with the consent of the senate, an inspector to act under the direction of the Board of Health. The inspector was to make investigations, inspections and reports and perform any other duties necessary for enforcement of the law.

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21 Ibid.
22 Laws of Texas, XVI, Chapter 47, pp. 90-91 (1913).
23 Ibid., p. 90.
24 Ibid.
25 Ibid., p. 91.
In 1915 the Thirty-Fourth Legislature made some minor changes which removed the cumulative effect of penalties and exempted municipal corporations situated on tidal waters from the prohibition against discharging "sewage or unclean water or unclean or polluting matter" into the water.\textsuperscript{26}

Despite the provisions of these early statutes, a 1970 report of the Texas Water Quality Board claims that the "first truly modern statutory concept in water pollution control in Texas was the creation by the legislature in 1953 of the Texas Water Pollution Advisory Council."\textsuperscript{27} The council was composed of representatives of the Attorney General, the State Health Department, the Game and Fish Commission, the Board of Water Engineers, and the Railroad Commission.\textsuperscript{28} Serving only as a clearing house agency, it had no real statutory authority, no funds and no personnel. A statewide sampling network with monitoring authority was established. In 1967, the Statewide Water Quality Monitoring Program was the heart of the information available when it was required that water quality standards be adopted.

The Fifty-Seventh Legislature in 1961 enacted the State Water Pollution Control Act which abolished the Texas Water

\textsuperscript{26}Laws of Texas, XVII, Chapter 23, pp. 38-40 (1915).

\textsuperscript{27}"A Summary of Water Pollution Control in the State of Texas," A Report of the Texas Water Quality Board (Austin, 1970), p. 3.

\textsuperscript{28}General and Special Laws of Texas, Fifty-Third Legislature, Regular Session, Chapter 353, pp. 868-869 (1953).
Pollution Advisory Council and other pre-existing agencies, as well as repealing the earlier penal code and civil statute provisions. The 1961 act authorized a six-member Texas Water Pollution Control Board, but the board received no money with which to operate in 1961 or 1963.

In 1965, the Fifty-Ninth Legislature amended the State Water Pollution Control Act to change the six-member board to a seven-member board, including as a member the Chairman of the oil-oriented Texas Railroad Commission. The oil industry, apparently fearful that the new board would assume too much authority and wanting to protect itself as much as possible, successfully included in the legislation a provision designating the Texas Railroad Commission as the state agency responsible for the control of pollution resulting from oil and gas production operations. A Ralph Nader study group report on Water Pollution explains that a few years ago the Board began showing a lively interest in the subject of pollution from oil-field brines. The report acknowledges that the "minions of the petroleum lobby in state government responded quickly by transferring regulatory jurisdiction


30 "A Summary of Water Pollution Control," op. cit., p. 6.

over oil brine to the Texas Railroad Commission." According to the report, that was the last anyone heard about oil pollution. Fiscal support also hampered the new board. For the biennium, September 1, 1965, through August 31, 1967, the state appropriated $32,276 and $33,128 for each year respectively.

In 1967, the Sixtieth Legislature created the Texas Water Quality Board (TWQB) with the enactment of the Texas Water Quality Act. The TWQB superseded the Texas Water Pollution Control Board. The Water Quality Act, for the first time, set forth a water pollution control or a water quality management agency in Texas as an independent agency with a staff of its own. Little work could actually have been done in pollution control prior to the 1969-1971 biennium, however, because until this time the board was not authorized to employ personnel. One of the first important tasks of the TWQB was the establishment of state standards for interstate waters as had been earlier requested by the federal government. On June 26, 1967, the TWQB established a set of standards

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33 "A Summary of Water Pollution Control in the State of Texas," *op. cit.*, pp. 6-7.

34 General and Special Laws of Texas, Sixtieth Legislature, Regular Session, Chapter 313, pp. 745-758 (1967).

35 "A Summary of Water Pollution Control," *op. cit.*, p. 7.
which subsequently had to be revised by the U.S. Secretary of the Interior. Before adopting the original standards, the board held a series of thirty-three public hearings. But despite widespread publicity through newspapers and direct mail to a wide range of interested groups, most of those participating in the hearings were representatives of cities and industries—the two greatest sources of water pollution in the country and the state.36

The Sixty-First Legislature amended the 1967 law with passage of the 1969 Texas Water Quality Act.37 This law polished language and provided more definitive and specific detail on certain authorities granted earlier. Further provisions strengthened septic tank regulation, increased control over certain wastes not feasibly controlled under the Waste Control Order System, expanded authority to implement a system requiring dischargers to monitor and report quality of waste waters they discharge, and improved procedures for reporting and clean-up of wastes accidentally discharged or spilled. In addition, changes were made in the appointment and terms of Board members.38 The legislature that year also passed three other pieces of legislation bearing on water


38 Ibid.
pollution. These were the Solid Waste Act, the amended Injection Well Act, and the Water Pollution Control Misdemeanor Act. This last act made pollution of state waters a misdemeanor punishable by a fine of not less than ten dollars nor more than one thousand dollars.\(^\text{39}\)

The Texas Legislative Council's Statutory Revision Program produced an extensive statutory reorganization of all water laws in 1971. The Sixty-Second Legislature in that year passed the formal revision as the *Texas Water Code*.\(^\text{40}\)

The new code revised the general and permanent statutes relating to water rights, water development, water quality control, river compacts and general law districts. The aim of the revision was to set forth a more logical order in the statutes, to establish a format to facilitate citation of the law, to eliminate repealed, duplicative, unconstitutional, expired, executed and other ineffective provisions and to restate the law in modern American English to the greatest extent possible.\(^\text{41}\) All of these changes, however, did "not in any way make any change in the substantive laws of the State of Texas."\(^\text{42}\)


\(^{41}\)Ibid.

\(^{42}\)Ibid., p. 110.
Other Texas statutes dealing with water pollution exist but rather than increasing regulation of water pollution, these laws tend to contribute to fragmentation and dispersion of the state's regulatory power. Power thus dispersed is power that is too weak to be effective.

The Permit System: The Legal Loophole

The heart of water quality control in Texas and the most important vehicle for implementing the state's water quality standards is the "permit system." After water quality standards have been established, the TWQB then regulates the amount each individual using the streams may discharge without violating the standards by issuing permits which describe effluent criteria. If the individual stays within the criteria, the stream's quality theoretically is maintained at a level consistent with its use. But the TWQB's system of granting permits has been labeled by conservationists as nothing more than a license to pollute. Senator A. R. "Babe" Schwartz of Galveston has been a persistent critic of the system, claiming that the TWQB caters to polluters. He has accused TWAB members of being representatives of industrial polluters and has labeled several as "apologists for polluters" and "foxes guarding the chicken coop." There

\[43\text{Ibid.}, \text{p. 1057.}\]
\[44\text{Ibid.}\]
\[45\text{Ibid.}, \text{p. 1058.}\]
is more than substantial evidence to support the silver-haired senator's position.

When the permit system functions as it was designed to, users dumping wastes into a particular body of water are required to do so in accordance with standards established for the specific waterway. If the user maintains the proper relationship with the standards, the water maintains the quality intended by the board. Actually, however, the permit system works quite differently.

The most publicized example of the permit system at its worst involves the Dow Chemical Company plant at Brazosport, Texas. In regulating pollution from Dow, the permit system has taken on all the appearances of a negotiated settlement between the polluter and the TWQB, with the polluter often times not meeting the criteria of the permit.

At a Texas Water Quality Board meeting held in Austin on February 25, 1971, the Dow Chemical Company and the TWQB came under heavy fire from Operating Engineers Locals 564 and 450, from the Citizens Survival Committee, from a Texas Senate staff member, and from private citizens. The chemical company was accused of ordering workers to dump titanium tetrachloride at night to escape daylight detection; of being responsible for a giant fish kill in January; and of providing improper human waste disposal facilities. Robert Clark, a member of Senator Schwartz's environmental staff, said he had worked with Johnny D. Laman, manager of the Dow Waste Control
Department, and that he had found samples of that company's discharge which were in violation of its waste permit.46

The response of Dow and the TWQB was understandably defensive, but it pointed up the true nature of the permit system at work. In a bit of public relations work, Laman presented a detailed slide report to the board on current work on Dow's waste control management programs. He went on to point out the plans Dow was undertaking to improve anti-pollution procedures at the plant. Then it was the TWQB's turn. TWQB Chairman Gordon Fulcher, TWQB staff assistant Emory Long, and the board's executive director Hugh C. Yantis commented on the situation. Fulcher reassured Senator Schwartz's staffer, Robert Clark, that the board was working on the Dow permit and would come up with an acceptable solution to their problems. Emory Long, meanwhile, attempting to put the board and Dow in a better light, told the board that he had been working with Dow and he assured Clark and the board that "most of the time" Dow was within the guidelines of the allowed permit and that "Dow is not a gross polluter." Hugh Yantis remarked: "We don't claim Dow has not polluted, but they are working with us to amend their waste permit in good faith."47

46The Brazosport Facts, February 26, 1971, pp. 1 and 12.
47Ibid., p. 12.
The whole incident raises some disturbing questions about the enforcement policies of the TWQB. How necessary is it that polluters follow the guidelines of their permits? What type of action does the TWQB take when violators abuse their permits, as in the case of Dow? What is "most of the time" compliance? How much time does it take to kill a river? And finally, if permits obviously allow violations of standards, are they not in fact licenses to pollute after all?

As the Dow incident illustrates, Texas Water Quality Board's enforcement procedures are the crux of the legal problem. Initially, the TWQB attempts to enforce compliance with the Water Quality Act through negotiation and voluntary cooperation. If this informal cooperative effort proves unproductive, the board will apply pressure through publicity and, if forced to do so, will ultimately render formal orders demanding a cessation of the violator's activities. As might be expected, "the Board's procedures, both formal and informal, are not wholly effective in forcing recalcitrant violators into compliance."48 What is especially unexplainable is the fact that a state agency, invested with authority by the legislature to fine and file suit, will resort to public relations as a tool of enforcement before it has exhausted its own statutory authority.

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48 Carsson, op. cit., p. 1072.
State Air Pollution Control Laws

The Nuisance Doctrine

Prior to enactment of the Clean Air Act of 1965, the legal remedy for air pollution in Texas was a nuisance suit.49 Through the nuisance approach injunctions for air pollution were awarded against railroads, rock crushing operations, a carbon black plant, cotton gins and garbage dumps.50 But the nuisance procedure was troublesome. In applying the nuisance doctrine in air pollution cases Texas courts were rather schizophrenic. In the case of City of Temple v Mitchell, for example, the court ruled that every person "has the right to have the air diffused over his premises in its natural state . . . free from artificial impurities," and that every person has a "right of pollution."51 In an attempt to resolve this conflict the courts have relied on a test of reasonableness. This has meant judging "the extent of harm or injury" and "the reasonableness of the polluting activity" in light of the nature and use of property of both parties, and the character of the community in which they are situated.

As applied in Texas courts, the nuisance doctrine has generally worked to the advantage of polluters. Persons

49Norvell and Bell, op. cit., p. 1086.
50Ibid., p. 1088.
51City of Temple v Mitchell, 180 S.W. 2d 959, 961 (1944).
seeking to halt a nuisance such as air pollution have had to first show that "substantial injury" has occurred. The court decided in Columbia Carbon Co. v Tholen, for example, that the offending condition must be "substantially offensive, discomforting, and annoying to persons of ordinary sensibilities, tastes and habits, living in the locality where the premises are situated."52 "Mere personal discomfort and annoyance" would not be cause for relief from air pollution.53 Additionally Texas courts have further weighted the scales of justice in favor of polluters by requiring the individual to show "special injury . . . different from that to the public generally."54 These procedural handicaps are preceded by drawbacks in the initiation phase of litigation. The high cost of the process discourages and prohibits many suits. Beyond these problems, according to Norvell and Bell, the most condemning the criticism of the nuisance doctrine is that it is ill-suited to regulate business conduct in air pollution. When faced with a nuisance suit, industry usually hires lawyers and public relations experts to establish innocence and/or to discredit the accuser.55 These weaknesses in the nuisance doctrine approach have generally made this method of abating air pollution ineffective.

52 Columbia Carbon Co. v Tholen, 199 S.W. 2d 825 (1947).
53 City of Temple v Mitchell, op. cit.
54 Norvell and Bell, op. cit., p. 1088.
55 Ibid., p. 1089.
Penal Code Provisions

A specific penal code provision against air pollution did not appear on the statute books until the Sixty-First Legislature, in 1969, established criminal provisions for "individuals and private corporations who pollute the air in the State of Texas or violate air contaminant emission variances or orders." Under this law polluters found violating the provisions of the statute are guilty of a misdemeanor and upon conviction are subject to a fine of "not less than $10 nor more than $1,000." Each day of violation constitutes a separate offense.

Civil Statute Provisions

The real framework for air pollution control in Texas was written into the Civil Statutes with the passage of the Clean Air Act of 1965. As the state's first piece of legislation devoted exclusively to air pollution, the 1965 law contained classic examples of the many weaknesses running through Texas environmental laws, and the origin and development of the law provides valuable insight into the political problem of pollution control in the Lone Star State. The legislation

57 Ibid.
was drafted in the State Health Department by Charles Barden and Ted Wimberly, two Department employees who were dissatisfied with the Department's role in fighting air pollution. Their active interest in the legislation was only partly environmental, however. A "states' rights" argument over the regulatory authority of the federal government's role in air pollution control was equally important to their efforts. Both men felt that new legislation was necessary to prevent federal control over Texas' air resources. They believed that this states' rights consideration would provide a stronger political argument for change than a simple plea to protect the environment. Such an argument would appeal to the prevailing political ideology of the legislature and the lobby.

Essentially their legislation provided for a six member Texas Air Control Board (TACB) as the state regulatory agency primarily responsible for air pollution control activities. The board was empowered to prepare and develop a general plan for proper control of air resources; to adopt and promulgate rules and regulations governing air pollution; to investigate possible sources of air pollution; to hold meetings upon complaints or petitions; and to issue orders or determinations necessary to control air pollution. Additionally, the board was to encourage research and voluntary cooperation by

\[59\text{Norvell and Bell, op. cit., p. 1090.}\]
\[60\text{Ibid.}\]
individuals and groups in restoration and preservation of a reasonable degree of air purity.\(^{61}\) The true nature of the 1965 law, however, was determined in the legislature where the political history of its passage in the Fifty-Ninth Legislature reveals that the law quickly became a legal boondoggle.

The 1965 Act, as it emerged from the House State Affairs Committee, was glutted with provisions protecting the polluters.\(^{62}\) Industry was to be substantially represented on the Air Control Board. A liberal provision for granting variances from regulations was included; and the board was directed to clean up pollution in a manner "consistent . . . with maximum employment and full industrialization of the state."\(^{63}\) Before the bill could be voted on by the whole House, an amendment from the floor, by Representative DeWitt Hale of Corpus Christi, achieved what opponents of the bill in the committee had been unable to accomplish. It was originally intended that the TACB could enforce its rules and regulations by having the attorney general institute civil action in a district court for injunctive relief and/or for the assessment of a penalty not to exceed fifty dollars per day for each day a violation continues. Hale demanded

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\(^{62}\) Norvell and Bell, op. cit., p. 1095.

\(^{63}\) Ibid., p. 1092.
that the section of the bill governing judicial review of the Board's regulations be amended to require a trial de novo rather than application of the substantial evidence rule. The amendment provided that:

. . . all administrative or executive action taken prior . . . to an appeal shall be null and void . . . and the rights of the parties thereto shall be determined by the court upon a trial of the matters in controversy . . . as though the matter had been committed to the courts in the first instance . . . 64

According to G. Todd Norvell and Alexander W. Bell, who conducted many interviews with legislators and officials involved in the drafting and passage of Texas' first air control laws, the intent of the amendment was lethal. The provision was designed to prevent the control board from taking action against any industry engaged in polluting the air without first going through the state courts. An unofficial opinion, from the state's attorney general, according to Norvell and Bell, indicated that the Hale provision rendered the whole act unconstitutional. The attorney general's opinion was based on the Texas courts' strange interpretation of separation of powers concept embodied in the Texas Constitution, whereby courts feel compelled to defer to legislative judgments made by administrative agencies. 65 The topsy-turvy situation created by Representative Hale's amendment made the enforcement

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64 Ibid., pp. 1092-1093.
65 Ibid.
actions taken by the board illegal. Since the de novo trial provision did not seem to allow such deference, the section was arguably void; and since this section was unseverable, any determination that it was void would render the whole act unconstitutional. Although an air control board was appointed, it was stymied in its control activities.

Hale's ploy was well calculated. He realized that previous judicial decisions had established the court's position of submitting to the legislative judgments of administrative agencies. Thus an amendment requiring a trial de novo would be contrary to legal precedents already established in this area. By having included a provision he knew was going to be declared unconstitutional, Hale had placed the whole act under a cloud of illegitimacy. The bill could be passed, but the enforcement powers had been stripped from the legislation. The law had been rendered impotent. The legislators knew the bill had been emasculated, administrators were aware of it and so were the industrialists. Since the Air Control Board had little ground upon which to base its foundations for the enforcement of its regulations, agitation began developing for a revision of the 1965 law. When the Sixtieth Legislature convened in 1967, another

66 Ibid., p. 1093.
bill was introduced to remove the declaratory judgment and nonseverability clauses from the Clean Air Act.\footnote{General and Special Laws of Texas, Sixtieth Legislature, Regular Session, Chapter 727, pp. 1941-1952 (1967).}

Representative Don Cavness of Austin had introduced the 1965 Air Control Act, but he had encountered so much flak over the bill that when the Board asked him to introduce newer and stronger legislation, he refused. Senator Criss Cole of Houston then agreed to carry the legislation that would repeal the 1965 Act and replace it with one that did not contain the objectionable provisions. The bill modified the trial de novo provision and eliminated the nonseverability and declaratory judgment clauses of the earlier law. And, despite criticism from Representative Braun, the new bill did eliminate some of the industrial orientation of the 1965 Act.

Senator Cole managed to change the definition of "undesirable levels" of pollution from "concentrations . . . that materially injure animal or plant life or property," to concentrations that "may tend to be injurious to or to adversely affect beyond inconvenience humans, animal life, vegetation or property."\footnote{Ibid.} Another section which had provided that "in all proceedings before the Board with respect to any alleged violation of this Act of any rule or regulation here under, the burden of proof shall be on the . . . Board," was eliminated.\footnote{Ibid.}
Cole's bill did nevertheless introduce some bad points. Chief among these was the one dealing with the controversy over the role of local governments in air pollution control. The new bill clarified the issue to the displeasure of environmentalists and rather drastically in favor of the polluters. It deprived local governments of any right to legislate in the area of pollution control. This was later modified in committee to provide that local governments would not be "inconsistent with the provisions of this Act." The effect was to deprive local governments of any authority to pass stronger laws. Local governments could not legislate nor cause to be executed any regulation which would be stronger than that promulgated by the State Board or contained in the Act. But the really significant fireworks were once again saved for the floor of the legislature, this time in the Senate chamber.

Here a previously sleeping giant, the "cotton lobby," rose up to challenge the provisions regulating the particulate matter concentrations established by the Board. The cotton lobby wanted an amendment exempting its constituents from coverage. Arguing that the regulation would ruin an already ailing Texas industry, the lobbyist for the cotton ginners, Tony Price, prevailed on the senators to accept a floor amendment by Senator Murray Watson. Watson, at the time,
represented district 13 of Central Texas in which the headquarters for the Texas Cotton Association, the Texas Farm Bureau and the Texas Certified Seed Association were located. The amendment euphemistically exempted from effective control any plant "processing agricultural products in their natural state."\(^{117}\)

In an effort to arouse public opinion against the amendment, Senator Cole released to newspapers numerous complaints received by the Air Control Board from people living near cotton gins, but the papers never printed them.\(^ {72}\) The members of the Air Control Board threatened to resign in protest if the amendment passed. Finally, however, they felt that the risk of losing the entire package of legislation was too great to carry out their threat. The exemption for cotton ginners was included as well as a further proviso by Senator Watson that rural areas of the state need not be controlled as strictly as urban areas. The cotton lobby was now fully insulated from polluter regulation.

In 1969 the Sixty-First Legislature passed further amending legislation intended "to improve the structure of the Clean Air Act and to provide for more effective control of the quality of the state's air resources" by changing the composition

\(^ {71}\)Norvell and Bell, *op. cit.*, p. 1095.

\(^ {72}\)Ibid.
of the TACB. The statutory qualifications for membership on the TACB are one of the greatest weaknesses in the state's air pollution control program. Manipulation of the nature of the board's membership requirements becomes important because through changes in membership qualifications polluters can assure themselves of representation on the Board. As now constituted the board guarantees to industrial polluters and/or those associated with their prosperity domination of the TACB.

Originally the Board was composed of six members appointed by the governor and three ex officio members, the State Commissioner of Health, the Executive Director of the Texas Industrial Commission (The Industrial Commission released a brochure in 1970 entitled "No Pollution in Texas," which claimed that "Texas industrial growth over the past five years averages 300 new plants and 400 expansions each year--without a measurable increase in air pollution." 

The 1969 law eliminated participation by the ex officio members, and required, much like the 1965 provision, "a professional 

engineer," "a physician . . . with experience in the field of industrial medicine," "a person who has been actively engaged in the management of a private manufacturing or industrial concern," a person "experienced in the field of municipal government," and "an agricultural engineer." Four appointees were to be "chosen from the general public." 76 Besides this change in the board, the Sixty-First Legislature also passed legislation regulating exhaust and crankcase emissions in 1969. 77

The Sixty-Second Legislature, in 1971, amended the Clean Air Act, adding provisions for the regulation of construction of new facilities or the modification of existing facilities which might emit air contaminants. 78 Under the new provision persons planning to construct or to modify facilities which might pollute the air are required to apply for and obtain a permit from the TACB. 79

The Variance System: The Legal Loophole

Texas air pollution control laws, in general, are shot through with weaknesses. There are problems of judicial

79 Ibid.
procedure which result in endless delay. There are boards and commissions which are established by law to regulate, but which, under specific statutory provisions, are inclined to represent rather than regulate the polluter. And there are entire sectors of the business community, such as those involved in the processing of agricultural products, which are completely exempt from pollution regulation and quality control standards.

There are loopholes "big enough to drive a truck through," and which are fully utilized by recalcitrant polluters. In the air control laws, these loopholes are called "variances." According to the law, these are "reprieves to take positive steps in meeting . . . costly procedures of plant modification." In some cases, these variances are an absolute necessity and are properly used. In many cases they are not.

The Texas Air Control Board tries to play down the importance of variances as loopholes. In one of its reports, the TACB proudly proclaims that during a "relatively short period of 24 months, December, 1967, to December, 1969, 105 Variances holders (one-third of ALL Variances issued) achieved compliance with the Regulation for which the Variance was granted." In a follow-up report, the board reports that in


82_**Ibid.**
a thirty-two month period, from December, 1967, to August, 1970, "211 Variance holders achieved compliance with the Regulation for which the variance was granted."\textsuperscript{83} But there are peculiarities in the board's statistics which appear to indicate that the variance situation is not so rosy.

According to the first report, the first variances were issued in December 1967. Between that date and December 1969, a total of 395 petitions for variances were received and 314 were granted.\textsuperscript{84} According to the second report, between December 1967 and August 1970, 448 petitions were received, with 371 of these granted.\textsuperscript{85} These figures reveal that fifty-three companies, over a two-year period from December 1967 to December 1969, had not even filed a petition for a variance. Were these companies in violation of TACB standards for two years before requesting additional time to delay compliance, or were they new industries allowed to begin their operation without air pollution control equipment? The report is not clear on this point. In any case, the granting of three-fourths of all requests is hardly a record to commend. The board steadfastly denies that its granting of variances is a glaring loophole in air control laws. The

\textsuperscript{83}"Air Pollution Control in Texas," A Report of the Texas State Department of Health (Austin, Texas), p. 2. There are no identifying passages indicating the differences between the first report and the second with regards to reporting dates.

\textsuperscript{84}"Air Pollution Control in Texas" (First Report), p. 2.

\textsuperscript{85}"Air Pollution Control in Texas" (Second Report), p. 2.
Texas State Department of Health has steadfastly maintained that, "This is not a 'license to pollute' as some have charged." Several state legislators, in both chambers, disagree. Some have charged that "the variance situation—the system of granting permits to pollute—has become a moral scandal."

The best clue to the nature of the state's air control activities has been the reaction of the United States Environmental Protection Agency to Texas' standards for air control. On May 31, 1972, the EPA rejected four sections of Texas' ten-point air clean-up plan and returned that plan for tougher provisions. The Texas plan was considered deficient in its standards regulating nibous opide emissions from large oil and gas-fueled power plants and on hydrocarbons emitted by petroleum refineries, holding tanks, organic solvents and loading operations. In addition, the state's plan for reporting and record-keeping by owners of pollution sources and for publication of emission data was deemed unacceptable.

On June 14, 1972, in an effort to prod Texas along with the necessary revisions, the EPA warned that if Texas could not plug the gaps, it (EPA) would offer its own proposal to do the job. EPA's plan would reduce the emission of certain

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86 Ibid.
88 Fort Worth Star-Telegram, June 15, 1972, Sec. C, p. 5.
pollutants in Texas' major metropolitan areas. The regulation would nit petroleum refining and holding industries of the Gulf Coast and the power plants and nitric acid producers in the Fort Worth-Dallas region. According to EPA, "the Dallas-Fort Worth area has been dubbed a 'priority I' area, as have the Gulf Coast metropolitan regions, indicating that pollution levels may be of proportion to endanger health."

A final criticism of both air and water pollution control laws in Texas focuses on legal provisions for environmental catastrophes. Under present Texas law, if an emergency such as the Santa Barbara spill or the explosion of chemical tanks as the result of a railroad accident occurs, the appropriate state agencies would be hard-pressed to respond adequately, if at all. Texas anti-pollution laws do not provide effective powers for immediate remedy or prosecution in such emergencies.

Houston attorney J. Wiley Caldwell has pointed out that both the Texas Water Quality Board and the Texas Air Control Board have neither self-help remedies nor effective emergency administrative procedures to deal with immediate pollution hazards. Caldwell lays the blame for this problem to limited funds, vague language and cumbersome judicial procedure.

89 Ibid.


91 Ibid.
State law makes no provision for funds to respond immediately to a pollution hazard by cleaning it up or arranging for the clean up of such a hazard. Under federal law, provisions are made for the United States to direct all public and private efforts at the removal or elimination of such a threat and, in addition, a "revolving fund" of $35 million dollars is available for financing immediate action on the emergency.⁹²

Administration of "temporary orders" and "injunctions" are hampered by vague language and the reviewing authority of the courts in emergency situations. What constitutes "emergency situations" and "generalized conditions of pollution" are not specified, and state courts retain the inherent right of reviewing administrative orders to stay further administrative actions. Since an immediate appeal could stay further action, argues Caldwell, it could presumably prohibit the Air Control Board or the Water Quality Board from making the administrative decision to file enforcement proceedings.⁹³ Texas laws, thus, give all the benefit of the doubt to the polluter. Notification times, compliance and performance intervals, re-notification schedules and further compliance intervals may drag on for a minimum of two years before prosecution is undertaken. These built-in delays actually permit continued pollution with relatively little threat of punishment.

⁹²Ibid., p. 11.
⁹³Ibid., p. 8.
Texas Law as a Protector of Polluters

Law, like money, social position, popularity and numerical superiority, is a political resource that can be utilized to influence political decision-making. As Robert Dahl observed in his study of New Haven politics, "any group of people having special access to legality is potentially influential with respect to government decisions." In Texas, where manufacturers, industrialists, petrochemical interests and oilmen enjoy greater access to the legislature than do conservationists and environmentalists, it is only natural to find that the laws regulating pollution reflect and protect the welfare of the polluters.

Research into Texas air and water laws reveals that statutes regulating pollution were drafted reluctantly, and were initiated out of self-interest. Federal authority threatened state interests with the possibility of tough environmental standards and regulations. State interests responded by initiating regulatory legislation designed to protect polluters more than to protect the environment. Further analysis indicates that variance procedures in air control laws and the permit system in water control laws are legal gaps in the law that permit environmental destruction.

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95 Ibid., p. 247.
by polluters. In addition, enforcement by the boards established by Texas laws tend to safeguard the interests of polluters rather than the interests of the Texas people. That is the subject of the next chapter.
CHAPTER V

TEXAS POLITICAL LEADERSHIP AND DECISION-MAKING:
THE ADMINISTRATIVE SYSTEM

Responsibility and Authority

A bearded old man sitting on a courthouse bench in an East Texas county once remarked about the sorry state of administrative government: "Man, if this won't arouse us, we are beyond redemption—or dead in the law."¹ The Texas executive branch and its multitude of administrative appendages are notoriously irresponsible and ineffective as regulators of the private interest and protectors of the public interest. The state's regulatory system suffers from fragmentation of authority and responsibility, and from an unwieldy proliferation of agencies, boards and commissions engaged in every imaginable concern from rate-fixing for burials to control and elimination of the pink bollworm. Several factors have contributed to this breakdown of executive power. The Reconstruction era in the state left Texans with a hardy distrust of government power and executive authority which they later translated into the constitution of 1876. The

Texas legislature which has created the many agencies has
done so with a view to denying power to executive leadership.
And various special interest groups which benefit from the
politics of dispersed authority in the system have thwarted
administrative reforms.

Attempts by politicians and careful students of the
Texas political system to even fix an exact number of the
boards, commissions and agencies are indicative of the problem
of control in the regulatory system. James Anderson and
his colleagues, writing in their recent book, Texas Politics,
published in 1971, indicate that the number of agencies
"apparently exceeds 140."\(^2\) They continued: "An exact count
of the number of separate administrative entities that exists
is difficult, if not impossible, to obtain; it is even difficult
to define what constitutes a separate administrative unit."\(^3\)
Dan Nimmo and William E. Oden, in their systems analysis of
Texas government, put the figure at "more than 150."\(^4\) And
most of these, they argue, are made up of "private interests
whose demands upon the system have been so successful that
they have been awarded economic protection. Both the demands

\(^2\) James Anderson, Richard Murray, and Edward Farley,
\(^3\) Ibid.
\(^4\) Nimmo and Oden, op. cit., p. 131.
and the awards are made, of course, in the name of the public welfare. In 1969 and 1971, thirty-seven new boards, commissions, and agencies were created by the legislature. These thirty-seven organizations resulted in 326 appointments. Reporter Bill Kidd, of the San Antonio Light's Austin Bureau, was moved to write that if legislators continue to question the wisdom of establishing so many agencies, while at the same time continuing to create them, they might be compelled to "call for a State agency to regulate the creation of State agencies." In the field of pollution control alone a joint report of the Interim Committees on Pipeline Study and Beaches in 1971 identified twelve different state agencies entrusted with authority to develop and protect the natural resources in Texas. In a patchwork of jurisdiction, the Texas Water Rights Commission, Texas Water Development Board, Texas Water Quality Board, Texas Water Well Drillers Board, Texas State Soil and Water Conservation Board, Texas Air Control Board, Parks and Wildlife Commission, Texas Industrial Commission, Texas Highway Commission, State Board of Health, General Land Office and the Railroad Commission all perform some function in environmental protection.

This fragmentation in responsibility and authority has a wide effect. As two students of the system have observed,

5 Ibid.
6 San Antonio Light, June 7, 1972, Sec. B, p. 5.
7 Ibid.
"the consequent disorganization and lack of legal control from the top may not prevent a particular agency from doing a stellar job, but neither does it provide any medicine for the delinquent and inert."\(^8\) Pollution control is naturally affected by the arrangement. The joint report of the Interim Committees on Pipeline Study and Beaches of the Sixty-Second Legislature noted that "the allocation of responsibility to so many agencies threatens the efficiency and effectiveness of pollution control activities."\(^9\)

Water pollution control is an excellent example. The coordination and supervision of Texas water pollution control activities by the Texas Water Quality Board is impaired by the Railroad Commission's absolute control of the disposal of oil and gas production wastes, by the Health Department's power to approve the construction plans of municipal sewage plants, and by the Water Development Board's practice of formulating long-range water development plans without adequately considering water quality objectives.\(^10\) "The effectiveness and efficiency of water pollution control efforts are reduced because the Water Quality Board, the


\(^10\)Carsson, op. cit., p. 1039.
Parks and Wildlife Department, and the Water Development Board each engage in pollution research, monitor Texas waterways and even determine what the quality of Texas water should be."¹¹

The proliferation of administrative agencies creates other problems as well. The great number of agencies provide many opportunities for the polluter-oriented lobby to probe for weak points in the fabric and to bring to bear the full cutting force of their influence and pressure. Nimmo and Oden make the point that:

The diffusion of responsibility for board policies among a number of individuals provide multiple points of access for interests concerned with establishing privilege, securing it, and expending it in the future. Semiautonomous administrators respond to the interests of vested clientele with little or no popular democratic control.¹²

All of this is not to say that there is no control being exercised. Obviously, decisions are being made and policies are formulated. The control, however, is not being exercised by the right people for "The People."

Administrative Leadership

The most critical factor in any regulatory activity is precisely the problem of "who is controlling?" The business community constantly bemoans what it considers "governmental

¹¹Ibid.
¹²Nimmo and Oden, op. cit., p. 131.
interference in the free enterprise system." Businessmen lambaste politicians regularly for their ignorant meddling and their tinkering with the economic system. But the reality and history of the situation finds that it is not the politicians per se (most of whom are put into office by downtown business support) who are at fault, but the business leaders themselves. The fact of the matter is that involvement by the government in the business community has come at the request of the business leadership and their lobbyists.

The Texas oil industry and its relationship with the Texas Railroad Commission is a superb example. Texas oilmen, the most vociferous exponents of the values of competition, rugged individualism, laissez faire economics and the principle of supply and demand, are very sensitive to the question of state regulation of oil and gas production. It is not that they are opposed to it, which logically they should be, but it is because it is a regulatory system they have demanded to protect their industry. "It was at their request and insistence that regulation was first begun and that practically every additional step in the control has been taken."13

The first proration order of the Texas Railroad Commission, restricting the flow of wells in the Burkburnett field in July, 1919, was issued upon the request of the oilmen of the district. A mass meeting of oil operators in the district was held and a committee of oilmen was appointed to confer with the Railroad Commission and get its help. Within forty-eight hours after the request was presented, the commission ordered all the wells in the field shut down for five days.  

Ostensibly, the oil allowable system was undertaken in the name of conservation, but anyone familiar with the history of Texas oil regulation knows that stabilization, "which in the industry means 'normal price structure'" was the principle motivating factor. "The beginning of proration [the allocation to each well of a rate of flow lower than its capacity] was based on the fear that too much oil would demoralize the price structure. The fear led to the first attempt at government proration, a temporary one only, in Texas in 1919."  

This pattern of state regulation has been repeated many times, and has included numerous professions, trades, and industries. Almost every administrative agency, board or commission created in Texas has been a direct result of demands placed upon the legislature by special economic interests. That is part of the story of the Sharpstown Bank Scandal. Frank Sharp wanted to avoid further investigation

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14 Ibid.
15 Ibid., p. 23.
and regulation of his banks by the Federal Deposit Insurance Corporation by attempting to have legislation introduced and passed by the Texas legislature that would enable state banks to be insured by a state-chartered insurance company. The new state organization, to Sharp's way of thinking, would have been easier to handle.\textsuperscript{16} Nor is this an isolated case. In the Regular Session of the Sixty-Second Legislature, the Texas Vending Commission and the Texas Motor Vehicle Commission were established, both at the request of the special interests with which they deal.

Leadership recruitment to state regulatory agencies depends heavily on the growing coincidence of interests between state agencies and private economic interests located within the state. As the affairs of state government have become more and more involved with the interests and activities of special interest groups, the line between governmental leadership and business leadership has been erased. This has been especially true with environmental regulatory agencies. Investigations in 1970 and 1971 by the \textit{New York Times} reveal that most state boards charged with regulating pollution are heavily weighted with representatives from the very polluters they are supposed to be regulating.\textsuperscript{17} Air and water control boards in thirty-five


\textsuperscript{17}\textit{Fort Worth Star-Telegram}, January 13, 1971, Sec. C, p. 9.
states are "dotted with industrial, agricultural, municipal and county representatives whose own organizations or spheres of activity are in many cases in the forefront of pollution."\textsuperscript{18} In Chicago, Illinois, for example, thirteen of the twenty-seven positions on the smog appeals board and three advisory committees were occupied by representatives of large polluters. In Connecticut, on the state level, four out of thirteen are pro-polluter oriented while on the local level directors of health are "plant physicians" and "medical directors" for some of the worst polluting industries. In Pennsylvania, the state commission chairman, Allen Brandt, appointed by Governor Raymond Schaefer, is an environment quality control director from Bethlehem Steel Corporation.\textsuperscript{19}

Texas has been no exception to this situation, and quite possibly has the worst reputation for pollution regulation by polluters. In the 1972-73 Texas Almanac, there is a full-page advertisement which illustrates the point. With a picture of Governor Preston Smith, Railroad Commissioners Byron Tunnell, Judge Jim C. Langdon, and Ben Ramsey, the ad proudly proclaims: \textit{SINCE 1891, THE TEXAS RAILROAD COMMISSION Has Served The Oil Industry.}" At the bottom of the page, "this message sponsored

\textsuperscript{18}Ibid.

\textsuperscript{19}Esposito, \textit{op. cit.}, p. 194.
by members: American Association of Oil Well Drilling Contractors and Texas Independent Producers and Royalty Owners Association."²⁰

According to one task force study, "all the Board members appointed by former Governor John Connally to the Texas Air Control Board were closely tied to the industries they were supposed to regulate. Even the representatives of the 'general public' had strong corporate connections."²¹

In 1965, Connally appointed Henry L. LeBlanc, Sr. of Port Arthur and Clinton Howard of Irving as "representatives of the public" on the Texas Air Control Board. These representatives of the "general public" had some strong connections with the corporate establishment that consistently militates against pollution control. LeBlanc is an executive of Standard Brass and Manufacturing Company of Port Arthur and Clinton Howard is from Bio-Assay Laboratory of Dallas, a company that does twenty per cent of its work for industrial customers. In 1966, John T. Files, Secretary-Treasurer of the Texas Chemical Council and President of the Merichem Company, "whose plants are easily recognized by the black smoke and sickening odors which come pouring out of their stacks,"²² was appointed by Governor Connally to fill a vacancy on the air control board as representative of

²¹Esposito, op. cit., p. 193.
²²Ibid.
industry. Files, who a year later failed to obtain confirmation by the Texas Senate and was forced to resign, had been named "polluter of the month" by Harris County officials and the Houston Post.\(^{23}\)

In 1968, Connally appointed D. O. Tomlin of Fort Worth, president of the Acme Brick Company, to fill a vacancy on the air control board. Tomlin at the time was a director on the board of the powerful Texas Manufacturers' Association. The appointment surprised many politicians and state officials, including members of the air control board. Indeed, the nomination was unexpected since the TMA had consistently lobbied "to defeat every really effective bill to combat pollution that has been introduced."\(^{24}\)

Governor Preston Smith has been as disappointing to many as was former Governor Connally in his executive appointments to pollution regulatory boards and commissions. Searcy Bracewell, a Houston attorney, had been designated by Smith as an "interim appointee" to the Texas Water Development Board after the Sixty-First Legislature ended in 1969. Bracewell's confirmation was to come before the Texas Senate in the Sixty-Second Session of the legislature meeting in 1971. On February 23, 1971, Bracewell resigned and, according to newspaper accounts, he told the Governor in a letter that

\(^{23}\)Ibid.

the job was taking more time than he could give. But there was more involved than time. A freshman Senator, Jim Wallace of Houston, who later introduced a constitutional amendment to prohibit lobbyists from serving on state boards and commissions, announced that he had more than the eleven votes needed to "bust" Bracewell's nomination. Senator Wallace told the press that "he's [Bracewell] a paid lobbyist and he's serving on one of the most powerful boards that we're going to have in a very few years. The proposed $50 billion water development program is going to put anybody on the board and particularly the chairman in an extremely powerful position." Bracewell had been serving as the chairman of the board. In light of Bracewell's personal interests and his duties as chairman of the Texas Water Development Board, the appointment would have raised serious questions about a conflict of interest.

The Texas Water Development Board is charged with the "specific duty to prepare, develop, formulate, and adopt a comprehensive state water plan, which is to serve as a flexible guide for state policy in the development of the state's water resources." Other duties include the issuing of "permits for

26Ibid.
271966 Supplement to Guide to Texas State Agencies, Institute of Public Affairs, the University of Texas (Austin, 1966), p. 6.
the use of state water," and "supervising the subsurface disposal of municipal and industrial wastes, and where wastes from oil and gas production are involved, the Water Development Board advises the Railroad commission relative to preventing the pollution of fresh water." The board also investigates and ascertains those situations in which the underground waters of the state are being polluted. Bracewell's nomination had followed the classical pattern of administrative appointments in Texas.

Bracewell is a paid and registered lobbyist for the Houston Lighting and Power Company, the Houston Natural Gas Corporation and Gulf States Utilities of Beaumont. Utility companies are among the biggest polluters in the nation and the state. Power plants, such as those represented by Bracewell, account for twenty million tons of pollutants released into the air per year. There are additional damages by such industries to water used in the production output. Eight months after his resignation, Bracewell's HL&P ran into some problems with the Texas Parks and Wildlife Department and the U.S. Environmental Protection Agency. The difficulty lay in a conflict between the Texas Parks and Wildlife Department and the Texas Water Quality Board. The

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28 Guide to Texas State Agencies, Institute of Public Affairs, the University of Texas (Austin, 1964), pp. 114-115.

29 "We Inherit the Sky," Fort Worth Air Pollution Control Division, undated, p. 7.
TWQB approved a permit for HL&P's Greens Bayou Generating Plant, in the Houston area, over the objection of the Texas Parks and Wildlife Department. The Parks and Wildlife Department said the total suspended solids in the HL&P discharge, which monthly would average 400 parts per million, "far exceeds" the Water Quality Board's own standards for the zone of the ship channel into which it empties. The Environmental Protection Agency's concern was about this high concentration of suspended solids the utility planned to release into the plant's new waste stream, which would discharge into the Houston Ship Channel. A spokesman for the EPA said, however, the issue was "no big deal." 30

But the most glaring coincidence and possible conflict of interest in Texas regulation of environmental affairs involves the Trinity River Authority (TRA). The Authority is a state agency which was ostensibly created to insure the maximum environmental and economic development of the Trinity River which runs between the Fort Worth-Dallas area and the Gulf of Mexico. A special interest group known as the Trinity Improvement Association (TIA) has been pushing for full exploitation of the river. The members of this association would benefit tremendously from the canalization of the river and have been in the forefront of the battle to create the Trinity River Canal. The coincidence of interest

30 Houston Chronicle, October 17, 1971, Sec. 1, p. 7.
between the Trinity River Authority (state agency) and the Trinity Improvement Association (special interest group) has created a very questionable conflict of interest. The Chairman of the Board of the Trinity Improvement Association is Ben H. Carpenter. Carpenter is also chairman of the Trinity River Authority. In addition, Amon G. Carton is Chairman of the Executive Committee of the TIA and David H. Brune is President of TIA. Both men also serve as directors on the Trinity River Authority. The state agency and the special interest association are so intimately intertwined that they function out of the same office at 2723 Avenue E East, Arlington, Texas. Representatives of the Sierra Club raised the question of conflict of interest in December of 1972 but few eyebrows were raised since the politically aware people in Texas accept this type of arrangement as a matter of political reality.

There is an added dimension, however, to administration which is more nebulous but no less significant to pollution control, and this is the area of "attitudes" and "values" of those individuals serving on the various regulating agencies, boards and commissions. David Truman has written, with respect to legislators, that, "a legislator-politician no less than any other man has . . . lived his life in environments largely group defined. These have given attitudes, frames of reference, points of view, which make them more receptive to
some proposals than others."\textsuperscript{31} Truman's observation about legislators applies no less to administrators. United States Attorney General Richard Olney's famous reassurance to a railroad president in 1894, who feared regulation by the Interstate Commerce Commission, described well the situation of most regulators:

The commission is, or can be made, of great use to the railroads. It satisfies the popular clamor for a governing supervision of the railroads, at the same time that the supervision is almost entirely nominal. Furthermore, the older such a commission gets to be, the more inclined it will be to take the business and railroad view of things.\textsuperscript{32}

Regulators can and do become tools of the industries they are regulating through a subtle socializing process which is nourished by the regulated corporations. In Texas, in addition to direct connection between appointments to pollution regulation boards and regulated enterprises, there are members whose general philosophical orientations are sympathetic to industrial polluters.

It was the problem of sympathetic attitudes toward polluters that played a significant factor in the rejection of construction magnate H. B. Zachry as appointee to the Texas Air Control Board. H. B. Zachry, Jr., a San Antonio builder, had been appointed by Governor Smith during the interim before the


\textsuperscript{32}"Regulating the Regulators," \textit{The New Republic}, CLXIV, p. 11.
Sixty-Second Legislature and he had been serving on the air control board pending Senate confirmation. Senator Schwartz had labeled Zachry, along with two other board members, William P. Hobby, Jr., Houston Post publisher and soon to succeed Lieutenant Governor Ben Barnes after the 1972 Democratic Party Primaries, and Fred Hartmen, Baytown Sun editor and publisher, "industry-business-foxes."\(^3^3\) Schwartz said, "I view all three of you equally as industry-business-foxes-watching-the-chicken-coop-kind of appointment to the air control board."\(^3^4\) On March 25, 1971, Senator Joe Bernal of San Antonio declared that Zachry's appointment was personally objectionable, and following the custom of "senatorial courtesy," the Senate voted unanimously to reject Zachry.

The timing of gubernatorial appointments and the fact that Texas has biennial legislative sessions results in a peculiar legislative check on the executive. Gubernatorial appointments to the many boards, commissions, and agencies are subject to confirmation by the Texas Senate. But due to the biennial nature of the legislature, unless a special session is called and continues for ten days, many of the Governor's appointees actually serve a portion of their terms without the scrutiny or approval of the thirty-one senators. As a result, the oversight power of the legislature is not

\(^{33}\) UPI Press Release, by Ann Arnold, Austin, Texas, undated; supplied to the writer by newsman David Day, KFJZ Radio Station, Fort Worth, Texas.

\(^{34}\) Ibid.
wholly effective at the point where it has been deemed most
critical—senatorial confirmation of executive appointments.
There is good and bad in the arrangement, especially in
environmental control.

Unsatisfactory appointees are not prevented from serving
completely. Their tenures may be characterized by ineptitude,
ineffectiveness, or administrative neglect, while the senate
scrutiny which might have prevented their administrative
mismanagement is delayed until the next session. In one
sense, however, there are advantages. Many executives appointees
are allowed what amounts to a grace period during which they
may exercise their administrative authority. When the interim
appointees finally come before the Senate, the senators
already have some idea as to how the appointees will perform.
This grace period of administration has resulted in some
interesting clashes between senators and appointees. This
is especially the case with appointees to the Texas Air
Control Board.

In 1972, during the third special session of the Sixty-
Second Legislature, the Senate was having its first opportunity
to examine Preston’s Smith’s appointments to the TACB. Up
for confirmation were E. W. Robinson of Amarillo, Dr. Willie
Lee Ulich of Lubbock, Charles R. Jaynes of Waco, James D.
Abrams of El Paso, and John J. Blair of Kountze. The encounter
between the appointees and the Senate Nominations Committee
provoked rash and embarrassing statements from the appointees,
disgust and epithets from the senators and headlines in the
state's local newspapers.

With Senator "Babe" Schwartz leading the examination,
committee members questioned the appointees at length on
their philosophy toward environmental regulation. It soon
became apparent that two of the appointees were fairly
insensitive to pollution problems and their effects on human
beings. Schwartz asked Blair if he had been accurately quoted
as saying, "poverty smells worse than pollution." Blair said
yes. The point of the question struck to the issue of
having to shut down some companies because they had not
met air control regulations. After listening to Blair
recount the case of a lumber mill that was closed down,
partly because of new air control standards, Schwartz argued
that he did not want "somebody on the Air Control Board
blaming ... some standard that the people want enforced."\(^{35}\)

E. W. Robinson was next to feel the heat from the senator.
Schwartz, thrusting hard, asked Robinson his position on the
Amarillo City Council's philosophy that "we want pollution—we
like it." Schwartz took the opportunity to point out that lead
poisoning in El Paso by a more modern smelter than the one in
Amarillo had been discovered in a number of children. (It was
later revealed by Charles Barden, Executive Director of the

\(^{35}\) *Fort Worth Star-Telegram*, June 20, 1972, p. 1.
TACB, that the plant in question, American Smelting and Refining, was violating air control standards two years ago and is still violating them today.) Robinson explained that he was an engineer and was inclined to look at things economically and realistically as well as from the human viewpoint. When health hazards are not "very harmful," Robinson stated that he looks more at "the effects on the socio-economic system." Senator Charles Wilson of Lufkin probed Robinson on this point. Wilson asked Robinson if minimal harm included pollution that irritated asthma and hay fever. Robinson astonished the committee by replying, "People seldom die of it." Wilson, a sufferer of acute asthma and other allergies, responded with a verbal "goddamn!" Senator Barbara Jordan, of Houston, admonished Robinson, saying, "your statement worries me a lot because of its weasel words--a lot of them. I hope you'll rethink your whole philosophy."36

Despite the negative votes by Senators Jordan, Schwartz, and Chet Brooks of Pasadena, the committee sent the appointments out for confirmation by the rest of the Senate. Senator Wilson, not satisfied with the way in which the appointees answered questions, however, had them called back again so that they might clarify their positions. But even with a second chance to put themselves in a better light they did not all succeed.

36 Ibid.
E. W. Robinson changed his tune to a certain degree but fared worse as the hearings proceeded. The result of the second meeting did not change much. Four committee votes were cast against the appointees, but the committee as a whole outvoted Schwartz and the others.37

Law Enforcement

If law and order are needed anywhere, it is in Texas, and it is in the area of environmental law and pollution. The "variance system" for air pollution, the "permit system" for water control, and the Texas Railroad Commission's regulation of pollution from oil and gas production are all tributes to the administrative neglect in which Texas regulatory agencies have functioned.

The Texas Pipeline Committee and the Beach Committee conducted a joint meeting in the chamber of the Texas House of Representatives on June 3, 1970, on environmental problems. At that meeting, the committee noted facts which clearly showed, in the words of the committee report: "that the Railroad Commission has displayed a callous disregard for the environmental impact of the actions of the oil companies operating in Texas."38

The findings of the joint committee meeting so accurately

37 Houston Chronicle, June 20, 1972, Sec. 3, p. 28.
38 "Pollution vs. The People," op. cit., p. 9.
pinpoint the failure of the Railroad Commission to function in environmental law enforcement that they deserve to be listed in full.

The committee found:

-The Railroad Commission has never denied a drilling permit to any company for ecological reasons.

-The Railroad Commission does have the authority within its rule-making powers to require all oil companies to submit a contingency plan before operations to demonstrate their ability to provide for environmental safety in the case of ecological damage. But the Railroad Commission has never exercised such authority.

-The Railroad Commission does not have the boats or other equipment to conduct surveillance of offshore operations of oil companies. The Railroad Commission has not requested such equipment for adequate surveillance. The result is that the Railroad Commission must request an oil company to use its own equipment and personnel to take the Railroad Commission inspectors to the site of its operations to see if that company is violating Texas laws on pollution.

-The Railroad Commission did not have a map of the State showing locations of pipelines that the Railroad Commission is statutorily charged with regulating.

-The Railroad Commission did not have any ecologist within its organization.

-In granting exceptions to its Statewide Conservation Rules the Railroad Commission shows a clear preference for industry concerns over environmental concerns: (1) Hearings Notification--in general public and public agencies are not informed of hearings on individual exception permits. (2) Initial applications for exception permits are granted by the Railroad Commission District Offices without a hearing. If objections are raised, the Commission may consider calling a hearing. (3) Once exception permits are granted by the Commission, the burden of proof of harm to the environment falls on the objections to such exceptions. It can be shown that such a burden of proof is inappropriate in evaluating harm to
the ecosystem. Nearly 2000 exceptions to the Railroad Commission's Statewide Rule forbidding the use of salt water pits were granted between January, 1969 (when the rule took effect) and May, 1970. When granted in such large numbers, exceptions both betray the industry bias of the Railroad Commission (alternative methods of brine disposal are expensive) and institutionalize pollution.

-Open and obvious cases of oil pollution have occurred in Texas in violation of the state pollution laws. Yet in no single case has the Railroad Commission undertaken enforcement proceedings, imposed penalties or brought court action against any oil company polluting the waters of Texas.

-Considerable delay occurs in the prosecution of pollution violations because the Attorney General lacks the authority to initiate suits. He must wait for recommendations for such suits from the Railroad Commission which has the jurisdiction over most cases of oil pollution.

-Under the statutory scheme of the State of Texas, the authority over pollution is divided such that several agencies may be responsible for some part of a case, but no agency has complete authority or responsibility.

-The policy of the Railroad Commission has been to instruct the offending company to clean up oil spills as quickly as possible. Because most spills are accidental in nature, the Railroad Commission does not recommend punitive action. While the statutes and the General Conservation Rules and Regulations appear to apply with strict liability, the Railroad Commission has a policy of requiring negligence before it brings any action.

-Enforcement of pollution laws as regards oil companies is the perogative of the Railroad Commission.

-The Railroad Commission has never in its history taken action against any oil company in any case of petroleum pollution.

\[39\] Ibid., pp. 9-10.
The findings of the committees provide some clue to the reasoning for the Fifty-Ninth Legislature amending the State Water Pollution Control Act in 1965 giving the Texas Railroad Commission the responsibility for controlling pollution resulting from oil and gas production. The Beach and Pipelines Committee recommended in conclusion "that the legislature should seriously consider removing from the Railroad Commission all authority to enforce laws relating to petroleum pollution and vest such authority with some other agency of the state."\textsuperscript{40}

From what the Pipelines and Beaches Committees concluded about the Texas Water Quality Board's performances, it is doubtful whether they would recommend giving the TWQB the Railroad Commission's authority over petroleum pollution. Observing that the prevention of environmental degradation on the state level depends on the existence of strict laws and vigorous enforcement by state agencies, it concluded that, regarding the latter point, "the Texas Water Quality Board has been conspicuously derelict."\textsuperscript{41} In its report on the TWQB, the committee identified fourteen significant problems with TWQB regulation. Some of the principal points included the utilization of local health authorities, existing waste disposal permits, hearing procedures, coordination of

\textsuperscript{40}Ibid., p. 10.

\textsuperscript{41}Ibid., p. 11.
water testing, and over reliance on polluters' claims of hardship.42

A further commentary on the regulatory practices of the Texas Water Quality Board and an up-date of the continuing story of the Dow Chemical Company and the TWQB occurred on March 11, 1971. Senator Schwartz rose on a point of personal privilege and took the Senate floor to blast Dow and the TWQB. He revealed that Water Quality Board investigators showed that the Brazos River below the Dow Chemical Company plant at Freeport was a "marine wasteland devoid of aquatic life."43 Senator Schwartz said, "I'm not telling you that there's been a few fish killed or that there's not as many fish as there use to be. I'm telling you that they've killed the river."44 A fisherman's paradise, where once six-foot tarpon were caught, the river is now a soup of industrial waste. "The Parks and Wildlife Department showed 'no evidence of aquatic life.' Investigators said they were unable to find any living thing, including single-celled organisms in the water."45 John Latchford, Director of the Water Board's district office in La Porte, said "the lack of aquatic organisms in the river water is 'more than likely due to the

42 Ibid., pp. 11-13.
44 Ibid.
45 Ibid.
amount of solids which Dow is putting into the river, and which are settling out below the plant and stifling the growth of micro-organisms."46

Senator Schwartz charged that Board Director Hugh Yantis knew of the study results but did not reveal them at a hearing February 25 at which Dow's waste discharge permit was reviewed. "It was covered up for the direct and unequivocal benefit of Dow Chemical."47 Schwartz later remarked that the board "does not regulate industry, it accommodates industry."48 He charged Yantis with being "an apologist for the polluters."49

Over a year later, in June of 1972, the TWQB finally released a study on Dow which confirmed what many persons had suspected all along. The report found approximately ten miles of the Brazos River and two miles of the Intercoastal Canal east of the river are being degraded by the industrial waste water. "The area of the estuary influenced by Dow was practically devoid of all benthic, nektonic and planktonic biological specimens during low flow conditions."50 This means bottom dwelling, swimming and floating marine life—

46Ibid.
47Ibid.
49UPI, op. cit.
50Fort Worth Star-Telegram, June 25, 1972, Sec. A, p. 11.
is everything from micro-organisms to fish are nowhere to be found. In Senator Schwartz's words "they've killed the river." The report indicated that Dow is operating under permits issued ten years ago and which have not been substantially changed or tightened since. 51

It would be unfair to paint all appointed officials and staff members as unsympathetic ogres with flaring nostrils and muck-dripping fangs. Some of these people are dedicated to solving the various environmental problems facing the state. Some, indeed, in their enthusiasm, have sacrificed their jobs trying to buck the system. One of these is a young attorney named Dan Burleson. Burleson, who headed the enforcement division of the Texas Air Control Board, was forced to resign in March 1971 because he proved too strict and vigorous in his approach to enforcement of air control standards. 52

The trouble developed when Burleson was caught in the "squeeze of pressure politics" between the appropriations committee of the Texas House of Representatives and the State Department of Health, from which agency Burleson had been supplied to the Texas Air Control Board. The Texas Industrial Commission, charged with attracting industry to Texas, had complained to Representative Bill Heatly, powerful chairman of the Texas House Appropriations Committee, that the TACB's

51 Ibid.

enforcement policies were hurting industrial recruiting efforts. The Texas Chemical Council and the Texas Manufacturers Association also lobbied against the enforcement policies and specifically demanded that Burleson be muzzled or busted. According to Burleson, Heatly began putting pressure on the State Department of Health. Heatly reportedly indicated to the Health Department and the TACB, both requesting budgets substantially larger than in the past, that their requests for funds would be more favorably received if Burleson were removed from his position. It was Burleson's opinion that Heatly threatened to tighten the purse strings because he (Burleson) and the TACB were too strict with industry and that the enforcement division was not cooperative enough. The complaint alleged that the TACB was expecting too much from these people in compliance with the regulations, too much and too fast. Heatly denied that any such pressure politics were put to work, or that, indeed, any threats, implied or otherwise, had been brought to bear on the Health Department.\textsuperscript{53} And Charles R. Barden, Executive Secretary of the TACB, also denied the incident, claiming, "We've never had any threat that our appropriations would be cut."\textsuperscript{54}

\textsuperscript{53}A letter was sent to Representative W. S. Heatly by this writer requesting his side of the story. No reply was ever received.

\textsuperscript{54}\textit{Dallas Morning News, op. cit.}
The incident as related by Burleson, however, is credible, given Heatly's past manipulation of the appropriations and funding of air control activities. In 1969, during the Sixty-First Session, Heatly prohibited the TACB from spending any more money to regulate air pollution by cotton gins.\textsuperscript{55}

Heatly comes from that part of Texas in the Panhandle where cotton is still king. Also eliminated from the spending bill was the Board's Director of Administrative Services. The most famous manipulation of appropriation funds by Heatly will undoubtedly go down in Texas history as the "Great Moss-Cutter Caper." Heatly, a patriarch of the Texas system in the House, had decided to take revenge on Representative Ben Z. Grant of Marshall, who was a member of the Dirty Thirty. Heatly's appropriation bill had ear-marked $220,000 for a moss-cutter on Caddo Lake, but only for that part of the lake that lay in the district of fellow team member and personal friend Representative Jim Slider and not for the part of the lake that lay in Representative Grant's district.\textsuperscript{56}

The pork-barrel story is typical Texas politics. Environmentalists will recall the tale and remember it when the legislators admonished the conservation groups about the cost factor in ecology.

\textsuperscript{55}Texas Observer, May 9, 1969, p. 2.

\textsuperscript{56}Sam Kinch and Ben Procter, Texas Under a Cloud (New York, 1972), pp. 100-101.
CHAPTER VI

PROPOSALS FOR REFORM

Legislative Reform: A Problem of Power and Influence

This study has documented the failure of the state government in dealing effectively with the problems of environmental degradation. The legislature, torn by conflicts of interests and dominated by special interests working to circumvent environmental control, has failed to adequately respond to the problem. The executive branch, from appointments to administrative enforcement procedures, has abdicated its responsibility to the public interest. Any proposals for reform, therefore, must come to grips with the weaknesses and failures of the lawmaking and law-enforcing institutions of state government.

Most suggestions for legislative reform have focused on improving the "machinery" of the lawmaking process. Because Americans put great faith in their institutions, they generally believe that by tinkering with the mechanics of the system they can bring about the required corrections. For most Americans, reforming government is quite similar to the tuning of an automobile engine. The national Citizens Conference on
State Legislatures (CCSL) and the Texas Citizen's Committee of 100, in this tradition, have proposed changes in the length and scope of legislative sessions, reforms in the committee system and improvements in legislative staffing. Recent criticism has also risen over the powers of the Speaker of the House, and there have been suggestions for curbing his authority and influence. All of these proposals for reform, it is hoped, will result in better government at the state level. All of these proposals are worthwhile, but the really important changes, that will most dramatically initiate serious consideration of environmental problems and other social issues, will have to focus on "political leadership recruitment" and the "power and influence" of special interest groups.

The aim of genuine reform must be first directed at electing political leaders who will make decisions with an ecological perspective. This must be followed by sincere efforts to balance power and break the heavy-handed influence of powerful monied interests which in reality "purchase legislative favors." Reform originating at the election phase, including single member legislative districts and limitations on campaign expenditures along with full financial disclosure, is imperative. Tougher lobby controls and a greatly expanded staff for legislators for the purpose of presenting the public interest side of issues is also essential. In the final analysis, legislative reforms are only as good
as the legislators themselves, which means the success of the legislature and environmental protection will depend on individual political leaders. Texas government, like all governments, is not based on law but on the politics of men.

Administrative Reform

There are four major administrative problems toward which reform must be directed. These include organization, executive appointments, enforcement and appropriations.

There are at least twelve administrative boards, commissions or agencies involved in the control of air and water abuse. Duplication, conflicting authority and fragmentation of authority results in inefficiency, ineffectiveness and wasted tax dollars. It is, therefore, recommended that a Texas Environmental Quality Agency be established, and that all authority for air and water quality and solid waste disposal be turned over to this single state agency with full administrative capabilities and a budget to meet its responsibilities. All other environmental boards, commissions and agencies would be abolished and those quasi-environmental agencies would relinquish their authority over previously assigned environmental problems. This would mean that the Texas Air Control Board and the Texas Water Quality Board would be abolished. The Railroad Commission would surrender its authority over pollution resulting from oil and gas pollution.
To implement the new TEQA's operations, it is also recommended that Regional Environmental Quality Field Offices be established in each of the twenty-one "planning regions" delineated by the State Division of Planning Coordination. The research and the designation of these regions has already been accomplished. Figure 3 depicts those twenty-one regions.

The regions reflect a community of public and private interests resources, problems and opportunities. Each region is functional for application of state and local public policy decision-making processes directed at the regional level. In addition, each region represents an identifiable and feasible unit for planning and for program development on both state and multi-jurisdictional local bases. The focal point of each of these regions is a major urban center and, where it was feasible, urban centers include the central cities of Texas' Standard Metropolitan Areas.¹

The regional TEQA offices could be based in the urban concentrations and would supplant existing local environmental control offices, including county and city authorities. Figure 4 pinpoints the regional centers where the regional TEQA offices may be located. Field offices would be responsible for enforcement of all state quality control programs. They would coordinate planning and operation of related efforts of state, federal, and local governments. The report of the

Fig. 3 -- Texas Planning Regions

Fig. 4 -- Regional Centers

Governor's Division of Planning Coordination underscored the desirability and feasibility of the TEQA regional concept, when it pointed out that "problems such as the availability of water, air and water pollution, and similar conditions which transcend political boundaries may be more effectively dealt with if regionally-based resources are pooled and properly directed."\(^2\)

Reorganization of environmental control agencies will not by itself be enough. The appointments to the Texas Environmental Quality Agency or to existing boards and commissions must not only insure industrial and governmental representation, but must also include representation of consumers and environmentalists. Only with all points of view present at the policy-making table will fairness and sound ecological management be more reasonably reached.

Once reorganization and appointments are complete, enforcement of agency policy should be tough. The "permit system" for water quality control and the "variance system" dealing with air pollution should be strictly controlled or, in the case of variances, curtailed with specific deadlines established for compliance. The present system of "negotiation" and "agency nagging" is not an acceptable process. The present system is totally inadequate.

\(^2\)Ibid., p. 5.
One of the chief problems of regulatory agencies in Texas is the lack of appropriate funding to carry out statutory obligations. The Texas Water Quality Board, for example, has been working with a budget which amounts to spending approximately twenty cents per person in Texas. The board has indicated that this is "far too low." The budgets of both the Air Control and Water Quality boards have been continuously slashed by the governor and the House of Representatives Appropriations Committee. Without adequate financial resources, anti-pollution activities are severely undermined. Therefore, appropriations must be substantially increased. The rural orientation toward spending must be reversed, insuring that state money goes where the people are--the urban centers of the state.

Inalienable Rights and Citizen Power

Article I, Section 2 of the Texas Constitution reads: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." The implication is quite clear; government exists to protect the interests of the people. Unlike the writers of the United States Constitution, the drafters of the Texas Constitution of 1876 made this principle a part of the body of constitutional law. The founding fathers of the


4 The State Constitution of Texas, Article I, Section 2.
federal republic were content to pay tribute to the idea in a preamble, while the signers of the Texas document stressed the concept as a matter of law. But what happens when the government fails in its legal responsibility to the people? What does the individual do when the power of special interests nullify the political influence he can exert on the legislature and the regulatory agencies? How do we insure the responsiveness of the institutions of government when the normal channels of political participation are thwarted? The logical alternative is to seek justice in the courts. The citizens should be able to take the environmental issue to the courts for final arbitration.

The Texas voters, in the general election of 1972, approved an amendment calling for the Sixty-Third Legislature to rewrite the Texas Constitution. This rare opportunity will allow the lawmakers to break new ground in the field of human rights and expand the list of inalienable rights to include "the right to an in abitable environment," which would be a right enforceable in the state courts. Such a right should include two important elements. Like other rights, it should determine the limits beyond which even a majority could not tamper with the environment. In addition, it should give all interested parties the opportunity to participate effectively in political and economic decision-making processes, which individually or collectively have a
substantial impact on their environment. To lend substance and muscle to this right and to increase the power of the individual, it is further recommended that the Texas Legislature make the principles of the Environmental Protection Act a part of statutory law.

The concept of environmental rights supported by the possibility of legal remedy in the courts is not a substitute for legislative and administrative machinery but it does offer one additional approach for safeguarding the environment against wanton exploitation and destruction. As Representative Rex Braun has said: "It is just another avenue. At this stage of the game, I want to open as many avenues as possible to stop the destruction of our environment."6

The great value of the Environmental Protection Act is that it affords the private citizen an opportunity to challenge the arbitrary decisions of big business and big government. To understand exactly how this law would operate, if adopted, we need only look to the case of Texas Oyster Growers Association vs. Odom and simply "affirm" what the court, in that particular case, "denied."7


The Texas Oyster Growers Association filed suit in 1965 against the State Parks and Wildlife Chairman, Will E. Odom, to challenge the authority of the state to authorize private companies to dredge in public waters for oyster shells. The suit brought by the oyster growers was generated out of economic interests the growers had in the area of the dredging operations and the potential threat such dredging possessed for their livelihood. Equally important, however, was the ecological considerations of this policy. There was real concern for the adverse effects the dredging would have upon the general ecology of the area, which served as feeding and breeding grounds for various species of birds and aquatic life.

The court decided in this case that the oyster growers had no grounds upon which to challenge the actions of the state. The decision was based on three points. The court held that the litigation brought by the growers was unpermitted litigation against the sovereignty of the state of Texas. It also declared that the order granting the permit was within the administrative agency's discretion. Finally, the court stated that the plaintiffs had no vested property rights at stake and thus no litigable interest in the controversy. Had the Environmental Protection Act of 1971 been in force, it would have permitted the suit brought by the oyster growers.

Ibid.
Although certain legislators have violently opposed the spirit and intent of the Environmental Protection Act, Texas has precedents for such concepts as are embodied in the new law. In 1905, for example, a law was passed by the state legislature which gave district courts the power to intervene in the regulation of oil and gas production if they chose to do so as a result of litigation. In an interesting blend of old English and American custom, Texas was using local judges and justices as administrative officers rather than consciously moving in the direction of special administrative agencies. The "public trust" concept also has a Texas precedent. The "public trust" idea places the state in the legal situation of being responsible for regulating the air, water, land and other natural resources in the interest of the people. The state is the trustee for the people. Actually, the spirit of the public trust concept had been previously recognized by the state of Texas as far back as 1917. In that year, which was the same year that the Texas Railroad Commission was granted some control over the petroleum industry, an amendment was added to the state constitution which declared in part that "the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and

9Revised Civil Statutes of Texas, 1911, title 134, articles 7852-54.

10Willbern, op. cit., p. 34.
the Legislature shall pass all such laws as may be appropriate thereto."\textsuperscript{11} Clearly the ideas that judges may act in litigable disputes involving administrative decisions and that the air, water and natural resources are a public trust are not completely alien to Texas political history and law.

The other issue raised by the court dealt with the challenge brought by the plaintiffs to the actions of the state. The court held that such a challenge was unpermitted litigation against the sovereignty of the state. But had the court read the dispute differently, it may have reached a different conclusion.

\textit{\ldots} the Texas court could have gone beyond the fact that shell dredging was in general legal, to ask whether the particular leases in question were consistent with the obligation of the state to protect public rights to the use and enjoyment of water resources--an approach often taken in such cases. Even the ability of fishermen to sue to enforce the public right of fishery--flatly denied by the Texas court--has been clearly recognized in a number of other states.\textsuperscript{12}

Sax best expresses what this "obligation of the state to protect public rights" in the area of the environment encompasses.

\textsuperscript{11} Constitution of Texas, Article XVI, Sec. 59-a.

\textsuperscript{12} Sax, \textit{op. cit.}, p. 187.
... a public right to clean air will not necessarily be a right to maintain the air as fresh as it is on the top of the highest mountain. Rather, it will be a right to maintain it as clean as it ought to be to protect health and comfort when considered against the demands for spillover use of the air by other enterprises—and with due consideration of the need for such uses, the alternatives available to the enterprises, existing and potential technology, and the possibility of other less harmful locations. 13

The greatest obstacle to successful pollution control policies and sound ecological planning is the political factor. This is not to say that politics is an evil and corrupt business which must be shunned or eliminated, but it is to make the point that political influence has been dominated by polluter-oriented interests whose pressures have rendered ineffective anti-pollution procedures. The foregoing analysis of the Texas political system and its attempts at dealing with the ecological problems of the state clearly demonstrated this fact.

The virtue of the judicial system is that it is far less open to direct or indirect political pressure than the more political grounded and oriented legislative and administrative branches of the government. The selection of judges, even where elected, as in Texas, is not determined by "anyone's estimate of a given judge's attitudes about" specific issues

13 Ibid., p. 162.
as narrow as environmental matters.\textsuperscript{14} Judicial selection is tempered by other considerations such as a judge's position on criminal law, his attitudes about law and order and related matters.\textsuperscript{15} In addition, the breadth of judicial work and diffusion of environmental issues among many courts result in the fact that environmental disputes will actually occupy only a small fraction of the court's time, thus freeing the judicial system from political pressure in environmental cases.

Another advantage of the judicial process is the opportunity it affords the private citizen for personal initiatives. Agencies and officials are not able to cope with "every" incidence of pollution or ecological abuse; thus initiatives of private citizens allow the individual to fill in the "gaps of attention" the boards and commissions are unable to treat. Here the initiative is left up to the citizen and no administrator need institute proceedings.

A further benefit of the judicial response is that it requires that disputes be reduced to concrete and specific issues of fact. It thus avoids the generality and windy platitudes which normally surround such public disputes. Arguments couched in the highly emotional polemics of "lost jobs," "depreciating oil supplies," or "economic depression"

\textsuperscript{14}Ibid., p. 109.
\textsuperscript{15}Ibid.
will simply not be sufficient in themselves. What the judicial approach does in essence, therefore, is to provide the "people" with an additional "source of leverage."\textsuperscript{16} The reality of the political world demands that an alternative be available to the citizen so that he can personally defend his environment against destruction or abuse.

Conclusion

Will these political changes discussed here make any difference? In the opinion of this writer, they will. But they do not come about without pressure. The problems of state government do not evaporate. It takes tough pragmatic political muscle to move the system. And tough political clout is grounded in a "gut level" conviction that reform must be achieved.

This report has been entitled "The Texas Failure" because the politics of pollution in Texas are characterized by failures in the state's political leadership and in the state's political institutions. Since beginning the research on this study, party primaries and general elections have swept many of the men who fought against reform and environmental legislation out of office. Single member districts now exist in Dallas, Houston and San Antonio. And the voters have approved a constitutional convention. The important changes may be starting already that will prevent continuation of the Texas failure.

\textsuperscript{16}Ibid., p. 115.
relating to suits for declaratory and equitable relief to protect air, water, and natural resources and the public trust therein from pollution, impairment, and destruction; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. This Act shall be known and may be cited as the Environmental Protection Act of 1971.

Sec. 2. The Legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of the air, water, land, and all natural resources of the state and that each person has the responsibility to contribute to the protection and enhancement thereof. The Legislature further finds and declares that it is in the public interest to provide each person with an adequate remedy to protect the air, water, land, and all natural resources of the state from pollution, impairment, or destruction.

Sec. 3. The State of Texas and each instrumentality, agency, and political subdivision thereof, which is authorized to exercise any jurisdiction over, or to have any effect upon, the air, water, land, or other natural resources in the state shall do so 'in public trust so as to protect and maintain for the citizens a quality environment.

Sec. 4. The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization, or other legal entity may maintain an action in the district courts of the state for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization, or other legal entity for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction.

Sec. 5. (a) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to, pollute, impair, or destroy the air, water, or other natural resources or the public trust therein, the defendant has the burden of establishing that there is no feasible alternative to the defendant's conduct and that such conduct is consistent with and reasonably required for the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction.
(b) In determining the feasibility of alternatives the court shall consider the value attributable to the saving of natural resources and the public trust from pollution, impairment, or destruction.

(c) Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the district courts shall apply to actions brought under this Act.

Sec. 6. The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust therein from pollution, impairment, or destruction.

Sec. 7. (a) If administrative, licensing, or other proceedings have been held or are available to determine the legality of the defendant's conduct, the court may submit the parties to such proceedings when the court deems submission to be advisable, in which event, the administrative agency shall give the plaintiff advance notice of all hearings and the plaintiff shall have the right to present and object to testimony and argument, to participate as fully as any other party to such proceedings, to receive copies of all briefs filed and orders rendered, and to appeal from any advance order. All hearings in such proceedings shall be open to the public. In so submitting the court may grant temporary equitable relief where appropriate for the protection of the air, water, and other natural resources or the public trust therein from pollution, impairment, or destruction. In so submitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment, or destruction has been afforded.

(b) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources and on the public trust therein in accordance with this Act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this Act.

(c) Where, as to any administrative, licensing, or other proceeding, judicial review thereof is available, notwithstanding the provisions to the contrary of any other law pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for the purposes of judicial review.

Sec. 8. (a) Whenever administrative, licensing, or other proceedings, and judicial review thereof are available by law, the agency or the court shall permit the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, and any plaintiff in a suit involving submission by a court under Section 7(a) of this Act, and may permit any person, partnership, corporation, association, organization, or other legal entity to intervene as a party on the filing with such agency of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water, or other natural resources or the public trust therein.
(b) In any such administrative, licensing, or other proceedings, and in any judicial review thereof, any alleged pollution, impairment, or destruction of the air, water, or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible alternative consistent with the reasonable requirements of the public health, safety, and welfare.

Sec. 9. This Act shall be supplementary to existing statutes and to administrative and regulatory procedures provided by law.

Sec. 10. If any section, subsection, paragraph, sentence, clause, phrase, or word in this Act, or application thereof to any person or circumstance is held invalid, such holding shall not affect the validity of the remaining portions of this Act, and the Legislature hereby declares it would have passed such remaining portions despite such invalidity.

Sec. 11. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.
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