REMARKS OF COMMISSIONER JOHN A. CARVER, JR., FEDERAL POWER COMMISSION, BEFORE THE JOINT MEETING OF THE MINERAL AND NATURAL RESOURCES LAW AND LOCAL GOVERNMENT LAW SECTIONS ON "AIR AND SURFACE WATER POLLUTION CONTROL" AT THE AMERICAN BAR ASSOCIATION CONVENTION, HONOLULU, HAWAII, AUGUST 7, 1967

Pollution of our air and water was the subject of a Gallup Poll 1/ a few days ago, and its results show that almost everyone is conscious of pollution. The results also show that virtually equal measures of citizen cynicism are heaped upon the effectiveness of Federal, local, and private efforts to do something about it.

President Johnson has used a global measure to describe the pervasiveness of air pollution, referring to the altering of the composition of the atmosphere through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels. 1a/ He did not exaggerate. The problems of water pollution are no less universal.

The current level of public awareness is not only general, it is sophisticated—thermal pollution and noise pollution are relatively new terms which now are achieving common usage. The former, of course, is very much related to the pollution of the atmosphere, being traceable to the same by-product of the release of energy stored in fossil fuels—the necessity of dissipating heat.

Pollution may already be a cliché, in an age of clichés. But cliché or not, this is an Energy Age, and pollution is one of its adverse by-products.

The framers of this program have selected a representative of the executive branch of the national government, of the legislative branch of local government, of the manufacturing and research sector of private business and a representative of that mysterious fourth branch of government, the regulatory agency.

The roster of this panel does not cover the waterfront, even symbolically. But the diversity represented here is sufficient to illustrate the point made by the President of the United States Chamber of Commerce. M. A. Wright, after


amending the generalities which would pin all the blame for pollution on industry, emphasizes that the problem of air and water contamination involves all of modern society:

. . . all segments of society have created the pollution problem. And all segments will now have to be parties to the solution.\textsuperscript{1b/}

The contribution of a member of the Federal Power Commission in this panel, therefore, might well be opened by citing a New York Congressman's generalized indictment of government—the worst single offender against scenic resources today is the Federal Government itself, which through such organs of national policy as the Bureau of Public Roads, the Federal Power Commission, the General Services Administration, the Atomic Energy Commission and a host of others, has approved and carried out endless violations of the landscape. \textsuperscript{2/}

The Congressman has put his finger on a significant point, however intemperate his statement: In innumerable ways, decisions are made at the government level which are quite separate from, and independent of, the goals and activities of the agencies responsible for pollution amelioration programs \textit{per se}.

We are acutely aware of this at the Federal Power Commission, charged as we are with administering the Federal Power Act and the Natural Gas Act. Our responsibilities go to the heart of energy consumption in the United States. We have found that the growth of energy consumption outruns the gains in efficiency in energy conversion, which is another way of saying that however fast technology solves pollution, the magnitude of the total problem will increase. For example, gains in transmission technology may enable electric generating stations to be moved not only out of the central city, where they started a half-century ago, but to the mine-mouth. But at the mine-mouth the impact on the streams which must furnish cooling water may be multiplied manyfold, with effects on the ecological balance of entire stream systems. Air pollution in the cities may be replaced by an adverse aesthetic impact in the countryside, until, someday, the transmission lines may be placed underground.

\textsuperscript{1b/} Wright, Air and Water Pollution: A Time for Decision, speech delivered before the Houston Chamber of Commerce, Houston, Texas, on December 6, 1966.

\textsuperscript{2/} Beauty for America, \textit{supra}, at p. 337
The Federal Power Commission's certification responsibilities over production, transportation, and interstate sales for resale of natural gas, make it at least an indirect arbiter of fuel competition. Natural gas as a fuel for electric generation leaves fewer objectionable solid residues than coal or oil. Solution of problems of desulfurization, however, may restore the superiority of the more plentiful coal, but probably not in time to lessen the pressures on the Federal Power Commission to authorize new supplies of gas to serve electric utilities' needs.

The economic impact that one fuel choice will have upon other fuel industries cannot be forgotten. Such impact can be far-reaching in such industries because of their large supporting industries such as transportation.

Such tough questions are pending in cases now before us. I am precluded, therefore, from doing more than identifying them here. The point is that an agency like the Federal Power Commission may be far more deeply involved in the pollution question than most people realize. How it approaches these responsibilities is an important public question.

Administrative agencies, like all bureaucratic organisms, are constantly redefining their roles. When public consciousness of air and water quality questions becomes widespread and vocal, agencies are as wont to reassure the public that they are responsive and responsible as legislatures or the executive branch departments—whether courts similarly respond I will leave to each of you to say.

Why the agencies respond is a more complex question than whether they do respond, and more complex than the why for Congress or the President. The complexity of agency response to questions like pollution arises from the mixed character of an agency's institutional ties. Congress charters and finances us, and oversees our activities generally. The President appoints and reappoints members subject to Senate confirmation; as "arms of the Congress" we are nevertheless not immune to the requirement of submitting a budget through the President. 3/ And the judiciary is able to exert its influence since Congress has provided for court review.

Furthermore, members are human. Regulators, like legislators and administrators and judges, must drive along the Potomac and deplore its pollution, or observe from the air the smog, haze or smoke which befouls so much of the view. They hunt and fish, picnic and swim, raise kids.

Agencies have their own version of constituencies—for the Federal Power Commission these are the consumer, the regulated industry, and the investor, all of whom crowd within the public interest tent of the regulator's legislative mandate.

Agencies decide individual cases, and make policy by adjudicating these cases; they also make rules and issue licenses and permits. This flexibility is one of the administrative process' great values. In a myriad of ways, they wrestle with pollution questions in the arena of conflict, and envy the administrator's Olympian detachment.

Of particular importance in our approach to any problem is the potential review of our decisions by the judiciary. This review covers the substance of our decisions, and the procedures by which we reach them. The scope of this process is in a state of flux.

As a case in point on the matter for FPC, consider Scenic Hudson Preservation Conference v. FPC. The Commission had licensed Consolidated Edison to construct a pumped storage generating project in New York. On appeal from a citizen group concerned with the aesthetic impact of that decision, the Commission was reversed, and ordered to consider certain alternatives posed by the citizen-intervenors. The Court said:

> If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King

4/ As the Supreme Court said in SEC v. Chenery Corp., 332 U.S. 194:

> "The choice ... between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."

project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates . . .

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In this case, as in many others, the Commission has claimed to be the representative of the public interest. This rule does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission . . . The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.

More recently, the Supreme Court (which had denied certiorari in Scenic Hudson) sent another case back to us with some words about the scope of the inquiry which the public interest requires:

The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife. 6/

The overtones of these decisions can be analyzed from two approaches—as classical problems of administrative law, or as substantive questions of legislative intent and statutory construction. In my own mind, there is little question that a new dimension is being added to the administrative process. Professor Charles A. Reich, in his Yale Law Journal article, The Law of the Planned Society, 7/ presents the idea that the nation needs more and better central planning, to take into account non-economic values; and the idea


that new methods and techniques to protect the individual are needed. He notes with approval the growth of the right to participate in agency proceedings and cites the Scenic Hudson case for FPC and the United Church of Christ 8/ case for FCC to show how far the concept of standing has advanced. 9/

Professor Reich criticizes a central feature of the traditional administrative process in these words: "[T]here cannot be a trial of what kind of television programs Boston should have, or which city should get a regional airport, or what plan is best for a river valley."

You as lawyers share with the agencies an interest in this matter; one point of intersection of interest may be the pollution question. Lawyers agree that procedure carries its own virtues. To borrow other of Mr. Reich's phrases, procedure can make certain that all points of view are heard, and can ventilate the decision-making process; it can tend to counteract the irresponsibility of decision making which is institutionally isolated from political responsibility.

Congress sees agencies somewhat in its own image—our Commission is bi-partisan, dedicated to conformance with legislatively fixed standards, and endowed with rulemaking power which is essentially legislative and gives to them a considerable measure of policy responsibility. One of our implicit responsibilities is to bring to the ad hoc decisional process and to the rulemaking and planning process, the same kind of broad-spectrum consideration of pollution and similar concerns, that the Congress itself applies to them. 10/


10/ For a general discussion of the administrative process, which includes both praise and criticism see the Symposium on Administrative Regulation, 26 Law and Contemporary Problems (Spring 1961).
In the field of air and water pollution, finally to be specific, this may mean some or all of the following:

a. In the licensing of new hydroelectric projects, and in the relicensing of projects at the end of the license term, water quality will be considered. 11/

b. Fuel competitive questions are presented, as I've already discussed, in certificate cases under the Natural Gas Act. Air pollution has been recognized as a major question in such cases. 12/

c. The Commission as an expert body participates in a variety of intergovernmental activities. Statutory language on making comprehensive river basin studies brings the Commission into close contact with State, Federal, and compact authorities in such studies. 13/ Water quality is universally accepted as a major consideration.

d. The National Power Survey, and a proposed National Gas Survey, must consider air and water quality considerations, as supply, demand, and energy economics are projected into the future.

e. Other government agencies have responsibilities for establishing standards of air and water quality. 14/ The

11/ For example, three licensing orders involving Rochester Gas and Electric Corporation considered water quality control and the preservation of historical sites. See Orders for Project No. 2584 issued June 30, '1967; and Project No. 2583 and 2582 issued July 5, 1967.


13/ Section 10(a) of the Federal Power Act provides that " . . . the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways. . . . "

14/ The Department of Health, Education and Welfare (HEW) has the primary federal responsibility for air pollution control under the Clean Air Act, 42 USC 1857 - 1857(1). The Department of the Interior was given the primary federal responsibilities for water quality control embodied in the Federal Water Pollution Control Act, as amended 33 USC 466 et seq. by Reorganization Plan No. 2 of 1966, effective May 10, 1966.
Federal Power Commission has a particularly strategic role in interpreting the government's needs to the regulated industry, and the realities of the regulated industry's situation to the government.

f. Our rules are under constant review, for we take seriously the necessity of keeping the regulated industry and the public informed as to how we view our responsibilities in these value-judgment areas.

A no less important challenge faces each of you—whether you are more concerned with the subject matter of the local affairs section of our association, or with the resources section. That challenge is the one Professor Reich puts to us as lawyers. Our country is built upon the rule of law. The concept of the rule of law encompasses the concept of fair procedures. Complexity of the modern society puts particular strains on these concepts, as we wrestle with inconsistent and overlapping government activity, deadening delay in the decisional processes, and mounting proliferation of agencies and offices. The challenge is not to forget the individual. This puts a premium on local responsibility. The concept of local responsibility is recognized in much of the new legislation in the water and air quality areas. Not forgetting the individual puts a premium on cooperation, because airsheds and watersheds don’t follow political boundaries. It puts a premium on being informed about the procedures of government, as well as the programs and substantive laws of government. More and more people are discovering that they have a right to show up at FCC or FPC hearings and participate therein. And it puts a premium on courage and innovativeness—the way things have always been done may be the easiest and safest route for the bureaucrat and the lawyer, but it may not be the right way to deal with new challenges.

There is no bigger public question than water and air quality. The Federal Power Commission is up to its neck in it, as is most every other sector of government and the public at large. But this is an area where we may not be able to stay even, no matter how hard we run, and the danger is that in recognizing that harsh reality, we may stop running altogether.

That would be a great shame.