An Analysis of the Performance of Texas State Agencies in Protecting the Environment

by

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ABSTRACT

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With emphasis on the recurring accidents in the transportation and production of petroleum, this study analyzes the performance of Texas State agencies in protecting the marine environment. It summarizes the chronic and destructive force of crude oil and petroleum products in the food chain and then evaluates the piecemeal legislative and administrative approach that is designed to cope with these problems. Noting the absence of a uniform state environmental policy and the failure of state agencies to effectively monitor and process pollution information, the study specifically characterizes the efforts of the Texas Water Quality Board and the Texas Railroad Commission. Describing the insulation of pollution control agencies from the public, the study proposes a legislative response, The Environmental Protection Act, which would provide an active role for concerned citizens. Also included are discussions of the problems of mapping environmental factors and comprehensive spill retention and recovery plans.
ACKNOWLEDGMENT

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>HOW A SERIES OF OIL SPILLS THREATEN THE MARINE FOOD CHAIN</td>
<td>1</td>
</tr>
<tr>
<td>Two</td>
<td>THE PATCHWORK OF JURISDICTION</td>
<td>4</td>
</tr>
<tr>
<td>Three</td>
<td>THE RAILROAD COMMISSION - A CASE OF CALLOUS DISREGARD</td>
<td>14</td>
</tr>
<tr>
<td>Four</td>
<td>IT TAKES THE RAILROAD COMMISSION TO MAKE THE WATER QUALITY BOARD LOOK GOOD</td>
<td>18</td>
</tr>
<tr>
<td>Five</td>
<td>THE CITIZENS ROLE - THE ENVIRONMENTAL PROTECTION ACT</td>
<td>22</td>
</tr>
<tr>
<td>Six</td>
<td>MAPPING ENVIRONMENTAL FACTORS ON THE TEXAS COAST</td>
<td>45</td>
</tr>
<tr>
<td>Seven</td>
<td>PLANS FOR PREVENTION OF INDUSTRIAL ACCIDENTS</td>
<td>49</td>
</tr>
<tr>
<td>Eight</td>
<td>PROPOSAL FOR UNIFORM ADMINISTRATION ACTION IN POLLUTION CONTROL</td>
<td>53</td>
</tr>
<tr>
<td>Nine</td>
<td>SUMMARY</td>
<td>56</td>
</tr>
<tr>
<td></td>
<td>FOOTNOTES</td>
<td>58</td>
</tr>
<tr>
<td></td>
<td>APPENDIXES</td>
<td></td>
</tr>
<tr>
<td></td>
<td>THE ENVIRONMENTAL PROTECTION ACT</td>
<td>69</td>
</tr>
<tr>
<td></td>
<td>PIPELINE MAPS by the RAILROAD COMMISSION</td>
<td>72</td>
</tr>
<tr>
<td></td>
<td>ENVIRONMENTAL MAP OF THE HOUSTON-GALVESTON AREA</td>
<td>78</td>
</tr>
</tbody>
</table>
Recurring accidents in the transportation and production of oil such as the Santa Barbara blowout, oil well fires off the Louisiana coast, and super tanker sinkings like the Torrey Canyon have caused the public to become concerned about petroleum as a serious threat to the environment. Investigations by the committees have found that the presence of oil on the beaches and in the coastal waterways has become a common occurrence in Texas. However, few people realize that the spectacular accidents (those mentioned above) contribute only a small fraction of the total oil that enters the coastal waters. Oil pollution from pipeline breaks, accidents in port, incompletely burned fuels and untreated industrial and domestic wastes contribute an equal or larger amount of oil pollution than the more dramatic petroleum accidents.¹

Some scientists and some spokesmen from the oil industry and the state pollution agencies have suggested that oceans and the Gulf of Mexico are capable of assimilating the entire oil pollution that enters the Texas waterways. Unfortunately this position is incorrect. Oil production, transportation, and use are heavily concentrated in the coastal region and the resulting pollution predominately affects these areas. Oil pollution does not distribute itself evenly throughout the entire water profile; it is concentrated in the coastal waters that make up one-tenth of one percent of the total surface area of the oceans. These coastal waters, nursery grounds of sea life, are also the areas most adversely affected by other activities of man, such as waste dis-
posal, dredging and dispersal of chemical poisons like insecticides.

Studies by the interim committees have found that crude oil and other petroleum products are far more dangerous and persistent in the marine environment than anticipated. It has often been thought that the eventual disappearance of the visible evidence of petroleum pollution coincided with the disappearance of biological damage. This is untrue.

Crude oil and petroleum products contain many substances that are most toxic to marine organisms. Some petroleum substances cause immediate death, others have a delayed effect. Because crude oils and petroleum products differ widely in relative composition, the specific toxicity varies widely. Generally, crude oil is less immediately toxic than distilled products. Nevertheless, crude oil that has been substantially weathered by exposure in the coastal waters still contains many extremely toxic hydrocarbons. The more persistent, slowly acting poisons, like carcinogens, are relatively abundant in crude oil and are quite resistant to weathering.

Crude oil and oil products are persistent poisons resembling in their longevity DDT, PCB and other synthetic materials that have long been recognized as serious threats to the environment. Like other long lasting poisons, petroleum from pollution enters the marine food chain and becomes concentrated in the fatty parts of organisms. The petroleum poisons can then be passed on from prey to predator until it finally becomes a hazard to man himself.

Petroleum pollution that does not enter the food chain directly can attach to sediments that move with bottom currents and contaminate unpolluted areas long after the initial "accident." Because of this, a single and relatively small spill may lead to chronic and destructive
pollution of a large area.

None of the presently available countermeasures in the State of Texas oil spill contingency plan are sufficiently effective to eliminate the continuing environmental degradation occurring in the coastal waters of Texas.

The most promising methods of reducing the disastrous effects on the environment are those which rapidly remove oil by mechanical recovery. The use of sinking agents or detergents have only a cosmetic effect causing the toxic and undegraded oil to spread in the waters producing greater biological damage than if the spill had been left untreated.
THE PATCHWORK OF JURISDICTION

The allocation of responsibility to so many agencies threatens the efficiency and effectiveness of pollution control activities. For example, Water Quality Board coordination and supervision of Texas pollution control activities 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 ((Art. 7621d-1 Section 3.21)), and by the Texas Water Development Board's practice of formulating plans without adequately considering water quality objectives. The effectiveness and efficiency of water pollution control efforts are reduced because the Water Quality Board, the Railroad Commission, the Health Department, the Parks and Wildlife Department and the Water Development Board each engages in pollution research, monitors Texas waterways and even determines what the quality of Texas waters should be. (The Water Quality Board sets stream standards that reflect the quality that Texas waters should be. Other agencies, however, indirectly determine standards for water quality. The Health Department and Parks and Wildlife Department determine standards by deciding what quality should be for human consumption and for fish and wildlife protection.) Moreover, since the Water Quality Board is not completely responsible for pollution control, the public cannot exercise its proper role in governmental decision-making by focusing its indignation on one agency in response to serious water pollution problems.


The development, regulation and protection of natural resources in Texas is the total or partial concern of at least 12 state agencies:

1. Texas Water Rights Commission ((established by Texas Revised Civil Statutes Annotated Article 7447)):

   Exercises continual supervision over the public waters of the state. Its regulatory functions include investigations and studies made to insure compliance with state water statutes and commission rules ((Art. 7477)).

   The Commission is required by statute to investigate and approve or
disapprove petitions for the creation of multi-county water improvement districts (Art. 7880-21), water control and improvement districts (Art. 7880-19), and underground water conservation districts (Art. 7880-3c). It is also responsible for the adjudication and administration of water rights on streams (Art. 7452a and Art. 7477).

Other programs of the commission include: (1) water management - providing guidelines for use in administration of adjudicated water rights (Art. 7452a and Art. 7477); (2) review of federal water development projects in Texas (Art. 7472e); and (3) supervision of all water districts and most river authorities in the state (Art. 7477).

2. The Texas Water Development Board:

Responsible for long-range planning for the development and use of Texas water resources (Art. 7537a (Supp. 1970)). Its most significant achievement has been the completion of the Texas Water Plan, a comprehensive statewide water plan that was released in November, 1968, and publicly adopted by the Board in April, 1969. Voters have twice defeated proposed bonds sale to finance the plan due to its cost and possible adverse environmental side-effects.

The Water Development Board is required to advise the Water Quality Board on matters relating to the quality of ground water in the State (Art. 7621d-1 Section 1.07 (Supp. 1970)), and also monitors pesticide levels in State waters in conjunction with the U. S. Geological Survey. It should be noted, however, that the Board's appropriations are restricted to water pollution control activities that are coordinated with the Water Quality Board (2 Texas Laws 1969, Chapter 50, Art. 3, at 860).
3. The Texas Water Quality Board:

Authorized to establish water quality criteria for all streams and
to issue permits for the discharge of treated water into or adjacent to
the waters of the state. The Board is instructed to cooperate with other
agencies, affected groups and industries in its program of prevention,
abatement and control of pollution, and to conduct studies and dissemin¬
ate information relating to water pollution and its control and pre¬
vention. ((Art. 7621d-l.))

The Board is responsible for the control of collection, handling,
storage and disposal of industrial solid waste ((Art. l4;77-7)), and pos¬
sesses regulatory powers over wells injecting industrial and municipal
waste (other than oil drilling water) into the ground ((Art. 7621b.)).

4. The Texas Water Well Drillers Board:

Only minimally concerned with water quality management. As part
of the process of regulating the operations of water well drillers, the
Board attempts to prevent contaminated water released in drilling opera¬
tions from polluting fresh water ((Art. 7621s Section 15 (Supp. 1970) )).

Has no water pollution control authority over the use of injection
wells for waste disposal except in an advisory capacity ((Art. 7621b
Section 3(c) (Supp. 1970) )).

5. The Texas State Soil and Water Conservation Board:

Coordinates the program and activities of the 184 soil and water
conservation districts throughout the State ((Art. 165a-l)). Because
of the physical unity between soil and water, many of the conservation
activities undertaken by the Soil and Water Conservation Board vitally
affect the water resources of the State.
6. The Texas Air Control Board:

The principal authority in the State on matters relating to the quality of the air resources in the State and for setting standards, criteria, levels and emission limits for air content and pollution control ((Art. 417-5)).

7. The Parks and Wildlife Commission:

Responsible for protecting, perpetuating and improving the State's public recreational areas (((Tex. P. C. Art. 978f-3a), (Texas Revised Civil Statutes Annotated Art. 5.1.1b-1, Art. 6069 and Art. 6070h) )) and for preserving its wildlife resources (( (Tex. P. C. Art. 906, Art. 917, Art. 928a, Art. 978f-3, Art. 978f-5, and Art. 978j-1) (Texas Revised Civil Statutes Annotated Art. 4018, Art. 4049a, Art. 4049c and Art. 4075a) )).

The Commission has the authority to issue permits for "taking, carrying away or distributing of the marl, gravel, sand, shells, and mudshell," from any "island, reef, bar" or the surface of State-owned submerged land (Texas Revised Civil Statutes Annotated Art. 4051).

The Water Quality Act (Texas Revised Civil Statutes Annotated Art. 7621d-1) authorized the Parks and Wildlife Department to file suit against discharger when "aquatic life or wildlife" is affected. But appropriation restrictions have hamstrung the Parks and Wildlife enforcement effort ((2 Texas Laws 1969, Chapter 50, Art. 3, at 822)).

The Department does conduct research on pollution problems as part of its protective role with respect to marine and wildlife (Texas Revised Civil Statutes Annotated Art. 4018, Art. 4050f and Art. 4075b), monitors streams to ascertain the quality of the water and watches Texas waterways for evidence of fish kills caused by pollution.
The Department advises the Water Quality Board on the effects of particular discharges on fish, game and recreation, and also advises or is authorized to advise the General Land Office on the following: water pollution regulations ((Texas Revised Civil Statutes Annotated Art. 5351)); geological and geophysical exploration permits ((Texas Revised Civil Statutes Annotated Art. 5382b (1962))); and applications for offshore pipeline easements ((Texas Revised Civil Statutes Annotated Art. 5351)).

8. The Texas Industrial Commission:

The Commission’s primary concern is attracting and locating industry in Texas through promotion of the state’s natural resources as an economic development base ((Texas Revised Civil Statutes Annotated Art. 5190\(\frac{3}{4}\)(a) and 6141\(\frac{1}{4}\))). The Commission concentrates on two program areas:

(1) Complementing and coordinating existing industrial development programs of private business and local committees; and

(2) Providing an information center through which a state advertising program can be carried on and from which factual data on all phases of industrial development can be obtained.

In pursuing the second program, the Commission "shall conduct and encourage research designed to further new and more extensive uses of the natural and other resources of the state, and designed to develop new products and industrial processes" ((Texas Revised Civil Statutes Annotated Art. 6141\(\frac{1}{4}\) Section 4(d))).

9. The Texas Highway Commission:

Passes on the location of new turnpike projects to be constructed
by the Texas Turnpike authority (Texas Revised Civil Statutes Annotated Art. 667h v Section 5(d)). The Turnpike Authority may acquire for such highway construction "public or private lands, including public parks, playgrounds or reservations, or parts thereof or rights therein... as it may deem necessary." (Art. 667h v Section 5(b)) Further, "the State of Texas hereby consents to the use of all lands owned by it, including lands lying under water, which are deemed by the authority to be necessary for the construction or operation of any Turnpike Project" (Art. 667h v, Section 6).

Construction of new roads obviously has a direct bearing on the State's natural resources in terms of sound land use planning.

10. State Board of Health:

Supervises Department of Health which is responsible for approving construction plans for new public waste disposal plants and for improvements to existing plants (Texas Revised Civil Statutes Annotated Art. 7621-d Section 3.24 (Supp. 1970) and Art. 1477-1 Section 12).

The Department of Health is the state solid waste agency with respect to the collection, handling, storage and disposal of municipal solid waste (Art. 1477-7 Section 3(a)).

Extensive water quality surveillance activities are also conducted by the Health Department: (1) in oyster certification (Art. 4050f Section 2 (1966)) (the Department is conducting a joint survey with Parks and Wildlife of pesticide levels in oysters) and (2) in monitoring municipal water supplies (Art. 1477-1 Section 12). The Department is also conducting a "Community Studies" program to determine the long range effects of pesticides on human health.
General Land Office:

The Land Commissioner has the power to grant leases for oil and gas development on: Public School land ((Texas Revised Civil Statutes Annotated Art. 15.01 of Texas Education Code, Art. 54.15e and Art. 54.21c-3)) as Chairman of the School Land Board; University Lands as member of Board for Lease of University Lands ((Art. 2603a (1965), Art. 54.17 (1962) and Art. 2596 (1965))); land bought by the Veterans Land Board (for mineral leases only) as Chairman of that Board ((Art. 54.21-m Section 2)); on other state lands, for example, lands owned by other state agencies, as Chairman of other Boards for Lease ((Art. 5358-d)).

The Land Commissioner has the authority to lease Public School and State-owned submerged lands for oil, gas and sulphur pipelines ((Art. 6020a)).

The Land Commissioner is authorized to issue permits for geophysical and geological investigations of Public School and submerged lands ((Art. 5382b Section 3)).

The Land Commissioner has the responsibility to control the pollution of inland streams ((Art. 5351)) and Gulf Waters ((Art. 5366 and Art. 54.21c-3 Section 14)). He is given statutory authority to impose antipollution regulations on permittees and lessees on State-owned lands. Art. 5382(b) Section 3 authorizes such regulations over surveys and investigations of areas within tidewater limits. Art. 54.21c-3 Section 14 vests all responsibilities of the Mineral Development Board in the School Land Board—one of those responsibilities being the prevention of pollution arising from mineral development. ((Art. 54.21c Section 3 subsection 6))
12. Railroad Commission:

Given jurisdiction over oil and gas drilling and over pipelines with very broadly defined powers ((Texas Revised Civil Statutes Annotated Art. 6023 and Art. 6029a)).

Given jurisdiction in preventing pollution resulting from oil or gas production in Water Quality Act ((Art. 7621d-1)). (Section 1.10--Duty of Railroad Commission - "solely responsible for the control and disposition of waste and the abatement and prevention of pollution of surface and subsurface water resulting from activities associated with the exploration, development and production of oil or gas") and the power to issue waste discharge permits for persons engaging in oil and gas production.

This delineation of authority says nothing about transmission of oil or gas.

POTENTIAL JURISDICTIONAL CONFLICT BETWEEN THE GENERAL LAND OFFICE AND RAILROAD COMMISSION SHOULD THE GENERAL LAND OFFICE UNDERTAKE EFFECTIVE REGULATION OF OIL AND GAS PIPELINES AND DRILLING.

To reiterate: The Railroad Commission has general jurisdiction over pipelines and oil and gas drilling and producing operations based on Texas Revised Civil Statutes Annotated Art. 6023 and 6029a. It also was given sole responsibility for the control of pollution resulting from oil and gas "exploration, development and production" by Art. 7621d-1 Section 1.10.

The Land Commissioner through his power to issue permits for oil and gas explorations ((Art. 5382b Section 3)), to lease Public School and submerged lands for easement ((Art. 6020a)), to authorize mineral leases of the Public School and submerged lands of Texas ((Art. 15.01
of the Texas Education Code, Art. 5h2lc-3 Section 2) and his responsibility to control pollution in inland streams ((Art. 5351)) and Gulf Waters ((Art. 5366)), can insert antipollution clauses in the above three leases and lay down specific antipollution regulations defining these general clauses.

The Railroad Commission apparently noticed the omission of "transmission" from the list of oil and gas activities to be regulated by them in accordance with Art. 762ld-1 since it has issued no regulations for the construction and maintenance of intrastate oil pipelines. Since the other acts giving the Railroad Commission authority over pipelines ((Art. 6023 and 6029a)) were passed with the intent to prevent "waste" of oil or gas resources and not to prevent pollution of water, it can be argued that the Railroad Commission has no definite authority to prevent pollution associated with pipelines.

Thus: Since the water pollution authority given the Land Commissioner by Art. 5351, 5366 and 5h2lc-3 Section 14 is not superseded by more recent authority given the Railroad Commission in the area of pipeline regulation and since the general regulatory apparatus of the Railroad Commission is oriented toward the prevention of "waste" of oil and gas rather than the prevention of waste of water resources, the General Land Office has substantial grounds for taking regulatory jurisdiction over pipelines in Texas.

The Railroad Commission is given clear jurisdiction over water pollution resulting from oil and gas drilling operations by Art. 762ld-1; the Land Commissioner's water pollution regulatory authority over its lessees ((Art. 5351, Art. 5366 and Art. 5h2lc-3 Section 14)) was not repealed by Art. 762ld-1.
Given the poor pollution control exerted by the Railroad Commission, it would appear only right and proper for the Land Commissioner, with his concurrent pollution regulatory authority over oil and gas lessees, to exercise that authority to reduce water pollution resulting from drilling, in Texas. But speaking practically and no longer idealistically, the Land Commissioner could not easily exercise his regulatory authority. He would face a stiff jurisdictional challenge from the Railroad Commission—a challenge much harder to meet than in the case of pipeline regulation authority.

Any potential conflict between the General Land Office and the Railroad Commission over jurisdictional boundaries may be moot if the Land Office is forced to continue to rely on the Railroad Commission for field enforcement of General Land Office rules.

I maintain that current statutory authority exists for the General Land Office to institute a program of effective regulation of pipelines and drilling in the submerged lands of the State of Texas. In the event of conflict between the General Land Office and the Railroad Commission Rules that the stricter regulation should prevail. Because of the historical insensitivity to and current disregard of environmental protection of the Railroad Commission, the Land Office should proceed immediately to initiate an aggressive program of pollution control in the waters of the State of Texas.
THE RAILROAD COMMISSION - A CASE OF CALLOUS DISREGARD

On June 3, 1970, the Pipeline Committee and the Beach Committee conducted a joint meeting in the chamber of the Texas House of Representatives. At this meeting Roy D. Payne, Director of Field Operations of the Railroad Commission and the chief enforcement officer of the Commission, appeared. From Mr. Payne's prepared statement and the questions which followed, the committees found the following facts clearly showing that the Railroad Commission has displayed a callous disregard for the environmental impact of the actions of the oil companies operating in Texas:

—The Railroad Commission has never denied a drilling permit to any company for ecological reasons. (p. 12)

—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. (p. 13)

—The Railroad Commission does not have the boats or other equipment to conduct surveillance of offshore operations of oil com-

*The page citations are from the printed transcript of the Joint Meeting of the Beach and Pipeline Committees, June 3, 1970. Copies are available at the Legislative Reference Library.
panies. 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. (p. 45)

—The Railroad Commission did not have a map of the State showing the locations of pipelines that the Railroad Commission is statutorily charged with regulating. (p. 47)

—The Railroad Commission did not have any ecologist within its organization. (p. 48)

—In granting exceptions to its Statewide Conservation Rules the Railroad Commission shows a clear preference for industry concerns over environmental concerns: (1) Hearings Notification—the 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 objectors to such exceptions. It can be shown that such a burden of proof is inappropriate in evaluating harm to an ecosystem. (4) 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. (See subsequent chapter - The Citizens Role).

—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. (pp. 5, 26)

—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. (pp. 7, 8, 25, 26)

—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. (p. 9)

—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. (p. 37)

—Enforcement of pollution laws as regards oil companies is the prerogative of the Railroad Commissioners. (p. 37)

—The Railroad Commission has never in its history taken action against any oil company in any case of petroleum pollution. (p. 50)
The report of the committees recommended 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.
IT TAKES THE RAILROAD COMMISSION TO MAKE
THE WATER QUALITY BOARD LOOK GOOD

The prevention of environmental degradation on the state level hinges upon two factors: (1) the enactment of strict pollution laws and (2) the vigorous enforcement of those laws by state agencies. Regarding the second factor, the Texas Water Quality Board has been conspicuously derelict. My findings and recommendations were submitted by the committee to the Board in hopes that it would make constructive changes in its actions. These recommendations are largely drawn from and coincide with the testimony of Roger Tyler, Assistant Attorney General and Chief of the Water Division. Mr. Tyler appeared before both committees during the interim and before the Senate Finance Committee during the Regular Session of this Legislature.

—Texas Water Quality Board is not now utilizing local health authorities in preparing enforcement cases. Enforcement at the state level must, of necessity, be a "selective" type of enforcement due to lack of people on the state staff.

—Texas Water Quality Board needs to re-evaluate all existing waste discharge permits. A number of old permits should be completely rewritten by the Texas Water Quality Board staff lawyers with Attorney General's help.

—Texas Water Quality Board gives too much publicity to cases before filing of a case in Court is accomplished. This is often done where there is no effective follow-up with an adequate evi-
ence file. This includes suits brought by a local government, suits directly brought by the Attorney General on request of Texas Water Quality Board, and files being administratively processed where there is a likelihood of suit. All such requests for information should come to the Attorney General whenever any file is in Court. Requests for information to the Texas Water Quality Board should be answered so as not to prejudice a future suit which may develop.

—Hearings Examiners are holding hearings as authorized by the Texas Water Quality Board. These hearings afford all of the necessary due process, yet the Texas Water Quality Board holds what in effect is a second public hearing. This causes unnecessary delay and sometimes can result in arbitrary Board action as a result of this second hearing, where there is generally not enough time for the Board to develop the facts. This procedure throws an unnecessary burden upon the Board contrary to accepted procedures in other state-wide regulatory bodies such as the Railroad Commission. Too many of these Examiners' Hearings are now held in Austin, Texas, instead of in the local area where the alleged polluter resides and where local government is situated.

—There is a need for more coordination between those who test the water quality and the staff lawyers of the Texas Water Quality Board with the Attorney General's office. Testing procedures are frequently inadmissible in Court for one reason or another. In this regard, Health Department tests often do not show who collected, handled or brought in the sample, or just who made the test of the water. Texas Water Quality Board should have its own
laboratory to test water for quality if this is necessary to maintain such a legal chain of evidence. There is no legal reason why Texas Water Quality Board cannot rely on reputable local government laboratories. Pages 103-105 of the Attorney General's "Principal Pollution Laws of Texas" cover what is expected in this area of the law.

—Texas Water Quality Board has one (1) adequately compensated, Independent Counsel and has seven (7) Attorneys at Law on its staff; yet, as a rule, memorandum briefs that should contain a summary of violations, theory of the case and supporting authorities, were not included in the files sent to the Attorney General in past years and such briefs would speed up the prosecution of polluters.

—Hearings Examiners are not adequately prepared for a proposed public hearing so as to effectively gather the evidence. An outline for the proposed hearing should be prepared by a Hearings Examiner so that he can develop admissible evidence in his record in the shortest time possible.

—Often notices given to an alleged polluter are not legally sufficient upon which to base a cancellation or amendment of a permit. Notices which Texas Water Quality Board sends to industries often are phrased to "show cause why a file should not be sent to the Attorney General." This expression is meaningless to a lawyer other than as some sort of veiled threat. Texas Water Quality Board has in the past referred technical violations of small companies, operators or cities to the Attorney General when it is common public knowledge that many large industries and cities in
the same area are probably very guilty of pollution. The notices should say that the activities of the company are to be reviewed and their permits will be reviewed for cancellation or amendment.

—Often too much credence is given to an alleged polluter's claim that he cannot clean up, rather than toward gathering facts for an effective enforcement action. The philosophy of Texas Water Quality Board has been to try to "talk compliance," rather than to "enforce" it. The time has come for more court actions.

—Quite frequently the Attorney General is called for "emergency" advice on a proposed Texas Water Quality Board order, or to participate in some "emergency" verbal conference, without being given any advance notice so preparations can be made even when such advance notice could have been given to staff lawyers and the Attorney General earlier.

—Texas Water Quality Board and its staff are not giving proper consideration to, or properly fully utilizing lawyers on its own legal staff.

—Texas Water Quality Board appears reluctant to follow the legal advice of the Attorney General in cases which are in the Courts. This is contrary to the policies of every other agency now represented by the Water Division of the Attorney General.

—Often, vital evidence of pollution is voluntarily released to an alleged polluter without advice from Texas Water Quality Board staff lawyers or the Attorney General. Legal judgment is necessary in each case where the public wants records and the so-called "public records" provisions of the Texas Water Quality Act do not always apply.
THE CITIZENS ROLE
THE ENVIRONMENTAL PROTECTION ACT

In January, 1965, the Texas Oyster Growers Association brought suit to challenge state authorization of dredging permits on grounds that such permits allowed the destruction of shell reefs from which the Oyster Growers harvested oysters for sale. The suit was summarily dismissed on the triply technical grounds that: A. The suit was an impermissible action against the state's sovereignty. B. The order authorizing the dredging was within the agency's (Game and Fish Commission) unreviewable discretion. C. Even though most of the plaintiffs were commercial fishermen, they had no vested property rights at stake and thus no litigable interest in the controversy.

In Mississippi a similar case had been litigated in 1962 with an opposite finding. Though susceptible to the same technical objections raised in the Texas case, the court looked instead at the Commission's statutory authority to lease tide-water bottoms, construed that authority narrowly and found that oyster shells were a part of the public trust which the Commission had not been expressly authorized to sell.

It is true that a Texas statute specifically authorizes shell dredging leases and that the Mississippi statute in question was more ambiguously worded but these differences need not and seldom do deter courts. The Texas court could have asked whether the particular leases in question were consistent with the public trust, read the authorizing statute as restricted to authorizing action which is consistent with the obligations of that trust, and invalidated those particular permits. As for the standing of the fishermen to sue, the Texas court could have found
there was legal right to support an action, since such individuals have
been granted standing in other states. The fact is, courts can generally
find support for whatever decision they might wish to adopt, and in Texas,
traditionally, the courts have dismissed public trust cases initiated by
private citizens on such technical grounds as plaintiff having no standing
to sue.

If the two cases are pursued further, it will be discovered that
the Mississippi legislature subsequently acted to protect oyster reefs by
strictly regulating the conditions under which shell dredging permits
would be granted; but in Texas, the shell dredging issue drags on unre-
solved while the marine ecosystem in the Texas offshore area deteriorates
at an alarming rate. Obviously, the Mississippi suit called the danger
to the environment to the attention of the public and the legislature so
that action to deal decisively with it was taken. Similar public trust
suits have had the same beneficial results in a multitude of environ-
mental suits around the nation.

THE TRADITIONAL LEGISLATIVE APPROACH TO PROBLEM-SOLVING

The traditional legislative approach to problem-solving is to set
standards to deal with the problem in this case pollution of the environ-
ment and to create an administrative agency to enforce implementation of
those standards. Such legislation is vital but not sufficient.

THE PITFALLS OF THE ADMINISTRATIVE APPROACH

1. No Provision Made for Dealing With Unforeseen Problems:

No provision can be made for unforeseen problems and thus when they
arise there is no administrative machinery set up to deal with them. As
was seen in the Mississippi shell dredging case, a suit by private citizens
not only called the problem to the attention of the legislature so that legislation to deal with it could be enacted, but also directly and satisfactorily dealt with the problem at hand, that is, how to prevent destruction of a vital public resource until protective legislation could be passed. Since the courts in Texas have not traditionally looked past the technicalities in public trust cases initiated by private citizens, it is time that the weapon used by the Mississippi citizens to protect their environment be overtly recognized by the legislature to be available for protection of Texans' environment.

2. Agency Insulation From The Public:

The unfortunate fact about regulatory agencies is that there is seldom provided a consistent public check on their activities. The legislature is far too busy to supervise agency decisions closely enough to ensure that the spirit of the law is being observed nor can it pass corrective legislation quickly enough to deal with agency inadequacies. Such limitation was succinctly identified by an English student of administrative law:

Parliament cannot possibly control the ordinary run of daily governmental acts except by taking up occasional cases which have political appeal. ...Every so often a Member of Parliament achieves spectacular success with a constituent's grievance by a Parliamentary Question or a motion on the adjournment. But this is a safety-valve, not the control mechanism, of the administrative system.

Moreover the concerned citizen's right of recourse to the legislature, supposedly adequate, is not accessible to groups not residing in the state capitol and concern, once expressed, may not be adequate competition for the representations of industry concern daily repeated by lobbyists. The legislature may crack down when an agency evinces blatant disregard for the public interest and a cry goes up from the
general public, but this "safety valve" hardly constitutes a "consistent check."

The second supposed check is also dysfunctional. The point will be raised that we have other public agencies and officials who can bring suit against a wayward agency. But as a general rule officials do not sue even when they have the authority. One example: In a recent Michigan case, "citizens sought to enjoin a program proposed by one state department on the grounds that it would seriously impair environmental quality. The Attorney General or another state agency could, in theory, have challenged that proposal. But it was determined in the Governor's office that it was unseemly for two equal state agencies to fight out a public question in the courts; and that it would have been improper for the Attorney General, who must defend state agencies in court, to be lawyer for both plaintiff and defendant in a single suit." The Texas system, unfortunately, closely parallels Michigan's.

The only body which scrutinizes agency activity carefully and consistently is the industry which that agency regulates. The result? The agency inevitably responds to the body which exerts the most consistent pressure, and receiving little information from the public, only intermittent attention from the legislature, and a constant stream of letters and visits from industry representatives, will begin to accept the industry point of view. Consider this enlightening example: The Interior Department, which is charged with administering public lands, decided against holding public hearings in Santa Barbara, California, on leasing submerged lands off that portion of the coast for oil and gas development because the agency "preferred not to stir the natives up any more than possible." (One hardly needs to note the condescending connotation of the word "native" and such language is used to describe the public
whose interests the agency is supposed to protect.) When questioned,
the agency gave as its public reason: "(We) feel maximum provision has
been made for the local environment and that further delay in lease sale
would not be consistent with the national interest." But again, pri-
vately, the agency indicated that "the 'heat' has not died down but we
can keep trying to alleviate the fears of the people," and noted that
pressures were being applied by the oil companies whose equipment
"costing millions of dollars" was being held "in anticipation." The
result of this vigilance for the interests of private industry and the
concomitant lack of strict regulation of its drilling operations was the
notorious massive oil spill that hit the beaches of Santa Barbara in
early 1969. And after the hoopla died down and after both the Congress
and the President had initiated investigations of the incident and after
specific protective regulations had been duly promulgated, it is in-
nstructive to note that industry still exerts a strong influence with the
Interior Department: one of the proposed restrictive regulations, a very
broad liability provision, 34 Fed. Reg. 7381 (1969) was supplanted by a
much more modest provision, 34 Fed. Reg. 13,547 (1969) primarily because
of the vigorous opposition of the oil industry.

Not all regulatory agencies have their inadequacies exposed in
such a glaring fashion, nor do they all become as remote from the public
as the Interior Department had, but this example shows how insulated a
regulatory agency can become from the public whose interest it is sup-
posed to protect, the poor decision-making that results from such
insulation and documents once again the cost of getting governmental
response to a problem - the cost in this instance being fouled beaches
up and down the California coast and the wholesale destruction of marine
wildlife.
SPECIFICS: STATUTORY REQUIREMENTS FOR PUBLIC HEARINGS AND JUDICIAL REVIEW OF AGENCY DECISIONS IN TEXAS

1. Powers of the Agencies:

Administrative agencies are generally vested with wide powers—and Texas pollution control agencies are no exception to this rule—to do a vigorous job of regulating the particular sector of society placed under their jurisdiction by the legislature. The agency can make rules that have the force of law; adjudicate cases with the finality of a district court decision; use its power to decide if and when a violation occurred, who is responsible and whether the offense merits a penalty.27

2. Requirements for Public Hearings:

Since the provisions made for public participation in the decision-making process of the following Texas agencies invested with responsibility for controlling water pollution are essentially similar to those of the other state pollution control agencies28 only the former will be discussed here, in the interests of brevity:

a. The Water Quality Board: Section 3.15, Subchapter C of the Texas Water Quality Act, Tex. Rev. Civ. Stat. Ann., Article 7621-d (1969) requires the holding of public hearings at which any person may give testimony "pertinent for consideration by the board" before the Board sets or amends water quality standards, with notice given by letter to each local government affected, to the holders of rights to appropriate water from the water in question, and to the holders of permits to discharge effluents, with notice published at least once in a newspaper circulated in the area affected at least 20 days before the hearing.29

Section 3.10 of the act leaves notice of hearings into violations of the act up to the judgment of the Board; Section 3.19 requires public
hearing and general notice given for applications for exception permits unless the application is to permit improvement of the quality to the waste to be discharged, when notice is only required to be given to the mayor and health authorities of the city and county affected.

There is little that can be quibbled with in these provisions except to regret that such procedure was not required of the other bodies given regulatory duties by the same Water Quality Act.

b. The Railroad Commission: Given sole responsibility for the control of pollution of the water resulting from oil and gas production and the power to issue waste discharge permits for persons engaging in oil and gas production by Section 1.10 of Subchapter A of the Water Quality Act. The Railroad Commission bases its hearings procedure on Article 6036a and 6038 since the Water Quality Act set down no such specifications to be observed by the Railroad Commission. Article 6036a requires the Railroad Commission to hold hearings before adopting any rule, regulation or order and to give at least ten days notice "in the manner and form prescribed by the Commission." Article 6038 requires that notice of such hearings be given to the "person, firm, corporation, partnership, joint stock association, or association, owning or controlling the pipeline or pipelines affected." In practice, the Railroad Commission give such notice in hearings only to operators "affected by" or "interested in" such hearings in all but hearings held on rules considered to be of statewide importance. In such statewide hearings, notice is sent to anyone who has requested it. The public is thus uninformed of hearings held on permits for exception to the pollution regulations of the Railroad Commission. Such exception permits are granted initially by the Railroad Commission's District Offices without a hearing. Only if there is an objection will the Commission call a hearing.
A good example of the number and environmental impact of such granted exceptions to the pollution control rules of the Commission is the number of exceptions granted to the statewide rule forbidding the use of salt water disposal pits for storage of oil field brines. Between January, 1969, when the rule went into effect, and May, 1970, the Commission granted nearly two thousand exceptions to it. 1,718 were lease exceptions granted by the Railroad Commission District Offices without a public hearing. Of these, 896 were for unlined pits; 543 for lined pits and 279 for fresh water pits. Unlined pits discharge approximately 6.9 billion gallons of salt water per year—this not being ordinary salt water but oil-field brines, ancient sea water which has a different ion-structure from modern sea water and an unknown (unstudied) effect on water. The Commission has granted several field-wide exceptions after public hearings—for "tidal disposal" that is direct discharge into bays and estuaries—and for pits used in the operation of gasoline plants and liquid petroleum gas storage wells. The Commission has not estimated the quantity of salt water discharged under these exceptions. One known effect of the discharge of oil-field brine is its alteration of the salinity of water: such an effect is damaging to estuarial nurseries whose low salinity is essential to ninety per cent of the marketable marine life in the Texas Gulf.

Once exception permits are given, it is difficult for any individual or agency that disapproves of the producer's operations to persuade the Commission to revoke his permit, because (1) The Commission can refuse to consider the issue. (2) In order to meet the burden of proof necessary to persuade the Commission to revoke a permit, both economic harm and a definite cause and effect relationship between the practices of an operator and the economic harm must be shown.
Given the quiet ordinary way exception permits are granted by the Commission and the heavy burden of proof required of those objecting to such exception permits, it appears that Railroad Commission hearings procedure favors the status quo, that is, continued pollution of the water.

c. Parks and Wildlife Commission: Section 108, Subchapter A, of the Water Quality Act, Authorizes Parks and Wildlife to enforce the provisions of that act to the extent that any violation affects aquatic life and wildlife by bringing suit in district court. Since the Commission is given no regulatory power over water pollution under this act, only enforcement power, there was no necessity to set down public hearings requirements for the Commission. The act which the Commission does administer which directly affects water quality and the marine environment is Article 4051 which gives it the power to issue permits for "taking, carrying away or disturbing of the marl, gravel, sand, shells or mudshell" from any "island, reef, bar" or the surface of state-owned submerged land. The destructive effects of shell dredging were discussed earlier in this section. There is no provision made for calling public hearings to consider applications for permits issued by the Commission under this act, nor is there such mention made in the statutes establishing the powers and responsibilities of the Commission.

d. The General Land Office: Articles 5351, 5366, 5421c-3, Section 1b, and 5382b, Section 4, require the Land Commissioner to promulgate regulations to prevent pollution of inland and gulf waters and the destruction of fish, oysters and other marine life. Since the Commissioner's main responsibility is administering the sale and lease of the public lands of Texas, he has the responsibility of inserting pollution prevention clauses in contracts executed by the various Boards on which he sits. There is no requirement provided in any of the
applicable statutes to hold public hearings before promulgation of such rules. Public notice of availability of land for lease is required, but no provision is made for agency response to public objections to the leasing of specific lands.

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It is apparent that, with the exception of the Water Quality Board, the above agencies and most other pollution agencies in Texas are not required to make a periodic substantive sampling of public opinion, and thus are likely to become increasingly insulated from the public and more susceptible to industry representations of what constitutes the public interest.

3. Judicial Review of Agency Decisions:

Should an agency not adequately protect the public interest, due to inadequate study of a project before giving it a go-ahead, or due to intensive pressure applied by self-interested parties, is there provision made in present law for a fair and adequate appeal of its decision?

A. Statutory Provisions: Of the statutes governing the agencies discussed above, only those governing the Water Quality Board and the Railroad Commission refer overtly to judicial review of agency decisions.

I. Water Quality Board: Subchapter F of the Water Quality Act, Article 7621-d, sets down the conditions for judicial review of the Board's decisions. "A person affected by any ruling, order, decision, or other act of the board may appeal by filing a petition in a district court of Travis County...In an appeal of a board action other than cancellation or suspension of a permit, the issue is whether the action
is invalid, arbitrary, or unreasonable. An appeal of the cancellation or suspension of a permit shall be tried in the same manner as appeals from the justice court to the county court."

II. Railroad Commission: Article 6049c, Section 8 and Article 6059 set down the conditions for judicial review of the Commission's orders: Any "interested" person may appeal the Commission's orders with the burden of proof incumbent upon him and the order of the Commission deemed prima facie valid.

B. Case Law: The problem facing persons wishing to appeal a Texas state agency decision that they feel will damage the environment is not whether the court will take jurisdiction but (1) Will they be granted standing to sue and (2) What burden of proof will the court impose on them.

I. Standing to Sue: It is clear that under the above two statutes an applicant who is denied a permit may appeal the agency decision. Whether other "interested" or "affected" persons may appeal either the granting or denial of a permit or other decisions, such as a decision not to prosecute a polluter, is unsettled. Downstream landowners who opposed the granting of a permit and who participated fully in agency proceedings have been granted standing to sue. But it is doubtful that a conservation society or public interest group opposed to the grant of a permit would be considered "interested" or "affected" by Texas courts. Since others besides the nearest neighbors of a polluter are physically affected by the continual discharge of pollutants into the air or water, other members of the public should be given the right to sue to protect the public trust. Because the courts of Texas have not recognized this right, a legislative enactment clearly providing such standing is needed.
II. Burden of Proof: Unless otherwise provided by statute, the substantial evidence rule is used in most appeals of Texas state agency decisions. The Water Quality Act, Subchapter F provides for trial de novo of appeals of cancellations of permits made by the Water Quality Board. To oversimplify, the difference between a trial de novo and a trial under the substantial evidence rule is that in a trial de novo no weight is given to the agency decision whereas in a trial under the substantial evidence rule, the burden is generally on the plaintiff to prove that the agency decision is unreasonable by showing that it is not supported by substantial evidence. What constitutes "substantial evidence" varies from decision to decision, from saying that if evidence is such that reasonable minds could not have reached the conclusion that the administrative tribunal must have reached in order to justify its action then order must be set aside, to saying "substantial evidence" which will support an administrative order is more than a scintilla and less than same amount of evidence necessary to sustain verdict attacked as being against great weight and preponderance of evidence. A clearer definition is implicit in practice: with the Water Quality Board and the Railroad Commission decisions, the decision is considered prima facie valid and the plaintiff must show clearly that it is unreasonable or unjust. The latter determination weighs the balance heavily against the plaintiff, and, in general, operates to support the agency decision.

Since a suit to invalidate an agency decision on grounds that it will contribute to the pollution of the environment will rarely if ever be an appeal of a permit revocation, most such suits would, under present law, be tried under the substantial evidence rule.

C. The Application of the Substantial Evidence Rule is Inappropriate in Appeals Made of Agency Decisions on Environmental Grounds:
Courts have traditionally applied the substantial evidence rule in reviews of agency decisions because: 1. The constitutional separation of powers doctrine prohibits the judiciary's usurpation of a legislative function and because 2. They presume that the agency, in line with its responsibility imposed by the legislature, has taken into account all information and all perspectives which a proper regard for the public interest requires. But in cases where agencies become insulated from the public and deaf to certain voices in the community, where in certain instances, as with the Railroad Commission, the hearing procedure is weighed in favor of those holding permits to discharge effluents in excess of legal standards and against those who argue that such permits are destroying the environment, the application of the substantial evidence rule serves to confirm the agency in its misguided apprehension of what serves the public interest.

What a concerned citizen would have to do, under present Texas law, to get a permit to discharge effluents in excess of legal standards revoked, presuming that the agency, for example, the Railroad Commission, chooses to hear his case, and presuming further that the Railroad Commission decides against him and he appeals, is:

1. Beg for the right to be heard, both before the Railroad Commission and the court, with the decision left entirely up to the body applied to;

2. Once given standing, in order to meet the burden of proof, show twice both economic harm and a definite cause and effect relationship between the practices of an operator and the economic harm. (He must show the economic harm, etc., to get the Railroad Commission to revoke the permit; he must show the court that the Railroad Commission's decision to not revoke the permit is not supported by sub-
stantial evidence thus shouldering almost as heavy a burden before the court as he had to carry before the Railroad Commission.)

To impose such a burden of proof on the plaintiff is inappropriate because harm to water resources (and to the whole environment) and especially to marine life in the bays of Texas is the result of a subtle and complex process, and tracing definite cause and effect relationships between a particular practice and the entire phenomenon of pollution is difficult. Furthermore, applying the economic standard of harm in the first place is inappropriate for evaluating the necessity of water pollution control measures because it will almost always favor the conservation of oil resources (industry needs) at the expense of water resources (public environmental needs). ("Harm" to water is generally proved by showing harm to commercial fish. It would be difficult to put a dollar value on pure drinking water, uncongested lungs, eyes that don't sting, unspoiled beaches, fishing, swimming, birdsong, quiet, a blue sky, a well-differentiated ecosystem.

One author sums up the situation neatly: "Present statutes provide a means for citizens to file complaints with state agencies. So they may, but I assume that even in the days of the monarchy citizens were perfectly entitled to file complaints with the king...In essence (present law) simply allows a citizen to tell an agency that he thinks it is wrong; and it allows the agency to say 'oh no, we were right'."

NECESSITY OF LEGISLATION RECOGNIZING THE ROLE PRIVATE CITIZENS HAVE TO PLAY IN PROTECTION OF THEIR ENVIRONMENT

It is clear from the above discussion that it is unrealistic to believe that a single arm of the government will be ever-vigilant for the public interest if the public has no legal means of affecting its
decisions. Supreme Court Justice Warren Burger said of traditional, unquestioning reliance on administrative agencies:

The theory that the Commission can always effectively represent the (public) interests...without the aid and participation of legitimate (citizen) representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. 

Therefore, in the interest of providing better protection of our public trust in the environment, it is essential that the Texas Legislature recognize the right of citizens to act as "private attorneys general" in filing suits to protect the environment by passing House Bill 56, the Environmental Protection Act, or an act basically similar to it, that, at the very least, provides the following:

(1). Recognition of the right of "any person" to sue "any person" (including state and local governments and private industries) for "declaratory and equitable relief." (Section 1)

(2). Adjustment of the burden of proof:

a. The plaintiff shall make a prima facie showing that the conduct of the defendant has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust therein.

b. The defendant then shall have the burden of establishing that there is no feasible alternative to his 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. (Section 5)
(3). A requirement that courts shall allow any governmental body or person involved in an environmental suit that has been remanded to an agency for hearings to intervene in a suit involving conduct alleged to be destructive to the environment, and recognition of the court's right to allow any other persons to intervene also as parties to the action. (Section 8)

(h). Allowance for court flexibility: The court may either adjudicate the suit directly or submit it to the appropriate agency for a fair and adequate hearing, and retain jurisdiction of the case pending its resolution in order to ensure that provision is made for adequate protection of the environment. (Sections 7a, b, c)

The author of the Michigan Environmental Protection Act, which provided inspiration for the Texas bill, said that the fundamental purpose of this act was:

to bring back to environmental regulation the plain common sense approach of the common law; and to follow the tradition upon which we have built the law of privacy, fraud, assault, and each of the great rights upon which the foundations of the common law rests. The problem is recognized in a straightforward manner and those who are adversely affected are authorized to bring their complaint to a court for investigation of the facts and an equitable resolution...This bill does not attempt to codify in advance the precise details of every matter which may be brought to a court's attention under this bill, anymore than the law of privacy or antitrust or fraud does...this...is the great beauty and vitality of the common law system: That it provides an openness, flexibility and receptivity to cope with novel problems as they arise. Particularly is this essential in a new and rapidly developing field such as environmental law.

Thus, the problem of agency insulation from the public is solved and the difficulties attendant upon citizen appeal of agency decisions which are likely to aid the further pollution of the environment are dissolved by this bill. Citizens are given the right of action so that they will no longer have to rely on the malleable 'public spirit' of layer after layer of bureaucratic middlemen. And pollution control agencies will
have inadequately considered decisions remanded to them for further study and hearings by the courts.

Furthermore, the act will put another tool in the hands of the pollution control agencies themselves, to use in their suits against polluters. As Joseph Sax pointed out:

...when the mercury pollution issue broke into public attention last year and when it was clear that prompt and effective action was required. Where did the federal officials turn? Not to the elaborate and elephantine "modern" water pollution laws and regulations, but back to the old plain-speaking Refuse Act of 1899, which prohibits pollution in no uncertain terms and provides for a quick judicial remedy.65

THE ESSENTIAL ELEMENTS OF THE ENVIRONMENTAL PROTECTION ACT

1. Give citizens standing to sue:

Such a right is recognized already in many states: courts in Massachusetts, Wisconsin, California, New York, Tennessee, Minnesota and Colorado have recognized the right of private citizens to sue to protect the public trust as implicit in the public trust doctrine,66 and Michigan passed a bill very similar to the proposed Texas bill in April, 1970.67 But, as earlier noted, Texas courts have not traditionally granted citizens the right to sue polluters, except as neighboring property owners, or the right to sue public agencies.

It is therefore obvious that a legislative recognition of the right of citizens to sue both the government and private polluters is necessary. The benefits will be manifold: the threat of judicial intervention can be used as a lever with public agencies and with private polluters:

A suit was brought under the act (Michigan Environmental Protection Act) last fall, with a state representative as a plaintiff, to challenge the procedures by which the state was leasing oil and gas lands. The issue got considerable public attention and the state agencies with responsibility in this area have been reconsidering many of their past practices. Apparently in recognition
of this, the suit was voluntarily dismissed by the plaintiff at an early stage. I have heard a number of reports that our agencies have indicated to recalcitrant polluters that they had better become more reasonable or they might have to fact their local neighbors in the harsh atmosphere of a courtroom.

Private suits will alert the public and the legislature to danger to the environment—here mention should again be made of the Mississippi shell dredging case; while the legislature did respond by passing a good dredging law, it did not undertake to deal generally with estuarial and shoreline problems; the courts, no doubt, will have to be called upon again to meet problems as they arise, and they, in turn, will have to call upon the legislature for more needed statutory reform. Another example is of suits initiated in Michigan against the use of DDT which helped advance and promote needed reexamination of the DDT problem.

2. "Declaratory and equitable relief:"

Injunctions seem to be the most expedient means available for dealing with threats to the environment, with threat of contempt as a sanction. Penalty money is rarely adequate compensation for pollution. For instance, what amount of money could bring Lake Erie back to life; a lake is priceless. An injunction stops the polluting process, period. If there is concern that, in granting injunctions to protect the public interest, the court may be damaging an interest of equal importance to the public, such as shutting down a factory which pollutes the air but which also provides work for a large number of people of the community, it should be noted that courts generally grant temporary injunctions only when there is great certainty of victory for the plaintiff or when there exists clear evidence of irreparable harm to one of the litigants. In a difficult case where both parties are threatened with severe damage, courts will generally balance out the interests involved before making a decision.
3. Adjustment of the burden of proof:

Plaintiff has the primary burden of showing that the defendant's conduct "has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust therein." If the plaintiff does not meet the burden of substantiality then the court will dismiss his case. Only after the plaintiff has established a prima facie case must the defendant then show that his conduct is reasonable—that there is no feasible alternative and that it is consistent with the public interest. This readjustment of the burden of proof is necessary since traditionally, in appealing agency decisions on grounds that it is destructive to the environment, citizens have had to assume a burden of proof that is inappropriate in environmental cases, that inevitably works to support the agencies' decisions, however unwise they may be, and tends to confirm them in their misapprehension of what serves the public interest. This allocation of burdens is designed to strike a proper balance between industry and public interests—to steer a middle course between unthinking exploitation and unyielding preservation. The requirement for a prima facie case protects industry and public agencies from harassment. The second requirement placing the burden of proof, thereafter, on the defendant protects the environment by ensuring that only adequately studied projects which are set up to inflict minimal damage and which will reasonably promote the public interest are henceforth allowed. This section of the bill, in talking of feasible alternatives, ensures that only practical proposals will come before the court for comparative evaluation, and echoes similar language found in the federal highway and transportation acts. And as Joseph Sax pointed out:
(To) put the burden of establishing alternatives on the proponent of action is a simple matter of common sense, for we expect the proponent of any activity to have considered all reasonable alternatives and to have chosen the best of those available; to ask him to support his decision is merely to ask that he reveal the process which he must—if he operates rationally and with the public interest in mind—already have undertaken. 78

Such an allocation of the burden of proof will have the positive effect of ensuring that industry will plan their future operations in a defensible manner—that is, rationally and with the public interest and a quality environment in mind, 79 and of ensuring that public agencies do the same so that the public will no longer have to suffer the ill effects of inadequately studied public projects. A good example of how the courts can stop such shots in the dark is a New York roadway dispute Citizens Committee for the Hudson Valley v. Volpe 80 in which the plaintiffs urged that the proposed location of a highway in the Hudson Valley was improper. At first, both state and federal agencies involved disagreed. When the citizens persisted, a careful study and analysis of all the alternatives was made, and the state officials reversed themselves and sided with the protesters.

4. Direct adjudication or remand:

The provision allowing the court to remand a suit to the appropriate public agency is desirable because it gives the court greater flexibility: 81 it may adjudicate the case directly or remand it to an agency which has the necessary expertise to make a proper study of the question under conditions which ensure that such study will take proper account of the public interest and specifically the plaintiff's apprehension of the public interest.

By remanding a case to an agency for full hearing and study the court may save itself valuable time that might be lost in making the
kind of study an administrative agency is set up to do already. If more information is needed then the court may make provision for obtaining it thereby simultaneously alerting the agency to the fact that its information-gathering and analysis techniques are inadequate. Such allowance may prevent duplication of effort and also may enable the court to draw public attention to the faults of the administrative agency in question so that measures can be taken to correct them by the legislature.

Either way the environment will be protected:

1. If the court chooses to adjudicate the case directly then the allocation of the burden of proof between the parties set down by statute is sufficient to protect the public interest.

2. If the court chooses to submit the case to the proper agency the statute sets down procedure for a fair public hearing and requires the court to retain jurisdiction of the case to ensure that provision has been made for protection of the public trust in the agency decision.

The question will be raised at this point: Are the courts competent to directly adjudicate environmental cases? Such concern can easily be set aside. An instructive example of the competency of the courts in this area is a recent New Jersey case, Texas Eastern Transmission v. Wildlife Preserves in which the judge, an ordinary trial magistrate, did a perfectly competent job of evaluating and sifting the evidence offered by each party, then drew on his experience at problem-solving to come up with a compromise solution which minimized the damage to the environment without preventing the pipeline company from getting its job done. For further reassurance, one should look up an article by Joseph Sax in the January, 1970, issue of the Michigan Law Review which details nearly 100 pages of environmental litigation.
Such suits are and can be tried practically. This is not surprising when one considers that environmental problems are no more difficult to grasp and no more technical than other matters that routinely come before judges, such as railroad reorganization, stock frauds, and patent applications.

5. Intervention:

Intervention should be allowed as provided for in the act in the interest of achieving judicial economy, and ensuring fairness to all the interests which may be involved. Generally, intervention is sought when the main points of controversy have been established and the interests involved have been defined. It has often been used as a means of assuring adequate representation of interests other than those of the initiating party by providing information that might not otherwise be available. For example: in a situation where the State Attorney General is the initiating party there might be some conflict of interest especially where the functions of an administrative agency are involved. Intervention would allow other parties to participate and provide a degree of incentive for adequate representation. Judicial economy is achieved because intervenors are bound by the judgment.

WILL THE COURTS BE FLOODED WITH LITIGATION?

This concern could be disposed of summarily as being a thinly disguised excuse for legislative inertia and furthermore as being improperly directed; such concern should lead to a reform of the courts rather than to an end to legislation.

Nevertheless there are safeguards to prevent such a supposed rash of lawsuits: 1. The plaintiff must establish a prima facie case or the
court will dismiss his case. 2. The cost of a lawsuit would make any frivolous plaintiff think twice. 3. The provision for intervention in ongoing suits ensures that there will be as few repetitive cases as possible. 4. The threat of individual action has caused public agencies in Michigan to start rigorously enforcing the law thus quieting public dismay and outrage which might have led to individual suits. Since public agencies have the resources to sue a whole industry, and the power to regulate pollution without having to resort to litigation, fewer cases should result and, better yet, less pollution will be allowed than before the bill was passed. 5. Judicial intervention will call problems to the attention of the legislature so that legislation may be passed to deal more adequately with present problems or to provide for regulation of newly perceived problems—thus cutting down on another possible source of individual suits.
MAPPING ENVIRONMENTAL FACTORS ON THE TEXAS COAST

The significance of accurate mapping of the Texas coast cannot be overstated. To rationally regulate pollution that causes environmental degradations, an adequate inventory of what exists, what is happening and the rate of change is essential. An inventory of the Texas coastal environment is exceedingly critical at this time if proper pollution regulation and coastal management is to be realized. Maps of environmental factors on the Texas Coast provide a benchmark to evaluate future changes resulting from man's impact on the coast.

It is astonishing but true that no agency of the State of Texas had a comprehensive map of the pipelines in the coastal waters of the State. While the Railroad Commission has been statutorily charged with regulating pipelines since 1917, neither it nor the General Land Office had adequate or complete maps of pipelines. (See: Texas Senate Pipeline Study Committee Staff Report on Land Office Pipeline Regulations, April, 1970. Available at the Legislative Reference Library.)

In a most cooperative manner the Railroad Commission undertook the task of compiling a comprehensive pipeline map during the interim. This map and a series of regional maps as submitted by the Railroad Commission are contained in the Appendix of this report. The Railroad Commission deserves congratulations for the cartographic efforts. But the task of accurate mapping of all pipelines in the coastal waters of the state remains to be done.
In addition to the Railroad Commission maps of the Texas coast, there are two other independently compiled maps of merit: The Whico Atlas and the Transcontinental Gas Pipeline map.

THE ENVIRONMENTAL ATLAS

The most far-reaching and responsible mapping of the Texas coast is currently under way under the auspices of the Bureau of Economic Geology at The University of Texas at Austin.*

In 1969, The Bureau of Economic Geology initiated, as a part of its Environmental Research Program, extensive mapping and investigation of the Texas Coastal Zone to define the extent, distribution, value, characteristics and boundary conditions of the diverse, natural coastal environments and resources, and to evaluate man's current level of activity in the Coastal Zone. This investigation will result in the publication by the Bureau of a comprehensive Environmental Geologic Atlas of the Texas Coastal Zone—a series of 61 full-color maps with explanatory legends and detailed topographic and cultural bases. The Atlas will have an accompanying illustrated and descriptive text. Publication is scheduled for late 1972. Examples of certain of the environmental maps to be included in the Atlas are reproduced in this report. (See Appendix)

The 20,000 square-mile area of the Texas Coastal Zone, comprising a belt parallel to the coast and extending from approximately the offshore six-fathom line inland through the area of dominant coastal in-

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*The following description was submitted to the committees by W.L. Fisher and L.F. Brown, Jr., Bureau of Economic Geology, The University of Texas at Austin as "Environmental Geology of the Texas Coastal Zone—An Inventory of Resources and Uses."
fluences (about 50 miles), is covered by seven separate maps (Fig. 1). For each of these seven areas, the Atlas will include a basic environmental geological map and a suite of eight special-use environmental maps (Fig. 2).

The environmental atlas is a current record of the status of dynamic environments and processes, as well as a permanent record of exploitation, erosion and human modification. Dynamic environments can be monitored by periodic mapping that shows the significant direction and approximate rate of physical, chemical and biological changes; precise quantitative measurements made at instrument stations can, therefore, be related to the entire system of integrated coastal environments. The environmental map is the common denominator for communication among environmental geologists, soil scientists, engineers, oceanographers, wildlife specialists, economists and various other marine scientists. The technical input from all kinds of scientists can be integrated and applied through the visual display of information on a common framework of coastal environmental maps. Significantly, economists, planners, public utilities specialists, power suppliers, sanitary engineers, lawyers, legislative councils and others interested in the coastal region in government and the private area can efficiently plot, plan, refer and digest environmental data input displayed in relation to the fundamental coastal environmental systems.

The environmental atlas provides a common, easily understood language and vehicle which brings together many divergent specialists and allows their collective contributions to be focused simultaneously on an impending coastal problem. The Environmental Coastal Atlas has already begun to serve this critical need in Texas. Other coastal
states are now actively planning similar projects patterned after the Environmental Geologic Atlas of the Texas Coastal Zone, which will eventually supply an environmental picture of the entire Gulf Coast Region.

During the next decade, legislation will be passed that will establish or significantly orient environmental coastal management for decades to come. It is vital that marine and coastal scientists contribute to the body of knowledge that will assist legislative action in this critical region. The research of coastal specialists must be integrated and presented to planners, legislative councils and many regional, State and Federal agencies in a format that is clear, accurate and understandable not only to scientists but to vitally interested nonscientists who will ultimately translate scientific conclusions into laws, guidelines and regional plans. The Environmental Coastal Atlas, coupled with computer storage of vital data, provides a basic environmental document with which Texas can clearly define its natural coastal systems, recognize the nature and effects of human impact, and plan for adequate, scientifically-based management of these critical resources.

Because of its proven research and consulting capabilities, the Bureau of Economic Geology of the University of Texas at Austin, should be designated as an advisory agency to all state agencies in matters of pollution and environmental protection.

The state agencies should develop close cooperation with the Bureau and seek advisory opinions from it before approving any programs or projects which will substantially affect the environment.
PLANS FOR PREVENTION OF INDUSTRIAL ACCIDENTS

During the legislative interim, I researched various plans for countering oil spills. I found that the most comprehensive and encouraging plan was promulgated by the Coast Guard designated The Pollution Contingency Plan. This plan utilizes the multi-agency approach on a regional basis. Both federal and state officials are identified and delegated specific tasks. Industrial organizations are further identified as to location and the type of equipment available for emergency use.

The Coast Guard plan follows basically the guidelines set out in the federal Water Quality Improvement Act of 1970 (PL 91-224) and the Corpus Christi oil spill plan. The committees commend the Texas state agencies for participating in the development of the Coast Guard contingency plan.

The Coast Guard plan is directed at emergency action on a governmental level in cooperation with industry. This plan is long overdue but it is not the definitive response to the continuing threat of petroleum pollution. The burden of pollution prevention must be born by the industries that create the menace. This burden must be placed on industries in their specific operations to meet the objective of preventing pollution, not merely cleaning up after the fact.

There are two areas of immediate need for specific correction on the part of state agencies regulating contractors and producers
in the petroleum industry.

(1) A comprehensive spill retention and recovery plan.

(2) A spill recurrence prevention plan.

Under the rule-making powers of the Texas Railroad Commission and the General Land Office the agencies should require two detailed plans to be submitted by each person or corporation seeking a drilling permit, lease, easement or any other action in the coastal waters of the State. These plans should be submitted by persons prior to operations for review by the Railroad Commission and the General Land Office. In reviewing the proposed plans, the agencies should consult with qualified and independent specialists, where appropriate, to determine the adequacy, sufficiency and credibility of the proposed plans.

I. SPILL RETENTION AND RECOVERY PLAN

Each contractor and operator in the petroleum industry shall:

A. Identify proposed methods of early detection and rapid response to potential oil spills caused by his operations. These methods should include:

1. Remote sensing
2. Periodic inspections

B. Maintain and demonstrate capability for rapid containment and recovery.

1. Listing alternative action plans for:
   a. Containment construction (e.g. earthen dikes, floating booms)
   b. Immediate repair
   c. Rapid recovery (e.g. vacuuming and gathering techniques.

2. Listing of Resources.
a. Adequate personnel (including trained teams)
b. Equipment inventory (including bulldozers, vacuum trucks, etc.)

3. Program for management for Pollution Recovery
   a. Naming a director of pollution recovery operations
   b. Establishing communication channels for monitoring spill recovery and corrections.

II. SPILL RECURRENCE PREVENTION PLAN

Each contractor and operator in the petroleum industry shall prepare and implement a plan whereby action is taken to preclude the recurrence of oil spills. This should not be confused with repair action taken at the specific spill but should, instead, consist of action taken to avoid repetition of that spill at that location or any other location using similar equipment and procedures. Each contractor and operator in the petroleum industry shall have a plan for accomplishing the following tasks:

A. Identification of specific prior causes (data base) including:
   1. Number of spills
   2. Magnitude of each
   3. Outward appearance of malfunction at source (failure mode)
   4. Underlying cause
   5. Assessment of spill effects on environment for each.

B. Identification of spill potential in similar locations with similar equipment using the information from (II.A.)

C. Corrective action (step-by-step attack on spill potential identified in ((II.B.)) including):
   1. Preventive maintenance and changes of existing equipment and operations for:
a. Repair
b. Replacement of components
c. Addition of detectors, monitors and automatic control devices
d. Inspection checklists.

2. New design features to introduce into installations and equipment

a. New control devices
b. New control procedures.
PROPOSAL FOR UNIFORM ADMINISTRATIVE ACTION IN POLLUTION CONTROL

Because of the patchwork of jurisdiction of state agencies over pollution control, the methods of reporting and evaluating actual cases of pollution vary widely.

I found that reports of pipeline breaks and other pollution that were required by law to be recorded with the Railroad Commission under a penalty of $3000 per day were often not sent to the Railroad Commission at all. Many times these reports by oil operators were sent to other state agencies but the reports never filtered to the Railroad Commission. On other occasions state agency field personnel thoroughly documented pipeline breaks and pointed out violations of state law yet these reports rarely ended up in the central records of the Railroad Commission.

As a result of the lack of uniform reporting of pollution by state agencies, it is impossible to rationally assess the full extent of pollution from petroleum. Questions like:

How many pipeline breaks occurred in Texas last year?
Which companies are involved?
What remedial procedures should be taken based on the recorded experience?
How many barrels of oil were lost last year?
Where are the pipelines? Who owns them?

cannot be fully answered because no agency has complete jurisdiction and the agencies have failed to coordinate the reports that they do have.
It is easier to state what is unknown:
—Number of barrels of oil lost in Texas rivers and bays.
—Location and ownership of all pipelines, including product lines and gathering lines.
—Safety precautions currently employed and the ability of oil operators to remedy pollution when it occurs.

I suggested and the committees recommended that the state agencies with statutory responsibility regarding pollution and environmental protection adopt the following administrative procedures under their respective rule-making power:

1) In all cases of pollution reported by any person to any agency of the State of Texas, the agency shall make a record of such report.
2) Following a report of pollution, the agency shall make a finding as to the validity of such report. In such finding, the agency shall state on the record, the nature and the extent of the pollution, the parties involved, the damage to the environment that has or may occur and what remedial action, if any, was taken in the case.
3) (a) The agency shall make a further determination on the record whether any of the laws of the State of Texas or rules or regulations of any of the agencies of the State of Texas have been violated.

   (b) If the agency finds that any law, rule or regulation of the State has been violated, the agency shall make a separate determination on the record, whether or not it should recommend to the Attorney General that the person or parties involved should be prosecuted under the laws of the State.

   (c) Following the determination of 3(b) the agency shall state
its reasons on the record for recommendations or lack of recommendation of prosecution.

4) The agency shall record and publish on a monthly basis all of the above actions required by section (1), (2) and (3) making the publication available to the Legislature and the public and filing such publications with the Attorney General.

5) The Attorney General shall make a compiled record of the reports sent to him by the various state agencies and publish this record annually.
SUMMARY

Recurring accidents in the transportation and production of oil have made the single and relatively small oil spill a chronic and destructive force in the marine environment. Crude oil and petroleum products contain persistent poisons that resemble DDT in their longevity in the food chain. Unfortunately none of the presently available countermeasures in the federal-state oil spill contingency plan are sufficiently effective to eliminate the continuing environmental degradation occurring in the coastal waters.

On the state level, piecemeal legislation aimed at specific problems has been passed creating a patchwork of jurisdiction among agencies. This has prevented the State of Texas from developing a uniform environmental policy. Uniform methods for reporting pollution are also essential for a rational assessment of the activities monitored by the various state agencies statutorily charged with protecting the environment. In this regard, the Railroad Commission has displayed a callous disregard for the environmental damage caused by oil companies operating in Texas. The Water Quality Board has been conspicuously derelict in its duty to vigorously enforce the pollution laws of the State of Texas. The failure of these and other state agencies to monitor and process pollution information has prevented the development of a comprehensive statewide approach to the problems of protecting the environment.

Under the political pressure of the Pipeline Committee the
Railroad Commission compiled a comprehensive oil pipeline map of the coastal waters during the interim. But the task of accurate mapping of all pipelines in the coastal waters remains to be done. The Railroad Commission and the General Land Office should immediately adopt rules which would require comprehensive spill retention and recovery plans and spill recurrence prevention plans to be submitted prior to the drilling, producing or transporting of petroleum in the coastal waters of Texas. Because the Bureau of Economic Geology has shown outstanding research and consulting capabilities, it should be regarded as an advisory agency to all other state agencies in matters relating to pollution and environmental protection.

The pollution control agencies have become insulated from the public partially because of inadequate hearing procedures and partially because of the pervasive influence of special interests. The passage of the Environmental Protection Act or similar legislation is necessary to provide a meaningful role for private citizens in the protection of the environment.
FOOTNOTES

CHAPTER ONE


CHAPTER TWO

1 Comment, Water Pollution Control in Texas, 48 Texas L. Rev. 1028, 1140-1 (1970).

2 Id., at 1141.

CHAPTER FIVE


5. In Robbins v. Dept. of Public Works, 244 N.E.2d 577 (Mass. 1969), the Massachusetts Supreme Judicial Court issued a writ of mandamus commanding that certain parklands not be transferred to the Dept. of Public Works until legislation authorizing such transfer be duly enacted--despite the relatively explicit statutory authorization for such a transfer. (The transfer had to have the approval of the Governor and Council and the new use was restricted to the "laying out or relocation of any highway.") Despite this the court held that the statute failed to "state with the requisite degree of explicitness a legislative intention to effect the diversion of use which the DPW seeks to accomplish. We think it essential...(that) the legislation should express not merely the public will for the new use but its willingness to forego the existing use."

Other such cases: In Fransen v. Board of Natural Resources, 66 Wash. 2d 672, 404 P.2d 432 (1965) defendant, despite having general authority to transfer state-owned land to cities, was restrained from conveying particular tract already devoted to an important public use. See also Williams Fishing Co. v. Savidge, 152 Wash. 165, 277 P. 459 (1929) (state enjoined from leasing Pacific shoreland despite general authority to do
so, because such leasing would adversely affect public use); State ex rel. Forks Shingle Co. v. Martin, 196 Wash. 494, 83 P.2d 755 (1938) (mandamus to compel sale of timber on school trust land denied despite general sale authority); State ex rel. Garber v. Savidge, 132 Wash. 631, 233 P.946 (1925) (mandamus to compel leasing to state land for oil drilling denied despite general authority, because school trust land was involved); Gould v. Greylock Reservation Commission, 350 Mass. 410, 215 N.E. 2d 114 (1966), (Court held lease of reservation land and management agreement to build and police an elaborate ski area invalid as in excess of statutory grant of authority); Sacco v. Dept. of Public Works, 352 Mass. 670, 227 N.E. 2d 478 (1967) (Dept. of Public Safety, despite broad statutory authority to take and “improve” state lands, enjoined from filling a great pond as part of a plan to relocate a state highway).


10. Texas alone has what is referred to as a basic area of important habitat (estuarine and tideland areas which support 2/3 of 90% of the sea food on the Continental Shelf) of 828,100 acres. Of this area as of 1967, 68,100 acres of 8.2% of the total area has been lost to dredging. [U.S. Code Cong. & Ad. News, 3096 (1968)] “The minute organisms that breed among the oyster shells may vanish, leaving shrimp and fish without food. Something like this is now happening in Galveston Bay.” [John O. Ludwigson, Managing the Environment in the Coastal Zone, Mono No. 3, ENVIRONMENTAL REPORTER 1, 2 (1970)].

12. The development, regulation, and protection of natural resources in Texas is the total or partial concern of at least twelve state agencies: The Texas Water Rights Commission, the Texas Water Development Board, the Texas Water Quality Board, the Texas Water Well Drillers Board, the Texas State Soil and Water Conservation Board, the Texas Air Control Board, the Parks and Wildlife Commission, the Railroad Commission, the Texas Industrial Commission, the Texas Highway Commission, the General Land Office, the State Board of Health. For a short summation of each of the above agencies' activities with reference to natural resources, see, The Texas Executive Department, IV: Boards and Commissions (League of Women Voters of Texas, 1969).

13. See, notes 1, 7 supra and accompanying text.

14. The Environmental Protection Bill, HB 56, currently before the Texas House of Representatives, would give private citizens standing to sue public agencies or private industries to protect public resources from pollution. See pp. 26-28 infra.

15. H. Wade, ADMINISTRATIVE LAW 11 (1967). Joseph Sax suggests that the “control mechanism” may be judicial review expanded in recognition of public rights in public resources. Public Rights, supra n.11, at 159. See also, pp. 26-28 infra.

16. Public outcry over the Santa Barbara oil spill has died away, and the oil industry still exerts muscle with the Interior Dept. See p.22 infra and n.24.

17. See pp. 9-13 supra.


19. The effect that lack of reliable means of receiving information from the public has had on the Railroad Commission is discussed in Comment, Water Pollution Control in Texas, 48 Texas L. Rev. 1028, 1121-26 (1970) [hereinafter cited as Comment]. “Because information is received solely from the industry, the difficulties of proposed pollution control regulations and the special hardships of the industry will naturally tend to be exaggerated.” Id. at 1124. See also pp. 22-24 infra.

21. N.Y. Times, March 25, 1969, at 30, col. 6 (quoting from a letter from the Undersecretary of the Interior to the chairman of the board of supervisors of Santa Barbara County).

22. Id. at col. 3.

23. Id. at col. 5.


25. See nn.5, 19 supra and accompanying text; pp. 22-24 and nn.42-43 infra. Another contributor to agency insulation is the expertise required to regulate modern industry. Such expertise makes agencies too narrow to comprehend the broader perspectives that are essential where the industry affects community patterns and natural resources.

26. The numbers of birds and fish killed were emphasized in Hearings on S.1219 Before the Subcommittee on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs, 91st Congress, 1st Session 165 (1969). Some scientists have suggested that large deposits of effluents or steady deposits over long periods of time may destroy the entire ecosystem of the area by forcing many species of marine life to migrate and by causing drastic reductions in the metabolic rates of those species unable to migrate. The lowered metabolic rate reduces the ability to compete for food, shortens life spans, and saps reproductive energies. Steed & Copeland, Metabolic Responses of Some Estuarine Organisms to an Industrial Effluent, 4 CONTRIBUTIONS IN MARINE SCIENCE 143, 154-55 (1967). “These effects will be particularly acute in edible sea life, the most delicate species of the ecosystem.” Interview with B. J. Copeland, Professor, University of Texas Marine Science Institute, Dec. 10, 1969, found in Comment, supra note 20, at 1088, n.13.

The exact nature of harm to water resources caused by the Santa Barbara spill is being studied currently. One such study is being made under a grant from the Western Oil & Gas Association entitled Biological and Oceanographic Effects of Oil Spilled in the Santa Barbara Channel Following the 1969 Blowout.

27. See generally 1 K. Davis, ADMINISTRATIVE LAW TREATISE, Sections 1.01, 1.07, 1.08, 3.04, 5.03, 6.01; 2 Id. : Ch 17 (1958).
28. See note 12 supra.


30. Of course, even the most admirable provisions for hearings can be circumvented: For example, the duty to hold a public hearing may technically be satisfied by holding a hearing which is "announced" to the public by posting a notice on an obscure bulletin board in a post office. Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179, 183 (6th Cir. 1967), cert. denied, 390 U.S. 921 (1968). Or, a statutory hearing requirement may simply be ignored, and the argument later made that despite the omission no citizen has legal standing to challenge the agency's decision. See D.C. Fedn. of Civic Assns., Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968).

31. See Comment, supra n.20, at nn.200-03 and accompanying text.

32. Not only is the general public uninformed, but also other water pollution agencies, such as the Water Quality Board which receive notification by word of mouth or by sending someone over to the RRC to inspect their hearings docket. Id. at n.202.

33. From an interview reported in Comment, supra n. 20, at 1116 n.196.

34. Rule 8 specifically prohibits the use of salt water disposal pits for storage of oil field brines, prohibits the discharge of oil field brines into a surface drainage water course, requires the backfilling of abandoned salt water disposal pits, and directs producers to refrain from polluting the waters of the Texas offshore and adjacent estuarine zones. Texas Railroad Commission Rules and Regulations. Statewide Rule 8(C)(1), 8(C)(1), 8(C)(4), 8(D). Exceptions to Rule 8 are granted under clause 8(C)(2) "where good and sufficient cause is shown."


37. Comment, supra n.20, at 1118. Discussion of why this burden of proof is inappropriate is found on pp. 25-26 infra.

38. See n.10 supra.


40. The Land Commissioner is Chairman of the School Land Board (Art. 5421c-3, Section 2, Art. 15.01 of the Texas Education Code, and Art. 5415e), member of the Board for Lease of the University Lands. (Art. 2603a, Art. 5417, Art. 2596), Chairman of the Veterans Land Board (Art. 5421-m, Section 2) and Chairman of Other Boards for Lease, of all boards that administer lands owned by other state agencies, such as parklands (Art. 5382-d).

41. Art. 5354, 5382b-7a, and 5382d-4.

42. Two such cases are discussed on pages 28 and 29. Another example is found in a suit filed by the National Audubon Society v. Resor, No. 67-271, CIV—TC (S.D.Fla., filed March 15, 1967) in which the Society sought to enjoin the U.S. Corps of Engineers from continuing a canal-building project on the grounds that would both divert needed fresh water from the Everglades National Park and promote detrimental salt water incursions.

43. One example, that of the Interior Department's handling of oil and gas leasing off Santa Barbara's shoreline, has already been discussed in this section on pp.21-22 supra. Another obvious case of agency capitulation to private interests occurred when the Maryland State Board of Public Works deeded 176 acres of state-owned submerged land near Ocean City, Md. to a private real estate developer for $100 an acre and 10 cents a ton for the sand dredged from the bottom to be used as fill. Once filled the land was subdivided into house lots of a fraction of an acre each, and sold at a price between $5,000 and $7,500 per lot. (A suit has been filed on that case: Kerpelman v. Mandel, Equity no. 78A p. 142, Case No. 426-86-A (Cir. Ct. No. 2, Baltimore, Md. filed June 25, 1969).

44. See Comment, supra n.20, at pp. 1064, 1178-9.

45. For a discussion of judicial review of agency orders in Texas see Comment, supra n.20, at pp.1064-66.


49. See Comment, supra n.20, at pp. 1064-66.


54. In Harrison-Halsted Community Group v. Housing and Home Finance Agency, 310 F.2d 99 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963) local residents objected to an urban renewal project and alleged that the agency had deviated from statutory and regulatory standards designed to protect local interest. Nevertheless, the court held that:
Congress did provide certain standards to guide the Administrator in the exercise of his discretion...such provisions and regulations thereunder do not confer legal rights upon plaintiffs, as individuals, separate from their position as members of the general public...The legislature, through its lawfully created agencies, rather than "interested" citizens, is the guardian of the public needs to be served by social legislation.

55. See nn.5, 19 supra and accompanying text; pp21-22 supra and nn.20-25; n.30 supra; p. 23 supra and n.32,33; p. 24 and nn.42-3 supra.

56. See Comment, supra n.20, at 1116-20 for analysis of a case in point: the Hearing on Chiltipin Creek and Garrison Drainage Ditch before the Texas Railroad Commission on March 4, 1970.


58. Comment, supra n.20, at p. 1118.

59. See generally, Comment, supra n.20, at 1118-20.

60. "An ecosystem is the sum total of all the living and nonliving parts that support a chain of life within a selected area. The four primary links in the chain are (1). nonliving matter (the sunlight, water, oxygen, organic compounds and other nutrients used by plants for their growth); (2).the plants (ranging in size from the microscopic phytoplankton in water through grass and shrubs to trees, they convert carbon dioxide and water into carbohydrates required both by themselves and other organisms in the ecosystem); (3).the consumers (higher organisms, such as herbivores and carnivores, which feed on the producers); and (4).the decomposers (bacteria, fungi, and insects close the circle of the ecosystem when they break down the dead producers and consumers and return their chemical compounds to the ecosystem for re-use by the plants). NEWSWEEK, Jan. 26, 1970, at 35. "Slight stresses on or interruptions of an ecosystem that are occasioned by water pollution tend to disrupt energy flow systems. The disruptions lead to lower levels of biological productivity, shortened food chains, and a poorer diversity of species." Fragile Estuarine Systems—Ecological Considerations, paper presented by Donald E. Wohlschlag and B. J. Copeland, The University of Texas Marine Science Institute, 5th Annual American Water Resources Conference held jointly with the 14th Water for Texas Conference, Oct. 29, 1969. These subtle changes in the ecosystem can have drastic effects on man. See LIFE, March 6, 1970.
61. *Common Law*, supra n.18, at 82-83.

62. *Id.* at 82.

63. *Hearings on HB 56 Before the House Committee on State Affairs*, 62nd Legislature, 5-6 (March 15, 1971) (Testimony of Joseph L. Sax, Professor of Law, University of Michigan). [hereinafter cited as *March 15, 1971 Hearing*]. See *Public Trust*, supra n.24, at 638-54 for a discussion of the particularly successful and flexible course the Wisconsin Supreme Court has pursued in adjudicating public trust cases.

64. See pp. 22-24 and pp. 24-26, *supra*, respectively.

65. *March 15, 1971 Hearing*, supra n.63, at 7. The attorney for the Wayne County (Detroit, Michigan) Air Pollution Control Commission has said that the new (Environmental Protection Act passed in April, 1970) law “is a significant additional tool for us; in effect it presses industries to talk to us under a much greater sense of urgency than had previously been the case...fears of agencies like ours being swamped by suits as defendants, or with unwarranted complaints by citizens, have not materialized. We are finding industries have a much more serious frame of mind about pollution control since we have had the new act as a tool.” *Id.* at 2.

66. Judicial recognition of a citizen’s right to sue to protect the public resources in Massachusetts, Wisconsin, and California is discussed at length in *Public Trust*, supra n.24. Such recognition in the other states is discussed in *Common Law*, supra n.18, at 86-7.


68. *March 15, 1971 Hearing*, supra n.63, at 10. After the National Audubon Society filed suit against the Army Corps of Engineers to enjoin a canal building project that allegedly diverted needed fresh water from the Everglades National Park and would allegedly promote detrimental salt water incursions, the case was settled out of court. (National Audubon Society v. Resor, No. 67-271, CIV—TC (S.D. Fla., filed March 15, 1967). A lawyer in Ann Arbor, Michigan, reports on the effect of Michigan’s new law:
(Citizens) complained about this sewage plant location prior to its construction by the State in 1963-64. After the State sold it to the...township, they complained to the Water Resources Commission. Nothing ever came of their complaints until the new statute was passed. Now...the State's administration agencies have stopped dragging their feet...One of the most salutary effects of the new law, I believe, is not in what action it permits, but in what it says. Because of this, existing administrative machinery is getting tough and industry is beginning to take anti-pollution measures without waiting for the process server.


70. Common Law, supra n.18, at 85.


72. HB 56, 62nd Texas Legislature, Section 5(a) (1971).

73. "The law cannot formally define away the ultimate minimal case, but in practice the law does not concern itself with trifles." March 15, 1971 Hearing, supra n. 63, at 7.

74. See pp. 25-26 supra.

75. See pp.24-25 supra; and n.52; see also p. 23 supra.

76. Such would be the conclusion of one noting the continuing licensing of destructive shell dredging in the estuarial areas of the Texas off-shore since the Supreme Court of Texas summarily dismissed Texas Oyster Growers, Inc. v. Odom, 385 S.W.2d 899 (Tex. Civ. App. 1965, writ ref'd n.r.e.). See pp. 21, 25-26 and n.52 supra.

77. Common Law, supra n.18, at 87.

78. Id. at 88.
79. A typical example of the current corporate priorities was provided in a proceeding before the Public Service Commission of Michigan: "the gas company had asked the Commission to establish priority categories for natural gas uses. Under the company's proposal, of the seven categories of priority, air and water pollution abatement stood next to the bottom." March 15, 1971 Hearing, supra n.63, at 2-3.


81. Under present rules of judicial review of agency orders, the court can neither modify an agency order or remand it to the agency for further consideration; the court can only uphold an order or declare it to be void. See Comment, supra n.52, at 842-4.

82. 48 N.J. 261, 255 A.2d 130 (1966); 49 N.J. 403, 230 A.2d 505 (1967).


84. There is a growing trend to encourage intervention where the public interest or a wide variety of private interests are involved. Fed. R. Civ. P. 24; In Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) the listening audience was allowed to intervene in license renewal proceeding before the F.C.C.


86. See n.65, page 28 and n.68 supra.

87. "We have not had a flood of litigation; indeed, citizens have been quite cautious in bringing cases to the courts. Our public agencies have not been buried under a mountain of complaints; quite to the contrary, they have found the law a useful tool for their own duties. We have not had crank plaintiffs or crank lawyers asking for the impossible, but rather a number of quite carefully constructed cases seeking out the reasonable powers of the courts of equity. We have not been brought to disaster by the broadly stated, flexible terminology of the law, but have found both its substance and its procedural structure one which our competent, but ordinary, judges of the circuit courts have been able to cope with...And we have begun to take action on some important and long neglected environmental problems." March 15, 1971 Hearing, supra n.63, at 11.

88. See generally, Public Rights, supra n.11 See p.20 supra.
THE ENVIRONMENTAL PROTECTION ACT

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.

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

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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Legislative Draft:
Terence O'Rourke
January, 1971