Conservation or exploitation of the environment: what role the Water and Soil Conservation Act 1967?

Penelope Jane Pepperell*

Legislation nowadays frequently includes exhortations to consider environmental matters but how effectual are these calls for conservation? Are environmental matters in fact given significant weight in development interests or are they merely paid lip service with development interests prevailing? In this article the writer undertakes an analysis of the Water and Soil Conservation Act 1967 from the standpoint that the Act aids the exploitation of water resources rather than their conservation.

> The State is established by those who desire to protect their material basis and have the power (because of material means) to maintain the State. The law in capitalist society gives political recognition to powerful private interests.[1]

The above view of the role of law in capitalist society has been criticised as unsophisticated. How, it is asked, does it explain legislation which seems antithetical to the interests of those with the 'power'? Such a piece of legislation which appears to restrict the activities of those who make use of natural resources for material gain is the Water and Soil Conservation Act 1967. The aims of the Act are outlined in its long title:

> An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water.

In recent years, particularly since the 1960s a large number of environment-oriented statutes have been passed. It could reasonably be assumed that this

* B.A. This paper was presented as part of the LL.B. (Hons) programme.

1 Quinney, R. "Crime Control in Capitalist Society: a critical philosophy of legal order" — Taylor, I., Walton, P., and Young, J., *Critical Criminology* (1975) 181, 192.

legislation is the result of a growing awareness that the laissez-faire attitudes which permitted the development of capitalism by the wholesale exploitation of the environment can no longer be tolerated if our surroundings are to remain fit for habitation.

I. POSSIBLE THEORETICAL FRAMEWORKS

In line with overseas developments resulting from a perceived need to control in some way the allocation of limited water resources in the face of increasing and competing demands, the Water and Soil Conservation Act 1967 was passed. It consolidated fifty-seven Acts of Parliament relating to water. Under section 21 of the Act, subject to certain exceptions,[2] all natural water was vested in the Crown. A system was instituted whereby those wishing to make use of this water must apply for statutory licences. If the protection of private property is the corner-stone of the capitalist economic system, and the Act removes Common Law rights property owners had over natural water, it might have been expected that there would be some outcry from private enterprise at this radical move which, in effect, amounted to nationalising the country's water resources. However, no such outcry occurred. In fact the one thing all witnesses before the select committee did agree upon was the centralisation of control of water resources under one Act was long overdue. Conservation groups could have been expected to give a favourable response to the placing of the control of water resources under a single authority, but the reason for ready acquiesence by development orientated groups is less apparent. There are a number of possible explanations which are worth outlining as they reveal the different interpretations which can be placed on legislation such as this. The various approaches can be divided into two general categories which depend upon differing basic views of the functioning of society.

A. The Consensus Perspective

Within a consensus type view of society, whereby laws which emerge are seen as reflecting the views and values of the majority of the population, it could be suggested that the Act did indeed reflect a growing awareness, shared by all sectors of society, of the need to preserve natural resources from undue exploitation. The Act would be seen as emerging fairly from the democratic process in that Parliament represents all views and as such it is appropriate and proper that valued resources should be placed under the control of this central democratic organ, to be allocated according to democratic principles.

B. The Conflict Perspective

Within a conflict view of society, whereby laws are seen as emerging as a result of conflict between various groups in society, the consensus viewpoint would

2 The right to take, divert and use (not discharge into) seawater and the right to take water for ordinary domestic needs, animal watering and fire protection. Unclassified waters, s.22, and waters of national importance, s.21(3D) and s.23(7), also fall outside ordinary and Crown water rights.

be regarded as naive and the ready agreement by development interests to the centralisation of the control of water resources would be looked at more critically.

Firstly, following the type of view expressed by Quinney in the opening quotation, it would be expected that natural resources would be vested in the state, but for the use of dominant economic interests rather than for fair distribution to all.

A gloss can be added to this type of approach by the use of an analogy to Gabriel Kolko's analysis of the emergence of laws regulating the railroad and meatpacking industries in the United States which[3]

> demonstrates quite clearly that in these areas the laws were, in fact, prompted and shaped by the largest companies in these fields in an effort to control competition from smaller companies and to insure better markets for the large companies' products.

A third view within the conflict model would suggest that the Act was a concession to the emergence of large bodies of opinion opposing exploitation and pollution of the environment, because of a realisation that not making such a concession would throw doubt upon the notion of the state as an independent arbitrator between opposing points of view and hence threaten the mandate to rule. This approach is used by Chambliss in his discussion of the anti-trust laws in America which he regarded as "tantamount to giving up a room in the basement to the servants in order to save the castle".[4]

A fourth approach again emphasises the importance of the symbolic dimension in lawmaking whereby an issue might become a symbolic focus for emerging political and ideological divergences. W. G. Carson's work on early English factory legislation provides a good example. Faced with a surging demand for reform in their factories the manufacturers eventually succeeded in adopting the reforms as their own. As Carson puts it:[5]

> For a time indeed, the battle became one, not so much over 'whose law this would be', as over whose 'knowledge' and whose moral interpretation of the whole system would be publicly endorsed in the act of legislating.

Victory for the manufacturing interests meant a considerable setback for the reformers and[6]

> Stripped of its threatened import, the Act of 1833 publicly affirmed that the precepts of common humanity were not so alien to the logic of industrial capitalism that checks could only be imposed from without. In this way it facilitated public representation of the relationship between the state, capital and an emerging working-class as one of pre-eminent moral stature.

It can be seen that there are a number of different ways of looking at legislation such as the Water and Soil Conservation Act 1967. The conflict views tend to imply a conscious attempt by those making laws to protect economic elite interests,

3 Chambliss, W. J., "The State, the Law and the Definition of Behaviour as Criminal or Delinquent" in Glaser, D. (ed.) *Handbook of Criminology* (Chicago, 1974) 7, 10.
4 Chambliss, W. J., in Chambliss, W. G. and Seidmann, R. B. *Law, Order and Power* (Reading, Mass., 1971) 66.
5 Carson, W. G., "Symbolic and Instrumental Dimensions of Early Factory Legislation. A Case Study in the Social Origins of Criminal Law" in Hood, R. (ed.) *Crime, Criminology and Public Policy* (London, 1974) 132.
6 Idem.

however, the same result may be achieved without any such conscious manipulative intention. In an area such as environmental protection, where there is no recourse for those who do not make known their views, the philosophical mindset of a society which affects the way the control and enforcement mechanisms work, will have an even stronger effect upon the way it will deny or impede the instigation of mechanisms which would produce a contrary value system. The circle is completed by speculation on how these particular thought patterns are perpetuated by those who have the rulership of society, to the extent that coercion of the many by a few is not regarded or seen as such.

The aim of this article is to look at the Act and its operation to see if there is any evidence to support the suggestion that the Act does in fact favour those who are exploitative in their interactions with the environment, rather than restrict their activities so as to protect existing water resources. This will be approached by looking at six different areas in which difficulties are encountered by those wishing to object or appeal against the granting of applications for rights over water.

II. DIFFICULTIES ENCOUNTERED BY OBJECTORS TO WATER RIGHT APPLICATIONS

A. Administrative Machinery of the Act

The Act sets up an extensive administrative network. At the top of the pyramid is the National Water and Soil Conservation Authority (NWSCA) which is responsible for the formation of a broad national policy for natural water and soil conservation. It also advises the Ministry of Works and Development which is the department ultimately responsible for the administration of the Act. The minister is the Chairman of the Authority. The initial question might be asked: Why should the Act be completely under the control of this department rather than a less economically orientated one?

Under the Authority is the Water Resources Council, to which matters relating to the quality of water, the allocation of natural water and co-operation with local authorities are delegated, and the Soil Conservation and Rivers Control Council to which matters relating to water and soil conservation and river control are delegated. Set up under these two councils and also administratively supervised by the NWSCA are the regional water boards, which are in fact local catchment authorities. The regional water boards receive applications for water rights and are also to investigate and record all water resources and their quality in the region.

Representation on the main bodies is heavily dominated by government department interests. Of the fourteen members on the Water Resources Council only one is appointed to represent recreational interests; the rest represent government departments, local authorities or the interests of primary and secondary industry. Although there may be public participation in voting for representatives at the local catchment board level, this becomes less apparent by the time the representatives are appointed further up the pyramid where the important administrative decisions are made. Sir Guy Powles noted that the representatives of the municipal

bodies on the NWSCA are in fact four steps removed from the actual free election process. He views with alarm this development of these 'pseudo-democratic-bureaucratic-structures' in New Zealand:[7]

> [I] warn that with this proliferation of these appointed semi-bureaucratic authorities the citizen may be, in effect, losing control of his environment by means of the machinery designed to effect its control.

It would also seem that a large number of representatives on bodies entrusted with the task of controlling water pollution have vested interests in industrial and development activities that cause water pollution. For example, after the dumping of between eight and twelve million litres of milk into the Waikato and Waitoa river systems in March 1979 by the New Zealand Cooperative Dairy Company during an industrial dispute, the Hauraki Catchment Board decided not to prosecute. It was revealed in *The Waikato Times*:[8]

> Earlier this year the Board twice decided not to prosecute but revoked those decisions after a legal opinion that several members of the Board could have a vested interest in the case.
>
> Eight of the 15-man Board who were not shareholders in the dairy company yesterday decided on a five-three vote not to prosecute.

Even if members of such bodies do not have so direct an interest in a particular industry, it would seem that most of those appointed to such bodies attain these positions by reason of their personal achievements which, in this society, are measured largely in terms of economic success. Consequently, it is likely that these bodies will acquire an attitude that restraints on industry should not unduly interfere with economic progress, and should be the minimum necessary to safeguard community interests.

Apart from the question of whether the water pollution bodies by reason of their composition and structure are reasonably amenable to suggestions from members of the public who are concerned that their environment may be adversely affected by a proposed development, there is also the discouragement offered to those unfamiliar with the bureaucratic procedures which must first be negotiated to attain access to these bodies.

As demonstrated by P. Galanter,[9] those who use administrative channels the most become the most adept at using them. These people, whom he calls "Repeat Players" (RP's) are at an advantage compared to those who only use the system once or occasionally, "One Shotters" (OS's). Objectors to applications for water rights which may lead to harm to the environment, and 'small time polluters' applying for water rights are almost inevitably OS's. They contrast sharply with RP's who, with respect to water right applications are, more often than not, government departments which have greater resources, access to scientific information and familiarity with the ways of bureaucracy. OS's have fewer resources and

7 Powles, Sir Guy, "Environmental Control: The Rights of the Individual Citizen" [1970] N.Z.L.J. 469, 470-471.

8 *The Waikato Times* (Hamilton, New Zealand) 21 June 1979.

9 Galanter, P., "Why the 'haves' come out ahead: speculations on the limits of legal change" (1974) 9 Law & Society Review 95.

more at stake in their one case than an RP who can afford to wait for appropriate cases to initiate self-benefiting rule changes. Although the system of application, objection and appeal under the Act is supposed to be open to all, if requirements of standing are met, in practice sheer complexity and expense discourage occasional users or greatly inhibit their performance.

B. Procedural Difficulties

Apart from difficulties inherent in the nature of the administrative structure there are also the procedural difficulties likely to be encountered by those objecting to or appealing against the granting of water right applications. The two main areas are those of locus standi, and the burden of proof.

1. *Locus standi*

In the area of locus standi, different standards apply to those objecting to Crown applications and to general applications. Applications for water rights by the Crown are made directly to the NWSCA. Ordinary rights of objection are only possible through appeal to the Planning Tribunal and, by section 23(5), this is on a limited base. The appeal may only be made by "any Board, public authority, or person which or who claims to be detrimentally affected by the decision of the Authority". This contrasts with general applications which are made to regional water boards. Objections against these can be lodged under section 24(4) by anyone "on the ground that the grant of the application would prejudice its or his interests or the interests of the public generally". Sir Guy Powles ponders:[10]

> Why should it be possible to object to non-Crown applications on the ground of public interest generally and have a hearing before the Authority, and yet not be able to object to Crown applications at all, and only to appeal on limited grounds which do not include public interest?

He sees it as an unwarranted extension of the doctrine of divine right of kings.

Attempts by environmental societies to fit themselves within the definition of "detrimentally affected" have consistently failed. In *Mahuta and Others* v. *National Water and Soil Conservation Authority*[11] the Environmental Defence Society (EDS) was denied standing on the ground that the interests of members of the society are separate and distinct from the interests of the society itself, and the society could not derive status to appeal merely because individual members of the society may have been "detrimentally affected" by the decisions appealed against. In the case *Environmental Defence Society Inc.* v. *National Water and Soil Conservation Authority*[12] it was made clear that section 23 "is not concerned with the views and rights of the public at large".[13] A group purporting to act in the public interest clearly has no right of appeal against the Crown applications[14] unless it can show "detrimental effect" to itself. This doctrine is a throwback to the days of laissez-faire philosophy when, in the words of Sir Guy Powles, it was assumed "that each

10 Powles, Sir Guy, "The Conference, the Law and the Citizen" [1975] N.Z.L.J. 662, 665.
11 (1973) 5 N.Z.T.P.A. 73.
12 (1976) 6 N.Z.T.P.A. 49.
13 Ibid. 58.

man is an island and the activities of one man affect only a very small number of others".[14] However, as he goes on to say, this is scarcely realistic today.

The Crown can also bypass the public objection process entirely by declaring the waters concerned to be of national importance under section 23(7). Before referring the application to the Governor-General in Council for decision the minister must first refer it to the NWSCA for consideration, assisted by reports and recommendations of boards for the regions concerned. Public notification for appeals is not required.

2. *Burden of proof*

As illustrated in *North Canterbury Acclimatisation Society* v. *North Canterbury Catchment Board*[15] the burden of proving any detrimental effect of discharge into water rests upon the objectors. The burden of overcoming scientific uncertainty also clearly falls upon the objectors and in that case they could not show with scientific certainty that Lake Ellesmere was in a critical condition.

With respect to appeals against Crown applications, the board (rejecting an EDS argument that the legal onus was on the applicant to show no detrimental effects would result from the granting of a water right) in *E.D.S.* v. *NWSCA*[16] said "The Board does not accept that there is any onus upon either party in respect of an application for a water right."[17] However, as the board needs to be satisfied that adverse effects would result from the acceptance of a water right application, in effect, the onus of proving these detrimental effects does fall upon the objectors.

It is also worth noting that both the locus standi and burden of proof rules were shaped during the period of industrial expansion in Britain and the USA. At a time when it was almost impossible to think of a scarcity of natural resources it is not surprising that it was felt desirable that the onus of proof should be placed upon those wishing to curtail these expansion policies. Unfortunately, although the state of our physical environment has radically changed, these rules continue to have their effect today and work against those objecting to proposals aimed at economic expansion but which may detrimentally affect the environment. As one writer points out, "the environmentalist is inevitably the objector and as burden of proof rules help the bias against the protection of the environment and the preservation of natural resources."[18]

C. Difficulty of Obtaining Proof Showing Likelihood of Harm to the Environment

The placement of the burden of proof is crucial in cases where the facts are not entirely clear because of insufficient information, and so it becomes evident that the obtaining of such information is of vital importance.

14 Powles, op. cit. n.10 at 664.
15 (1970) 3 N.Z.T.P.A. 329.
16 Supra n.12.
17 Ibid. 54.
18 Krier, J. E., "Environmental Litigation and the Burden of Proof" in Baldwin, M. and Page, J. K. *Law and the Environment* (New York, 1970) 107.

In New Zealand there is something of a Crown monopoly upon available scientific information as most of the country's scientific experts are employed by the Department of Scientific and Industrial Research or other government departments. DSIR scientists have a professional code of conduct with private clients which limits their ability to disclose certain information which may be relevant in environmental issues.[19] As well, section 6 of the Official Secrets Act 1951 continues to act as a gag on any government employee who, unless authorised to do so, discloses any information acquired in the course of his duties. In effect this means the government has a right to withhold any information it does not wish to disclose, backed up by the sanction of imprisonment provided for in this Act.

A paper delivered by an acclimatisation society to the Environment '77' Conference in Christchurch, told of how the acclimatisation societies have been hampered by their inability to present enough scientifically based evidence on the probable effects of a proposed development. The water boards have at times strongly criticised the acclimatisation experts for lack of such data and as the government has a monopoly over such data, it is:[20]

> The unkindliest cut of all to the recreational water user, when he is reminded that through his taxation contributions he is subsidizing the very restriction of his recreational enjoyment.

In the end environmental groups are forced back upon the reports of the regional water boards unless they can go to the huge expense of obtaining the services of overseas experts. However, as well as the lingering suspicion, (justified or not), that such material may be developer-biased, there is the catch that the regional water boards who, by section 26A(1) of the Act may carry out investigations as to water quality, are greatly handicapped in their ability to do so because of lack of funds and manpower.

A questionnaire sent by J.W. Lello[21] to North Island catchment and regional water boards in 1975 revealed that only one board claimed to have a full inventory of actual discharges. The average number of staff, including clerical, was three, although there were extra part-timers, and it looked as though the whole of the North Island was dependant upon forty people for front line water management with half of these full time on pollution control. Recent figures are not obtainable but it is well known in water management and environmental circles that the boards have great difficulty in procuring sufficiently qualified people and indeed some of the boards have not yet changed in status from catchment to regional water boards because of this difficulty.

D. Enforcement of the Act

The 1976 Annual Report of the NWSCA indicated that the regional water boards gave consent to 62 rights to discharge waste into classified waters which,

19 See the discussion in Clifford, D. K. "The scientist and freedom of information" (1978) 9 V.U.W.L.R. 451.

20 Anderson, C. R., "A Claim for Recreational Water" A Paper for the Environment '77' Conference, Christchurch, 1977.

21 Lello, J. W., "Environmental Planning: the Case for Management" Master of Town Planning Thesis (University of Auckland: 1975).

bearing in mind that in the same year the Crown was granted 198 water rights, seems to indicate that a number of discharges are not registered under the Act. Indeed Lello's survey in 1975 showed that the boards felt that the number of discharge applications they were processing each year represented only a small percentage of the total number of discharges. There is also the problem of those with discharge rights failing to comply with the terms of their permit. A report in *The Waikato Times* in 1978 reads:[22]

> A report to the Waikato Valley Authority Chairman on recent monitoring of dairy factory discharge, released late last year graphically illustrates the blatant abuse of water rights.
>
> There are 14 dairy factories in the Waikato Catchment — all their discharges are considered unsatisfactory. They are rated from minor to serious polluters.

Although the Act gives the regional water boards the authority to prosecute those who are not complying with the terms of their water rights or who are discharging wastes into water without a permit, the number of prosecutions are few. Lello found in his 1975 survey that none of the boards questioned had charged any person or organisation with an offence against the Act. The reasons for this failure to prosecute are not only difficulties in policing but are to some extent related to political considerations. The difficulties in policing are evident when it is seen that the Waikato Valley Authority covers a catchment area of 19,500 sq. km. into which flow 2,200 discharges; and the policing difficulties are compounded by the lack of suitably qualified staff and financial resources. The political aspect of prosecution is shown by the following statement in the *New Zealand Dairy Exporter* relating to the failure of the Hauraki Catchment Board to prosecute the New Zealand Cooperative Dairy Company for the release of millions of litres of milk into local rivers, "Mr A.W. Gibson, Director of the National Authority says that the problem facing the Catchment Board is that it works closely with the dairy company in pollution control work".[23] The board felt that the dairy company had little control over the dumping and little practical benefit would be achieved by prosecution.

There is also the point of view expressed by the Waikato Valley Resources manager, Mr Bob Priest, " 'It's a matter of economics' he said. 'Antipollution measures involve high capital costs and this in turn is passed on to the consumer.' "[24] The hands of the local catchment boards are particularly tied by this factor with local sewage schemes. As ratepayers are paying for such measures the boards have no option but to continue issuing temporary permits or to ignore such polluting activities until sufficient funds can be raised to complete schemes for the effective treatment of sewage.

Fines under the Act are a maximum of $2,000 with an extra $100 for every day during which the offence continues. This kind of penalty, even if it were imposed, is a poor deterrent to a big company.

22 *The Waikato Times* (Hamilton, New Zealand), 1 April 1978.
23 *The New Zealand Dairy Exporter* (New Zealand), May 1979.
24 *The Waikato Times* (Hamilton, New Zealand), 1 April 1978.

Even accepting that the Act does have the machinery for the enforcement of its provisions, the sanctions will be of no value if the regional water boards fail to use them, either because of difficulties in policing or other considerations. The 'watchdog' role is often left to environmentally concerned groups with limited resources because of default by the bodies appointed by statute for this purpose.

E. The Role of the Commission for the Environment and Environmental Reporting Procedures

The Environmental Impact Reporting (EIR) Procedure, whereby government departments or private developers engaged in joint development with the Crown or who require certain statutory consents, are required to produce an assessment of possible impact upon the environment and viable alternatives, was whittled down comparatively soon after it was first introduced in 1973.

The role of the Commission for the Environment in this area it to act as an independent body to audit the reports. However, in the commission's annual report for the year ending March 1978, it comments on the changing emphasis of the commission's role with a streamlining of the impact reporting procedure. The rationale behind this is that with new Acts, such as the Town and Country Planning Act 1977, which bind the Crown and require environmental considerations to be taken into account in town and country planning procedures, to retain the EIR procedure on the same scale as before would merely duplicate procedures unnecessarily. It can, however, be strongly argued that this policy is an attempt to integrate two incompatible procedures, one decision making, the other educational, and the net result is that public participation and influence upon proposals which may have drastic environmental effects, is effectively being cut back.

The New Zealand Environmental Impact Reporting Procedure was originally based upon the USA model. In that country there have been strong misgivings about giving an independent agency too much power in this type of procedure as it might lead to its being able to assert itself too easily over the large corporations, a step the American government was not prepared to take. One commentator[25] regarded the separation of regulation and supervision of pollution laws as intended to prevent this independent agency gaining too much power. Even if this analogy is not applicable to the New Zealand setting, in this country there were strong misgivings in some quarters about the amount of public participation which should be allowed, even though the point of the procedure was to allow public participation. One view about the introduction of the EIR procedure which can be regarded as expressing the feelings of many in decision making positions is:[26]

> The environment today is a 'bandwagon' onto which many ill-informed or ill-advised people are leaping in an endeavour to bring themselves into the public eye, and it is regrettable that certain sections of the Government are pandering to these people

25 Sax, J. *Defending the Environment* (New York, 1972).

26 Simpson, E. H. (President of the New Zealand Catchment Authorities Association) Editorial, Soil & Water, (Wellington, New Zealand) December, 1973, p.1.

> by bringing forward legislation that will give them an even greater say in the conduct of affairs.

Six years later as the EIR procedure is being phased out, the Minister for the Environment was reported as saying at an environmental forum that:[27]

> The question of delay was one of the key issues in environmental procedures . . . . Eventually decisions must be made. The final step must be a decision. Unfortunately, some groups want to use the procedures to delay a final decision . . . .

It would seem the attitude that public participation is an annoyance which interferes with speedy decision making, has prevailed. As the Commission for the Environment is a creature of Cabinet, lacking any statutory status, it must respond to government directives, (as in the case of the EIR procedure), and this lack of real independent status combined with close work with government departments in the planning of projects means that the commission would appear to have become absorbed into the government bureaucracy.

The streamlining of the EIR procedures, which means that the public will, except in a very few instances,[28] not be able to express its view on proposed government ventures at the planning stage, means that concerned citizens are now forced back into the adversary situation to protest against Crown water right applications. The more cynically inclined would suggest that it has never been any different: public views expressed through the EIR procedures were rarely given significant weight, the views of government departments prevailing.

F. Attitudes of the Planning Tribunal

Section 25 of the Water and Soil Conservation Act 1967 provided that, subject to certain limited exceptions

> every decision of a Board under section 21 or section 24 of the Act shall be subject to appeal to the Town and Country Planning Appeal Board constituted under the Town and Country Planning Act 1953 . . ."

In 1977, the Appeal Board was replaced by the Planning Tribunal, established by the Town and Country Planning Act 1977. Section 164 of that Act provided that "All references to any of the Town and Country Planning Appeal Boards constituted under the Town and Country Planning Act 1953 in any other enactment or regulation or in any document whatsoever shall hereafter be read as references to the Tribunal . . . ." The persons who had previously been chairmen of the

27 *The Evening Post* (Wellington, New Zealand) 8 August 1979. It is interesting to note that shortly after this paper was written, Parliament passed the National Development Act 1979, which is aimed at circumventing delays caused by public participation with respect to projects regarded of national economic importance.

28 As stated in the Commission for the Environment's Annual Report 1978, at p.11, "the projects subject to the full procedures should be limited by a process of careful selection. This will ensure that the procedures will be applied only when that is the most appropriate and effective way of carrying out the environmental investigation required". Exactly what this and similar sorts of statements made by the Commission mean in practical terms is unclear. It is notable that in 1979 two controversial proposals, one concerning the establishment of an ammonia/urea plant which is likely to have particularly significant environmental side effects, and the other concerning the introduction of the sale of milk in cartons, were not considered 'appropriate' for the environmental impact reporting procedure. [Cp. also Postscript n.48].

appeal boards were to become chairmen of their respective divisions of the Tribunal.[29] In view of the very real similarities between the functions, structures and personnel of these bodies, the writer has felt able to assume that the views of the Appeal Board, as expressed in its judgments, are likely to be adopted by the Tribunal. Certainly there is nothing in the decisions of the latter to indicate any major departure from the Board's policies. For this reason both Appeal Board and Tribunal decisions are referred to in the discussion that follows.

As stated in *Metekingi* v. *Regional Water Board*[30] the 1967 Act did not specifically state the objects to be attained by a grant or refusal of the right applied for and so "Regard must therefore be had to the object of the Act as a whole."[31] However, the objects of the Act, which are summarised in the long title, require a balancing of many and competing different interests. The result is that, "Land use and water use planning in New Zealand has a decided bias towards resource development as opposed to environmental conservation."[32] The bias lies in the balancing required by the Act:[33]

> For in the process of balancing tangible economic benefits and tangible social benefits against the intangible and generally misunderstood environmental benefits, the tangible wins out every time.

In *Royal Forest and Bird Protection Society of New Zealand Inc. and Another* v. *Bay of Plenty Regional Water Board*[34] the Tribunal acknowledged that it had no guidelines for an energy development policy to work on. They were asked to balance two claims which were impossible to reconcile — the development of a hydro electric resource or the preservation of a wildlife habitat. In the words of one member of the Tribunal:[35]

> There are practically no means by which a common factor may be reached upon which to base a factual or a balanced judgment, and therefore the decision must be a value judgment alone.

The Tribunal there favoured the electrical generation authority and ended with a strongly worded statement which bodes ill for those fighting for the so-called intangible benefits:[36]

> But we warn that in future if an appeal which involves principally a value judgment is unsuccessful, it is likely that an order for costs will be made against the appellant.

The point is, of course, that in the end all such decisions are 'value judgments' between competing interests, even if there is adequate scientific information (as this can be interpreted in different ways depending upon the point of view being put forward). The question becomes one of Whose values will be favoured: development or conservation? The Town and Country Planning Board appears

29 Section 164(2).
30 *Metekingi pp Atihau-Whanganui Incorporation and Others* v. *Rangitikei-Wanganui Regional Water Board and Another* [1975] 2 N.Z.L.R. 150.
31 Ibid. 152 line 37.
32 Black, T., "Defending the Environment" Editorial [1978] N.Z.L.J. 153.
33 Ibid. 153.
34 (1978) 6 N.Z.T.P.A. 361.
35 Ibid. 368 (Mr Martin).
36 Ibid. 370.

to have been wedded to a positivistic philosophy which can only recognise realities of a tangible concrete nature. This is scarcely surprising considering the tradition in the British judiciary of a reluctance to engage too openly in what appear to be policy decisions. Locus standi and burden of proof rules can also be effectively used by judges who feel inhibited about actively participating in the making of decisions involving strongly competing sets of values.

That the Tribunal's perception of its role is a limited one can be supported by its attitude to the receiving of Environmental Impact Reports as evidence. Although the Appeal Board was not bound by strict laws of evidence, it stated in its decision in *EDS* v. *NWSCA*[37] that to allow the introduction of such reports as evidence would be to admit the evidence of many interested parties who would not achieve legal standing to appear personally and, "would largely negate the more restricted function of this Board and place this Board in a situation of considering wider public views".[38]

G. *Overall Conclusions which can be Drawn from the Foregoing Points Relating to Difficulties Encountered by Objectors to Water Right Applications*

The Act by its specific terms permits pollution as rights to discharge waste into natural water are obtained under it. In *Mahuta's* case it was stated that the[39]

> object of the Act is not to prohibit the discharge of waste . . . into natural water, because the Act anticipates that rights may be granted having the effect of authorising such discharges. We apprehend that on this point the object of the Act is to keep the discharge of waste . . . into natural water within proper limits in order to maintain the quality of the receiving waters.

Also, the problem of exploitative versus conservation viewpoints will always exist in the sense that the consumptive users of resources will always prevail over non-consumptive.[40] The latter will not prevent a consumptive use as the resource still remains there to be used. The real question becomes, whether or not the Act is more receptive to the desires of developers than to the need to preserve the environment.

Even acknowledging a conservation bias in the selection of the material, the six factors chosen to demonstrate the difficulties encountered by those objecting to water right applications clearly indicate that the Water and Soil Conservation Act 1967 does generate a bias in favour of those whose activities would tend to exploit environmental resources. This tendency is heightened by the interaction between these different areas which compounds the difficulties.

Given that the Act favours exploitation rather than conservation of the environment, the next step is to enquire into the reasons for this bias. If the law reflects a consensus of community values then the Act in its present form merely reflects the attitudes of the majority of the population to environmental issues, an attitude

37 Supra n.12.
38 Ibid. p.52.
39 Supra n.11, p.79.
40 Krier, op. cit. 107.

which desires some token restraints on the gross abuse of environmental resources but not to the extent that economic progress is curtailed. If, on the other hand, this presumed consensus of attitudes to environmental issues is not a true consensus but rather is artificially created by the conscious or unconscious exercise of influence by economically orientated elites, then it could be suggested that statutes such as the Water and Soil Conservation Act 1967 work to further the ends of these groups rather than to express the popular will.

The material already discussed relating to difficulties faced by objectors to water right applications shows that the general public is given little opportunity to participate effectively in the decision making structures and has poor access to useful information concerning the likelihood of environmental harm from a development proposal. This suggests that the possibility of the existence of a true consensus view that economic development should take precedence over environmental concerns is somewhat remote. The control of the processes of socialisation and of the media by elite groups indicates that even an apparent consensus of values is suspect.

III. POSSIBLE INTEREST GROUPS INVOLVED IN THE MAKING AND OPERATION OF THE WATER AND SOIL CONSERVATION ACT 1967

A. A Conspiracy by a Vested Economic Elite?

Richard Quinney suggested that, "The State is established by those who desire to protect their material basis"[41] and that the law in capitalist societies recognises these private economic interests. Can it be shown that the Water and Soil Conservaion Act 1967 was consciously engineered by big developers as a tool whereby competition for water resources from smaller developers or recreationalists could be more easily controlled? Gabriel Kolko's examples of the railroad and meatpacking industries expansion in the U.S.A. which demonstrate that the laws in those areas were promoted and shaped by the big companies to control competition, do not transplant easily to the New Zealand situation. However, there are certain points which emerge from observation of the operation of the Act which could be interpreted in this light.

The most striking feature of the Act is the privileged position the Crown enjoys in the acquisition of water rights. There exist only limited rights of public objection through appeal to the Planning Tribunal which, as noted, has a development bias. As the number of Crown applications each year for water rights is significant for projects which often involve large scale development and so more likely to arouse public opposition, it can be seen that this protection from a potentially large number of objectors is not inconsistent with the Quinney view.

A recommendation by a Water and Soil Review Committee[42] that Crown water rights be determined by regional water boards in the same manner as other water

41 Quinney, R., "Crime Control in Capitalist Society: a critical philosophy of legal order" in Taylor, I., Walton, P., and Young, J. *Critical Criminology* (London, 1975) 181, 192.

42 As discussed in *Environmental Defence News* (Auckland, New Zealand) Vol. 4 No. 2 1977.

rights was rejected by the NWSCA as anomalous, as all water rights are vested in the Crown by the Act and the NWSCA is the Crown's agent. The NWSCA felt that the suggestion by the Committee to use the provision in section 23(7), (whereby the Crown can bypass the appeal procedure entirely by declaring the waters concerned to be of national importance), to place Crown applications on an equal footing with all other applications, was too drastic and could only be used in exceptional circumstances. Of course it might be suggested that the Committee intended that the section be used only in exceptional circumstances. This raises the question of whether the NWSCA sees the special privileges accorded the Crown as necessary to get through most, not just an exceptional few, of its water right applications without being hamstrung by the objection procedure. Too frequent use of a section such as section 23(7) would undoubtedly raise questions concerning the supposed neutrality of the Crown with respect to the allocation of water resources.

Sanctions provided in an Act that on the surface appears to be against the interests of economic development may reveal a different picture. The maximum fine of $2,000 provided in the Act is merely likely to hurt the pocket of the small polluter than that of the large. As well, enforcement of the Act has, for reasons already discussed, been poor. For example, the deterrent effect upon a regional water board considering prosecution, of a large company threatening to pass on the costs of antipollution measures to the public, cannot be underestimated. Export industries are also likely to be treated with some leniency in the interests of the country's economy. It could be argued that the Crown would have an interest in ensuring that the water boards, which are the fact gathering part of the administrative set up, have sufficient funds and manpower to allow identification of all those using the natural water resources. However, as the Crown does not have to pass its applications through the water board objection procedure it could be suggested that these boards are being kept in an under-financed state because the material collected by them, as seen earlier, may be the only source of information for a group concerned about likely detrimental effects upon the environment as a result of a particular development proposal.

At the select committee stage there were a number of changes to the Bill, one of the most striking being the addition (on the submission of the New Zealand Manufacturers Federation and New Zealand Forest Products Limited), of the words 'primary and secondary industry' to the list of factors in the long title to be balanced against one another and taken into account. This might suggest, that the original Bill was more conservation orientated, and would tend to negate the suggestion that the Bill was originally conceived by development interests. However, the area is not without complexity. If, for example, the view of E. F. Schumacher[43] that capitalism destroys its own base, is to be taken seriously, the curtailment of development activities in a way that still retains the basic capitalist structure, would seem to be advantageous to development interests. Indeed there is evidence from America that truly effective water pollution legislation

43 Schumacher, E. F. *Small is Beautiful: Economics as if People Mattered* (New York, 1973).

was not put into operation until it became obvious that water resources for industrial uses would run out in the 1980s. This might suggest that environmental pressure groups had no real effect upon the emergence of the Water and Soil Conservation Act 1967. However, the influence of such groups may have been more real in the sense that the ruling elite needed to accede to their demands in some way to preserve the legitimacy of their rulership and the basic social structure, even though this would entail restrictions, albeit minimal, upon development activities.

It is the existence of these types of restraints upon lawmakers which leads Paul Rock to warn against the adoption of a naive conspiracy theory which "poses an image of society which is dominated by an intellectualised version of International Freemasonry; a knowing, self-interested and capable elite".[44] and to say:[45]

> Law can be understood neither as a pure expression of vested interests, nor as a purely 'rational' response to phenomena threatening harm. Instead, it is vastly more complex . . . . A legislature is constrained by its predecessors' ideas and is thereby rarely free to initiate laws reflecting its own unalloyed interests. It is also constrained by ideas which percolate up through the social control network, by the press and by its exposure to current typifications.

However, this is not to deny that the law might still tend to serve economic interests.

B. Economic Interests Via the 'Mobilisation of Bias'?

William Chambliss in discussing how laws reflect the interests of economic elites subconsciously rather than consciously, introduces Schattschneider's theory of the 'mobilisation of bias':[46]

> All forms of political organisation have a bias in favour of the exploitation of some kinds of conflict and the suppression of others because organisation is the mobilisation of bias.

As Chambliss points out, members of the legislature, judiciary and of tribunals and other administrative bodies are overwhelmingly drawn from economically privileged classes in society.

Procedural rules, which must be abided by for those objecting to exploitative proposals, come from a period of developing capitalism. The adversary system in fact emerged to provide a means for the rising entrepreneurial class to develop a base for certainty in their enterprises without interference from the feudal landowners. This system is based upon inequality and works to the advantage of those with the best resources which, in the environmental area, will almost inevitably be the developer.

The interests of economic elites, then, may prevail in spite of the lack of a conscious conspiracy to do so. The ideology of our society, an ideology created and

44 Rock, P. *Deviant Behaviour* (London, 1973) 144.
45 Ibid. 167.
46 Schattchneider, in Chambliss, W. J. op. cit. n.3, p.21.

perpetuated by those with the greatest power, is development and progress orientated and thus conservation interests will find it difficult to achieve recognition.

C. *Bureaucratic Empire Building*

Another explanation for the emergence of a law such as the Water and Soil Conservation Act 1967 could be that the Act was more the result of bureaucratic empire building than a genuine concern for the environment. The Act was the 'baby' of the Ministry of Works and Development and had been in the discussion stage for some years before finally emerging. Although the ministry had originally promised that interested groups would be given a chance to comment on the proposed legislation before it was introduced, this was not done and one of the major criticisms by interested groups at the select committee stage was this lack of prior consultation. One researcher[47] has done a study of select committee procedure which confirms general feeling that it is rare for significant changes to be made at the select committee stages, the view of the department in charge almost inevitably prevailing. Reading between the lines of the parliamentary debates might lead to the impression that the department (realising it was making a major move by, in effect, bringing the control of the entire country's water resources under its own wing), saw it would be greatly impeded in its intentions if it did not introduce the Bill in the desired form before interested groups were allowed to voice their opinions. As the minister is dependent upon his department for information and opinion regarding proposed legislation, the fait accompli aspects of this legislation could very well lend weight to the suspicion that the Bill was the result of a certain amount of empire building on the part of the ministry.

However even if the Bill was the result of empire building on the part of the ministry, that does not preclude the Act from serving the interests of economic elites. It would seem that the Act is to some extent the victim of the system in which it is placed. Empire building, for example, on the part of the ministry without sufficient resources to back up this extension of influence would leave a void which would inevitably be filled by methods of doing things based upon the society's mindset, which here is profit and expansion.

IV. CONCLUSION

From the foregoing the conclusion can be drawn that the title of the Water and Soil Conservation Act 1967 is misleading. Although it cannot be denied that the introduction of the Act has improved the quality of water in some areas, (for example the Waikato River), it would not be too cynical to suggest that the clean up operation there was absolutely essential if the river was to continue to be used for the benefit of industry. When confrontation occurs between recreationally inclined and development orientated groups, the latter inevitably succeed as a result of the difficulties for objectors to water right applications revealed in the first part of this paper. In the final analysis it must be conceded that a viewpoint akin

47 Lee, M., "The Human Rights Commission — A Case Study in Legislative Influence" LL.M. Research Paper, Victoria University of Wellington, 1978.

to that expressed by Quinney in the opening paragraph is more plausible. Even if the cloak and dagger picture of a number of ruthless capitalists conspiring together to ensure water resources are used for the best interests of industry seems somewhat absurd in the New Zealand setting, in effect the same end result is achieved, as decisions regarding the use of natural water are made in accordance with an ideology that finds it impossible to attach much weight to intangible assets. It may be that curtailment of development enterprises which cause significant damage to the environment will only occur when the developers are confronted with the depletion or even exhaustion of the resources themselves.

POSTSCRIPT

Since this article was written, the National Development Act 1979 has come into force. Under this Act, if a proposed development is declared to be of national importance it is possible to entirely avoid the water right application procedures required by the water and soil legislation. Consents are granted by the Governor-General in Council. Elaboration of these points and the implications for the propositions in this paper is regrettably not possible at this stage.

48 Under the National Development Act 1979, GIR's will be required for developments considered to be of national importance as well. The one positive feature of the Act from the environmental point of view, is that the Commissioner for the Environment is given a statutory independence in the exercise of his functions under the Act.

Mr Solicitor

Double your Client's Money Invest in a better World !

You can't arrange for him to take it with him, but you can suggest that his money is put to good use when drafting his will.

☆ Gift money to CORSO now — The gift is protected from inflation by being invested in people and projects. New wells, improved farming methods, basic health care — programmes chosen for their multiplier effect. A gift to CORSO will yield benefits to an ever widening circle of people in the poorer countries of the world. It reduces the dutiable estate too.

☆ Establish a trust to provide a continuing income for CORSO. This will reduce tax now and mean less estate duty whilst providing funds to assist the needy year after year after year.

☆ Provide for those in greatest need when drafting the will. CORSO gets money to where it is most needed. Families are assisted to become independent of charity; able to provide for themselves and their families.

To: The General Secretary, CORSO, Box 9716,
49 Courtenay Place, WELLINGTON.

Please send me more information on: — Gifting ☐
— Trusts ☐
— Legacies ☐

Name: .....

Address: .....

Firm: .....

(Please Print)

Please send this form now — Hunger & Poverty cannot wait.