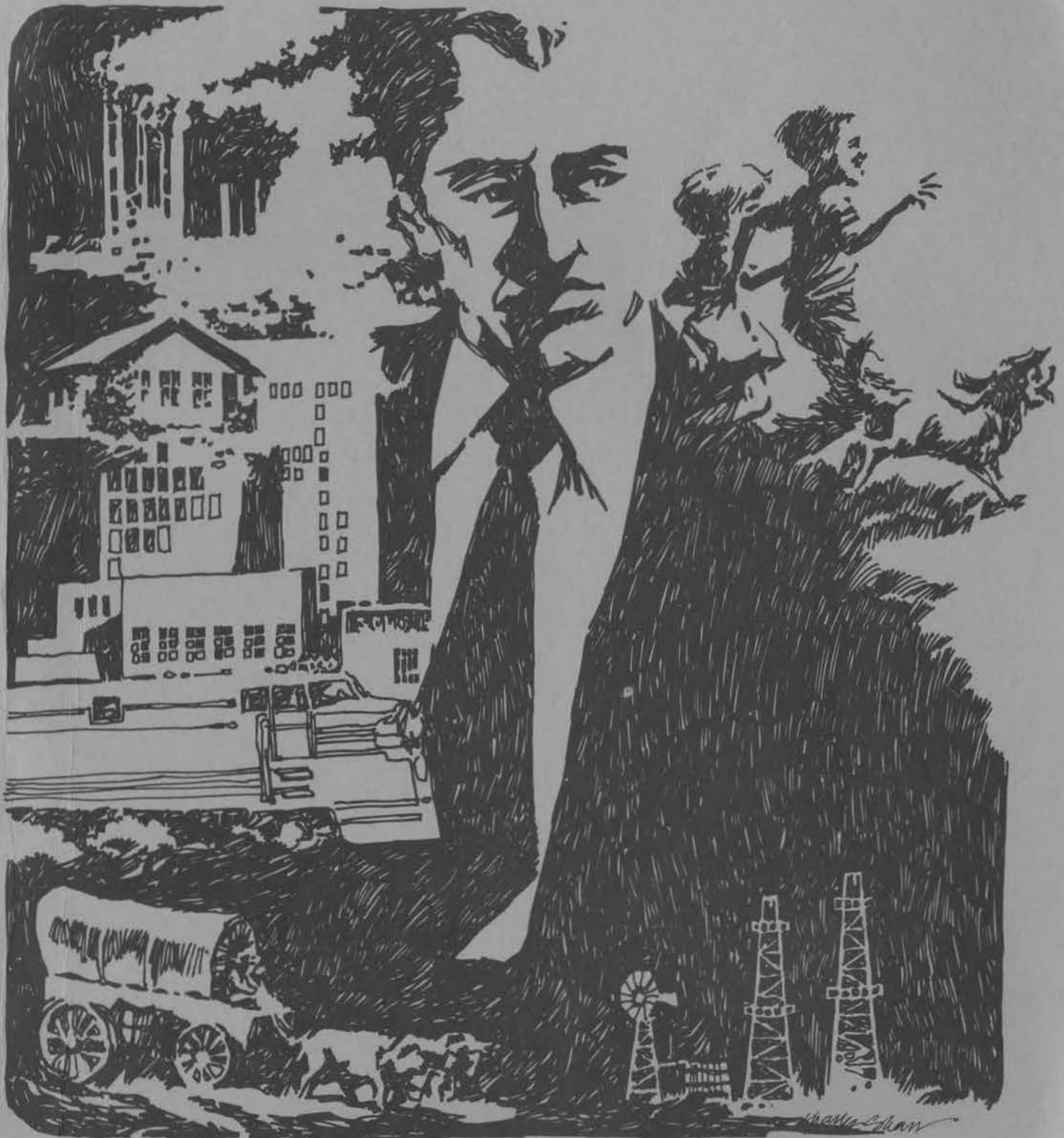


v. 2

TEXAS LAND USE

2-Existing Mechanisms



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TEXAS LAND USE

A

Comprehensive Land Resource
Management Study

Report No. Two: Existing Mechanisms

Conducted by:

Research and Planning Consultants

Austin, Texas

for

The Division of Planning Coordination

Office of The Governor

FOREWORD

Throughout its history, Texas has been blessed with an abundant supply of land and other natural resources capable of sustaining a wide variety of uses. This heritage has enabled Texas to grow and prosper in a manner characterized by a diversity of human lifestyles, agricultural capabilities, and business interests which are unique to our nation.

As the State has grown and developed so has the realization that our land resources are indeed finite. There is a need to study various land resource management techniques which may be useful in Texas to preclude or solve certain land use problems similar to those which have been experienced by older, more densely populated and heavily industrialized sections of the country. The seriousness of these problems has resulted in proposed federal legislation which, among other provisions, would encourage the state and local governments to develop planning and management mechanisms conducive to prudent land use practices.

Realizing the importance of these problems and the need for establishing proper land use practices throughout the state, the Governor's Office, through the Division of Planning Coordination, authorized a study of land resource management in Texas. This study is comprised of the following eight technical reports:

- * Historical Perspective - A survey of historical developments, trends, and processes in land resource management in the State of Texas.
- * Existing Mechanisms - A survey of the legal bases for existing land resource management activities in Texas.
- * Problems and Issues - A determination of existing and potential land use problems.
- * Significant Policies - An identification of existing significant public policies relating to land resource management in Texas.

- * Needs for the Future - A determination of the relative need for improving the existing approach or approaches to land resource management.
- * Management Approaches - Consideration of alternative approaches to improve land resource management.
- * Role of Planning - A study of the role and scope of land use planning as a major ingredient of a continuing land resource management program and as an element in an overall state planning process.
- * An Informed Public - Development of recommendations in regard to ways by which to best inform the citizens of the State of Texas about the need for a revitalized state and local role in land use planning and land resource management.

In this manner, factual information and objective interpretation of issues are presented with the expectation that they will provide a basis for action by those private citizens or public officials who will have the responsibility for making land management decisions in the future.

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I. INTRODUCTION

What Is Land Use Control Law?

When a company buys land for a factory site inside a city it must be sure that the zoning ordinance permits the proposed industrial use. When a subdivider develops raw acreage, he must meet city requirements concerning street layout, drainage and minimum lot size. When a widow puts a new bathroom in her home, the contractor must follow the local plumbing code. When a subdivision lot owner converts his garage into a workshop, he must check the deed restrictions for his subdivision to see whether they prohibit such use. These land uses, and millions more, are subject to the indicated types of governmentally enforced controls which limit landowners' choice. Controls can be established by statute, regulation, ordinance, contract, or common law. Land use control law establishes the enforcement mechanism and defines the limitations which apply to these governmental and private controls.

Land Use Control Compared with Land Resource Management

Planners and policy-makers know that land is one of the nation's basic resources, and that its use should be consistent with long range societal goals. Without controls, private owners use their land for the purposes they deem most profitable, the so-called "highest and best use." Privately determined uses may or may not be consistent with the nation's long range purposes.

In order to require conformity of private action with the general community interests, governments impose formal land use controls such as zoning, building codes and subdivision regulation. To some extent, these controls determine how land will be used and implement planners' decisions about how an area should grow.

Formal controls and private landowners' decisions are only two of the many factors which determine actual land use. Land use is also affected by site

location, proximity to population centers, climate, market conditions, transportation, water and power supply, availability of raw materials, terrain, popular attitudes, accidents of judgment, and a host of other variables.

Many factors which determine land use are under the control of community decision makers. For example, public officials plan and construct highways and other transportation systems. Their decisions concerning by-passes of cities, location of intersections, and emphasis upon automobiles instead of rail transit may have more to do with actual land use than any zoning system. Public decisions of this type are often made without regard to the land use consequences of government activity. Occasionally, public decisions work at cross purposes, e.g., when an airport is built near a wildlife preserve or a highway goes through a park.

Community decision makers have recently become more conscious of the far ranging implications of their decisions. They have also realized that land is a limited resource which must be used wisely in order to support the nation's people.

Today's governmental planners speak of "land resource management" when they plan for the state's future growth. The term "land use control" is far too narrow a category to convey the framework within which policy makers must allocate land and other irreplaceable resources during the next quarter-century and throughout man's time on earth.

Land resource management means policy thinking. A policy maker must establish community goals and assign priorities to competing claims for use of valuable resources. He must systematically examine available community and private resources and determine how they are currently being used. He must predict the long term effects of current use. If the predicted effects are not consistent with community goals, then the policy maker must formulate alternative strategies which will lead toward these goals. The policy maker must objectively examine the effects of newly applied strategies to determine whether they lead to the desired results. If they do not, then new strategies must be developed. Even community goals are not static. New technology and new demands require that stated community goals be constantly re-examined for current validity.

Formal land use controls are thus an important part of land resource management, but they are only a part. Although the present survey deals primarily with land use control law, the broader theme of land resource management runs throughout. Particularly when policy recommendations are made concerning land use controls, the broader theme should be emphasized.

Trends in Land Use Control

There is a clear trend toward greater governmental influence over land use, and a greater centralization of control. In its early years, the nation sought to populate its vast wilderness and encourage production and trade. These goals were best served by emphasizing private ownership of land and private choice as to land use, including full utilization of the profit motive.

Governmental land use controls did not fit into the frontier picture. When a particular land use became noxious to residents of early American communities, the neighbors did not call upon governments to establish elaborate control systems. Instead, they turned to courts to have the offending use enjoined as a "nuisance." When major cities sprouted on the east coast, however, and residents battled the intrusion of slaughterhouses and other extremely offensive uses, legislative land use controls began to appear, usually to impose a nuisance classification upon the use in question.

Zoning and subdivision regulation became accepted land use controls in the early Twentieth Century. Even when governmental action in land use controls became an accepted part of life, the control systems assumed that only the local governmental interests were involved and worth protecting. State statutes therefore authorized local governmental units such as cities and counties to zone, but they did not require that the controls be used. Apart from enabling local governments to control land use, the states assumed no active responsibility for controlling the uses of privately owned land.

After World War II, broader concerns appeared. Automobile transportation spread residential subdivisions into previously rural areas. In most states, counties have been given power to control lands lying in unincorporated areas to insure responsible use. These controls became progressively more important as urban growth spread beyond the boundaries of existing cities.

The federal government became an influential land use control participant in the 1920's when the Department of Commerce drafted model enabling statutes for states to adopt. Federal involvement increased with the Public Housing Program in 1937, and the urban renewal program in 1949 and 1954. Public housing and urban renewal made millions of federal dollars available for clearing and rebuilding slum areas. The urban renewal program, however, required that local governments conform to federally established guidelines for planning and land use control. By making money available only upon compliance with federal requirements, the federal government caused many cities to adopt zoning ordinances, subdivision control regulations, and other codes associated with land use control.

Under federally funded programs, working arrangements between cities and the federal government have tended to bypass state governments. Instead of promoting state involvement in the planning process, federal requirements in the 1960's focused on federally sponsored regional planning and coordination of grant programs as a condition to certain types of funding. Although Regional Planning Commissions (usually councils of governments) were created under state law to perform this function, their general purpose is to respond to federal requirements.

States recently assumed additional responsibility for land use controls by passing and enforcing air and water pollution laws, and they joined the federal government in encouraging local governments to engage in regional planning. During the 1970's states have become aware of the significance of land resource management and have undertaken serious planning and coordinating action.

Proposed federal legislation would make a limited amount of money available to states to increase their planning and control activities. An early draft of one bill would have impounded funds under other federal programs in order to force the states to conform to the new planning models.

The control picture shows a steady progression from a laissez-faire, highly individualistic system to one of increased governmental involvement. The transition is justified by the increasing complexity of social and economic conditions, an exponentially expanding population, and severe depletion of the country's resources, including land itself.

The period of transition from individualism to control will be tense. Old values will be modified as the country prepares for the year 2000, with a potentially vast increase in regulation of human activity. The institution of private ownership of land as it is known today may itself be jeopardized by constantly increasing social demands. If private ownership of land leads to denial of the good life for a large number of persons or threatens species survival, then it may be significantly altered. A control system which harmonizes private and public claims may insure preservation of private rights in land into the foreseeable future.

A Framework for Policy Formulation

Although this survey is largely descriptive, it contains recommendations and criticisms. These evaluations are made in conformity to the following goal statements concerning resource management:

1. The earth must be kept habitable. A prestigious group of experts recently programmed into an M.I.T. computer the current world trends in industrialization, pollution, food production and resource depletion. Their shocking conclusion was that if these trends continue, then the limits on growth on this planet will be reached sometime within the next one hundred years. The most probable result will be a sudden and uncontrollable decline in population and industrial capacity. Even when optimistic and even miraculous assumptions were fed into the model, representing "unlimited" resources, pollution controls, increased agricultural productivity, and perfect birth control, the system collapsed before the year 2100. Only one computer path allowed a state of equilibrium which would support life as we know it: population growth must be stopped in 1975; industrial growth must be stopped by 1990; and resource use and pollution must both be reduced to one-fourth of their 1970 levels.

At the current growth rate, the world's population doubles every thirty years. However, this doubling time is decreasing, thereby shortening the time within which political decision-makers can respond to the demands made by an exponentially increasing constituency. In this country, the effects of a sudden and dramatic decrease in fossil fuel reserves are just beginning to be

realized. New York has already experienced a tragic power failure, and suffers an inability to meet the potential energy demands of its multimillion inhabitants.

Even if the computer projections of disaster are wrong, the message to Texans from the United States' east coast is clear: uncontrolled private growth and uncontrolled land use can make life unenjoyable, even if livable. Land is a limited resource. Environmental controls must be established and rigorously applied to insure maximum human enjoyment of and participation in the life process.

2. The nation must respond to the needs of its projected population with adequate housing, work and play facilities. Private enterprise is better able than government to supply these essentials. Private enterprise should be given a favorable setting within which to do its job in a manner consistent with the maintenance of high overall environmental standards. Efficiency must be maintained and increased to reduce the cost of shelter and services.
3. In order to implement broad national policies, large scale control decisions should be made at a governmental level which is freest from local influences. On the other hand, those land use decisions which have only local importance should be made at the lowest possible level of government, and greater citizen participation should be encouraged.

II. A NECESSARY PROLOGUE: NUISANCE LAW

For centuries, the common law has accepted the premise that private landowners are not privileged to use their lands so as to cause unreasonable harm to their neighbors, i.e., to maintain a nuisance. Thus, one who operates a pig sty on a city lot can be enjoined from doing so.

In determining whether a particular use is a nuisance, courts consider the character of the area in which the offending use is located. Although pig sties are not permitted in a crowded city, they are acceptable in the open country. But it is no defense to the offending city swineherd that his land was rural when he began raising pigs. After the city grew out to his farm, the character of the neighborhood and the test for nuisance changed accordingly.

Through private nuisance law, the judiciary played a rudimentary land planning role. Although their ostensible task was to resolve a dispute between private litigants, their decisions affected the community at large in a substantial way. Judges even measured the public good generated by offending uses against the harm suffered by the plaintiff to determine whether a nuisance existed, and whether the proper remedy would be damages or injunction. The public interest in keeping local factories in business often overrode private nuisance claims by people who suffered from noise and pollution.

Private nuisance actions are still brought, and in some cases result in spectacular recoveries. But land use control has reached the point of social importance where legislative regulation is more significant than judicial application of the nuisance doctrine in private lawsuits.

The organized community can sue to abate "public nuisance" which adversely affects the public at large. Texas specifically empowers towns and cities to control nuisances. Accordingly, cities have classified slaughterhouses, funeral homes in residential areas, and explosives warehouses as nuisances and have passed control ordinances prohibiting or regulating their operation.

Although courts freely admit that legislative branches of government may identify and abate public nuisances, the power is not broad enough to support extensive day-to-day land use regulation. For example, in City of Houston v. Lurie, the city declared dilapidated buildings to be nuisances. The city established an administrative procedure for determining which buildings violated the ordinance. However, the Texas Supreme Court held that the city could destroy only those buildings which were nuisances in fact, and that landowners were entitled to a jury determination on that issue. Allowing landowners to bring every administrative action to a full scale court inquiry diminishes greatly the utility of the regulation. Nuisance law is not nearly broad enough to support zoning ordinances, subdivision regulations, building codes, and other current land use control devices.

Seeking a broader power base to justify land use regulation, governments turned to the state's police power. Without relying upon nuisance law, the police power allows reasonable legislative regulations which promote the health, safety and welfare of the community. Using the police power rationale, courts have generously upheld conventional land use controls such as zoning, subdivision regulation, and building codes.

Land use regulation has outgrown its common law background; nuisance law is thus prologue and occupies a place in land use law's history, not its future.

III. FEDERAL INVOLVEMENT IN LAND USE MANAGEMENT

The federal government has played a complex and influential role in establishing land use patterns in this country. The constitutional law structure which protects landowners from confiscatory governmental regulation is a monumental factor affecting land use. By emphasizing private landowner's rights and encouraging private enterprise, the system achieved industrialization and land development at a rate far exceeding that of any other nation. Government's early policies were directed toward placing the nation's land in private hands to reap the benefits of private enterprise. Only recently has government acknowledged that in some cases private use has resulted in exploitation without social responsibility.

Even with its emphasis upon private property, however, the federal government continually affected land uses by its spending and control decisions. The federal dollars spent for highways and housing have obvious land use implications. In recent years the federal role has virtually exploded into many new areas which relate directly and indirectly to land use.

The federal government may lawfully exercise only those powers delegated by the United States Constitution. All power not delegated is reserved to the states. In areas in which it lawfully operates, the federal action has supremacy over conflicting state action.

These abstract statements may indicate that the federal branch is weak. Such is not the case. The scope of delegated federal power has been interpreted broadly, and there are few areas of economic life which the federal government could not constitutionally regulate if it chose, including detailed land use regulation.

Art. I, § 8 of the Constitution grants Congress power to regulate commerce among states. Under present constitutional decisions, Congress could probably engage in direct land use regulation under this section. The rationale would be well within the doctrine of Wickard v.

Filburn. Filburn raised a small quantity of wheat in violation of federal crop quotas, and said Congress had no constitutional authority to regulate him. The Court held that under the Commerce Clause, Congress could regulate even small quantities of wheat grown for home consumption, because such wheat would affect the total amount of wheat bought and sold in interstate commerce.

On similar reasoning, federal control over land use could be justified. Land uses on the eastern seaboard clearly affect commerce. The spread of suburbs affects transportation between New York and Boston; the intensity of population in that section affects the flow of goods from other sections of the country; and the waste generated by urbanization in that urbanized strip affects commerce and the environment on an interstate level. The urbanization of Texas rice lands and California orchards probably affects the flow of those goods into commerce far more than the wheat which was raised on Filburn's Ohio wheat patch.

Whether Congress could regulate land uses throughout the country is not immediately important. Congress has chosen not yet to do so. Instead, for the most part, the federal government relies upon its powers to tax and spend as a way of influencing desirable state and private action. Thus, it is the carrot and not the stick which most often appears in federal legislation.

For example, the highway program consists largely of cooperative action between state and federal governments, with large payments by the federal partner. Federal involvement in housing programs has occurred almost entirely through federal funding which encourages private or local governmental action. Sometimes, the carrot has subtly turned into a stick. For example, under the federal urban renewal program, funds are made available but the locality must meet federally formulated workable program requirements in order to get the money. Even so, the regulation is indirect with states having at least a technical choice whether to accede to the federal will.

Under the proposed National Land Use Policy and Planning Assistance Act, the states would be given money to engage in extensive land use planning and formulation of control systems. If a state fails within five years to do so, the federal funds otherwise available to that state for highways, soil and water conservation, and airport construction would be reduced.

By using its power to spend for the public good, Congress thus exercises considerable control over state and local activity without direct regulation. However, in some areas Congress exercises direct control, and it may soon enter other areas.

For example, pollution of streams is a federal offense. Although states are now responsible for control of air pollution, the effects of air pollution often cross state boundaries and affect persons in other states. Pollution threatens to become an international problem. Accordingly, federal activity may soon take the form of detailed controls. Unless states respond to the present demands for land use planning and control, similar federal entry can be expected.

Transportation

The Cumberland Road, which began construction in 1811, opened the middle west for civilization. The Santa Fe Trail, the Oregon Trail, the Mormon Trail, and the California Trail carried great streams of settlers to the west. In 1916, the Federal-Aid Road Act authorized the federal government to give financial aid to states for highway improvement. In 1921, a federal-aid system was designated, and the country embarked upon improving the system of two-lane roads which interconnected its cities. These roads opened the way for automobile traffic into, and congestion in, those cities.

By the 1940's, the country had begun to concentrate on the main arteries through cities, building expressways and upgrading existing highways. Four-lane divided highways with limited access were constructed, to the great pleasure of the motoring public.

At mid-century, the country spent annually \$2,700,000,000 for construction and \$1,500,000,000 for maintenance. More than 100,000 miles of highways of all kinds were improved annually. In 1969, contracts were awarded for \$6,657,000,000 in highway construction.

The Highway Revenue Act of 1956 established a highway trust fund into which go many highway-related excise taxes. This is the source of the federal contributions for federal-aid highways.

In the 1950's, construction commenced on the most impressive highway system yet conceived--an interstate system which would provide high speed automobile

transportation between all sections of the country. As this grand system nears completion, the land use implications of the automobile emphasis by the federal government are just beginning to appear. American families have mobility which allows them to live in suburban communities and work in the central city. It allows them to own recreational properties miles away from their regular residences. In some prestige areas, two-car garages have been replaced by three or more car garages. A staggering number of persons owe their employment directly or indirectly to the automobile industry.

But not all of the effects are good. Central cities are clogged with automobiles. Mass transit systems have lost passengers and lost money in competition with automobiles. Every new freeway opens up land development opportunities and increases urban sprawl. Giant freeways form impenetrable walls, separating and isolating part of cities from the remainder. Exhaust pollution is a major problem in most large cities, and the haze spreads even into the farmlands. Auto graveyards dot the landscape, producing their own visual blight.

Automobiles consume petroleum products at an ever increasing rate. Only recently have the grave implications of this consumption become clear. Domestic fossil fuels are being depleted, and the country will soon depend upon high priced imported oil for its domestic use. Thus, just as the country reached a pinnacle of reliance upon private automobiles, they may be phased out, or extract a greatly increased percentage of our disposable income.

A population which based its housing and land use expectations upon private automobiles may have to shift drastically and suddenly to mass transit within a few years. Here again, federal funding is coming to the fore.

In 1961, federal assistance for mass transit studies was made available. In 1964, a major bill authorized grants of \$500 million over a three year period to subsidize area-wide transportation planning and facilities. Federal grants would cover up to two-thirds of net project cost.

In 1970, the assistance program was expanded to allow grants for advance acquisition of properties and increased funding. The bill expressed a commitment for mass transit support of \$10 billion over a 12-year period, still far below the highway support levels.

In 1972, congressional debate centered upon use of highway trust funds for mass transit support. Although these efforts failed, increased federal assistance for mass transit will be coming, with or without highway trust funds.

Substantial federal assistance for mass transit would have enormous land use impact. Central cities would probably become more compact. Housing scatteration patterns would be changed. Suburban development might occur along transit-stop nodes instead of spreading out along the existing freeways. The next century may see as much effect from high speed mass transit as this century saw from automobile transportation.

Housing and Slum Clearance

During the first two centuries of American history, government did not consider that housing was a matter of public concern. Settlers were busy hacking communities out of the wilderness, and plenty of logs and rocks were available for cabin construction. Overcrowding on the frontier was the least of problems for the pioneer.

In some newly urbanized areas, frontier conditions changed rapidly. Between 1820 and 1840, the country's urban population trebled. New York City, Boston, Philadelphia and Washington, D.C., began to experience severe sanitation problems and local governments had to wrestle with them. The federal government remained generally uninvolved and the country continued to grow.

Federal Influencing on Home Financing for Middle-Income Families

Major federal involvement in housing began in the 1930's with home financing as the target. In the country's early years, urban dwellers tended to rent their dwelling units. In 1900, only 36% of nonfarm houses were owner-occupied. By mid-1950's, 60% were owner-occupied. The increase in home ownership was accelerated by improved transportation to suburban areas and increased purchasing power. However, other key factors were a major change in financing, and the revitalization of the home building industry. The federal government was responsible for both.

Following a post World War I housing boom, the home-building industry went into a nosedive in the 1930's. In the five years from 1930 through 1934, volume barely

equaled that reached in a single year in the mid-1920's. The 1930's also saw a wave of home mortgage foreclosures.

H.O.L.C. In 1932, the federal government created a Federal Home Loan Bank system to strengthen home-financing institutions other than banks. In 1933, the Home Owner's Loan Corporation was established to relieve distressed homeowners and credit institutions. During a three year period when foreclosures of home loans ran as high as 1,000 a day, HOLC purchased more than 1,000,000 such loans. HOLC refinanced the loans on a monthly payment basis with amortizations running as long as fifteen years. By 1951, HOLC had liquidated its total investment, and showed a profit of \$14,000,000 to the government on its \$3,500,000 total investment.

HOLC's approach of stretching out mortgage payments so home buyers could make low monthly payments held promise for both home-builders and potential home buyers. If such financing were regularly available for persons with regular incomes, then many renters might enter the market and buy new houses. If the market were thus insured and stabilized, house builders could gear up to satisfy the demand on a steady, long term basis. Unfortunately, private money lenders would not lend money on these terms. They wanted one-third down and a short repayment period.

F.H.A. The Housing Act of 1934 found the key to financing home purchases with low-down-payment, long-term loans from private lenders. The Federal Housing Administration (F.H.A.) was created to offer insurance to private investors that home buyers would repay low-down-payment, long-term loans. If a home buyer defaults on an FHA insured mortgage, then FHA buys the property from the mortgage lender, and covers the monetary loss from foreclosure. For its service FHA charges a modest 1/2 of 1% per year on the mortgage debt. With FHA covering foreclosure losses, private money lenders can be persuaded to make home loans on favorable terms.

Even with FHA's insurance, some money lenders still hesitated to enter the home financing market because of the difficulty of reselling long term mortgage investments. In order to provide liquidity for FHA guaranteed loans, the government established the Federal National Mortgage Association (FNMA). FNMA buys and sells insured mortgage loans, thereby providing a secondary market for participating investors. For a while, FNMA also serviced some governmental subsidy programs. However in 1968 this function was shifted to a new entity, Government National Mortgage Association (GNMA).

The 1934 Act also established the Federal Savings and Loan Insurance Corporation (FSLIC) to guarantee S&L investors that funds up to a certain dollar figure would not be lost in event of insolvency. Because of FHA and the strengthened Savings and Loan Associations, the money market for house buyers improved immeasurably. On FHA insured loans, private lenders now regularly advance 97 percent of the purchase price of standard middle income housing, with amortization periods running up to thirty-five years. The availability of financing on low down payments and long term amortization makes the monthly cost of buying a house less than the cost of rental for many families.

FHA is not a subsidy program. However, middle income house buyers are heavily subsidized through favorable income tax treatment which allows deductions for taxes paid on the house, and for interest paid on the home mortgage. If all of the investment benefits of home ownership are taken into consideration, the cost of housing for affluent and middle income buyers is amazingly low. One analysis shows that a \$40,000 house may cost a buyer in the 40 percent tax bracket only \$33.00 per month, plus maintenance expenses and utilities. The income tax reduction subsidy for this homeowner is \$960, or \$80 per month.

FHA programs have generally increased the quality of housing available to middle income purchasers and held interest rates down. FHA operates in a business-like manner and will not insure loans on housing which does not meet its inspection standards. Purchasers benefit from FHA appraisals and quality inspections of new and used housing. Therefore, middle income buyers are assisted in their financing and guided in their purchase by a helpful system which extends its benefits beyond mere financing.

Although FHA's greatest impact has been in providing single family housing for middle income families, mortgage insurance is also available for specialized programs, apartment projects, and cooperative and condominium apartments. Cooperative and condominiums furnish methods of home ownership for apartment dwellers.

Because government programs provided a market for middle income housing, housing suppliers provided it in great quantities. Knowledgeable middle income buyers took advantage of the governmental programs and bought instead of renting.

From 1935 through 1939, the volume of home building almost doubled that of the previous five years. Ninety-six percent of the 1,782,000 dwellings constructed in that period were by private builders. By the end of 1939, FHA had insured 497,000 mortgages for purchase of new and existing houses. Membership in the Federal Home Loan Bank System included 3,920 home-financing institutions, of which 3,870 were savings and loan associations.

VA and HHFA. During World War II, regular housing production gave way to production of federally financed temporary housing. In June, 1944, anticipating the war's end, Congress enacted the Servicemen's Readjustment Act. The Act included home loan guarantees for veterans through the Veteran's Administration (VA). A post war housing boom followed, with private builders, FHA, VA, Savings and Loan Associations, and a new umbrella agency, the Housing and Home Finance Agency (HHFA) participating strongly. The HHFA absorbed three constituent agencies: The Federal Home Loan Bank Board, the Federal Housing Administration, and the Public Housing Administration. These activities have now been transferred to the Department of Housing and Urban Development (HUD).

Current Influence in Middle Income Housing. FHA and VA loan programs continue to influence the house financing market although they do not now dominate it. In 1969, FHA insured \$5.5 billion in loans on existing single family homes, and \$1.5 billion on new homes. Project mortgages accounted for \$1.3 billion. VA loans in 1969 totalled \$4 billion. The market effect of FHA and VA cannot be measured in terms of their statistics alone. FHA and HOLC introduced the concept of low down payment and long term loans for home purchases. Private lenders have been impressed by the low foreclosure rates on those loans. Accordingly, they have lowered their down payment requirements and lengthened repayment periods to the point where conventional financing is often competitive with FHA. Private mortgage insurance companies have also entered the field and offer strong competition with FHA.

Land use patterns in the country and the configuration of the suburban landscape are due in large measure to the activities of federal programs such as FHA, VA, and the Federal Home Loan Bank System. To many observers, FHA influences have been primarily responsible for undesirable urban sprawl. To others, the programs have been a godsend, bringing the joys of home ownership to millions of families.

Whether for good or bad, the federal government is totally involved in the process of housing supply.

Subsidy Programs

Government provides middle income families with favorable financing and a subsidy system working through income tax reduction. What does it do for the poor? By one theory middle income housing is supposed to "filter" down to lower income families as it wears out. Thus, any system which produces middle income housing should eventually work to the advantage of the poor. However, by the time housing filters down, much of it is completely worn out. The result is that poor housing adds to the social problems which concentrate in cities' "slum" areas. To some extent, poor housing contributes to the disease and crime which characterize slum areas.

The federal government did not totally ignore low income families. Beginning in 1937, it undertook a program to furnish subsidized housing for low income persons whose income was 20 percent below the level at which standard housing could be provided without subsidy. Later programs were developed to serve persons in the 20 percent gap, who by definition were too poor to buy or rent standard housing, but who could not qualify for housing provided for low income families.

Public Housing. In 1937, Congress inaugurated the Public Housing program, designed to eradicate standard housing, provide good housing for the poor, and pump money into the construction industry. At the insistence of the private home building industry, access to public housing was limited to persons whose income was 20 percent below the level at which standard housing could be obtained. To avoid constitutional objections to direct federal ownership of public housing, the 1937 Act made its subsidies available through housing authorities set up under state law. Texas passed a qualifying public housing enabling act in 1937.

The total subsidy for public housing in 1969 was \$339,000,000. The total number of units under management at the end of 1969 was 1,034,700. The average subsidy based on these figures would be about \$325 per unit per year or less than \$30 per month. The subsidy cost per unit in Houston is \$150 per year, or about \$13 per month.

Public housing never lived up to its promise of clearing away the nation's slums and providing decent housing for low income persons. The projects are visible and carry a "welfare" taint. They concentrate the poor and cause police enforcement problems.

Because local governing bodies must enter into a contract to provide services to the housing authorities, construction of public housing projects can be vetoed by the municipalities. If middle income residents do not want public housing then they make their desires known to city council. The Supreme Court has held that local referendum requirements are valid, even though they may exclude low income housing from a city. Houston has been particularly deficient in providing for the housing needs of its low income persons: no new standard public housing has been constructed in twenty years.

As another example of institutionalized state-wide antipathy toward public housing, the Texas Urban Renewal Law prohibits the use of land cleared under that act for public housing. This disability removes potential sites which may even be unsaleable to private developers.

Subsidies for the 20 Percent Gap

People with enough income can buy a house and get tax reduction subsidies. Hardcore poor with incomes 20 percent below the standard rental level have access to public housing if they can find a vacancy. A large segment of low-middle income people are left in the 20 percent gap--by definition they cannot afford standard housing, but they are too prosperous to live in low rent public housing.

Three significant programs have been developed for people in this 20 percent gap. The oldest, § 221(d)(3), is dormant. Most new projects are constructed under the §236 rental program and § 235 ownership program.

Money for long-term financing of § 236 projects comes not from government but from private lenders such as insurance companies. A qualifying nonprofit or limited dividend landlord borrows money at the going FHA rate from a private money lender; government provides an interest subsidy throughout the loan term by paying the private money lender the difference between mortgage payments at the stated interest rate and the payments on a hypothetical loan bearing 1 percent interest. For example, if the market rate is 7 percent, the mortgage would be paid at this

rate of return; however, the landlord's repayment schedule would be as if the interest rate were only 1 percent; the additional 6 percent would be paid by the U.S. Government. The effective interest rate for the project is thus cut from the market rate of 7 percent to 1 percent, and rentals can be correspondingly lower.

Under § 235 of the National Housing Act, a buyer in the "20 percent gap" may buy a standard FHA house and get a purchase price subsidy which, depending upon his income level, brings the effective interest rate on his home down to as low as 1 percent.

The basic framework for the subsidy is the same as for § 236, but without the landlord. The subsidized housebuyer buys the house and gets an FHA insured loan from a regular mortgagee. His payment schedule reflects the regular FHA interest rate. However, subsidy payments are made by the U.S. Government directly to the mortgagee. The amount of subsidy is determined by calculating two factors: (a) the ability of the buyer to make purchase price payments, measured at 20 percent of his income, and (b) the maximum subsidy allowed, which is the difference between monthly payments and the market interest rate and what they would be at 1 percent interest. Subsidies may in some cases exceed \$75.00 per month.

Not all people in the 20 percent gap get the subsidy. The purchase must be of new or renovated housing sold after the effective date of the act, and it must be processed as a subsidy transaction. Except for ordinary zoning and subdivision control, local government approval is not now required for either § 235 or § 236 construction. However, citizens are complaining about the location of projects in their neighborhoods, and city officials are seeking methods to control their location, and perhaps to exclude them entirely.

In a recent development, the President has administratively suspended payment of subsidies under many of these housing programs. When federal activity is resumed, it may assume a substantially different form. It is unlikely, however, that federal influences in the housing field will cease.

Urban Renewal

The middle class flight to the suburbs was hastened by availability of FHA financing and large scale builders ready to satisfy their housing needs. Improved

transportation into the inner city provided access to their jobs. Suburbia became the name for bedroom communities located in outlying areas.

The loss of middle income and affluent residents left central cities with a host of problems. Residential buildings which had been occupied by middle income and affluent residents were turned into slums occupied by low income "problem families." The low income residents were not reliable taxpayers, and they drained the cities' welfare funds. Central cities often found that they could not expand their boundaries to take in new subdivisions, because the departing residents had formed a tight band of suburban cities which were immune from annexation. Thus, the nation's major cities seemed destined to rot with massive slums surrounding their business centers.

One goal of the public housing program was to eliminate slum housing inside American cities. However, slum conditions became so severe that entire cores needed renewal. If renewed only for public housing, the land would be removed from the tax rolls and the hearts of many cities would be solidly occupied by the urban poor.

The National Housing Act of 1949 offered a new approach to solving the slum problem. The Act declared a National Housing Policy of providing a decent home and suitable living environment for every American family. It then outlined a partnership between private enterprise and government designed to accomplish this objective. The thesis was simple.

Inner city areas needed renewal. Government rebuilding, for public housing or otherwise, should be minimized. Instead, private enterprise would be encouraged to reenter the city and rebuild. Unassisted by government, private enterprise could not rebuild inner city land, because of the difficulty of assembling separately owned parcels and the high cost of inner city land.

The land assembly problem could be solved if local governments used their power of eminent domain to condemn large tracts for renewal. However, the cost of purchasing the land and tearing down existing buildings would be greater than the cleared land would be worth. Federal financial assistance would therefore be needed to help cover the loss suffered in the purchase, clearance and resale process.

In a nutshell, the urban renewal program envisions local renewal authorities empowered by state law to

identify, condemn and take title to slum properties. Local authorities clear the land and offer it for sale to private developers who agree to build according to the city's renewal plans. The federal government pays 2/3 of the total loss suffered by local authorities. For small cities, the federal share is 3/4 of the project loss. Under urban renewal, slums could be cleared and land redeveloped by private enterprise at minimum cost to local and federal governments. Hopefully, the renewed lands would be added to local tax rolls and attract back to the central city some of the middle class and affluent residents who fled to the suburbs.

Congress requires that localities be federally certified to have a "workable program" as a condition of participation in the urban renewal program. The requirement reflects congressional concern that local authorities not waste their federal funds.

Workable program certification requires the locality to utilize planning and police powers to maintain and upgrade the renewed and nonrenewed properties. Generally, the legislative and administrative requirements relate to adequate land use planning, citizen participation, relocation planning for persons dislocated because of slum clearance, and housing building and zoning codes.

The Housing Act of 1954 allowed the local renewal authority to undertake rehabilitation and conservation programs in areas where clearance was not necessary. The same Act permitted use of up to 10 percent of urban renewal funds for nonresidential purposes. The percentage has since been increased to 35 percent. The Housing Act of 1956 authorized payment of relocation grants to persons and businesses forced to move because of an urban renewal project.

In the Housing Act of 1968, a new funding system, the Neighborhood Development Program, authorized annual funding and planning instead of the project funding and planning method. Use of a Neighborhood Development Program reduces the time required for project implementation and prevents funds from being tied up under the grant reservation system.

The Housing Act of 1969 requires one-for-one replacement of dwelling units occupied by low and moderate-income families demolished in urban renewal projects if the vacancy rate is less than 5 percent.

Urban renewal is no longer a "clearance machine." Instead, it is a flexible urban development tool which can be used in a manner most appropriate to the particular locality. Urban renewal may be used to revitalize downtown; modernize and expand industrial areas; rehabilitate residential and commercial buildings; and provide public facilities such as schools, libraries and municipal buildings. Urban renewal may help colleges and hospitals expand, and provide neighborhood improvements such as parks, playgrounds, streets, and water and sewer facilities. The hardships of urban renewal have been minimized by availability of relocation assistance for families and businesses required to move because of project activities.

Texas passed an urban renewal enabling act in 1957. Although generally conforming to the federal model, the Texas Act for some reason disables localities from using land cleared by urban renewal for public housing purposes. In Davis v. City of Lubbock the Texas Supreme Court held the general urban renewal process to be constitutional.

Considering the benefits available through participation in urban renewal, it is surprising that in June of 1970, only 23 Texas cities had active urban renewal projects. Neither Houston nor Dallas have urban renewal. Of the 23 participating cities, 17 have populations of less than 50,000.

The impact of urban renewal can be seen by comparing the situation of newly annexed "rural slums" in Houston and in cities which have active urban renewal programs. A Houston community called "Bordersville" is situated near the new intercontinental airport. It has dirt streets, no utilities, and tumble-down houses. The occupants are poor and black. They receive little benefit from city services. Although the area has been studied extensively by volunteer groups and students, its basic problems remain unsolved, and there is little hope for broad based action. There are a number of less publicized Bordersvilles in Houston, with as bleak a future. By contrast, the cities of Grand Prairie and Mission, Texas, undertook urban renewal of similar areas. The old neighborhoods in both cases were upgraded. The Grand Prairie neighborhood received paved streets, underground drainage, a new school, new residential units, and neighborhood parks. The Mission neighborhood underwent a similar renewal, including substantial renovation and replacement of dwellings for homeowners.

Urban renewal is not limited to residential areas. Waco and San Antonio have revitalized downtown areas through the program. In Waco, a six-block pedestrian mall was constructed, governmental buildings were expanded, and a convention and cultural center constructed. Downtown businessmen report sales increases. Private investors have returned to the central city area. San Antonio redeveloped a close-in slum for commercial and light industrial uses, and converted another into a convention center and municipal park.

For all of its positive attributes, urban renewal is not perfect. Funding is uncertain. There is a time lag between authority for new programs at the federal level and actual local implementation. Programs do not cover the wide array of social needs which may be uncovered during the course of a project. Relocation is still a problem.

In addition to the infirmities of the program which are built in at the federal level, Texas' urban renewal law has two features which hinder Texas cities from fully using the program. One is the prohibition against use of land cleared by urban renewal for public housing. Another is the requirement of local referendum before urban renewal powers are used. Although bills were introduced to eliminate these limitations in the 62nd Texas Legislature, neither was approved.

Cities and towns may forego the benefits of urban renewal because they do not know about the programs, or lack the expertise to carry them out. In New York a state Urban Development Corporation (UDC) was created to carry out programs at the local level when a city asks for help. Since its creation in 1968, New York's UDC has undertaken projects in 24 cities and three counties, in areas where 75 percent of the State's population lives. As of 1971, UDC had committed 43,000 housing units in 26 different localities.

Although Texas may not need a full scale UDC, Texas cities could benefit from greater information about urban renewal programs and methods of implementing them. They also need financial assistance to provide seed money for local projects and project planning.

Model Cities Program

Federal slum clearance programs began in 1937 with the narrowly based public housing program.

Congressional backers hoped that improving slum housing would upgrade the general lives and habits of slum residents. Public housing did provide better housing; it did not solve the deep rooted social problems of slum residents.

Urban renewal broadened the federal assistance base, but it also addressed primarily the physical aspects of slum neighborhoods. The program was not equipped to deal with the social dimensions of its own renewal process. Some critics accused urban renewal of destroying social values in many low income neighborhoods by uprooting entire communities and scattering their residents before the bulldozer's blade.

By 1966, the federal government was ready to reassess its programs. Through workable program requirements the federal government had tried to impose an official model of good planning upon localities. By maintaining individual project approval at the federal level, it further strengthened its hand in local renewal activities. Unfortunately, the federal model did not accomplish the ambitious goals stated for its programs. Slum problems increased. A series of riots in large cities pushed the nation along in its efforts to solve the social dimensions of problem neighborhoods. With the threat of wholesale destruction facing its large cities, the federal government devised an open-ended program to allow localities to formulate their own approach for solving inner city problems.

The Demonstration Cities and Metropolitan Development Program, passed in 1966, provides 80 percent federal funding for a broad range of locally devised "Model City" programs. Funds may cover neighborhood renewal, street paving, police and fire stations, social programs, and whatever the locality may devise to solve its problems. Extensive neighborhood participation in program selection is required.

Model Cities funds must be spent in designated demonstration neighborhoods which contain a significant portion of the city's problem conditions. Assumedly, the results of local experiments may be examined and applied more widely. Model cities funds may be used for matching funds for urban renewal projects which are connected with the model city program.

Model Cities legislation reflects a clear shift in governmental thinking from "we know what needs to be done" to "let's find out what needs to be done." As a measure of its disillusion with past experiments, Congress

did not even require participating cities to meet workable program certification.

Because workable program certification was not required, the city of Houston was able to participate. The city received initial funding in 1969. A 1971 report of the city's second action year measures about two inches in thickness. It reports expenditure of some \$14,000,000 in model cities funds. Funded programs reflect a wide range of local ingenuity. For example, the city received \$200,000 to demolish unsafe buildings in the model cities area; the parks department received \$469,000 to buy and develop parks; the school district received \$260,000 for special education purposes; neighborhood day care centers received \$200,000; and a Progressive Amateur Boxing Association received \$75,000 to provide boxing instruction for youths between ages 6-19. Because Houston does not participate in urban renewal programs, Model Cities funds were not used for that purpose.

Model Cities funding helps round out other federal programs presently available for localities, and when combined with the other grant programs, they may have considerable impact on urban land use.

Federal Planning Assistance

Section 701 of The Housing Act of 1954 provided federal planning funds to assist smaller communities which lack adequate planning resources and to aid regional planning. Federal funds now cover two-thirds of the cost of comprehensive planning for communities with populations under 50,000, and for regional planning agencies. Grants may be made to counties having populations in excess of 50,000 if their plans are coordinated with comprehensive planning for their metropolitan areas.

The program is designed to facilitate comprehensive planning for urban and rural development, including coordinated transportation systems, and to encourage area-wide planning.

Many Texas cities have qualified for § 701 planning and have benefitted from the product. Texas has authorized regional planning commissions to perform areawide planning, and all parts of the state are now included in designated planning areas. The functions of regional planning commissions are described in Chapter V.

Federal Assistance for New Communities

At the turn of the century, an Englishman named Ebenezer Howard declared that London had grown too big, and that new communities should be developed to accommodate the increasing population. The new community idea caught on, and some new English towns were actually built during Howard's lifetime.

In the United States, new communities have been often dreamed about and occasionally built. In some cases, the new communities are no more than super-subdivisions, serving as bedroom villages for people who commute to a nearby central city to work. In other cases, they attempt to be self-sufficient, with substantial industrial and commercial bases. Reston, Virginia and Columbia, Maryland are two of the most publicized new communities. Reports vary concerning their economic successes.

Hucksters have found a gold mine in promotional developments called "new communities." For years, land promoters have carved up bits of California, Arizona and Florida desert and swamp and sold it by mail to dreamers in Chicago, New York and other cold climes. Charles Dickens was once taken by a new community promotion involving the underwater outskirts of Cairo, Illinois. He gained at least literary revenge by writing a book about his misfortune.

But what about legitimate new communities? It is at least worth experimenting to see whether the urban population can be diverted from existing, overcrowded cities. Unfortunately, private land developers are not able to take the risk of establishing complete new towns. Such developments have extremely heavy front-end costs. They are economically risky. Without governmental assistance, new towns are not likely to be built.

Recognizing the need for federal encouragement of "new community" development, Congress provided FHA mortgage insurance to accomplish that goal as a part of the Demonstration Cities and Metropolitan Development Act of 1966. The Housing and Urban Development Act of 1968 further authorized the Secretary of HUD to guarantee bonds, debentures, notes and other obligations issued by developers of new communities. The Housing and Urban Development Act of 1970 extended additional grant, loan and guarantee authority to the Secretary. New communities are also eligible for the extension of credit for public works and mass transportation projects from HUD.

The legislative reports recognize four types of new communities:

1. New communities within existing metropolitan areas;
2. Additions to existing small towns and cities which can be economically converted into growth centers;
3. New town-in-town developments to help renew central cities;
4. Free standing new communities where there is a clear showing of economic feasibility.

Although this categorization is not carried forward into the statute, it illustrates the types of developments which prompted the federal interest.

New communities legislation was designed to help public and private developers overcome financial barriers to new community development. A significant problem to new community developers is the high front-end cost of providing basic service and acquiring land for potentially large populations. High start-up and carrying costs which otherwise would prohibit private developers from undertaking substantial developments are to a large extent covered by federal mortgage insurance. Loan guarantees are available to both private and public developers. The Act authorizes total guarantees of \$1 billion, with a \$50 million ceiling per project.

The 1970 Act authorizes the Secretary to make grants to state land development agencies or local public bodies for essential public services during the first three years of the project. This Act also authorizes \$10 million for planning grants for public and private developers of new community development programs.

Under both the 1968 and 1970 Acts, the Secretary may make necessary supplemental grants to state and local public bodies and agencies engaged in new community development projects. Grants may not exceed 20 percent of total project cost.

Under the Public Works Acceleration Act, the Secretary may purchase the securities and obligations of municipalities and other political bodies to finance public works projects or mass transportation projects. New communities may participate in these programs.

To be eligible for new community mortgage insurance, a project must meet certain feasibility requirements. The development must represent a good mortgage insurance risk and involve improvements which comply with all applicable state and local requirements and with the minimum requirements set by the Secretary. The Secretary must approve the schedule for development.

Development must be undertaken in accordance with an overall plan appropriate to the scope and character of the project. The community must have a sound land use plan, and be consistent with comprehensive planning for the area in which the land is situated. Local governing bodies must approve the plan. The Secretary must determine that the development will make a substantial contribution to the sound economic growth of the area.

New Communities in Texas

Three new community projects are underway in Texas: San Antonio Ranch, north of San Antonio; Woodland, north of Houston; and Flowermound, near Dallas.

San Antonio Ranch

San Antonio Ranch has experienced planning difficulties to date and has not received federal guarantees or grants. The estimated population is 88,000 and total land area is 8,300 acres.

The Woodlands

The Woodlands is the largest of the three Texas projects, with an estimated population of 150,000, and a land area of 15,000 acres. The project has received a maximum \$50 million guarantee, and the debentures for the project have been sold. No grants have been made to the Woodlands.

The Woodlands will be divided into seven villages. A university campus has been included in the planning, along with a 250 acre man made lake. A metro center will serve as a downtown area. Greenbelts are designed to follow the natural flow of drainage and border the creeks which run through the city.

Although four exits off Interstate 45 will serve as access roads, there has been no planning for rapid

transit into Houston. The highway serving Woodlands-Houston is now overcrowded during rush hours, and if the new community is successful, traffic problems are bound to increase. There may be some question whether The Woodlands can successfully become a truly self-contained city, or whether it will be a bedroom community for Houston. If the latter, then some answer to the transportation problem is essential.

The Woodlands lies in the extraterritorial jurisdiction of both Houston and Conroe. Some dispute appears likely between the two cities as to subdivision control and eventual annexation of the territory. The Woodlands cannot incorporate as a city without Houston's and Conroe's approval. This may operate to the advantage of the developer, inasmuch as he can maintain control much longer.

Flowermound

Flowermound is the smallest Texas development, having a land area of 6,100 acres for an estimated population of 60,000. However, it has received the largest share of federal grant funds, including \$1.4 million water and sewer grant, a \$576,800 supplemental grant, a \$20,000 open space land acquisition grant, and an E.P.A. water treatment grant of \$1.3 million.

Private developers have jumped at federal assistance available for their new communities. There may be some doubt whether totally self-contained new communities can be developed successfully, even with the federal monies. It is not sufficient that a developer buy up a large tract of land and decree that a new town come into existence. Successful communities, whether new or old, require industry, transportation, people, services and a reason to exist.

Some new communities may succeed as super-subdivisions for people who work in a central city. If this be the future of Texas' new communities, then immediate attention is due to the transportation problems which they create.

Anticipating that existing cities might use the new communities funds to revitalize themselves, the Texas Legislature authorized them to participate in the federal program and to issue Certificates of Indebtedness connected therewith. Activity, if any, by existing cities and towns is unknown.

Federal Assistance for Open-Space Acquisition

In the Housing Act of 1961 Congress legislatively recognized a need for federal assistance to state and local governments for acquisition of open-space land. The purpose of federal assistance is to "help curb urban sprawl and prevent the spread of urban blight and deterioration, to encourage more economic and desirable urban development, . . . and to help provide necessary recreational, conservation and scenic areas." The Act encourages the preservation of historically and architecturally valuable areas, sites and structures as well as open-space land acquisition.

Benefits under the Act are generally restricted to the provision, preservation and development of open-space land in a manner consistent with the planned long-range development of urban areas. The Secretary of HUD is authorized to make grants to states and localities to help finance under § 401a (1) "the acquisition of title, or other interest, in open-space land in urban areas," (2) "the development of open space land in urban areas for open-space uses," and under § 401c-2 (3) the acquisition of interests in "undeveloped or predominately undeveloped land which, if withheld from commercial, industrial, and residential development would have special significance in helping to shape economic and desirable patterns of urban growth."

Open-space land, as defined in the Act, includes any land in an urban area which has "value for (A) park and recreational purposes, (B) conservation of land and other natural resources; and (C) historic, architectural, or scenic purposes." Open-space uses are any uses to achieve these three purposes. Developed land cannot be acquired unless undeveloped land is not available.

Once land is acquired under the Act, conversion to other uses requires the prior approval of the Secretary. Only three findings are statutorily required for conversion: (1) an assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value; (2) the conversion and substitution is necessary for orderly growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable comprehensive plan for the urban area. This conversion restriction does not apply to a § 401c-2 acquisition.

The Act authorizes \$560 million for federal grants. For § 401a grants the maximum federal share is

50 percent, with not more than 1/2 of the nonfederal share to be made up of land or materials. However, under § 401c-2, the federal share may be as much as 75 percent with no limitation of the type of nonfederal contribution.

In addition to his grant authority, the Secretary may provide technical assistance as required to effectively carry out activities under the Act.

The planning requirement and certification process is spelled out in two HUD circulars last published in 1970. In addition to the requirement that acquisition be consistent with the comprehensive plans developed by the areawide planning organization (usually a Regional Planning Commission) HUD's regional office requires any submitted plan to be consistent with the comprehensive Texas open-space land use plan prepared by the Texas Parks and Wildlife Commission. Since this is on file with the regional HUD office, and is usually researched by any group seeking assistance under the Act, it rarely provides a barrier to certification.

Although statistics as to the total amount of federal assistance or acreage acquired in Texas under the Act are not readily available, there has been extensive use of both § 401a and § 401c-2 grants in this state. In one new community project, Flowermound (in the Dallas area), \$20,000 in federal funds were added to \$10,000 in local funds for land acquisition. There is a pending request for an additional \$100,000 in development grants. As with most open-space land grants in Texas, this grant represents the maximum possible federal contribution (75 percent since it is a § 401c-2 grant).

The Rural Development Act of 1972

The past half century has seen a migration from rural areas into the nation's cities. To some extent, the migration reflects popular perceptions of a lack of opportunity outside the cities. The Rural Development Act of 1972 is designed to make rural life more desirable. Hopefully, Americans will be encouraged to remain in or return to rural areas, and thereby relieve some of the pressure on overcrowded urban areas.

The Act amends existing agricultural legislation, and expands the duties of two Department of Agriculture agencies, the Farmers Home Administration and the Soil Conservation Service.

The Act increased the dollar authorizations for Farmers' Home Administration loans and grants, and adds a planning requirement for water and waste disposal systems grants. These systems must conform to the regional plans, or no grants will be made. Planning grants for waste disposal are also increased.

The Secretary of Agriculture is authorized by the Act to make and insure loans, make grants, and participate in joint financing with other agencies to facilitate rural industrialization. Private developers may use this financial assistance to acquire and develop land without land use limitations or comprehensive planning requirements.

The Act expands the Secretary's authority under the Watershed Protection and Flood Prevention Act. Cost sharing is available for items such as land use changes, and soil, woodland and wildlife conservation and development along with water related activities. No guidelines are set out except that activities must be in the public interest.

The Act directs the Secretary to carry out a land inventory and monitoring program, to include studies and surveys of land use changes and trends and degradation of the environment resulting from improper use of soil, water, and related resources. At not less than five year intervals, the Secretary must issue a land inventory report reflecting soil, water, and related resource conditions. Hopefully, the information will help state and local agencies formulate and administer their land use management strategies.

The Act also provides up to \$20 million by 1976 for state colleges and universities to research, investigate and apply useful knowledge and innovative approaches related to rural development. Rural development includes the "planning, development, conservation and use of land, water and other natural resources or rural areas to maintain the quality of the environment for people and business in rural areas."

The National Environmental Policy Act of 1969

The United States Government has spent billions of public dollars to build dams, highways, military installations, waterways, and other public works which have drastically changed the face of the country. Sometimes, the expenditures are direct; sometimes they are channeled through state agencies.

In many cases, project decisions were made on a single goal consideration, e.g., to build a dam to provide electricity, or a highway to link two cities. Any adverse effects which these improvements might cause the environment are seldom considered. Some bureaucracies found that their existence and legitimacy depended upon continuation of the public improvements programs. Accordingly, they did not want environmental questions answered. In some cases, adverse effects may have been consciously concealed.

In 1969, Congress passed the National Environmental Policy Act (NEPA). Its purpose is to protect the air, water, and land from governmental abuses. The Act establishes a Constitution-like framework for making decisions where environmental values are found to be in conflict with other values.

NEPA does three basic things: first, it requires that environmental implications be considered in all government decisions; second, it requires all federal agencies to file an environmental impact statement on all legislative proposals or major federal actions; and third, it creates the Council on Environmental Quality (CEQ) to review the federal programs and make policy recommendations.

The Act's policy statements are strongly directed toward maintaining the environment for future generations and preserving historical, cultural and natural aspects of our natural heritage. It specifically states that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

NEPA's real strength lies in the requirement that environmental impact statements be filed for every major project. This requirement is designed to cause the agency to examine the environmental implications of its actions, and to display the results for review by others. Only in this manner may a cost-benefit analysis be made.

In recent years, citizens have turned to the courts to stop public projects which threaten the environment. With NEPA, citizens may use an agency's failure to file impact statements as an entry into court. Although courts are generally hesitant to get into federal agency conflicts, the NEPA requirements are quite clear on at least one issue: for major projects, an impact statement must be filed. In Scherr v. Volpe citizens sought to enjoin construction of a Wisconsin highway, claiming that the Department of Transportation (DOT) had failed to file an impact statement. DOT contended that the highway was not a

major project which in the words of the Act would "substantially affect the quality of human environment," and that therefore no statement was needed. The District Court held that if government was claiming that the project was insignificant as a reason for not filing the report, then it had better have a fully prepared case for its contention. DOT did not have a convincing case on that point, and the injunction was granted.

In Goose Hollow Foothills League v. Romney, plaintiffs sought to enjoin construction of high rise apartments at Oregon University. No impact statement had been filed. The court rules that HUD should have classified the project as "major" and filed a statement. The building had generated local controversy, and several newspaper items had been written about it. The court looked at CEQ guidelines and determined that impact statements should be filed in such "controversial" cases.

In Citizens for Reid State Park v. Laird, plaintiffs sought to enjoin Army maneuvers on state park grounds. Although no impact statement was filed, the Department of Defense was able to show that it had consulted all of the proper state and federal agencies before making a good faith decision that filing an impact statement was unnecessary.

In San Antonio Conservation Society v. Texas Highway Department the court enjoined construction of a highway that would have gone through Brackenridge Park. The government claimed that because the project was approved before NEPA became effective, no impact statement was required. The court disagreed and required a statement.

For an example of practical operation of NEPA, the procedures of the Texas Highway Department in Harris-Brazoria counties were examined. The key person in the system is an individual who shall be called Ms. A. She is in charge of meeting NEPA requirements for proposed projects. Ms. A. states that a year before NEPA became effective, the Department of Transportation required the Highway Department to consider environmental aspects of projects at public hearings. DOT suggested consideration of 23 basic factors, including eminent domain factors, aesthetics, multiple use possibilities, harm to animal and plant life, and conflicts of the project with religious beliefs. These 23 basic considerations now go into impact considerations.

When NEPA became law on January 1, 1970, no one knew what to do with it, so the Highway Department continued

to follow the public hearing procedure and waited for instructions. In late 1970, the DOT guidelines reached one of the Texas Highway Department's divisions in which Ms. A. works. From then to the present, it has been Ms. A.'s job to file or decide not to file impact statements.

She states that the toughest part of the decision is whether a project is important enough to file an impact statement. The DOT guidelines are so vague that she usually has to decide for herself. When a project is proposed, Ms. A. checks with resident engineers as to the project's probable effect on the land, with city officials to determine whether the project is likely to arouse controversy, and generally "listens around" for potential opposition.

If she decides that a project will not "substantially affect the quality of the human environment" Mrs. A. prepares one of two types of memos. If the project is very minor, e.g., painting new stripes on a road, she prepares Memo No. 1, explaining why no impact statement is necessary. The letter goes to the Highway Department in Austin, and to the Federal Department in Washington. If the project is somewhat larger in scope, but still not considered by Ms. A. to be big enough to merit an environmental impact statement, she prepares Memo No. 2, a "negative environmental declaration." Projects such as widening pavements where no new rights-of-way are taken fall into this category. The negative declaration is then sent to state and federal agencies. If one of these agencies disagrees with the "no impact" decision, then she would file a statement. So far, this has not happened.

On all major projects and those which are at all controversial, Ms. A. prepares full environmental impact statements. In accordance with the DOT guidelines, every statement is broken down into seven chapters.

1. History of the project and the area.
2. Description of project. This chapter often presents problems. The CEQ and DOT guidelines recommend that the impact statements be filed at "the earliest possible stage of the project." Often this means that Mrs. A. is attempting to describe a project which has not been fully formulated.
3. Possible environmental effects. Usually along the DOT guidelines considering as many of the 23 areas of environmental impact as applicable.

4. Alternatives--one of which must be "make no improvement."
5. Analysis of short-term environment drawbacks as compared to long-term benefits of project--a sort of subjective balancing of interests. Ms. A. notes that the long-term benefits of any new highway are generally the same and they usually use a stock paragraph about increasing economic growth, trade, mobility, etc.
6. Irreparable effects to environment. Ms. A. is of the opinion that in the construction of a new highway there are usually very few irreparable effects because "if we ever wanted to we could completely erase a highway, and you'd never know a highway had ever been there."
7. Comments received. As soon as the first six chapters are completed in first draft form, Ms. A. sends copies of the statement to over 14 federal and state agencies for their comments. The various agencies are given two months to comment on any aspects of the project. Any agency that requests extra time to look over the statement is granted an extension. When comments come in, Ms. A. analyzes and answers each one in the appropriate chapter in the final draft. She notes that the commenting agencies do not feel at all limited by their particular jurisdiction. The Coast Guard, for example (to whom a draft is sent whenever a navigable waterway is involved in a project) might comment on the mass transit or aesthetic implications of the project.

One of the agencies which receives a draft is the Texas Interagency Council on Natural Resources and Environment, a newly created branch of the Governor's Office. The Council was created to coordinate the numerous state agencies with an interest in the environmental effects. According to Ms. A., the Council is supposed to forward the draft to agencies which it believes would be interested in commenting on the project. In view of the two month period allotted agencies in responding to the draft, it seems highly unlikely that all relevant state agencies would have an opportunity to comment fully on the project.

When all comments are received and answered by Ms. A., she sends the completed final draft to the same agencies which received the first drafts. The Federal Highway Department, upon receiving its copy, makes

numerous copies and circulates them to the "appropriate federal agencies." Ms. A. admits that she "has no idea" where these copies go.

It has been said that all the trees that have been saved by environmental impact statements are more than equalled by all the trees that have been cut down to produce the paper that the impact statement procedure requires. But aside from creating a fascinating "bureaucracy," what have these impact statements accomplished in Texas?

Apart from the San Antonio controversy, Ms. A. knows of no highway project that has even come close to the litigation stage. One result of the statement is that the fears of concerned citizens are allayed. For example, a civic group that is worried about the environmental effects of a federal or state project, somehow is pacified by the sight of a government document which tells them that everything has been carefully researched and there is no reason for concern. This is a potentially dangerous situation because it lays the predicate for government whitewash. More citizen input in the drafting of the impact statement would seem in order. In the case of highways, the department is required to make the first draft of the statement available at the public hearing.

Another effect of the environmental impact statements is to build in a delay in carrying out projects. In 1956, when the Highway Trust Fund was established, the lag time between original inception of a highway project and the awarding of contracts was approximately two years and six months. Lag time now averages out to about six years and six months. One cause of delay is NEPA requirements. This is not necessarily a bad development. A major cause of the current environmental dilemma is that the good life has been indiscriminately equated with economic expansion and manufacturing productivity.

NEPA operates only when federal funding is involved. However, states must insure that projects involving matching funds are cleared on environmental issues without unnecessary delay from citizens' suits. States should set up effective, rational decision systems to make decisions concerning projects which come under the Act. The San Antonio highway case is only one example of what can result when agencies act without due regard for the NEPA requirements.

Should Texas follow California's lead and pass an environmental policy act which requires impact

statements on every state and local project? California's act even covers private projects which require state licensing.

It is doubtful that Texas is currently prepared to review impact statements on all state and local projects. Adding this burden when more elementary issues need to be resolved might even be self-defeating. However, the increasing complexity and magnitude of federal programs in environmental matters will eventually lead to state action of this type. If Texas were to set up an EPA, that agency could supervise all environmental issues which must be resolved under present and anticipated federal legislation.

The Federal Water Pollution Control Act Amendments of 1972

Representative John A. Blatnik (D-Minn.), a ranking member of the Conference Committee that came up with the final version of this mammoth pollution bill, calls it the second most complicated piece of legislation ever enacted by the federal government. (The most complicated is the internal revenue code.) It is also the most important law to control water pollution ever enacted by any country.

The first section of the Act spells out the congressional mandate for clean water in no uncertain terms. There are eight basic imperatives:

1. Elimination of pollutants discharge into navigable waters by 1985.
2. Interim water quality goals (protection of aquatic animals and recreational waters) by July 1, 1983.
3. Prohibition of discharge of toxic pollutants in toxic quantities.
4. Federal assistance funding for construction of publicly owned waste treatment works.
5. Waste treatment planning by states.
6. Research and development funds.
7. Presidential level action for international control of water pollution.
8. Drastic minimization of paperwork.

In the execution of all these mandates, Congress emphasized that public participation should be "provided for, encouraged, and assisted" by the Environmental Protection Agency (EPA) and the states. EPA will publish minimum requirements for public participation in all programs of the Act. The opening section declares that the entire Act will be administered by the EPA Administrator, currently William Ruckelshaus.

At the core of the Act are its water quality standards, to be administered through a new permit system, The National Pollutant Discharge Elimination System. If a state wishes to operate its own permit system, it must enact statutes and regulations that meet these standards. There are two types of standards: first, those that define the uses of specific bodies of water (public water supply, propagation of fish, recreational, and/or agricultural and industrial water supply); and second, those that give criteria based on those uses.

The use type of standard is not as consequential as the criteria type. For example, even if a lake were designated as an industrial water supply, industry would nevertheless have to obey the strict criteria standards.

The criteria standards require scheduled control of industrial pollution. Controls are stated in terms of deadlines and quality criteria.

Deadlines for Pollution Abatement

Industries discharging pollutants into the nation's waters must use the "best practicable" control technology by July 1, 1977, and the "best available" technology by July 1, 1983. This provision seeks to alleviate some of the economic hardship that industry faces as a result of the Act. EPA will issue guidelines defining what constitutes "best practicable" and "best available" technologies for the various industries by October, 1973. These guidelines may be modified by the industry, subject to EPA approval, according to several factors including the costs of pollution control, the age of the industrial facility, the process used and the environmental impact, other than water quality, of the controls. EPA will also identify those control methods that can completely eliminate industrial discharges.

Any industry that discharges its wastes into a municipal treatment plant must pretreat its effluent so that the industrial pollutants do not interfere with the

operation of the plant or pass through the plant without adequate treatment. This requirement takes effect, for new industrial sources of pollution, no later than May, 1974, and, for existing industrial facilities, no later than July, 1976.

Quality Criteria

If an industry plans to discharge anything into the nation's waters, it must apply for a permit to do so either from the National Pollutant Discharge Elimination System (NPDES) or from the state authority.

Under § 307, EPA is formulating a list of toxic materials which industries will be prohibited from discharging. According to EPA Spokesman Dave Chandler, these toxic materials will include those which are "disease causing (including carcinogens) in animals." Standards and regulations for pretreatment of all discharged materials are forthcoming from EPA. Mr. Chandler notes that at present there is a moratorium on illegal discharge prosecutions until the list and regulations are received from Washington.

Under § 311, EPA is also formulating a system for regulating "oil and hazardous substances" and assigning liability for violations. Before passage of this section, there were controls on oil spills. The new Act regulated other hazardous materials and allows prosecution for discharge. Mr. Chandler explains that the basic difference between § 307 and § 311 is that § 311 is designed toward "one shot" type discharges (oil spills, pipeline ruptures, tanker spills, etc.). All oil spills, "major, medium and minor" are covered. Hazardous materials, though EPA has not published its list, will probably include those substances that are harmful to "any aquatic life--including plants." Texas may have to draft new legislation with language quite similar to the § 307 and § 311 of the Act if it wishes to administer its own permit system. A Texas Water Quality Board spokesman does not believe this will be necessary.

The discharge into the nation's waters of radioactive, chemical or biological warfare materials or high-level radioactive waste is now prohibited.

Water quality standards are to be administered on both the state and national level. The state should immediately set up standards consistent with the federal guidelines. If states do not, then EPA will set up standards for them.

If a state finds that the use of "best practicable" or "best available" controls are not adequate to meet water quality standards, more stringent controls must be imposed. States must establish the total maximum daily load of pollutants, including heat, which will not impair propagation of fish and wildlife.

States are required to submit yearly reports on the quality of bodies of water within their boundaries. The first report is due January 1, 1975. At least once every three years, states must hold public hearings to review and update their water quality standards subject to EPA approval.

The tool by which the Act hopes to control industrial pollution is the discharge permit system. No industry may discharge effluents into the nation's waters without a permit. The permit program will be administered by EPA through the National Pollutant Discharge Elimination System (NPDES). States may, however, under certain conditions, apply to EPA for permission to run their own permit program. It is unclear, at this point, just how much autonomy the states qualifying for self-regulation are allowed. One provision in the Act requires permit review by EPA. Texas Water Quality Board Administrator Jim Showen notes that this requirement can be waived. Showen believes that there are a lot of inconsistencies in the Act's permit system, "not so much in the law itself but in its administration."

"It is uncertain right now, even if we qualify to regulate our own permits, whether or not we really do have self-governing powers." "It may be," says Showen, "that we will just become a front for the EPA . . . we'll catch all the complaints and harrassment and they'll get all the publicity."

Showen sees the permit concept of the Act as setting up an "integrated system that is basically federal." The question is whether the state agency will really make and enforce law or merely shuffle papers for EPA.

If a state wants to apply for permission to conduct its permit system, its criteria for granting permits must be in compliance with federal criteria. To this end, EPA recently published proposed guidelines on "State Program Elements Necessary for Participation in the NPDES." These guidelines suggest that it may be necessary to rewrite some parts of the state law in the discharge permit area.

Mr. Showen states that approximately 4,000 permits are outstanding under the current state permit program. Although they will have interim validity, all 4,000 will have to reapply when the new program comes into existence.

Section 402 of the Act sets out exactly what the permit system does and does not do. Significant provisions are as follows:

- The new Act preempts the Refuse Act of 1899 which was the basic effluent permit system prior to the Act.
- All permits are to be for fixed periods not to exceed five years.
- All permits can be terminated or modified by:
 - (a) violation of any conditions of the permit;
 - (b) obtaining a permit by failure to disclose or misrepresentation;
 - (c) changes in conditions that require elimination or reduction of permitted discharge.
- Any other state whose waters might be affected by the issuance of a permit must be conferred with by the permitting state.
- Any state permit program must include civil and criminal penalties for noncompliance. It is unclear whether the state permit system must enact the same penalties as the Act mandates for the federal government.
- Before the granting of any permit there must be an opportunity for a public hearing.
- A state permit program is subject to revocation by EPA, after a public hearing if the state fails to implement the law adequately.
- The Army Corps of Engineers retains authority to issue permits for the disposal of dredge-and-fill material to specified disposal sites, subject to EPA veto of disposal sites if the discharge will have an adverse effect on municipal water supplies, fishery resources and/or recreation.

- Another permit system is set up to regulate disposal of sludge from sewage treatment plants into bodies of water or on land where it affects water quality. After EPA establishes regulations for issuing sludge-disposal permits, a state may take over the permit system if it meets EPA requirements.
- All persons who are awarded permits must keep proper records, install and maintain use monitoring equipment, and sample their discharges.
- EPA, or the corresponding state agency, has the power to enter and inspect any polluting facility, to check records, monitoring equipment, and to sample its discharges.
- All permits must meet the requirements of the National Environmental Policy Act (NEPA) including the filing of an environmental impact statement.

Enforcement Provisions

Penalties for violations range from a minimum \$2,500 to a maximum of \$25,000 per day and up to one year in prison for the first offense, and up to \$50,000 a day and two years in prison for subsequent offenses. The recent Fifth Circuit Court of Appeals case of U.S. v. Mobil Oil held that, although criminal and civil penalties can be levied on a polluter who gives the government no notice of his activities, only civil penalties may be levied against those who do give notice.

Injunctive relief is available. There is no longer much problem of standing. The Act gives any citizen or group whose interests may be adversely affected standing to take court action against polluters or against EPA should they fail to carry out the Act's requirements. There is still some question as to whether it will be possible to get equal standing extensions in the state courts should the state be allowed to conduct its own permit system.

The Act also sets up a national surveillance system to monitor water quality.

The state permit program is vitally connected to the assistance grant provision of the Act. Under § 106, Congress has earmarked \$135 million in grants to states for assistance in implementation of pollution control programs; \$60 million for fiscal 1973 and \$75 million for

fiscal 1974. However, if a state reduces its own water pollution control spending below that which was spent in fiscal 1971, it will not be eligible for any funds from the grant program. The Act authorizes a number of additional grant programs. Among these are the following:

Grants to cover 50 percent of the administrative expenses of a state planning authority are available to administer the various aspects of the Act which apply to the state level. These grants are made on the request of the Governor. Each planning agency receiving these grants must demonstrate to EPA that they can and will operate consistently with the Act. Grants cannot exceed three years.

Under § 104, research, investigation, training and information dissemination on all levels is encouraged and the Act authorizes EPA to "make grants to State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations and individuals" to further these purposes. The language here is so broad and repetitive that EPA grants could be made to anyone who wants to study causes and cures of water pollution. However, no money amounts are stipulated. There are specific authorizations for grants to colleges and universities.

Research and development grants are to be funnelled through the state agency to those who might be able to provide:

1. Better waste management methods.
2. Advanced waste treatment techniques.
3. Improved methods of monitoring pollution.

Loans from the Small Business Administration are available to businesses that suffer "substantial economic injury" unless they receive assistance to comply with the laws.

Sewage Treatment Grants

The most important program in Title II concerns grants for constructing waste treatment plants. The Act earmarks more than \$11 billion over the next two years to aid municipalities to construct and modernize waste treatment works. An additional \$2.75 billion is authorized to reimburse local governments for treatment plants built in

anticipation of federal aid. The grants are scheduled to extend over nine years with federal participation set at 75 percent.

The Act also establishes an Environmental Financing Authority to aid states and cities in financing their share of projects. The Authority's main function is to purchase bonds and to assist states and cities in financing their share of construction costs.

In order to qualify for grants, sewage treatment plants approved before June 30, 1974, must provide a minimum of secondary treatment. After that date, federal grants may be made only to plants using the "best practicable treatment."

By July 1, 1977, all treatment plants, whether built with federal money or not, must meet all additional effluent standards. All publicly owned waste treatment plants must use "best practicable" treatment techniques by July 1, 1983.

Areawide waste treatment management plans are to be established by July 1, 1976, in urban areas with substantial water pollution problems. Federal grants of up to \$300 million over the next three years are authorized to aid the areawide agencies (the Houston-Galveston Area Council for example) develop and operate integrated water pollution programs. It is unclear whether these grants are to be funnelled through the Governor's office, through the state water pollution agency, or given directly to the requesting areawide agency.

In order to qualify for federal construction grants after July, 1976, a waste treatment plant in an urban area must be part of, and in conformity with, the areawide plan. In addition, NEPA environmental impact statements must be filed for each plant.

If a city wishes to apply for a construction grant, the city standards must accord with the federal requirements. Some cities have already realized the exigency and enacted ordinances to comply. Thus, when the grants are awarded, these cities will have the enforcement capabilities necessary to qualify.

Apparently anticipating the federal action, Houston amended its code to meet the new requirements. The changes concerned chemical formulas for permissible pretreatment effluents and an increase in fees charged industry for waste treatment.

The President's Veto

President Nixon vetoed the Pollution Control Act. On the eve of his veto, William Ruckelshaus, EPA Administrator, commented:

The issue comes down to whether the good features of the bill when coupled with (the President's) ability to limit the bill's inflationary pressure outweighs its obvious fiscal drawbacks. Only the President can make that judgment.

Leon Billings, Senate Public Works Committee Senior Staffer, said: "The bill won't work without adequate funds, it's as simple as that."

Inherent in all environmental legislation is the conflict for priority with other economic considerations. Therefore, when Congress in the late spring of 1972 passed what has since been called "the most sweeping and costly clean-waters program ever voted by any nation" and sent the bill to a President primarily concerned with economic stability, the battle lines were drawn. The President vetoed the bill.

Congress overrode the President's veto. The President then announced that he was slashing the total Congressional authorization of \$11 billion to \$5 billion. The \$5 billion authorized for the first year was reduced to \$2 billion and the \$6 billion authorized for the second year was reduced to \$3 billion. The 60 percent cut in water pollution funds presented a challenge to the new Democratic-controlled Congress.

The President reasoned that a choice had to be made and that his action was necessary to avoid a tax increase and renewed inflation.

As a result of the President's reduction of outlays for construction grants, EPA was forced to come up with a new method of money distribution. The distribution system as originally set out called for states to be certified by EPA for Priority, and for municipalities to go to their state authority and request plant grants. Now, according to David Chandler of the EPA's Dallas office, the "priority" system has been replaced by the "neediest municipality" system. Under this process, the state must pick those cities most in need of treatment plants. This section is still subject to EPA scrutiny. The severity of the funding shortage is reflected by a statement made by William Ruckelshaus that, even with the full \$11 billion,

only 60 percent of the nation's cities would be able to meet the pollution control standards set by Congress.

Late in 1972, Commissioner Henry L. Diamond of New York's Department of Environmental Conservation along with a number of similar officials from other states pled with EPA to at least allow them to spread the available money across all approved projects. As yet there has been no decision by the Agency on this request.

"It's all like rolling marbles across a table," Diamond told the New York Times at the time. "If we can start rolling them to the other side all at the same time, we'll get them to the other side more quickly than if we had to start rolling them one at a time."

New York has filed suit challenging the President's limitation of outlay of the Congressionally appropriated funds. Claiming that Congress appropriated the funds for tightly drawn, explicit purposes, New York asserts that the President is violating the letter of the law by impounding over half of the Act's funds.

If these attempts to offset the effects of the fund curtailment fail, the states and cities will find themselves in a predicament summed up in a December statement by the National League of Cities. The League strongly criticized the federal government for giving them congressionally mandated clean water standards and then allocating totally insufficient funds to meet them.

Texas Water Quality Board administrator, Don Showen, believes that as a result of the reduction in funds there will be less federal money available for plant construction next year than, in fact, there was in previous years.

The Coastal Zone Management Act of 1972

Newspapers have carried pictures of dead fish and birds, news of oil slicks, cyanide in the Houston Ship Channel, increased dredging of wetlands and marshes, and announcements of new housing developments covering more and more beachland. The coastal zones appear to have become both an industrial dumping ground and a battlefield where competing interests fight for the right to destroy wetlands and beaches.

In the Coastal Zone Management Act of 1972, Congress encourages the states to take a long, hard look at their coastlands and come up with comprehensive legislation to reconcile the conflicts and conserve the coasts.

The Act provides a two step federal program. Step one provides grants for developing comprehensive coastal zone management programs, and step two provides administrative grants to help the states carry out their programs.

The Coastal Zone Management program does not force states to do anything. It does offer \$45 million in yearly grants to help them develop management programs. Moreover, if a state complies with the program, all federally licensed activity in the coastal zone must conform with the state's plan. Federal projects must conform to the extent conformity is feasible. Without participation in the program, a state could not control federal projects in the coastal zones.

What type of compliance is required? The state must identify the coastal zone subject to the management program. The management program must include a definition of permissible land and water uses within the coastal zone which have a direct and significant impact on the coastal waters. There must be an inventory and designation of areas of particular concern within the coastal zone. The state must also identify the means by which it proposes to exert control over the land and water uses to be permitted, including a listing of relevant constitutional provisions, legislative enactments, regulations, and judicial decisions. Uses in particular areas must be assigned priorities, with specification of those uses of lowest priority. An organizational structure must be formulated, with an identification of responsibilities of local, areawide, state, regional, and interstate agencies.

Grants may be made to cover up to 2/3 of the costs of the management program. Program development grants may be made only for three years, and grant authority expires in 1975. At the end of the three years of program development states may receive administrative grants to cover 2/3 of the cost of running the management program.

The management program must be coordinated with local, areawide and interstate plans applicable to areas within the coastal zone. A single agency must be designated by the Governor to administer the grants. The program must also provide for siting of facilities of greater

than local concern, and provide for preserving or restoring areas having conservation, recreational, ecological, or aesthetic values.

An approved management program must authorize appropriate agencies to administer land and water use regulations, control development, and resolve conflicts among competing uses, and acquire property through eminent domain.

Texas should act immediately to set up a coastal management program which will qualify under the Act. It is not only the prospect of receiving federal dollars which requires action. Far more important is the substantive necessity of undertaking serious management of the irreplaceable land and water resources in the coastal zones which are now in jeopardy.

As an additional incentive for state action, any observer will note that the coastal problem will not go away. Moreover, the federal interest will not be diminished by default of state action. Instead, federal control will probably be exercised directly if states do not formulate their own programs. Within the federal guidelines, there is an opportunity for states to identify their own policies and priorities, and formulate a management system which conforms to local and regional desires. If the states do not act, then their opportunity for self-determination may be lost.

Power Plant Siting Bills

At best, power plants are unsightly. At worst, they may destroy irreplaceable aspects of the natural environment and upset entire eco-systems. However, they are necessary. Cities in other parts of the country are now experiencing serious electrical power shortages which range from "brown-out" when the power source is simply inadequate, to occasional "black-out" when power is cut off entirely. Although shortages threaten the living style of Twentieth Century Americans, exclusionary zoning and environmentalist groups are increasingly successful in blocking the construction of new power facilities. As fossil fuels run out, electric companies are turning toward nuclear fuels. With the constant threat of explosion and radiation, private parties can be expected to fight installation of atomic generating plants with even greater vigor than they directed at conventional plants.

The United States has direct licensing power over some power generating facilities, e.g., The Federal Power Commission licenses hydroelectric plants, and regulates electric utility companies engaged in interstate commerce.

The federal government is about to enter the power plant siting controversy, with a procedure for making final determination as to location of new plants. Two bills have been offered, one by Eckhardt of Texas and another by McDonald of Massachusetts.

The Eckhardt Bill

The Eckhardt bill is straightforward. It addresses itself to two issues: supplying electric power and preserving environmental values. The bill provides for planning and certification of the location, construction, and operation of bulk power supply facilities. Federal guidelines would be established for certification by state, regional and federal agencies.

Planning would be performed by regional councils established in the various power regions designated by the Federal Power Commission. Councils would be made up of voting representations from the Federal Power Commission, the Department of the Interior, the Environmental Protection Agency, and the Council on Environmental Quality. All bulk power suppliers within a region would be required to submit their long range plans to the regional council. The councils would consider those plans and formulate their own long range plans for power supply.

Each state would be required to establish a decision-making body at the state or regional level to certify power plant sites and bulk power supply facilities. The state body would include in equal proportions, (1) representatives of state agencies relating to pollution, land use planning, public health, and fish and game; (2) electric companies; and (3) citizens' environmental protection and planning groups.

A federal certifying agency would also be constituted, with the same balance of representation between the designated interest groups. This agency would formulate and publish procedures and criteria for certifying proposed sites and facilities. The agency would certify state agencies which meet the federal qualifications.

If a state did not establish a qualifying certification agency, then applicants for site approval would go directly to the federal agency; if the state did establish a qualifying certification agency, then applicants would go to the state certification agency. Applications would have to be filed three years prior to construction. The bill would declare construction of facilities to be unlawful unless certification has been obtained for a qualifying state or federal agency. Certificates could not be issued which would allow an applicant to violate environmental or land use requirements under federal, state or local laws.

Electric companies which receive a certificate may use eminent domain, if necessary, to acquire conforming sites. States are permitted to enter into cooperative agreements to form regional certification agencies.

The McDonald Bill

The McDonald bill would create regional planning and control councils made up of bulk power suppliers (electric companies) located in the region. The Federal Power Commission and the Environmental Protection Agency would send nonvoting members to the council. Bulk power suppliers within a region would prepare their long range plans and participate in the regional council which prepares long range plans for the region. State siting agencies, the Federal Power Commission, the Department of the Interior, and the Environmental Protection Agency would render assistance to the council upon request. Each year the councils would submit to the latter agencies an updated proposed regional plan. After publication and comment the regional councils would determine what revisions should be made, and publish their final plan.

States would be encouraged to set up their own siting agencies to supervise power plant site locations. Pending final action establishing a state agency, the Governor of the state becomes the approving authority. The state is deemed to have an official siting agency when the Governor certifies that one exists having final power over site location.

Any bulk power supplier which proposes to build a facility would give two years advance notice of its intention to the Federal Power Commission and the state siting agency. The supplier would also file an environmental impact statement. The proposal would be published in local newspapers. If the Commission is satisfied that

an emergency exists, then construction could start in less than two years, and need not conform to the regional plan.

If an applicant for a permit is delayed by formal action other than refusal by the state siting agency, then it might ask that a panel be appointed which may authorize construction of the facility, or an alternative facility. Persons who are aggrieved or adversely affected by construction of a proposed facility might apply within six months after a proposal has been filed to the Environmental Protection Agency (EPA) for relief. The conditions under which the Environmental Protection Agency could respond are very narrow. If the state had a state siting agency, then the Environmental Protection Agency could not intervene.

If the Environmental Protection Agency objects to construction and if the Federal Power Commission acquiesces, then the facility could not be built. However, if the Federal Power Commission certifies that construction of the facility is "necessary" then the Environmental Protection Agency would request the Secretary of the Interior to assign a panel which may authorize construction of the facility or an alternative.

The all important panel would contain three members, one of whom would be appointed by the Federal Power Commission, a second by the Council on Environmental Quality, and the third to be selected by the first two. If the panel approved of the construction or operation of a facility, then no other federal law could be applied to stop the facility, except regulations under the Atomic Energy Act, which relate to radiological safety.

The McDonald bill provides for limited judicial review of the agency decisions.

Apparently the federal act would not be invoked to aid an applicant whose proposal was denied by a state siting agency. Therefore, the veto power of the state agency would be powerful. Approval by a state agency would also be powerful, inasmuch as the Environmental Protection Agency appeal could not be made if the state siting agency has approved the application.

A Compromise Bill?

The Eckhardt bill does not solve the problems power companies have in locating sites in areas where local land use regulations zone them out. The McDonald bill puts the goats in charge of the cabbage patch, and

assigns low priority to environmental concerns. It is unlikely that either bill will be voted on in their present form. Some compromise is likely. However, both bills and any likely compromise will issue a clear call for a state entity to participate in power plant siting. Texas should prepare for immediate action to establish a workable system to regulate power plant siting.

Proposed Land Use Policy and Planning Assistance Act

Potentially one of the most important pieces of land use legislation during this century will be actively debated during the next Congress. Senator Henry M. Jackson's Land Use Policy and Planning Assistance Act of 1972 was reported favorably out of Committee and passed the Senate. The bill, however, did not pass the House. The bill has been reintroduced and because the final bill in 1972 had administration support, passage in some form is likely by the 93rd Congress.

The bill does not impose national zoning, or even require statewide zoning. Senator Jackson states, perhaps inaccurately in light of Wickard v. Filburn, that the federal government does not have power to control privately owned land. His bill assumes that the primary responsibility for land use control rests with the various states.

The proposed Act states that land use decisions should be made in accordance with sound national policy. It would declare that the federal government and the states share responsibility to develop and implement a national land use policy which incorporates environmental, aesthetic, economic, social and other appropriate factors. The Act would establish within the Department of the Interior an Office of Land Use Policy to administer the Act and a National Advisory Board on Land Use Policy to encourage interagency communication and coordination.

Federal funds up to \$40,000,000 per year would be made available as grants to the states to cover up to two-thirds of the cost of compliance with the Act during the first two years of operation, and one-half of the cost during the next three years. Thereafter, the federal share would be 66-2/3 percent.

States would be required to develop within three years an adequate statewide land use planning process. This process would include among others the following specific items: