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COMMENTS

WATER POLLUTION CONTROL IN WASHINGTON

INTRODUCTION

Puget Sound provides a disposal site for various municipal and industrial wastes. This Comment discusses the Washington Pollution Control Commission's attempts to secure improved water quality in the area. Because the pulp industry is the largest polluter in the region,¹ the Comment focuses more sharply on the Commission's activity in securing abatement from this industry.

Pulp and paper mills use vast quantities of fresh water each day for processing and cooling.² Ninety-five percent of this water is later discharged as waste, principally as sulfite waste liquor (SWL).³ The resulting pollution is the equivalent of four times the total raw sewage of the population of the state.⁴ A recent federal-state study indicates that SWL is harmful to marine life,⁵ and that water circulation in most northern Puget Sound disposal areas is not sufficient to remove the abnormal deposits of SWL.⁶

SWL wastes may be substantially reduced by use of several available recovery processes.⁷ In the common pulp process, wood is debarked and cut into chips which are placed in a digester with any one

¹ TRANSCRIPT OF JOINT FEDERAL-STATE POLLUTION CONTROL CONFERENCE 66 (1962) [hereinafter cited as 1962 JOINT CONF.].

² 1962 JOINT CONF. 272 (statement on behalf of the Northwest Pulp and Paper Association).

³ Two spellings are proper for sulfite. I have selected the one used in all the literature concerning pollution in Washington. In Wisconsin and in the eastern states it is spelled sulphite.

⁴ 1962 JOINT CONF. 78. For the figures on each pulp mill in question, see *id.* at 69-74.

⁵ The report was especially concerned with the effects of SWL on oysters, juvenile salmon, flatfish eggs, bottom organisms, and plankton. In all cases SWL was found harmful, although the toxic quantity varies between the various species of marine life. To assure safety for all species a maximum SWL level of 10 parts per million was recommended. This is substantially below current levels. See generally U.S. DEP'T OF THE INTERIOR, NORTHWEST REGIONAL OFFICE & WASHINGTON STATE POLLUTION CONTROL COMM'N, POLLUTIONAL EFFECTS OF PULP AND PAPER MILL WASTES IN PUGET SOUND (1967) [hereinafter cited as REPORT].

⁶ *Id.* at 67, 276, 300, 423. Guemes Channel is an exception, being "nearly ideal for waste disposal." Nevertheless, by the shallow outfall area of the Georgia-Pacific pulp mill dissolved oxygen approaches zero, thus endangering marine life, and a surface patch of highly discolored water is present. *Id.* at 226, 231-32.

⁷ See REPORT 2-6; Charmichael, *Forty Years of Water Pollution Control in Wisconsin: A Case Study*, 1967 Wis. L. Rev. 350, 404. Naturally the pulping and recovery processes are far more complex than the discussion indicates.

of a number of chemical solutions and cooked. After cooking, the pulp is washed and then the chemical cooking liquors are either discharged into adjoining waters or recovered. The recovery systems operate by evaporating and burning the pulping wastes, resulting in recovery of some of the chemicals for reuse and heat for the pulp mill's operations.⁸

I. FEDERALISM

Pollution control involves the process of federalism. The federal government first enacted a comprehensive water pollution control act in 1948. Since then the act has been amended four times, and each amendment has strengthened the federal program.⁹ As the act now stands it has two main thrusts: (1) grants for construction and (2) a demand for water quality standards for interstate waters.

Grants are authorized for "the construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage or other wastes into any waters. . . ."¹⁰ The grants are subject to several limitations, but the most important are approval of the state pollution control agency and contribution for thirty percent of estimated reasonable cost.¹¹

Under the act the governor or state water pollution control agency was given until October, 1966 to file a letter of intent that before June 30, 1967 the state will adopt (1) water quality standards applicable to interstate waters within the state and (2) a plan for implementation and enforcement of the standards. If a letter is not received or the standards are insufficient, the federal government is empowered to adopt standards applicable to the interstate waters of any noncomplying state.¹² In so doing, the Secretary of Interior is required to consider "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses."¹³

On May 9, 1966 the Secretary of Interior sent a letter to the

⁸ Unfortunately, some extent of air pollution results from use of a recovery system.

⁹ For a brief discussion of the Federal program as of 1962, see Stein, *Problems and Programs in Water Pollution*, 2 NATURAL RES. J. 388, 409-15 (1962). There is a useful survey of some of the problems in water pollution in STAFF REPORT OF SENATE COMM. ON PUBLIC WORKS, 88th CONG., 1st SESS., A STUDY OF POLLUTION—WATER (Comm. Print 1963).

¹⁰ 33 U.S.C.A. § 466e(a) (Supp. 1966).

¹¹ 33 U.S.C.A. § 466e(b)(2) (Supp. 1966).

¹² 33 U.S.C.A. §§ 466g(c)(1),(2) (Supp. 1966).

¹³ 33 U.S.C.A. § 466g(c)(3) (Supp. 1966).

governor of each state with enclosed guidelines for setting standards for interstate waters. Briefly the guidelines provide: (1) no standards are acceptable which provide for less than existing water quality; (2) no stream may be used primarily for transportation of wastes; (3) potential and future uses of streams must be considered; (4) a program for upgrading water quality is necessary, as is (5) a plan considering all relevant polluting sources and how the plan is to be implemented; (6) no plan will be acceptable which allows any treatable waste to be disposed without treatment; and (7) standards must be adequate to protect and upgrade water quality in the face of future changes.¹⁴

Any pollution in interstate or navigable waters¹⁵ which endangers the health or welfare of any person is subject to abatement under the act. When the navigable waters are entirely within one state, a governor or state agency may (1) request a joint conference on pollution and (2) authorize federal enforcement.¹⁶

The federal act, however, is of secondary importance in securing abatement of pollution. Federal legislation has been predicated on the theory that a state pollution control agency will be the primary enforcement organization in attempts to control pollution. Consequently, the primary effect of federal legislation has been to stimulate effective state programs of pollution control.

II. THE STATE EFFORT TO 1955

A fact finding program by the Departments of Health and Fish and Game from 1925 to 1937 marked the beginning of a pollution control program in Washington. In 1937 Governor Martin created a pollution control commission consisting of the directors of the Departments of Health, Fish and Game, and Conservation. With an initial budget of \$14,500 the commission commenced operations, pursuing two immediate objectives: (1) gaining immediate and practical results from research, and (2) building a broad foundation for future work.¹⁷ This

¹⁴ U.S. Dep't of the Interior Press Release, May 10, 1966.

¹⁵ A recent Interior decision, *Water Quality Standards—Interstate Waters Within the Meaning of Section 10(c) Fed. Water Pollution Control Act, As Amended*, 73 I.D. 181 (1966), held that "coastal waters" in the act included all waters of the seas within the territorial jurisdiction of the United States and all inland waters in which the tide ebbs and flows. The decision is ambiguous on the status of tributaries of interstate waters. They are not per se interstate, but if waste discharged into a tributary reaches interstate waters and reduces water quality below the established standards, then the tributary is subject to the act. At this time it is unclear what this latter holding will mean in the operation of the act.

¹⁶ 33 U.S.C.A. § 466g(d)(1) (Supp. 1966).

¹⁷ *POLLUTION CONTROL COMM'N, PROGRESS REPORT ON FIELD INVESTIGATIONS AND RESEARCH 1* (1938).

executive commission, with its emphasis on interagency cooperation and concern with the polluting effects of SWL from the pulp and paper mills, had much in common with the later statutory commission.

Pollution control bills were introduced in both the 1941 and 1943 legislatures, but neither passed.¹⁸ In 1945, however, the governor endorsed the legislation, and the legislature enacted the Water Pollution Control Act.¹⁹ A statutory commission was created on the model of the previous executive commission, but was expanded to include the director of the Department of Agriculture²⁰ as well as a director who was to be recommended by the Commission and appointed by the governor.²¹ A broad policy section directed the Commission to maintain the "highest possible standards" of water quality consistent with the various water uses of the state.²² The act vested the Commission with full powers to promulgate rules and regulations,²³ to determine the conditions of the waters of the state,²⁴ and to issue orders.²⁵ A "person aggrieved," however, was granted the right to an administrative hearing and a further trial *de novo* in superior court; all orders were stayed during these proceedings.²⁶ All plans for new sewage systems had to be submitted to the Commission for approval.²⁷ Finally, violation of any provision of the act was declared to be a gross misdemeanor.²⁸ After the federal water pollution control legislation of

¹⁸ Interview with Mr. R. H. Bailey, in Seattle, Aug. 1, 1967. Mr. Bailey is managing director of Citizens for Clean Water, and was formerly president of the Pacific Coast Oyster-Growers Association.

¹⁹ WASH. REV. CODE ch. 90.48 (1961).

²⁰ WASH. REV. CODE § 90.48.021 (1961). Fish and Game by this time had been divided into two departments.

A significant feature of the Commission is that there is no representation of industry, especially the pulp industry, on it. Of the seven other states which have a significant pulp industry, five allow an industry representative on their commission and a sixth, Wisconsin, has a state advisory committee for the industry. Sulphite Pulp Manufacturer's Research League, Progress Report No. 4, table 1 following p. 3 (Sept. 1, 1961).

²¹ WASH. REV. CODE § 90.48.023 (1961). The director is removable at the will of the governor.

²² WASH. REV. CODE § 90.48.010 (1961):

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington.

²³ WASH. REV. CODE § 90.48.035 (1961).

²⁴ WASH. REV. CODE § 90.48.070 (1961).

²⁵ WASH. REV. CODE § 90.48.120 (1961).

²⁶ WASH. REV. CODE § 90.48.130 (1961). The only exception was emergencies "affecting the public health."

²⁷ WASH. REV. CODE § 90.48.110 (1961).

²⁸ WASH. REV. CODE § 90.48.140 (1961). The maximum penalties are a \$100 fine and one year in the county jail.

1948,²⁹ further sections were added to the Washington statute providing for cooperation with the federal government and other states.³⁰

The Commission first met on July 9, 1945. Immediately its members turned to public education concerning pollution, feeling that a program creating an educated public was a necessity for success.³¹ The program was first directed at municipal officials³² rather than the general public on the rationale that activities of public officials would educate the public.

Shortly thereafter, however, the education program was expanded to the general public. The slogan "Keep Washington Clean" was instituted "for the purpose of enlightening the people of the state to the necessity of pollution control."³³ Other educational activities followed. Commission speakers were always available and frequently addressed interested private groups. In 1947 funds were expended to acquire a booth at the Seattle Sports Show to draw attention to the various problems of water pollution.³⁴ By the early fifties the Commission had acquired a model sewage treatment plant which was sent to all the fairs around the state.³⁵ Sportsmen's clubs were one of the first groups to actively support pollution control,³⁶ and their support was welcomed even though they emphasized conservation to the exclusion of health considerations.³⁷ Support from women's organizations was also

²⁹ 62 Stat. 1155 (1948). The federal acts are discussed in text accompanying notes 9-16 *supra*.

³⁰ WASH. REV. CODE §§ 90.48.153, .156 (1961).

³¹ POLLUTION CONTROL COMM'N, PROGRESS REPORT No. 15, at 1 (Feb. 1, 1948) [Progress Reports of the Pollution Control Commission are hereinafter cited as PROG. REP.].

³² PROG. REP. No. 1, at 1-2 (Oct. 3, 1945). Depending on the status of the municipality's planning for sewage construction, one of three letters was sent to municipal officials. If the municipality had adequate sewage facilities the letter complimented the officials on their farsightedness. If a program was beginning they were praised for a good start and urged to complete the program quickly. If no action had been taken the need for immediate planning was emphasized.

³³ *Id.* at 12.

³⁴ PROG. REP. No. 11, at 1 (June 2, 1947). Another reason was to draw particular attention to the deplorable conditions around Seattle. For discussion of the Seattle problem, see text accompanying notes 52-58 *infra*.

³⁵ PROG. REP. No. 39, at 1 (Dec. 1, 1955). The Progress Report indicates the Commission was pleased with the educational effectiveness of the model plant.

³⁶ Oyster-growers also supported pollution control, but two factors differentiate their efforts from other groups. First their motives were less than selfless, and second they were concerned with the pulp industry and no one else. See text accompanying notes 82-86 *infra*.

³⁷ PROG. REP. No. 15, at 2 (Feb. 1, 1948). The initial director of the Commission had a favorite analogy which he repeated all too frequently. He would discuss how beautiful the waters of the state were years ago and then note that an Indian on the warpath would have to kill many people before he created the danger to human life that water pollution did.

Even if sports groups did ignore the human health implications of pollution in their arguments, they were a powerful ally in pollution control. In Wisconsin, for example, the Izaak Walton League of America, a conservation organization, lobbied

actively sought and welcomed.³⁸ While education was beneficial in creating a general awareness of the problems of pollution,³⁹ it did not provide the specific impetus to convince an individual polluter that he should abate.

The second fundamental premise of the Commission was cooperation.⁴⁰ Possibly the best example of cooperation concerns the Commission and the pulp industry.⁴¹ Throughout its entire existence the Commission has joined with the industry in conferences and joint surveys, trying to secure effective pollution abatement. Another aspect of cooperation was the Commission's mediating efforts between municipalities and their industries to provide sufficient information to both parties in hopes of avoiding misconceptions by either party.⁴² As a variant of the policy, the Commission felt that when a municipality constructed sewage treatment works, the industry in the area, too, should correct its pollution problems.⁴³ In many instances cooperation was successful. After World War II, extensive mooring of Navy vessels in Puget Sound produced pollution from both oil and raw sewage. Commission discussions secured the removal of ex-war ships from Lake Washington and ended the mooring of "live" ships in Discovery Bay near Port Townsend.⁴⁴

The Commission's inoffensive method of investigating a complaint

through strong pollution control legislation over the combined opposition of the pulp industry, the dairy industry, the canning industry, the Wisconsin Council of Agriculture, the Wisconsin State Federation of Labor, and the League of Wisconsin Municipalities! E. MURPHY, *WATER PURITY* 91-92 (1961).

³⁸ PROG. REP. No. 15 at 1-2 (Feb. 1, 1948).

³⁹ The Commission felt their program of education assisted the phenomenal 20 to 1 vote in favor of a sewage construction bond issue in Spokane where the sewage problem was extremely bad. See PROG. REP. No. 6, at 6 (Dec. 1, 1946).

⁴⁰ The same premise worked successfully in Wisconsin. See generally E. MURPHY, *supra* note 37, at 71-130. Cooperation is a natural concern for an interdepartmental agency, and when achieved provides additional strength for the agency because the varied talents of the several departments can be effectively applied to solving a particular problem.

The Commission was fortunate enough to achieve the needed interdepartmental cooperation, and the director acknowledged this: "[T]he finest possible cooperation has been achieved from the various other state departments concerned in connection with our problems." PROG. REP. No. 4, at 19 (April 1, 1946); see also PROG. REP. No. 1, at 4 (Oct. 3, 1945). But see PROG. REP. No. 17 (June 1, 1948) where the Commission dismisses the accomplishments of the previous executive commission and ignores the fact that a history of interdepartmental cooperation had been established before 1945.

⁴¹ The controversy with the pulp industry is discussed in the text accompanying notes 68-123 *infra*.

⁴² PROG. REP. No. 6, at 3 (Aug. 1, 1946): "when both parties to such controversies are properly informed of the problems involved, they are less apt to assume they are being 'picked-on' for political reasons."

⁴³ PROG. REP. No. 7, at 2 (Oct. 1, 1946).

⁴⁴ PROG. REP. No. 4, at 14-16 (April 1, 1946). There were few subsequent complaints about oil pollution from Navy vessels. See PROG. REP. No. 5, at 2 (June 1, 1946).

also was helpful in securing compliance. First there was an investigation, followed by consultation with the polluter; then recommendations for improvements were agreed upon. And adequate checkups insured that the improvements were constructed and working properly.⁴⁵ Initially all communications were answered and, where possible, specific recommendations were made.⁴⁶ Over time, however, the technical problems became more complex and usually only general information was supplied.⁴⁷

The Commission stated that legal force was used only when cooperative methods failed,⁴⁸ but this is misleading. Properly stated, the Commission did not use legal force; it merely applied pressure. The formal legal actions authorized by the Water Pollution Control Act were avoided either because the Commission lacked finances,⁴⁹ did not feel ready to commence a vigorous application of the law, or was too firmly committed to the policy of cooperation.

Prior to 1955 both municipalities and industries were under the same provisions of the statute.⁵⁰ When dealing with municipalities there is the additional problem of convincing elected officials that any action involving the expenditure of public funds is necessary; thus the idea of applied pressure was probably the most feasible solution. In 1946 the Commission consistently prodded Bremerton to construct treatment facilities. Finally the city officials were issued a warning slip and informed that definite steps were necessary.⁵¹ This achieved results. Applying pressure to Seattle officials was less successful. In 1945 the Commission undertook a study of pollution in Lake Washington, and the results indicated a pollution problem, although it was not critical. Two years later the Commission began criticizing Seattle's intransigent elected officials. Without referring to Lake Washington the city maintained "that no raw sewage treatment is necessary because of the large volume of water in Puget Sound available for dilution."⁵² The Commission felt that it was "beyond human comprehension" that the Sound

⁴⁵ See PROG. REP. No. 3, at 13 (Jan. 28, 1946).

⁴⁶ *Id.* at 12.

⁴⁷ Interview with the Honorable Charles B. Roe, Jr., Assistant Attorney-General for Water Resources, in Olympia, Washington, Aug. 3, 1967.

⁴⁸ See PROG. REP. No. 36, at 1 (Aug. 1, 1954).

⁴⁹ By 1947 complaints had tripled and the Commission was beginning to worry about finances. PROG. REP. No. 8, at 2-3 (Dec. 1, 1946). In 1947 the Commission requested \$250,000, but received only \$143,000 from the legislature. The Commission announced activities would be curtailed and the staff reduced. See PROG. REP. No. 10, at 3-4 (April 1, 1947).

⁵⁰ On the changes in 1955 see text accompanying notes 59-61 *infra*.

⁵¹ PROG. REP. No. 5, at 16 (June 1, 1946).

⁵² PROG. REP. No. 14, at 1 (Dec. 1, 1947).

could be so abused.⁵³ The forecast in 1947 was pessimistic: "If the present condition is bad, the future condition will be intolerable and a great danger to public health."⁵⁴ However, the city undertook no action and the Commission's forecast proved correct.⁵⁵

Unfortunately the city council, the mayor and the city engineer could not agree on the issue of primary treatment.⁵⁶ The Commission, the Municipal League, and a committee chaired by attorney James Ellis, however, moved toward a metropolitan solution to the sewage problem. A comprehensive study of the Seattle area was initiated with funds from the city, county, and state.⁵⁷ Finally in early 1958 the voters approved a comprehensive sewage plan for the greater Seattle area, and even before the election the Commission was making enthusiastic statements about Seattle's progress.⁵⁸ It is apparent, however, that action from Seattle was long delayed, and applied pressure was too ineffective. Furthermore, it was a citizen's organization, not elected officials, who provided the impetus for action.

III. THE PERMIT SYSTEM

The Commission gained additional necessary authority in 1955. The legislature enacted a statute requiring all industrial operations which discharge any waste materials into the waters of the state to obtain a permit from the Commission.⁵⁹ The permit could be permanent (five years) or temporary. Permits could be conditioned upon maintenance of standards designed to prevent undue pollution of the waters of the state in violation of the policy section of the 1945 statute.⁶⁰ The change in the law was significant because it shifted the inertia inherent in previous procedure. Instead of waiting for a complaint and then investigating, the Commission was placed in a position where industry came to them to request permission to discharge wastes.

The Commission continued its policy of cooperating with polluters

⁵³ *Id.*

⁵⁴ *Id.* at 2.

⁵⁵ PROG. REP. No. 39, at 7 (Dec. 1, 1955). The result was that "[n]ot a single foot of salt water shoreline, within the area and very little freshwater shoreline could be considered safe for recreational or other uses involving bodily contact." 1962 JOINT CONF. 217. Lake Washington was rapidly approaching a state of eutrophication (permanent impairment). *Id.* at 218.

⁵⁶ Argus, March 6, 1954, at 1, col. 3-4. Cost was the chief issue.

⁵⁷ The total cost of the study was \$130,000. Seattle provided \$90,000, the county \$30,000, and the state \$10,000. *See* PROG. REP. No. 41, at 5 (Dec. 1, 1956).

⁵⁸ "Seattle is taking giant strides toward the cleanup of both fresh and salt water areas." PROG. REP. No. 43, at 15 (Jan. 1, 1958).

⁵⁹ WASH. REV. CODE § 90.48.160 (1961).

⁶⁰ WASH. REV. CODE § 90.48.180 (1961).

because the policy "created a favorable impression on the part of industry, and almost complete acceptance of the system."⁶¹ The Commission's procedure under the permit system was similar to the pre-permit procedure: inspection of the plant; an evaluation of the pollution problem; requirements to meet the problem; and in many cases a study of the adjoining waters. Thus, rather than using the new authority to coerce immediate compliance with the policy of the state, the Commission concluded that acceptance of the new system without resort to the formal legal processes was the preferable method of achieving pollution abatement.

With less significant polluters the informal process is usually effective. In general, staff members will conduct investigations and attempt to convince the operator to take the necessary measures. Beginning in 1963 a new procedure was adopted. If cooperative attempts fail, a staff member will inform the director about the problem, and then a letter may be written from the Attorney-General's office which will state that the violation may be a crime and is subject to abatement.⁶² After the letter is sent the statutory procedure⁶³ is readily available and it, not cooperation or applied pressure, will be used.

By June, 1957, 70 percent of the industries had obtained permanent permits; in 1958, 80 percent, and in 1963, 93 percent.⁶⁴ The statistics are impressive, and Murray Stein, chief enforcement officer of the federal program, commented that in his opinion Washington had "one of the best, if not the best, records of municipal and industrial compliance" in the nation.⁶⁵ The record is far from perfect, however, because by 1963 only 41 percent of the pulp mills had obtained permanent permits.⁶⁶ If the pulp industry is segregated from the other industries the statistics are more meaningful: the pulp mills represent only 4.13 percent of the industrial operations in the Puget Sound area, yet the mills account for 32 percent of the total noncompliance.⁶⁷ It is therefore necessary to review the record of the Commission efforts concerning the pulp industry.

⁶¹ PROG. REP. No. 39, at 4 (Dec. 1, 1955). Cooperation was further enhanced by incorporating industry suggestions in the permits whenever possible.

⁶² Interview with the Honorable Charles B. Roe, Jr., *supra* note 47.

⁶³ WASH. REV. CODE § 90.48.120 (1961): Notice by registered mail, the proper waiting period (formerly 15 now 30 days), the order, and the administrative hearing.

⁶⁴ PROG. REP. No. 43, at 1, 25 (Jan. 1, 1958); 1962 JOINT CONF. 66.

⁶⁵ *Hearings Before A Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 89th Cong., 1st Sess. 115 (1965).

⁶⁶ 1962 JOINT CONF. 66. The only other group with less than 92% compliance was miscellaneous at 84%.

⁶⁷ *Id.* Figures are extrapolated.

IV. THE COMMISSION AND THE PULP INDUSTRY

A. *Attempting to Secure Compliance*

The pre-1945 executive commission was concerned with pollution from SWL and immediately initiated a water quality monitoring program in Grays Harbor.⁶⁸ The commission also took an active interest in construction of a magnesium oxide (MgO)-SWL recovery system at the Weyerhaeuser plant in Longview. The statutory Commission continued this interest.⁶⁹ Hope for immediate pollution abatement in large part rested on the success of the Longview conversion. Furthermore, Weyerhaeuser advised the Commission "that a similar conversion will be made at their Everett plant and has further indicated that this [MgO] process will be available to all members of the industry."⁷⁰ Expectations increased and the Commission decided that if the Longview conversion were successful, they would meet with industry representatives and find out how long it would be before the whole industry would convert to the new process⁷¹—although the Commission did note that the conversion cost might be too great for smaller operations.⁷² The Longview plant was a success, but the Korean War intervened, preventing the industry from obtaining necessary materials for converting the plants.⁷³ Nevertheless, Weyerhaeuser and Scott jointly expended over \$1 million to construct a deepwater diffuser at Everett for their SWL discharge into Port Gardner Bay; no Commission order forced this action.⁷⁴

After the Korean War, the Commission was unfortunately compelled to spend increasing amounts of time and effort in convincing Seattle officials to take action on their sewage problem; thus, to some extent the pulp industry was ignored. The industry was not wholly idle, however, and the Commission recognized this. After the 1955 permit legislation, permit number one was issued to Weyerhaeuser's Everett

⁶⁸ See POLLUTION CONTROL COMM'N, PROGRESS REPORT ON FIELD INVESTIGATIONS AND RESEARCH (1938). The initial results showed: (1) a low dissolved oxygen content in the waters; (2) that the ocean and tides provided little dispersion; and (3) acute pollution existed until the first material increase in the stage of the river following the summer dry period.

⁶⁹ PROG. REP. No. 12 (Aug. 1, 1947) is totally devoted to the problem of pollution from SWL.

⁷⁰ PROG. REP. No. 10, at 4 (April 1, 1947).

⁷¹ PROG. REP. No. 16, at 3 (April 1, 1948). During this period the Commission was optimistic about solution of the pulp problem because it appeared the whole industry was actively pursuing abatement.

⁷² PROG. REP. No. 20, at 1 (Dec. 1, 1948).

⁷³ 1962 JOINT CONF. 83.

⁷⁴ See PROG. REP. No. 29, at 9 (Dec. 1, 1951); see also Argus, May 11, 1962, at 4, col. 5.

plant "in recognition of the efforts of this company to control the wastes from this operation."⁷⁵

The permit system encouraged various pulp companies to reduce their wastes. Crown Zellerbach (Camas),⁷⁶ Weyerhaeuser (Cosmopolis and Longview),⁷⁷ Scott (Everett),⁷⁸ and Rayonier (Grays Harbor)⁷⁹ all initiated major projects which assisted pollution abatement.⁸⁰ Approximately 25 percent of all these projects were initiated directly for pollution control benefits. The remaining 75 percent were initiated for other purposes, but did assist pollution abatement.⁸¹ Unfortunately, almost all the major construction occurred at mills which were not located on Puget Sound. Thus it becomes apparent why the focus of the pollution problem of the pulp mills is in the Puget Sound area.

The oyster-growers were most concerned with pollution from SWL. They felt that SWL was seriously harming their economic livelihood, and they consistently pressed the Commission for immediate action. In 1958 the Commission responded by requesting two outside consultants, acceptable to both the pulp companies and the oyster-growers, to prepare a report on the effects of SWL upon oysters.

In early 1960 the Gunter-McKee *Report*⁸² was submitted, and it immediately became a center of controversy. The two scientists had conducted no direct investigations, but merely relied on information gathered from various sources.⁸³ Also the report was concerned with oyster mortality in SWL⁸⁴ and not with other potentially harmful effects of SWL on oysters such as reduced size or unmarketable quality. The oyster-growers termed the report a "disaster,"⁸⁵ since, while not entirely vindicating the pulp companies, it was highly favorable to them. In fact, the report would have permitted a greater

⁷⁵ PROG. REP. No. 39, at 4 (Dec. 1, 1955).

⁷⁶ Besides enlarging and modernizing an already effective Kraft recovery system, the company began a water sampling system. The cost of all the expenditures was \$3.9 million. PROG. REP. No. 43, at 40-41 (Jan. 1, 1958).

⁷⁷ Weyerhaeuser spent \$11.25 million in improving recovery systems, constructing a sewage treatment plant, and measuring, sampling and analyzing wastes. *Id.* at 46-47.

⁷⁸ Scott's various improvements cost \$1.2 million. *Id.* at 45.

⁷⁹ For \$7.5 million the company constructed a sodium base recovery system to recover at least 85% of all organic and inorganic solids. Form letter to all employees from Geo. A. Holt, Resident Manager, Rayonier, Inc., Grays Harbor Div., Jan. 8, 1960 (on file in the Washington Law Review offices).

⁸⁰ Other companies made minor improvements. *See*, PROG. REP. No. 43, at 40-49 (Jan. 1, 1958).

⁸¹ PROG. REP. No. 43, at 50 (Jan. 1, 1958).

⁸² G. GUNTER & J. MCKEE, ON OYSTERS AND SULFITE WASTE LIQUOR (1960).

⁸³ *Id.* at 3.

⁸⁴ *See, e.g., id.* at 48.

⁸⁵ Interview with Mr. R. H. Bailey, *supra* note 18.

amount of SWL discharge into the waters of the state than already existed.⁸⁶

Nevertheless, the Commission was moving toward requiring full abatement from the pulp companies which had not yet constructed adequate recovery facilities. In the four years beginning in 1958 there were 20 special committee sessions concerning pulping wastes.⁸⁷ In 1960 the Commission issued new regulations governing pollution from the pulp industry,⁸⁸ and these regulations were merely part of a tougher Commission policy to insure "adequate recovery of settleable solids to fully protect all water uses. . . ."⁸⁹ Interestingly, the policy was not in full accord with the Gunter-McKee *Report* as the Commission moved to insure there would be no increase in SWL levels.⁹⁰ New rules resulted in issuance of temporary permits for the mills which lacked adequate recovery facilities: these permits containing new and stringent standards.⁹¹ The Commission was finally taking the initiative authorized by the permit system. The mills were required to begin construction of facilities similar to those built by other mills in the state. The permits required recovery of 85 percent of the SWL, a large but not impossible order.⁹²

The companies in question balked because they felt the changes necessary would collectively cost them approximately fifty million dollars.⁹³ Previously cooperative, if not wholly active in pollution abatement, they demonstrated the most fundamental weakness of the

⁸⁶ Pollution Control Comm'n, Digest of Reg. Meeting, at 6 (Sept. 6, 1960) [hereinafter cited as Digest].

⁸⁷ Argus, May 11, 1962, at 4, col. 3.

⁸⁸ Rule 04.252 (1960) (no longer in force) of the Commission provides:

(1) The general policy is to provide facilities to protect all water uses. (2) The burden of proof is on the applicant in order to gain an increase in the amount of SWL to be discharged. (3) To receive a permit the mill must show a system to recover solids to be in operation within three years. (4) If no permanent permit is issued, the mill must file plans for installation of recovery facilities of solids, show that the existing system is adequate, or be in operation within three years. (5) The Commission may offer evidence in support of conditions to the issuance of the permit. (6) Intervenor is allowed in situations where their interests are or may be affected by the proceedings.

⁸⁹ Digest at 7.

⁹⁰ *Id.* See also letter from D. C. Ellsworth, Vice President of Columbia River Paper Co. to Pollution Control Comm'n, Sept. 2, 1960 in Digest at 42. Mr. Ellsworth felt the rules would prevent any additional construction of new mills or expansion of existing mills. *But see*, Rule 04.252 (2), *supra* note 88, indicating Mr. Ellsworth was in error.

⁹¹ *Cf.* Sulphite Pulp Manufacturer's Research League, Progress Report No. 4, at 7 (Sept. 1, 1961).

⁹² *Id.* at 9. The "Report" notes that both the Kraft and MgO processes are at least 75% effective.

⁹³ Argus, May 11, 1962, at 4, col. 3. It should be noted, however, that five years later a mill spokesman estimated the cost at \$40 million. *See* Seattle Times, Sept. 6, 1967, at 31, col. 2. *But see* note 189 *infra* and accompanying text.

Water Pollution Control Act. The companies requested an administrative hearing thereby insuring legally sanctioned delay while the process moved to a final determination, probably by the state supreme court. Furthermore, the objections to the temporary permits were so numerous that a considerable delay appeared likely. In the words of one non-legal member of the Commission staff, the objections "include[d] . . . the kitchen sink."⁹⁴

B. Legal Issues

The requests for a hearing by the various pulp companies created the possibility of the initial court test of the permit system. In their written applications for hearings the companies presented the legal issues on which they might rely in the event of a court test. The essential objections to the permits were constitutional; but these objections are without merit.⁹⁵ Basically the pulp companies alleged

⁹⁴ 1962 JOINT CONF. 84.

⁹⁵ There were four other legal objections. One of the minor arguments is based on WASH. CONST. art. XXI: "*Public Use of Water*. The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use." The pulp companies contend that their use of the waters is a public use, and the permits would destroy this public use to benefit private persons. 1962 JOINT CONF., apps. B7, D4, E4. Even if correct the argument would still not be dispositive of the issue. *Anderson v. Superior Court*, 119 Wash. 406, 205 P. 1051 (1922) established that the declaration in art. XXI is not exclusive and does not preclude the legislature from declaring other purposes to be public uses. The policy section of the Water Pollution Control Act can easily be construed as accomplishing this because it treats industrial uses merely as co-equals with the other enumerated uses. Furthermore, in the recent en banc decision in *Botton v. State*, 69 Wash. Dec. 2d 759, 420 P.2d 352 (1966) (4-1-4) five of the judges specifically emphasized the importance of recreational uses of water to the state. (The four judges joining in the opinion of the court did not deal with the problem.) Given *Botton*, there is little doubt that if the court faced the art. XXI issue, it would hold that recreation on state waters is a public use.

The companies also alleged the requiring of permits constituted a taking of property without just compensation. Unfortunately, this argument rests on the fallacious assumption that there is a vested right to pollute as much as one pleases. Furthermore, *Snavelly v. Goldendale*, 10 Wn. 2d 453, 117 P.2d 221 (1941) presents an insurmountable obstacle to the argument. In *Snavelly* the court held that pollution from a city may assume the character of a "taking" of a downstream owner's land. *See also Sittner v. Seattle*, 62 Wn. 2d 834, 384 P.2d 859 (1963).

Two non-constitutional contentions were also presented: (1) the Commission is violating the policy section and (2) the Commission's standards are so inadequate that even the Commission is unable to know the amount of abatement which will result if the companies comply with the permits. The latter argument, even if correct in 1962, is moot. The Commission now has the results of the five-year study, discussed in text accompanying note 158 *infra*, and the Commission must enforce the standards promulgated under the Federal Water Pollution Control Act. These standards are unlikely to be seriously questioned by a reviewing court.

The pulp companies have disagreed with the Commission's interpretation of the policy section, *i.e.*, that it is a clear mandate for an aggressive program of pollution abatement. The pulp companies read the section as if it merely said: "Highest possible standards to insure the purity of all waters of the state consistent with . . . the industrial development of the state." Thus when the pulp companies threaten to leave the state, as they frequently did (*see, e.g.* 1962 JOINT CONF. apps. A, B, D), they can argue that the Commission is violating the policy section. The section, however, is

(1) that RCW chapter 90.48 constituted an unlawful delegation of legislative power,⁹⁶ and (2) that the orders in the permits deprived them of property without due process of law under both the federal and state constitutions.⁹⁷

The two essential criteria of the Washington supreme court in the unlawful delegation cases are a declaration of legislative purpose and some standards within the statute to guide administrative determinations.⁹⁸ The Water Pollution Control Act satisfies both of these requirements, although it cannot be denied that the standards are not explicit.⁹⁹ The policy section, while ambiguous, does focus on a legislative desire to improve water quality whenever possible, and the sections governing general powers,¹⁰⁰ determination of pollution,¹⁰¹ and issuance of permits¹⁰² either explicitly or implicitly refer back to the policy section as a guide for the Commission. Furthermore, one might ask how, in 1945 or even in 1967, the legislature could draw more explicit standards and still maintain sufficient flexibility?¹⁰³

not written with three dots in the middle, and contains more considerations than the industrial development of the state. Even the Department of Commerce and Economic Development (which is not represented on the Commission) concurs with the Commission's interpretation: "It is extremely important, however, that no one... be permitted to destroy the usefulness of these waters for others." *Id.* at 165 (Statement of Mr. Richard Beebe for the Department).

⁹⁶ 1962 JOINT CONF. apps. B6, C18.

⁹⁷ *Id.* at app. D3.

⁹⁸ See, e.g., *In re Puget Sound Pilot's Ass'n*, 63 Wn. 2d 142, 144, 385 P.2d 711, 712 (1963); *Peterson v. Hagan*, 56 Wn. 2d 48, 62, 351 P.2d 127, 135 (1960).

⁹⁹ In an original, if not convincing, example of drafting allegations, Rayonier attempted to secure the best of all possible worlds. The company alleged: (1) that the Commission's authority to issue permits has been "carefully circumscribed" and under legislative standards a permit should issue automatically and (2) somewhat incongruously in view of the previous statement, that there was an unconstitutional delegation of authority because there are no standards! 1962 JOINT CONF. app. C5, C18.

¹⁰⁰ WASH. REV. CODE § 90.48.035 (1961), as amended by Wash. Sess. Laws 1967, ch. 13, § 6 (substantially unchanged on this point).

¹⁰¹ WASH. REV. CODE § 90.48.070 (1961).

¹⁰² WASH. REV. CODE § 90.48.160 (1961).

¹⁰³ See *City of Utica v. Water Pollution Control Board*, 5 N.Y.2d 164, 156 N.E.2d 301 (1959) (rejecting a similar argument under a statute with similar guidelines). In *Texas Co. v. Montgomery*, 73 F. Supp. 527, 533-34 (E.D. La. 1947), *aff'd*, 332 U.S. 827 (1947) the court stated:

[I]t would have been impossible [considering the purpose and aim of the act] for the Legislature to prescribe a formula for the Commission's guidance or to lay down rules with reference to harmful pollution applicable to all waters: What might be harmful pollution in one body of water might not be harmful pollution in another. Of necessity, a determination of the facts of what might constitute harmful pollution was left to a fact-finding group. The Legislature was compelled to create an agency to administer the act.

See also the guidelines for the Secretary of the Interior if he promulgates water quality criteria for interstate waters: "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other legitimate uses." 33 U.S.C.A. § 466g(c) (3) (Supp. 1966).

The court also has recognized two additional considerations in unlawful delegation cases. The first is the length of time a statute has been applied without a constitutional challenge,¹⁰⁴ and the Water Pollution Control Act was enacted in 1945. The second consideration is the feasibility of a legislature which meets for 60 days every other year handling the problem itself.¹⁰⁵ "The legislature may . . . delegate to a Commission the power to do some things which it might properly, but can not advantageously, do itself."¹⁰⁶ Pollution control is a clear example of an area where the legislature could not solve the continually changing problems, and must delegate authority to an expert agency—which itself is unable to solve many of the problems. If there were no Pollution Control Commission it would be impossible to have even a semblance of pollution abatement and improved water quality.

The fourteenth amendment due process argument as applied to the Water Pollution Control Act is obviously frivolous. Beginning with the *West Coast Hotel* decision¹⁰⁷ overruling *Adkins v. Children's Hospital*,¹⁰⁸ the Supreme Court has permitted the states to regulate their industry as they chose with the "wisdom and utility of legislation" left to the state legislatures where the responsibility belongs.¹⁰⁹

On the state level, substantive due process continues to have some vitality.¹¹⁰ However, even though there is dictum to the contrary,¹¹¹

¹⁰⁴ *In re Puget Sound Pilot's Ass'n*, 63 Wn. 2d 142, 385 P.2d 711 (1963) (court found it significant that there had been no previous constitutional challenge of a 26-year-old statute).

¹⁰⁵ *Frach v. Schoettler*, 46 Wn. 2d 281, 287, 280 P.2d 1038, 1042 (1955); *Vail v. Seaborg*, 120 Wash. 126, 130, 207 P. 15, 16 (1922); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 364, 194 P. 595, 597 (1920).

¹⁰⁶ *Spokane Hotel*, *supra* note 105, at 364.

¹⁰⁷ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

¹⁰⁸ 261 U.S. 525 (1923).

¹⁰⁹ *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

¹¹⁰ See Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607 (1963). The Comment is principally concerned with cases which border between police power and eminent domain. The author suggests the court makes an independent determination of whether "the benefit conferred upon the public warrants . . . [the] degree of infringement upon private property interests." *Id.* at 613. Furthermore, he erroneously suggests the court should do this. Although he mentioned deference to the legislature, the author failed to elaborate the point and leaves the reader wondering why the court should be substituting its judgment for the legislative determination.

See also *Washington v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 430-31, 156 P. 837, 842 (1916):

It may be true that the act is burdensome, and will prevent many from engaging in this form of traffic who would otherwise engage therein. . . . These . . . are not questions for the consideration of the courts. With the courts the question is one of power, not one of policy. The courts cannot overthrow statutes . . . because in the opinion of the judges they could or should have been made less rigorous.

¹¹¹ *Peterson v. Hagan*, 56 Wn. 2d 48, 53, 351 P.2d 127, 130 (1960): "We reject flatly the argument that the due process and equal protection clauses of the federal and state constitutions do not apply to statutes enacted in exercise of the police power."

most Washington decisions indicate that legislation passed pursuant to the police power is not limited by any concept of substantive due process under the state constitution.¹¹² *Frach v. Schoettler*¹¹³ amply demonstrates the analysis used in due process cases:¹¹⁴ plaintiff has the burden of proof against a presumption that the statute is in the interest of the public welfare; there is an expansive definition of the police power;¹¹⁵ finally the court asks: is the method selected in the legislation reasonably related to the police power goals? Once the question is answered the constitutional inquiry is ended. There is no doubt that the Water Pollution Control Act is police power legislation,¹¹⁶ and therefore the sole issue is the reasonable relation. *Sittner v. Seattle*¹¹⁷ is dispositive of the issue. In *Sittner* the court upheld Seattle's air pollution ordinance over due process arguments where plaintiffs alleged that compliance would drive them out of business. The court stated that economic hardships, without more, cannot affect constitutional validity.¹¹⁸ Thus the substantive due process argument under the state constitution is without merit. Other actions, however, shifted the focus from the legal issues to Federalism.

V. ACTIONS SINCE 1962

A. *The Federal—State Conference*

While the Commission and the pulp companies were attempting to narrow the issues to be presented at the hearing, Governor Rosellini

The statement is wholly correct in its reference to the equal protection clause, but this dicta as to the due process clause was gratuitous—and erroneous—because the court was faced with an equal protection problem. Only equal protection cases were cited to support the proposition, and the majority (there was an intelligent and scathing dissent) proceeded to decide the case on traditional equal protection grounds: "This is not classification or even an attempt at classification." *Id.* at 58, 351 P.2d at 133.

¹¹² *Lillions v. Gibbs*, 47 Wn. 2d 629, 634-35, 289 P.2d 203, 206 (1955); *Frach v. Schoettler*, 46 Wn. 2d 281, 280 P.2d 1038 (1955); *Shea v. Olson*, 185 Wash., 143, 53 P.2d 615 (1936); *Fisher Flouring Mills Co. v. Brown*, 109 Wash. 680, 187 P. 399 (1920). For purely procedural interpretations of the due process clause see *Gnecchi v. State*, 58 Wn. 2d 467, 364 P.2d 225 (1961) and *State v. Cater's Motor Freight System, Inc.*, 27 Wn. 2d 661, 179 P.2d 496 (1947).

¹¹³ 46 Wn. 2d 281, 280 P.2d 1038 (1955).

¹¹⁴ The court does apply the arbitrary and capricious test in due process cases, however. This, of course, necessitates less analysis. See *State v. Spino*, 61 Wn. 2d 246, 377 P.2d 868 (1963); *Kelleher v. Munshull*, 11 Wn. 2d 380, 119 P.2d 302 (1941).

¹¹⁵ "[T]here is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order, and welfare of the people." 46 Wn. 2d 281, 285-86, 280 P.2d 1038, 1041 (1955).

¹¹⁶ See *United States v. 531.13 Acres of Land*, 366 F.2d 915 (4th Cir. 1966); *Shirely v. New Hampshire Water Pollution Comm'n*, 100 N.H. 294, 124 A.2d 189 (1956); *City of Huntington v. State Water Comm'n*, 137 W.Va. 786, 73 S.E.2d 833 (1953).

¹¹⁷ 62 Wn. 2d 834, 384 P.2d 859 (1963).

¹¹⁸ The court's language also disposed of the "taking" issue, note 95 *supra*. *Id.* at 839:

The plaintiffs contend that compliance with the ordinance makes it economically infeasible for a continuation of their business and that the ordinance is there-

requested a joint Federal-State Conference concerning pollution in Puget Sound and the Strait of Juan de Fuca. The Conference met January 16-17, 1962, and extensive testimony was received from the Commission, various state agencies, the pulp industry, two labor unions, a sportsman's group, oyster-growers, and others.¹¹⁹

The testimony not only illuminated many of the pollution problems of the Puget Sound area, but also reflected attitudes of many of the conflicting interests. The most interesting of the attitudes was the parochial view expressed by the two labor spokesmen. One of them summed up the pulp workers' union's position explicitly: "My concern is *solely* with the ten thousand people I represent."¹²⁰ The other spokesman was not as blunt, but his message was essentially identical: the employees and their families were "totally and completely financially dependent upon the continued operation of the mills," and naturally the threats to close the mills worried him.¹²¹ Thus, both labor and management were affirming a similar position which, of course, could place the Commission in a politically unhappy position. Also illuminating were the continually diametrically opposite views of the pulp industry and the oyster-growers on the problems of the oyster industry. The latter contended that sulfite waste liquor was a major cause of their problems,¹²² while the former placed the blame on poor conservation procedures.¹²³

B. *The Five Year Study and Federal Standards*

The principal conclusion of the conference was that pollution abate-

fore oppressive and a taking of their property without due compensation. Economic hardships often inevitably result from laws and ordinances enacted or adopted for the protection of the public health and welfare; this, however, cannot affect their constitutional validity unless they are shown to be clearly unreasonable and discriminatory.

¹¹⁹ See generally 1962 JOINT CONF.

¹²⁰ *Id.* at 263 (emphasis added). This was not, of course, the first time union representatives had spoken on behalf of their employers. See, e.g., Minutes of the Pollution Control Comm'n Meeting, May 18, 1960, at 18-19. A field representative of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers stated: "... I do know that scientists, if they err, invariably err on the conservative, or safe, side. [Then referring to the Gunter-McKee Report,] I can only deduce that the industry is doing an outstanding job in the abatement and control of pollution." A union president stated: "Certainly this [pulp] is an industry that I don't think should be jeopardized by oyster growers or anyone else."

¹²¹ 1962 JOINT CONF., at 193, 195.

¹²² *Id.* at 235-36.

¹²³ *Id.* at 282, 305-09. In fact, most fisheries problems were blamed on poor conservation. *Id.* at 298-305. Five years later the industry's position was unchanged. When confronted with the results of the Federal Report, confirming the oyster-growers contentions, pulp spokesmen labelled the Report unscientific. Seattle Times, April 26, 1967, at 7, col. 4-7.

ment measures taken by the pulp industry were inadequate.¹²⁴ To help remedy this problem, a joint federal-state investigation, to last for five years, was initiated to conduct: (1) in-plant studies at each mill in question, (2) oceanographic studies to determine dispersion and persistence of pollution in relation to currents and tides, (3) biological and related chemical studies of the marine environment, and (4) studies of all sources of wastes discharged into the study area.¹²⁵

The five year study was essentially a federal, rather than a state or cooperative, project. The \$1,500,000 of direct financial assistance was provided by the federal government. The Commission, however, did provide considerable assistance through the use of its personnel in staffing the study. The projects undertaken by the study were determined by a technical staff of both federal and state officials, but they nevertheless bear a substantial imprint of past work and investigation by the Commission. Of course the problems discussed at the 1962 joint conference provided a considerable focus for the study.¹²⁶

The five year study resulted in a reprieve for the pulp companies from the temporary permits of 1961, because the Commission decided that final decisions of the requirements for the disposal of SWL would be deferred until field investigations were completed.¹²⁷ However, the pulp mills were required to make certain immediate corrections which the Commission deemed feasible. The most notable of these were at Weyerhaeuser's Everett plant where the company spent over \$100,000 to reduce fiber losses by 50 percent and suspended solids in the hydraulic barker effluent by 85 percent to 90 percent.¹²⁸

As the five year study approached its conclusion, the Commission began work toward preparation of standards for interstate waters to comply with the new federal legislation.¹²⁹ Initially the required letter of intent was written; then the Commission held public hearings throughout the state. The hearings were informational only. The Commission was attempting to solicit public comment on the proposed

¹²⁴ POLLUTION CONTROL COMM'N, QUARTERLY PROGRESS REPORT ON POLLUTION OF NAVIGABLE WATERS: PUGET SOUND, STRAIT OF JUAN DE FUCA AND THEIR TRIBUTARIES AND ESTUARIES, No. 8, at 3 (March 31, 1964). [Hereinafter cited as QUARTERLY PROG. REP.]

¹²⁵ UNITED STATES PUBLIC HEALTH SERVICE, DIVISION OF WATER SUPPLY AND POLLUTION CONTROL, SEMI-ANNUAL PROGRESS REPORT: WASHINGTON STATE ENFORCEMENT PROJECT, at 3 (Feb. 1, 1965).

¹²⁶ Letter from the Honorable Charles B. Roe, Jr. to author, April 26, 1967 (on file in the Washington Law Review offices).

¹²⁷ QUARTERLY PROG. REP. No. 9, at 7 (June 30, 1964).

¹²⁸ See QUARTERLY PROG. REP. No. 11, (March 31, 1965).

¹²⁹ See text accompanying note 12 *supra*.

standards. Finally there was a rule-making hearing under the Administrative Procedure Act,¹³⁰ and on June 29, 1967, the standards were promulgated with all inconsistent regulations being repealed.¹³¹ Although they were modified slightly, the standards were approved in December 1967.

The five year study assisted greatly in drafting the standards. The study, with its complete federal financing, secured data that would have been unavailable for years had the Commission been forced to delay until adequate state finances were forthcoming.

The standards created four separate classes of waters, ranging from AA ("extraordinary") to C ("fair"). Class AA characteristic uses are water supply, recreation, wildlife habitat, and fish and shellfish reproduction, rearing, and harvest. The Class C uses are more limited and of an industrial nature.¹³² The two intermediate classifications are by far the more prevalent,¹³³ and their uses combine the two other classifications.

The Commission has announced that existing waste discharges which conflict with the standards shall be modified to conform as expeditiously as possible, which at the latest is to be five years. "Exceptional cases," however, may be granted a longer period to conform.¹³⁴ Thus while the five years from 1962 through 1967 have been devoted largely to studying the effects of pollution and preparing standards, the next five years apparently will involve an increasing amount of inspection and enforcement activities.

VI. THE 1967 AMENDMENTS

Before the final report of the five year study was completed, the 1967 legislature, responding to Commission needs and the impetus of the new federal legislation, strengthened the Water Pollution Control Act by enacting two separate statutes.¹³⁵ Just as the permit system of the 1955 legislation shifted the inertia of the law toward a stronger policy of pollution control, the 1967 amendments added considerable force to the policy. The essential framework of the act remains un-

¹³⁰ WASH. REV. CODE ch. 34.04 (1959).

¹³¹ See generally, Water Quality Standards for Interstate and Coastal Waters, Pollution Control Comm'n Regulation, June 29, 1967.

¹³² *Id.* at 3, 6. See appendix *infra*.

¹³³ Of the 64 areas classified 7 are AA, 39 are A, 15 are B, and 3 are C. Water Quality Standards for Interstate and Coastal Waters, Pollution Control Comm'n Regulation, *supra* note 131, at 7-13.

¹³⁴ *Id.* at 17.

¹³⁵ Wash. Sess. Laws, 1967, ch. 13; Wash. Laws Ex. Sess. 1967, ch. 139.

changed,¹³⁶ but the additions provide new powers for the Commission, and correct several substantive difficulties in the old legislation.

One of the most significant changes made by the new statute was the repeal of RCW section 90.48.130 which provided for a stay of Commission orders during a hearing and appeal. Prior to the repeal of this section, a significant polluter may have found the delay while an order is stayed to be worth the expense of challenging a Commission order. The new amendments cover the problem of repeal in two separate sections. One provides that the Commission shall not stay an order unless *in its discretion* the Commission determines that a stay would not be detrimental to the public interest.¹³⁷ The decision not to stay an order is appealable, however. The other section explicitly provides that the APA shall apply to all proceedings under the Water Pollution Control Act.¹³⁸

At the time the amendments were passed the change meant that a Commission determination could be reversed only (assuming jurisdiction, fair procedure, and no error of law) if the order was either "unsupported by material and substantial evidence in view of the entire record as submitted" or arbitrary and capricious.¹³⁹ Later during the session, however, the legislature amended the APA and changed

¹³⁶ In fact, many provisions of the old act remained either unchanged or substantially unchanged. The policy section was unchanged. The broad definitions of person and waters of the state, WASH. REV. CODE § 90.48.020 (1961), were unchanged, but an expansive definition of pollution was added to the section. Wash. Sess. Laws 1967, ch. 13, § 1. Other substantially unchanged sections include the requirement of a waste discharge permit, WASH. REV. CODE § 90.48.160 (1961), and the authorization of cooperation with the federal and other state governments. WASH. REV. CODE §§ 90.48.153, 156 (1961).

WASH. REV. CODE § 90.48.190 (1961) pertaining to the termination of permits was also substantially unchanged, but a problem of construction remains under the section. A permit may be terminated if the Commission finds: (1) procurement by misrepresentation of any material fact or lack of full disclosure; (2) violation of the permit; (3) a material change in the quantity or type of waste discharged. It seems clear that any one of the three conditions is grounds for termination of a permit, but unfortunately the section is not written in the disjunctive. The section is simply poorly drafted, and if a court required all three conditions to be met, the provision would be nullified because it is unlikely all would be present in a given case. Hopefully a court will construe the section as if it had been written in the disjunctive.

Lastly, the permit section, WASH. REV. CODE § 90.48.160 (1961) as amended by Wash. Sess. Laws 1967, ch. 13, § 13, still refers to "commercial or industrial operation." The Commission has interpreted this to include agricultural use, but there is some doubt if this construction is correct because WASH. REV. CODE § 90.48.020 (1961) as amended by Wash. Sess. Laws 1967, ch. 13, § 1 refers to "commercial, industrial, [and] agricultural... uses" which implies that the legislature distinguishes between the various uses. It would be helpful if the legislature would amend the section to clarify this confusion. It must be emphasized, however, that the issue is permits, not jurisdiction. The Commission's jurisdiction over agricultural uses is clear. See WASH. REV. CODE § 90.48.030 (1961).

¹³⁷ Wash. Sess. Laws, 1967, ch. 13, § 12.

¹³⁸ Wash. Sess. Laws, 1967, ch. 13, § 21.

¹³⁹ WASH. REV. CODE §§ 34.04.130 (6) (e), (f) (1959).

the substantial evidence test to "clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order."¹⁴⁰

Although the Washington supreme court has never elaborated the difference between the substantial evidence and arbitrary and capricious tests under the APA, it has recognized a distinction.¹⁴¹ The definition of arbitrary and capricious is stringent, and the court has noted "it would seem safe to predict that it would be a rare occasion to find" arbitrary and capricious action.¹⁴² Substantial evidence, as the court has developed the test, is evidence "which would convince an unprejudiced, thinking mind of the truth . . . to which the evidence is directed."¹⁴³ Unfortunately the court has not used the clearly erroneous test, but many state courts have accepted the classic formulation¹⁴⁴ of the United States Supreme Court in the *United States Gypsum* case:¹⁴⁵ "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Thus the clearly erroneous test allows more review than the substantial evidence test, although the former may provide more clarity on the scope of review.¹⁴⁶ It is not clear exactly what the legislature intended by inserting the clause concerning agency policy. It could be construed as an open invitation to substitute a judicial judgment for an administrative determination. However, the section does not provide for a de novo trial, and one may query whether the legislature intended

¹⁴⁰ Wash. Sess. Laws 1967, ch. 237, § 6(6)(e). The impetus for this change was the extensive lobbying efforts of "a large part of the pulp industry—not including Weyerhaeuser" according to Senator Wilbur Hallauer. See *Argus*, March 24, 1967, at 1, col. 4.

¹⁴¹ *Northern Pac. Transp. Co. v. Washington Util. & Transp. Comm'n*, 69 Wash. Dec. 2d 474, 481, 418 P.2d 735, 739 (1966).

¹⁴² *Id.* Obviously "no talismanic words" can solve the process of judging whether action is arbitrary and capricious. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951). The Washington supreme court has provided a definition, however, which indicates the standard to be applied in determining whether action is arbitrary and capricious: willful and unreasoning action without consideration and regard for facts and circumstances. *Northern Pac. Transp. Co. v. Washington Util. & Transp. Comm'n* 69 Wash. Dec. 2d 474, 418 P.2d 485 (1966); *Miller v. Tacoma*, 61 Wn. 2d 374, 378 P.2d 464 (1963); *Lillions v. Gibbs*, 47 Wn. 2d 629, 289 P.2d 203 (1955). But "where there is room for two opinions action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Miller, supra*; *Smith v. Hollenbeck*, 48 Wn. 2d 461, 294 P.2d 921 (1956).

¹⁴³ *Arthurs v. National Postal Transp. Ass'n*, 49 Wn. 2d 570, 577, 304 P.2d 685, 690 (1956).

¹⁴⁴ See 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 726 n.259 (1965).

¹⁴⁵ *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

¹⁴⁶ See COOPER, *supra* note 144, at 724-30.

to subvert its earlier determination favoring a speedy administrative adjudication by encouraging recourse to lengthy judicial procedures. The section appears to require a judicial opinion on what the policy section of an agency statute means, and then a subsequent determination of whether the agency decision in implementing that policy is "clearly erroneous." The court should remember, of course, that a highly technical record demands an exercise of expert judgments, and therefore the new section should not be interpreted as vesting this expertise in the court.

Another significant change is an additional penalty section¹⁴⁷ which should assist enforcement of the act. The new section operates on anyone who either violates a waste discharge permit or who operates without one when required. There is a penalty of \$100 per day for each violation, and each violation is a separate offense. The director of the Commission must send a written notice of the penalties incurred, and upon receipt of such notice by the violator the penalties become due. The attorney general is authorized to bring an action to collect the penalty if unpaid after 15 days. If vigorously enforced this section should secure rapid compliance from less significant polluters who cannot afford the costs of a violation; in fact, threat of such action will probably be sufficient.¹⁴⁸ While a larger polluter will not be deterred by the costs, if the Commission attempts to seek publicity concerning such actions the publicity may provide considerable impetus to comply with the act.

Coupled with the new penalty provision is a tax credit plan¹⁴⁹ for facilities installed "for the primary purpose" of pollution abatement.¹⁵⁰ After securing a certificate from the Commission, the operation is entitled to a tax exemption or credit of two percent cumulatively per year of the total cost of the facilities as long as the certificate is in force.¹⁵¹ Such credit may not cumulatively exceed 50 percent of the total cost nor 50 percent of the excise taxes payable in a year.¹⁵² The

¹⁴⁷ Wash. Laws Ex. Sess. 1967, ch. 139, § 14.

¹⁴⁸ *But see*, Charmichael, *Forty Years of Water Pollution Control in Wisconsin: A Case Study*, 1967 WIS. L. REV. 350, 389-95. The Wisconsin act provides for severe penalties, and consequently the courts are rather lenient toward violators.

¹⁴⁹ Wash. Laws Ex. Sess. 1967, ch. 139.

¹⁵⁰ Wash. Laws Ex. Sess. 1967, ch. 139, § 1(1) (b). There may be considerable difficulties with the "primary purpose" language. As noted in text accompanying note 81 *supra*, much of the construction provides only secondary pollution abatement benefits, and yet one would presume that the legislature intended to include these facilities within the statutory coverage.

¹⁵¹ Wash. Laws Ex. Sess. 1967, ch. 139, §§ 5, 6.

¹⁵² Wash. Laws Ex. Sess. 1967, ch. 139, §§ 6(2) (a), (c). Excise taxes are defined as business and occupation, use and public utility taxes.

credit also is reduced by the amount of the federal investment credit.¹⁵³ A questionable, but interesting, feature of the statute is that existing facilities also qualify for the credit, although the credit is applied only to the depreciated value of the facilities.¹⁵⁴

By consolidating two sections of the old act,¹⁵⁵ the amendments clarify the problem of injunctive relief under the act. Previously the act allowed "an appropriate action at law or in equity" to carry out the provisions of the act, but the power was inserted in a section declaring a violation of a Commission determination to be unlawful.¹⁵⁶ A further section provided for injunctive relief in cases of emergency.¹⁵⁷ Thus the act could have been construed as limiting injunctive relief to emergencies, although the legislature probably was simply cautious and thereby explicit in providing for injunctive relief in one case, while still authorizing it in other cases. In any event the amendments leave no doubt about the status of injunctions. A new section¹⁵⁸ was added which provides for an "appropriate action at law or in equity, including an action for injunctive relief" to carry out the provisions of the act. Although this is probably not a substantive change in the law, the clarity will prevent future difficulties.

The most intriguing section in the amendments is the summary abatement section.¹⁵⁹ Notwithstanding any other provision of the Water Pollution Control Act, if it appears to the director of the Commission "that water quality conditions exist which require immediate action to protect the public health or welfare," he may issue an order, without any prior notice or hearing, which affords the polluter an alternative of either (1) immediately discontinuing or modifying the discharge or (2) appearing before the Commission. If the polluter elects the latter, he must not be afforded less than 24 hours notice. Then at the end of the hearing, if a majority of the Commission agree with the director, a written order shall be issued and no court may stay the order unless the court finds the Commission to have acted arbitrarily

¹⁵³ Wash. Laws Ex. Sess. 1967, ch. 139, § 6(2)(d). The credit in Washington will be based on a higher figure because the statute is written in terms of total cost which will include labor.

¹⁵⁴ See Wash. Laws Ex. Sess., 1967, ch. 139, § 6(1). Presumably the tax credit was intended to provide an incentive to encourage future construction of pollution abatement facilities. If the assumption is correct, one may query why the statute applies retroactively because in cases where facilities already exist, no incentive was necessary.

¹⁵⁵ WASH. REV. CODE §§ 90.48.060, .080 (1961).

¹⁵⁶ WASH. REV. CODE § 90.48.080 (1961).

¹⁵⁷ WASH. REV. CODE § 90.48.060 (1961).

¹⁵⁸ Wash. Sess. Laws 1967, ch. 13, § 7.

¹⁵⁹ Wash. Sess. Laws 1967, ch. 13, § 22.

or capriciously. However, the order is subject to review in the same manner as any other order.

The principal problem under the summary abatement section is ascertaining the type of hearing the polluter will receive if he elects not to discontinue immediately. The fact that this is a summary abatement section and the situation "requires immediate action" indicates that the hearing should be more rapid than under normal procedures. To this end the statute provides that 24 hours notice is sufficient. However, is this the only difference?¹⁶⁰ May the hearing itself be summary? The section provides little assistance on this point. Clearly the section would be more effective—and no less constitutional¹⁶¹—if, in light of a situation requiring immediate action, the Commission were able to hold a summary hearing. As soon as the situation lost its emergency nature a full hearing could be held with a more elaborate record for a reviewing court. Because the section operates "notwithstanding the other provisions" of the act and applies to an emergency situation, the section should be interpreted to allow the Commission to hold a summary hearing. However, the language of the section does not compel such a conclusion, and it is uncertain how the Commission and the courts will interpret it.

The Commission was granted the necessary power to subpoena witnesses and records in rule-making proceedings, in contested cases, and in considerations of applications for waste discharge permits or their termination or modification.¹⁶² The only limitations within the section are: (1) the subpoena must relate to the matter under consideration and (2) no trade secrets need be divulged. If an individual refuses to comply with the Commission's subpoena "it shall be the duty of the superior court of any county . . . to compel obedience by proceedings for contempt."

The provisions on standing have been noticeably expanded by the amendments. Previously the standard had been "any person who shall feel aggrieved."¹⁶³ The new standard incorporates the "feels aggrieved" concept, but also explicitly provides that the party need not

¹⁶⁰ Thirty days notice is necessary for a normal termination. Wash. Sess. Laws 1967, ch. 13, § 17. The decision not to stay is appealable.

An ambiguous statement by Senator Wilbur Hallauer provides the rationale for a conclusion opposite to mine on the scope of summary abatement. See *Argus*, March 24, 1967, at 5, col. 3.

¹⁶¹ *Gnecchi v. State*, 58 Wn. 2d 467, 364 P.2d 225 (1961).

¹⁶² Wash. Sess. Laws 1967, ch. 13, § 9.

¹⁶³ WASH. REV. CODE § 90.48.130 (1961).

have an economic interest in the proceedings.¹⁶⁴ The party must demonstrate, however, the manner in which the order affects him. Under this broader definition of standing, members of conservationist organizations will be able to contest Commission permits which they believe to be insufficient. To supplement the new standing provisions, any application for either a new permit or increased waste discharge must be publicized twice in a newspaper of general circulation within the appropriate county and in any other information media which the Commission may select so that interested parties may present their views to the Commission.¹⁶⁵ An application for a mere renewal permit, however, need not be publicized.

The legislature did make an effort to assist municipalities in constructing new sewage treatment facilities. It granted the Commission power to administer grants subject to four qualifications:¹⁶⁶ (1) grants are matching only, but a municipality's share includes any money received under a federal grant; (2) no grant shall be made for a project not qualifying for a federal grant; (3) no grant shall be made for a project which fails to conform to a comprehensive basin plan if such a plan has been adopted; (4) a recipient must meet any qualifications and procedures which the Commission may establish. The legislature also authorized a \$25 million bond issue to provide the initial matching money.¹⁶⁷ The Commission, however, determined that the maximum state grant will be only 15 percent of total eligible project cost until more funds from both the state and federal governments are available.¹⁶⁸

Under the old act the Commission had only two sections which allowed it to attempt to abate pollution by a municipality.¹⁶⁹ Issuing a written order to a municipality was not used, and instead the Commission sought to secure abatement through cooperation or applied pressure. This left the Commission with only one operative section: reviewing and approving all plans for sewage systems and disposal or treatment works. Thus, because it was unwilling to issue enforceable written orders to municipalities, the Commission reduced its powers to a largely negative function of approving or disapproving new construction. The new amendments greatly increase the Commission's powers

¹⁶⁴ Wash. Sess. Laws 1967, ch. 13, § 12.

¹⁶⁵ Wash. Sess. Laws 1967, ch. 13, § 15.

¹⁶⁶ Wash. Sess. Laws 1967, ch. 13, § 28.

¹⁶⁷ Wash. Sess. Laws 1967, ch. 106.

¹⁶⁸ Interview with the Honorable Charles B. Roe, Jr. *supra* note 47.

¹⁶⁹ WASH. REV. CODE §§ 90.48.110, .120 (1961).

with respect to municipalities. Starting with the old section as a base, one amendment provides that municipalities and all others constructing sewage systems must submit, in addition, their proposed method of future operation and maintainance of the system.¹⁷⁰ The Commission may not approve any plans unless it is satisfied that the plans are adequate to protect the quality of the waters of the state¹⁷¹ This section should insure that all new housing developments provide their residents with adequate sewage systems.

New sections have been added which grant the Commission a positive role in gaining treatment from municipalities. These sections sanction the Commission: (1) to delineate and establish sewage drainage basins in the state;¹⁷² (2) prepare and/or adopt a comprehensive water pollution control and abatement plan for each basin after notice and a public hearing; and (3) "require compliance with such plan by any municipality" or other person operating or constructing a sewage collection, treatment, or disposal system within the basin.¹⁷³ Thus the Commission now has positive powers which it may exercise to force municipalities to protect the water quality of the state. The immediate effect of the changes is more limited, however, and probably they initially will be used to implement the state's new construction grant program.

A minor, but indicative, change was made in the section governing the issuance of permits.¹⁷⁴ Previously a permit would issue if the Commission found that the waste disposal would not "*unduly* pollute" the waters of the state in violation of the policy section of the act. On its face the language of the section creates the anomalous situation where waste discharge could violate the policy of the state, but unless it would unduly violate that policy, a permit should issue nevertheless. The amendment to this section in keeping with the general tenor of a strengthened pollution control program deletes "*unduly*."¹⁷⁵

Several other minor changes were made. As previously mentioned, the Washington APA now explicitly governs all rule making and contested cases before the Commission.¹⁷⁶ Although it was unnecessary,¹⁷⁷ a new section was added to the act which designates the Commission as

¹⁷⁰ Wash. Sess. Laws 1967, ch. 13, § 10.

¹⁷¹ *Id.*

¹⁷² Wash. Sess. Laws 1967, ch. 13, § 26.

¹⁷³ Wash. Sess. Laws 1967, ch. 13, § 27.

¹⁷⁴ WASH. REV. CODE § 90.48.180 (1961).

¹⁷⁵ Wash. Sess. Laws 1967, ch. 13, § 16.

¹⁷⁶ Wash. Sess. Laws 1967, ch. 13, § 21.

¹⁷⁷ See WASH. REV. CODE § 90.48.153 (1961).

the appropriate state agency for all purposes under the Federal Water Pollution Control Act.¹⁷⁸ A further section of the amendments explicitly preserves all common law remedies against a polluter.¹⁷⁹ The section should overrule a questionable holding of the two *Rayonier* cases¹⁸⁰ that a person is not liable for damages from pollution if he holds a valid waste discharge permit from the Commission and is not violating it.

Significantly, the policy section of the act¹⁸¹ remains unchanged. The legislature, by leaving this section in its original form, obviously concluded that the policy as enunciated in 1945 contained sufficient clarity and breadth in directing the Commission's enforcement of the act. Thus the Commission's position that the policy section provides a clear mandate for a vigorous program of pollution abatement is, in 1967, even more tenable than in 1962 when the pulp companies were emphasizing the language "consistent with . . . the industrial development of the state."¹⁸² It should be noted that the policy section authorizes two complementary means of securing abatement. First, it requires the best practicable treatment possible; if this is not done, no permit should issue. Second, the section would prevent an operation from merely treating a portion of its wastes in order to reduce discharge below the water quality level set by the Commission for the adjoining waters. It is apparent that if every operation did only this that the Commission standards would be meaningless. Thus discharge must be reduced to the lowest possible levels so that cumulative discharges from all operations in the area will not violate the Commission standards. Even if the legislature is not presumed to have ratified all administrative determinations when it amends part but not all of a statute, it is clear in this case that the Commission's position must be accepted because if the policy section were insufficient in light of the increased powers, the legislature would have been derelict in not expanding the section to an appropriate policy.

VII. CONCLUSION

The Commission's record in its first two decades of operation is unspectacular. By foregoing formal legal methods initially, the Commission may have avoided alienating industries and municipalities, and

¹⁷⁸ Wash. Sess. Laws 1967, ch. 13, § 24.

¹⁷⁹ Wash. Sess. Laws 1967, ch. 13, § 25.

¹⁸⁰ *Olympia Oyster Co. v. Rayonier, Inc.*, 229 F. Supp. 855 (W.D. Wash. 1964); *Ellison v. Rayonier, Inc.*, 156 F. Supp. 214 (W.D. Wash. 1957).

¹⁸¹ WASH. REV. CODE § 90.48.010 (1961).

¹⁸² See note 95 *supra*.

certainly secured some abatement, but nevertheless there was marked room for improvement.

The permit system, providing much of the necessary impetus for abatement by smaller polluters, improved the record considerably. However, the Commission actively pursued its program of cooperation even when the governing statute allowed, and perhaps even demanded, a more vigorous application. Thus, while portions of the pulp industry rapidly complied with the policy of the state, companies in the northern Puget Sound area remained recalcitrant about the financial investment necessary to comply. This recalcitrance was demonstrated fully by threats to move from the state and by their willingness to use all legal means of securing delay.

Furthermore, little enforcement action has been instituted against anyone since 1962.¹⁸³ During this period, however, there has been a substantial increase in the Commission's knowledge concerning the effects of pollution; the federal government enacted legislation requiring standards for interstate waters; and new state legislation has strengthened the Water Pollution Control Act. These factors brighten the outlook for the future.¹⁸⁴

Less significant polluters, who tend to conform to the state's policy without much overt resistance, now have the added incentive of the new penalty provision to continue to comply with the policy. Significant polluters will be faced with extensive data gained since 1962, the necessity of the Commission enforcing the federal standards, as well as a significant tax incentive for constructing pollution abatement facilities. Municipalities will be assisted by the new state grant program, although additional funds are necessary, and hopefully in the near future the Commission will use its new authority to create sewage basin plans including all municipalities within an area. Success in the future, however, will not be possible absent a vigorous application of the Water Pollution Control Act by the Commission.¹⁸⁵ The Commis-

¹⁸³ Since early 1966, however, the Commission has instituted several administrative actions to terminate permits. Interview with the Honorable Charles B. Roe, Jr., *supra* note 47.

¹⁸⁴ Another factor which will assist enforcement activities is the phenomenal increase in the Commission's operating budget over the previous biennium. Previously it was \$599,776, (*see* Wash. Laws Ex. Sess. 1965, ch. 169, § 1); it is now \$1,410,015. The latter figure is based on subtracting \$2.5 million (state matching money) from the 1967 appropriation. *See* Wash. Laws Ex. Sess. 1967, ch. 143, § 1.

¹⁸⁵ Professor Galbraith's enlightening but disquieting thesis in *THE NEW INDUSTRIAL STATE* (1967) supports the conclusion that a vigorous enforcement of the Act is essential. If the cost of new facilities to the pulp companies will be in the nature of \$40-50 million, *see* text accompanying note 93 *supra*, then two of Professor Galbraith's

sion's record for its first two decades demonstrates that abatement and compliance can not be achieved by mere cooperative and token enforcement methods alone.

ADDENDUM

On October 6, 1967 the Joint Federal-State Conference was reconvened, and it accepted the recommendations of the five-year study.¹⁸⁶ The recommendations will be forwarded to the Secretary of the Interior for approval before being enforced by the state.¹⁸⁷

Immediately following the Conference, the companies inflated their cost of compliance estimate to \$90 million.¹⁸⁸ The figure was undoubtedly chosen for shock value; at no previous time had any estimate exceeded \$50 million.¹⁸⁹ The companies now indicate they will seek a court test before taking any major steps to comply with the recommendations.¹⁹⁰ Thus, assuming three years for a final Supreme Court decision, it will be at least eight years before the state secures adequate treatment for pulping wastes.

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main criteria of the mature corporation, sufficient capital for continued expansion and failure to identify with aesthetic values, reinforce the companies' decision to resist compliance with the Act. I am assuming that most of the pulp companies involved are mature corporations, but even if they are not Professor Galbraith's thesis would apply in this case.

¹⁸⁶ See note 5 *supra*. The companies will have five years to comply with the recommendations.

¹⁸⁷ The federal government could enforce the recommendations, but if the state is willing to do so, it is unlikely the federal government would intervene. See text accompanying notes 12-16 *supra*.

¹⁸⁸ Seattle Times, Oct. 6, 1967, at 56, col. 4; Seattle Post-Intelligencer, Oct. 7, 1967, at 1, col. 3-4.

¹⁸⁹ See note 93 *supra* and accompanying text. The new estimate is unbelievable since exactly one month before the same mill spokesman estimated the cost of complying to the same recommendations at \$40 million. Seattle Times, Sept. 6, 1967, at 31, col. 2.

¹⁹⁰ An administrative hearing will precede the court test, and the companies will undoubtedly rely on the same legal issues discussed in text accompanying notes 95-118 *supra*.

A mill spokesman stated that the companies "need better guidelines from an impartial source [i.e., a court] as to how much power a group like this [the Conference] has." Seattle Post-Intelligencer, Oct. 7, 1967, at 1, col. 3-4. If the state enforces the recommendations the statement is inaccurate. In that case the five-year study would be introduced as evidence, and the recommendations will be adopted as the Commission's order at an administrative hearing. Thus the issue will be the Commission's, not the Conference's power. The spokesman's statement is proper if the federal government enforces the recommendations, but in that case the companies will learn the Conference has more than adequate statutory power. See 33 U.S.C.A. § 466g(d) (1) (Supp. 1966).

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APPENDIX

Some of the Uses to be Protected by the Federal Standards

Uses	Watercourse Classification			
	AA	A	B	C
Fisheries				
Salmonoid				
Migration	FM	FM	FM	FM
Rearing	FM	FM	FM	
Spawning	F	F		
Warm Water Game Fish				
Rearing	F	F	F	
Spawning	F	F	F	
Other Food Fish	FM	FM	FM	
Commercial Fishing	FM	FM	FM	
Shellfish	M	M	M	
Wildlife	FM	FM	FM	
Recreation				
Water Contact	FM	FM	FM	
Boating and Fishing	FM	FM	FM	FM
Environmental Aesthetics	FM	FM	FM	FM
Water Supply				
Domestic	F	F		
Industrial	FM	FM	FM	FM
Agricultural	F	F	F	F
Navigation	FM	FM	FM	FM
Log Storage & Rafting	FM	FM	FM	FM
Hydro-Power	F	F	F	F

F—Fresh Water ; M—Marine Water

Source: Water Quality Standards for Interstate and Coastal Waters, Pollution Control Comm'n Regulation, June 29, 1967, at 16.