

THE NATIONAL INDUSTRIAL POLLUTION CONTROL COUNCIL: ADVISE OR COLLUDE?

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The process of lawmaking is often obscure, at times beyond the ken of authorities such as courts and legislatures and even academic researchers. On consumer and environmental issues, few sources of legal authority are as influential as the advisory committee, particularly the industry advisory committee, which only now is beginning to receive the attention it deserves.¹ Thousands of such committees function regularly within the executive arm of the federal government. They give advice, receive information, participate in the evolution of policy and influence various federal administrators. The lawmaking function of advisory committees is effectively immune from judicial review; even worse, it is often beyond public scrutiny. The latter circumstance is especially serious, since it is well recognized that a law created by only a few and known to them only is unlikely to serve the interests of many.

The dominant industry advisory committee on environmental issues in recent years has been the National Industrial Pollution Control Council (NIPCC), established by Executive Order on April 9, 1970.² "The new Council," declared the President, "will allow businessmen to communicate regularly with the President, the Council on Environmental Quality and other governmental officials and private organizations which are working to improve the quality of our environment."³ The Executive Order stressed the need for closely coordinated public and private efforts on environmental issues: "The Council," the Presi-

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¹ Hearings on Advisory Committees, Before Senate Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations 92d Cong., 1st Sess. (1971) [hereinafter cited as 1971 Hearings on Advisory Committees]; Hearings on Advisory Committees, Before Senate Subcomm. of the Senate Comm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 91st Cong., 2d Sess. (1970); Hearings on Presidential Advisory Committees, Before House Special Studies Subcomm. of the House Comm. on Governmental Operations, 91st Cong., 2d Sess. (1970); H. R. Rep. No. 91-1731, 91st Cong., 2d Sess. (1970).

² Exec. Order No. 11523, 3 C.F.R. 915 (1966-70 Comp.), 42 U.S.C. § 4321 (1970).

³ Statement by the President on Establishing the National Industrial Pollution Control Council, April 9, 1970, 6 Weekly Compilation of Presidential Documents 502 (1970) [hereinafter cited as Presidential Statement].

dent explained, "will provide a means by which the business community can help chart the route by which our cooperative ventures will follow."⁴ Named as Chairman and Vice-Chairman, respectively, to help chart the route were Mr. Bert S. Cross, Chairman of the Board of the Minnesota Mining & Manufacturing Company, and Mr. Willard F. Rockwell, Jr., Chairman of the Board of the North American Rockwell Corp. Joining them as members of the Council were fifty-three top executives from the nation's leading industrial enterprises. Over two hundred industry executives have served on NIPCC's thirty separate sub-councils. Secretary of Commerce Maurice Stans put it succinctly at one NIPCC meeting: "Here is a very large part of the industrial might of the country."⁵

NIPCC, as the President indicated, was to be charged with broad responsibilities: (1) to provide a liaison among members of the business and industrial community regarding environmental matters; and (2) to offer advice on regulatory initiatives affecting the environment undertaken by federal, state and local officials.⁶ That these business leaders were to talk to one another as well as to their government was made clear by Secretary Stans at a press conference announcing the formation of the Council: "The total objective is to get the maximum input from the business community in coordination with the Government's effort to resolve the environmental problems and to urge the industries, [*sic*] solicit their support in developing the technology required to eliminate them."⁷ Chairman Cross has opined that the Council gives business and government "every opportunity to communicate with each other very well. . . . [O]bviously some industries have done a better job than others and I think that just being able to pass this technology back and forth between the separate members is going to have a good effect."⁸

This article analyzes three aspects of NIPCC's performance: (1) the promise and risks it has presented; (2) its procedural performance, as tested by governing law; and (3) its accomplishments, both on the record and *sub rosa*, as measured by the expectations. In brief, NIPCC is portrayed as a dangerously anticompetitive institution occasionally doing business in violation of the law. The Council has published both public relations material and some useful data, but it has served more importantly as a lobbying forum for industries chafing under the regu-

⁴ Id.

⁵ See Summary Minutes, National Industrial Pollution Control Council (NIPCC) Meeting, Feb. 10, 1971, at 3. A copy of these Minutes, and of those cited hereinafter in the notes, may be obtained from the Central Reference and Records Inspection Facility, Dep't of Commerce, Washington, D.C. See text accompanying note 43 *infra*.

⁶ See Presidential Statement, *supra* note 3, at 502.

⁷ Transcript of Press Conference of Maurice H. Stans, Secretary of Commerce, et al., Office of White House Press Secretary, Apr. 9, 1970, at 2.

⁸ Id. at 4.

latory bit. The experience of NIPCC forms the basis for section (4) of this article, which offers recommendations designed to make more responsive that potent fourth branch of government—the advisory committee. It is submitted that the emergence of the advisory committee from the shadows of the administrative process is long overdue.

I. THE PROMISE AND RISKS OF NIPCC

A critical analysis of any governmental institution should start with a consideration of its utility. An Administration considering regulatory initiatives unavoidably and profoundly affecting the nation's economy and industrial technology would be well advised to keep informed regarding their likely consequences. In terms of potential utility to government regulators, no better consultants are available than those from industries whose technology contributes to the degradation of the environment. At present, no one is in a better position to do something about environmental problems than the chief executive officers of such industries. So, too, it is impossible to quarrel with the proposition that those who have a better way of doing business should pass along their ideas to others not similarly inspired. That businessmen should talk to each other and to their government about pollution is a belief widely shared.

On the other hand, some kinds of talk are not always healthy. Mr. Dooley, that venerable commentator on American life, expressed concern about business leaders getting together with government officials: "It seems to me that the on'y thing to do is to keep polyticians an' businessmen apart. They seem to have a bad infloonce on each other. Whiniver I see an alderman an' a banker walkin' down the street together I know th' Recordin' Angel will have to ordher another bottle iv ink."⁹ And it was Adam Smith who said: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public. . . . Though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary."¹⁰

The point is that antitrust issues loom large when competitors get together to talk over their pollution problems. In *United States v. Automobile Mfrs. Ass'n*,¹¹ for example, cooperation on pollution control in the automobile industry led to a consent decree forbidding the manufacturers and their trade association from engaging in joint research

⁹ Quoted in L. Kohlmeir, Jr., *The Regulators* 265 (1969).

¹⁰ A. Smith, *Inquiry into the Wealth of Nations*, Bk. I, ch. X, pt. 2 at 102 (4th ed. 1874) (Alex. Murray publisher).

¹¹ 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.*, *New York v. United States*, 397 U.S. 248 (1970).

and publicity, and forbidding common political strategies which would influence administrators having the power to set standards. Similarly, Richard McLaren, before his recent departure as head of the Antitrust Division of the Justice Department, publicly discouraged joint environmental research activities which are not clearly cost justified.¹² He also opposed coordinated informational submissions to administrative officials on environmental standards: "It is for this reason—*i.e.*, to avoid the risk that the group may be slowed down to the pace of the slowest—that we urge that members of an industry present their views to government agencies on questions of feasibility and timing on an individual, rather than on a joint, basis."¹³

The law governing the conduct of advisory committees is not unrelated to these fundamental concerns regarding the conspiratorial abuse of governmental processes. Executive Order 11007, signed by President Kennedy in 1962,¹⁴ grew out of extended deliberations concerning the antitrust consequences of competitors getting together to assist the government during the Korean War.¹⁵ The question of whether competitors meeting under the auspices of NIPCC have scrupulously complied with this executive order serves as a useful legal test for assessing the group's anticompetitive potential.

II. THE PROCEDURAL PERFORMANCE OF NIPCC

Executive Order 11007 attempts to avoid antitrust problems by providing three procedural safeguards, concerning: (1) representation within the relevant group; (2) public access to group deliberations; and (3) governmental control of group meetings. Tested by these criteria, the performance of NIPCC has been less than reassuring.

A. Representation

Executive Order 11007 defines an industry advisory committee as an advisory group "composed predominantly of members or representatives of a single industry or group of related industries, or of any subdivision of a single industry made on a geographic, service or product basis."¹⁶ The membership of an industry advisory committee must be representative:

Each industry committee shall be reasonably representative of

¹² Remarks of Richard W. McLaren, Assistant Attorney General, before the Spring Meeting of the Antitrust Section of the American Bar Association, Apr. 9, 1970, at 9.

¹³ *Id.* at 8.

¹⁴ 3 C.F.R. 573 (1959-63 comp.), 5 U.S.C. § 901 (1970).

¹⁵ For background in this area, see G. Lamb & C. Shields, *Trade Association Law and Practice* 178-83 (rev. ed. 1971) [hereinafter cited as G. Lamb & C. Shields].

¹⁶ Exec. Order No. 11007 § 2(b), 3 C.F.R. 573 (1959-63 comp.), 5 U.S.C. § 901 (1970).

the group of industries, the single industry, or the geographical, service, or product segment thereof to which it relates, taking into account the size and function of business enterprises in the industry or industries, and their location, affiliation and competitive status, among other factors.¹⁷

One purpose of including all segments of an industry is to avoid giving a competitive advantage to those having the good fortune of being consulted about pending policy moves. Illustrative of potential industry conflict over environmental issues is the debate concerning the wisdom of retaining phosphorus in detergents—a matter which will be subsequently discussed—where the decision to condemn one product effectively serves to condone another.

It is likely that the directive requiring a “reasonably representative” sample in an industry group has been violated in the administration of NIPCC. Selection of the members of the thirty sub-councils was delegated to the big-business chairmen, who were advised only to choose “no more than eight members” and to respect the size and geographical distribution of firms in making their selection.¹⁸ In order to avoid a clearly unlawful delegation of decision-making, sub-council chairmen were cautioned “that governmental clearance is a prerequisite for membership on a Sub-Council.”¹⁹ Wholly apart from the question of whether governmental rubber-stamping of the nominees of the sub-council chairmen amounts to an independent judgment regarding what is “reasonably representative,” it is evident that the membership of many sub-councils has not been representative. The big-business executive, it would appear, does not think immediately of small business when he sits down to assign members to an industry advisory committee. For one example, among many, the Detergents Sub-Council, chaired by Howard Morgens of the Procter & Gamble Co., included the chief executive officers of the Lever Brothers Co., Armour Dial, Avon Products, Inc., Colgate-Palmolive Co., Purex Corp., International Flavors & Fragrances, Inc., and the Calgon Corp.²⁰ The list is hardly overloaded with the midjets of the industry, a circumstance repeated on the roster of virtually all the sub-councils.

The regular appearance of exclusively large corporate “observers” at sub-council meetings reinforces the negative impression concerning the representative nature of the groups. Observers at the Electric and Nuclear Sub-Council included two representatives from Westinghouse,

¹⁷ Id. § 5.

¹⁸ Summary Minutes, NIPCC Meeting, Apr. 14, 1970, at 2.

¹⁹ Id.

²⁰ For a roster of the members of the sub-council, see News Release, July 14, 1970, United States Dep't of Commerce News, G 70-88, at 6.

one from General Electric and another from the Radio Corporation of America (RCA).²¹ Observers at a meeting of the Sub-Council on Dairy, Fish and Other Foods included representatives of CPC International, General Foods Corp., Campbell Soup Co., Kraft Corp., Nestle, Del Monte Corp., and Booth Fisheries.²² Sitting in with the Sub-Council on Grain-Based Food Products were observers from the Pillsbury Co. and General Mills, Inc.²³ No elaborate analysis of the respective market shares of these NIPCC members is necessary to reinforce the suspicion that small business interests have not been big enough to be included in the Council's deliberations.

B. *Public Access to NIPCC Deliberations*

A time-tested technique for discouraging meetings of competitors from becoming conspiracies against the public is to record fully the deliberations of the group. Decades ago Milton Handler urged that trade associations should be required to keep and to make available to the public "a complete stenographic record of their proceedings at all regular and special meetings."²⁴ The registration of trade associations and the disclosure of their activities was recommended by the Temporary National Economic Committee in 1941.²⁵ In the early 1950's, the Justice Department distributed to government agencies "suggested standards" for minimizing the antitrust risks surrounding advisory committees, including a recommendation for public access to the complete minutes of each meeting.²⁶

In similar fashion, Executive Order 11007 initially declares that "[a] verbatim transcript shall be kept of all proceedings at each meeting of an industry advisory committee. . . ."²⁷ But a proviso allows a waiver of this obligation and alternatively permits the keeping of summary minutes if the head of a department "formally determines" that a verbatim transcript "would interfere with the proper functioning of such a committee or would be impracticable, and that [a] waiver of the

²¹ See roster of observers present. Summary Minutes, Electric and Nuclear Sub-Council Meeting, June 30, 1970, at 1.

²² See roster of observers present. Summary Minutes, Dairy, Fish and Other Foods Sub-Council Meeting, June 26, 1970, at 2.

²³ See roster of observers present. Summary Minutes, Sub-Council on Grain-Based Food Products Meeting, June 23, 1970, at 1.

²⁴ Handler, *A Study of the Construction and Enforcement of Federal Antitrust Laws* 93 (Temporary National Economic Committee, Monograph No. 38, 1941).

²⁵ Final Report and Recommendations of the Temporary National Economic Committee, *Investigation and Concentration of Economic Power*, S. Doc. No. 35, 77th Cong., 3d Sess. 38 (1941).

²⁶ See G. Lamb & C. Shields, *supra* note 15, at 179-80.

²⁷ Section 6(d), 3 C.F.R. 574-75 (1959-63 Comp.), 5 U.S.C. § 901 (1970).

requirement of a verbatim transcript [would be] in the public interest"²⁸

Predictably, industry spokesmen have indicated that the public interest demands excluding the public from NIPCC deliberations. A need to encourage candor and open discussion has been proffered as the justification for this secrecy. Walter Hamilton, NIPCC's Executive Secretary, so indicated in response to a query from Senator Lee Metcalf, during recent Senate hearings:

It has been my own observation many, many times over my own career that the larger the group, the less the commonality and background between the people, the more people there are in a room or around the table, the more record in detail of what is said that is required, the less effective the exchanges. . . . This is not because they have anything to hide, but because those present in the meeting in small groups are able to understand each other and talk in what amounts often to a kind of shorthand. They do not have to spell everything out.²⁹

NIPCC Chairman Cross has offered this defense of the special kind of "shorthand" spoken at industry advisory committee meetings:

There is often a vast difference between the sense of a frank exchange and the exact words used. Verbatim transcripts would not be an effective or accurate account of meetings such as those of our council and subcouncils because they would not reflect the commonality of experience and knowledge assumed between those engaged in the discussions. If everything had to be spelled out for the benefit of the verbatim transcript, the freedom and the effectiveness of the often rapid-fire types of exchange in which we now engage would be impaired. The effect would be similar to that if open meetings were required.³⁰

The highly dubious contention that the "proper functioning" of the NIPCC deliberations depends upon the participants speaking "off the record" is a principal reason for NIPCC's loss of credibility. The claim that small industry groups and behind-the-scenes meetings are essential to facilitate candid discussions is an apologia of general utility, intended to explain the waiver of verbatim transcripts as being "in the public interest." One wonders why any advice offered to the government, if worthwhile, is not worthy of being placed in the public

²⁸ *Id.*

²⁹ 1971 Hearings on Advisory Committees, *supra* note 1, at 413.

³⁰ *Id.* at 406-07.

record. Mr. Cross' further contention that a verbatim transcript of meetings would not provide an "effective or accurate account" is pure nonsense, and fails to explain why something *less* than a verbatim transcript would be any more accurate. There may be some merit to Mr. Hamilton's concern for maintaining the integrity of free exchange within a small group, especially among those unskilled at on-the-record communications. But the public's need to know should prevail over any concern regarding the participants' privacy, especially those who represent "a very large part of the industrial might of the country." In the case of NIPCC, the "free exchange" principle appears to be offered primarily to still congressional inquisitors: the March 8, 1971, meeting of the Mining and Non-Ferrous Metals Sub-Council, for example, brought together a group of sundry members, observers and government officials numbering fifty-nine.⁸¹ Oddly enough, in this "small group" there was no room for representatives of the public.

There is yet another reason to question a decision to waive verbatim transcripts. As early as 1951, the Justice Department took the position that trade association executives should not participate in the work of industry advisory committees,⁸² although Executive Order 11007 is silent on the question. The rationale was that the "coordination" of advice and exchanges of information through persons so close to industry-wide policy-making might easily become conspiratorial. The meetings of NIPCC have proceeded unencumbered by this Justice Department advice and, it would seem, totally unaware of it. Various sub-council meetings have been attended by observers from the American Petroleum Institute,⁸³ the American Institute of Merchant Shipping,⁸⁴ the American Meat Institute, the National Independent Meat Packers Association, the National Renderers Association,⁸⁵ the Rubber Manufacturers Association,⁸⁶ the Western Wood Products Association, the Southern Forest Products Association, the Southwest Forest Industries, the National Forest Products Association,⁸⁷ the American Min-

⁸¹ See roster of those in attendance. Summary Minutes, Mining and Non-Ferrous Metals Sub-Council Meeting, Mar. 8, 1971, at i-ii.

⁸² See G. Lamb & C. Shields, *supra* note 15, at 178-80.

⁸³ See roster of observers present. Summary Minutes, Sub-Council on Petroleum and Gas Meeting, July 7, 1970, at 1.

⁸⁴ See roster of observers present. Summary Minutes, Sub-Council on Shipping Meeting, July 10, 1970, at 2.

⁸⁵ See roster of observers present. Summary Minutes, Poultry and Animal-Based Food Products Sub-Council Meeting, Sept. 29, 1970, at 1.

⁸⁶ See roster of observers present. Summary Minutes, Sub-Council on Rubber Meeting, Sept. 23, 1970, at 1.

⁸⁷ See roster of observers present. Summary Minutes, Sub-Council on Wood Products Meeting, Sept. 18, 1970, at 1.

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ing Congress,³⁸ the Soap & Detergent Association,³⁹ and the National Canners Association.⁴⁰ One might ask what type of information it is that can be freely shared among such industry members and trade association officials but which cannot be made available to the public.

Somewhat inconsistently, NIPCC spokesmen have defended the closed meeting procedure on the alternative ground that an adequate public record has been provided in any case: in the event of a waiver of a verbatim transcript, the law requires "in lieu thereof" the "keeping of minutes which shall, as a minimum, contain a record of persons present, a description of matters discussed, and copies of all reports received, issued, or approved by the committee."⁴¹ The minutes must be certified as accurate by a full-time salaried officer of the government, present during the proceedings recorded.⁴² They are available under the Freedom of Information Act⁴³ to anyone wishing to spend twenty-five cents per page.

The value of the available information is another matter. An investment of \$128.50 will pay for the committee-meeting minutes of approximately the first six months of the deliberations of NIPCC and its sub-councils.⁴⁴ The minutes amount to a skeletal outline of the issues discussed, evidently thoroughly sanitized. The practice⁴⁵ of the NIPCC staff has been to circulate draft summaries of the minutes to members of the sub-councils, who are invited to make editorial changes, with the consequence that all damaging, and some useful, information has disappeared from the public record. The final versions of the minutes have thus been thoroughly diluted, whether accurate or not.

The requirement that the minutes contain "copies of all reports received, issued, or approved by the committee" has also been violated occasionally. The Summary Minutes of the Meeting of the Sub-Council on Wood Products⁴⁶ disclose that the members received a Boise Cascade

³⁸ See roster of observers present. Summary Minutes, Mining and Non-Ferrous Metals Sub-Council Meeting, Mar. 8, 1971, at 1.

³⁹ See roster of observers present. Summary Minutes, Detergents Sub-Council Meeting, Aug. 27, 1970 at 1.

⁴⁰ See roster of observers present. Summary Minutes, Dairy, Fish and Other Foods, Sub-Council Meeting, Aug. 11, 1970, at 1.

⁴¹ Exec. Order No. 11007 § 6(d), 3 C.F.R. 574-75 (1959-63 Comp.), 5 U.S.C. § 901 (1970).

⁴² Id. § 6(c).

⁴³ 5 U.S.C. § 552 (1970).

⁴⁴ See letter from author to Ruth M. Smyser, Central Reference & Records Inspection Facility, Department of Commerce, dated Dec. 3, 1970. A copy of the letter is on file in the office of the Boston College Industrial and Commercial Law Review.

⁴⁵ Based on the author's personal conversations with NIPCC staff members, on several different occasions.

⁴⁶ Sept. 18, 1970, at 6.

report entitled "Forest Management—Soil Erosion." A request for the report from the company drew this response from R. Kirk Ewart, Assistant to the Vice President:

I prepared this paper for use by Mr. R. V. Hansberger, President of Boise Cascade in his capacity as a member of the President's Council on Environmental Quality. This paper *may* be included in the report of the Forest Industry section of the aforementioned Council. I do not feel it would be prudent to release my work prior to the Council's report. Upon release of the Council's report, this work will be generally available.⁴⁷

Enough appears in the summary minutes to disclose that the information flowing to the sub-council members from the government has made their participation worthwhile. A thorough briefing on pending federal research projects is a customary courtesy,⁴⁸ offering the distinct advantage of insider's information to the participants. The NIPCC meetings, especially those of the full Council, often have been attended by a regalia of top officials with policy-making responsibilities on environmental issues.⁴⁹ NIPCC members have been kept fully informed of the thinking of the government regulators, the data available to them, gaps in their information, and questions they might have to confront.⁵⁰

Of course no serious objection can be made to governmental briefing of industry representatives on the status of federal research, or to disclosing other information having the potential of being translated into regulatory initiatives. Knowledge of what our government is doing is a fundamental principle of freedom of information. A sounder objection against the special informational service provided to NIPCC may, however, be directed at the fact that the information is unavailable to all. Barriers of cost, time, convenience and access mean that only a select few are offered a full explanation of current regulatory thinking. In addition, information about pending governmental moves is a one-way street—the public and the government have no legal claim to information regarding pending industry or trade association initiatives on pollution issues. NIPCC's waiver of a verbatim transcript makes it impossible to assess fully the significance of the disparity in information which the institution perpetuates. But as any lawyer knows, inviting

⁴⁷ See letter to author, Apr. 8, 1971 (emphasis added). A copy of the letter is on file in the office of the Boston College Industrial and Commercial Law Review.

⁴⁸ See, e.g., Summary Minutes, NIPCC Meeting, Oct. 14, 1971, at 3-8.

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 3-8.

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one side to talk to the judge behind closed doors is a questionable route to a healthy decision.

C. *Government Control of Policy Decisions*

Clearly, no advisory committee should take over the role of the government decision-maker. Government control over the agenda and retention of the power to adjourn meetings and prepare summary minutes are supposed to ensure against undue influence by an advisory committee. "Unless specifically authorized by law . . ." declares Executive Order 11007, "no committee shall be utilized for functions not solely advisory, and determinations of action to be taken with respect to matters upon which an advisory committee advises or recommends shall be made solely by officers or employees of the Government."⁵¹ Handing over governmental powers to private persons is an indiscretion not lightly undertaken. How NIPCC has made use of its advisors from key industries and, conversely, how these advisors have used NIPCC to effect changes in federal environmental policy are issues which require a closer examination of the Council's work-product.

III. NIPCC's ACCOMPLISHMENTS:

THE FORM AND THE SUBSTANCE

A. *The Formal Record*

On more than one occasion NIPCC has been accused of being a bold public relations effort, designed to achieve a government-sponsored whitewashing of industry's role as a polluter.⁵² In support of this theory, Senator Lee Metcalf published in hearings of the Subcommittee on Intergovernmental Relations a document distributed to "NIPCC-public relations contacts" by Mr. Tom Cuning, NIPCC's Director of Communications and Public Affairs.⁵³ Cuning pointed out that at the opening Council meeting on October 14, 1970, "the need for industry and NIPCC to get going on a 'communications-P.R.' program was mentioned time and time again."⁵⁴ "As you know," wrote Cuning, "the P.R. aspects of industry and pollution and what industry is doing is a tough nut to crack. It's not that industry generally isn't doing something and making progress, it's how do we get the story told considering the attitude of the public."⁵⁵ Cuning explained that he was preparing a "case history" series that would provide "results . . . [and] facts . . .

⁵¹ Section 4, 3 C.F.R. 574 (1959-63 Comp.), 5 U.S.C. § 901 (1970).

⁵² Hearings on Advisory Committees, Before Senate Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 92d Cong., 1st Sess. 353-54 (1971).

⁵³ *Id.* at 422-23.

⁵⁴ Remarks of Mr. Cuning are set forth in *id.* at 422.

⁵⁵ *Id.*

show[ing] that industry is doing something."⁵⁶ His plea for cooperation from industry's communications experts was met with a blizzard of material.

The strongest supporter of NIPCC would not deny that public relations has been an important part of the Council's endeavors. The "case history" series recommended by Mr. Cunning has been published,⁵⁷ and its content consists largely of a number of reprints from house organs and planted news stories, all trumpeting the accomplishments of NIPCC members. Although edited for taste, the tone in the following typical statements is unmistakable:⁵⁸ "Healthy cattle grazing on a Tennessee hillside and flawless peaches ripening in a Washington orchard seem at first glance to have little to do with aluminum smelting and fabrication"; "Texaco's Giant Step"; "GF is Praised for Pollution Control"; "Boise Cascade Transforms Long Beach Refuse Site Into Mobilehome Community"; "Cash-for-Cans Program Moves." And on it goes. Though pride in one's accomplishments is not without its place, it can be said that the promise of NIPCC has not been brought to fruition by the public relations experts.

Another major NIPCC publication, entitled "Commitments of Industry Pollution Cleanup Actions in Progress,"⁵⁹ was designed to demonstrate what the Council members have accomplished and to offer good examples for others. "We need to give direct and specific evidence that the members of the Council and its Sub-Councils take the President's charge personally and seriously . . ."⁶⁰ was the message to NIPCC members from Staff Director Walter Hamilton. "The more complex issues must still be addressed, but this evidence of action can make an important difference in public attitudes in the coming year."⁶¹

The Commitments document is useful and contains instructive information regarding scores of unpublicized industry undertakings intended to curb or eliminate environmental degradation. For lawyers who are inclined to equate progress with the number of suits filed, the document lends perspective by identifying a range of initiatives available to innovative businesses. Public appreciation is owed to a company

⁵⁶ *Id.*

⁵⁷ The "case history" is entitled CASEBOOK: Pollution Cleanup Actions (Feb. 10, 1971).

⁵⁸ Unfortunately, the pages in the CASEBOOK are not numbered. The quotes which follow in the text are derived principally from the titles of the individual histories.

⁵⁹ Published in Feb. 1971. At the NIPCC meeting on Oct. 14, 1971, Mr. Hamilton announced that the Council would issue a periodic report entitled *Industry In Action*. See Report of the Executive Director, reproduced in the Summary Minutes, NIPCC Meeting, Oct. 14, 1971.

⁶⁰ Undated letter sent to all NIPCC members, reproduced in *Commitments publication*, at 2.

⁶¹ *Id.* at 3.

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that undertakes voluntarily to replace the high phosphate detergents used in dining areas; or to recycle tires on company vehicles; or to find out where the waste hauler disposes of liquid wastes; or to insist upon recycling of the aluminum foil used in the packaging of frozen foods; or to conduct ecological surveys at all plants; or to use low-leaded gasoline in company vehicles. Commendable, too, are the few corporations which pledge to combat air and water pollution "to the extent that such prevention is technically feasible."⁶² Also praiseworthy are industry promises of specific commitments, even though they are often heavily qualified or the product of legal compulsion, especially in view of the often-changing regulatory patterns affecting many industries. It was the Consolidation Coal Co., for example, which unqualifiedly represented that by the end of 1975 "mine drainage produced in and pumped from our active operations will be under control."⁶³ The Commitments publication makes clear that there exists a broad range of useful initiatives which can be undertaken by a concerned management; it is for this reason that the NIPCC theme of volunteerism should not be dismissed summarily.

The most significant publications of NIPCC are a series of short sub-council reports discussing the pollution problems of various industries.⁶⁴ Of uneven quality, these tracts set forth an industry's position with supporting data.⁶⁵ The reports are useful both as public relations documents and as a shorthand consolidation of an industry's position. Several provide informative, though abbreviated, nontechnical summaries of the major pollution problems confronting an industry.

Illustrative of the sub-council reports are the following. The Airlines and Aircraft Sub-Council provides a depressing analysis of noise technology:

⁶² Letter to Walter Hamilton from W.E. Callahan, International Harvester Co., Dec. 18, 1970, reproduced in Commitments publication.

⁶³ Letter to Walter Hamilton from John Corcoran, President, Consolidation Coal Co., Jan. 8, 1971, reproduced in Commitments publication.

⁶⁴ Over 40 of these reports are anticipated. As of October 1971, 31 had been published. Among them are those entitled Detergents, Junk Car Disposal, Mercury, Acid Mine Drainage, Air Pollution by Sulfur Oxides, Animal Dumping of Baled Refuse, Exhaust Emissions from Gas Turbine Engines, Glass Containers, Mathematical Models for Air Pollution Control Policy Decision-Making, Noise From Gas Turbine Aircraft Engines, Regionally Consolidated Industrial Wastewater Treatment, Self-Analysis of Pollution Problems, Waste Disposal in Deep Wells, Wood Products, Detergents (A Status Report), The Engineer's Responsibility in Environmental Pollution Control, Maintaining Vehicular Emission Control System Integrity, Paper, Plastics in Solid Waste, Wastewater Reclamation, Leisure Time Product Noise, Pollution Problems in Selected Food Industries (excludes Meat, Poultry and Grain-Based Foods), The Chemical Industry and Pollution Control, The Disposal of Major Appliances, An Evaluation of the Appliance X-Ray Pollution Problem, The Use and Disposal of Electrical Insulating Liquids, The Electric Power Industry, Fertilizers & Agricultural Chemicals, and Rubber.

⁶⁵ Based on the author's personal conversations with NIPCC staff members.

A point currently has been reached where no immediate breakthroughs are foreseen and it is anticipated that further noise reductions will be achieved only in small increments. Despite the progress made to date in reducing noise levels, aircraft will still be judged as noisy by those who live or work in close proximity to airport flight paths.⁶⁶

As regards air pollution, another report of the same sub-council indicates that "[f]urther reduction of hydrocarbons and carbon monoxide will be difficult."⁶⁷ The report of the Glass and Plastic Containers Sub-Council indicates few industry problems: "Because of their inertness, plastics make a suitable component for landfill. Plastics can be incinerated with few complications even in present substandard equipment if properly operated."⁶⁸ As to the future, "the plastics industry believes that for the next ten to twenty years the most widely used means for solid waste management will be sanitary landfill and incineration."⁶⁹ The Coal Sub-Council views acid mine drainage as a problem, but not one that can be solved by the coal industry alone: "If the acid mine drainage problem is ever to be solved, responsibility for control and/or treatment of such discharges from non-operating and abandoned mines must rest with the public. Large sums must be appropriated by governmental bodies for this purpose."⁷⁰ A "minor problem"⁷¹ making up only one percent of the country's solid waste, reports another sub-council, is the disposal of the 350 million major appliances now in use—63 million refrigerators, more than 63 million ranges, nearly 63 million water heaters, 58 million washers, 25 million dryers, 25 million air conditioners, 18 million freezers, 16 million dishwashers and 14 million garbage disposals.⁷² The Sub-Council on Leisure also reports that, compared to other noise makers, motorcycles, snowmobiles, chain saws and rotary power mowers are "not a very serious problem."⁷³

Not surprisingly, the NIPCC sub-council tracts generally contain the type of information found in trade association publications. Usually, each offers a common definition of the problem, together with a brief description of research programs under way, and recommendations for

⁶⁶ Airlines and Aircraft Sub-Council Report, Noise From Gas Turbine Aircraft Engines, Feb. 1971, at 23.

⁶⁷ Airlines and Aircraft Sub-Council Report, Exhaust Emissions From Gas Turbine Air Engines, Feb. 1971, at 26.

⁶⁸ Glass and Plastic Containers Sub-Council Report, Plastics in Solid Waste, Mar. 1971, at 17.

⁶⁹ *Id.* at 16.

⁷⁰ Coal Sub-Council Report, Acid Mine Drainage, Feb. 1971, at 6.

⁷¹ Electric and Nuclear Sub-Council Report, The Disposal of Major Appliances, June 1971, at 13.

⁷² *Id.* at 7.

⁷³ Leisure Sub-Council Report, Leisure Time Product Noise, May 1971, at 6.

future action. In a sense, the publications are anticompetitive since they offer joint positions on common regulatory and research problems. But standing alone they certainly are not dangerous enough to be violative of the antitrust laws. Overall, it could be said that the store of knowledge concerning industry's pollution problems is enhanced by the NIPCC publications.

NIPCC has also engaged in other activities worthy of mention. Periodic reports have been made to the President. The report of February 10, 1971,⁷⁴ took a stand against "permanent subsidies" for pollution control, stressed the need for international accords, opposed a system to sell rights to pollute the environment, and urged that controls be based on evidence showing a reasonable likelihood of harm to man and his environment. NIPCC has also established a panel of technical representatives from industry, to be available to the Environmental Protection Agency (EPA) on an "on call" basis.⁷⁵ As explained by NIPCC staff member Thomas W. Jackson, "[w]herever possible the technical personnel should encourage submission of testimony in order to prevent the Government from making decisions without technical input from industry."⁷⁶

One is left, however, with an abiding conviction that the formally acknowledged activities of NIPCC fail to tell the whole story. There exists some doubt as to whether a few pamphlets, which could have been compiled by the public relations staffs of the corporations represented on NIPCC, reflect the principal performance of the institution. Top corporate executives, though they may spend time writing tracts if the President asks them to, are more familiar with major policy decision-making. The impact of NIPCC on policy matters cannot be assessed by reviewing the publications; rather, it can be determined only by looking beyond the formal record.

B. *The Sub Rosa Record*

At the sixth meeting of the Council on October 14, 1971, Secretary Stans candidly acknowledged that the Council had become "an effective new institutional communication and leadership link for industry and Government."⁷⁷ He stated to the Council members: "You have played an increasingly important role in both Government policy-making and

⁷⁴ The National Industrial Pollution Control Council Report to the President, BNA Env. L. Rep., Current Devs. 1103 (Feb. 12, 1971).

⁷⁵ Letter to William Ruckelshaus, Administrator, Environmental Protection Agency (EPA), from Walter Hamilton, undated. A copy is on file in the office of the Boston College Industrial and Commercial Law Review.

⁷⁶ Memo from Thomas Jackson to NIPCC-Technical Representatives, June 11, 1971. A copy is on file in the office of the Boston College Industrial and Commercial Law Review.

⁷⁷ Opening Remarks of Secretary Maurice H. Stans, reprinted in Summary Minutes, National Industrial Pollution Control Council, Oct. 14, 1971, at 1.

in industry leadership Virtually no major move is made in environmental policy without drawing on your advice and criticism. The rough spots in [the] administration of environmental laws, standards and implementation actions have been easier to spot and smooth out because you are always available to give us help."⁷⁸ In an effort to assess the role of NIPCC, the two following cases are offered as suggestive, if not paradigmatic, of the manner in which the advisory committee serves as policy maker. The extent to which industry has "smoothed out the rough spots" in national environmental policy makes clear that the advisory committee is a lawmaker to be reckoned with.

1. *The Non-Ferrous Smelters*

Early in 1970, as NIPCC was created by order of the President, the smelting industry was locked in a bitter controversy with several western states. The latter had moved to impose emission standards on smelters by calling for control of ninety percent of the sulfur dioxide released by process weight.⁷⁹ Based in part on a document prepared by Mr. Terry Stumph of the National Air Pollution Control Administration (NAPCA), Division of Process Control Engineering,⁸⁰ the states of Washington, Utah, Montana and Arizona were moving to impose emission standards thought to be technologically and economically unfeasible by the smelter operators.⁸¹ Industry's counter-attack in mid-1970, coordinated by the American Mining Congress, included a letter to NAPCA Commissioner John Middleton, demanding that he repudiate the Stumph document and communicate that message forthwith to those states acting in reliance upon the document.⁸² Industry argued at one point that NAPCA was attempting illegally to establish emission standards.⁸³

The Mining and Non-Ferrous Metals Sub-Council of NIPCC served as a convenient focal point for bringing industry pressure to bear on the ninety percent standard. The Sub-Council's first meeting was held in Washington, D.C., on July 6, 1970. The highlight of the session was the distribution of a blistering talk by Frank Milliken of the Kennecott Copper Corporation:⁸⁴

In government's development of criteria and the subsequent

⁷⁸ *Id.*

⁷⁹ For a brief discussion of this controversy (which is still continuing), see *New York Times*, Feb. 7, 1972, at 24, col. 3.

⁸⁰ The original draft of the paper, entitled *Proposed Emission Standard for Reduced Sulfur from Primary Non-Ferrous Smelters*, was published in Nov. 1969.

⁸¹ See note 79 *supra*.

⁸² Letter from J. Allen Overton, Executive Vice-President, American Mining Congress, to John Middleton, June 30, 1970. A copy of the letter is on file in the office of the Boston College Industrial and Commercial Law Review.

⁸³ *Id.*

⁸⁴ Set forth in an appendix to Summary Minutes, July 6, 1970.

setting of standards . . . the testimony and data presented by industry have not received due consideration by government And in the *present* critical stage of action—the planning and implementation of quality control measures—government *must* grant us a fair and honest forum Many elements of the Federal bureaucracy show every sign that they endorse precipitous actions often based on inappropriate or incomplete research data, set ill-defined objectives or oversimplify complex problems

. . .

Yet our own experience, particularly that involving smelter emissions in the [w]estern United States, does not show the HEW research data to be relevant

. . .

Imposition of uniform but unnecessarily severe ambient air standards across the country can place an undue economic burden on industry. But when *emission* standards place restrictions on industry that are even *more* repressive than the ambient air standards—and are even less necessary—the resulting economic impact on industry is serious enough so that it might lead to the shutting down of smelters.⁸⁵

Milliken supported his shut-down talk with a few cost figures—a \$180 million investment would be required to recover seventy percent of the sulfur, and an additional \$150 million to achieve ninety percent control.⁸⁶ Replacement of existing smelters, he observed, would cost “billions.”⁸⁷

Apparently inspired by Milliken's remarks, the Sub-Council dictated a series of “recommendations” into the summary minutes, indicating that it was seriously dissatisfied with the role played by NAPCA in the standard-setting process at the state and regional level. NAPCA's use of an “unofficial paper”⁸⁸ was singled out for criticism; submission of the Stumph Report “as part of NAPCA testimony at state hearings [had, in the Sub-Council's view,] lent an entirely unjustified but authoritative significance to it.”⁸⁹ The Sub-Council further resolved that “the use of this paper as the basis for establishing standards for sulphur dioxide should be discontinued, and that the states who have received

⁸⁵ Id. at 2-6 (emphasis in original).

⁸⁶ Id. at 7.

⁸⁷ Id.

⁸⁸ Suggested Emission Limits for Equivalent Sulfur from Existing Primary Non-ferrous Smelters, U.S. Dep't of Health, Educ. and Welfare, Environmental Health Service, National Air Pollution Control Administration (rev. ed. Aug., 1970).

⁸⁹ See Summary Minutes, Sub-Council on Mining and Non-Ferrous Metals Meeting, July 6, 1970, at 7.

it should be informed that it does not reflect the official position of NAPCA."⁹⁰

By September, 1970, the strategy for killing the ninety percent standard had matured. On September 24, the Mining and Non-Ferrous Metals Sub-Council of NIPCC again met in Washington to consider, among other agenda items, NAPCA's use of the Stumph Report. The minutes of that meeting disclose a new strategy involving industry research and development: industry would now search for facts to support its position. One study, to be conducted at the University of Utah, was to focus on the health effects of atmospheric sulfur dioxide (SO₂) from smelters.⁹¹ The Smelter Control Research Association was to be formed to demonstrate, on a pilot plant scale, "the technical and economical feasibility of at least one method of SO₂ removal from smelter stack emissions."⁹² This tardy joint research effort caused some surprise because, as Kennecott's Milliken explained in July of 1970, "[e]nvironmental quality control measures [at smelters] have to be integrated into individual processes and have to be tailored to a variety of factors peculiar to each operation and each locale in which we operate."⁹³ The types of concentrates and metallurgical processes, in particular, supposedly make the problems of each smelter different. None of the big four (Kennecott, Anaconda, Phelps Dodge, and American Smelting & Refining Co.) lacked funds for individual research, and all, in fact, were engaged individually in sulfur dioxide research (ASARCO, with Phelps Dodge, now has a pilot plant under construction). One is left with the impression that the Smelter Control Research Association has the potential only for demonstrating that it is *not* technically and economically feasible to remove sulfur dioxide from smelter stack emissions.

The most important meeting of NIPCC's Mining and Non-Ferrous Metals Sub-Council took place on March 8, 1971. In attendance were two members of the Sub-Council, four NIPCC staff members and fifty-three observers, including members of the American Mining Congress Presentation Group and federal government invitees. The chief executives of the major producers served up a carefully coordinated performance aiming, once and for all, to kill the ninety percent emission standard then in effect in several states. Kennecott's Chairman of the Board, Frank Milliken, opened the meeting with a general discussion of problems faced by the non-ferrous metal smelting industry, particularly the copper industry. He stressed concern for foreign competition:

⁹⁰ Id. at 8.

⁹¹ See Summary Minutes, Mining and Non-Ferrous Metal Sub-Council Meeting, Sept. 24, 1970, at 5.

⁹² Id.

⁹³ Appendix to Summary Minutes, July 6, 1970, at 8.

"U.S. security interests require U.S. capability to counter foreign threats of lowered production and high prices."⁹⁴ Kennecott's David Swan then took over to explain "the magnitude of the disparity between these government [cost] figures [of \$87 million]⁹⁵ and the figures arrived at in an independent study⁹⁶ made by the reputable engineering organization of Fluor Corporation."⁹⁷ The capital costs necessary to meet a ninety percent curtailment of sulfur dioxide emissions were estimated to range from \$345 million to \$1200 million, with the latter figure involving complete plant replacement. For those who missed the occasion, Mr. Swan's remarks were later published in the Mining Congress Journal.⁹⁸

In addition to overwhelming NAPCA's existing cost data by a factor of ten, this "independent" Fluor study, as interpreted by Mr. Swan, offered other insights: "Available technology does not permit achieving both ambient and 90 percent emission control within the time allowed by the 1970 Clean Air Act Emission control of 90 percent is very costly. At present, methods of achieving this limitation are not known. New smelters or radical re-design of plants would be required to meet the 90 percent control limits."⁹⁹ Mr. Swan concluded by offering these suggestions: (1) the 90 percent emission requirements should and could be eliminated; (2) efforts to establish reliable data on health effects particularly in smelter environments should be identified; and (3) the proposed national secondary ambient air standards should be reviewed and revised downward.¹⁰⁰

Speaker after speaker from these supposed competitors passed the identical word: drop the ninety percent standard. Closing the lengthy presentation was ASARCO's Charles Barber: "If my remarks sound more urgent than those of some of the others who have spoken this morning, it is because the problems facing American Smelting and Refining Company are more urgent [For us,] it is a matter of survival We urge that APCO's [Air Pollution Control Office of EPA] sponsorship of the arbitrary 90 percent sulfur emission standard

⁹⁴ Summary Minutes, Mining and Non-Ferrous Metals Sub-Council Meeting, Mar. 8, 1971, at 1.

⁹⁵ Report to the Congress, The Economics of Clean Air, S. Doc. No. 92-6, 92d Cong., 1st Sess. 4-19, (1971); see S. Doc. No. 91-65, 91st Cong., 2d Sess. 32 (1970).

⁹⁶ The report is Fluor Utah Engineers & Constructors, Inc., The Impact of Air Pollution Abatement on the Copper Industry, Apr. 20, 1971.

⁹⁷ Swan's remarks were reprinted in Swan, Study of Costs for Complying with Standards for Control of Sulfur Oxide Emissions from Smelters, Mining Cong. J. at 85 (Apr. 1971).

⁹⁸ Id. at 76.

⁹⁹ Id. at 84.

¹⁰⁰ Id. at 85.

be withdrawn and discontinued."¹⁰¹ Speaking as one, the entire industry painted a picture of doom for the United States' non-ferrous smelting capacity and laid the blame squarely on the ninety percent standard. The strength of the submission came in part from the unanimity of its proponents.

On April 7, 1971, after the March 8 NIPCC presentation at the Department of Commerce, the Environmental Protection Agency published proposed federal guidelines for the states to follow in their preparation of implementation plans necessary to achieve the ambient standards.¹⁰² The guidelines marked the last appearance, under federal sponsorship, of the ninety percent standard for copper smelters. Included in the appendix to this document were "examples of emission limitations and other measures directly applicable or adaptable to point sources and area sources Although these emission limitations contained herein are relatively stringent, they have, with some modification, been applied by various State and local jurisdictions."¹⁰³ Under the heading "Non-Ferrous Smelters" was a formula for the emission control of copper, lead and zinc smelters, accompanied by an explanatory note: "This rule, in effect, requires removal of *about* 90 percent of the input-sulfur to the smelter."¹⁰⁴

On August 14, in the final version of the guidelines, the same formula was published¹⁰⁵ with a different explanation:

These emission limitations are equivalent to removal of about 90 percent of the input-sulfur to the smelter for most copper smelters and somewhat higher for most lead and zinc smelters. Technology capable of achieving such emission limitations may not be applicable to all existing smelters. In such cases, less restrictive control can be coupled with restricted operations to achieve air quality standards.¹⁰⁶

Who decreed the change in the standard, and why, are matters of speculation. No NIPCC minutes supply the evidence. It appears, however, that the Mining and Non-Ferrous Metals Sub-Council was a principal contributor of *ex parte* information on the technical and economic aspects of a significant federal policy. It seems clear, too, that the strength of this information in part depended upon a number of competitors joining hands in what amounted to a united political

¹⁰¹ Attachment VIII to Summary Minutes, Mining and Non-Ferrous Metals Sub-Council Meeting, Mar. 8, 1971, at 1, 5.

¹⁰² 36 Fed. Reg. 6680 (Apr. 10, 1971).

¹⁰³ Id. at 6683, 6687.

¹⁰⁴ Id. (emphasis added).

¹⁰⁵ 36 Fed. Reg. 15486 (Aug. 14, 1971).

¹⁰⁶ Id. at 15496.

front. Secretary Stans stated on October 14, 1971: "EPA and industry estimates of cost increases attributable to control of sulphur oxide emissions, for example, were an order of magnitude apart. It has taken a great deal of work by both sides over the past year to get closer agreement on this one item in the smelter industry."¹⁰⁷ It is also apparent that NIPCC had provided an opportunity for industry spokesmen to discuss and refine a joint-research strategy aimed at developing new technologies. Fostering conspiracy had become a conscious government policy.

2. *The Detergent Makers*

Like the smelter operators, detergent manufacturers were engaged in intense regulatory struggles early in 1970, when NIPCC was established. The principal problem concerned the phosphorus in detergents, which had been identified as a major factor in the process of eutrophication in many bodies of water. This process is typified by excessive algae, oxygen depletion and a reduction in the water's beneficial uses.¹⁰⁸ The new cry against detergents as water polluters inspired numerous local regulations designed to control phosphorus content,¹⁰⁹ various complaints against advertising filed with the Federal Communications Commission,¹¹⁰ and a proposed warning label and ingredients statement recommended by the Federal Trade Commission.¹¹¹ In February, 1970, federal water pollution officials of the Joint Industry-Government Task Force on Eutrophication, which had been studying the problem since late in 1967, publicly indicated their belief that the detergent industry was renegeing on its commitment to eliminate phosphorus from detergents.¹¹²

The ground lost by industry within the Joint Task Force was soon made up within NIPCC. Although the Detergents Sub-Council did not clearly emerge as a major influence, it served as a useful forum for

¹⁰⁷ Pollution Control Costs and Phase II of the New Economic Program, appendix to Summary Minutes, NIPCC Meeting, Oct. 14, 1971.

¹⁰⁸ Hearings on Phosphates in Detergents and the Eutrophication of America's Waters, Before the House Conservation and Natural Resources Subcomm. of the House Comm. on Governmental Operations, 91st Cong., 1st Sess. passim (1969).

¹⁰⁹ See, e.g., Chicago Municipal Code §§ 17-7.1 to -7.4 (1970); Detroit Code ch. 5, art. 5 (1971); and Akron, Ohio, Code ch. 753 (1970).

¹¹⁰ See, e.g., the reply of The Federal Communications Commission (June 28, 1971) to complaints filed against licensees who broadcast phosphate commercials. A copy of the reply is on file in the office of the Boston College Industrial and Commercial Law Review.

¹¹¹ See release of the Federal Trade Commission inviting comment on its proposed trade regulation rule concerning labeling and advertising requirements for detergents, "Notice of Public Hearing and Opportunity to Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule," 36 Fed. Reg. 1212 (Jan. 26, 1971).

¹¹² See Discussion Record, Business Meeting of Joint Industry/Government Task Force, Feb. 17-18, 1970, at 5.

those anxious to head off unfriendly federal initiatives. The June 17, 1970, meeting featured a factual status report on the phosphates problem made by representatives of the Council on Environmental Quality; in addition, legislative options under consideration were outlined by Secretary of Commerce Stans. The options included a punitive tax on phosphate content and legislation allowing the federal government to establish and enforce both content regulations for detergents and labeling requirements. A government spokesman noted that a "consensus exists that [a] reduction in phosphate content or detergents would be a beneficial move and [that such a reduction] should be a government policy objective."¹¹³ The consensus, however, did not include NIPCC's industry membership, who went on record as being unanimously opposed to legislation. The Sub-Council "took the position that the most important steps for the Government to take now are to help speed the adoption of techniques for treatment of effluent, rather than excluding products from the markets."¹¹⁴ In a little more than a year, the federal government came around to the latter point of view.

No better opportunity for influencing the government was available to industry than NIPCC, an institution designed to invite influence of the federal government. On July 14, 1970, Secretary Stans told a press conference that the Detergents Sub-Council had met three or four times and that he had attended most of the meetings.¹¹⁵ Unfortunately, summary minutes are available for only a single meeting prior to that date, a fact which indicates either that Mr. Stans' memory is poor or that the Sub-Council members met from time to time without bothering to go through the motions of complying with Executive Order 11007. The latter possibility is indicative of the potential abuses of the industry advisory process.

In October, 1970, came the first of two Detergents Sub-Council reports, reportedly written by Procter & Gamble's Howard Morgens, which indicated that "[a]s of this date the industry has reduced its annual phosphate consumption by 100,000,000 pounds. . . ."¹¹⁶ This figure amounted to $\frac{1}{5}$ of the problem, a pace which, barring setbacks, would have resolved the phosphate detergent controversy by the year 2025. The Sub-Council also promised a six-fold increase in the rate of reduction by early 1972 but, alas, there were setbacks. Nitrilociatetic acid (NTA), which was to be the principal replacement material, fell from favor in December of 1970, with disclosures that use of NTA in preliminary experiments with test animals caused birth defects.¹¹⁷ The

¹¹³ Summary Minutes, Detergents Sub-Council Meeting, June 17, 1970, at 6.

¹¹⁴ *Id.* at 4.

¹¹⁵ Transcript of Press Briefing, Dep't of Commerce, July 14, 1970, at 9.

¹¹⁶ Status Report on Detergents, Detergents Sub-Council, Oct., 1970, at 6.

¹¹⁷ Status Report on Detergents, Detergents Sub-Council, Mar., 1971, at 11-12.

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record remained unclarified until a Sub-Council Status Report on Detergents was issued in March, 1971:

Some of the key portions of the earlier report consisted of commitments and undertakings by the Industry to replace certain stated amounts of phosphates with NTA. As the Industry has promptly complied with the request of the Government agencies to suspend the use of NTA, some of those commitments are now rendered impossible of accomplishment at an early date, and it is this which prompts this updating of the 1970 report.¹¹⁸

Mr. Morgens and his colleagues on the Sub-Council could not resist noting that the products the government was moving with all deliberate speed to eliminate were not really deserving of elimination: "Certainly there is no proof anywhere in the world that phosphate reduction in detergents will eliminate the accelerated or excessive eutrophication."¹¹⁹ The report concluded that a lowering of phosphate content without providing replacement materials would "mislead the public," because

extensive experience indicates that there would then be a strong tendency for women to increase the amount of the detergent they use in order to achieve the same cleaning results. By using a greater quantity of these detergents, the housewife would be putting approximately the same amount of phosphate into the environment as she does now—only at a higher cost to herself.¹²⁰

Within a year, Colgate-Palmolive and the FMC Corp. were prepared to "mislead the public," when they began pushing for federal regulation as a means of heading off stiffer local regulations.¹²¹

"Research and testing" was emphasized in NIPCC's October, 1970, publication discussing industry's "intensive" and prolonged research effort aimed at "solving the problem of man-accelerated eutrophication."¹²² This effort involves "hundreds of scientists and millions of dollars,"¹²³ although how many hundreds and how many millions remains a well-kept trade secret. The research effort to find phosphate

¹¹⁸ *Id.* at 7.

¹¹⁹ Status Report on Detergents, Detergents Sub-Council, Oct., 1970, at 8.

¹²⁰ *Id.* at 9-10.

¹²¹ See Statement by LeRoy H. Hurlbert, Colgate-Palmolive Co., Before the Subcomm. on Environment of Senate Commerce Comm., Oct. 29, 1971, at 2; Statement of Frederick A. Gilbert, FMC Corporation, *id.* at 9.

¹²² Status Report on Detergents, Detergents Sub-Council, Oct., 1970, at 12.

¹²³ *Id.*

replacements was said to be "by far the largest single research project in the industry,"¹²⁴ and, in support of this program, industry has imposed "no financial or manpower limits on investigation."¹²⁵ Working hard to find a replacement for something that does not need to be replaced apparently presents no paradox for detergent makers. Professional schizophrenia was quite evident when Colgate-Palmolive's Dr. Richard B. Wearn told a House subcommittee in 1969 that the industry was working "diligently" to come up with a phosphate substitute,¹²⁶ while at the same time his company was working diligently to introduce and promote "Punch," still another high phosphate detergent.¹²⁷

In the end, politics, not research, proved decisive. Warning signs foreshadowing the capitulation of the federal government appeared in mid-1971. On July 2, a little noted press release was disseminated under the heading "EPA Explains Position on Publication of Detergent Lists."¹²⁸ Consumers were now advised that a hard-hitting list of detergent products and their percentage phosphate content, published by the Federal Water Quality Administration in September, 1970, could "no longer be considered as a reliable basis for comparison of products on today's market. . . . The rate of introduction of new products and reformulation of old products has become so rapid," the explanation went, "that it is essentially impossible to prepare a list which doesn't become obsolete almost as soon as it is published." This circumstance, "coupled with the fact that some manufacturers now *apparently* market products of differing composition for different geographic areas, has led us to decide to refrain from publishing any further lists at this time."¹²⁹

On September 16, 1971, came a surprising announcement at a press conference held by Surgeon General Jesse Steinfeld, FDA Commissioner Charles Edwards, CEQ's Russell Train and the EPA's William Ruckelshaus. The message was startling: in addition to continuing uncertainty regarding NTA, the increasing use of "highly caustic substitutes" for phosphates in detergents was said to be a "cause for serious concern." Phosphates were back in favor. The announcement went to the extreme of urging states and localities "to reconsider laws

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Hearings on Advisory Committees, Before the Senate Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 92d Cong., 1st Sess. 80 (1971) [hereinafter cited as 1971 Hearings on Advisory Committees].

¹²⁷ See Colgate-Palmolive Co., 1969 Ann. Rep. at 3.

¹²⁸ Environmental Protection Agency, Environmental News (July 2, 1971). A copy of this edition is on file in the office of the Boston College Industrial and Commercial Law Review.

¹²⁹ Id. at 1..

and policies which unduly restrict the use of phosphates in detergents."¹⁸⁰

In slavish detail, Administration spokesmen articulated the position which the major manufacturers had consistently urged. Surgeon General Steinfeld went so far as to declare: "My advice to the housewife at this time would be to use the phosphate detergent."¹⁸¹ Within days, full-page Lever Brothers ads were paraphrasing the Surgeon General: "My advice to the housewife is to use phosphate detergents."¹⁸² No ads bothered to carry the Surgeon General's later concession that several of the most caustic of detergents analyzed were phosphate-based.¹⁸³ Mr. Ruckelshaus chimed in with a pledge to help local governments upgrade waste treatment facilities so that they would be capable of handling phosphorus.¹⁸⁴ A New York City official pointed out a few weeks later that the federal government had come through with only two percent of the funds obligated to improve the city's sewage treatment facilities.¹⁸⁵

As with the situation involving air pollution standards for smelters, there is evidence that NIPCC has supplied invaluable inside-track opportunities for those who would redirect governmental policy concerning the use of phosphorus in detergents. The decision to rehabilitate the reputation of phosphorus had serious economic effects upon those who had already made a substantial economic commitment to use replacement materials. Once again, the evidence against NIPCC is circumstantial, since the written record of contacts between the government and the industry during the crucial decision-making days is unavailable. This dearth of hard evidence itself points to the need for procedural reforms in the advisory mechanism.

IV. ADVICE FOR THE ADVISORY COMMITTEE

Under present consideration by Congress and by the Office of Management and the Budget (OMB) are proposals that would rework the advisory process as it functions under NIPCC.¹⁸⁶ In light of this activity, a long overdue modification of Executive Order 11007 is virtually certain. The NIPCC experience also points the way to further

¹⁸⁰ Dep't of Health, Educ. and Welfare, Press Release, Sept. 15, 1971, at 10.

¹⁸¹ Unofficial Transcript of September 15 Press Conference, Sept. 16, 1971, at 10.

¹⁸² See, e.g., Seattle Post-Intelligencer, Sept. 28, 1971, at C-12.

¹⁸³ Statement Before the Subcomm. on the Environment of the Senate Commerce Comm., Oct. 1, 1971, at 4.

¹⁸⁴ Unofficial Transcript of September 15 Press Conference, Sept. 16, 1971, at 6.

¹⁸⁵ Testimony of Jerome Kretchmer, New York City Environmental Protection Administrator, Before Senate Commerce Comm., Oct. 1, 1971, at 4.

¹⁸⁶ See, e.g., S. 2064, 92d Cong., 1st Sess. (1971); Draft Executive Order: Prescribing Regulations for the Formation, Management, Use and Termination of Committees in Government, Aug. 27, 1971 [hereinafter cited as Draft Executive Order].

strictures on the activities of trade associations, whether or not they are specifically invited to offer advice to the government.

A. *The Proposed Changes in Executive Order 11007*

If the NIPCC experience offers an abiding insight, it is that the advisory committee process should be completely open, both to the casual observer and to the serious investigator. Public access to these proceedings should not remain a matter of discretion. Testimony before congressional committees has revealed flagrant instances regarding the denial of access to observers who sought entry to special interest advisory groups.¹⁸⁷ The argument proffered to justify the secrecy, that it enhances the freedom of dialogue, should not override the risks inherent in *ex parte* submissions made to the regulators and exchanges among competitors supervised only by the sympathetic. The further claim that outsiders who would intrude can do so on their own time and expense overlooks the tangible benefits afforded to those arriving by invitation, such as the members of NIPCC. As we have seen, these invitees are given the red-carpet treatment by policy makers bending every effort to provide current information on research or planned regulatory initiatives. It is decidedly more advantageous to learn about pending research proposals from an agency's director of research than it is from a public information officer.

One remedy to the problem could be a mandatory requirement that public representatives be included on advisory committees. OMB proposes "effective representation of the public, when appropriate . . ."¹⁸⁸ which is as noncommittal as can be. Short of this, open meetings should be required. OMB wisely advocates open meetings by proposing that "any interested persons may attend meetings of advisory committees . . ."¹⁸⁹ subject, of course, to logistical limitations.

For industry advisory committees, at least, and probably for all advisory committees, the privilege to waive verbatim transcripts should be eliminated. Tape recording the meetings could easily be accomplished and public access to the verbatim record would guarantee the trustworthiness of summary minutes. These summary minutes should be made available for general distribution to interested parties, which is the present practice. OMB proposes, however, broad limitations that would justify secrecy for the deliberations of government advisors if their discussions touched on national security, international policy, trade secrets, information concerning the competence or character of

¹⁸⁷ See Hearings on Advisory Committees, Before the Senate Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 91st Cong., 2d Sess. 209-33 (1970) (testimony of Ralph Nader).

¹⁸⁸ Draft Executive Order, *supra* note 136, § 13(c).

¹⁸⁹ *Id.* § 15(b).

any individual, or information that "if prematurely released would be detrimental to the public health or safety."¹⁴⁰ Without pausing to probe these loopholes, suffice it to say that every exception jeopardizes the policy of full disclosure in areas where, for practical purposes, administrative fiat is the last word. One can rightly be skeptical about what kind of trade secret it is that may be freely shared among competitors but withheld from the public.

Other provisions in OMB's proposals also deserve brief comment. It is presently the law, and it should remain so, that the agenda of an advisory group should be prescribed by a government employee, and that the meetings be conducted in his presence and adjourned at his direction. It is also essential that an advisory group remain advisory, unless Congress gives it a law-making function. OMB proposes to drop entirely the special definition of industry advisory committee and, in particular, the requirement that an industry committee be representative in character. While it may be arguable whether the public should have a seat on a special interest advisory committee, there is no room for the claim that the special interest should not be fairly representative. These and other indicated deficiencies suggest that Congress should legislate in this sensitive area, instead of deferring to a newly-aroused OMB whose concern about advisory committees became more pronounced as congressional hearings progressed.¹⁴¹

B. *Further Reporting Obligations for Trade Associations*

The NIPCC experience raises more questions about what has gone on *outside* the advisory committee process, than it does about what has transpired within it. In the policy issues raised before the NIPCC sub-councils, trade associations have played an important, although not explicit, role. As observers at the meetings, collectors of data for committee reports, reviewers of the finished products, and architects of policy initiatives, the role of the trade association official has been obvious though ill-defined. The trade association's research and lobbying role is critical when environmental concerns of industry-wide significance arise. In industry after industry it is clear that the trade association coordinates research activities which measure the polluting impact of a technology and the costs, prospects, or need for change. The Smelter Control Research Association is a prime example of the joint-research practice now quite popular. Similarly, the Executive Order creating NIPCC explicitly sanctions common responses to regulatory initiatives of the type condemned in the smog conspiracy decree and discouraged by the head of the Antitrust Division of the Justice Depart-

¹⁴⁰ Id. § 15(f)(3).

¹⁴¹ See 1971 Hearings on Advisory Committees, *supra* note 126, at 517-37 (testimony of Arnold Weber).

ment. In this context, it is not surprising that uneasiness about the anti-trust laws is a regular concern of industrial lobbyists dealing in environmental matters.

One measure which might remove doubt concerning the legality of trade association activity in areas of research and political influence could be implemented by rejuvenating the timeworn proposals requiring full disclosure of trade association activities. Thirty years ago one writer found it "impossible to measure the extent to which members of trade associations are actually engaged in cooperating to serve the public and in conspiring against it."¹⁴² He saw no "assurance" against a conspiracy "unless an agent of the Federal Government is placed in every trade association office to read all correspondence, memoranda, and reports, attend all meetings, listen to all conversations, participate in all the merriment and diversion, and issue periodic reports on what transpires."¹⁴³ The leading hornbook on trade association law today coyly reports: "Trade association and company counsel are working together with increasing frequency to assure complete compliance with the antitrust laws. . . . Perhaps the two, working with enlightened company and association personnel, have obviated any need for placing 'an agent of the Federal Government . . . in every association of office. . . .'"¹⁴⁴ And perhaps they have not.

Over the years, stiff proposals have been aimed at trade associations. As indicated earlier, Milton Handler, one of the deans of antitrust scholarship, years ago recommended that trade associations should be required to register with a public authority, and to make periodic reports of their activities. Their operations, he said, "should be completely in the open."¹⁴⁵ To implement this policy, he suggested that "[t]rade associations should also be required to keep a complete stenographic record of their proceedings at all regular and special meetings."¹⁴⁶ The wisdom of this proposal was recognized by the Temporary National Economic Committee in 1941, which recommended the registration of trade associations and the disclosure of their activities.¹⁴⁷

CONCLUSION

The President set out to encourage voluntary initiatives and to invite industry opinions on governmental policy when he established

¹⁴² Wilcox, *Competition and Monopoly in American Industry* 233 (Temporary National Economic Comm., Monograph No. 21, 1941).

¹⁴³ *Id.* at 234.

¹⁴⁴ G. Lamb & C. Shields, *Trade Association Law and Practice* 230 (rev. ed. 1971).

¹⁴⁵ Handler, *A Study of the Construction and Enforcement of Federal Antitrust Laws* 92 (Temporary National Economic Comm., Monograph No. 38, 1941).

¹⁴⁶ *Id.* at 93.

¹⁴⁷ *Final Report and Recommendations of the Temporary National Economic Committee, Investigation and Concentration of Economic Power*, S. Doc. No. 35, 77th Cong., 3d Sess. 38 (1941).

THE NATIONAL INDUSTRIAL POLLUTION CONTROL COUNCIL

a National Industrial Pollution Control Council, consisting of top executives from the nation's major industries. Both objectives were achieved, although the record raises serious questions regarding the role played by the advisory committee in the formation of public policy. *Ex parte* decision-making is not to be applauded, as the case histories suggest. The enduring lesson of the National Industrial Pollution Control Council should provide the touchstone for reform: when members of an industry set out to influence their government, they should be required to do so publicly.

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