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ENVIRONMENTAL PROTECTION ACT OF 1970

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENERGY, NATURAL
RESOURCES, AND THE ENVIRONMENT

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION.

ON

S. 3575

TO PROMOTE AND PROTECT THE FREE FLOW OF INTERSTATE
COMMERCE WITHOUT UNREASONABLE DAMAGE TO THE EN-
VIRONMENT; TO ASSURE THAT ACTIVITIES WHICH AFFECT
INTERSTATE COMMERCE WILL NOT UNREASONABLY INJURE
ENVIRONMENTAL RIGHTS; TO PROVIDE A RIGHT OF ACTION
FOR RELIEF FOR PROTECTION OF THE ENVIRONMENT FROM
UNREASONABLE INFRINGEMENT BY ACTIVITIES WHICH
AFFECT INTERSTATE COMMERCE, AND TO ESTABLISH THE
RIGHT OF ALL CITIZENS TO THE PROTECTION, PRESERVA-
TION, AND ENHANCEMENT OF THE ENVIRONMENT

MAY 12, 14, JULY 1, AND 10, 1970

Serial 91-80

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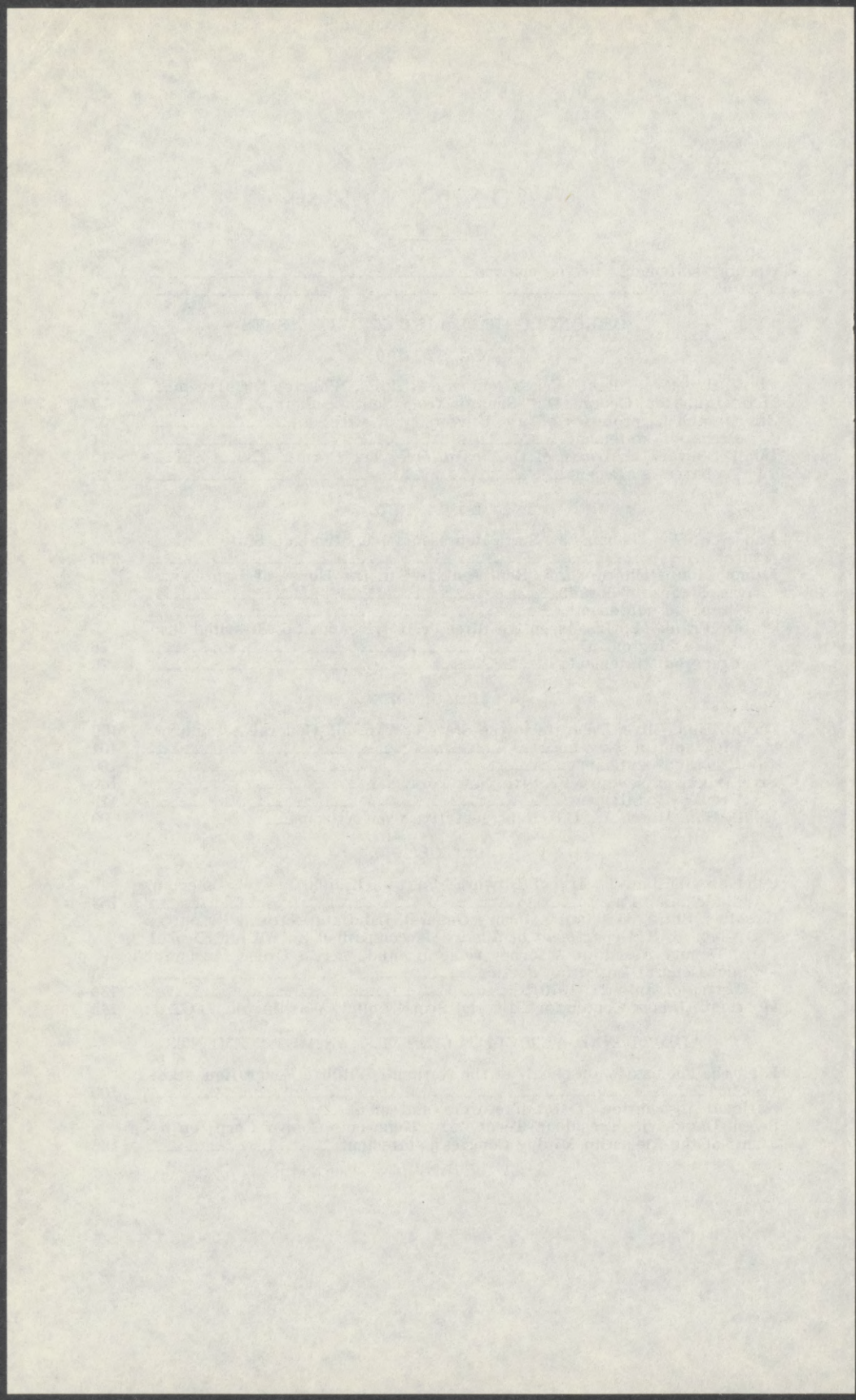
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ENVIRONMENTAL PROTECTION ACT OF 1970

TUESDAY, MAY 12, 1970

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY,
NATURAL RESOURCES, AND THE ENVIRONMENT,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 318, Old Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Present: Senators Hart and Moss.

OPENING STATEMENT BY THE CHAIRMAN

Senator HART. The committee will be in order. I have a brief opening statement.

The Subcommittee on Energy, Natural Resources, and the Environment will begin consideration of S. 3575, the Environmental Protection Act of 1970.

The bill, which Senator McGovern and I introduced earlier this year, would provide that each person is entitled by right to the protection and enhancement of the environment and would facilitate the bringing of conservation suits to enforce that right. Senator McGovern and I are indebted for much of the language in this bill to Prof. Joseph Sax of the University of Michigan Law School. Professor Sax drafted similar legislation for introduction in the Michigan State Legislature.

Our basic purpose in introducing this bill is to broaden the participation of citizens in the resolution of issues which directly affect them. Recent events have demonstrated the frustration of those who, while deeply committed on matters of public policy, feel powerless to influence such matters. If commitment of this sort is harnessed in the proper manner, it can be relied upon to alleviate many of society's evils. If it continues to be frustrated, however, society's destruction may be the inevitable result.

These remarks, of course, extend to matters far afield from that of environmental protection. In recent days, less has been heard about pollution than about problems of admittedly greater immediacy. Yet the broad themes of unresponsive governmental action and accompanying disillusionment with governmental institutions provide a glaring link between these diverse substantive areas.

We intend to examine these themes today in hopes of taking strides toward curbing their continued development. In the environmental area, where the effects of governmental inadequacy are perhaps most directly felt by the public at large, our system cries out for increased participation by the citizen in the determination of his own fate. S. 3575 is designed to satisfy that need.

(The bill follows:)

Staff member assigned to this hearing: Leonard Bickwit, Jr.

91ST CONGRESS
2D SESSION

S. 3575

IN THE SENATE OF THE UNITED STATES

MARCH 10, 1970

Mr. MCGOVERN (for himself and Mr. HART) introduced the following bill;
which was read twice and referred to the Committee on Commerce

A BILL

To promote and protect the free flow of interstate commerce without unreasonable damage to the environment; to assure that activities which affect interstate commerce will not unreasonably injure environmental rights; to provide a right of action for relief for protection of the environment from unreasonable infringement by activities which affect interstate commerce and to establish the right of all citizens to the protection, preservation, and enhancement of the environment.

1. *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Environmental Protec-
- 4 tion Act of 1970".

1 SEC. 2. (a) The Congress finds and declares that each
2 person is entitled by right to the protection, preservation,
3 and enhancement of the air, water, land, and public trust
4 of the United States and that each person has the responsi-
5 bility to contribute to the protection and enhancement
6 thereof.

7 (b) The Congress further finds and declares that it is
8 in the public interest to provide each person with an adequate
9 remedy to protect the air, water, land, and public trust of
10 the United States from unreasonable pollution, impairment,
11 or destruction.

12 (c) The Congress further finds and declares that hazards
13 to the air, water, land, and public trust of the United States
14 are caused largely by persons who are engaged in interstate
15 commerce, or in activities which affect interstate commerce.

16 SEC. 3. (a) Any person may maintain an action for
17 declaratory or equitable relief in his own behalf or in behalf
18 of a class of persons similarly situated, for the protection of
19 the air, water, land, or public trust of the United States from
20 unreasonable pollution, impairment, or destruction which
21 results from or reasonably may result from any activity which
22 affects interstate commerce, wherever such activity and such
23 action for relief constitute a case or controversy. Such action
24 may be maintained against any person engaged in such
25 activity and may be brought, without regard to the amount

1 in controversy, in the district court of the United States for
2 any judicial district in which the defendant resides, transacts
3 business, or may be found: *Provided*, That nothing herein shall
4 be construed to prevent or preempt State courts from exercis-
5 ing jurisdiction in such action. Any complaint in any such
6 action shall be supported by affidavits of not less than two
7 technically qualified persons stating that to the best of their
8 knowledge the activity which is the subject of the action
9 damages or reasonably may damage the air, water, land, or
10 public trust of the United States by pollution, impairment,
11 or destruction.

12 (b) For the purpose of this section, the term "person"
13 means any individual or organization; or any department,
14 agency, or instrumentality of the United States, a State or
15 local government, the District of Columbia, the Common-
16 wealth of Puerto Rico, or a possession of the United States.

17 SEC. 4. (a) When the plaintiff has made a prima facie
18 showing that the activity of the defendant affecting inter-
19 state commerce has resulted in or reasonably may result in
20 unreasonable pollution, impairment, or destruction of the
21 air, water, land, or public trust of the United States the de-
22 fendant shall have the burden of establishing that there is no
23 feasible and prudent alternative and that the activity at
24 issue is consistent with and reasonably required for promo-
25 tion of the public health, safety, and welfare in light of the

1 paramount concern of the United States for the protection of
2 its air, water, land, and public trust from unreasonable pollu-
3 tion, impairment, or destruction.

4 (b) The court may appoint a master to take testimony
5 and make a report to the court in the action.

6 (c) The court or master, as well as the parties to the
7 action, may subpoena expert witnesses and require the pro-
8 duction of records, documents, and all other information
9 necessary to a just disposition of the case.

10 (d) Costs may be apportioned to the parties if the inter-
11 ests of justice require.

12 (e) No bond shall be required by the court of the plain-
13 tiff: *Provided*, That the court may, upon clear and convincing
14 evidence offered by the defendant that the relief required will
15 result in irreparable damage to the defendant, impose a re-
16 quirement for security to cover the costs and damages as
17 may be incurred by defendant when relief is wrongfully
18 granted: *Provided further*, That such security shall not be
19 required of plaintiff if the requirement thereof would unrea-
20 sonably hinder plaintiff in the maintenance of his action or
21 would tend unreasonably to prevent a full and fair hearing on
22 the activities complained of.

23 SEC. 5. The court may grant declaratory relief, tempo-
24 rary and permanent equitable relief, or may impose conditions
25 on the defendant which are required to protect the air,

1 water, land, or public trust of the United States from pollu-
2 tion, impairment, or destruction.

3 SEC. 6. This Act shall be supplementary to existing
4 administrative and regulatory procedures provided by law
5 and in any action maintained under the Act, the court may
6 remand the parties to such procedures: *Provided*, That
7 nothing in this section shall be deemed to prevent the grant-
8 ing of interim equitable relief where required and so long
9 as is necessary to protect the rights recognized herein:
10 *Provided further*, That any person entitled to maintain an
11 action under this Act may intervene as a party in all such
12 procedures: *Provided further*, That nothing herein shall be
13 deemed to prevent the maintenance of an action, as provided
14 in this Act, to protect the rights recognized herein, where
15 existing administrative and regulatory procedures are found
16 by the court to be inadequate for the protection of such
17 rights: *Provided further*, That at the initiation of any person
18 entitled to maintain an action under the Act, such procedures
19 shall be reviewable in a court of competent jurisdiction to
20 the extent necessary to protect the rights recognized herein:
21 *And provided further*, That in any such judicial review the
22 court shall be bound by the provisions, standards, and pro-
23 cedures of sections 3, 4, and 5 of this Act, and may order
24 that additional evidence be taken with respect to the environ-
25 mental issues involved.

Senator HART. It is indeed appropriate that our hearings open with the able Senator from South Dakota, George McGovern, as our witness because not alone has he, by the filing of this bill which we are here considering, suggested a device whereby citizens who feel deeply with respect to the environment may themselves act; but he has been and is now currently engaged in promotion of a Senate bill which would permit a deeply frustrated Congress to take a step which I hope in the majority of the Congress mind is the resolution of an equally frustrating problem in Southeast Asia.

Senator Moss?

Senator Moss. I do not have any opening remarks, but I am glad to be here. I wanted to hear Senator McGovern. I will have to be excused for a short time, because I must go to another hearing briefly. But I will be back, because I have great interest in this approach to protection of the environment.

We have been pursuing various ways and with not too much success I think so far. I, therefore, am most anxious to examine this approach that is coming before our subcommittee today. I am pleased to welcome Senator McGovern for whom I have the greatest admiration. I want to hear his ideas.

STATEMENT OF HON. GEORGE MCGOVERN, U.S. SENATOR FROM SOUTH DAKOTA

Senator MCGOVERN. Thank you very much, Mr. Chairman and Senator Moss.

Let me begin by expressing my appreciation that these hearings have been arranged. You gentlemen have both been working in this field longer than I have; but it is a privilege, Senator Hart, to be a cosponsor with you on the measure that I am going to talk about this morning, to testify before you and Senator Moss, who have been leaders in the field of environmental protection for many years.

For the last 5 years our weapons have been inflicting a savage wound upon the face of Southeast Asia. In the last 2 weeks we have again confirmed that the wounds of Indochina are a mirror-image of the violence we inflict upon ourselves at home.

Our indigenous violence wears many masks. The death of four students on a university campus. The assassination of compassionate leaders of our Nation—blacks and whites. The violence to democracy created by the polarization of generations and races. The silent violence of hunger and poverty. And the steady ravishment of a nation and its citizens by random industrial growth and governmental neglect.

Today the Congress is reviewing its constitutional responsibilities for the violence and destruction visited upon the people of Indochina and America itself. In the last several years, Congress has also begun an analysis of the environmental violence which we have inflicted upon ourselves for over two centuries.

For the past week, Mr. Chairman, as you and Senator Moss know, our offices have been filled with young Americans calling upon us to end the war in Asia. Three weeks ago the campuses of the Nation were focused on Earth Day, the concerns of the environment. I think there is no way to separate those two issues, for our fascination with war

and the pouring of our resources and energies into the furnace of war has delayed us in facing up to the mounting needs of our own country.

But some early steps have been taken to save our environment. National air and water pollution control legislation has moved slowly in the direction of more stringent controls on environmental degradation.

Recently, Congress has passed the National Environmental Policy Act and the Environmental Quality Improvement Act of 1970. This legislation clearly establishes the policy and commitment of the Federal Government to the eradication of environmental damage.

Yet more must be done. And we must be willing to recognize the necessity for new approaches in binding our ecological wounds.

Too much of our current environmental legislation relies upon elaborate regulatory and administrative procedures. At the same time, the enforcement authority of the Federal pollution control agencies is weak. And I will define the Federal Water Pollution Control Act.

The Federal Water Pollution Control Act exemplifies the infirmities of the present system. Nearly 5 years have passed since the States were directed to establish water quality standards; yet the end is not in sight. The Water Quality Administration is met with cries of anguish by both industry and local government at every turn of the standard-setting process.

Nothing of consequence has been done to establish the nationwide monitoring system necessary for detecting violations of water quality standards. Appropriations have been meager. And administrative resolve is undercut by an authorizing statute which allows a polluter to continue his despoilment if the economic benefits of his activity are sufficient. At worst, we have created a flying machine of false hopes which casts the shadows of motion without the substance of movement.

The President, in his recent environmental message, stated that:

The task of cleaning up our environment calls for a total mobilization by all of us. It involves governments at every level, it requires the help of every citizen. It cannot be a matter simply of sitting back and blaming somebody else. Neither is it [one] to be left to a few hundred leaders. Rather it presents us with one of those rare situations in which each individual everywhere has an opportunity to make a special contribution to his country as well as his community.

I agree with that conclusion of the President.

The legislation, Mr. Chairman, which you and I have introduced would ease the difficulties which confront individuals in making that "special contribution" of which the President spoke.

Traditionally, pollution control has been left to the regulators. Recently, however, some of the restrictions imposed upon individuals in defending their environment have been loosened.

A group of citizens has effectively used the courts to review construction of a hydroelectric project near Storm King Mountain on the upper Hudson. Construction of the Hudson River Expressway and the Trans-Alaska oil pipeline are under scrutiny by Federal courts.

In none of these cases have the courts acted frivolously or hastily. Yet they did act effectively and swiftly. In this way they have supplemented the authority of the administrative agencies, who often are not responsive to individual crises. They have allowed, to a limited degree, individual citizens to become "private attorneys general." This concept has perhaps been most carefully developed by the present Chief Justice

of the U.S. Supreme Court who in one of his landmark decisions, involving a suit by individual citizens against the Federal Communications Commission, has written that:

The theory that the Commission can always effectively represent listener interests * * * without the aid and participation of legitimate * * * representatives fulfilling the role of private attorneys general is one of the assumptions we collectively try to work so long as they are reasonably adequate. When it becomes clear * * * that is no longer a valid assumption * * * neither we nor the Commission can continue to rely on it.

The legislation that I am now discussing is in the tradition of the "private attorneys general" articulated by Chief Justice Burger. The bill does essentially three things:

First, it grants all citizens the right to the protection, preservation, and enhancement of their environment; second, the bill gives citizens an effective means for enforcing that right by establishing and clarifying the jurisdiction of Federal courts to hear suits involving damage to the environment. Thirdly, S. 3575 recognizes the continuing vitality of present administrative procedures, but at the same time affords citizens the judicial standing to protect the rights guaranteed by the bill when the administrative process is inadequate.

This Nation has at last begun to listen to her environmental scientists. She has come to recognize, though perhaps not sufficiently, that those who predict that the planet has only 30 years remaining may be optimists rather than alarmists. Under such conditions, it is necessary that we establish a Federal right to a protected environment.

The concept is not entirely new; the Senate passed a similar provision in the National Environmental Policy Act, only to have it modified in conference committee. However, I believe that the right to a nondegraded environment is of such importance that it should be among those protected by Federal legislation.

The provision of S. 3575 allowing suits by individual citizens and groups of citizens to protect their environment follows a respected tradition in American jurisprudence. Similar legislation has been introduced in the States of Massachusetts, New York, Colorado, Pennsylvania, Tennessee, and Michigan. As you know, in Michigan the legislation has passed the House by a vote of 98 to 3.

Congress itself has extended similar rights to citizens in other areas of the law. One example is the antitrust laws. The treble damage section there, giving citizens a cause of action for damages suffered as a result of anticompetitive business practices, has proved extremely successful in many cases.

The bill which Senator Hart and I have introduced, however, does not extend to the awarding of damages in environmental cases. The remedies which it provides are limited to declaratory and injunctive relief, a factor which we believe will minimize the institution of frivolous suits.

As for administrative discretion and procedures, let me emphasize that this bill is supplementary to existing regulatory power. It does not displace the administrative process. It does, however, recognize the limited expertise of many agencies in environmental matters, and allows citizens to receive an independent, judicial inquiry into those questions when agencies are derelict in their responsibilities.

The independence of the judiciary has consistently allowed the rendering of intelligent decisions uninfluenced by the pressures inher-

ent in the regulatory process. Moreover, the judicial process itself is highly conducive to the exchange of ideas, the sharpening of issues, and the just disposition of cases.

The citizen who today sees his Nation being ravaged also sees a labyrinth of agencies, procedures, and rules which make individual action impossible. We hope to clear this thicket to assure that individuals can receive a hearing for their grievances in a forum which can provide effective relief. The courts of this Nation offer that forum. We also hope to extend participatory democracy and the meaningfulness of the political process. This bill will help to accomplish that.

And most important, we hope to give citizens an opportunity to share the full responsibility for saving their environment. We believe they are eager to undertake that responsibility. And we believe that this will accomplish that purpose.

Senator HART. Thank you, Senator. It would be a case clearly of two people with a similar point of view exchanging opinions to establish why it is a wise proposal, if I start to cross examine you on a bill that you introduced and which I joined you on.

But I do have two questions to raise because they are the kind of things which I am sure have been addressed to you and certainly have been addressed to me by those who wonder whether there is any need for this bill. There is lots of Federal antipollution legislation pending, some already enacted. Generally, they suggest the setting of standards and so on.

In view of the near flood of pending Federal proposals aimed at reducing pollution, why is it really necessary that there be established in addition this basic proposal which would give the citizen as an individual his opportunity?

Senator MCGOVERN. Well, I think it is necessary to supplement the administrative procedures that are open through the Federal agencies, Mr. Chairman, with a greater possibility for action in the courts in the first place, because those agencies often provide a very cumbersome and rigid process that is difficult for the ordinary citizen to understand.

The procedures are lengthy. They are complicated, and they are confused. And sometimes when the citizen appeals or a local government appeals for redress of what he believes is a violation of his rights as a citizen, it is very difficult to get action within the administrative agency.

One of the reasons for that, if you stop to think about it, is that those agencies really were not set up with any special competence in the pollution field. For example, let us take the Corps of Engineers. It is entirely possible that the Corps of Engineers structure could do great damage to the countryside and open up a great scar or erosion process or something that would be of great damage to a particular area in the country.

But the Corps of Engineers was not really established to face up to that problem. They were set up to build dams and waterways, and I think we need some unbiased, technically competent area where competent witnesses can be called and where an unbiased judge, court can reach a verdict, and that, of course, is the reason for this legislation.

Senator HART. That is the answer that I have been giving when challenged as to the need. And I am sure the example you use of the Corps of Engineers can be applied to some of these other agencies

which, in theory, could evaluate environmental damage as they review applications. An airport application to the FAA is one example.

Senator MCGOVERN. The same with the Federal Power Commission, Mr. Chairman. Those agencies were not set up to protect us from pollution. The FAA was set up to deal with aviation matters of a technical kind, setting rules for the operation of aircraft and airports and so on. The Federal Power Commission has its competence primarily in the granting of licenses, the determination of pipeline sitings and things of that kind which have little or nothing to do with the kind of competence that is needed in protecting the larger community against pollution or environmental damage.

So, I do think we need to supplement the rather limited expertise that these administrative agencies have with the judicial process.

Senator HART. The one I think most frequently cited reason for objection was cited I know in the hearings on a comparable bill in Michigan. The critics suggest that if enacted, this bill would flood the courts with claims, the resulting litigation would almost swamp the courts. You had some comment in your prepared testimony.

I think if you would develop further for the record the reasons why that ought not be anticipated or assigned as a reason against enactment of the bill that it would be helpful.

Senator MCGOVERN. Mr. Chairman, I think we would have to admit that there would be some increase in the court load under the terms of this bill. I wouldn't anticipate it would be a heavy increase; but you have taken the lead in the Senate as a member of the Judiciary Committee in trying to strengthen our court structure so that it can more efficiently process cases of all kinds. And I think we need to provide whatever personnel are necessary in our courts to deal with this and other problems that are of great importance to our society. Even if one grants that there would be some modest increase in the load on the courts, that seems to me to be a price that we ought to be willing to pay to protect our environment from destruction.

There wouldn't be any courts or anything else here 30 or 40 years hence if we do not do better than we have in the past. Let me say that the bill through your own prudence in assisting in drafting it has provided some protection against frivolous suits or a great rush of suits that are not carefully thought out.

The judge has the power under this bill to dismiss suits where there is a lack of adequate cases for controversy or jurisdiction or lack of cause for action; also, under the terms of the bill no suit would be considered until two qualified parties have joined in that action.

Furthermore, the bill excludes the awarding of damages to an individual. It provides only for declaratory or injunctive relief, and that eliminates the possibility of some person taking a long shot on recovering a monetary award from a suit that is not well grounded.

Also, I think it is fair to say that reliable scientific testimony of the kind that would be necessary to sustain a claim or sustain a suit is not easy to come by. You cannot get competent technical and scientific people to go into court to testify in a suit unless there is some reasonable grounds for it.

So, I think with those safeguards, and looking at the historical precedence for similar situations, one could conclude that this would not place an undue burden on the courts.

Let me stress again, Mr. Chairman, if there is a strain on the courts as a consequence of this legislation, then we ought to act to strengthen our courts and provide more judges and more personnel to process these cases.

Senator HART. Your point is if in fact the enactment of this bill would burden unduly the Federal court system, the conclusion isn't don't enact the bill, the conclusion is to strengthen the court system?

Senator McGOVERN. Yes. The Senator himself has made that point so many times with reference to simple justice. He has argued for years that we don't give up on enforcing civil rights legislation because it is a burden on the courts. We try to strengthen the court system so they can handle that responsibility. I think the same argument holds in this instance.

Senator HART. I know how many demands there are on your time these days, leading a contingent in Congress who is busily trying to prove to the students who are in the city that some at least are listening.

Knowing that kind of schedule, I will not hold you further. But I do express again the appreciation of I think everyone who has a concern about the environment, namely, thanks for taking a lead in presenting to the Congress what I think is a useful device, a device which sort of permits you to use self-help in defending the environment.

I hope very much the bill will be enacted.

Senator McGOVERN. Thank you, Mr. Chairman.

Senator HART. We are delighted to welcome perhaps the one man most responsible for the heightened interest in the environment. He brought this concern to the forefront in his very effective service as Secretary of the Interior. I am just delighted to welcome him back. I wish he were still the Secretary, but he is now the chairman of the Board of Overview Corporation.

STATEMENT OF STEWART UDALL, CHAIRMAN OF THE BOARD, OVERVIEW CORP.

Mr. UDALL. Thank you very much, Mr. Chairman.

I have a prepared statement, and as usual I am not going to follow it very closely.

Senator HART. We will print it in the record after your oral testimony.

Mr. UDALL. I stand behind the bill in every respect. I want to make some rather highly personal comments on this legislation and on the subject matter it touches.

However, I would first like, and I know the chairman would understand why, to make a comment or two about Walter Reuther as an environmentalist. The chairman and I both knew him well, and I will always think of him as not only one of the most idealistic men I have ever met but one of the most effective. And Walter, interestingly, was a person who was an environmentalist long before others discovered the subject.

He had a place out in the country, he loved the land, he saw the scarring, polluting and degradation of the country and resented it. Most every time he and I crossed paths we talked about that, among other subjects.

So, to my way of thinking the country not only lost a great labor leader, one of the Nation's real statemen in that field, but a person who cared very much about this Nation, this land, and its future. I just simply wanted to make that statement this morning.

Senator HART. I am glad you made it. It is not the role we think of Walter Reuther playing, but you are quite right. He was sensitive to the abuse that was being visited upon the earth.

Mr. UDALL. Mr. Chairman, I would like to begin by commenting on the fact that the environment movement, as it has emerged this spring for the environmental teach-in, is a movement of youth. The task of environmental control and protection is producing in this country a new idea of what progress is. Redirecting the growth of the country and redirecting technology is the job of a generation. And I think whether we will win or lose depends upon whether the young adults and the youth coming on the scene take this up as their cause.

So, I think this legislation is particularly appropriate at this time, and my own feeling is that those who think the environment movement might be a fad are going to be sorely disappointed. In the past 5 or 6 weeks, I have been almost constantly on the road as kind of an environmental evangelist.

I have been on campuses speaking everywhere from Maine to California, and I think I can say to you this morning that the environment movement is here to stay. It must be if we are to preserve human life on this planet.

Probably the most interesting outgrowth of the environment movement is the fact that environmental defense citizen organizations have sprung up all over the country. This movement and the attention it has attracted have started a great recruiting drive for the older conservation organizations that have done such a fine job in the past. Many of the new environmental protection groups are turning to the courts. They have done this already. I am a national board member of the Environmental Defense Fund which, as you know, is one of the earliest and most militant of the environmental protection organizations.

We waged the fight against DDT and fought other environmental issues. But in many parts of our country these battles are happening at the State level and the local level. The question is whether these people have legal remedies, whether they can involve themselves in legal actions and go to court both to keep the bureaucrats on their toes, one might say, as well as to make polluters and polluting industries toe the line.

In many parts of our country we have seen attorneys general lately grab headlines by finding laws that were already on the books but were not being enforced. I think this is a good move.

But the private citizen must be the ultimate ombudsman in this whole area. And citizen groups, therefore, if they are deeply concerned, if they see laws that are not being enforced, if they see governmental action that is ill advised, must have remedies. This is where I think this legislation very admirably fills a gap.

I wanted to say one other thing, Mr. Chairman, as a matter of background.

As I have traveled around the country in recent months, I have found that the pollution and degradation already done and now underway in this country are far more severe than we have admitted.

We need more citizen action and more militant citizen action rather than less. Therefore, I am somewhat encouraged by the fact that already, in the absence of sound foundation legislation like this, we have seen what one might think of as a legal beachhead established by the *Scenic Hudson* case, by the *Hell's Canyon Dam* case, and by other more recent cases where aggressive, able lawyers have persuaded the courts that citizen groups should have standing in court.

Nevertheless, I think that we ought to give meaning to the words in the Constitution. When one looks at the last century, one would have thought the American Constitution was designed entirely to protect property.

In this century, there has been more emphasis on civil liberties and civil rights. But what does the word "life" mean? Is there at the heart of the ideal of the Constitution the idea that the citizen has a right to take action to protect his right to a life-giving environment?

We know now and we have begun to recognize in the last few years that unless we stop some of the trends and tendencies that are underway, we run a very serious risk of imperiling the life-support system that all life, including human life, rests upon.

A few weeks ago, when the Apollo 13 astronauts were in their serious difficulties, the big test was whether there was sufficient consumables, primarily, oxygen. Did they have enough oxygen to last until they could get back to earth?

The environmental movement says that we on earth have to be concerned for our consumables here as well—the oxygen, the water.

I think that the time is right for this legislation. I think it is well conceived. I think it could give a tremendous push to the environment movement that has been gathering strength, and I want to add my sentiments in support of it, this morning. I thank you for the opportunity to appear here.

Senator HART. Mr. Secretary, thank you for background that I think does strengthen the case for this legislation and should heighten the desire of each of us to move in every area that offers promise of improving the environment.

How strongly do you feel that the courts really can help solve the problems that damage to the environment cause? You were the head of an executive agency; you had technicians in the field who had set some standards, and so on. How appropriate do you think it is to turn to the courts and open the doors of the courthouse to citizens to complain about a streamflow or something like this?

Mr. UDALL. Senator, when I look at the last few years, I think the fact that the courts in a limited way have opened their doors to environmentalists to file lawsuits has been one of the most helpful and hopeful developments. As I regard this legislation, instead of the door being opened a crack, it would open wide with appropriate restraints, of course.

I can say to you—and you will find some of this in my prepared statement—that both because of conflicts and the cumbersomeness of any bureaucracy, governmental agencies and people who are trying to do their best cannot police all the situations. They cannot be completely effective. All over this country today we see citizens' groups who are in effect trying to alert government that action is needed. But

the wheels of government turn very slowly, and sometimes the wheels of industry turn very fast.

It therefore becomes vital that citizens, vigilante groups if I may call them that—and I think this is a pretty good description—who are alerted to some peril, some danger to their community, or region, or environment have a forum that they can go to rather than simply writing their Congressman or protesting to some law enforcement official.

Of course, those channels are always open. But I want to say that I think of all the things that have happened in the last 5 or 6 years, the *Scenic Hudson* case—and it really was a landmark case—has been the most hopeful event. It has opened another avenue of attack, and it encourages citizen groups to organize, to unite, and to act.

This is precisely what this country needs right now in my view.

Senator HART. Before a citizen group can act—I don't know what the financing of the *Scenic Hudson* case was,—who will serve as the lawyer for citizen in this broad thrust?

Mr. UDALL. Again, Senator, I am greatly encouraged on this. I am teaching as a visiting professor at Yale, and I have a seminar with law students mixed with students from several other disciplines. I am talking with students on campuses all over the country, and part of the idealism and ferment that is occurring on campuses involves a lot of young people. Take the law profession, for example. The thing to do a decade ago was to work for the big law firms. Today many of the brightest young law students are not interested in that.

They are more interested in seeing if they can have more effect on changing the system or improving our country by getting involved in litigation, involving themselves in the civil rights movement, the civil liberties movement, and the environment movement.

In most of the legal cases that are brought, you will find idealistic lawyers very modestly paid. This is usually the case, even in these big cases. I am very familiar with the environmental defense fund, for example, where professors, students, and others do an enormous amount of work for practically no pay at all. In that sense I think that the environment movement is and must remain an idealistic movement of people who are doing something because they believe in it primarily, rather than just because they are being paid.

I believe I can say to you that there are young lawyers all over this country, and there are a lot more coming out of the law schools, who would be delighted to get involved on a pro bono publico basis or for very modest fees in environmental controversies. This may make the older law firms shudder a little bit, but it is here to stay.

There is no way you and I can stop it. It is true this legislation will open the door to the kinds of citizen groups that want to be heard and have a case to present for environmental preservation. And I think in that sense, Mr. Chairman, this legislation could be more far reaching than any of us realize this morning.

It could involve citizen groups—I mean it could give them an opportunity to have a forum in which to be heard, to present in accordance with the legal traditions of our country the case for environmental protection.

Senator HART. I believe you are correct in your judgment that there will be lawyers, competent lawyers, available to initiate and try the

cases. It would be hoped, I am sure, that there will develop over the years a combination of the volunteer lawyer and the lawyer who is being compensated, but, as you say, at a very modest rate, and perhaps organizations which contribute some of their treasury to finance litigation of this type, and together, in that combination, an effort might be made to redress environmental grievances.

I share your opinion on that. What do you say to the people who argue that opening the Federal courts to private suits alleging environmental damage by industry—what do you say to those who argue that this kind of legislation would injure America's industrial strength?

Mr. UDALL. Let's be honest about it. I am not one who is as harshly critical as some others of American industrial leadership, because I think essentially what has been wrong with American industry, the reason we have polluted so much and made so much of a mess is that we started with the wrong kind of ground rules and the wrong kind of system, and we have to change the system. The system beginning with the industrial revolution was that waste and pollution were normal incidents of business and that you threw it in the nearest river or into the air or onto the land and let somebody else worry about it later.

In the beginning this made sense, because a river could absorb small amounts of waste. Yet, as we plunged rapidly down that road followed by the industrial development of the last 20 to 25 years, we have found to our dismay that this system not only didn't work, but that we were destroying the very life support system that we all depend upon.

So, as a result we are in a period now when we are seeing laws passed, when we are seeing citizens demand basic changes in the industrial system. I think we are going to have to move to a clean industrial system, as clean as technology can make it.

During this period of change, some of the industrial people may not be happy to have citizens' groups taking them to court. But I think that their arguments are very weak on these grounds. I think they have got to anticipate that citizen interests, law enforcement officials, and everyone are going to be breathing hard on them. For them to say "Don't pass legislation of this kind because it means that we will have to defend the damage that we are doing," ill behooves industry at this point, because they are in trouble.

But the enlightened ones that I see in various parts of the country today are trying to take aggressive action, trying to move rapidly to a situation where they are not going to be vulnerable to such lawsuits. The best defense for them is to begin to mend their ways and to get with the water pollution laws and invest the money in research and development and so on.

Senator HART. One problem that they always hit you with when you answer, as you have, and that is the way I have been answering, is, yes, I will respond. I will take those steps that will eliminate the damage to the environment from my plant, but I have to put into the cost of my end product the cost of the device that I have installed to eliminate the pollution and my competitors have not been forced to or are yet unwilling to do this, so that I price myself out of the market.

How do you handle that one?

Mr. UDALL. I think there is a very simple answer to that question, and I think that this underscores the need for national standards and a national approach to the problem.

Industry has played the game for years. If a State were going to enforce its water pollution laws and there were some other State it could move to, the industry would say, if you crack down on us, we will take our jobs and go elsewhere. This is the reason I think having water quality standards that essentially put industry on equal footing in all of the 50 States is very vital, and I think this is essentially what we have now.

If industry has to perform—all industries that are in competition with each other—if they have to perform at the same level and are told to install the very best equipment that is available to abate pollution, then, the argument falls by the wayside and it becomes a clean or cleaner way of doing business. Of course, it adds to the cost of producing, and much of that will be passed onto the consumer and should.

So, out of this evolves, you see, a new industrial system. What I am talking about requires substantial changes and they are long overdue, but we have to make them.

Let me take one other example that you are more familiar with, Mr. Chairman, than anyone—the automobile industry and the internal combustion engine. Washington began to move into the picture and say here is a big national industry, concentrated in a very few States, and it began to say here are certain performance standards and here is a deadline, now meet it.

There is no question in my mind that the auto industry will meet such deadlines if we keep the pressure on. I have talked to a lot of the present and former high officials of the automobile industry, and they have always told me, that it is the most competitive industry in the country. Sales is the name of the game, and, therefore for any one segment of the industry to spend a lot of research and development money to produce a different kind of combustion engine, let's say that added \$150 to the price of the automobile, might find that they have done themselves out of business.

I think this is a perfect example of where the national approach is absolutely essential. And I think this is really what industry now recognizes, that they want to be put on the same footing with the same performance standards.

Once this happens, then their competitive problems of being put at a disadvantage with a competitor are at an end. So, the Congress really does them a favor by passing laws that establish national standards and a national program.

Senator HART. Clearly, I think that is the sound response to those who are engaged in an activity which will be required to meet national standards within a brief period given adequate enforcement.

Each unit in that segment of our economy would be operating on the same cost basis so far as the antipollution devices go. But there is a further protest that is voiced to the bill that is pending. The argument goes this way, there will be some economic activities for which there will be no national standards set, perhaps because the damage that they do is beyond a standard setting response, or it is an industry in which there are national standards but somebody in private litigation authorized by this bill is going to argue that the standard is not adequate.

Have you given any thought to either of those charges against the bill?

Mr. UDALL. I do not believe I see the validity of the argument. I am frank to say that I think there are a few kinds of industry today that pollute so severely and do so much damage that we may ultimately have to shut them down and find substitutes. This is not a radical opinion I am expressing. In the Time or Newsweek cover story, an anonymous figure in the steel industry said just that, that there are some types of old steel operations that simply pollute so badly that they probably ought to be shut down and replaced by modern plants. I think the kinds of laws that we are writing at the national level, and what some of the States are beginning to do, cover as well as they can the various types of industrial activity. I have never had called to my attention a specific instance where this argument really is valid when you analyze it in a precise situation covered by precise laws.

Yes, it is going to cost—there is going to be added cost to do what we must place environmentally on industry for research and development. And let's just think to ourselves if legislation like this is passed, there is going to be added cost for attorney's fees. They are going to have to defend a lot of cases. But is that an unreasonable burden? After all, industries and corporations hire law firms, have them on retainers, it is their business to defend industry from anti-trust actions and so on.

I don't think there is anything unreasonable about letting citizens do what we should have been letting them do for a long time, to organize and fight themselves where appropriate to protect their environment and their lives.

Senator HART. Mr. Bickwit.

Mr. BICKWIT. In light of the environmental litigation that you cited, the *Storm King* case and others which I am sure you are more familiar with than we are, are you convinced that a bill like this is really necessary, or can we accomplish the same purposes through an extension of litigation that has already taken place?

Mr. UDALL. Permit me to make another statement, if I may, Mr. Chairman. Because the environmentalists of this country ought to know that the best friend they have had on the Supreme Court of the United States is Mr. Justice Douglas, and some of the landmark cases that I am talking about he either wrote or I am sure, without knowing the deliberation of the Court, had a great deal to do with.

But the old English common law of nuisance, based on the idea that the individual had to show damage to him or to his property, was a very limited concept, appropriate to the 18th century I would suppose, and yet we have brought it forward into modern jurisprudence.

What the Supreme Court of the United States and other courts have been doing in the last few years—what courts should always do—is evolving new concepts to fight modern conditions.

As we know, the courts move slowly, and judges are inclined to be status quo minded—don't want to be bothered with law suits, don't want to recognize expanding jurisdiction or take jurisdiction of additional cases. And so you get a sort of scattered reaction. We have had the *Mineral King* case, a Federal judge took it in California. The conservation groups just won a case in Colorado, decided by Judge Doyle, a Federal judge, and yet the picture is uneven.

I am sure there are other cases that I am not familiar with where courts refused citizen law suits. And I think that we are at the point now where there is an indication that many of the judges and many of the courts feel that this is an area where citizen law suits should be given standing, where you can't prove the conditions previously under the nuisance common law idea. What the Congress would be saying if it passed legislation of this kind is that it thinks the direction the courts are trying to move in is the right direction and that it would like to encourage this type of law suit and this type of jurisdiction by the courts.

Mr. BICKWIT. Since you left the administration, we have established additional environmental agencies which have proliferated in part in response to this new concern for the environment. Are not agencies such as the Council on Environmental Quality capable of accomplishing the objectives of this bill?

Mr. UDALL. Well, I welcome the Council on Environmental Quality. I have advocated it for the last 3 or 4 years. And I think Senator Jackson's leadership on that was very fine and very forceful. It is not clear yet what role the Council is going to play or how strong it will be.

Some of us are hopeful that it will have a strong influence. But, at best, the Council is going to have to concentrate on big national issues. It is going to have to concentrate within the Federal Establishment on being sure the right hand is not subtracting from what the left hand is doing. And the door that this legislation will open, the most important door, is the avenue to action and a forum for people at the local level and the regional level. These are matters that are really almost beyond the purview of many Federal agencies.

Federal agencies usually are involved in some way or another, but these are issues that are very vital to local citizens and matters of local and regional concern. And oftentimes you may even find Federal agencies on these particular arguments at cross purposes.

Therefore, I don't think that the Federal machinery, even with my assumption that the Council on Environmental Quality is going to be as successful as I hope it is, is an answer at all or an argument to say that legislation like this would not be invaluable to citizen groups.

Mr. BICKWIT. As this bill will open the door to local citizen groups, is it likely that it will also open the door to cranks? Are we in danger of the deluge of crank suits that people warn us about?

Mr. UDALL. Well, we are a Nation of cranks in a way, I guess. That is part of the glory of the country. We have room for dissenters and odd-balls and people that have unusual views on some issues. I think the answer to that argument is the limits that I see in this bill. I am sure you are going to look very carefully in writing the bill at the standard of reasonableness.

I think that is the protection at any time against cranks—people who want to engage in litigation solely for dilatory reasons and things of that kind.

Another final protection against cranks too is the judgment of the judges themselves. They are able to spot litigation which is baseless and which does not have sufficient merit.

So, I think if we were afraid of cranks, we probably wouldn't pass any laws, because we would be afraid that passing a law which would encourage cranks.

Senator HART. If I could interrupt, section 3(a) of the bill provides that a complaint must be supported by affidavits of not less than two technically qualified persons stating that to the best of their knowledge the activity which is the subject of the action damages or reasonably may damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction.

Even if the citizen who wants to go to court is a nut, by definition two technically qualified persons would have to believe him not to be a nut; otherwise, he wouldn't get into court, if I read it right.

Mr. UDALL. I think that could properly be interpreted as a crank protection provision, Mr. Chairman.

Mr. BICKWIT. Thank you, I have nothing further.

Senator HART. Senator Moss.

Senator MOSS. I regret that I was not here when Mr. Udall started his testimony. I was here at the beginning and I had to go and be a witness myself on a little bill I have on the House side. I would like to have been here to hear a full discussion.

Certainly, your service in the Congress and then in the Cabinet and now the work you are doing qualifies you to have opinions on this matter that should be weighed very well by this committee. I understand you have given an endorsement now to this bill, you think it is going to provide us with a much needed tool or weapon in order to tackle this environmental problem and to clean up so much of the pollution that has come upon us.

So, I appreciate that. I don't have any specific questions to ask you. I rather enjoyed your response to the crank question, and I think perhaps you are right. If we feared that persons were going to take advantage of the law and therefore we shouldn't ever try to legislate, perhaps we would be frozen in ice like the ice age people were before us.

I am glad to see you again and enjoyed having you here before the committee.

Mr. UDALL. Senator, if I may pass the time of day with you, at this time yesterday morning I was lecturing at the campus of Utah State University, the mountains had snow, and it was delightful to see that there are parts of our country that are still pristine.

Senator HART. Thank you very much. I echo your sentiment that the concern with the environment is not a fad, that it is a movement that is here to stay.

(The statement follows:)

TESTIMONY OF STEWART UDALL

Mr. Chairman and members of the Committee, it is a pleasure for me to be here to testify on S. 3575, the "Environmental Protection Act of 1970." I would like to state at the outset that I am very much in favor of S. 3575. I believe, if passed, S. 3575 would have a large impact on the nation's problems of environmental degradation. It will provide a tool for frustrated citizens groups who are tired of waiting and who want to pitch in and do something constructive about our pollution problems. I think that this bill will, in fact, turn the tide of pollution that besets us and anticipate a genuine clean up.

As I understand it, S. 3575 does two essential things. First, it gives the citizen legal rights to clean air and water, to protection of the land, and to preservation of the public domain. The recognition of this right is the keystone of this legislation. Man has evolved in the presence of clean air and water; his survival and well being depend on their continued integrity. The citizen is entitled to the legal right to the conditions necessary for life.

In addition to recognizing the rights to protect our lands, it provides the citizen with a remedy. It lets the citizens go into court and stop unreasonable degradation of his environment. The key word here is "unreasonable." This word, of course, will be subject to judicial interpretation and will permit the courts to make adjustments among competing interests. I believe that the courts will now more closely scrutinize the reasonableness of some industry actions. In my view conduct which leads to the destruction of the waters, land and air that a whole nation depend on is clearly unreasonable. I hope the courts will be receptive to this concept. The destruction of Lake Erie is by any standard, intolerable. Painful as it may be for those who have become economically dependent on despoliation, they simply must be ordered to cease and desist and that fairly quickly.

I would like now, if I may, to call upon my experience at Interior to suggest why I think that this bill would be a useful weapon in the fight against pollution. As Secretary of the Interior, I had major responsibility for the protection of the nations' lands and waters. The Department of the Interior, as you know administers the public lands and the Federal Water Quality Administration. Neither the Department of the Interior, nor any other administrative agency can do the job alone. I would like to tell you why, based on my experience.

First of all, there are just too many things to watch. Government cannot police everyone's conduct. This is neither desirable nor practical, even if we put an increasing share of the burden on the states. S. 3575 will provide a system in which citizens can call their neighbors to account for their environmental misdeeds without the need to petition a bureaucracy. God help us if every accident claim in the country had to await the turning of the machinery in Washington. The citizens of South Carolina or Nebraska should be able to take their local pollution problems directly to the local courts for immediate action.

Second, a government agency, such as the Department of the Interior, is an empire of many interests. As Secretary of the Interior, I was constantly called upon to call balls and strikes between competing interests within the agency. For example, the program of the Bureau of Reclamation can come into direct conflict with the Federal Water Quality Administration's program. The needs of the budget for the money from oil lease sales tugs against environmental programs, and so it goes. Every administrator will necessarily seek to compromise the competing demands within his agency. It becomes a way of life. Frankly, it is a good thing to have the courts presented with some of our thorny environmental questions. It is sometimes easier for a court to avoid the compromise.

Third, every agency develops a program, a timetable, and a point of view. With the development of such a program, blind spots also develop. The administrator may conclude that one type of pollution is the important thing and put his efforts there, leaving other problems to another day. Why should the citizen have to wait years to have his urgent problems resolved? In addition, the administrator often hears about problems over and over again, and he becomes jaded. A problem may be so pervasive that he does not get upset with each new example and begins to lose any sense of urgency. When an aroused citizen or conservation group goes to a judge, he will not face the bureaucrat who has heard it all before.

Fourth, and I won't say much about it, because you all know more about it than I do. That is politics. We just cannot escape it. When an agency takes vigorous action against pollution, there is likely to be a vigorous counterattack by large economic interests. Things slow down, drag out, and, in many cases, become interminable. The citizens' remedies included in this bill will actually permit the administrative agency to resist these pressures.

Fifth, agencies and the industries they regulate often begin to think alike and develop their own *modus vivendi*. They learn to accommodate each other. Today we need action, not accommodation.

In a recent landmark decision involving the Federal Communications Commission, Chief Justice Burger, then Judge of the Court of Appeals of the D.C. Circuit underscored the need for public interest advocacy. Justice Burger said:

"The theory that the Commission can always effectively represent the listener interests * * * without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience neither we nor the Commission can continue to rely on it."

If you substitute the word "government" everywhere Justice Burger said "Commission" you have the true picture.

I believe that S. 3575 is an action bill. If you are serious about protecting the environment, you will give the citizen his right and his remedy. This bill will, of course, disturb the *status quo*. That makes it the litmus test of environmental credibility. If you are afraid to let the citizen have his cause of action, it means you are afraid to disturb the *status quo*. The *status quo* is pollution.

Senator HART. The subcommittee is delighted to welcome an old friend whose contributions I think are increasingly being recognized by an America which at one time was, if not indifferent to them, bitterly opposed to them. We welcome the former Attorney General Ramsey Clark.

**STATEMENT OF RAMSEY CLARK, OF PAUL, WEISS, GOLDBERG,
RIFKIND, WHARTON & GARRISON**

Mr. CLARK. Thank you very much, Senator Hart and Senator Moss. It is a privilege to be able to appear before you again. I have a brief statement.

The pollution of our lives are many. They are not unrelated. Mass population and technology contaminate our physical environment of air, water, and earth. They create constant din and commotion. From these and the sheer numbers of our times, we are saturated with anxiety, frustration, and violence.

Wordsworth believed that noble character springs from quiet, gentleness, beauty, and reflection. If so, it will be hard to cultivate in these turbulent days. The world is no longer pristine.

Better to be suffocated in garbage than inhumanity and therefore we must strive for peace first. But we cannot overlook the clear connection between human dignity and our threatened ecology. The vast pollutions we have caused contribute to the level of violence in America. They depreciate human values and ultimately question whether man can control his destiny. Will technology which has liberated man from many of the burdens of nature, now master man?

Science does not make moral judgments. If science is to have moral direction, we must guide it. The great threats to our environment are byproducts of technology—a child of science. Science must measure and control those byproducts and devise methods for effectively preventing pollutions of mass population and excessive consumption.

The solutions will be essentially economic. A determined commitment to scientific research and the provision of vast financial resources will be required if we are to preserve nature. The cost will be billions annually. Survival will depend on it.

Our pollutions are all-pervasive and will require solutions that are equally pervasive. Few interstices of our environment escape the sedimentation of our civilized offal. To reach those interstices we must purify on all fronts. To contaminations that critically affect individual and community lives is to expect what all history tells us will not happen.

One of the greater frustrations of my years at Justice was the happy duty on the one hand to enforce water and air pollution statutes and our total helplessness on the other to end major pollutions by the Department of Justice itself. The same appropriations subcommittee of the Congress that would not provide funds for toilets in the Federal Prison for Women at Alderson, W. Va., would not fund the purchase of treatment facilities necessary to avoid dumping raw

sewage from the Federal correctional center into the Red River at Texarkana, Tex.

The Federal Government itself remains a major pollutant of water and air. The Potomac River is a tragic illustration. This hardly causes respect for law by those prosecuted for its violation, or those who merely know the truth.

It will be impossible for government enforcement to control all significant acts of pollution. Nor will it be able to extend the rules of law to reach the difficult and unforeseen areas of conduct that cause immense discomfort, damage, and frustrations to millions.

The extension of private right, the standing to sue and effective sanctions for the persons directly affected or concerned will be essential if vital interests are to be protected. Our experience in areas of massive unlawful racial discrimination such as in schooling, employment, and housing tell us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity.

Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individuals affected by, or concerned about pollutions in his life, the power to stop them through legal process.

Far from risking an undue or inhibiting interference with Government enforcement, it will provide powerful supplementary enforcement, a major way of illuminating the full range of the law's reach which is established so slowly by Government litigation, and an effective and desirable prod to officials to do their duty.

It is inherent in human nature that those with power are the last to question its beneficence. Only when the people are given the power to redress important impositions on their condition, will their interests be fully protected.

Litigation can only begin to effect a control of environmental corruption. It would be foolish to rely unduly on it if we are to prove we know the wealth of water before the well goes dry. The major solution is economic. But litigation is an essential element in any all-fronts attack on the poisoning of our lives.

The last few years have seen an astounding upsurge in the public's desire for a livable environment. Few would have foreseen a year or so ago that an event such as Earth Day could have attracted the enormous popular interest and participation which it did this April.

As is so often the case, one product of the public's new-found concern in the environment has been a wide range of lawsuits to protect that environment. Lawyers have been imaginative in discovering unsuspected opportunities to assert the environment interest in various judicial and regulatory proceedings.

Faced with a threat to the environment, the imaginative lawyer can often find his way into some court or administrative proceeding. But even when the environmental interest can succeed in being heard, it is too often treated as a secondary issue in the proceeding, reluctantly acknowledged by the court or agency, and only grudgingly given weight.

Their purpose is something else. And as a consequence of the patchwork fashion in which "environmental law," as it might be called, has developed, there are inevitably many areas where narrowly worded statutes and unresponsive administrators prevent the environment interest from being heard at all.

Thus, for example, a citizen's group may find that it is unable to challenge a proposed nuclear powerplant in court because the Atomic Energy Commission has exclusive jurisdiction over such projects, only to discover that the Commission will consider only the danger of radiation, and not the equal danger of thermal pollution.

For these reasons, I believe there is a clear and important need for legislation such as the proposed Environmental Protection Act that will recognize the full right of any private citizen or group to challenge any activity that threatens to pollute, impair or destroy our environmental resources.

Such an act is necessary both to insure that the environmental interest will be heard, and that it will be given the primacy that it deserves. Justice Holmes told us 39 years ago that "a river is more than an amenity, it is a treasure." We can no longer defile nature's treasures with impunity. I urge the early enactment of S. 3575.

Senator HART. Well, as always you put words together in a fashion that makes very clear the adoption of whatever proposal you are advocating, and in this case you have very persuasively argued the obligation of all of us to try to do better by our environment.

With your years at the Department of Justice, I think you are as qualified a witness as we will have to respond to the suggestion that the adoption of a bill such as the one we are considering will put an undue burden on the courts. You say in your statement that you believe citizens should have the opportunity to present a claim challenging any activity, ongoing or proposed, that will threaten the environment, and that citizens deserve to be heard.

Under the present court system and docket load, do you think they can be accommodated in this area?

Mr. CLARK. There is no question that justice is denied in America because it is delayed, and court backlogs are a serious problem for society from every standpoint. But society has to have priorities and survival should be a pretty high priority. Survival depends upon the protection of our environment, and I think legal redress in America will be a major method of protecting that environment. The imposition of any additional caseload that might follow from this bill on the courts is one that it must gladly assume.

In my judgment, the time now wasted on irrelevant issues such as standing to sue and other litigious jurisdictional and procedural questions is perhaps nearly as great as the time spent going to the merits of the matter. It is very much like our recent findings of the cost of determining fault in automobile accident litigation. Perhaps by conceding fault and going directly to damages, you can reduce the cost of insurance and the burden on the courts. We may find that same principle true here. But the burdens on society, the frustrations of the powerless and their inability to affect things of such vital importance as the rivers they live on and the air they breathe compel administrative agencies and courts in our time to give early and full consideration to the issues that would arise under this bill.

Senator HART. Another one that bears on the courts and their competence goes this way. Often litigation or the evaluation of a proposal which might damage the environment raises very technical questions. Do you feel that the courts are competent to judge when a proposed or an existing activity unreasonably pollutes, or do you fear that the courts would be required in this litigation to substitute themselves for the technically qualified administrative agency that otherwise would handle it?

Mr. CLARK. In my judgment, the courts will be considerably better qualified to judge these matters than most of the administrative agencies before which they may be likely to arise now. The expertise of those agencies has not really been central to this problem.

They have other purposes for which they were created and really other constituencies which they serve, and if you look at the history of some of the major agencies, the Federal Power Commission and others, you find they really haven't wanted to be bothered with issues of environment. They do not believe this is their mission. They have some other purpose for which the Congress created them, and the people who are concerned about such esoteric questions as the salmon in the river will just have to look to some other source.

The courts are the most effective problem-solver that our system for resolving legal disputes has devised. We need a generalist view of environmental quality because the concern is general.

Senator HART. Senator Moss?

Senator Moss. Are there any State statutes that approach this matter as the bill before us does? Do any of the States have a general statute like this?

Mr. CLARK. My impression is that the pioneer venture is before the legislature in the State of Michigan at this time. I think States could well enact such legislation. It would be a valuable tool to have the State courts involved as well.

With our immense population and the dimension of the problems of pollution that affect people so directly, we need to open up as much of the judicial process as we can to consideration and resolution of these issues. I don't think that implies in any way that the Congress shouldn't act first, both from the standpoint of leadership, to create a sense of priority and to show the Federal commitment to this vital matter.

Senator Moss. I certainly appreciate your statement here, Mr. Clark. As the chairman said, it is a very eloquently phrased statement and one that certainly speaks well for the point of view that you have taken on this matter, and I am pleased to have you make it because of your background. Certainly no one should know better than you what we can expect by putting this directly into the courts, and I am glad to have your impression that the courts will be a problem-solver.

Now, of course, I think you touched briefly on this question of whether we might expect this to clog the courts, whether we might have a delay period that we associate with litigation. Is that going to be serious enough to nullify the results that we can expect from this bill?

Mr. CLARK. Certainly not to nullify the results you can expect from this bill. The only question is how effective the litigation will prove to be, because there will be some litigation, and the litigation will be decided and it will have an impact.

So, it is a question of dimension. If the courts exercise efficient self-administration, as they have learned to do, in, say, areas of antitrust litigation, if the institutions that Congress has recently created, such as the Federal Judiciary Center, apply themselves to remedies and effective justice in such litigation, they can move these cases very effectively, and without interfering with their other dockets.

It is imperative that courts learn to handle massive caseloads anyway. We cannot deny justice out of fear that the courts won't be able to handle cases. They will have to rise to the need.

Senator Moss. It has been said by some that the bill needs a more elaborate definitions section. Professor Sax, who has done a good deal of work in drafting the bill, believes that it does not. Can a court be expected to interpret what is meant by "unreasonable pollution" without a further elaborate definition of that?

Mr. CLARK. The standard of reasonableness is one that has been used in perhaps the major part of our recent civil litigation in our court system. Through the careful honing of the process of litigation, we have developed very effective applications of that rule.

As far as I can see, it is the proper standard for a bill such as this and one that the courts can apply readily. My own judgment is that the plaintiff should really not have more than the burden of establishing a *prima facie* case initially, because under what I hope will become the standards of full disclosure in litigation, the defendant will tend to have the facts at his disposal, and if a *prima facie* case is made, then the defendant ought to come forward and show that his conduct is reasonable, and if not, the court should enter judgment against its continuation.

Senator Moss. I certainly appreciate your appearance and your testimony here, Mr. Clark. It is good to see you again and have you before the committee.

Senator HART. Mr. Bickwit?

Mr. BICKWIT. You anticipated this question to some extent in your statement, but I would like to hear you elaborate on it if you would. Does this bill infringe important limitations developed by the courts on the question of standing to sue? Do you find these limitations to be important?

Mr. CLARK. I think those limitations are anachronisms that are very costly to America today. There isn't any single cause that contributes more to the frustrations of modern life than the powerlessness of people to affect things of vital importance to them.

You can't sue; you have just got to live with it. If the garbage isn't collected, if the park that you sit in is being leveled by bulldozers, you can't do anything. We can't go on like that. People must have the power through legal process to affect things that are important to them.

These old ideas of standing to sue which came from the 18th and 19th centuries are inadequate to mass population.

Mr. BICKWIT. If we give them the power, do you think it is likely that they will use that power to block developments that society as a whole really needs though these particular people might find them unpleasant to themselves?

Mr. CLARK. Well, if we give them the power to enforce rights, we can assume, if our system is capable of coping with modern life, that the

law will govern the direction of the Nation and the law will make those decisions. In our time there is no other way to achieve the public good. There will not be rights where the law does not create rights, and there will not be delays where the legal system doesn't cause delays, and there will not be prohibitions where the law doesn't prohibit.

Mr. BICKWIT. Thank you.

Senator HART. Mr. Clark, I echo Senator Moss' appreciation for your willingness to come to speak in support of the bill and particularly to respond to some of those questions that are asked critically of us, because you respond from a background rich in experience with respect to court dockets and the appropriateness of the assignment to the court of questions like these.

We are very grateful.

Senator HART. Our next witness is Prof. Joseph L. Sax of the University of Michigan Law School, who has drafted similar legislation to S. 3575 for introduction in the Michigan State Legislature. We appreciate your coming to testify.

STATEMENT OF JOSEPH L. SAX, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

Mr. SAX. Thank you, Senator Hart.

I appreciate the opportunity to appear before the committee this morning.

I have prepared a fairly lengthy statement, and rather than read it, I would ask that you put it into the record of the hearing and permit me to summarize briefly what is in my prepared statement and then to make myself available for whatever questions you would like to ask.

Senator HART. Very well; the printed testimony will be carried in the record in full after your oral testimony.

Mr. SAX. This bill will permit citizens to obtain judicial scrutiny of private or public conduct which may have unreasonable adverse impact on the environment in land and water resources. It recognizes that each person has a legally enforceable right to the protection, preservation, and enhancement of that environment. It authorizes the courts to take cognizance of claims that this right is being infringed—making clear that traditional barriers such as lack of standing to sue and lack of jurisdiction may no longer be interposed against the citizen.

It empowers the courts to grant both declaratory and equitable relief so that unreasonable threats to environmental quality may be decisively enjoined in a timely fashion.

The first question is why a bill of this sort is needed. Simply stated, it is because regulatory and administrative agencies, upon whom reliance has principally been put in the past, have disappointed us again and again.

Traditional approaches to dam and highway building, to dredging and filling continue despite congressional language calling for new policies and new practices. Examples, unfortunately, are legion. I need merely call to the committee's attention the notorious events at Santa Barbara, which are detailed in my prepared statement, to make clear that all is not well within the Federal bureaucracy.

Former Secretary of the Interior Udall, testifying afterwards, candidly described Santa Barbara as "a sort of conservation Bay of Pigs."

Persistent citizen inquiries in that case were put off with publicity release assurances that all was well, so as, one of their memoranda stated, "not to stir the natives up any more than necessary."

I understand that serious consideration was given there to instituting a lawsuit to challenge the leasing programs, but was rejected in substantial part because legal tools for citizen challenge were lacking. This is a common experience.

Moreover, when cases do get into court, as they have more frequently in the last year or two, it is demonstrated how much some forum for judicial inquiry into administrative practices is needed. One can go right across the country, the *Parker* case in Colorado, the *Mineral King* case in California, the *Alaska Pipeline* case tried here in the District of Columbia, the *Storm King-Scenic Hudson* case, in New York, the *Hudson River Expressway* case, and many others, where citizens have come in. Judges have been willing to listen to them, and the plaintiffs have been able to adduce evidence enough to obtain injunctive relief against governmental misconduct.

The problem is that national policy thought out in the Congress and put into legislation does not automatically get reflected in the daily activities of those who administer our national resources. Congress cannot do the whole job. It cannot watch over every timber sale, every oil lease, and every highway.

One of the best devices is the watchfulness of the citizens. Senator McGovern mentioned the famous opinion of Chief Justice Burger in *United Church of Christ v. F.C.C.* I would add only a single sentence to the quotation he gave you: "Consumers," Justice Burger said, "are generally among the best vindicators of the public interest," and citizens are the consumers of environmental degradation.

In addition, the present law, although it has been amplified to a considerable degree recently, is still uneven. The right of challenge may depend on some statute being brought into a case that is not at the heart of the environmental problem. The real issues in the case may be distorted. The *Hudson River Expressway* case, for example, was litigated upon the technical question whether there was a dike being built. That was not the issue in the case.

The unevenness of present law has not only had the effect of deterring some lawsuits which should have been brought and considered on their merits, and the effect of distorting the issues put before the court because one had to seek out some statutory or other legal basis; it has also resulted in cases being dismissed before an opportunity was available to get the court to consider the merits.

Just recently a case in our own State of Michigan in the Federal district court was dismissed because the judge said that under the present law in an environmental matter he could only give relief if the plaintiff showed by clear and convincing evidence that the action of the Federal agency (which was the defendant there) was malicious, arbitrary, or capricious. We simply are not going to be able to make those kinds of showings. The purpose of environmental litigation is not to demonstrate to a judge that the administrator should be as-

signed to a lunatic asylum, but rather that he has made a mistake about an important environmental issue.

The new National Environmental Policy Act is a helpful step in the right direction, but it is only a step. That law, which is now being tested in the courts, does not make crystal clear the right of citizens to sue, nor does it clearly go beyond authorizing the courts to enforce formal requirements for study and reporting.

We don't know at this moment how the courts are going to come out definitively on the interpretation of that statute, but at the very least it should be said that there is a need for a bill like this to make clear what is left ambiguous by that statute. It ought also to be pointed out that the Environmental Policy Act goes only to the conduct of Federal agencies and does not, even if read most liberally, provide the opportunity for suits against private enterprise on environmental matters.

We have already seen, unfortunately, that the Environmental Policy Act does not enforce itself to the fullest extent that the Congress might wish.

If one looks at the act and sees the very elaborate and comprehensive reporting requirements which it requires in section 102 and compares that with the first report under the act that I have seen, which is the report of the Department of the Interior on the highway proposed in Alaska for facilitation of construction of a pipeline, I think you will be dismayed, surprised, perhaps even shocked, at how narrowly and in what limited fashion the Department is turning out reports under this statute which asks so much. So, even under that statute, we are going to have some significant need for prodding.

Let me now turn to the question of whether a statute like S. 3575 which puts environmental matters before the courts has the potential for usurping the legislative function, a question that is often asked.

The answer is clear "No." We all recognize that the legislative function in this area must remain preeminent. The difficulty at this stage is that it is not easy to legislate precise standards which make clear in detailed fashion what administrators ought to do.

In some areas we don't have the knowledge, we are not prepared to legislate detailed criteria, and for that reason many questions of implementation will continue to arise, and the problems of implementation are often at quite a low level in the administrative bureaucracy. Some regional official out in the country somewhere is doing the job of enforcement in the name of the Congress, but he isn't the Congress and he is not always right, to put mildly.

So, my own view about this bill is that it opens the door to some elucidating legislation and itself will serve as an important aid to the legislative process; it will help to develop some case studies for us of what the problems are, what the difficulties in coping with them are, and it will help us to bring out into the open some scientific information which is not now available.

For this reason, the judicial and legislative processes, rather than being viewed as inconsistent or warring approaches, should be viewed as fully compatible and mutually beneficial.

Another question always at the tip of the tongue when legislation like this is under consideration is the question of judicial competence to deal with environmental disputes.

This issue is usually raised by asking some question such as how do you expect a judge to be able to decide how to build an oil pipeline in Alaska? I must say bluntly, as one who has studied a great many of these environmental disputes, that this is just a red herring.

Of course, a judge is no more qualified to build an oil pipeline or a powerplant than he is to run a railroad, take out tonsils, or invent the light bulb, but judges can and do decide fraud, malpractice, and railroad accident cases and many others, each of which may involve exceedingly complex and technical questions.

For the job of the court is to hear and evaluate the testimony of those who are technical experts, not to do their job for them. A judge is perfectly competent to hear evidence on damage, on alternative solutions, and on the asserted need for various kinds of facilities which are brought into challenge.

A plaintiff in an environmental case, as in any other, who fails to define and to clarify the issues he wants decided within the ability of a judge to decide, or who fails to carry his burden of proof, will simply not prevail on his claim. In those cases which have arisen recently we have seen that the courts are perfectly able to meet the issues which the plaintiffs seek to raise. For this reason I like to think about S. 3575 and similar bills as employing a common law approach to environmental litigation, that is, an approach in which courts are available to examine the reasonableness of conduct in respect of environmental damage.

No one balks when courts inquire into reasonableness with regard to the enormous and diverse number of issues which every day comprise the business of the judiciary. Yet, somehow the notion seems to have gotten abroad when environmental damages are in dispute that these well developed techniques for factfinding and decisionmaking disappear. This is not so. I refer to some of the literature detailing the competence of the courts in my prepared statement.

Another specter which is routinely raised in opposition to legislation such as this is the fear that it portends the dismantling or obstruction of the administrative process and of the work of regulatory agencies.

The bill speaks clearly to this. The fear is unwarranted. Again, as with the legislative process, the courts will perform a principal function here in encouraging agencies to look at problems which they ought to take a look at, prod them to do the jobs which they have not been doing, and to some extent liberate them from the pressures which prevent them from doing what they know ought to be done but feel themselves unable to do.

Finally, it should be understood that to create the opportunity for judicial inquiry does not mean that every dredging permit and every industrial site issue or every highway location will come to the court.

A principal reason for having the opportunity for recourse to the courts is to affect behavior in order to avoid litigation. In the environmental matters, as in contract disputes, knowledge by the parties involved that serious controversies can be taken to court is itself a prod to reasonableness.

One major reason we have such a backlog of controversy and public dissatisfaction is that far too many agencies have acted on the arrogant and complacent assumption that whatever they did, and

however unsatisfactory it might be, their decisions were essentially unchallengeable.

Another mistaken notion is that every trivial dispute will be taken to court, and that important projects will be tied up interminably without regard to their merits. Those who assert this have obviously had little experience with the Federal judiciary. Judges are neither knaves, fools, nor softies. They are far from eager to run around granting injunctions and reluctant indeed to enjoin projects in which many millions of dollars are involved or in which there is an important public interest.

At the same time, as Judge Hart said in the *Alaska Pipeline* case, the mere fact that somebody spent a billion dollars does not authorize them to violate the law. It is most important to remember that nothing gets tied up unless and until a judge can be persuaded to grant injunctive relief, not the mere desire of the citizen plaintiff, and that task of persuasion I can assure you is not easily accomplished.

The striking environmental cases about which one reads in the newspapers in which such relief has been granted are by no means a measure of the expansive liberality of the judiciary.

Rather, lamentably, they are a measure of the degree to which our agencies have been proven by hard evidence to have ignored the mandates which the Congress has imposed upon them, and of their often flagrant insensitivity to the environmental concerns which they so piously purport to have at heart.

I am sorry to have to say this in such a harsh way, but I think one can come to no other conclusions if he has done what I have done for the last 2 years, and that is to go all around the country and sit through these trials and hear the evidence which is adduced against Federal agencies—often showing the most simple and plain violation of statutory mandates. What has happened thus far in environmental litigation, therefore, is nothing so much as it is a demonstration of the need for legislation like S. 3575 which can bring some order and certainty to citizen initiatives.

Senator HART. Thank you, Professor.

One of the criticisms of the bill—and I direct it to you because in large part you are responsible for the bill's provisions—is the lack of elaborate definitions. Is the bill subject to this criticism?

Mr. SAX. Obviously, I don't think so. I certainly would have no objection to amendments in the nature of elaborate definitions. The difficulty is that we are not prepared to define in a precise way exactly what we want achieved in every environmental area.

That is, if you are going to define pollution, all you have to do is look at the existing bills and see that it is in enormously broad terms or in terms of public health, safety and welfare, and so forth. I don't think those kinds of definitions help you very much. When you are at the point that you are prepared to come down hard on particular conduct with criteria, as to air pollution, for example, the Congress then ought to undertake criteria or standards legislation.

These elegant definitions that appear in most of the statutes are just boilerplate. I don't think they hurt anything but I don't think they help.

Senator HART. Why, in environmental litigation, should we not leave the job to the public officials, the agencies, the Department of

Justice? Why do we propose the additional right being given the individual citizen?

Mr. SAX. Nothing would make me happier than to see public officials, including the U.S. Department of Justice, undertake the job that is now a burden upon the citizens who find it very difficult indeed to pull together the money and the expertise to litigate these cases.

They are not doing it. Today, in the spring of 1970, every time a citizen suit is brought in which the United States or Federal officials are joined as defendants, the U.S. Department of Justice comes in and argues there is no standing to sue, the sovereign immunity of the United States, that the court shouldn't consider these cases on their merits, that the job ought to be left to those who know best—as they say in some of their briefs, "These are technical questions to be left to the technicians."

I am troubled by the fact that rather than helping to get us some consideration and inquiry into these environmental problems, the Department of Justice is spending our tax money and its own staff and energy trying to persuade the courts that they shouldn't look at these cases on the merits. I must say I think this is shocking. I think that someone ought to pull together the briefs that the Department of Justice files in these cases and see what they are really doing to implement their responsibility in this area.

It is a very sad story indeed. Let me take just a moment to read you a very few brief quotations from some recent U.S. Department of Justice briefs.

In the *Hudson River Expressway* case, "Only a blatant illegal act by a Federal official may be enjoined by the courts."

"All the plaintiff requires," under its theory says the Justice Department, "is a national issue like conservation in order to get into court. No case supports such an extreme [sic] position."

"The letting of a timber sale," they say in another case, "does not provide for the publication of agency policy, for participation of the public by submission of views, or for the holding of hearings or determinations to be made on the record or for judicial review of official decisions."

In another brief, "Congress has wisely left these technical matters to the technicians."

Finally—I could go on all day with these briefs—"where as here agency discretion is brought into challenge, only the most egregious abuse will warrant judicial intervention."

That is the tone of the briefs that are being filed right now by the Department of Justice.

The New York Times on the 15th of February, talking about the dumping of tailings into Lake Superior said "The recently constituted Pollution Control Agency has heeded the cries and clamor over pollution and finally moved against the company. This was not done, however, until conservation organizations in Minneapolis brought a court suit to impel the agency to act."

That is the situation in which we find ourselves, and for that reason I don't think that we are prepared to leave these matters in the hands of public officials at this point. They are moving in the opposite direction, sad to say.

Senator HART. What about strengthening the citizen participation in administrative proceedings? Would the legislation expand the citizens' opportunities in administrative hearings to have access to documents and notices and so on?

Mr. SAX. Eventually we are going to have to face up to a rather unpleasant fact. Decisions that are being made by public agencies, by and large, are not made because they lack facts or because they have failed to hear the voice of private citizens.

In fact, if you look at these cases, you will find that the agencies come in, as they did in one of the highway cases, and say we have had five hearings, six hearings, 17 meetings with public citizens. That isn't the problem. The problem is that these are perspectives, traditions, which move these agencies in directions that are inconsistent with our present views about the environment.

I think it was Senator McGovern who said something about the single-mindedness, the limited expertise of some of these agencies. That is the heart of the problem.

Lots of hearings and lots of procedures aren't going to do the job. They need to be prodded from the outside. They need what I call shock treatment.

All you have to do is look at the famous—perhaps now infamous—*Scenic Hudson* case. The court of appeals decided to send that case back to the agency in 1965 and we haven't had a decision out of the Power Commission yet, although in the summer of 1969 again they approved the project, tossing off citizen testimony in the most offhanded way.

They have got to be subject to tough-minded, rigorous inquiry by an outsider on the merits of these disputes. That is the heart of the environmental problem.

Senator HART. It was Senator McGovern who commented on the single-mindedness of the agencies, but they are nonetheless competent technicians in their field. A criticism of this bill is that you are going to require the court to substitute for technically competent and expert administrative agencies his own judgment, and he is a lawyer, not an engineer or what-have-you.

Mr. SAX. Let me respond to that by giving you an example.

When citizens in Colorado sued the U.S. Forest Service on the claim that they were not adequately enforcing the Wilderness Act and the Multiple Use-Sustained Yield Act, the Government lawyers came in and said, "Judge Doyle, you can't decide matters of silvicultural judgment, you don't know anything about when trees ought to be harvested and about black beetle disease." The judge's response was: "You are right, I don't purport to know about those things and I don't purport to substitute my judgment for yours. What I want to know is why you people are giving a contract to cut down trees in an area that is said to have wilderness qualities before you have studied the area, before you have made a recommendation to the President and the Congress under the Wilderness Act. Why are you preempting the opportunity of the Congress and the President to decide whether or not they want to enlarge the wilderness system? That is what I want to know, and that is not a question of how many beetles are in a tree. That is a question of whether you people are enforcing the Wilderness Act that Congress passed and told you to enforce."

That was the question in the case and that is what he issued an order to prevent them from doing. That is what these cases are all about. These are not technical cases of how to build a highway or a pipeline. They are cases in which the question is raised whether policies articulated by the Congress are being enforced and what policy choices are being made.

No judge is going to get himself tied up in these technical matters. That defense is a smoke screen.

Senator HART. The bill is said to shift the burden of proof as to the feasibility of alternatives to the defendant. If that charge is correct, how do we justify the shift?

Mr. SAX. Yes; the charge is correct and the justification for it is this: You have already heard some testimony today about the very great difficulty on the part of plaintiffs who undertake these jobs to bring together expert scientific opinion, and it is a difficult job.

If an agency or a private enterprise such as a power company comes forward with a proposal, we ought to be able to assume that he has done his homework; that he is recommending this type of plan or this location because he has already looked at the other alternatives and decided they were less desirable or less feasible.

If he has not done that job, he hasn't done his elemental homework.

If he has done that job, which he certainly should have, then we ought to feel free to call upon him to explain to us how he came to the conclusion rather than simply using discovery processes in which the defendant says, "Go look in our files, you can go through all the filing cabinets that you want."

I think that is the critical point about shifting the burden of proof. You are not asking them to go out and prove your case for you. You are asking them to reveal how they came to the conclusion which they supposedly have already come to.

If the Federal Environmental Protection Act were implemented, all of this material would be on the record. This was a policy that was much discussed in the context of Santa Barbara. It is very difficult for a skeptical plaintiff in a place like Santa Barbara to go out and get himself a petroleum geologist to testify about problems that the oil companies are having. These people just don't float around.

I think this is a critical part of the bill, Senator Hart and Senator Moss. I think if that shifting in the burden of proof of adequate alternatives is not in the bill, the bill is very much weakened and perhaps disastrously so.

This does not mean, incidentally, that the plaintiff just comes in, files a paper and says to the defendant, it is your turn. The plaintiff must still bear the burden of making a *prima facie* showing that there is a threat of serious harm to the environment, and this is another one of these filtering devices that we have talked about earlier this morning to keep frivolous suits and crank plaintiffs under some kind of control.

Senator HART. The bill refers not just to the protection of air, water, and land. It refers to a public trust obligation.

Why do we add this feature?

Mr. SAX. This is a subject close to my heart. I just wrote one of these turgid 100-page law review articles about the public trust. Let me try to explain it this way.

Ordinarily when we think about environmental problems we think in terms of physical pollution, that is, a physical deterioration in the quality of resources. But there is another side to the environmental problem that might be called the distributive side. Take the issue of public beaches, which has been a matter of controversy in many States. If those lands which have historically been available for the free and general use of the whole public—beaches or fisheries, that kind of thing—are given over (as they sometimes are) to very limited kinds of private development, there is a diminution in environmental quality, a restriction in the use of these public resources that can have a serious, adverse effect on the public. One need merely go down to some resort areas and see how the beach has been fenced and shut off, and turned over to private use of a few people.

The responsibility of the Government to maintain free and open use of the great historic resources—water and the seashore, fisheries, navigation, and so forth—is what has historically been called in the law “the public trust obligation”; it is important that attention be focused on the redistributive aspects of environmental problems as well as on the physical degradation problems. To make that clear, to bring back into the focus of attention the historic obligations of Government to protect the public, as a trustee, is the purpose of putting this provision in the bill.

I feel strongly about it. I think it is important.

Senator HART. What is your response to the frequently voiced suggestion that the appropriate way to deal with environmental problems is for the legislature to fix or authorize the fixing by administrative agencies, of standards, rather than turn these questions, in a sense, over to a court?

Mr. SAX. As I indicated a little earlier, my view is whenever the Congress feels that it has the information that prepares it to establish legislatively specific criteria or standards, it ought to do that. That is, you ought to give administrators as much guidance as you can. I think they are entitled to it. But that is today possible only for a very small number of our environmental problems.

I spent this last weekend with a group of scientific consultants to the Senate Public Works Committee, and all you have to do is sit around for a weekend with a group of scientists and listen to the difficulties they have in trying to articulate criteria to know how difficult it is at the moment to establish specific criteria.

But when you can do it, I think you ought to do it.

When you can't do it, and you simply say to an agency, you go out and set standards, implement the public health, safety, and welfare—that has been a traditional legislative position—then you open the door to exactly the problem that we now have. That is, the agencies fix standards and set criteria and implement the law according to their own perspective, and such standards may be a product of their singlemindedness.

After all, many of these agencies have had a single mission for a long, long time and we have to be realistic. To tell the Bureau of Public Roads to think of all the reasons why roads shouldn't be built is not to give them the kind of function that is easiest for them to perform.

If you are going to have administratively set standards, you have got to have some forum for challenge and inquiry into the adequacy of those standards. Otherwise, we don't accomplish anything.

Senator HART. One of the questions that we wanted to be certain you were able to address relates to the special provision for bond. Why make such special provision for bonds?

Mr. SAX. The reason is that in cases of this kind where challenges are put to large projects, often involving enormous sums of money, to impose upon the plaintiffs as a regular matter the requirement of bond is in effect to deny them the right to sue, because the ordinary plaintiff is simply not going to be able to put up the money.

For that reason the bill says that bond ought not to be required as an ordinary matter but leaves it open to the court where it feels it necessary and evidence has been adduced to support the necessity to obtain a bond.

It is simply designed to mitigate the provision which now exists in the Federal rules which say :

No restraining order or preliminary injunction shall be issued except upon the giving of security by the applicant for such sum as the court deems proper by any party who has been found to be wrongfully enjoined * * * such security shall not be required of the United States.

The trouble with that provision is that it encourages the bonding requirement in every case rather than suggesting, as this bill does, that a careful look ought to be taken at the needs in the case and that bonds should not be issued where it would seem to infringe the real opportunity of the plaintiffs to have a hearing on the merits of their case. This litigation is to a very substantial extent going to be a situation of the little fellows against the big fellows, and I think we have to be realistic about that in thinking about the provisions of the statute.

As one who has been in touch with many lawyers involved in these cases, I regularly get letters from lawyers saying the thing that stopped us in our tracks was the fear that we would have a large bond imposed upon us.

Just as a brief example, I pulled out a letter I got from a lawyer in Tennessee. He said :

We completed our research, prepared our bill, and gave them one more chance. They refused to act, and so we filed suit. The conduct which the city officials said could not be cured was promptly buried by dirt and fire and the smoke was eliminated. We did not ask for a preliminary injunction because of the bond requirements, but fortunately as it turned out we got the results by filing suit.

He was a lucky lawyer. They are not all that lucky. For all the lawyers engaged in this business, the bond requirement is a critical issue.

Senator HART. Assuming the adoption of this bill, the litigation goes forward and a decision is reached that a certain activity is a violation of the bill, does that have the effect of subsequently barring administrative agencies from approving a comparable action? Is there any res judicata applicable to these decisions that will follow under the bill, if adopted?

Mr. SAX. Ordinarily a citizen's suit would not bar subsequent action by a public agency which was seeking to enforce the laws which are committed to its jurisdiction.

So, I don't think as a practical matter that that is a problem. As you well know, the problems of the binding effects of litigation in situations where large numbers of people are involved is a very technical legal question involving the doctrine of *res judicata*, the principle of collateral estoppel, the class action rule under rule 23 of the Federal rules, and the joinder rule under rule 19 of the Federal rules.

Now, the man does not live who can put all those four principles together into any kind of a general statement that would explain exactly what is going to happen in every case.

I think I can fairly say this. Most of these cases are brought as class actions and will bind the whole class of potential plaintiffs in a judgment either in their favor or against them, so that is one important protection for the defendant against the possibility of continuous relitigation of the same issue.

Even if the plaintiffs fail to initiate a class action under rule 23, the court has substantial powers under rule 19 to compel the joinder of other parties, even making people under the rule involuntary plaintiffs.

So, between the Federal rule provisions and the common law rules relating to *res judicata* and collateral estoppel, I think the courts have ample power to prevent the problem of multiple litigation and harassment.

The only qualification I would make on that is that any kind of litigation in which the interests of large numbers of people are affected is necessarily somewhat more complex than a case in which I sue you for \$50 under a contract.

But we have lots of experience with this. We have actions involving the members of labor unions and stockholders and mass accidents—everybody on the plane killed and so forth.

I don't think there is anything in this law that will create a new dimension to the problem.

Senator HART. Did we have your response—and I think not—to the business of the crank suit, the opening of the flood of litigation?

Mr. SAX. No, I don't think I responded to that, Senator Hart.

In my own view, a crank by definition is somebody whose conduct is not going to be affected by what you put into a statute. Crank suits will exist under this legislation if the Congress passes it. They exist right now. People sue in the absence of legislation on frivolous cases. I think you have already heard much of what I would say on this.

The bill in three or four different places puts the best constraints that we know how to enact legislatively on crank or frivolous litigation. More importantly, though, the reliance principally is going to be on the judges.

Judges do not issue injunctions for cranks. They just don't do it. They are even reluctant to issue injunctions on many very meritorious suits, and the good sense of the judiciary is the principal bulwark against frivolous and harassing litigation.

I would only add one thing to that. It is important to understand that most of these kinds of cases will succeed or fail on a claim for preliminary injunctive relief; that is, these are not cases by and large which go on for months and months of trial. They are cases to bring a stop to something quite soon. It is at that early point, which ordi-

narily comes on in a matter of a few days or at most a few weeks, that the judge hears the case, in the first instance, and if he decides not to issue an injunction at that point, that is essentially the end of the matter. So that unlike the damage cases where you can go to trial and drag things out for years, sometimes to the great expense of the defendant, that is not really a problem of any consequence in this particular area.

Senator HART. Mr. Bickwit.

Mr. BICKWIT. In response to Senator Hart's question whether the defendant had to be worried about continuous suits by citizens, you enunciated certain principles. I wonder if those principles would also apply to shield the defendant from an action, say, by the Federal Water Quality Administration after which citizens would hop on the bandwagon and begin initiating their own suits? Can he condense those suits into one action or does he have to fight the two separate actions?

Mr. SAX. It is very difficult to answer that in a general way. It is certainly possible and appropriate in many cases for a public enforcement agency and private citizens to join together where they have common interests and are seeking the same goal, and there are cases of this kind.

By and large if a public agency takes the initiative to try to get an environmental job done, citizens would be more than happy to let them carry the ball themselves and turn their own attention, if it is needed, to other matters where public initiatives are not being taken.

As a practical matter some of this litigation seeks as relief simply an order requiring a public agency to do its job, so that all the citizens want is a court to tell an enforcement agency to go out and enforce the law, at which point they fade into the background.

These are, in a sense, provocative suits. Once the agency is going, ordinarily they don't want to interfere with its work.

Mr. BICKWIT. But if the Water Quality Administration loses in its suit and this bill provides a basis for a suit in which citizens might be able to win, wouldn't they follow the FWQA's loss with the initiation of a suit?

Mr. SAX. That could certainly happen. Again their ability to do that would be dependent on whether the first lawsuit was treated as having a binding effect on them, or whether the Government itself was suing as a class action on the part of all the citizenry, which is the nature of many governmental lawsuits.

I think we must understand there are instances in which a public agency's action may not seek to enforce all the rights that may be asserted or to litigate all the issues that may need litigation. I don't mean to confuse this. Let me give you a simple example.

You heard testimony about the problem we have had with AEC not having exercised authority over thermal pollution. Now, the AEC may institute or be a party to a proceeding in which the question is the emission of radioactivity from a proposed plant.

They may litigate only that issue and may not have any jurisdiction over the thermal pollution problem. Then, it would certainly be appropriate and desirable for citizens to be able to come in and fill that gap. That is in a sense what this bill is all about. It is an opportunity to add some leverage to this enforcement machinery, and let

citizens come in and do some of the jobs that are not otherwise being done.

Mr. BICKWIT. If an administrative agency promulgates certain standards, I take it you feel that compliance with those standards in and of itself would not be a defense to an action under this particular bill.

Mr. SAX. It certainly would not be a defense.

Mr. BICKWIT. Could you elaborate on why you feel it should not be?

Mr. SAX. Yes. As I have already said, the problem to a substantial extent is the failure of administrative agencies to act vigorously enough. If you simply let them articulate standards and treat those standards as the be-all and end-all, you are locked into their perspective about how much muscle they ought to employ. That is just the perspective we are trying to get out of. That is the first point.

The second point is that we ought to view standards and criteria as a floor and not a ceiling. That is to say we ought to use standards to set the minimum below which no one ought to go. But there will be many instances in which it will be appropriate to have higher standards, and we ought to leave the opportunity open to enforce higher standards where they are needed, because if you have national ambient standards for air, for example, they are inevitably going to be at the lowest common denominator.

On the other hand, if the Congress were to say these are the standards we want to enforce and we are willing to pay the price in environmental degradation of conduct which only meets those standards, we don't want to go any higher because we want to promote some other activity, if that is the law the Congress wants to make, the courts will have to enforce that law.

I think rarely would it be wise to legislate that kind of a program, but one could conceive of it.

Mr. BICKWIT. Do you feel any sympathy at all for the private entrepreneur who is constructing a plant and wants to build it so that it complies with the law and takes a look at the standards which are applicable and builds it so that those standards are complied with, and then the next day has a citizen come in under this act and sue him for unreasonable pollution?

Mr. SAX. As a lawyer, I don't think in terms of sympathy. I think in terms of facts. If an entrepreneur is doing something which is either for his own benefit, economically, or which he in the most sincere fashion thinks is desirable, I don't condemn him for that. But my concern—and it seems to me the focus of the concern of Congress—ought to be on the protection of the public interest, and the activities of an individual entrepreneur may, or may not, implement that. Whether or not one feels sympathy for him, the question is whether his conduct is consistent with the public interest. The situation today is one in which we have given too little attention to the maintenance of environmental quality for the benefit of the public at large.

The degree to which we have permitted the natural environment to deteriorate in this country is just breathtaking. I don't like to talk about alarms and survival, and so forth, but all one has to do is to talk to the most hardheaded scientist to be convinced that we are in a serious situation because we have treated the natural environment as a free resource; that is, you go out and pour wastes into the air and

the water and you don't pay anything, because no one owns it. Any economist will tell you that all free resources tend to get extravagantly used.

Put out a box of lollipops in a restaurant, and every child is going to come up for a handful. We need an instrumentality to speak for the public interest in those resources, to say they have a price, they have a price in terms of public health in terms of amenities, they have a price in terms of citizen dissatisfaction, they have a price in respect to what Ramsey Clark talked about, the feeling of powerlessness. We have got to give those interests an instrumentality for effectiveness, and that is what the lawsuit is all about.

It gives to the citizen and to these previously free floating kinds of resources which anybody could use, a forum in which to give them a price, and that doesn't always mean a dollar price. But nobody ought to be able to build a highway until, and unless, he can satisfy an independent arbiter that that highway meets all the standards of decent environmental quality that the public of the United States is entitled to.

The Congress keeps telling them that, there are lots of laws to that effect, but all you have to do is to go out and see what they do. You can see with your own eyes that we are not affecting agencies, because the Congress cannot supervise adequately. The Congress can't exercise oversight over every highway dispute, every dam project, every dredging permit. Who is going to do this?

Well, we are fortunate that we now have enough citizens in this country who are angry enough and concerned enough that they are prepared to take on this tremendous burden, and we ought to facilitate it, and this bill will help to do that. We ought to be thankful to these people that they are willing to take on this kind of a burden.

Mr. BICKWIT. Can citizens express this concern through the common law doctrine of nuisance, and, if so, why exactly do we need this bill to improve upon that concept?

Mr. SAX. The answer is by and large no, they can't express it through the doctrine of nuisance, because the traditional law of public nuisance can be enforced only by the State attorney general, and State attorneys general have not done the job of enforcement. They are busy with a lot of other things, they are under pressures to do a lot of other things, they do not have the staff to do it.

So, the citizen is blocked, the attorney general is unwilling or too busy or will only occasionally act, though we have some attorneys general who are now very interested in doing this. That is one part of the problem.

The second difficulty is there is no Federal common law of nuisance. There is no Federal common law. So, within the Federal system we don't even have the advantage that exists in the States, some body of common law to which you can turn.

That suggests to me that there is even more need of a bill of this kind in the Federal system than there is in the States, although the need is considerable in both places.

Mr. BICKWIT. What about the doctrine of private nuisance?

Mr. SAX. Occasionally the doctrine of private nuisance would be useful to you in an environmental case, but you must establish some harm to yourself that goes beyond the harm to generality of the public.

But, of course, with resources like the air mantle, in most cases. I can't establish that I am harmed more directly than the general public.

So, again, this brings you back to the fortuity I talked about earlier. If you happen to have a landowner and if he can bring himself within the narrow traditional confines of private nuisance law, he may in effect be able to bring a lawsuit which will protect not only himself but the whole citizenry.

Sometimes that happens, sometimes it doesn't. You may have no citizen who has any traditional private property right.

Mr. BICKWIT. If we are going beyond and behind the administrative process in as many instances as seem to have been enumerated here, is there the danger that this bill will just completely dismantle the entire administrative process?

Mr. SAX. No; it ought to be understood that these regulatory and administrative agencies deal with thousands, tens of thousands, of matters every year just inside the Federal system. Most of the time, nobody objects to what they are doing. So at most a bill like this would only give the opportunity for challenge in these cases where there is a serious problem, where citizens are upset about it, where they are willing to mobilize the necessary resources, and go through the difficult problem of litigation. We continue to have the regulatory process operative for the rest of these things, and there is an interplay between these two things. As long as the administrative process is working reasonably satisfactory, litigation will be minimized. The worse a given administrative agency gets, the more litigation there is. The more the courts come down hard on them, the more likely it is that their behavior will be affected.

So, the administrative process and the judicial review process it seems to me fit together and complement each other, as I said about Congress and the judicial process, rather than being exclusive or at war with each other.

Senator HART. As I perhaps did at the outset, and I certainly should have—to make sure, I will repeat it as we conclude—the thought and the imagination that you have put into the development of this bill is extraordinary. I hope we can repay it in part by persuading Congress to adopt it.

Mr. SAX. I would feel more than amply rewarded if that were the resolution. Thank you, Senator.

Senator HART. Thank you, Professor.

(The statement follows:)

STATEMENT OF JOSEPH L. SAX, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

S. 3575 has its genesis in a bill drafted in 1968 for introduction in the Michigan legislature. Introduced in April, 1969 as H.B. 3055, it has undergone intensive scrutiny by citizens, state officials and members of the legislature, and on April 21 of this year passed the Michigan House of Representatives by a vote of 98-3. Prior to this vote, the House Committee on Conservation and Recreation held three very widely attended hearings throughout the state. The bill has an extraordinary degree of public support; it has also broad bipartisan support in the legislature as well as from concerned state agencies, and the governor on March 31 issued a strong statement in support of it.

S. 3575 is a version of the Michigan bill adapted to the requirements of federal legislation, with a few differences of language. In its structure and purpose, however, it is essentially identical.

The bill is designed to permit citizens to obtain judicial scrutiny of private or public conduct which may have unreasonable adverse impact on the environment in land, air and water resources of the United States. It recognizes that each person has a legally enforceable right to the protection, preservation and enhancement of that environment from unreasonable impairment. It authorizes the courts to take cognizance of claims that this right is being infringed—making clear that traditional barriers such as lack of standing to sue and jurisdiction may no longer be interposed against the citizen; and it empowers the courts to grant declaratory and equitable relief so that unreasonable threats to environmental quality may be decisively enjoined in a timely fashion. It is thus truly an environmental *protection* bill, rather than an effort to impose penal or punitive sanctions for damage which has already been done.

Why is a bill of this sort needed? Has not Congress already called for environmental protection in many laws such as the Air and Water Quality Acts, the Federal Aid Highway Act, the Fish and Wildlife Coordination Act and the new Environmental Policy Act? The answer to this question is two-fold.

First, it must be understood that the environmental provisions in existing legislation are essentially directions to federal agencies. To the extent that these directives are adequately taken into account by the agencies, all is well. Too often, however, traditional approaches to dam, highway and canal building, dredging, filling and timber cutting, continue despite legislative language calling for new policies and new practices.

Examples, unfortunately, are legion. I need merely call to the committee's attention the notorious events at Santa Barbara to make clear that all is not well inside the federal bureaucracy. Former Secretary of the Interior Udall, testifying afterwards, candidly described Santa Barbara as "a sort of conservation Bay of Pigs." It was not lack of citizen concern, but failures in the public agencies which permitted such risks to be taken. A Santa Barbara official recalled later that the problem "was discussed many times, but always Interior Department and oil industry officials led us to believe we had nothing to fear. They said they had perfected shutoff devices that were foolproof even in such disasters as a ship running into the platform or an earthquake."

Later events at Santa Barbara demonstrated just how misplaced that confidence was. The distressing part of the story, however, is not merely that those who ought to have known better were wrong—but rather that every effort to open such issues to inquiry was brushed aside or ridiculed because other more powerful forces had already predetermined the leasing question.

When questions were raised about the proposal by concerned citizens, federal officials responded publicly with a letter saying "we feel maximum provision has been made for the local environment and that further delay in lease sale would not be consistent with the national interest." Privately, though, an interagency memorandum was circulated commenting that "the 'heat' has not died down but we can keep trying to alleviate the fears of the people" and noting that pressures were being applied by the oil companies whose equipment "costing millions of dollars" was being held "in anticipation."

The eagerness of Interior Department officials to get the leasing over with quickly and quietly was made clear in a memorandum written when it was learned that another federal agency was considering holding public hearings at Santa Barbara prior to the leasing. Here is the text of an Interior Department memorandum circulated privately in response to that suggestion:

Discussion centered around "public interest" aspects in our offshore operations. Outlined what we had done in Santa Barbara and how it appeared to conflict with Corps public hearing . . . Of course, how they handled the public was their business, but we did not have to participate . . . I pointed out that we had chosen not to go the public hearing route . . . That we had tried to warn the . . . District Engineer of the Corps what he faced and *we preferred not to stir the natives up any more than possible.* [sic]

The reason for the eagerness of the Interior Department to go forward with the leasing was made quite clear later, after the oil spill, when responsible officials were called upon to testify about the decision. The former Secretary of the Interior explained it all quite succinctly. The Bureau of the Budget was "hungry for revenue" and "a Presidential decision had been made about getting more money to help balance the national budget . . . Communications from the budget bureau were indicating to us that we should have a maximum leasing program."

No doubt these considerations were reason enough to persuade the Interior Department. It is not the Secretary of the Interior's job to reexamine the

President's suggestions. The question, however, is who was representing the interests of the citizens of Santa Barbara and of the general public who have a stake in that environment? Not the oil companies; not the Interior Department, which had other priorities; and not the Santa Barbara citizens themselves, who never really had an opportunity or the means to participate in the decision making process. They were merely bystanders, passive recipients of publicity-release assurances that all was well.

I understand that very serious consideration was given to instituting a lawsuit to challenge the Santa Barbara leasing, but was rejected because the legal tools for instituting citizen challenge litigation were lacking. This experience has been duplicated in many instances.

When cases do get into court for a hearing, as sometimes happens, it is often demonstrated how much some forum for inquiry into administrative practices is needed. A few months ago, a federal judge in Denver issued an injunction against the U.S. Forest Service in a case entitled *Parker v. United States*. There citizens alleged that national forest land had been sold for commercial timber harvesting which should have been reserved for inclusion in the national wilderness system; or, at the least, that cutting should be enjoined until the President and Congress had an opportunity to decide on the future of this area under the Wilderness Act.

Government lawyers argued at length that the court should not inquire into the merits of the case; they sought outright dismissal, and then submitted a motion for summary judgment in favor of the Forest Service. When these were denied and the case went to trial, they asserted that the Forest Service had fully studied the area and had determined that it was inappropriate for inclusion in the wilderness system. Their discretion, it was said, should not, and could not, be submitted to judicial inquiry. They had the public interest at heart, and it they must be assumed that they would implement it.

The judge was more skeptical. After hearing the testimony of all parties, he found that the decision to harvest timber in the contested area—which decision was challenged as inconsistent with national policy as stated in the Wilderness Act—had been made before that Act was even signed into law. That in fact the decision had been made some years earlier when the Forest Service built an access road into the area, and that they seemed bound and determined to amortize the investment in that road. In short, traditional practices had simply moved along inexorably and unyieldingly, with hardly a glance in the direction of the newly enacted federal Wilderness Act.

It is not a pretty story, but to a significant degree, this is the *real* story of the administrative agency in practice.

National policies, fought out in the Congress and stated in legislation, do not automatically get reflected in the daily activities of government agencies. Someone has to keep an eye on those who administer our precious resources, and some means has to be provided to test the assertions so confidently made that the public is being adequately protected. Plainly the Congress cannot do this job; it cannot watch over every timber sale, every oil lease, each timber contract and highway. It can from time to time conduct investigations and hold hearings which affect conduct; and it can in some instances set out sharply defined standards in legislation. But the job that is needed goes beyond this.

One of the best devices for providing needed scrutiny is the watchfulness of the citizen, for it is he, in his own community, who will be victimized if adequate precautions are not taken. As Chief Justice Burger noted in a very important decision issued shortly before he came to the Supreme Court, "Consumers are generally among the best vindicators of the public interest." If consumers are to be allowed to vindicate the public interest, they must have a forum for so doing, and no institution presently available in our system provides a better opportunity for looking hard and carefully at dubious enterprises than the courts.

If courts are now available, as the previously mentioned *Parker* case from Colorado indicates, why is additional legislation needed? The problem is that at present the law is very irregular; in some controversies a court may find a legal basis for review, which is not present in other situations equally deserving of judicial inquiry. For example in the *Parker* case, the area in question adjoined a primitive area, thus bringing the Wilderness Act into operation; had the same question, with equal merit, been raised at a distance from any primitive area, an entirely different legal question would have been raised, and the plaintiff might have had their complaint dismissed, as in fact occurred in just

such a case recently in the federal district court in the western district of Michigan, *Gnadt v. Hardin*.

There the judge said that the plaintiffs could prevail only if they established "by clear and convincing proof" that "the action of the agency was in fact malicious and illegal." The plaintiffs had challenged the Agriculture Department's plans for land in the Ottawa National Forest and said that it was not an appropriate or reasonable implementation of the Multiple Use Act. In that law the Congress set out only the broadest standards for accommodating authorized uses of such land. Plainly if the demand for environmental protection is to be made meaningful there must be some opportunity to inquire into agency action beyond the question whether the agency has acted "maliciously." Indeed the judge made clear that there were numerous aspects of the debated plan which were dubious, including "the use of motors on lakes in an area such as this . . . the use of what are called snowmobiles or any other mechanical devices" which create serious environmental problems. Yet in the absence of legislation the judge felt himself powerless to inquire into the reasonableness of the plan or to investigate the consistency of the plan with congressional concern for the maintenance of environmental quality. It is precisely such decisions such as this, delivered orally and attracting little attention, which illustrate the need for legislation.

Because this is essentially the present status of the law, parties to environmental litigation find themselves twisting and turning in order to put meritorious cases into a posture where they can obtain some judicial attention. The result is a most undesirable distortion of good legal practice. Perhaps the most notable example of this problem arose in a pending case challenging the proposed Hudson River Expressway in New York. The plaintiffs wished to challenge alleged adverse environmental impacts from the proposed highway. But no existing law permitted this challenge to be made directly. As a result, the court and the lawyers involved became entangled in the question whether the structure on which the highway was to be built should be called a dike. This question was raised because an old—and virtually forgotten—law required express congressional approval for the building of dikes in navigable waters. The parties argued at length in both the district court and the court of appeals whether this structure was a dike, each citing technical dictionaries and the like.

Of course, nothing in the case *really* had to do with whether there was a dike. It was a case about a project with potential adverse environmental effects. Yet in the absence of law clearly permitting litigation over environmental issues, the lawyers grasped for the only straw available—an obscure statute from 1899—and the court, no doubt concerned about the real issue in the case, seized upon this reed. It is outrageous that litigation should be distorted from its genuine purposes, and that the fate of so important an issue as the environment should be dependent upon fortuities of this kind.

During the past several years, I have talked with dozens of lawyers who had been asked to investigate potential environmental litigation, and very frequently the soundness of the proposed suit, as a legal matter, turned upon some such quirk as whether a dike was involved. Sometimes a meritorious suit is abandoned because no statutory "hook" can be found; more often a case is twisted away from its real merits so that some legal standard can be tested. Unless and until clarifying legislation such as S. 3575 can be enacted, we are going to be making bad law, and inconsistent law, and imposing unreasonably upon the courts and the legal system. This must not be allowed to prevail.

The new National Environmental Policy Act is a helpful step in the right direction, but it is only a step. That law neither makes clear the right of citizens to sue, nor does it clearly go beyond authorizing courts to enforce formal requirements for study and reporting. The need is for a law which plainly permits inquiry into the question whether a proposal, however much it has been studied, unreasonably threatens environmental quality; and which authorizes judicial action if such a threat is, upon an examination of the merits of the dispute, shown to exist.

Two questions which are always asked about legislation such as S. 3575 are whether judicial intervention in these cases will have the effect of usurping legislative decisions, and whether courts are competent to examine the technical questions which seem to be involved in environmental disputes.

As to the first question, the answer is decidedly not; indeed, the principal purpose of this legislation is to make available a forum in which to assure that settled congressional policies are implemented and not obscured or quietly

ignored by the actions of public or private enterprises. For example, the Federal Aid Highway Act declares a national policy that "special effort should be made to preserve . . . public park and recreation lands, wildlife and waterfowl refuges, and historic sites." It prohibits the use of such lands for highways programs unless, among other things, "there is no feasible and prudent alternative to the use of such land."

S. 3575 simply makes it possible to raise and examine the question whether such congressional mandates are being effectuated. Indeed it makes it possible to ask whether the highway building agencies are usurping or ignoring congressional policy. In light of the examples I have already noted, I think it clear that questions of this sort very much need to be raised. Moreover, S. 3575 embraces the sort of environmental protection policy now found in scattered fashion in various federal laws, and makes it generally applicable to activities affecting interstate commerce.

The bill provides a needed opportunity to examine and give specific content to broad legislative policy determinations, filling a gap between the legislative statement of policies and unbridled administrative decisions about how those policies should be implemented. At the present time many laws state in only the most general terms that an appropriate balance should be struck between highways and parks, timber harvesting and recreation, fish and wildlife protection and development. Unless we are simply to accept on blind faith the judgments of agencies such as the Corps of Engineers or the Forest Service, a medium must be provided for putting forward and resolving disputed questions about the proper balance to be struck.

It is important to understand, in this respect, that the ambit of judicial inquiry is closely tied to the readiness and ability of the Congress to articulate detailed and specific environmental standards. To the extent that legislative standards are available to give specific guidance on environmental matters—thus closing the gap between congressional policy and implementation—the need for, and scope of, judicial involvement will be proportionately reduced. For example, were it deemed appropriate to legislate that park land should never be taken for a highway, or that no oil drilling should be permitted off the California coast, litigation would, of course, diminish to the disappearing point over those questions.

I have given these rather extreme examples to suggest how wide of the mark it is to suggest that environmental litigation is striving toward a usurpation of legislative policy. The examples suggest two other points. The first is the very great difficulty, in many areas, of legislating precise standards. If we are to be realistic, we must recognize that many questions of implementation will continue to arise, and detailed inquiry into the specifics of many project proposals will be required if the principle of the right of the public to environmental quality is ever to be more than a rhetorical statement.

It is also important to recognize that we are still at rather an early stage of development in dealing with the environment. We are very far from knowing what all the problems are that will arise, let alone knowing in detailed fashion how to cope with them in terms of setting precise legislative standards. To open the door to some elucidating litigation is itself to aid the legislative process as it attempts to grapple with these issues. It permits us to get some detailed case studies of problems, upon which to begin working out more general standards which can be imported into legislation. Thus the judicial and legislative processes, rather than being viewed as inconsistent or varying approaches, should be understood as fully compatible and mutually beneficial.

Finally, on this point, I should like to make clear my own view that environmental litigation should not in general be raised to a constitutional level. Constitutional amendment is not needed to recognize environmental rights, and it seems to me unwise to leave the final word on environmental policy in the judiciary. While I think it most important to permit a vigorous blossoming of judicial activity in this area, I feel strongly that—except in the most exceptional instances—the legislative process remain the ultimate authority.

I turn now to the question of judicial competence to deal with environmental disputes. This is the issue that is usually raised by asking a question such as "How do you expect a judge to be able to decide how to build an oil pipeline in Alaska?" I must say bluntly—as one who has studied in detail a great many environmental cases—that this question is just a red herring. Of course a judge is no more qualified to build an oil pipeline or a power plant than he is to run a railroad, take out tonsils or invent a lightbulb. Yet judges can, and do, decide

fraud malpractice and railroad accident cases—each of which may involve exceedingly complex questions. For the job of courts is to hear and evaluate the testimony of those who are technical experts, not to do their job for them. A judge is perfectly competent to hear evidence on damage, on alternative solutions and on the asserted need for various facilities. A plaintiff in an environmental case, as in any other, who fails to define and clarify the issue on which he wants a decision within the ability of a judge to decide, or who fails to carry the burden of his proof, will simply not prevail on his claim.

In addition, far more often than is assumed by those unfamiliar with these cases, the real issue is not some esoteric matter of engineering or biology. It is, rather, the reasonableness of a determination to subordinate one interest to another. For example, if I may return to the *Parker* case which I mentioned earlier, a central issue as it developed in that case was why the Forest Service seemed so insistent that the particular tract under dispute there be subjected to timber harvesting immediately, before the studies and recommendations on wilderness additions in that area were completed. Judge Doyle said during the trial, "Where is the compelling public interest in selling the timber? That's what I'd like to know." A perfectly sensible question for a judge to ask, and one that was determinative in the case. Careful study of environmental litigation reveals how often it is precisely such questions which the courts are truly called upon to ask; and how competent they are to obtain comprehensible answers upon which decisions may be based.

It is with such examples in mind that I, in talking about legislation like S. 3575, always emphasize what I call the common law approach to environmental litigation. That is the need to have courts available to examine the reasonableness of conduct in respect to environmental damage. No one balks when courts inquire into reasonableness with regard to the enormous number of diverse issues, from auto accidents to fraud and unfair business practices, with which courts deal every day; yet somehow the notion has gotten abroad that when environmental damage is in dispute, these well developed techniques for fact finding and decision making disappear.

For example, I would call your attention to a most instructive case decided a few years ago in New Jersey, entitled *Texas Eastern Transmission Company v. Wildlife Preserves, Inc.* There the court had before it a dispute over the location of a gas transmission line. The question was where, and how to locate the pipeline so as to minimize environmental damage. The court took testimony from many experts on this issue, heard various alternative proposals, and ultimately worked out a compromise with particular protective techniques that had been suggested during the trial. Of course that judge did not know anything about the pipeline business, but he was an expert at decision making, and in this typical sort of environmental case he was able to resolve disputed facts and to bring out into the open other critical facts which had not been put forward in earlier negotiations among the parties. The trial transcript of this case should be required reading for all those who so confidently continue to repeat popular unexamined assumptions about the limits of judicial competence.

Another spectre which is routinely promoted in opposition to legislation such as this is the fear that it portends the dismantling or obstruction of the administrative process and of the work of regulatory agencies. This fear is unwarranted. First, I call to your attention that the bill explicitly notes that it is supplementary to the administrative process, and authorizes judicial remand to administrative proceedings where they are available. The bill contemplates that existing administrative procedures will go forward and that courts will in no respect displace those procedures. Indeed, it anticipates that administrative agencies will operate to protect the environmental interests recognized by the bill, so that the need for litigation will be diminished. It does, of course, authorize the granting of temporarily injunctive relief to prevent disregard of the interests protected in law by action that may create irreparable injury. And it retains the opportunity for judicial action if administrative agencies do not fulfill responsibilities (or if there is no regulatory proceeding available). This authority is necessary, obviously, unless we are to return to the old system wherein administrative or private action is, as a practical matter, beyond challenge or review.

It is true that an agency may have to defend itself beyond asserting that it has not been capricious or arbitrary; it will be subject to the challenge that it has not reasonably made provision for environmental protection, or that it has failed to implement an available feasible and prudent alternative course of action.

Yet this is exactly what a number of laws, such as the Federal Aid Highway Act mentioned earlier, now require. This bill will do no more than convert that congressional aspiration into an enforceable reality, and make it applicable in an even-handed fashion across the spectrum of environmental problems.

Next I come to the issue of delay. Again this is a routine canard; judicial action means interminable delay. And again I must call facts to attention. When courts are willing to hear cases on the merits, a decision can very frequently be obtained quite expeditiously, particularly on the question of preliminary injunctive relief, which is often the essential issue in environmental litigation. The *Wildlife Preserves* case was tried in less than a week; the *Parker* case was tried in three and a half days; the Hudson River Expressway case, mired down in issues like "what is a dike", went on for several weeks. In fact, the judicial process—if it can turn away from interminable technical bickering over issues like standing to sue (of which government lawyers are so fond)—can be quite expeditious. The notorious cases of interminable delay are principally cases pending before regulatory agencies. The famous *Scenic Hudson* case, for example, has been pending for years before the Federal Power Commission, not the courts. It is generally courts which refuse to come to grips with the merits of the dispute, continually remanding for further study and more administrative hearings, which produce unwanted and unneeded delay.

As to delay, finally, it must be said that any system which is concerned about protecting the rights of the public and in ascertaining facts, necessarily interposes some delay. Of course the most expeditious system is one in which some all powerful and unchallengeable czar declares what shall be and what shall not be. Plainly this is a kind of efficiency which none of us wants.

It must be understood that to create the opportunity for judicial inquiry does not mean that every dredging permit and every industrial site issue or highway location will come to court. A principal purpose of having the opportunity for recourse to the courts is to affect behavior in order to avoid litigation. In environmental matters, as in contract disputes, knowledge by the parties involved that serious controversies can be taken to court is itself a prod to reasonableness. One major reason we now have such a backlog of controversy and public dissatisfaction is that far too many agencies have acted on the arrogant and complacent assumption that whatever they did, and however unsatisfactory it might be, their decision was unchallengeable.

Another mistaken notion is that every trivial dispute will be taken to court and that important projects will be tied up interminably without regard to their merits. Those who assert this have obviously had little experience with the federal judiciary. Judges are neither knaves, fools nor patsies. They are far from eager to run around granting injunctions, and reluctant indeed to grant injunctions against projects in which many millions of dollars are involved, or in which there is an important public interest. And it is most important to remember that nothing gets tied up unless and until a judge can be persuaded to grant injunctive relief—a task which, I can assure you, is not easily accomplished.

The striking environmental cases about which one reads in the newspapers, in which such relief has been granted, are by no means a measure of the expansive liberality of the judiciary. Rather, lamentably, they are a measure of the degree to which our agencies have been proven, by hard evidence, to have ignored the mandates which Congress has imposed upon them, and of their often flagrant insensitivity to the environmental concerns which they so piously purport to have at heart. What has happened thus far in environmental litigation is nothing so much as it is a demonstration of the need for legislation like S. 3575.

CASES AND OTHER REFERENCES CITED ABOVE

1. Santa Barbara Oil Spill: Hearings Before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works, Water Pollution—1969, pts. 2, 3, 4, 91st Cong., 1st Sess. (1969).
2. *Parker v. United States*: Civil Action No. C-1368, U.S. District Court, Colorado, opinion of Judge William Doyle, February 27, 1970.
3. *Gandt vs. Hardin*: Civil Action No. 1334, U.S. District Court, W. Dist., Michigan, N. Div., opinion of Judge W. Wallace Kent, Dec. 11, 1969.
4. Hudson River Expressway case: Citizens Committee for the Hudson Valley et al v. Volpe et al. Nos. 428-33, Sept. Term, 1969, U.S. Court of Appeals, 2d Cir., decided April 16, 1970.

5. Wildlife Preserves case: Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc. et al, Superior Court of New Jersey, Law Division—Morris County Morristown, New Jersey, Docket Nos. L-8612-64, L-13678-64; L-13784-64; L-5853-65; L-5856-65; L-5860-65 (January 1967); 48 N.J., 261, 225 A.2d 130 (1966); 49 N.J. 403, 230 A.2d 505 (1967); see Sax, "The Search for Environmental Quality: Role of the Courts," in *The Environmental Crisis*, ed. H. W. Helfrich, Jr., (Yale Univ. Press, 1970).

6. Scenic Hudson case: Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), cert. denied 384 U.S. 941 (1966).

7. National Environmental Policy Act: Public Law 91-190, 83 Stat. 852 (1970).

Senator HART. The committee adjourns to resume Thursday morning in room 5110 at 10:30 a.m.

(Whereupon, at 12:15 p.m., the hearing was recessed, to reconvene at 10:30 a.m., Thursday, May 14, 1970.)

ENVIRONMENTAL PROTECTION ACT OF 1970

THURSDAY, MAY 14, 1970

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY,
NATURAL RESOURCES AND THE ENVIRONMENT,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 5110, New Senate Office Building, Hon. Philip A. Hart, (chairman of the subcommittee) presiding.

Present: Senator Hart.

Senator HART. The committee will be in order.

Our first witness is a friend, a constituent, as well as an expert in the field. I am delighted to welcome the cochairman of the Conservation Committee of the Michigan House of Representatives, the Honorable Thomas Anderson.

Tom, good morning.

STATEMENT OF HON. THOMAS J. ANDERSON, STATE REPRESENTATIVE, MICHIGAN STATE LEGISLATURE

Mr. ANDERSON. Thank you, Mr. Chairman.

Senator HART. Let me indicate for the day that the statements that have been prepared will be printed in the record in full.

Mr. ANDERSON. For the record, my name is Thomas J. Anderson, and I am cochairman of the Conservation Committee of the Michigan House of Representatives, and the sponsor of Michigan House Bill 3055. I am honored at the invitation to address your committee and wish to testify upon the need for a Federal statute such as S. 3575, and upon the experience gained by the Michigan Legislature with similar legislation.

The need for citizen involvement in the area of environmental quality has been only recently widely recognized by the public. Although for years the general public was apathetic about the problems of pollution and environmental degradation, and tended to accept as necessary to progress much that served to deteriorate the elements of the environment, there were groups of citizens in all States, and all walks of life, who worked diligently toward the goal of wide public concern. Among these groups were the professional ecologists, and the environmentalists, who, by reason of training and background and daily work, could see the dangers facing the whole race of man. House bill 3055 was written by such a man, Dr. Joseph Sax.

I will not presume to explain the problems of population growth, nor of the effluent of our affluent society, nor even of the growing rate

at which, per capita, Americans toss materials into the environment. I am certain, Mr. Chairman, that your committee has much knowledge of these factors and the awesome predictions of horror if trends of effluence and nonconcern are not shifted dramatically. I am not a pessimist, but rather a firm optimist, and a strong believer in the ability of our society to meet challenges. Here is a challenge of importance—the challenge to meet the combination of moderate population growth and of our rate of throwaway with an ultimate goal of a balanced use of the ingredients of the environment, while maintaining a high standard of life and the opportunity for enjoyment of the wonders of nature for the people.

In March 1969, Mr. Chairman, I introduced House bill 3055, to the Michigan legislature. It was carefully researched and written, as I said before, by Dr. Joseph Sax, of the University of Michigan, and allowed, as does S. 3575, citizen involvement in the fight for environmental protection, by the presentation of *prima facie* evidence, to a court of record, of environmental impairment, existing or possible, for the purpose of seeking injunctive or equitable relief in behalf of the people. A polluter would then have the burden of showing he had no feasible and prudent alternative to his action, whereupon the court could react.

Adequate provision was made for court appointment of technical experts, or for the court's remanding the matter to a controlling agency of the State having jurisdiction in the region of the subject matter, and for ultimate relief or dismissal of the complaint. I have submitted copies of the bill, as originally introduced, by mail, and as ultimately passed by the House on April 21, 1970. The bill now rests with the Senate Conservation Committee in the legislature, and is being at this moment reviewed by the committee.

I might add, parenthetically, on Tuesday of this week, the Michigan Senate Conservation Committee conducted a public hearing which was well attended in the city of Lansing and took testimony from, I think 50 or 60 people, none of whom, unfortunately, expressed opposition to the bill, so that the opposition is, as I will indicate later, much underground.

From the outset the bill has been popular in Michigan. I very carefully shepherded the bill during 1969, after its introduction, calling its provisions to the attention of those groups in Michigan I felt were most in tune with environmental concerns. During this phase, I had the strong support of the West Michigan Environmental Council, a group representing more than 50 concerned organizations, and which had assisted in the action which led to the original draft of the bill.

Late in 1969, as then chairman of the House Conservation and Recreation Committee, I scheduled a series of hearings on the bill, at selected locations in the State, at the Capitol Building, Lansing, and the cities of Grand Rapids, Warren, and Kalamazoo. These hearings were heavily attended and it was clear that wide public awareness of the bill's potential was now fact. More than 700 persons, for example, attended the Lansing hearing, and over 400 the Grand Rapids hearing, during a heavy snowstorm. Only token opposition was voiced at any hearing, this by a utility, an auto firm, and a sod farmer. However, several personal contacts—and this is the point I would like to make

very carefully and very clearly—were made to me during the past several months by representatives of several major industries, indoor pest control firms, chambers of commerce, and manufacturers associations, expressing concerns about the bill.

To date, more than 500 separate organizations and citizen groups, including high school and college groups, have expressed enthusiastic support of the bill's provisions, and, in addition, I have received more than 8,000 letters, contacts and signatures urging passage without weakening amendments.

The opposition I mention has been behind the scene, in the main, or couched in guarded terms as indicated by the chamber of commerce bulletin which I submitted by mail to the committee earlier.

Industry and commerce fear the bill. There is a fear of proliferation of lawsuits, of harassment, of possible court antagonism, particularly from judges up for election, or otherwise motivated against industry. We have argued against the fears, calling in witness the traditional court discretion against frivolous or trivial matters. There is also a fear of suit, although an industry might be within the limits of technological accomplishment. We have argued against this concern by citing the bill's provisions for the defendant's showing he has no feasible and prudent alternative, and that his product or proposal is in the public interest.

The substitute bill, which I submitted this morning, indicates the form of the bill that passed the Michigan House, represents an honest attempt to word carefully and handle all honest concerns and fears, without crippling the opportunity for meaningful citizen involvement.

Parenthetically, I would like to say I met 12 or 14 times with groups of industries, representatives from various industrial concerns, and I told them at all points of our development of this bill that, if they had an honest concern, one that was genuine, we would try to protect them in the bill from frivolity and harassment.

We did make several adjustments to the bill to eliminate honest concerns, but we have been careful at all stages not to adjust the bill so as to weaken the chance for citizen involvement in direct process action-taking. We have been successful heretofore in keeping the bill strong in that regard.

Even so, Mr. Chairman, industry and commerce have been at work to emasculate the bill. During house debate, an attempt was made to provide mitigating words, such as "unreasonable"—pollution, impairment, or destruction of the environment—and at one point the minority party prevailed upon by opponents to take a caucus position to water down the bill. Had not three members of the minority disregarded caucus position and voted with the majority party to sustain the bill's veracity, it would have gone over to the senate a weaker bill.

Opposition is now mounting in our senate. I understand from several senators that many contacts have been made for crippling amendments, and there is talk at this moment again of the majority party in the senate—which has the minority of the house—taking a caucus position to support the bill after reducing its potential as an effective deterrent to impairment of the environment.

Mr. Chairman, your bill has the same features as House bill 3055, and I believe it will draw comparable public support, and comparable industrial opposition, during the bill's passage through the Congress. I would urge that caution be taken to prevent emasculation. Our experience has been very clear. The opposition is not open and above board.

At Tuesday night's hearing, not one person spoke against the bill. The opposition is buttonhole type in the corridors of the Capitol Building, and I feel certain from our experience that it will be that kind of opposition that will be manifested against this bill.

I would urge also, Mr. Chairman, since I know you are well aware of the benefit of wide public acceptance of a concept, I would encourage that careful plans be laid to encourage wide citizen expression of interest in this bill.

Only if a demonstrative public outcry is heard will opposition forces look more carefully at your bill and cease automatic opposition. I think this is very significant. The opposition can be expected to back away only if there is a loud public demand for the bill.

I believe that if industry will look more carefully they will find it, as we have, a useful potential tool and not a vehicle to fear out of hand.

Mr. Chairman, I commend you for your bill and would suggest that you have here a major conservation vehicle, which should be nurtured carefully in the public interest.

That is the end of my prepared statement. I would be very pleased to answer any questions concerning our experience or the detail features of the Michigan bill.

I understand that your bill was written in large part by the same gentleman who drafted our bill, so there are several similarities.

Senator HART. I was going to say, Mr. Anderson, that we are really responding to your leadership and to Professor Sax, when we introduced this bill. I am delighted to have you explain the progress made thus far in the Michigan Legislature on your bill. I think you described accurately the forces that will be at work here in the Congress, both in support of and in opposition to the bill.

I do want to acknowledge that we are following you and Professor Sax in this effort.

Do you have any prediction as to what will happen in the Michigan Senate on the bill?

Mr. ANDERSON. Yes, Mr. Chairman.

I believe that we will pass a bill in the Michigan Senate. The indication is clear. As a result of some cooperation we had with the executive office. The Governor's office put the legal adviser to the Governor with us and we went to meet with Dr. Sax after the bill was introduced, and had had its first series of hearings. The chamber of commerce had expressed such wide concern and several industries had expressed concern as the document from the chamber of commerce will indicate, there were some 20 or 30 points of concern some of which had some validity and could be repaired by correcting the language in the bill, but some of which we objected to very strenuously.

Joseph Thibodeau, who is the Governor's legal adviser and I, Senator Rockwell, who is head of the Senate Conservation Committee, and my cochairman, Mr. Goemdere, visited Washington and met with

Dr. Sax and went through the proposed language of a rewrite. The substitute that we passed is with one or two minor language exceptions, the agreement we came to in Dr. Sax' office, so that we have a bill now that has wide acceptance in the front office—in the Governor's office—and also in the Senate.

It is still feared by many industries. Two of the automobile companies have told me that they don't intend to oppose the bill, that they think they can live with it. One of the automobile companies has taken the stand that they would as soon not have the bill because they say in every block somebody doesn't like them, or bought a car they didn't like, so they will be in to sue.

But I think we have the bill in a shape that it will pass the Senate. Our problem will be in keeping it in the strongest form as possible, and then, of course, if it is weakened in the Senate, to try to restore its strength in conference. But I believe we are going to pass a bill, Mr. Chairman.

Senator HART. You have indicated that much of the opposition centers on the claim that nuts will sue and we will be badgered to death and so on.

Would it be possible for an individual to sue every automobile owner in this country to stop using his car in order to protect or to reduce air pollution?

Mr. ANDERSON. Under the terms of your bill, it wouldn't be possible, nor would it be possible under the terms of the Michigan House bill.

In the first place, in the Michigan House bill, the suit would be brought in circuit court, and the judge would have to determine the reasonableness of the suit. The courts traditionally guard against allowing into action frivolous matters or matters that don't have strong bearing, matters of, say, frivolity.

It would appear to me that a suit of such type could not be enjoyed and would not be entertained.

This is one of the questions raised by some of the opponents, however; that somebody might sue all industries, or sue all cities, or sue all automobile owners, or even sue everybody who has a fireplace and so forth.

Of course, the courts have indicated over many years and by legal tradition that this just doesn't happen.

Senator HART. Would it be fair to say that while the word "reasonable" or "reasonableness" is not in the Michigan bill, that pollution of a minimal nature such as one car's exhaust is not intended to give a cause of action in the bill?

Mr. ANDERSON. That is correct. It is not intended to. The reason I objected to insertion of the word "unreasonable" in our bill was because of the fact I believe strongly—although I am not an attorney—I believe strongly in good information that indicates that the term "reasonable" is implicit in the law as it now stands and that the courts make determinations in all instances based on prudence and reasonability and so forth. It has been my stand that, to insert the word "unreasonable" as a modifier of pollution into the bill would give an additional cop out for defense attorneys or weaken, perhaps—let me restate that, to strengthen the opportunity for defense against a pollution charge.

What we wanted to do in this bill is to make it as tough as possible, to defend against a pollution charge within the bounds of reason. We

want to make it possible here, Mr. Chairman, for a citizen to bring suit in an honest case where there is impairment in the environment and then we want the defendant, if you will, to be able—and your bill has the same provision—to make the defendant have a tough time defending himself.

In other words, he just can't come in and say, "Look, I am doing the best I can." He has to come in with some definite proof that he is not polluting, or there is some technological limitation on his further improvement, or there is no feasible or prudent alternative.

We don't want to make it easy to defend, but at the same time we don't want to make it impossible to defend. We think that insertion of the word "unreasonable" would provide an additional avenue of defense that we do not want.

Senator HART. And that there is available to the defense the claim of reasonableness given the limitations of technology or the minimal damage to the environment, is that correct?

Mr. ANDERSON. That is correct, Mr. Chairman. S. 3575, as well as the Michigan bill, both provide the man with the opportunity of showing that he has no feasible and prudent alternative, and we think the court's traditional reliance upon the reasonableness of a charge or the reasonableness of a defense, and the fact that a man can show that he has no alternative that is feasible or prudent, a technological avenue is not available to him, would make it possible for him, if he had an honest defense, to so defend.

Senator HART. So, in a sense, as you read the bill, the inclusion of "unreasonable" would almost be redundant.

Mr. ANDERSON. I believe so strongly.

Senator HART. Have you given any thought to this possibility, suppose the Federal Government has approved a standard, has anyone given any thought to the question whether under this bill or yours in the State legislature, the compliance with the Federal standard would be a defense?

Mr. ANDERSON. That has been discussed many times, Mr. Chairman. It has been suggested, for example, by the chamber of commerce, the Michigan State Chamber of Commerce and many industries with whom I have talked, that some words be put in here to the effect that—and this will probably be a suggestion in the case of the Federal bill that you have introduced—if the man is meeting the established standards from the regulatory agency, that he was not subject to suit.

We have strongly opposed insertion of such language. I don't mean to cast aspersions, but it is customary in the American system of democracy, if you want to appoint a commission to review or to control railroads, you usually find a man with vast experience in railroading so that he will be knowledgeable on the subject of control.

In so stating this, I don't cast aspersions on a railroad commission or anything else. I use it only as a hypothetical example.

It is conceivable that the regulatory commission having to do with water pollution or air pollution or land pollution, whatever, the public health commission, or something, could be staffed largely from the industry being regulated and thus have an excessive sympathy, and rightly so, for the industries they are regulating.

They have an awareness of the industries' problems and perhaps could even be a little too close to the forest so they couldn't see the in-

dividual trees. In so doing, they might see a standard that wasn't as tough or as restrictive as it ought to be in the eyes of the public.

It is my opinion, and the opinion of the persons who drafted the bill and the sponsors of this bill, that the fact that some of the agencies might have been a little overly lenient in establishing standards that should be subject to challenge.

So, I would think if you put some standards in there saying that a man cannot be sued if he meets those standards, that you have limited the ability of the citizen to bring action. I would hope that it would not be done.

Senator HART. If an individual did meet the standards and the standards were inadequate, I wonder if it would be possible for the individual who complains to go after the standard setter rather than the fellow who complied with the standard?

Mr. ANDERSON. Mr. Chairman, I think that is one of the prime features of the bill. The citizen who feels aggrieved in the name of humanity or the environment, or whatever, can bring action, not only against the man putting the stuff into the water, but against the man who is setting the standard.

He can bring action against the controlling agency if he feels the standards are not sufficiently rigid.

Now, the agency can then show as a defense that their standards are set on the basis of prudence and feasibility, that there are certain technical limitations, and then the court will make a determination whether the standards were, in fact, adequate.

Senator HART. I am sure industry voices have raised this point. If compliance with the standards would not be a defense, how would an industry that wants to construct a new plant protect itself? Is there any mechanism?

Mr. ANDERSON. It is my opinion, Mr. Chairman, that this is one of the primary advantages of the bill. Many people look at your bill or the Michigan bill or the Colorado bill, or any of these seven others that have been introduced throughout the country, as a way to allow citizens involvement in seeking out and stopping pollution. But I look at this as having an excellent secondary advantage, and that is that it is an excellent way also for citizen involvement in the business of stopping potential impairment of the environment.

If a powerplant, for example, were going to be located on a river in a location that might be deleterious or extremely damaging to the environment, for example, on pike spawning marsh—a pike marsh as one looks at it is a rather messy looking place as we human beings look at things, so the marshes are not particular—attractive to look at and don't seem to have on the surface any particular benefit—but as environmentalists know and ecologists know, marshes have specific and particular benefits and advantages in the life chain of many species.

So, if a plant were going to be located in the pike spawning marshes such as at Houghton Lake in Michigan, which can be greatly damaging to the environment, there perhaps ought to be a better location for that plant.

Citizens could, under this bill, bring action saying that that plant should not be located in a place that will impair the environment in an unreasonable or unnecessary amount and not in keeping with the balance between the environment and man's progress.

So, I think very definitely there is a chance that industry, in response to your question, might sometimes find trouble in locating plants where they would freely locate them otherwise, because this will give citizens an avenue of expression of opposition that is difficult to reach now.

Your bill will be supplementary to existing law. Our Michigan bill is supplementary to existing law and does not in any sense supplant existing law, but it makes an easier avenue by which people might enter into action; sets up an established procedure whereby they can proceed with an action.

If a man were going to build a plant in the wrong place, as you have indicated, he would have to demonstrate that where he wants to put that plant is the best place to put it.

Senator HARR. But in the situation where the location of that plant would comply with the standards that have been issued, the industry that plans to construct at that location would have to insure it is not alone that it was meeting the standards that have been promulgated, but that it was a site, a location, and a type of construction that would not be subject to a citizen's suit under this bill.

The mere fact that it met the standards would not of itself be a defense; it would have to anticipate an additional standard being voiced by the individuals through the courts, is that right?

Mr. ANDERSON. I would think so, Mr. Chairman, that that is correct, although this could be overstated, I believe, and is being overstated by some industries at the present time.

If I can be permitted a philosophical comment, a very brief one, I think that too long we have used as one of the prime determinants for making decisions of where to locate a plant, or what product to put out, or how to do something or how to get rid of our waste, the amount of cost to the stockholders.

I think that we have to reach the position in our society where the first thing we should do is ask what will our action do to the environment, what will our action do to the ecology of the area in which we propose to do something.

I think that that has to be a primary consideration in advance of the dollar value to the stockholder. I think if a man wants to build a plant, he not only has to look at the problem of what will be the emission standards be, so he can build his plant without damaging the environment anymore than it is technologically possible, but, also, he will have to build that plant in the area that will do the least damage to the surrounding community and to the environment of the region.

So, I think those are considerations that have to be looked into at some point in our society, and relatively soon, because we are rapidly running out of time in this business of environment, as you so well know and have so aptly stated. But I think that has to be a primary consideration.

A bill such as this, such as S. 3575, will encourage builders and developers and industrialists to make sure that one of the considerations that they have in a plant location plan, and a plant standards plan, will be the effect of that plant on the environment, and that will be considered as one of the major considerations along with how much it is going to cost to make the product or how much it is going to make for the stockholders.

Senator HART. Again, I express the appreciation for all people who will be benefitted by the leadership you have given in this area.

Mr. ANDERSON. Thank you, Mr. Chairman.

Senator HART. Next we will have testimony from the Honorable Richard Lamm, a member of the Colorado House of Representatives.

**STATEMENT OF HON. RICHARD LAMM, STATE REPRESENTATIVE
IN THE HOUSE OF REPRESENTATIVES, STATE OF COLORADO**

Mr. LAMM. Mr. Chairman, I have prepared a written statement which I will certainly introduce into the record, but I might, if I might, speak extemporaneously about some of the problems I see in this area of legislation.

I introduced a similar bill, again under the inspiration and thinking of Professor Sax, in the Colorado Legislature. For your information we are now adjourned, the bill not having been reported out of the committee.

I have another perspective in the fact that I have done some environmental litigation in my law practice. I thus have seen both as an attorney and as a legislator some of the needs that we have for this type of legislation.

I would first of all like to direct myself to the question, and it is a good one, that you asked about crank litigation, because I think that is probably the key, one of the things that was brought up in the Colorado Legislature, it obviously has been brought up many times to you.

In the Colorado Legislature we had some 1,450 bills introduced last session of which only a couple hundred passed. Some of these bills were considered crank legislation. But yet in a couple years much of this crank legislation will in effect become tomorrow's perfected legislation. Almost like new ideas.

I think Will Durant, looking in lessons of history, said 99 out of a hundred new ideas that come along are bad ideas; yet, we pay the social price of the 99 bad ideas for the advantage that we get in the one new idea.

I would say that a great many lawyers thought *Brown v. Board of Education* was crank litigation when it began.

We have to view the weighing of social benefit with the social cost. We have to accept a certain amount of bad lawsuits, and there will be spurious lawsuits, for the social benefit that legislation like this obviously will bring to an ever-increasingly polluted society. It is almost like bad debt losses in a department store. If in effect you are not getting any bad debt loss, you don't have adequate enough credit policy.

I believe the same thing holds true in litigation. You have to expect to pay a certain price for the good that social mechanism does. I think it is particularly important in the field of environment and pollution, because I am very upset as a legislator, I suppose as a human being, with the inadequacy of some of our problem-solving mechanisms.

I believe we don't have the adequate problem-solving mechanisms really to save man from some serious problems. In effect, Colorado is in a way a little microcosm of some of the problems we have had.

We have had, for instance, the Army telling us that there was no problem with deep-well waste disposal near Denver, and it took an independent review by an independent geologist or a private citizen to

show that there was a direct correlation between those earthquakes we have been experiencing and the deep-well high pressure waste injection.

The Dow Chemical Co. or the Atomic Energy Commission—neither of them ever mentioned there was any kind of release of radiation near Denver, but yet an independent group found there had been downwind considerable radiation release.

We are finding in effect that the Forest Service in Colorado doesn't have always all of the right ideas and that the Atomic Energy Commission in Grand Junction hasn't always had all of the answers.

Not to be mistaken, I would say that we don't want to raise any kind of false issues here. In fact, I am not criticizing these agencies. As a matter of fact, the Atomic Energy Commission, I would suggest, given our power needs, we probably can't live without it.

The problem is, of course, they don't have all the answers and that we need an independent mechanism to check and balance agency action and to help serve as a mechanism whereby individual companies, individual agencies can have independent review.

I can think of a few things really as important—there are a lot of other important problems, but what we are talking about here today is problem solving machinery, and I would say as a State legislature we don't really anticipate some of the dangers of technology.

I have inserted in the record a couple of articles which I think are well worth reading, one by Harold Green, which talks about the increase in technology. In 1940 there was \$74 million spent on the part of the Federal Government for research and development. By 1950 this amount had risen to a billion dollars. Last year it was some 15 percent of the Federal budget. All of this money forced into the research and development area has in effect given us a millenium of change in a few short years. We have a thousand new ideas and new technologies and these ideas are put into effect almost immediately.

So, as Professor Green pointed out in his article, we don't have the law to be an independent check as a leveling influence, if you will, that was available when the technology called railroads developed.

We had over a hundred years for the courts to make sure that railroads were safe. This was generally given by citizens suing railroads saying that your technology is not safe, and by the medium of damages and by the medium of law suits they were in effect able to protect society against some of the dangers of technology.

With the rate of change and the ability to affect things being so large, these mechanisms are no longer adequate.

We, as State legislators, spend most of our time reacting to immediate problems, not anticipating future ones. We are understaffed, under financed, and we lack the time. We also lack I suppose some of the ability to fully anticipate some of the problems that some of our constituents are binging up to us. I think often of the old Greek proverb, "To know all to ask is to know half." We don't know all to ask. The same way with the courts. We really wonder about the historic way that the courts were able to protect society against technology when you look at the type of impending changes and technology that the next 30 years holds for us, a lot because of this massive influx of Federal money.

For instance, the SST, radiation, all of the toxic results from tire dust to regular air pollution, food additives, genetic engineering, a

whole range of things, we could go on for a long time, which in effect have an ability to vastly affect the kind of society we live in and the public health problems we anticipate.

For instance, in water pollution in the year 1900 when the old type of law mechanisms would handle it, if someone was throwing sewage in the creek, an individual citizen could come into the court and if he didn't have any of these modern remedies, he at least could sue for damages after the damage was done.

But society didn't pay all that big a penalty because the ability to affect things was on a much smaller scale. But in 1970 if the Atomic Energy Commission makes a mistake in Colorado 7 miles from the Colorado River tributaries, we are literally talking about an ability, without being inflammatory, to affect large-scale serious public health problems in all downstream areas.

So, one of the problems I think we are talking about here is no longer so much the odds, it is the stakes, and the ability of technology to affect things on so vast a scale.

The stakes being so high, new problem solving mechanisms are required to help protect us against these kinds of things. That is the reason I think that citizen law suits are very necessary. The legislature, as I have already mentioned, seems to be inadequate, and I say that very respectfully, I just see in Colorado we cannot anticipate all the problems.

Public agencies also have their problems. Some are captives of their industry, some are lazy, some are not doing the right job, some are victims of Parkinson's Law. Some, for instance, have inconsistent functions. For instance, some people are criticizing the Atomic Energy Commission. By giving it the duty or the ability to police and promote the peaceful use of the atom, some people have suggested that this agency has inconsistent functions.

For those reasons, we do need new ways in which people can bring up adversary issues and really make sure that the public interest is being served, to make sure that the public interest is being served, to make sure that all viewpoints are being considered, to make sure that new ways or that new technology is in effect taking full ability to protect society against these kinds of problems.

What in effect we need is a new system of checks and balances. Consequently, there is a wide range of abilities or advantages that come through citizen law suits. One is to spotlight needed areas of legislation. One is to monitor public agencies. One is to bring minority viewpoints of scientific change.

For instance, the type of thing that is saying that tire dust or asbestos from brake linings in effect is really carcinogenic. Some way we have to bring in competing viewpoints into a realm where they can be weighed and considered and taken into consideration.

No one is saying that a law court is the complete answer to the kind of problems we are talking about. As a matter of fact, there is some very good thinking we need a wide range of many new legal institutions, an ombudsman, a series of legal private doctrines like we were talking about before, and really many others.

But I think in Senate bill 3575 you really in effect have taken a large step toward allowing these private citizens, and many of them represent very valid viewpoints, to come in and present their case in

court. They are able to come in and they are able to say to a public agency have you really considered X, Y, and Z, and they haven't been able to come in and to monitor through a series of checks and balances.

In summary, getting back in a complete circle where I began on the spurious or crank law suits, I have been involved in a number of these pieces of litigation, and I know this is not the same kind of thing as writing your legislator a crank letter. Any law suit at the threshold has considerable finances in it, the matter of going to an attorney, the matter of finding the experts, the matter of just putting up the filing fees and the discovery costs.

I think in effect you already have a certain threshold barrier which I think will protect industry against a wide variety of crank law suits simply by the fact that it takes a certain level of dedication, a certain level of financing to even walk into the court.

I think with that and my written statement, I would be available for questions.

Senator HART. Your extemporaneous statement was—I was going to say moving—it was certainly interesting and also moving.

I read one paragraph from your prepared statement which seems to summarize your informal comment.

We need citizen law suits, we need them to act as an independent mechanism to supplement agency action, we need them to monitor and check agency action, we need them to spotlight needed areas of legislation, we need them to review and leaven technology, to anticipate dangers, to insure all factors are taken into account and to insure an adequate weighing of the risks and the benefits.

I think that expresses in just that one sentence the purpose that Representative Anderson had in mind, that Senator McGovern and I have in mind and you in Colorado have in mind in offering this new—well, it certainly isn't a new institution, but adding this piece to the existing mechanisms.

You have said it well. Do you find that your explanation reassures people who are afraid of crank law suits?

Mr. LAMM. I think there is an increasing responsibility on the part of industry to recognize the rights of citizens and their concern with the environment. I do believe that in Colorado, we are seeing that a lot more than merely, as the charge is sometimes made, industries spending money on public relations rather than on research and technology.

I think the vast majority of industry in Colorado would find this to be responsible legislation if they would not actually be lobbying for it. At least they would realize that the 20th century makes some demands upon people. I think they are perhaps resigned to it.

Senator HART. To approach it from the other extreme, the bill pending here in the Congress provides only for equitable relief. Do you feel it desirable or prudent to go further and to provide for money damages for unreasonable pollution?

Mr. LAMM. No, I do not.

Senator HART. Would you care to explain why not?

Mr. LAMM. Well, I suspect that may be the overriding reason to be strictly honest, of course, is the fact this is a new concept, and we want to get the new concept across.

We have been involved in some of these, for instance, air pollution agencies, and I know there is a great resiliency to old doctrines to allow citizens to get damages. I am more worried, not about compen-

sating the present citizens against damages, I am really more worried about anticipating and correctly assessing the technology in terms of future damages.

I don't mean in any way to understate the fact that this bill—equitable relief would also give a lot of benefits—would give an additional weapon by which society can protect itself against immediate dangers, but I really think that this legislation is such important legislation it shouldn't be diffused or mixed up.

We should try to maximize our friends rather than try to multiply our enemies.

Senator HART. Very good.

Mr. Bickwit.

Mr. BICKWIT. In deciding what sort of activity we will allow under this bill, when a court makes that decision, what factors, other than the amount of pollution, impairment and destruction ought it to take into account?

Mr. LAMM. Let me see if I understand your question. Did I hear you say existing standards?

Mr. BICKWIT. Under our bill an assessment has to be made by a court in deciding what sort of pollution, impairment, or destruction is reasonable: Or, if we don't like the word "reasonable" in deciding what sort of pollution, impairment, or destruction is allowable, exactly what factors ought the court to be considering in making this assessment?

Mr. LAMM. The subject matter came up in Colorado, and I told the story of the person sentenced by the judge to 99 years. He looked up to the judge and said, "Your Honor, I am 50 years old, I will never be able to do 99 years."

The judge said "Just do the best you can, just do the best you can."

I think there is plenty of adequate explanation on the part of industry that they are doing the best that they can, that technology doesn't allow them to completely abate all pollution, and further, you have a problem that we have that maybe you achieve 98-percent pollution reduction by a certain process that the Colorado Public Service puts in at a cost of millions of dollars and 3 years later someone comes along with a process that will reduce it 99 percent.

You have then maybe a citizen saying they are not doing the best they can. But the wording in here of reasonable and prudent and the historic ability to have the courts to understand when people are reasonable and prudent seems to give adequate protection.

Mr. BICKWIT. In other words, we will probably apply somewhat different standards to an existing plant or an existing structure than we would to one which hasn't been built?

Mr. LAMM. Very true.

Mr. BICKWIT. And in other words, this doesn't mean that a plaintiff can come into court and enjoin the continued operation of all existing structures simply because they do not have the best possible pollution control devices if the installation of those devices would not be a feasible and prudent alternative?

Mr. LAMM. You see, you raise something very interesting. We have in Colorado a little town, a little mining town of some 200 persons, and they have been ordered not by any court but by the Water Pollution Agency to install a water pollution facility. There is no possible

way for them to do this—I am sure this has come up in your hearings many times—and the Water Pollution Control Agency in Colorado has taken this attitude, that we cannot allow this little town to dump sewage in the creek, and we just have monstrous health hazards and perhaps the 200 people that are living there might have to move to a different location.

It is a very interesting concept because in a lot of ways it shows that there are certain activities that we might have to face up to that perhaps even provide jobs in some areas but whose overall social cost is not what the social benefit is.

So, I do not want to understate the fact that there is not inherent in this legislation certain teeth and certain ability, I think, of courts to make decisions which are going to affect adversely both some industries and some people. I would say, as Representative Anderson said very beautifully, that for the overall social benefit it is necessary sometimes to close down some plants.

We have a plant in Colorado. There is no way you can make it economical. They are just going to have to start and build a new plant. That is too bad; it really is.

But, on the other hand, the overall social demands for a clean environment are such they will have to do it.

Mr. BICKWIT. If injunctions are facilitated under this bill, do you believe we run the risk of unduly tying up projects that we really need?

Mr. LAMM. Yes. You know, the ability of the court—I can't answer for all—the ability of a court in Colorado to act expeditiously even with the 10 percent increase in the filings we have had both in the Federal District and the appellate court—but this court is very expeditious.

In effect cases get at issue and get solved. The delay is minimal. There has been no case that I can think of which has been really significantly delayed.

Mr. BICKWIT. You talked a lot about technology assessment, the sort of judgments that have to be made to protect us.

Many of these involve highly scientific factors. One of the arguments that we have heard is that a court is incapable of grappling with that kind of technical issue. Do you believe that that is a valid argument?

Mr. LAMM. Well, that is a many-headed question. First of all, the courts have been fantastic. It is almost like extending a franchise. Every time we have done something like this, extended the franchise, we have found people that were in effect able to exercise their franchise.

The analogy is true with the courts. We have given them increasingly complicated problems to solve and they have really done it. They deal right now, today already with scientific problems. But more importantly, most of the time these issues are raised, you really don't require that these people substitute their judgment for the scientists.

For instance, in many cases there is a very clear policy laid down by Congress, and the question is with competing viewpoints in the adversary system, the citizens bringing their viewpoints, which was best seen in our case in the wilderness area, you just simply find the public agency wasn't following the congressional doctrine at all.

So, it is not a perfect institution. The questions you raise are serious ones. There is no institution that is perfect, and there are times when they obviously get into some deep scientific questions. But I don't think that is any reason not to pass this legislation.

On the contrary, I think it is more reason to pass it. They have done a good job, and a lot of this becomes in monitoring to make sure that agencies are following congressional intent.

Mr. BICKWIT. You mentioned in your remarks that you thought the court would not in and of itself solve these problems and that other institutional advances were necessary. I wonder if you have given any thought to what other institutions the Congress ought to be considering.

Mr. LAMM. I think there is a whole range, one of which is a study of some of the different and competing functions. I personally am very disturbed that a small handful of Federal legislators in the Joint Committee on Atomic Energy have under their ability to control such a vast amount of what today—for instance, the nuclear energy today accounts for 1 percent of our electrical energy. By 1980 it will be 50 percent. By the year 2000, it will be somewhat upwards. They project, you know.

This is only one area that atomic energy is working in. I very strongly feel that we have given the Atomic Energy Commission inconsistent functions. Whether that is true or not, I don't know, but it is an increasing viewpoint that is being voiced, and I wish that the people would start to examine some of the functions that we have given some of our Federal agencies.

So, one of the questions or answers to your question would be we certainly need a review of many of the agency functions that have been given. I think another mechanism that we need on the State level is more financing. All of the citizen conferences on State legislatures have shown that we have inadequate staff; we have inadequate ability to do anything but to react to immediate problems.

So, we need to oil the problem solving machinery of State government a lot more than we do right now.

Colorado has done a very good job on this, but nevertheless, we also are inadequate. I think you need perhaps to go beyond this. Ultimately, a lot of these problems are political decisions, risk versus benefit, is the social benefit bigger than the social risk. You have some things that we are doing right now. You have to discount some of the reductions that people have made about technology even to discuss the subject dispassionately.

Some people make the prediction that we have already spread enough DDT to do away with our oxygen supply. I think that is probably not true. But we do have to recognize that technology can effect things on so vast a scale that by the time we really truly anticipate the dangers in the historic sense where you can say "Loow, I told you, I can prove now that this is causing the damage," it is too late.

Our fates will have been sealed. So at some point some thought ought to be given to some way that in certain instances, perhaps, the burden of proof ought to be on technology. They have to prove beyond a reasonable doubt or maybe even by a preponderance of the evidence that that is not injurious rather than on the ability of either agencies or citizens to come in and prove that it is.

Again, to know all to ask is to know half. There are two control groups on radiation. I always refer to radiation, and again I don't mean—I am dead serious, I think some of the risks on radiation are much less than some of the risks on fossil fuel generation. I don't want to be classified as one of these, and there are a few who are, objecting all the time.

One has to admit there are only two significant human control groups on the effect of radiation. One is Nagasaki and Hiroshima. The long-time effects of this thing no one really knows, either the somatic or the genetic. It seems to me we ought to go very slow in developing radiation.

For instance, we ought to make use of whatever experimental capacity there is inherent in new technology on power production which we definitely need right now rather than on oil shale stimulation and gas stimulation in western Colorado which we don't need right now.

We ought to, in other words, not develop a technology just because we can, because science can do something. There is a difference between the can and the ought, and it is not being sufficiently examined. We can do lots of things, but I am not so sure we ought to do them.

Mr. BICKWIT. Do you think the existing agencies can decide what it is that we can do that we ought to do, or do we need a completely new agency structure? Do we need total administrative reform or do you think we can patch up what we have?

Mr. LAMM. I definitely think we can, but sometimes it is better to start—you know, these are very, very complicated questions of public policy.

I think we can reform our State legislatures, but do we? There is the inability of a lot of State legislatures to make themselves effective in problem-solving machinery.

I assume the House of Representatives could reform the seniority system. But will they?

It could be the ultimate answer to solving some of these agency problems will be the fact that it is so ingrained.

We also have the other problems of civil service. We have insulated these people for better or worse against the patronage system which is good, but then sometimes we have so insulated them we have a hard time getting rid of them for any reason other than gross incompetence. So you build up a large structure, then you insulate these people against affecting them in any way, and all of a sudden they don't do a good job. They are lazy or for some other reason. If you can reform that agency, fine. But it might be better to give a check or balance to another agency or an ombudsman.

I think there is no really one answer to your question. It really disturbs us in Colorado. Some of our State agencies, for instance, our highway department, good people, trying very hard to meet transportation difficulties, but they are so understandably institutionalized toward cement that they just absolutely refuse—we have put in a public highway trust fund, too, so we have a hatful of money to spend on highways, and we have no money to spend on mass transportation.

That is an institutional problem I don't know how to solve. When you combine that whole hatful of money with no interest by the highway department in anything other than cement, I don't know how to solve it. I don't know.

Senator HART. Thank you very much for an interesting discussion. (The statement follows:)

STATEMENT OF STATE REPRESENTATIVE RICHARD D. LAMM, STATE OF COLORADO

I would like to discuss with you today not a specific problem, but the question of problem solving machinery. I am concerned about the adequacy of our historic legal institutions to solve some of our twentieth century problems.

I would like to hand in and make a part of the record an article by Harold P. Green entitled *The New Technological Era: A View From The Law*. I believe it is extremely important to putting S. 3757 into perspective. Mr. Green discusses the adequacy of the law to currently assess and leaven technology and concludes that given the rate of technological advancement that we must devise new legal checks on technology.

As a state legislator I am very concerned about the ability of either the legislature or the courts to anticipate some of the dangers that technology brings us along with its benefits. This because of many reasons, one of which is that most legislators and judges are not scientifically trained, but more important because the rate of change is so fast that not even scientists can adequately anticipate the dangers—to find the cliffs before mankind falls over them. Let's examine the rate of change—in 1940 the Federal government spent 74 million dollars on research and development, by 1950 this amount had risen to 1 billion dollars, and last year it was close to 20 billion dollars representing some 16% of the total Federal Budget. The forced influx of Federal research and development money in addition to that spent by the private sector has brought on a torrent of change. The law which had 100 years to deal with the dangers of that technology called Railroad, now is inadequate to leaven and protect society against the dangers inherent in new technology, whether it's called weather modification, S.S.T., radiation, genetic engineering, food additives, tire dust or any other of the many new toxic insults we are putting into our environment.

Science makes a breakthrough and technology has it on the market in a few short years. The massive amounts of public and private monies cause a millennium of change in a few short years.

We have lost a great deal of predictability in this torrent of change. We really don't know what many of these toxic insults are doing to ourselves or to our children. We must discount many of the dire predictions to even approach the subject dispassionately.

We don't know what these substances do individually, we know even less what they do cumulatively. We do know one thing—they are on a scale that are vast and encompass millions of people and generations. If a company made a water pollution mistake in the 1920's, it would at most affect a handful of people, if the Atomic Energy Commission is wrong in the 1970's, radiation pollution will affect millions of people and generations of man. Our ability to affect things on a vast scale has given us a shrinkage margin of error.

To meet these problems, we have the historic problem solving institutions. We first have the legislative bodies. In the states we are understaffed, unfinanced, mostly scientifically illiterate, and we spend most of our time reacting to immediate problems rather than anticipating future problems. There is an old Greek proverb "To know all to ask is to know half." Given the complexity of technology and the rate of change, most state and Federal legislators don't know enough to ask.

The private lawsuits are also inadequate. The railroad technology was made safe through suits for damages. If a person was hurt by technology, we used to sue for money damages: a million people hurt by the indiscriminate application of D.D.T. have no such remedy. Some suggest that before man could prove a case with the normal burdens of proofs that all mankind's fate may well have been sealed.

Public Agencies also have their inadequacies, they also need their system of checks and balances. Some are given inconsistent functions, like the A.E.C. who must both police and promote the peaceful use of the atom. Some become captive of the industry they are supposed to relegate, some are lazy, some are ignorant, some are victims of Parkinson's law. Their interests are not always synonymous with the public interest.

We thus must have a new and additional system to act as checks and balances. The question of twentieth century technology is not so much what

are the odds it will do harm, the question is what are the stakes, and the stakes are the health and lives of millions of people.

We need citizen lawsuits, we need them to act as an independent mechanism to supplement agency action, we need them to monitor and check agency action, we need them to spotlight needed areas of legislation, we need them to review and leaven technology, to anticipate dangers, to insure all factors are taken into account and to insure an adequate weighing of the risks and the benefits.

Colorado is a microcosm showing the need for this legislation. The Army told us that our increase in earthquakes had nothing to do with the deep well waste-disposal, but an independent geologist proved they were causing our earthquakes. The Dow Chemical Company never said a word about releases of radiation, nor did the A.E.C., but a citizen group proved that there was radioactivity in the soil miles downwind from the plant. We are now finding the A.E.C. didn't have all the answers on the Grand Junction mine tailings or the uranium miners.

The A.E.C. is a responsible body, I believe it's not a question of living with the peaceful atom, but given our power demands we probably can't live without them. *But they do not have the answers.* They need also a system to checks and balances. They also need to be subjected to the adversary system. The stakes are too high not to have checks and balances.

S. 3575 will provide a system of checks and balances. It will allow citizens to have standing to go into court and review the actions of those who put toxic insults into the environment.

Some will ask about spurious lawsuits and let us start out admitting that there will be spurious lawsuits. Last year in the Colorado legislature there were "spurious" bills introduced, and there are many "crank" ideas around—and just as in their examples, we pay a social cost greater if we don't allow the mechanisms to bring good bills and bad, good ideas with bad ideas, good lawsuits with bad lawsuits.

I strongly endorse the thinking of Professor Joseph Sax and the concepts of S. 3575.

Senator HART. David Sive, who was to testify today, is unable to do so because of an illness, but we are delighted to have the opportunity of hearing from Frank M. Potter, Jr., who is the executive director of the Environmental Clearinghouse in Washington.

**STATEMENT OF FRANK M. POTTER, JR., EXECUTIVE DIRECTOR,
ENVIRONMENTAL CLEARINGHOUSE, INC., WASHINGTON, D.C.**

Mr. POTTER. Thank you, Mr. Chairman.

Let me begin by going through the ritual statement of saying I am happy to be here. Let me say, in fact, I am happy to be here. I thank you for inviting me, as an interested and concerned citizen.¹

You have called these hearings on what is perhaps one of the most revolutionary and ultimately effective concepts that has been identified in the environmental area.

Perhaps I should tell you a little bit about my own background and qualifications. I am a lawyer by training, an amateur ecologist by avocation, and my wife has accused me, I am afraid with vast justification, of having become a monomaniac on the subject.

For several years I was in the Interior Department as a lawyer. I left Interior to work on the *Storm King* case which tested out some of the basic concepts developed in your legislation.

Since then, I have been involved as the executive director of the Environmental Clearinghouse which, as you know, was an organization set up to provide an independent, open channel of communications

¹ You understand, of course, that I cannot and do not speak as a representative of the clearinghouse or any other group.

between the congressional community, on the one hand, and the scientific and otherwise informed community on the other.

The essential subject matter of this bill is how citizens can play a more significant role in institutional decisionmaking, and this is what I refer to when I say that you have a revolutionary and very important concept here.

I have just finished writing a paper for the Center for the Study of Democratic Institutions which happened to deal rather directly with this general subject, and with your permission I would like to submit it for the record.

Senator HART. It will be made a part of the record after your oral testimony.

Mr. POTTER. I have just come back from a conference at the center on the subject of oceans and ecology. The aspect of that discussion that was of particular interest to this legislation is that we are beginning to identify the process of social decisionmaking as something that needs a great deal more examination and informed discussion than it has yet received.

This is the thrust of the paper that I wrote. I won't try to summarize it except to say that I tried to examine the ways that we have of making institutional decision to see which of them were more responsive to rational processes of thought. I came to the conclusion that Government essentially is not ideally suited to the job of environmental monitoring and protection.

It can clearly play an important role, but it is not going to do, and it has not done, the ultimate job, because the Government as an institution does not suffer from environmental problems. Only individuals—people—suffer from these problems.

The Government as a sensing mechanism is insufficiently responsive to human environmental needs. I don't think we need to spend very long on the ability of industry to handle these problems without prodding from the outside.

The kinds of prodding from outside we are talking about is lawsuits, some of which I am familiar with, and regulation from the Government, but again the Government isn't going to respond except as it is constrained to do so from external pressure.

This type of pressure is presently increasing in different ways. I believe your bill is an example of an idea whose time has come. It may or may not pass in this session of this Congress. As you well know, there are predators that are lying in wait here as there are for most innovative legislative concepts. But it is almost undeniable that at some time, and I hope soon, this principle will be enacted into law.

One important issue that was raised this morning was this question of the burden of proof. I think you have gone a step in the right direction by the language in the bill which permits the burden to shift to some extent once a *prima facie* case has been established. Industry is properly concerned about this. Industry has recognized, correctly I believe, that this is going to create problems for them.

We can afford those problems. We must afford those problems. The concept that we are talking about is tradeoffs. If we don't do this and so, what is the price that we pay? We are beginning to discover that we have been paying the piper all along, and that the tune that he has been playing may not be one that is agreeable to us.

I was a little troubled by some of Mr. Bickwit's questions as to what else ought we be doing. I think we ought to be doing a lot more. But what is important is that what has to be done is to put better and more effective tools into the hands of citizens. This bill is not going to solve all of our problems by a long shot, but I do believe that the kind of sensing mechanisms that are involved and the ways of inducing, you might say, perturbations in the body politic that this permits will be very important and useful to legislators as they begin to refine and define with greater particularity the kinds of problems that exist today.

One thing that the bill does not do—and I think you are wise in trying not to import this into the bill—is to expand significantly the causes of action that can be raised.

You are also right for not trying to get damage suits involved in this type of legislation. I believe that this would be a serious mistake and might well contribute to the issue of clogging of the courts to which you are so sensitive.

One factor has not been raised in the context of this legislation. I am not sure whether you want to consider it now, but it is something that ultimately you are going to have to come to grips with, and this is the question of who pays for environmental lawsuits.

The *Storm King* case has been going on since 1964. The Federal Power Commission has not yet finally decided that case. They tried it once, did it rather badly and the second circuit told them to go back and do it right. To my knowledge, Con Edison has expended more than \$16 million in that project. One of the principal opponents of the project, the Scenic Hudson Preservation Conference, the organization which I served as counsel, has probably committed itself to around a half million dollars in legal expenses and court costs. Much of that will never be paid.

The lawyers in these cases, to my certain knowledge, have never gotten rich on them. You try to live at something better than a subsistence level, and I hope other people are better at it than I am. But we have got to begin to devise ways of shifting the burden of these costs to the people who create them.

This may involve a number of things. My preference would be to see this done in the form of some type of bonding, in which a potential polluter would be forced to post a bond which would then be available if it turns out that he had created problems that he hadn't predicted or that we weren't able to adequately protect ourselves from.

This may or may not be workable. I have not examined it in the kind of detail that would permit me to come in and suggest by specific language.

Another alternative would be to create a Federal fund from which you would permit the court in its discretion to permit the payment of legal expenses, the cost of experts—which can be staggering—and other costs.

I do not suggest that it is necessary for plaintiffs or counsel in these cases to make money on them, they are, in fact, protecting public assets and property, and it seems to me it would be desirable in some way or another for the social body to pick up the payment of those costs.

It is always good to be the witness following a number of others so I can pick up on some questions that you asked that I wanted to say something about. You raised the question of whether or not governmentally adopted standards ought to be conclusive, and I think that Mr. Anderson was right when he said that they ought to be—and they would certainly be—a factor.

It would be very dangerous to establish a conclusive presumption that these standards, in fact, provide wholly adequate protection. We all know of cases where factories and industries and governments may carry out projects which are later discovered to have problems. I know you are familiar with the mercury problem in Lake St. Clair.

At the Santa Barbara conference there was a witness from Sweden who was particularly involved with this question. As you know, they have blacklisted a hundred lakes in Sweden into the indefinite future. No fish will be permitted to be caught from those lakes.

We talk about DDT and recognize that it creates long-term problems. Mercury creates even more substantial problems. And we didn't know this—as at least we didn't consider the consequences.

It is unquestionable that there are going to be kinds of problems like this that grow up that we are not going to be able to predict. I don't think we can rely upon the legislators to set standards that will be entirely adequate for the future.

We have to rely on the sensitivity of the citizen, of the individual, to these problems and on his ability to bring these to a focus very quickly. I don't have to tell you that this can happen much more quickly this way than it can going through the normal legislative routine.

So, it seems to me to be necessary in the course of any kind of proceeding brought under your bill that it be made perfectly clear that any existing standards be advisory and certainly not conclusive.

Let me come back to the principal issue which is now just beginning to emerge; how do we develop new mechanisms to permit society to evaluate the consequences of actions which individual members of it may take, but which affect the health of society and individual members generally?

What we are looking for is new methods, new procedures, and new ways of bringing these consequences to the fore before we become so enmeshed in the action of taking whatever steps we have started on that we lose sight of the side effects of these actions.

This kind of legislation will almost certainly be adopted ultimately. I hope very soon, because I think again that this is a very important way of beginning to permit us to make realistic social decisions before the molasses has become absolutely immovable.

The courts are beginning to expand in this area. Professor Sax on Tuesday referred to a number of cases in which private litigants have been successful. The Storm King case was only one of them. I am sorry Dave Sive was not here, because he is a superb lawyer and very well informed on the kinds of questions you are talking about.

The courts could probably handle environmental issues through the traditional common law process if they had enough time. I am sure, that it has become clear to you as it has to me, that we don't have that kind of time, that we are operating under a much more restrictive time frame than we had realized, and we have got to begin to move

more quickly, For this reason the kind of legislation which you propose is not only useful, it is essential and should be adopted very soon.

Thank you.

Senator HART. Let me go to a narrow question, first.

You mentioned the problem of the cost of litigation and should there be a Federal fund that would be available. The bill has a one-sentence treatment of this, discussing what the court may do. "Cost may be apportioned to the parties as the interests of justice require."

Do you think that is sufficient?

Mr. POTTER. Although I saw the section that you were referring to, I read it narrowly. Costs in this kind of context are, I believe usually considered to direct court costs.

If in fact you intend to expand this to cover the costs of witnesses and attorneys so that someone protecting a public asset will in fact be not out of pocket—he may not make any money but at least he won't be hurt badly—perhaps you can do this in the course of legislative history.

My guess is that this might be expensive, and it might be desirable to spell out the ways in which these costs would be assessed and the area of the discretion of the court, perhaps even to create some sort of Federal fund in the Treasury of an identifiable size which could serve as a reservoir.

Senator HART. I think your suggestion is helpful.

You have reminded us that you have been involved in the *Storm King* case. In light of your experience with that case—and perhaps with other litigation—can you explain or give us some examples of how this type of legislation would have been helpful?

Mr. POTTER. That is a tough one.

Senator HART. Do you think, had this bill been on the books, this would have been of assistance to the plaintiffs?

Mr. POTTER. Clearly it would in the question of standing, although I believe the *Storm King* case has now laid that particular specter to rest.

The *Storm King* case, as I am sure you know, was peculiar in that it permitted a reevaluation of the decision under section 10(a) of the Federal Power Act, I must say that the kind of litigation that was involved and the kind of issues that were placed before the Commission in the course of its reopened hearings, were, I suspect, quite beyond what anybody had contemplated when the Federal Power Act was passed in 1920.

I would guess that in cases involving the Federal Power Act that the kind of history that has developed would permit a fairly broad review of Federal Power Commission actions, and I am not just sure—I will have to go back and take a look at that case—whether or not the existence of this legislation would have made a significant difference.

I can see that in other types of cases, such as cases involving the Atomic Energy Commission—which answers only to God, and then only occasionally—that this kind of legislation would be highly important.

I am dodging your question. I am sorry to have to do it. Maybe I should just simply confess ignorance.

My guess is that in almost every one of these cases, this legislation is going to save an awful lot of time and trouble arguing with people who are more traditionally oriented. I think that an inventive lawyer might be able to find ways in many cases, to force court review of a decision which had traditionally been left up to the bureaucrats or to the pollutocrats."

Senator HART. Ignorance is one plea in this area that you are not entitled to.

Mr. Bickwit?

Mr. BICKWIT. In *Storm King*, as I understand it, the court felt incompetent under the Federal Power Act to decide the substantive issues and, therefore, remanded it to administrative proceedings for substantive determinations. They spent most of their time on procedural matters.

Under this bill, as I read it, the court would have been able to make substantive disposition.

Do you think the court ought to be entitled to make such disposition without remanding to the administrative process if the court feels in its own discretion it is capable of making such determinations?

Mr. POTTER. This is a day for asking difficult questions.

The whole justification for the administrative process has been that there are particular types of questions which can be dealt with only accurately and adequately by experts which are the administrative agencies.

We know that this experience has not been on the whole a happy one, and we all recognize that the agencies tend to be captive of the groups that they were set up to regulate.

I guess the question that you are asking is where do we really put the pivotal points, where do we put the pressure points in the system so that the system will react to real problems, not just localized or expert problems.

Certainly in the environmental area there are few experts and precious few of them can be found in the administrative and other Government agencies.

So, I would have to say that I think that it is important that the courts be able to review the environmental consequences of any particular action which is proposed. It is also important that these actions be subjected to scrutiny from a number of different points of view, not only that of the immediate agency responsible.

Just how you are going to work out what the standards are that the court uses—I don't see that that is really spelled out, and maybe it can't be yet. Somebody is going to have to do it. If the agencies don't, the courts will.

I seem to have ducked that question twice, and I am embarrassed, but I just don't see a clear answer.

Mr. BICKWIT. I think you have answered it to some extent. You have said that administrative agencies are subject to bias which courts may be without under certain instances, and therefore, the courts may be in some instance more capable of making determinations on environmental matters than are administrative agencies.

Mr. POTTER. There is no question about that.

My problem has to do with the circumstances under which the courts deal with these problems and the extent of the presumptions of ade-

quacy of the administrative decisions which the court is going to have to deal with.

Under the history of the Administrative Procedure Act, there is, of course, a heavy bias in favor of the adequacy of the administrative agency. The courts are going to have to work out, with whatever help you can give them in developing this legislation, just where that new pressure point is going to be found: how much the agency can foreclose judicial inquiry by engaging in its own investigation or pseudo-investigation of environmental issues.

I am very much afraid of this. I have seen it happen, and it is not going to stop. You are legislating a bill, but you are not legislating a change of character.

Mr. BICKWIT. We have been cautioned on the danger of floods of litigation and you have adverted to it as well.

It has also been suggested that to minimize that danger, we might adopt some kind of screening process to insure that only the fellow who meant business and had something intelligent to say would be able to get into the courtroom.

What do you think of that suggestion?

Mr. POTTER. To be charitable, I don't think it makes a great deal of sense. The courts are an entirely adequate screening mechanism, as has already been pointed out. They can spot a frivolous law suit as fast as anybody else can and they can dispose of it with dispatch and make it sufficiently unpleasant for whoever is doing it, that he is not going to jump right back in with another one.

I think the fear of a flood of litigation is wholly unfounded. I see no indication of this. Whatever you do, it is a traumatic experience to engage in litigation. The system tends to select out the frivolous cases. I don't see any real danger that people are going to clog up the courts with unmeritorious law suits.

As was said on Tuesday, this is really no defense. If meritorious law suits are clogging up the courts, maybe they damn well should. We can't afford to sit around and say we will die a little faster because of air pollution, but that this is acceptable because the alternative is to clog up the courts.

Mr. BICKWIT. Thank you.

Senator HART. I think on that note, we can conclude.

As we close today's hearing, let me thank each of the witnesses, each has been most helpful, and I thank the staff for their thorough preparation.

That concludes our scheduled testimony for today.

(The statement follows:)

PROGRESS MEANS POLLUTION: AN IDEA WHOSE TIME HAS COME—AND GONE

(By Frank M. Potter, Jr.)*

I. INTRODUCTION AND SUMMARY

Knowledgeable men today appear to be in general agreement that mankind faces a new dimension of environmental crises—that, however distant the prospect may appear, we have developed the power to degrade the environment in which we live and upon which we depend that the quality of our lives—possibly our existence itself—is at hazard.

*Executive Director, Environmental Clearinghouse, Inc. Copyright, 1969, Frank M. Potter, Jr.

The reasons underlying these crises are varied, but they seem to spring from a common source: our ability to manipulate the physical world has progressed faster and farther than have the social institutions and protective mechanisms which might act as controls over that ability. In the midst of the technological revolution, individuals become demoralized and ineffective; private enterprise has no motivation to tamper with the goose that lays the golden egg, and the government is inadequately stimulated to take forceful steps to resolve the dilemma.

Our environmental problems are not entirely the legacies of deficient social institutions: a certain amount of ecological perturbation is inevitable and is indeed important to the survival of civilization as we know it. Nonetheless, while the ecology of the Earth is under considerable stress as a result of man's actions, and will continue to be so, the lack of ability to devise better corrective social restraints upon rampant technology appears to be the decisive factor in the environmental crises that confront us.

Not until we are able to step far enough away to see the crises and the institutions in the same context will we be in a position to diagnose the problems and begin to prescribe remedies. Such a comprehensive review may, it is hoped, suggest ways in which we may make those institutions more responsive to the needs of man and the laws of Nature.

Current environmental problems vary in effect and force, but they are nothing if not pervasive: existing at all levels of society, from local to international. They evidence the lack of an adequate information base, unresponsive and ineffectual techniques for technological evaluation and restraint, rapid rates of physical change compounded by a critically slow social reaction time, all further magnified by a surprising lack of consensus on the environmental goals that we really wish to achieve.

Pollution, which we may define as using a resource in such a way as to make it less desirable for other uses, is inevitable only until we can develop adequate tools for dealing with it. The government will never do the job by itself. The key to the problem, if any exists at all, seems to lie rather in putting stronger weapons into the hands of the public—helping it to precipitate the necessary reforms through judicial and other channels. That process would be greatly facilitated if we were able to require those who intend to make use of common resources to disclose their intentions and the expected consequences of their actions far enough in advance to allow less directly interested parties to consider possible unanticipated consequences and if necessary to force a public review in which the range of social costs and benefits might be explored impartially. Also, the burden of showing the need for action should be shifted from the public to those who wish to make use of public resources.

Current public concern with environmental issues shows no signs of slackening and, assisted by new ways of funding environmental protection programs, must provide the ultimate impetus for any upturn in what has been a rapidly declining quality of life for all men.

Pollution is becoming increasing international in scope. Here the issues will be less easily resolved, chiefly because of the lack of effective non-violent sanctions. The best available tool for counteracting global environmental problems may lie only in effectively mobilizing world public opinion.

Current proposals for treaties for the use of the oceans and the ocean floors provide a useful exercise in developing imaginative steps to protect a vital part of the ecology of the Earth. The best hope for a workable device for this purpose might lie in the creation of an organization to serve as an Ombudsman for the Seas.

II. THE INSTITUTIONS—HOW DID WE GET WHERE WE ARE?

A. *The individual*

No rational person consciously acts to degrade the quality of his own life. He may do so through inattention, neglect or general hopelessness—and to some extent most of us do—but rarely if ever does an individual set out deliberately to foul his own nest. It is difficult to find a current newspaper without at least one story on environmental problems; and people who read these stories react to them. This reaction may take the form of amusement; more often, and with increasing frequency, the reaction is sympathetic. Environmental concerns are no longer the private preserve of the birdwatchers: the same bell tolls for us all.

In 1969 the National Wildlife Federation commissioned two polls on American environmental attitudes. The polling organizations reached similar conclusions; most people are actively concerned about environmental problems, and would prefer that their taxes be devoted to a greater proportion of the costs of solving these problems than is now the case. The level of concern rises with income, and varies inversely with age.

Over 50 percent of those interviewed felt that the government was devoting insufficient attention to environmental problems and was providing insufficient financial support toward their resolution. Over 80 percent felt personal concern, and most of these were deeply concerned.

What then keeps them from the barricades?

Apathy is the most common explanation, but the surveys appear to rule this out. The most significant inhibitor of action may rather be that we are too easily convinced of our own political impotence. The larger the social grouping, the more difficult it is for any person to make a significant impact upon group decisions. On the other hand, when aroused, people can take and have taken effective action.

A coalition of citizens joined forces in 1969 to require a reluctant U.S. government to quadruple the amount of funds to be used for waste water treatment facilities. They did so by informing their elected representatives that this was a matter of specific, personal and urgent priority; their representatives listened and responded.

The lack of adequate information is also a powerful factor, but this too can be overcome. Today there is almost a superabundance of data about environmental destruction, and by no means all of it is the uninformed emotional outpourings of a few fuzzy-headed radicals (and reactionaries), as some have claimed. Respectable and respected scientists and citizens are picking up the cudgels and are making sizeable impressions with them.

A few years ago a small and determined group of citizens banded together to oppose the largest utility in the United States, fighting plans to construct a major hydroelectric plant within 50 miles of New York City. They stopped the utility in its tracks. That company was Consolidated Edison, the plant was the Storm King project, and the Federal Power Commission, which must decide whether or not the plant should be built, still has not decided the case. The strong case made by the citizens depended in large measure upon the fact that they were able to propose alternatives to the project, supported by a wealth of technical and engineering detail, to suggest that New York's serious power problems could be met by less damaging methods. Although Con Edison has not yet given up the project, it has adopted the alternatives and many sophisticated agency-watchers consider it unlikely that the plant will ever be built.

Another more philosophical issue must be considered. Assume that we, individually or collectively, are confronted with a clear option: do we live very well for a short period, or do we cut back economic growth in favor of long term survival for the species? With or without volition, we appear to have adopted the former course of action, and it is by no means clear that we would act much differently if the choice were clearer. "Apres moi, le deluge" is a lifestyle confined neither to France nor to the Eighteenth Century. This conflict permeates the environmental issues of the day, at all levels of each institution.

As individuals, we tend to be somewhat ambivalent about the importance of an environmental conscience. In some respects, many people fail to observe even a minimal degree of environmental good manners. For example, a shift in public attitude would produce an instant halt to the littering of our highways, but no such shift is visible. With very little effort, we could easily educate our children in the importance of environmental responsibility; yet if anything our children seem to be taking the lead in educating us. A national Environmental Teach-In is scheduled for April, 1970 in schools and colleges across the country, and there are signs that problems of pollution are occupying a rapidly increasing portion of the attention of young people. A more encouraging sign could scarcely be imagined.

It is important to distinguish between the actions and attitudes of individuals and those of the groups into which they form themselves to consider environmental problems. The biggest problems faced by citizens' groups seldom involve a lack of motivation; they are typically financial. It is rarely to anyone's economical interests to oppose a polluter; this means that the concerned citizens must themselves assume these costs, although the financial burdens involved in speaking out against a powerful and well-financed industry or government

agency may be substantial. Although these are not usually publicized it is known that the costs of carrying on a major controversy may exceed \$500,000. We cannot reasonably expect any group to bear such a burden, nor should we as long as that group is acting to protect assets that are common and valuable to all. At the same time, of course, we have a legitimate interest in seeing that public subsidies will be employed only in valid and meritorious cases.

It might also be noted that citizens may not always organize themselves to protect an environmental *system*. One group may be interested only in visual pollution, while another is interested in noise, and it is an unfortunate fact of life that the normal resolution of a pollution problem is to push it into another area which may not be so vigorously defended. The public concern with power generation facilities producing air pollution in the form of coal dust, oil droplets, and increased sulfur dioxide emissions has played a significant role in the encouragement of nuclear plants, which involve none of these problems but which may have their own problems in terms of radioactive and thermal pollution of cooling water. What we need is groups with a *total* environmental concern.

B. Private institutions

Private businesses suffer to an extent from the same lack of information that plagues individual citizens. Unlike those citizens, private companies can usually afford expert advice, but for a number of reasons that advice is not always sought.

The horizons of the private decision-making structure are deliberately limited to those factors which are considered to be of immediate importance, principally economic. The hidden social costs of organized activity—what the economists term “externalities”—tend to be thrust out of the decision matrix. These costs still exist, however, and must be borne by society as a whole if not by the agency which creates them. A classic example would be a pulp processing plant which emits fumes of hydrogen sulfide, causing wrinkled noses and peeling paint for miles downwind. The resulting inconvenience, possible health costs and certain increases in maintenance costs have not traditionally been imposed upon the agency which created them. Instead they have been imposed upon society generally, regardless of the capability or willingness of individual members to bear them. And of course as Garrett Hardin has clearly shown, the short-term interests of the entrepreneur may be directly opposed to the long-term interests of society generally. [G. Hardin, *The Tragedy of the Commons*, *Science* (13 December 1968).]

This system is not inherently evil, nor are its managers committed to profit at the expense of the public. Indeed, some private companies have taken significant steps to limit the disadvantageous social consequences of their operations at considerable internal costs, quite beyond what they were required to assume by law. Unfortunately, a voluntary approach to reducing environmental problems does not appear to be adequate to a rational, long-term approach to resolving them.

The forces of competition tend to minimize such voluntary efforts: few men or companies, however public-spirited they may be, are prepared to expend large sums upon the internalization of indirect costs. Nor can they do so without incurring the wrath of stockholders even further removed from the environmental affronts which they have indirectly created.

The mechanisms for balancing social costs against economic values must be found outside the private institutions themselves, and they are: this is a major function of government. It is important to note that the *laissez-faire* philosophy which at one time characterized the attitude of American government toward at least American industry is inappropriate to the problems which both confront today. It is also apparent that on environmental issues the government is likely to expand its control-oriented program. Public attention has already been focused on air and water pollution as appropriate areas for concentration of effort. There are other areas in which governmental action must be anticipated: among them noise, solid waste disposal, and the byproducts of energy transfer are mentioned with increasing frequency.

Governmental overview, if impartially and reasonably imposed, need not be hostile to the private sector; it may even be in its short- as well as long-term interests. The National Association of Manufacturers has never been known as a hotbed of social activists, and yet members of NAM operating committees have endorsed proposals for a strong federal body overseeing environmental issues. Businessmen have to breathe, too, and are prepared to accommodate them-

selves to the ecological imperative, so long as their fellows are subject to the same rules.

We cannot assume that this increased governmental concern will take place without some economic disruption. Marginal producers will feel the pinch most strongly, and some may not survive. Nevertheless, the important consideration to be borne in mind is that the rules must be enforced fairly and impartially upon all parties.

Polluting industries have most often resisted pressure to clean up their operations by claiming that the measures proposed are unduly prohibitive or confiscatory. Their chief means of resistance has usually involved threats to pull up their stakes and move to a more permissive climate. It is believed that this last resort has been adopted infrequently, if at all, and that it is only likely to occur where a producer has found himself impossibly squeezed between falling profits and rising costs. It has also been alleged that these are the marginal producers whom the next strong wind will blow away in any case, so that little lasting economic damage ever occurs.

In concluding the discussion on private institutions, it might be useful to stress the distinction between those which exist to make a profit and those which do not. The non-profit groups, smaller in size, financing and influence, have only recently begun to interest themselves in environmental issues. The interest of the private foundations in these topics may recently have been diminished by changes in the tax law, which seem to discourage the kinds of intervention which may have political implications. If this turns out to be lasting, the cause of environmental protection will have received a severe setback in the United States.

C. The Public Sector

Governments appear to be unresponsive to the environmental problems of today, and seem even less likely to be adequate to those of tomorrow. In major part this appears to be due to the fact that the pace of technological change has so accelerated that governments, as presently oriented, find themselves unable to adapt to new problems and to exercise the type of control for which they were originally constituted.

1. Executive branch

Although the problems of the executive branch are essentially similar throughout the hierarchy, it is important to bear in mind that the mass of government workers, the *lumpenbureaucracy*—marches to a drumbeat that only it can hear, which (if it exists at all), is faint indeed. Higher levels of government, although presumably more responsive to broad social needs, generally find their choices so circumscribed by business-as-usual decisions further down the line that their theoretically available policy options become dissipated by the inertia of the machinery. This phenomenon is by no means peculiar to environmental problems, although these tend to be somewhat more acute because of the high stakes involved and because the new issues do not fit easily into existing patterns of bureaucratic stimulus and response.

In practically every agency of government, at almost every level, there develop strong and seemingly almost irresistible pressures to maintain the *status quo*. As one progresses from local to national bureaucracy this inertia rapidly increases. A random example: very early in the 1950's the Eisenhower Administration stated a strong preference for private power development as against public power, but it was not until the Kennedy Administration took office eight years later that the direction of the government had changed enough for it to become an effective supporter of private power. Nor could the Democrats reverse the trend.

There are also powerful personal influences that affect the career civil servant—influences that are environmentally, in current bureaucratese, “counter-productive.” As one observer has put it, “the paramount objective of the permanent bureaucracy is permanence.” This contributes directly to the institutional resistance to change already noted. Agency employees tend to react self-protectively, and in so doing they protect their own institutions. Examples of this tendency may readily be found: it was probably the principal roadblock encountered by Ralph Nader’s “Raiders” in their government agency investigations during the past two summers, who often ran up against a blank, noncommunicative, bureaucratic wall. The same conspiracy of silence resulted in the attempted burial of several agency reports on the controversial supersonic

transport, all of which were unfavorable and all of which had to be wrenched from unwilling bureaucratic hands by actively concerned Congressmen. It was to combat this reaction that Congress recently passed the "Freedom of Information" Act, requiring disclosure of all but certain specified documents—a public law which has been honored far more in the breach than in the observance.

This problem is compounded by a frequent lack of clear policy direction from the upper levels of government to the lower. New policies may be found in new regulations and pronouncements which go religiously unread, or they trickle down by word-of-mouth through a number of communicants, each with his own built-in bias. This communications system serves as an efficient filter for any content which may fortuitously have crept into the public statements of the man or men on top.

These problems should not be ascribed solely to bureaucratic malevolence. Their problem is essentially the same as that of the private citizen: they are not programmed to relate everyday decisions to any specific action of the government machinery. Moreover, the results of yesterday's decisions are rarely communicated to the decision-makers as a corrective for tomorrow's programs. To be sure, there is enough feedback that everyone knows when the dam doesn't hold water (which happens), but when a dam destroys a delicate ecological balance and wrecks havoc in the local community, this is rarely perceived as a real-world problem, reported back and worked into the apparatus in such a way as to avoid similar problems in the future.

Still another aspect of the problem is that government agencies compete with one another. For example, for decades there has been a mute and polite war between the Departments of the Interior and Agriculture; the first casualties of this war have frequently turned out to be the environmental considerations. Countless examples of this competition have been observed: timber cutting practices on public lands and in National Forests, pesticide regulation (if that is the correct word for it), dam building and soil conservation are just a few. The same kind of competition may occasionally be found between the public and private sectors of the economy; once again environmental considerations usually are among the first items to be jettisoned when the order comes to lighten ship.

This competition is healthy in some respects, and the public may even occasionally benefit. For instance, several years ago, the Army Corps of Engineers conceived and attempted to give birth to a plan to build a high dam on Alaska's Yukon River which would flood hundreds of thousands of acres of land in the process. This dam was successfully opposed by the Fish and Wildlife Service of the Interior Department on the grounds that it would do untold damage to the wildlife in the region. The operative word here is "untold"—no one knew just how much damage would have been done, and the Corps was not seriously interested in finding out.

Governmental competition has other consequences as well: although they operate with public funds, governmental agencies are under pressure to maximize the value of the funds that they expend. This is not undesirable, but it produces the same problems affecting the private sector: agencies are subjected to great pressure to externalize social costs. The budgetary restrictions placed upon the head of a large operating government agency are no less severe than those upon the directors of a large corporation, and the body to which they report is not much more aware of the importance of environmental factors than is the average stockholder of American Telephone & Telegraph Corporation. This analogy ought not to be pressed, since it lies within our grasp to improve the ecological understanding of the Congress within a realistic time-frame, and it will be difficult to do the same for the average citizen.

Finally, the actions of government agencies acquire considerable momentum, which must be maintained if they are to continue to survive and grow [C. N. Parkinson, *Parkinson's Law*, Houghton Mifflin Company, 1957]. The Corps of Engineers pursues an aggressive program in promoting its projects. A major factor in this system is the method of calculating the costs of these projects against the projected benefits to be provided. Cost/benefit calculations have, however, tended to inflate the benefit side of the equation while downgrading costs. It is not that the Corps wants to dam every river and dredge every harbor in America so much as that an institutional myopia has crept in, magnifying immediate objectives and obscuring the relationship of those objectives to the needs of society.

2. *Legislative branch*

The essential function of the legislative branch of government is to formulate and to review policy. In so doing, it operates under constitutional or other social restraints, and it must of necessity paint with a broad brush. Translating basic policy decisions into specific go and no-go decisions is never an easy task, and is often complicated by pressures within the executive branch to change the policy decisions themselves. This can be done on a small scale and is done, often without significant risk since the legislative oversight is inclined to be sporadic.

More importantly, policy is only as good as the information upon which it is based, and this information tends to be biased, conflicting, fragmentary and/or out of date. Turning to the U.S. Congress as a case in point, consider the effect of the following factors upon the theoretical nonbasis with which a policy decision is supposed to be approached:

1. *The nature of the proposal.*—Most legislation enacted by the Congress is first proposed by agencies in the executive branch. (This, incidentally, may not be quite so common today: the legislative proposals of the present Administration have been criticized as somewhat sporadic. Many of the bills now before the Congress, however, are holdovers from earlier years, and the basic pattern seems to have changed very little.) Support for these measures tends to be channeled well in advance of their consideration—facts are marshalled, charts are prepared, as are witnesses. A frequent byproduct of this process is that the Congress may focus on the wrong issues.

2. *The Congressional Committee structure.*—Committees of the Congress, and especially their ranking members, are the principal focus of much of the power in Washington. This apparatus determines which bills shall be heard, whether testimony in opposition shall be considered, and if so, how it will be rebutted. Unless the issue is a prominent one, under the attention of the press and the public, or unless a maverick Congressman digs in his heels, those controlling the Committee have a relatively free hand in developing the arguments for and against the bills; hence they control its future.

3. *The bias of Congressional leaders.*—The environmental crisis is a relatively new phenomenon, and the young are, in general, more concerned with the problems than are their elders. This is as true in the Congress as it is elsewhere, and the result is that many of the older members, who exercise greater control over legislative action than do their younger colleagues, are visibly less inclined to move vigorously to meet the new challenges. Exceptions to this generalization can easily be found, but its general truth is not seriously questioned. The effect of this bias toward inaction ought not to be discounted.

4. *The adequacy of the testimony itself.*—Assuming that the measure is a reasonable one, and that the controlling committee is interested in developing the true issues, the witnesses called to testify may nonetheless not be the best available. Witnesses on environmental issues have tended to be the elder statesmen—established scientists and professionals whose views on new problems and on the need for new approaches have been colored by their own studies and viewpoints, which may be considerably out of date. A review of nongovernmental scientific testimony over the past few years shows several names which tend to crop up again and again; these individuals (who may be spectacularly well qualified in their areas of competence) may occasionally edge into areas in which they are not so well qualified to speak, and often seem to respond to the unspoken needs of some committee members to be reassured that "things are not all that bad, and somehow technology will find a way." Although not every witness falls into this category, it happens often enough to constitute a real problem. There is a need to develop the base of scientific testimony available to the Congress on environmental issues and to see that the younger men and women (who in some respects at least have a greater stake in the future than do their elders), whose factual knowledge may be far more current, shall also be heard.

5. *The context of the legislative decision.*—Another conflict, not at all restricted to environmental issues, faces the legislator who must decide whether to favor the interests of his own constituency as opposed to those interests which he may or may not perceive as national. Thus Congressmen and Senators from the West are generally inclined to favor legislative proposals to open public lands for development (mining, grazing, lumbering, oil exploration, etc.), whereas the interests of the entire country might seem to favor retaining these lands in a less vigorously exploited condition. How to measure the interests of local areas against those of society is a serious question; this task may be one of the most significant functions of government.

The broad nature of the authority and responsibility of the legislature may prevent it from exercising effective control over the actions of the organizations under its theoretical direction. Aspects of this problem have already been alluded to. The policies that the legislators are called upon to define are so broad that they cannot possibly be spelled out in detail, and yet it is in those details that the actions of government become manifest, and where the shoe pinches most cruelly.

The legislative mechanism may also be criticized for one factor which has been instrumental in allowing the institution to survive: its slow reaction time. The Congress is a highly conservative body—deliberate in adopting new courses of action, and slower to change them once adopted. This is a source of strength, preventing today's fad from becoming tomorrow's straitjacket, but it is also a real source of danger to the system. Science and technology have transformed the world of the mid-twentieth century into something that was quite unimaginable fifty years ago. The rate of change is accelerating, and it is a brave man who claims that he can predict the state of the world in the year 2000. Shrill voices may decry technology and demand that there be a halt to new technological development; they are no more likely to be heeded than were the machinery-wrecking Luddites of nineteenth-century England. Whether they are right or wrong is quite beside the point; barring massive catastrophe, technology will not be significantly curbed and the rate of technological change will almost certainly continue to accelerate.

New technology creates new social conventions, which in turn affect legislative policy. Yet the mechanisms for determining that policy are keyed to technological considerations that may have been out of date in 1789, and to decision-making processes that have remained essentially unchanged since the days of Roger Bacon. Consider another example: that of massive climatic change. Scientists tell us that urban development and energy transfer now have a significant effect upon global weather patterns. We hear on the one hand of the "greenhouse effect", which tends to raise atmospheric temperature as a function of increased carbon dioxide production, and on the other of increased amounts of pollution in the air, which tends to lower atmospheric temperature by decreasing the amount of solar radiation reaching the Earth's surface. Some scientists, extrapolating present activities, speculate that it would take ten years to decide which is the more powerful effect, and that by then large scale climatic changes may be irreversible. This view is by no means commonly held, but it is under serious consideration by men whose voices ought to be heard. They have not been heard by the Congress, and if they were, they would be outnumbered ten to one by men saying "we are not certain, we do not know, and we should take no action until we do."

These problems are not the exclusive province of the Congress; they are those of the scientific community and they are ours as well, as humans with a presumptive interest in survival. There is no way to force these problems to the front, conjoined as they are with an historically validated precedent for doing nothing—yet.

Legislators tend to focus upon institutions rather than upon individuals—to see the needs of the larger groups, whose existence depends upon traditional thought patterns and legal fiction. A water pollution problem is perceived as that of a municipality or an oil company, an air pollution problem as that of a manufacturer. Yet it is individuals whose favor the legislator must seek if he is to survive. This suggests in turn that if individuals can organize themselves to be heard as an institution, concerned with environmental survival, the legislators will respond. This has not yet happened generally—no significant environmental lobby has yet made its voice heard on the national level; if any exist elsewhere, their story has not properly been told.

3. *Judicial branch*

The courts exist to see that the written and unwritten rules of society are followed—that the policies formed by the people and their elected representatives are observed. Within narrow limits, recognized and indeed insisted upon by society, the courts have been successful in this function.

As a means of achieving rational decisions on environmental issues, the courts are usually ineffective. Their influence could increase, but this would require a significant departure from the usual legalistic approach and would involve the recognition of a basic and inalienable human right to a liveable environment. Such a decision appears to be only a remote possibility. Without this new con-

stitutional approach, the courts will almost certainly be hamstrung by inadequate policies adopted by the legislature and by common law rights which were defined centuries before the current environmental problems appeared.

Lawyers are adept at pouring old wine into new bottles, and efforts are under way to push the courts into a more enlightened attitude on environmental questions by torturing old principles of law into new shapes, designed to meet the needs of the time. Principles of sovereign trust, of public and private nuisance, and of public rights in private property are being dragged out, dusted off and sent into battle, but may well be expected to return on their shields, bloody and bowed. In time, the law could adapt, but it is time that we lack.

The basic defects go deeper than theories and tactics: only in rare instances can the courts make decisions with more than local force and effect. The U.S. Court in Southern New York may properly hold that the federal Department of Transportation must observe certain procedures specified by statute that may have escaped the Department's notice, and that for this reason a highway shall not be built over the Hudson River. At the same time the same Department in apparent disregard of the same procedures seems to be traveling down the same path in favoring the construction of longer runways into the Columbia River. Technically the decision of the New York court is not binding in Oregon; the Oregon courts are free to disagree with their Eastern brethren and such disagreements are in no way uncommon. A means does exist for resolving interjudicial disputes: the Supreme Court of the United States. That Court, however, is already operating under a fearful load and can devote only a limited amount of its energies to environmental questions, however imperative they may appear to be.

The courts also lack an adequate information base upon which to make their decisions. The common law system is grounded upon the adversary system, the theory being that each side will present the most favorable case, and that the court will then resolve the dispute on the basis of the evidence before it. The environmental problems arising today are highly complicated—so different from the land disputes and tort actions of centuries ago that they hardly bear comparison. In theory, expert testimony ought to be available to both sides to support their cases; in practice, this simply does not work. Even if environmentalists can afford to hire experts (and they often cannot), experts cannot always be found. It is a rare electrical engineer who will agree to take the witness stand on behalf of opponents to a power plant or transmission line: he knows well that other utilities may thereafter hesitate to contract with him for services in circumstances that may be wholly unrelated to the present controversy. Conscientious men do exist and someone may be found to testify, but it is not easy; cases have been lost and will continue to be lost for this reason. Without that interplay of expert testimony, the court is at a major disadvantage, and the decision is likely to suffer.

Even if experts can be found by all parties, the court's information problems are not thereby solved. Technical questions are already difficult, and they are growing more complex. Judges spring from different backgrounds, but the law operates upon the theory that their experience is essentially irrelevant to the issues that they must decide; historically, ignorance has been a prime virtue, the court acting as the *tabula rasa* upon which the cases of the opposing parties may be written. This is a manifest absurdity, but it is the way the law grew, and it is a fact that lawyers with weak technical cases prefer judges with little technical competence.

Another weakness built into the judicial system from the environmental standpoint is its tendency to delay decision. Combined judicial and administrative delays have postponed the Storm King decision by five years and if the parties fight down to the wire another two or three year delay is likely. This delay has in many respects worked in favor of the conservation group, but this happy state of affairs is not the rule. Citizens opposed to a particular proposal or project are usually forced to seek injunctive relief from the courts; they may and often do find that this relief cannot be obtained without their posting a substantial bond, which is quite beyond their means. The results is that while they work their way through the courts, the opposition is busily "doing its thing"—building or digging or chopping down—and by the time that the court is ready to decide, the essential question has become moot. Injunctive relief is typically the only possible hope for environmentalists, since the alternative is a damage suit, and it is a basic tenet of such organizations that money cannot replace what is threatened.

Constitutional revision has been proposed as a means of providing a clearer and more enforceable definition of our rights to an undergraded environment. New York State has adopted such a program, and similar efforts have been mounted on a national level. An Environmental Bill of Rights would indeed be a valuable tool, but no such proposal has a chance of even being seriously considered without vastly increased pressure upon the Congress and upon the legislatures of the several states; there is no evidence that such pressure is forming. Consequently, at present such a step must be considered too remote to be seriously considered.

D. The National and International Nature of Environmental Problems

Much of this paper has been devoted to American institutional and environmental problems. Neither category is exclusively ours: England has had and continues to have serious air pollution problems; the Russian sturgeon is virtually extinct, and with it, a valuable national resource; Tokyo displays almost every conceivable environmental problem; and the indiscriminate use of pesticides has wreaked havoc in South American ecosystems.

Environmental problems are not peculiar to specific ideologies or geographical locations, although these may play a role. At least in part, the problems arise because of identifiable human failings and are encouraged by continued human inadequacies.

Pollution is limited by neither internal nor external political boundaries: dirty air and water pass from country to country with no restriction, and people downwind and downstream can only suffer, possibly comforted by knowing that their hands are not likely to be any cleaner than those of their neighbors.

The international community is rapidly becoming aware of the nature of the problems presented by environmental degradation. Sweden has taken an important step by proposing a world-wide Conference on the Environment for 1972, under the auspices of the United Nations. The general question is one on which many nations can agree, but our complacency with this happy state of accord must be tempered by the realization that agreement is usually easy to reach in principle, until specific problems arise. Everyone is against pollution, but the ranks of enthusiasts quickly thin as specific problems arise and specific remedies are proposed.

As we have noted, man has been less than successful in his dealings with environmental problems on the local and national level. Internationally, our record is even worse; nor do the histories of the international fish and whaling commissions encourage a sanguine view of prospects for the future. The United Nations, in turn, has neither the constituency nor the commitment to act as a source of resolution for the foreseeable international environmental conflicts. It was not created for this purpose, and would require extensive internal change if it were to take them up seriously.

As in the case with national problems, we are challenged to develop new ways to attack international pollution. In so doing, we must take account of the deficiencies built into the system and, wherever possible, should adapt corrective techniques to the situation as we find it, not as we would have it.

E. Patterns of Institutional Inadequacy

The preceding review of social institutions reveals some basic patterns: problem areas where difficulties appear to be concentrated and where effort may profitably be devoted to provide a more enlightened context for environmental decisions.

Perhaps the most important of these is the lack of adequate information at the operating level—information about what is happening, what is at stake, and what the alternative may be. In some cases this information is not there because it is not available—because no one has yet asked the right questions. In other cases, and probably more frequently, the information is not available to the person who needs it when he needs it.

Another major area of inadequacy might be described as that of the lack of effective control systems: ways of determining that decisions once made are carried out, and that the sand that creeps into the machinery is removed with a minimum of time and trouble.

The next problem area is probably the least controllable: the time scale within which we must respond to the environmental challenges is so compressed that whatever information and control systems we can develop may still be unable

to operate effectively. The rate of technological change will probably remain rapid, although it has been suggested that a leveling off is likely in some areas, [J. Platt, *What We Must Do*, 166 *Science* 1115 (28 November 1969)]. The objective then becomes to develop sufficiently responsive systems to permit society to react to new crises before these have acquired unstoppable momentum.

Still another problem is that our trouble-sensing procedures are inaccurate and inadequate. We do not seem to be able to react when problems are foreseen; we do not respond until they have become massive and therefore less easily managed. This in turn requires the exertion of far greater corrective force than would be necessary if we had reacted sooner and more adequately.

It also points up the failings of the more or less simplistic solutions that we often adopt as a means of correcting environmental problems, which are rarely if ever simple in origin, and are not usually curable by the simple solutions presented to and accepted by decision-makers who are not professionals in these complex areas. The Department of Health, Education and Welfare has concerned itself strongly with the effects of carbon monoxide and sulfur dioxide in discharging its statutory responsibilities under the Clean Air Act. While it has not entirely ignored the interacting and cumulative effects of the many other pollutants that affect the quality of our air, it seems to have spent considerably less time and effort upon them, notwithstanding the fact that some may have a substantial effect upon our health and welfare.

A further problem is that we have never seriously set out to define what we mean when we talk about an "optimum" or "livable" environment. True, we all tend to make these judgments on a subjective, nonanalytical basis, and we focus on issues with which we may personally and emotionally be involved. The tennis-shoed Little Old Lady may grieve for the Redwoods or a threatened brook without realizing that bigger and more serious problems may threaten much more basic values—perhaps life itself.

Subjective judgments on these questions are unavoidable, and may not be undesirable. But at the same time it would seem important to devote a portion of our energies to an informed effort to *define* the public interest, and to clarify some of the conflicts that are inevitably involved. If, for example, we continue to favor the internal combustion engine as an integral element of our transportation system, what will this mean in terms of projected levels of air pollution, climate and human health? Should we not, in other words, develop a base-line, from which we may then judge the consequences and costs of proposed new courses of action?

If we are in a position to relate the consequences of certain behavior to a better-defined concept of what we want as an environment, we can then measure one against the other, and take rational positions for or against a given proposal. If we first define the amount of permissible variations in salinity, heat, oxygen and other factors affecting the quality of our rivers, we can then judge how many dams and power plants those rivers can tolerate before they are damaged or destroyed as resources.

As indicated at the outset, these problems may be found in different forms at each level of man's organized activity—local to global. They tend to increase in intensity as the area of concern expands, and the larger groups may and often do frustrate the wishes of the smaller groups. This question requires separate treatment, but is important. We have traditionally attempted to cope with the phenomenon by setting aside areas of sanctuary to protect the smaller units from the action of the larger, and this may not have been a happy choice. It might be wiser to concentrate upon building an automatic review procedure into the decision-making apparatus of the larger groups with appropriate sanctions, to ensure that the interests of their constituent members are not ignored while larger scale policy decisions are being thrashed out.

III. NEW STRATEGIES—WHERE DO WE GO FROM HERE?

A. Local and National Problems

The first and basic corrective need is to construct a more authoritative and responsive information-gathering network, and to develop methods of distributing that information at minimum cost to those who need it. This need affects all institutions, at all levels, and is only superficially satisfied at present. How this should be done and who should do it are important questions yet to be resolved; strong arguments can be made for keeping the apparatus out of governmental hands, and the profit factor provides equally powerful reasons for keeping it out of the marketplace.

Emphasis in developing any such information network must necessarily be placed upon the excellence of the service—differences of opinion are no vice, when responsible and adequately documented, and unanimity of opinion ought properly to be a source of some concern.

The traditional approach to the development of social control systems has involved the creation of administrative regulatory bodies, acting as expert arbiters to protect the public interest. This approach has been spectacularly unsuccessful: the regulators have inevitably become captives of the industries that they were established to regulate. Whether consciously or not, the regulators have adopted roles as promoters and protectors of the theoretically regulated. There is little hope that improved environmental protection will result from the establishment of a new superregulatory environmental agency.

Another method suggested for controlling rampant environmental degradation involves the establishment of technical and technological monitoring systems—putting scientists in the position of active maintenance, control and dissemination of environmental information and protective measures [B. Crowe, *The Tragedy of the Commons Revisited*, 166 *Science* 1103–1107 (28 November 1969); see also *Technology: Processes of Assessment and Choice* (July 1969, National Academy of Sciences), and *A Study of Technology Assessment* (July 1969, Committee on Public Engineering Policy, National Academy of Engineering), both submitted to the House Committee on Science and Astronautics]. This effort is hardly more likely to succeed, requiring a degree of political sensitivity and aggressiveness which is foreign and perhaps antithetical to the scientific method, and certainly inconsistent with past history and current tradition.

The most adequate solution to the problem of devising workable control mechanisms appears to lie in putting necessary information into the hands of the concerned public, which has the most direct interest, and by giving it better tools and ways of calling environmental miscreants to account. We cannot prevent the bureaucrat or the entrepreneur from making decisions which have short-term advantages for him but long-term disadvantages for society. What we can do is to require him to make his decisions and reasons public, and to provide a forum which can review those decisions with broad social interests in mind.

In effect, this would involve building into the decision-making structure of government the ability and directive to consider long-term and ecological consequences of activities within their areas of responsibility. This might be accomplished by taking a number of specific steps:

1. Long-term effects of programs and policies must be examined and detailed as a matter of public record.
2. Post-monitoring control systems must be established to determine whether the environmental effects were those anticipated, and if not, why not. Here again the public should be given easy access to the full record, and procedures should be established to permit citizens to put the appropriate agencies on notice that problems have arisen requiring attention.
3. Executive agencies should be required as a matter of regular procedure to obtain the views of other interested federal, state, or local groups, public and private, on questions related to their programs. Responsible issues raised should be answered on the record, and if no answer is forthcoming, or if the answer is unsatisfactory, procedures should be established to permit judicial review of the matter.
4. Public agencies adopting specific programs should also be required to document whether and how these programs are best adapted to the comprehensive needs of the situation. Where reasonable alternatives exist, these should be described, and an explanation should be given as to why they were not adopted.

5. Each agency taking action should be required as a matter of law to justify why any action at all was desirable. This is not so simple-minded as it sounds: the Corps of Engineers is hard put to defend itself when asked to develop the cost/benefit calculations of the virtues of *not* building a dam. The assembling of a group of technologists and/or engineers presupposes great pressure to do *something*—the option of not going forward at all is often obscured or ignored.

This latter requirement suggests itself for nongovernmental areas of endeavor as well. Highway builders, land developers and others have a far easier job in proving their cases than do their opponents, and are much better equipped to deal with these problems. A heavy burden of proof is placed upon the people presuming to speak for the public interest. To get into court they must show

that active harm will result, not balanced by the putative good to be achieved through the proposed activity. The burden is misplaced—those who wish to use environmental assets should be required to show that the balance *favors* their proposals.

We must also develop mechanisms for more rapid, extensive and convenient public review of major public and private agency decisions. This might best be done through the creation of a Public Defender for the Environment, with authority to review general governmental policies and to pass upon specific problems which are considered to have significant environmental consequences. In extraordinary cases, this Defender might be given the authority to issue temporary cease and desist orders as a means of preventing the otherwise inevitable destruction of important resources. Control procedures must of course be set up to prevent such a Defender from acting irresponsibly, or to force him to act in proper cases.

We must encourage the public to participate more effectively in the making of decisions with environmental implications, as to which it has no present measurable impact. This means citizen action programs, keyed to the issues of the day. Call them lobbies, pressure groups, or anything else; color them important. Their actions should be coordinated in such a way as to have a meaningful impact upon the legislative bodies whose decisions affect us all.

We also need to develop new ways of funding citizen organizations with environmental objectives. Where they act to protect common assets, they should be supported by the public treasury or by the organizations whose actions created the problem in the first place.

The first method might be accomplished by the enactment of a federal statute to the effect that any person or group winning or perhaps even instituting a court case based upon the violation of a federal pollution law should be entitled, in the discretion of the trial court, to recover reasonable attorneys' fees and costs. It would be necessary to spell out in detail the nature of the cases in which such relief would be appropriate, but the basic idea merits discussion.

In many ways it would appear more desirable to force the would-be polluter himself to underwrite the costs of protecting the resources that he has threatened. This could be done by requiring a public bond to be filed by agencies which propose to take actions with potentially undesirable environmental consequences. That bond would be subject to forfeit if an anti-pollution law were violated or if unforeseen environmental consequences should occur, and the funds might be applicable to legal fees or to cleaning up the resultant problems.

We should also step up our efforts to find more adequate technological solutions to the problems which technology has itself created. The most effective and least harmful method that we were able to develop to clean up the infamous Santa Barbara oil spill involved the massive use of straw, men and hand rakes—hardly a creative response. Transferring oil from Alaska's North Slope to world markets could create serious environmental problems: the use of gigantic ice-breaking tankers risks the Arctic Ocean, and the use of overland pipelines threatens a tundra that has remained substantially unchanged for many, many years. Both techniques menace a fragile ecology that might take centuries to recover, when and if something unforeseen should happen.

It is almost inconceivable that more effective and less expensive techniques could not be found to meet these and other environmental hazards of the time. The civilization that could put men on the Moon ought to be able to do better. The solutions to these problems might be expensive, but the failure to find answers will certainly cost us more.

Some of the strategies described above have already been implemented in the United States, others are under consideration, and some may never have been publicly advocated.

In 1968, several Congressmen formed an unofficial Ad Hoc Committee on the Environment as a channel for communication on environmental issues between the Congress and interested scientists and informed citizens. The committee now numbers 120, and is in regular contact with 132 expert advisors. Membership on the committee is open to any interested legislator: Senator or Representative, Republican or Democrat. This step does not entirely satisfy the need for better information, but it seems to be a long step in the right direction. The information network available to members of that committee may soon be expanded to meet state and local demands for better environmental information, and it ought also to be useful to other groups with similar concerns.

Legislation has been considered in the Congress which could go far toward arming citizens' organizations with better information on what federal agencies are doing and why they are doing it. The National Environmental Policy Act of 1969, sponsored by Senator Henry Jackson and Representative John Dingell, contains language to this effect, as does the airport construction bill recently passed by the House. It remains to be seen, of course, to what extent the executive agencies will be successful in their inevitable efforts to weaken the impact of these measures. Their jobs will be made more difficult by the certain knowledge that interested legislators will be watching them carefully.

These steps and the ones that remain to be taken are hopeful signs in an area in which hopefulness is uncommon. If anything, these efforts should be accelerated; we may not be able to afford much more delay, and we should begin to exercise what talents we have for imaginative and bold departures from patterns of behavior that are no longer adequate to the needs of the time.

B. International Problems

The factors that inhibit adequate response to local and national pollution problems are even more effective in preventing international action, and yet we now realize that many national environmental problems have supranational consequences. Thus control procedures to keep global pollution to a tolerable minimum assume critical importance.

Although attention has only recently been focused on international environmental problems, it is clear that this is an important area for concern. The proposed 1972 U.N. Conference evidences the acceptance of this concern, but few specific suggestions have been made to create mechanisms to meet today's problems, and those which are predictable in the near future.

The need for better information channels is as great here as it is on the smaller scale. If anything, political corrective steps can be even more easily blocked than are those acting at state and national levels, and we have not yet devised a workable system of sanctions to minimize those problems which all concede to exist.

If it is true, as argued above, that the interests of small groups are often at odds with those of the larger societies in which they exist, how much more true is this of separate nations, where antagonisms are more easily created and sustained, and where common concerns may be deliberately obscured? Downwind and downstream nations from those applying persistent pesticides may see their own problems clearly, but their apprehensions are likely to be viewed as quite unimportant to the nation creating the problem. That nation may well consider righteously that its first interest must be to protect the health and food supply of its own citizens, and that the undesirable side effects are simply someone else's problem. Unfortunately, they may be everyone else's problem.

The same conflict lies at the heart of many of the issues discussed earlier, but its impact is perhaps most clearly visible in international issue. The strongest peaceful sanction that we have been able to devise to influence international decisions appears to be the force of public opinion. More attention might profitably be devoted to the use of public disclosure as a force to produce more adequate decisions on international environmental issues. A weak reed it may be, but it must serve until we can find a stronger substitute.

If we narrow our focus to a specific topic, the ways in which such pressures might be brought to bear become clearer. One such suggests itself immediately as of current and significant interest: treaties for the use of the seas. The significance of this problem area has been perceived clearly by national interests which see the oceans as a vast potential source of food and mineral resources, and thus as critical to their survival.

We must pass over without further analysis the critical issue of sanctions as beyond the scope of this paper and as beyond the ability of the concerned parties to resolve at this time. We shall also assume, for the purpose of argument, that it will eventually become possible to develop working treaty relationships with the affected nations and that such a treaty will provide an operating structure as well as a policy-making body.

What suggestions may be made to provide some assurance that the vast assets of the ocean will be used for the common good, and not misused on behalf of narrow segments of humanity? Proposals have been made to provide a focus for scientific impact at the policy-making level, these disciplines will of necessity be represented at the operating levels as well. These proposals do not appear to be entirely adequate to current needs—they are lacking in the control aspects

described above, and will be as inadequate to international issues as they are on the smaller and presumably more easily managed national scale.

We need an Ombudsman for the Seas.

The functions of such an organization would be simple: to review and to comment upon proposed actions by the operating arm of the treaty organization and others, to consult with the policy-making arm on matters which are or which ought to be under consideration, and to make recommendations to these and to all nations on ways to use, without misusing, the oceans.

This latter point is particularly important, since the seas can be significantly affected by the activities of nations which may not be treaty signatories—even by nations which are entirely land-locked. Inland rivers and estuaries play an important role in the life cycles of fish and other species important to man; these in turn may be highly vulnerable to actions affecting airsheds or watersheds with oceanic outlets. Few nations in the world remain entirely oblivious to the opinions of others and the ability of the Ombudsmen to focus worldwide attention upon previously ignored problems could prove to be a highly valuable tool.

When and as sanctions are developed for the international treaty, consideration should also be given to making sanctions available to the Ombudsmen, under adequate control procedures. The Ombudsmen should not, however, be policemen: they will have enough problems without adding new ones. They should have and maintain a close working relationship with whatever organization handles the operations of the treaty organization.

The Ombudsmen should have direct access to current oceanographic and ecological information about the seas. Again it would be desirable to keep informational and experimental activities separated from their primary functions; it would also be important to keep them separate from the conventional channels of authority within the operating arm of the treaty organization.

History indicates that, in the seas as elsewhere, strong pressures will be brought to bear by those seeking to exploit these resources. It will be critically important to build into the treaty organization some form of countervailing pressures to ensure that the long-term productivity of the oceans is not endangered by man's effort to turn these assets to limited advantage. If we have learned nothing else from the ecologists, we know now that we exist within a closed system and that we must develop processes and procedures that will permit us to recycle those resources that we must use. To this end, the Ombudsmen can serve us well.

For a number of reasons it would seem desirable to create a three- or five-member organization of Ombudsmen with staggered, rotating memberships. They should have a semipermanent professional staff; continuity is important, but a constant access to fresh blood can provide a responsiveness to challenge that will be invaluable to the participating organizations and nations.

It may not be desirable to have a highly structured decision-making apparatus within the organization itself. No member should be given the power to *veto* the action of the group or of any other member; indeed, if any member perceives a particular problem as important, and if his colleagues do not share his views, he should be given latitude to study the problem and to report upon it to the appropriate bodies, supporting his report with whatever evidence is available.

The Ombudsmen should be required to submit an annual report on their operations to the treaty organization, and copies of this report should be given wide distribution to member nations as well as to the United Nations. Dissenting views should be made available in the same form. The incentive to review specific problems might come from within the organization itself, or it might come from any member nations. If review is declined, the reasons for disapproval ought to be spelled out in detail.

Funding is critical. As one of the important functions of the treaty, the Ombudsmen should be assured of a regular budget, subject to no diminution because of the concerns of any member nation for tender subjects. Unless the organization can be truly independent and free of budgetary apprehensions, its work must inevitably suffer.

Clearly the problems of protection of the global environment are not confined to the use of its oceans. Theatrics for the oceans are only a beginning—but there is no good reason why this treaty should not be viewed as the first real step toward more comprehensive and adequate environmental protection. Men require a world that men can live in.

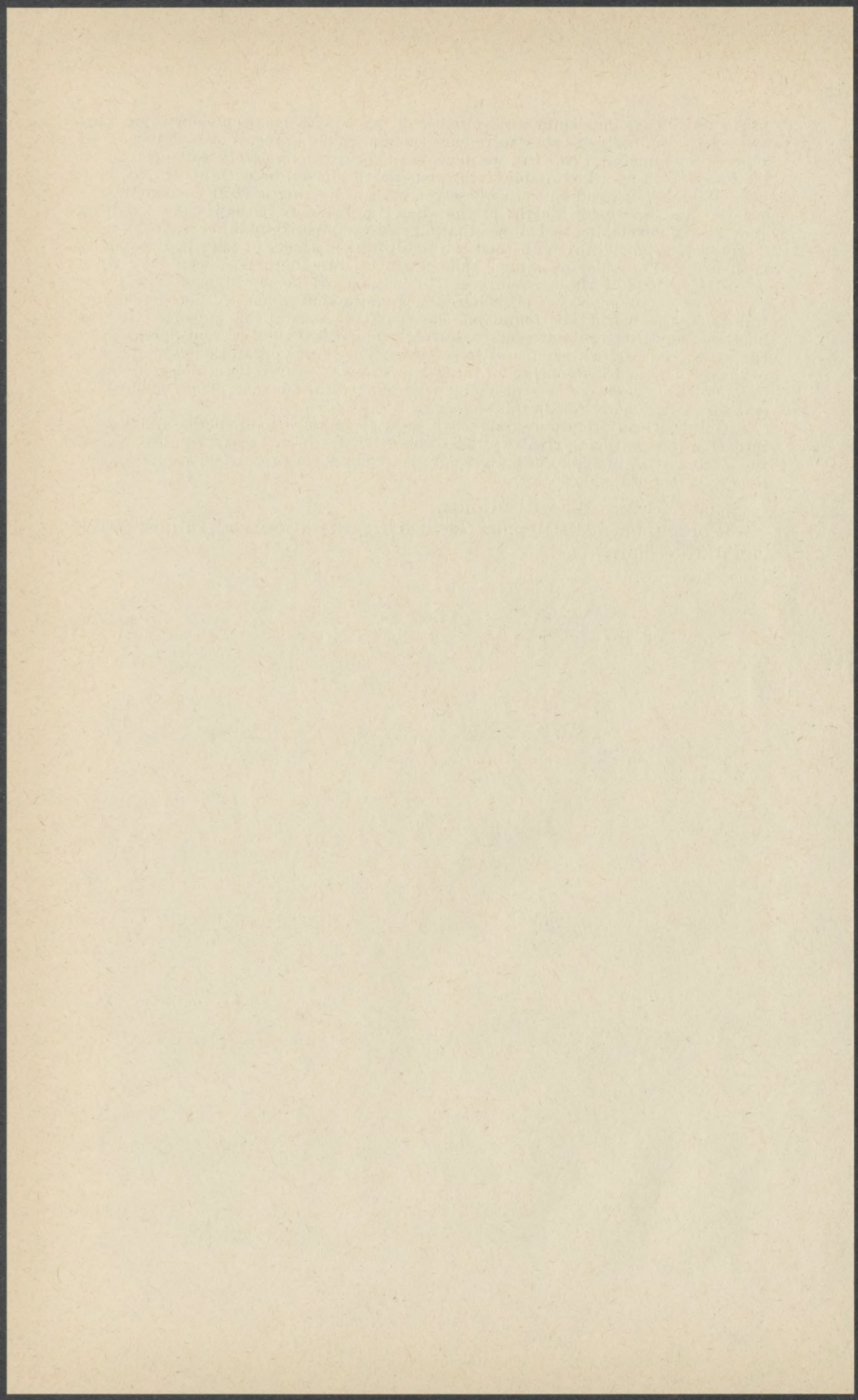
The oceans are important for a number of reasons. It has been shown that they are not as productive as they were once thought to be, in terms of long-term food sources for humanity. Nor can we develop the oceans as a safety valve for man's tendency to fill up all available living space with himself or with his waste products. We must instead concern ourselves with protecting a vital element in the ecosystem of Spaceship Earth; at the same time we may perhaps take a halting step toward developing techniques that may prove effective in other areas as well.

Antarctica has so far withstood the territorial instincts of man in reasonably good order. For this we cannot take much credit—there has been very little pressure to exploit these resources. This region of the world may now prove significant in other ways; oceanographers claim that some of the best fishing waters in the world are found off the coast of Antarctica, supported by the massive upwellings of nutrients resulting from convection currents created by the warm and cold water masses in the area. The treaty organization might well begin its charter by mounting an intensive review of Antarctic ecology, to determine how this resource may provide a sustained value for man. The Ombudsmen can play a significant role in this endeavor.

In international relations today, we need techniques to disperse and not to intensify international rivalries. The potentialities of a treaty for the use of the oceans, with built-in guarantees for their long-term protection, would appear to be a matter of high priority.

Senator HART. We will adjourn.

(Whereupon, at 12:10 p.m., the hearing was adjourned, subject to the call of the Chair.)



ENVIRONMENTAL PROTECTION ACT OF 1970

WEDNESDAY, JULY 1, 1970

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY, NATURAL
RESOURCES, AND THE ENVIRONMENT,
Washington, D.C.

The subcommittee met at 10:15 a.m., in room 1114, New Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee), presiding.

Present: Senators Hart and Moss.

OPENING STATEMENT BY THE CHAIRMAN

Senator HART. The committee will be in order.

Today the Subcommittee on Energy, Natural Resources and the Environment resumes its hearing on S. 3575, the Environmental Protection Act of 1970, which Senator McGovern and I introduced earlier in this session.

We have had some earlier hearings. At that time we had testimony from several distinguished advocates of the bill, including Senator McGovern.

Additionally, we heard from the former Attorney General, Ramsey Clark, the former Secretary of the Interior, Stewart Udall, and from Prof. Joseph Sax, from the University of Michigan Law School.

Professor Sax was extremely helpful in drafting the bill. He had earlier drafted a similar proposal which was introduced into the Legislature of Michigan. That bill, I am glad now to say, after passing in the House of Representatives of the State legislature several months ago, was approved last week by the State senate, and with only minor modifications.

This is welcome news, not only for the advantages it brings to the conservation movement in Michigan, but for the salutary effect it may have on the progress of the bill we are considering. At least it will be possible now to respond to those who find impending disaster in the bill's provisions that the legislature of at least one State, which some consider enlightened, does not share in their views.

In fact, I have been told that similar bills are now moving in the legislatures of other States, as well.

If there are, in fact, risks of disaster in the enactment of S. 3575, it is the opinion of those of us who support it that those risks pale in comparison with those inherent in the rejection of the bill.

Time and again we witness the failure of our bureaucratic machinery to provide the public with adequate environmental protection. It is

the basic theme of S. 3575 that on all such occasions, the citizen must be equipped with the legal tools to protect himself through the judicial process.

Unfortunately, traditional legal barriers have consistently stood in the way of his efforts in this regard. It is the purpose of S. 3575 to effect a complete and thorough removal of all such barriers.

Our first witness is one who I suspect will not offer any great opposition to what has been said thus far, in that he has introduced in the House a bill the language of which is identical to that of S. 3575. It is a pleasure to have with us today the distinguished Congressman from Arizona, Morris Udall.

I wonder if the able Senator from Utah, Senator Moss, would care to say something?

Senator Moss. Well, thank you, Mr. Chairman. I really have no opening statement to make. I wish to welcome Congressman Udall and the other witnesses we have today.

This is a very important area, one that we are all more conscious of today than we were a few years ago, and certainly an area where we need to move forward with the tools to give the average citizen his opportunity to defend the environment.

So I have really no opening statement, other than to welcome him, Mr. Chairman.

Senator HART. I welcome the Representative from Arizona, Morris Udall.

STATEMENT OF HON. MORRIS K. UDALL, U.S. REPRESENTATIVE FROM ARIZONA

MR. UDALL. Thank you, Mr. Chairman, and Senator Moss.

I have a great deal of pleasure in appearing here this morning before two of the men I most admire in Congress, and I know you have heard from a number of learned and well-informed witnesses. I hope I can add something to it, but at least I want, by my presence here, to underline the importance, as I see it, of moving into this area and giving the ordinary concerned citizens some tools to join in this battle for the environment.

I have a 12-page, double-spaced prepared sheaf of testimony here.

Mr. Chairman, I come from a State that still has relatively clean air and water. It has wild lands and mountain streams and wildlife. But Arizona is growing rapidly, and each day our air becomes dirtier, our water less fit to drink, our land more crowded, and our people more frustrated by the pollution they see accumulating around them.

Anyone who reads the morning paper or watches the evening news—or even takes a casual glance at his own surroundings—knows that pollution problems are not confined to any one State. The recent public concern over our environment during Earth Week tells me that more than a few people have that awareness.

The seriousness of the problem cannot be overemphasized. Some scientists are even saying that we have only about 30 years to put our collective house in order if we are to survive as a species. I think that is very likely an overstatement. At this point we have insufficient knowledge to pass judgment on the validity of such observations. But

the evidence gathered today does not allow us to dismiss such doomsday predictions out of hand; they could be right.

As a Congressman of the 1960's I have made a lot of "point with pride" speeches about how grand it is that at last we have begun to do something about our environment. On paper at least I think I was justified. In this last decade we have enacted such legislation as the Wild and Scenic Rivers Act, the Land and Water Conservation Act, the Water Quality Act of 1965, the Air Quality Act of 1967 and so forth. But it has become apparent that our Federal antipollution and conservation programs have not been very efficient. One reason, of course, is our unwillingness to fund these programs adequately. Perhaps an even more important reason is that we haven't been using the right machinery to attack the problem; the agencies of Government assigned areas of responsibility haven't had the authority or the mandate to get the job done.

The rapid growth of this country over the last quarter of a century—an increase of 60 million people since the end of World War II—has resulted in a tremendous expansion of our Government. Expansion has traditionally meant the creation of new regulatory agencies. As our society has become more complex, we have created one agency after another to deal with specific problems. The unfortunate result is that, while we have many specialists, no one person or agency is able to look at the total picture and see the interaction of all these governmental decisions.

This is a natural process, and we shouldn't be surprised that it has occurred. What we need is some kind of overview procedure which will call the attention of the Government agencies to the very real gaps that do exist. And I see that as the function of the bills being considered by your subcommittee today—S. 3675, H.R. 16436, and companion bills, known as the Environmental Protection Act of 1970. What is proposed in this legislation, as I see it, is the investiture of the American public as an overseer of the regulatory processes of their Government. To my mind, no other agency, group, official or individual, no superagency or czar, or even the Congress itself, could ever come close to performing this oversight function as thoroughly or as well as can the American public itself.

It has become increasingly clear that our regulatory agencies operate under the push and pull of many forces that have little in common with the interests of the public at large. All too often the agencies become so aware of the special problems of the industries they are attempting to regulate that they overemphasize the industries' problems to the detriment of the interests of the general public.

Then, too, there is the age-old problem of bureaucracy and the complacency about the needs of the public they are there to serve. I don't apply these words to the entire civil service but we all know examples of this kind of nonresponsiveness on the part of some civil servants in some Federal agencies. I think this kind of nonresponsiveness has cost this country a great deal and will continue to do so until changes are made which clearly discourage such employee attitudes.

I think the environment is one area where we pay a particularly heavy price in this regard. For example, when the Department of the Interior leased the Continental Shelf off Santa Barbara for oil exploration, there was little public debate about the advisability of this

action. Within the Interior Department there was little if any opposition to the granting of these leases, and I would say it was not in Interior's frame of reference at that time to consider the possibility of oil spills. I think the lesson is clear—if we leave environmental decisionmaking to the experts, to the developers, we can expect many more oil spills in the future. This would be rather like turning over our foreign policy to the generals in the Pentagon.

An alternative is clearly needed to the agency system of pollution control, and I believe the courts are the only forum that can provide that alternative.

Courts are not necessarily staffed with the wisest men in the land, but the courts are independent and do provide a forum that any citizen can utilize. Moreover, the courts can act quickly where action is called for, a circumstance which is generally the case in any environmental fight.

The process of reform has already been started by concerned citizens in this country. Across the land environmental defense organizations are being formed to challenge in the courts both governmental and private industry decisionmaking where it has an impact on the environment. The result of initial challenges has been generally good. The Federal judiciary has substantially liberalized the concept of "standing," allowing citizens to appear before both courts and the agencies to present the case for the environment.

But we cannot and should not rely on judge-made law to weave the structure of citizens' rights in this crucial area. In fact, the present state of environment law leaves something to be desired. People do have "standing" to argue environmental issues where they did not have it before. But "standing" by itself is not enough.

If you now go before a regulatory agency and protest some plan that would damage the environment—the building of a dam—the agency is in no way bound by the evidence you present or the arguments you make, however convincing they may be. All it has to do is consider the complaint. It can reach whatever decision it deems appropriate, and that decision will usually be final—not subject to review or reversal by the courts.

Even where ordinary citizens can get into court with a case, the chance of getting effective relief is oftentimes minimal. Let me cite an example.

Let's take the case of a plaintiff who lives in a town near a pulp mill which regularly casts smoke and offensive odors over the entire area. The plaintiff files suit against the operator of the mill seeking relief from this smoke. Under present law the plaintiff would have to show that he suffers specific economic damage before relief could be granted. As a practical matter, most people would not be able to do so.

The other aspect of the problem relates to the type of relief now available. Let's suppose that the plaintiff is able to show economic damage. Usually the court will tell the defendant to pay damages and send the parties on their way; the offensive activity will be allowed to continue. Only rarely will a court order that the activity be modified or altered in any significant way.

The Environmental Protection Act of 1970 addresses itself to these deficiencies. It starts by giving citizens a right to an environment unimpaired by the blight that is too often seen around us and em-

powers a judge to order the offensive activities modified or halted. This right is not based on economic injury. It is based on the interest we all have in a clean environment, one that is conducive to physical and mental well-being, that is not esthetically offensive or harmful.

Let me digress here to say that I think one of the most significant features of the bill we are discussing here is right in this area. I hailed, with a good deal of enthusiasm, the action of New York State in putting into its constitution a conservation bill of rights which gives every citizen in that State the right to a good environment.

Many other States are moving in this direction. I have urged conservationists in my State to get out petitions. I would like to see the day when we have a Federal Constitution amendment that writes into the Federal Constitution that it is the right of every citizen to a clean and decent environment.

Until that day comes, I believe this is a pretty good substitute, because we are saying that, under the Commerce power in this bill, every citizen does have a right to a clean environment—a decent environment. We are giving him the tools to enforce it.

So, this is a kind of substitute temporary interim conservation bill of rights, in my judgment—these particular provisions of the bill—and I think that it is an important step that every citizen ought to be interested in.

It also gives citizens an unqualified right to participate in the administrative decisionmaking process and to appeal from those decisions where appropriate. This is the way the democratic process was always supposed to work. I do not see the agencies of Government as villains, but I think they would benefit from the kind of public overview made meaningful by this legislation. Government agencies must be made to consider the larger issues involved in protection of the environment, and the only way this is going to come about is through the application of this kind of effective public attention.

This legislation is not going to be without controversy, to be sure. To avoid polluting our environment many businesses will have to modify their present methods of operation and there is no question that such modifications will cost money.

It may be argued that legislation of this kind will lead to the disruption of American industry. I have no doubt that some disruption will occur. However, I really don't believe it will be so great as to impede the normal function and orderly growth of our industrial facilities. The key standard the courts will employ in their deliberations is one of reasonableness. The question will always be: Is the defendant guilty of unreasonable actions leading toward pollution of the environment? The reasonableness standard is as old as the common law itself. It is time-tested and reliable. It allows a judge to consider all factors in reaching a decision.

In environment litigation there will be more to consider than just the fact that pollution is resulting from a particular activity. The judge will have to determine the nature of the activity, its importance to the community, the number of people who depend on the activity for their livelihood and the disruption that would occur if a particular activity were ordered halted or even modified. Judges are specifically trained to do this. The whole tradition of our courts is to weigh all

the evidence and to try to reach a fair decision, taking everything into account.

The objection may also be raised that this bill will allow people to bypass the administrative process. This is not true; in fact, under the bill judges are empowered to remand the parties to the agencies for resolution of disputes where the judge is satisfied that the agencies have the authority to provide appropriate relief.

What the bill is meant to do is to supplement and complement the antipollution measures of Government agencies. Under present law many agencies have inadequate authority and insufficient machinery to monitor many activities which endanger the environment. Where the authority appears to be sufficient, agencies have often been reluctant to enforce the law adequately. For example, the record of the initial National Air Pollution Control Administration, which after 5 years has failed to draw up air quality standards as the Congress directed, shows that the judicial alternative provided by this bill is needed.

In my view, the time has come for us to make some tough decisions, and I think this bill represents one of the first of them. If this legislation is enacted, people will be given the means of overcoming vested interests, both private and governmental, that have been a major stumbling block in the attempt to alleviate pollution.

So long as there are people there will be pollution. There is nothing Congress can do to restore our environment to a pristine state. But this does not mean that the present pollution levels must be accepted.

For several years, people in government have been talking about air and water pollution, waste disposal, and the like. But the Federal Government's record on pollution control has been less than impressive. For instance, we have yet to see a real effort mounted to enact a tax to help finance disposal of junked cars—a ridiculously simple device that would put the burden where it belongs—on those of us who are creating the problem. Antipollution rulemaking lags. The initial Federal Water Pollution Control Administration has been bickering with industry for months over phosphate content of detergents—at a time when more and more scientists are recognizing the very harmful effect phosphates have on the life cycles of water systems. The administration has allocated only a few million dollars for the development of a smog-free auto engine, perhaps our greatest single need. Yet we're told it's vital to spend \$190 million on the development of the SST airliner which, if built, will pour tons upon tons of new pollutants into the atmosphere and disturb even the remotest wilderness areas with its sonic boom.

One thing we can do as individuals is to reexamine our fundamental attitudes concerning consumer consumption and public tastes. The price of a decent environment may be cars with 60 horsepower instead of 360; fewer gadgets; higher taxes, but more fishing streams; fewer cross-country SST's but nicer beaches and forests. In our private lives, we can each pledge to stop being litterbugs, contribute as little garbage and junk as absolutely necessary. But I don't think for a minute that this fight will be won by 200 million citizens making 200 million separate decisions for the environment. In the end, it must be the coercion of law, backed by an alert citizenry, that keeps the transgressors in line.

As Congressmen, what we can do here and now is to pass the Environmental Protection Act of 1970. The task of turning this country around on pollution problems will be a tough one. I do not think the politicians can do it; we are spread too thin. I do not think the regulatory machine that now exists can do it. Nor do I think President Nixon's planned reorganization of antipollution agencies will make those bodies appreciably more effective than they are now in fighting this problem.

I do think people using the courts can help to do the job. Individual citizens armed with the right to take their grievances to court have moved mountains. Where the environment is concerned, the right is not yet adequately established. The Environmental Protection Act of 1970 will give people that right, and I urge that it be enacted.

Senator HART. Congressman Udall, thank you for what in my book is a very compelling statement.

You have anticipated most of the questions. I want to react to just two points that you made in your prepared testimony.

The first is your statement that, as you see this bill, it is to supplement and complement the antipollution measures of the governmental agencies. That is exactly what it is.

And, your second point was contained in the paragraph where you say the business that maybe if we all examine our conscience and apply a little self-discipline, the problem can be reduced to a level that is acceptable.

That has two appealing elements to it. First, it sort of admits that we, as people are great things. Second, it means that we won't have to pay any more taxes.

We kid ourselves on both points. It is true that we should discipline ourselves and stop throwing paper away, and ask the milkman to bring our glass containers back. But, as you say in that omitted paragraph, I don't think for a minute that this fight will be won by 200 million citizens making 200 million kinds of decisions for the environment. That is absolutely right, as I see it.

Mr. UDALL. I think that the chairman—I think we see it the same way. There is a role for everyone. There is a role for the citizens. There is a role for the Government.

In the final analysis, we have to make some national policies that have the force of law and to see that they are carried out.

Senator HART. There are lots of people who were persuaded and were told that prayer and good work alone will solve everything. Without those, we are not going to solve it. But those, coupled with money, will get us where we have to be.

Mr. UDALL. That's right. I have said around the country that the water is dirtier and the air is dirtier, year after year, and that we have had a lot of speeches, a lot of verbal pollution around the country in the last few months. No speech ever cleaned up a river. No speech ever cleaned up the air in Detroit or Phoenix or Los Angeles. It is going to take money, laws, and people—all these things together.

Senator HART. One of the things I was going to say, which is the favorite criticism of this bill—your bill, our bill—but also a valid concern, goes to the business of how much damage would be done to this country's industrial strength. Wouldn't this open the Federal courts to suits that do seriously threaten, and indeed potentially

suggest, the shutting down of many of the country's industries? I am sure you have run into that. What is your response?

Mr. UDALL. Well, this is a most early and most fundamental objection you get, Mr. Chairman. I am sure you have encountered it.

My reply is that, yes, there will be some changes made. Yes, there will be an impact on industry if this bill is passed. If we are simply to go on doing what we are doing, the fact is that the battle is lost. In the long run, the consumer is probably going to have to pay part of the price for the modifications that are necessary, if we are going to have a decent environment.

It costs \$145 to make steel in Indiana if you are permitted to dump your waste into Lake Michigan. It may cost \$175 a ton or \$160 a ton, if you make the same steel at the same place and clean up the by-products before you dump them into the lake or don't dump them at all.

Everyone is all against pollution. Everyone is all for clean air and clean water. If the new automobile costs \$100 more because you have a pollution-free plant, we may hear about it.

My basic answer is yes, there will be some disruption of industry. Yes, this law will probably force some plants to change the way we operate, and yes, that will cost money, and yes, it will take more judges and more court time. But that is the price we are going to have to pay to do what everyone says they want done.

Senator HARR. Well, there is a second step in this criticism. The equity may result from the fact that in States or cities where there is a steel plant or an auto manufacturer, or you name it, there is also a group of effective, avid conservationists. Under this bill, that manufacturer is taken to court and perhaps is compelled to modify his operation to increase the cost of his unit by 10 percent.

In State B, the producer of an identical unit happens to be in a community where everybody thinks everybody should breathe smog. So he doesn't get dragged into court, and he continues to produce the unit at 10 percent less than his competitor in State A.

How do you feel about that?

Mr. UDALL. This, of course, is a problem. But it is not without analogy or without precedent in other fields.

You and I are driving in on the freeway this morning, and 200 cars all exceeding the speed limit are there, also. The policeman may decide to single out me and you for arrest, and we have to go to traffic court for discipline.

The other 198 motorists avoid it. But the net result is that the next morning the rest of them, having seen some of us stopped and arrested and cited, will slow down. I think if this happens, if an aggressive group in one town in Detroit moves in on one or more automobile manufacturer, there will be pressure to adopt national standards, or State standards. There will be pressure upon the State official or the Federal official to enforce uniformity across-the-board.

There may be some temporary injustice in the interim. I think, though, in the long range this thing will be evened out.

If you pronged the force of public opinion and concern for environment in one area, it won't be long before the same thing will be done in other areas.

I think we have safeguards in the legislation. But no one can guarantee that there won't be unequal application of this, from time to time and from place to place. But the dangers of that are far outweighed, in my judgment, by sitting back and doing nothing, and seeing the air and water deteriorate all over the country.

Senator HART. In your testimony, and indeed in some of your responses, you refer to the court as a competent instrument to resolve the competing claims that we are discussing. One of the criticisms of the bill is that the court is not competent to sit and resolve technical questions such as these. The judge may be a Greek or history fellow. He may not have the foggiest notion of how chemicals combine, and what not. If he had all year to study it, he still wouldn't understand it, How do you respond to that?

Mr. UDALL. I see that argument. But my answer is that, in all the really fundamental basic conflicts of our society, the decisions—the ultimate decisions—are made by people who take the broad view, who have the public interest in mind, and who are not influenced.

The Congress, for example, makes decisions in broad public policy. The direction this Nation takes and the care it takes in checking the accuracy of relations, and all the press, are not made by specialists. They are made by you and me and Congressmen from all backgrounds, and all sections of the country.

The ultimate question of life and liberty and property are made by judges who may not be specialists in each particular case.

As a practicing lawyer, I used to try malpractice cases one day, before a judge, and a complicated electrical engineering case before the same judge the next week. You try these cases before juries who are not specialists.

I believe there is something fundamental and something very good and very sound about saying that ultimate major decisions of this kind in the environment field are not going to be given to scientists or narrow agencies or specialists who may only see one side of the general problem, but put into courts which have a pretty good record in broad fundamental things—in sifting out the good from the bad—taking into account the technical testimony and expertise of all the bits, and then rendering a judgment that is valid.

Senator HART. Senator Moss, do you have anything?

Senator Moss. Thank you, Mr. Chairman.

I do appreciate the very fine statement you have given us, Mr. Udall. It certainly is helpful.

There are one or two questions I would like to ask.

In most civil litigations the plaintiff has the burden of proof in establishing the right for relief. before the court will grant him relief. In this bill it seems that once the plaintiff has established his prima facie case, the burden shifts to the defendant. Then he must establish that his activities are not in violation of the act, or that he has a defense under the act.

Is this a justifiable burden to shift onto the defendant in this instance?

Mr. UDALL. I think so. It is different, but we load the scales just a little bit, here, in favor of the environment, and against the polluter. This is a judgment that I urged the Congress to make, when I introduced this bill.

Obviously, there are many presumptions in the law that aid a plaintiff or defendant. We simply say in law that, for reasons of social policy, we will presume innocence. That puts a very heavy burden on the prosecution. Or, we presume this fact or that fact, or we will put the burden of proof in certain cases upon one merit or the other, for reasons of national policy.

It isn't as though the bill simply permits me to file a complaint against industry *x* and shift the burden immediately to industry *x*. He is a polluter until proven otherwise.

I have to come in with some evidence and at least make a *prima facie* case that will permit a judge to find on that evidence that the environment has been damaged.

Then, and only then, does the burden shift. So I would have to answer yes, this does make a little extra burden that is not involved in some kinds of lawsuits. But we will start off with a scale that favors the environment a little bit, and make the polluter, after a *prima facie*, come in and show that he isn't polluting.

If it is a legitimate business, the burden of proof and the presumption all run in favor of the polluter, as long as it is legitimate and doesn't violate any law.

This counterbalances this a little bit.

Senator Moss. This bill talks about not only the protection of air, land, and water, but also about protecting our public trust. What is that that you are referring to?

Mr. UDALL. This is a concept that has pretty good historical justification. It has been in the law for some time. It is intended to broaden the tools available to those who want to save the environment, by letting them participate in the decision of the way we use the land.

Government agencies may decide that a piece of public land in your State or mine, or somewhere else, is best used for sewage plants, or best used for some kind of industrial use. It is perfectly legal and legitimate and in accordance with the law.

That would enable the courts to apply the same kind of standards of reasonableness to these basic decisions, in the same way that the bill would permit the court to determine whether the operation of the plant that is going to be on there is operated in a reasonable or unreasonable fashion.

I know this is controversial, and I know this is perhaps a new step forward. But it is the kind of tool I think we are going to have to give individual citizens if we are really going to save the environment.

I can go to any major community in the country and I will find some big controversy going on in which a county or city has decided to run a freeway through some area—or, in Detroit, some land to be used for a specific use. There isn't any pollution yet there. The plant hasn't begun operations. But a fundamental community decision that affects the quality of life and environment is going to be made.

This is what we are talking about, in terms of public trust. It is an old concept, but we would apply it to this kind of legislation.

Senator Moss. Getting back to this equity suit idea again. Normally, when a litigant brings an action in equity, he has to put up a bond to reimburse the defendant in the event that he causes him injury. This bill all but eliminates that requirement, and allows bond only where the defendant can establish clear and convincing evidence that irreparable injury will be suffered. Is this restriction or shift justified?

Mr. UDALL. I think so. Again, we are setting up a system of generalizing these basic environmental questions, and we are balancing a little bit in favor of the environment.

The fact is that in most of these cases it is going to be the little guy against the big guy—sort of a widow in the small family, a local taxpayer against Kaiser or United States Steel or Ford Motor Co., or some industrial giant.

And if the lawyers for the polluter can go to the court, as they can in so many cases, and demand that a bond be put up for every conceivable amount of damage that could be done, the fact is that suits will never be brought. Because, if you close a plant for one guy, or reverse a smokestack, you may be talking in terms of hundreds or thousands or millions of dollars.

The ordinary environment-concerned citizens that I hope will use these tools aren't going to be able to put up a bond of that kind.

So, we put it in the hands of the judge. We say that bonds will not ordinarily be required, but we permit judgment under certain circumstances to require a bond.

We do load the scales just a little bit in favor of the environment. Again, that is the philosophy of this bill.

Senator Moss. If an administrative agency brought a suit and lost it, could the citizen come in and bring action thereafter?

Mr. UDALL. Yes. This is one of the complaints that is made against the bill, double jeopardy, multiple suits. But this is not without precedent.

If the Government sues you for antitrust violations, and the Government attorney thoroughly bungles the job and loses the lawsuit, or the jury is prejudiced against the Government and rules against the Government—if I have been damaged by your antitrust violation, I can still sue.

We see this in many other fields of law. This is designed to give the citizen his day in court.

If the Government agency, for political reasons or any reason, has really pursued its right to go against the polluter in a way that will guarantee victory and loss of the lawsuit, or if he bungled it, the citizen is damaged and still can go in and try it again.

Maybe this will place an increased load on the courts. I am more interested in preserving the environment than preserving totally clean court dockets. I think one is more important than the other.

Senator Moss. Suppose you have the case where the Government agency sets a pollution standard, and the defendant, in an action, can show he has complied with those standards. Is this complete defense?

Mr. UDALL. No, it isn't. Again, we get to the fundamental philosophy of this bill. It is a far-reaching bill, and very important. We should not fool anybody as to what we are doing. Part of the problem is that the average citizen feels he is shut out in the decision that affects his life. Decisions are now made by politicians—by distant people, and by agencies, and by Government. There is nothing the citizen can do, if his air is dirty or his water is foul.

So we are saying that if in an election year, for example, some State or water agency, or some Federal agency, for political reasons, sets standards that don't really protect the environment—this is what the politician has in mind. The citizen can say that those are unsound reasons. Those standards do not protect the people.

The court can take an independent look at that, and the citizen has some redress. This is the philosophy of the bill. I agree, there are problems, but you accept them.

Senator Moss. Well, certainly it does release the energy and the drive of the mass of citizens, rather than confining them behind the actions of the bureaucracy and the governmental agencies, where they are compressed now to a large degree.

Mr. UDALL. That is the whole philosophy of the bill, Senator Moss. Too many times, and to a great extent—but I don't want to run down the politician, because I am one—or the bureaucrats, because we have many good ones. Too many times we have a situation where only the district attorney or the Attorney General or the Federal Water Pollution Control Agency has a right and the standing to do the job.

I want to bring the citizens into this, so that we can keep the politician honest. He can keep his back up and his feet to the floor.

Senator Moss. Well, I surely appreciate your testimony and leadership in this field. Like you, I feel we have just about said enough about environment. Now we had better start doing something about it.

Thank you.

Mr. UDALL. Thank you, sir.

Senator HART. Congressman, where does your bill stand in the House, if I may ask?

Mr. UDALL. It was referred to the Judiciary Committee, and then re-referred to a subcommittee headed by Congressman Rogers from Colorado.

I have talked to Chairman Celler about the bill. He has indicated that he would have no objection if Congressman Rogers and his subcommittee wanted to hold hearings, and he would be quite agreeable to it.

I talked to Congressman Rogers, and there has been some indication that he will hold hearings as soon as he can.

Congressman Dingell is very interested in this matter, and has a somewhat similar bill pending for a subcommittee in the Fishery Committee.

I believe, if we can get action in the Senate, through the leadership of you gentlemen, that there is a possibility that before we wind up here on Christmas—or whatever outrageous time is fixed for adjournment, maybe we can strike a blow and get the job done this year.

Senator HART. If we do, and I don't want to make book either way—it will be in large part because of the combination of your sensitivity and eloquence.

Mr. UDALL. I thank the Senator for that. I wish both my colleagues a Happy New Year. This is the new fiscal year, and this is the beginning.

Senator HART. The committee next welcomes the distinguished Congressman from Virginia, the Honorable Clive DuVal, a member of the Virginia House of Delegates, and a near neighbor.

STATEMENT OF HON. CLIVE DuVAL, DELEGATE TO THE STATE OF VIRGINIA GENERAL ASSEMBLY

Mr. DuVAL. Thank you, Senator Hart.

Senator HART. Mr. DuVal, let me order printed at this point in the record a summary biography about you, because I think those who read

the record will be even more persuaded that they should listen to you, based on the proven record of accomplishment in the area of conservation, as reflected by that.

(The biography follows:)

BIOGRAPHY OF CLIVE L. DUVAL, 2D

LEGISLATIVE ACHIEVEMENTS

Conservation and environmental protection.—Introduced legislation which became law to strengthen both the State's Air Pollution and Water Pollution Control laws; to establish a Virginia scenic rivers system protecting some of the State's beautiful rivers; to develop safe alternatives for dangerous pesticides; to authorize a State income tax deduction for scenic easements donated to Federal, State, or local governments; and to protect historic landmarks. Co-sponsored legislation establishing the Commission of Outdoor Recreation and an expanded State Parks System. One of the drafters of the new Article on Conservation in the proposed Constitution of Virginia. Received the 1969 National Wildlife Federation award as the top State legislator in the country in the field of conservation achievement.

Better Education.—Co-sponsored legislation to establish public kindergartens and State system of community colleges and introduced a bill to provide for the education and training of retarded, disturbed and handicapped children within the public school system. One of the plaintiffs in the successful 1968 lawsuit to compel the State to provide more aid to public schools and one of the sponsors in 1970 of a new formula requiring increased State contributions towards the operation and construction of public schools.

Consumer Protection.—Introduced bills to establish a State Consumer Counsel (1968) and a Division of Consumer Counsel in the Attorney General's office (1970) to provide representation for the public against unjustified increases in utility and insurance rates. Was one of six legislators appearing for the people before the State Corporation Commission in 1968 and 1969 in opposition to auto liability insurance rate increases. Introduced strong legislation to prevent deceptive advertisements and sales practices. Co-sponsor and supporter of numerous other consumer protection measures.

Political Reform.—Introduced legislation which became law to prevent officials from voting on zoning matters in which they have a personal interest; to strengthen conflict of interest laws and the statute controlling the activities of lobbyists; filed the first complaint against a major lobbyist for failing to register; co-sponsored many measures for election law reform.

Human Rights, Labor, Economic Progress.—Supported legislation to establish a Division of Human Resources and a Virginia Equal Employment Opportunity Commission; introduced a bill to provide improved workman's compensation benefits; supported legislation to protect the health and rights to benefits of firemen and miners; co-sponsored a bill to encourage industry to move into Virginia and introduced legislation to establish a State Department of Commerce.

Tax Reform.—At each session of the General Assembly introduced or supported legislation exempting food and patent medicine from the State sales tax; sponsored repeal of the personal property tax on household effects; proposed imposition of additional taxes on diesel fuel (so as to require heavy trucks to pay their fair share of highway costs) and simplification of State income tax returns.

Committees.—At the 1970 session of the General Assembly served on the following House Standing Committees: General Laws; Counties, Cities and Towns; Health, Welfare and Institutions; and Labor.

PROFESSIONAL AND PERSONAL INFORMATION

Professional Experience.—1959 to date; private practice of law with Milbank, Tweed, Hadley and McCloy. General practice and practice before Federal agencies.

1955-59; General Counsel, U.S. Information Agency. Responsible for all legal affairs and Congressional relations for the Agency. Became familiar with Congressional Committees and procedures, and worked closely with many Senators and Representatives.

1953-55; Assistant General Counsel (International Affairs) Department of Defense. Work included Congressional relations and all legal work having international implications.

1951-52; Special Assistant to Under Secretary of the Army. Work primarily in procurement and government contracts.

1946-51, 1938-42; private practice of law.

Education.—1935-38; LL.B. Yale University Law School. Editor, Yale Law Journal.

1931-35; B.A. Yale University. Phi Beta Kappa. Summa cum laude.

Early schooling; New York City.

Personal Background.—Married, 1940, to the former Susan Bontecou. Four children, Susan, 24; Clive, 21; David, 20; and Daniel, 17. The DuVals have been residents of McLean in Fairfax County, Va. for 19 years. They restored and live in historic "Salona," 1214 Buchanan Street, to which President James Madison and Dolley Madison fled with the Declaration of Independence and other state papers and possessions and where President Madison held emergency cabinet meetings when the British captured Washington during the War of 1812. Born in New York City in 1912; grew up there and in New England.

Military Records.—During World War II, served in U.S. Navy 1942-46 attaining rank of Lt. Comdr., USNR. War service included 14 months on an aircraft carrier in the Pacific as air combat intelligence officer; awarded Presidential Unit Citation, Asiatic-Pacific ribbon with five battle stars, Commendation Medal.

Civic Activities.—Active in civic work for many years, with outstanding record of service to his community. Former President of McLean Citizens Association and in this capacity led fight against a smelly Fairfax rezoning (Merrywood) involving damage to scenic approaches to Washington; entered local politics soon thereafter (1963) in campaign to defeat corrupt supervisor responsible for the rezoning. Member of the Fairfax County Chamber of Commerce, the Committee to Preserve the Potomac, the National Trust for Historic Preservation, Fairfax Branch, YMCA, McLean Business and Professional Men's Association; member and officer of Post 8241, Veterans of Foreign Wars, McLean.

Mr. DuVAL. Thank you, Mr. Chairman.

My name is Clive DuVal. I am a member of the Virginia House of Delegates from Fairfax County—Falls Church and Fairfax City.

At the present time I am a candidate for the U.S. Senate Democratic nomination in Virginia.

Senator HART. I think, if you had been here last night, and early this morning, you would have reconsidered such a program. We had 18 rollcall votes in about 4 hours, and I got out of here after midnight.

I think before you get too deeply committed, you had better be sure.

Mr. DuVAL. Only 2 weeks away from the primary today, and I think we are over the edge.

I am pleased to have this opportunity to testify on your bill, and Senator McGovern's bill.

I have a statement which I would like the committee to have for the record.

Senator HART. It will be printed in full.

Mr. DuVAL. Now I have some comments I would like to make.

I have been a long-time fisherman, hunter and outdoorsman, and for many years, both as a private individual and a legislator, I have taken steps to protect the environment.

There are several basic problems towards achieving this objective, of which you are well aware. One of them is the lack of adequate funds to upgrade sewage treatment facilities across the land.

We have the technology to do this, but in many cases we don't have the funds—and additional funds are needed.

Also—and equally important, I feel—a sense of urgency is lacking on the part of many Federal and State agencies—at least not matching the urgency with which many citizens view the situation—in tak-

ing appropriate action to protect the environment and to clean up the air, water, and land.

Many citizens are discontented with the pace at which Federal and State regulatory agencies are proceeding to protect the environment.

In a few cases, citizens, as you know, have brought suit and have been successful in maintaining their standing in the courts, but legal requirements make this very difficult for them.

Of course, that is a basic purpose of your bill.

As an example of the lack of action by regulatory agencies to protect the environment as fully and quickly as citizens want, let me cite the following:

The Federal Aviation Administration has for many years permitted a gross overutilization of National Airport, which is a small airport of about 850 acres in size. It is now being used to about four times its design capacity, whereas, Dulles International Airport is being under-used to the extent of about one-third capacity.

The result is heavy noise pollution along the banks of the Potomac on both sides.

I happen to be the chairman of an organization of citizens on the Virginia side stretching from Alexandria through Arlington and Fairfax, known as "Virginians for Dulles." We repeatedly have asked the Federal Aviation Administration to move some of the traffic to Dulles and to take other steps. We have been regularly refused.

Very recently the Federal Aviation Administration permitted stretch jets to use National, which of course increased the congestion.

I have now recommended to my organization that a suit be brought by interested citizens—Northern Virginians and others—to compel the Federal Aviation Administration to transfer some of the traffic overload to Dulles, and also to require the reduction of noise levels of many of the aircraft which use National.

Of course, serious legal problems and difficulties stand in the way of that suit. It may not be possible for us to obtain standing in court to challenge the FAA in this respect.

We also believe that the FAA has failed badly in adopting appropriate noise certification standards for many of the commercial aircraft now in use in this area.

I have a report on the subject which comes from a reliable source, which makes the statement:

For example, with regard to noise certification standards for the Boeing 747, it is interesting that the 747 produces noise levels substantially in excess of the noise levels specified for this plane by a recent International Conference on Aircraft Noise.

The United States participated in that conference and specifically endorsed the noise standards that were adopted for the 747.

Despite all this, Boeing has now been given 2 more years—through December 31, 1971—by the Federal Aviation Administration to comply with these watered-down standards.

This report states specifically:

It is important to understand the effect of this exemption. Of the 747's manufactured before the end of 1971—at least 170 aircraft will not be required to comply with the Federal Aviation Administration's new standards. (See appendix C of the New Federal Regulations.)

That means that at least 88 percent of the 747 fleet now scheduled to be built by Boeing will not be covered by noise standards originally written to cover this aircraft.

In Virginia—

Senator HART. To interrupt you, because it is on that point: Are you in a position to indicate the source of this criticism of the Federal Aviation Administration?

Mr. DuVAL. I would prefer to do that after this hearing is over and discuss it with the Senator. I was given this report under certain limitations.

Senator HART. All right.

Mr. DuVAL. As a Virginia legislator, I introduced legislation to strengthen the State's air pollution control law and to give it some bite. It was interesting to me that I was opposed by our own State air pollution control board, which did not want the law strengthened. The board was apparently afraid of offending some of the industries in Virginia.

In the 4 years that our air pollution control board has been in existence, it has brought only two abatement actions against air polluters.

Yet, in one of our counties the particulate matter in the air is measured by the same agency—our State air pollution control board—at 356 tons per square mile per month.

There are other equally bad water pollution situations. I recently made a trip on the James River in the Richmond area to look at the condition of the water.

The Potomac is the national river. The James, of course, is the State equivalent. It is the river of the Commonwealth. It comes into Richmond as a rather clean, beautiful stream. Yet, within a mile or so of its passage through Richmond, up to 20 million gallons of completely raw sewage are dumped into it per day by the city. There are also a number of industries which are dumping improperly treated waste into that river.

For all these reasons, I warmly endorse the proposal of S. 3575 to open up Federal and State court systems for antipollution suits by ordinary citizens against other citizens or against government agencies.

I welcome, in other words, what might be described as the citizens' "do it yourself" approach to curbing pollution.

Thank you very much.

Senator HART. Thank you, Mr. DuVal, for the support that you give the concept of this bill.

I have been impressed with your concern and leadership over the years in the matter of conservation. You are a legislator and you understand the forces that affect legislation, some of which never show on the record. What is your reading of the attitude of the people of Virginia? How deeply are they concerned, and how willing would they be to accept the burden, in order to reverse the deterioration of the environment? What kind of support do you get in the house of delegates, as you rise to speak to the problem?

Mr. DuVAL. I think they are deeply concerned, and I received tremendous assistance when I introduced my clean air bill at the last session. As I said, it was opposed by the Air Pollution Control Board and by a number of corporations. But, because of the help of the Izaak Walton League, the Farm Bureau, and many individual citizens who came in and testified in support of it, we overrode that opposition. We won in the house by a 2-to-1 margin, and my bill was approved almost unanimously on the Senate side.

I have been campaigning across the State and find deep interest and concern about the need to do something to curb pollution and to find solutions to the disposal of solid waste and the other problems that we face.

I am quite sure the Virginians will be willing to pay their share of what will be the necessary costs.

Senator HART. It certainly will cost. One of the problems we are having in legislating in this area is that the constituency that is now alive is just one part of your responsibility. Other constituents are those that are not yet born. The action that you seek to persuade the public to take imposes the burden on them, the physical burdens, many of the benefits of which will arise only when the not-yet-born constituents are around. We have the same basic problem here.

Mr. DuVAL. Yes, we do. But I think that a lot of the burden will be carried by young persons now alive, who are deeply concerned about the environment and who will soon be involved in electing legislators—because I hope that they will receive the 18-year-old vote soon. These young people are very willing to carry this burden.

Senator HART. And very sharp in their criticism of any new foot dragging, which is good.

Mr. DuVAL. Yes, sir.

Senator HART. My last question, Mr. DuVal: You mentioned the development of support for the inclusion in State constitutions of the so-called environmental bill of rights. What has been your experience with the Virginia Legislature in the writing of the new constitution? I know that you did serve as a draftsman in this area.

Mr. DuVAL. We did try to include in the new constitution an effective conservation bill of rights in those terms, because we felt that the right to enjoy life and to pursue happiness included the right to breathe clean air and drink clean water, and not be offended by stenches or impurities in the water.

We did not succeed in putting in that exact language. We did insert for the first time—I was one of the drafters of it—a new article on conservation, which goes quite far in recognizing the rights of persons to have clean air and clean water as a part of their total enjoyment of existence. We are proud of that.

Senator HART. Has that constitution yet been presented to the people of the Commonwealth?

Mr. DuVAL. No, sir. It has been passed twice by the State legislature. It will be put up to the people, in effect, this November.

Senator HART. Is there any discussion developing on that portion of the proposed constitution?

Mr. DuVAL. No, sir. The constitution has been split into several parts. There are four questions, three of which are controversial and deal with the power to issue bonds, and so on.

The main part of the constitution, including this conservation article, has not been controversial in any way. I am relatively sure that the main body of the constitution, including the new conservation article, will be adopted by the people.

Senator HART. Senator Moss?

Senator Moss. Thank you, Mr. Chairman.

I appreciate your very fine statement, Mr. DuVal, and recognize your leadership in Virginia in this field.

I perhaps have just one question. How do you respond to the charge that is made by some that this legislation would open the floodgates for crank suits, overwhelming the Federal courts? What is your response to that?

Mr. DuVAL. Well, I have noted that this was a concern of the sponsors of the bill; and of course there is already a provision in the law requiring, as a condition of suit, the filing of affidavits by two experts certifying that pollution does exist. This provides some protection against frivolous suits. How to provide further safeguards without completely locking the door is a difficult question to answer. Perhaps the filing of a small bond could be made a prerequisite of the lawsuit. By that, I mean a bond of perhaps \$10,000 to cover the defendant's attorneys' fees and costs, if the suit was found to be without merit. That would not be an extreme financial burden on the plaintiff, but at least it would screen out some completely frivolous suits.

Senator Moss. Quite likely there would have to be an investment in the number of judges in the Federal bench, by just the adding of this additional jurisdiction, wouldn't there?

Mr. DuVAL. I suppose here would be, sir. I think it is a question of balancing the advantages we would gain by cleaning up the air and water against the costs involved.

Senator Moss. I assume that you, like Congressman Udall, say we will just have to recognize and face up to the fact that it is going to cost us more individually, to have an imposed clean environment. That is just one of the costs of having a pure environment.

Mr. DuVAL. That is the way I see it.

Eventually, the people are going to have to pay an additional cost to have a clean environment. It might almost be considered a cost of survival.

I think the people will be willing to pay that cost.

Senator Moss. Thank you very much for your appearance.

Senator HART. I will ask you to discuss with the committee counsel, Mr. Bickwit, the report to which you referred.

(The statement follows:)

STATEMENT OF CLIVE DUVAL, MEMBER, VIRGINIA HOUSE OF DELEGATES

Mr. Chairman, my name is Clive DuVal. I am a member of the Virginia House of Delegates from Fairfax County, Falls Church, and Fairfax City; and at the present time I am a candidate for the U.S. Senate Democratic nomination in Virginia.

I am especially pleased to have the opportunity to appear before this committee to testify on the bill S3575 entitled the Environment Protection Act of 1970. This bill, which would give the American people a voice in determining the quality of their environment, is long overdue in America. If passed by Congress, it will eliminate traditional barriers against citizens who wish to do something more than merely complain about pollution. This landmark bill will supplement whatever administrative review and action may already be involved and ultimately make our body of law more responsive to the changing needs of the nation. Similar to legislation now under consideration by Congress in the consumer protection field it gives the average American, the "little man," a right to sue for damages. Until now, unfortunately, this has been almost impossible.

In the past decade we have witnessed some astounding and very gratifying developments in the conservation and pollution control field. The Wild and Scenic Rivers Act, Water Quality Act, Clean Air Act of 1963, Solid Waste Disposal Act, all have been passed during the last 10 years. Back in 1960 no one would have predicted the increased level of awareness on the part of the public and Congress

which we are witnessing today. What remains to be determined is whether the people have the will and determination to support the laws now enacted.

I do not intend to review the long list of statistics which shown evidences of the degradation of our environment. I would like to however, briefly mention two examples of problems of pollution which affect Virginians, and who could very well utilize the legislation you are now considering to bring suit against in one case an agency, and another an industry or group of individuals.

The first example is the growing problem of noise pollution in Northern Virginia. As you may know for some time now many Northern Virginia citizens have expressed their concern repeatedly about excessive levels of aircraft noise emanating from planes landing and taking off at National Airport. Despite frequent complaints, and the obvious need for noise abatement action to be instituted by the Federal Aviation Administration, nothing has been done to bring relief for the harassed citizens of Northern Virginia. Clearly something on a massive scale must be done to reduce noise levels in the Washington metropolitan area as well as in cities throughout the nation. Evidence related to this problem leads me to believe Northern Virginia citizens have a strong case for taking the FAA to court on this issue. That is, if citizen status in the courts related to environmental questions were established by act of Congress as S3575 would do.

There are several methods to significantly reduce aircraft noise pollution. One of these is to "retrofit" the engine nacelles of currently used aircraft such as 707s and DC-8s with special acoustical material which will suppress the noise generated by the engine. Recent NASA studies show retrofit is technologically feasible and that substantial noise reductions can be achieved. What a blessing this would be for communities around the nation's major airports. Despite the need to move forward quickly to adopt retrofit standards the FAA is asking for more studies and generally is delaying any action. It's been almost 4 years since a White House panel studied aircraft noise and two years since Congress gave the FAA authority to regulate aircraft noise and sonic boom—and all the FAA offers is a possible setting of standards by the end of 1971. The economic questions raised in connection with this program have been studied and found not to be a barrier to implementation. And if there were, then in the interest of the public the government should share some of the financial responsibility.

In typical and I might add predictable fashion, the FAA seems to be leaning toward increasing noise level tolerances in order to please the industry. Related to all this is the SST which is supposed to be even more noisier than any current generation aircraft. If the SST ever becomes a reality, the FAA will be in a position to authorize its noise pollution level or as the FAA implies—may require a separate system of airports. How ridiculous, and what a grave disservice to the American taxpayer.

There seems to be no end to the evidence which all points to the FAA's strong bending to the special profit making interests of the industry which it is supposed to regulate.

In sum, the FAA is doing a terrible job of setting acceptable noise standards and would very likely be the subject of a citizens suit under the provisions of S. 3575. As chairman for the Virginians for Dulles (organization), I have already recommended to that group that they institute suit against the FAA and National Airport for failing to reduce the noise levels of many of the aircraft which utilize National. The legislation now before this Committee would provide the necessary legal tools to do battle with the negligent FAA and either force them to take action or seek redress for damages incurred.

Another example which has specific application to S. 3575, is the failure of the Justice Department to enforce the Refuse Act of 1899. This Act, as you may know, requires U.S. Attorneys to prosecute all polluters who discharge refuse into a navigable waterway without a permit from the Corps of Engineers. It appears that the Corps is not enforcing the law, and perhaps the Justice Department is in fact limiting its enforcement as well by informally deciding not to intervene unless compelled to by the Corps of Engineers. Virginia's James river is an example of violation of the Act. Almost anywhere along the James river in Virginia it's a rather easy feat to observe the dumping of untreated industrial waste into its waters. Only a few days ago I took a short inspection trip on the James and believe me it was the most disgusting spectacle imaginable. Right in the heart of Virginia and within the Richmond area the discharge of untreated sewage and industrial wastes was enough to gag anyone. Industry and the municipalities all along the River have been dumping garbage into the water for many years. If the Refuse Act had been enforced as intended by Congress,

the James river and many other rivers throughout the nation would not be in the deplorable state they are now in.

Recent correspondence (which has been made public) between Rep. Henry Reuss, Chairman of the House Conservation and Natural Resources Subcommittee, and the Justice Department, reveal the Justice Department is not enforcing the Refuse Act of 1899. It's about time the citizen was considered in all this abuse of the environment and the legislation now before this subcommittee seems to offer part of the solution. Administrative action however must be continued, no laxity on the part of the executive branch can be tolerated. In many cases the only way to stop polluters from continuing to pollute is to bring suit against them. The threat of such a suit alone will be sufficient in some instances to bring about a change in policy, with others a suit must be instituted when damages have been incurred. The Santa Barbara oil spill, the failure of the Agriculture Department to move expeditiously on the banning of D.D.T., and many other examples illustrate the necessity for the courts to open up to citizens suits.

Virginia is a classic example of the uncoordinated and sometimes contradictory nature of pollution abatement activities in the United States. Although there are several agencies in Virginia which have limited functions touching aspects of the environment, there is no single agency explicitly charged with maintenance of environmental quality.

As to water, for example, the State Department of Health certifies the quality of community water supplies, the Division of Water Resources in the Department of Conservation and Economic Development has responsibility for state water resources development, and the State Water Control Board (SWCB) has authority for maintenance of the quality of these waters. The Division of State Planning and Community Affairs has a general mandate for statewide comprehensive planning which could include environmental quality. There are perhaps twelve other state agencies and a myriad of local and regional authorities whose actions influence the quality of the water resources of the Commonwealth.

The responsibility for maintenance of air quality is similarly fragmented. For other influences on environmental quality—such as noise, general aesthetics, solid wastes, and general sources of ecological imbalance—there is either little or no authority for state control.

The Governor has established an environmental quality council but it does not have any enforcement or policy making authority. Thus the average Virginia citizen is still too often lost in the myriad of different agencies with overlapping responsibilities. Until a fair measure of coordination and uniform enforcement of all existing and future pollution control standards becomes more of a reality, the enactment of S3575 will *first* provide inducement for polluters to act to reduce pollution levels, and *secondly*, will focus public opinion and the courts on offenders who see fit to ignore the deleterious effects his activities have on the environment.

This legislation will, like any other break with the traditional past, be not without some controversy. It is my hope that the Press and broadcast media bring into clear focus what enactment of this bill will offer the average citizen who is concerned about dirty water or smelly air, and who wants to do something about it. The initial excitement over Earth Day and the environmental teach-in has waned, the honeymoon is over, but the air and water of our nation still waits for the action it deserves. Focusing public opinion on this bill will do much to gain further acceptance of this innovative and very necessary legislation.

The time has now arrived when everyone must take part in preserving and protecting our land, air and waters. Pollution is the result of years of neglect. We can ill afford to wait years before we act to reverse the trend toward the destruction of our environment and bring about a renewal. And so S3575, which would "establish the right of all citizens to the protection, preservation, and enhancement of the environment", will take the American citizen one giant step forward in the battle to save our country from total destruction of our natural resources. Many observers are pessimistic about the prospects to preserve our environment. I am not. I have seen a great deal accomplished in the past few years in my own state of Virginia and hopefully the trend will continue. But the road ahead is a long hard one.

For years now we have perpetuated the notion that somehow "more" is good and that "growth" and "prosperity" meant profits in the material sense, and we ignored the toll it took on our human and natural resources. Now a new awakening has come about, and none too soon. The public is now aware that certain

pesticides, such as D.D.T. can be destructive, and that an alternative must be found that is equally effective on pests but non hazardous. In the continuing fight to save our rivers and lakes, we have found that the massive discharges of heated water from nuclear power plants is causing thermal pollution. It threatens to further upset the aquatic balance in our waters. Lake Erie, Lake Michigan, Lake Huron are tragic examples of greed and stupidity, combined with ineffective governmental controls. Passage of this bill will improve the chances of ending the trend toward the destruction of these waters. The trend must be reversed, and S3575 will add immeasurably to reversing the trend.

Thank you.

Senator HART. Our next witness this morning is a member of the firm of Winer, Neuberger & Sive.

Mr. David Sive is a man who has distinguished himself in the courts in the matter of actions seeking to safeguard the environment.

We welcome very much the opportunity to have his judgment on the legislation.

**STATEMENT OF DAVID SIVE, OF WINER, NEUBURGER & SIVE,
NEW YORK, N.Y.**

Mr. SIVE. Thank you very much. I am honored to be here.

At this time I will again repeat my apologies for not making a prior hearing to which I was invited; my inability arose because of an illness, and I just couldn't be here.

Senator HART. We understand.

Mr. SIVE. I have submitted to you a prepared statement. Following the two distinguished gentlemen who preceded me, and others who were at the prior hearings, I think I might best serve the purpose of presenting to you what ideas I have by departing somewhat from my prepared statement and by picking up a couple of the matters which have been raised this morning.

Senator HART. Let's order the statement printed in full, and we would appreciate your reactions—not just to summarize the statement, but the reactions to other issues raised this morning.

Mr. SIVE. Thank you. I think that will do.

There are also a good number of points which I have made which have already been made by those that preceded me—particularly Professor Sax, who was here at the prior hearing.

Just to take up some of the points, one that was raised concerned State constitutional provisions. I would suppose that the declaration of rights which is in section 2 of the proposed act, 3575, and the purpose of including that in the act which I very firmly support and I think should be in the act—I would suppose that that is not meant to be a substitute for a possible Federal constitutional amendment expressly to create such a right.

I personally favor very much the adoption of such a constitutional amendment.

In answering one of the questions asked before, I think that the support throughout the States would be overwhelming.

This is based upon my own experience, having worked on and actually written the constitutional amendment in New York, which I think is the first of such amendments. That amendment originally arose during the State Constitutional Convention in 1967, at which I headed the Committee on Natural Resources. Because of the inclusion of one

newly written constitution and the submission of that in one piece, which I think was an error, and because that one piece involved State problems, the whole constitution was rejected.

Of all of the numerous changes in that proposed new constitution in 1967, the only one which has since then been enacted and adopted, by a regular constitutional amendment process, is the so-called conservation bill of rights, which became law after favorable vote at the general election in November of 1969, by I believe a 4 to 1 margin.

One further point concerning the possible constitutional amendment, and a point which goes to the very important substantive provision in the act before you—the declaration of the right: The issue was raised, and the point was made in many different places—and I imagine you have heard it as much or more than I—that in declaring such a right, whether it be by statute, and perhaps even more, by constitutional amendment, we are leaving a great deal vague. The right is not defined, and it must be worked out by courts. It might open the courts to floodgates of litigation, it has been claimed.

I think one of the responses to that is that given by the gentleman who preceded me.

Another is that I think that if we regard environment as fundamental—and I certainly believe it is as fundamental as anything that we have today, not excluding our basic right of due process and equal protection, et cetera—if we do regard this as fundamental, then I think it must go through the same evolutionary process through our courts that due process and equal protection and other constitutional requirements went through.

It requires no sophistication, to the extent of the constitutional historians, to state that the equal protection clause meant far less just 11 years ago than it does today.

If we were willing to pose with the courts the problem of spelling out what is meant by "equal protection of the law," then we should be willing to spell out the problem of defining a right such as you declare—either statutory or constitutional.

As to the problem of opening the courts to floodgates of litigation, there are three answers to that: One is sheer economics.

I think that most significant, from very direct personal experience—and indeed it is a very serious personal problem at this point—is the matter of the tremendous amount of time that one consumes in moving into the courts as an attorney in environmental matters. Matter of this sort, by and large, cannot be commercially handled in any law office.

The reason is very simple: You are protecting in the courts the rights of a large number of people no one of whom has any economic or any appreciable economic interest in the controversy. Therefore, you are depending on your own voluntary work and the voluntary work of everybody, from the typists to expert witnesses.

The second answer to this possible opening of the courts to floods of litigation—I might say I would disagree with the proposal of requiring \$10,000 bonds—is an answer already formulated by the courts, and one already in force in the courts. They have already an inherent power to govern the adequacy of the representation of the public or of class rights—or what we might call "derivative rights"—before the courts.

Those who have had any such experience, perhaps in matters such as stockholders' derivative actions, where the very same problem arises, the problem of persons with one share coming into court and asserting groundless claims, consuming vast amounts of the court's time and vast amounts of the funds of the company which is the defendant, are familiar with the problem. In this case the inherent power of the court is used to curb frivolous suits, the bad faith suits, and the suits by persons whose attorneys may simply be incompetent.

That is the part of the body of corporate law which involves a whole half-volume in any encyclopedia of corporation law.

Moreover, under the rules of civil procedure, the Federal rule—Federal Rule 23—specifically set that requirement, dealing with the adequacy of the representation of a class of persons by a person who comes into the court. Again, one can find, I think, at least 200 pages in the standard text on Federal procedure defining and referring to literally hundreds of cases which dealing with what is meant by adequate representation of a derivative or of a class right.

I think the problem is applying those principles, and weeding out the frivolous and the bad-faith suits and the persons doing that, there might be some that will come into court. It is no harder in the environmental field than it is in any of these other fields.

The right which we are really comparing, although here it may appear to be the right of each citizen, would be in the nature of a public right, the right of all persons. The very purpose of having the access to the court is that one person may, despite the absence of any economic interest, assert that right of a large number of persons. The very same standards apply which apply to these other types of actions which are the subject matter of rule 23 of the Federal Rules of Civil Procedure.

The final comment that I have concerning the threat of volume litigation is just a short statement, quoted in my prepared statement, from the Supreme Court case of *Flast v. Cohen*, a statement in a decision by Mr. Justice Douglas—and that is discussed at some greater length in my prepared statement.

May I just go into a couple of other problems that have been raised here which I think are raised by the act? When I say problems, I don't mean necessarily objections. I do say in the prepared statement very definitely that I support the act. I would like, if there is time—and I believe that I will take the time—to study this other statement that has been submitted, in some detail, and also the initial remarks of Professor Sax. I might offer some suggestions about some precise points of wording. I don't think that this is necessary or advisable at this time, and I will take the liberty of just communicating with the committee counsel to do that.

Now, to just go into the matter of the burden of proof—and the administrative agency problem. Here we are concerned, I think, with the most fundamental problem that we have in the resource field. The beginning of dealing with it—not the final phase of dealing with it, because it is such a complex problem, is in section 6 of the act.

The problem was stated by Representative Udall and has been stated by many other persons with much greater sophistication in the field of administrative law than I have. That is the control of most of our resources by administrative agencies, and the tremendous advantage

in court which the agency has—the agency itself or a company or developer or user of resources—with an agency licensed or permitted.

The tremendous advantage which they have in the courts under the standard rule of administrative law is that if there is any basis for the administrative decision, unless there is an error of law, the administrative decisions must be upheld. Here we have I think a very curious reversal of history, apparent to a person of my age. It bears upon the questions asked before, and the comments concerning the impatience of the citizens and the citizens' groups in the environmental field.

I can very clearly remember the 1930's and the 1940's when the growth of the administrative agencies and the growth of the very doctrine of law which we are discussing were fought for by those of us who might have considered ourselves liberals. I think it is still a great term, and I class myself as that. We looked with favor upon that, because the administrative agencies, the NLRB, the Federal Power Commission, the REA, and all the others were the protectors of the people against vested interests in property, and large corporate enterprises. Now we have a curious reversal of history. For different reasons which have been documented by Professors Sax and Louis Jaffee and others the protectors have become the unwitting agents of the users of those resources. We must somehow take out of the exclusive jurisdiction of those agencies the general resource problem.

I would second and very firmly endorse the comment that was made by Representative Udall in answer to one of your questions, concerning the need of the generalist, in this case the court. It balances the conflicting consideration, and determines whether the number of kilowatts out-range in importance the scenic beauty of some gem along the river.

I think that the act, in section 6, begins to address itself to the problem of the overwhelming power of the administrative agencies, and their powers in court, by virtue of these basic rules of administrative law.

I would respectfully suggest that that problem is one that requires much deeper and further study.

I endorse what is in section 6, but I respectfully suggest that this matter is as fundamental as I have stated.

The fact is that people interested in the environment, until just 2 years ago, when the revolution—the environmental revolution—reached the proportions that it has—could go only to the courts to combat the power of the administrative agencies.

I will just mention one other point which was referred to by a prior witness here, and also referred to slightly in my prepared statement. That is the point which has been made several times that the people are willing to shoulder the additional cost of environmental protection. I think that is absolutely so.

In my own travels, speaking in many different places, I have found, although perhaps my audiences would be too heavily inclined to agree with me in the first place, that people, perhaps far more than those in our own State legislatures and Congress believe, are willing to shoulder the costs. By shoulder the costs I mean not simply paying more taxes in dollars, or levying more taxes on the wealth or the corporations who pay the dollars, but shoulder the costs in

terms of having somewhat less in goods and materials and services. I don't think that stating that people can shoulder the cost, and then taking that cost and putting it into any particular group of taxpayers is the solution to our environmental problem—on whom we levy the cost of all Government services, and on all Government products is a problem of taxation. I have no sophisticated opinions on how to reform the tax laws.

I do believe that in the final analysis what we mean by shoulder the cost is that we may have—and I think most people are willing to have—somewhat less electricity, somewhat smaller automobiles, somewhat narrower roads, somewhat less of a large range of products and services. Because that is the only way that they can have the Potomac or the Hudson or the Cascades as we want them, or even the air that we breathe in Washington, New York, or Spokane.

So I would respectfully suggest that when we discuss this willingness to shoulder the cost, we recognize the basic problem. If that means cutting a little bit of what we use by virtue of goods and services, then I think that there is overwhelming knowledge and support for doing that, and an overwhelming recognition of the fact that what people want is not simply broader highways and greater speed, but some of the things toward which this Act is addressed.

So I would just conclude these brief remarks by stating that the principal point in my prepared statement is that I very much support the policy and the provisions of the act as to the technical points which I might comment upon. I will take the liberty of submitting to your counsel my views.

Most of the other points which I would have made have been made far better than I could, by the people who have preceded me.

I thank you for the opportunity of being here.

Senator HART. I think the record already understands why we are anxious to have you back here, since we were unable to the first time.

Mr. SIVE. Thank you.

Senator HART. In your prepared testimony, on which we have had an opportunity now to develop questions, you were talking about the tendency of the Government agencies to assert lack of standings as a defense.

Now, you are in court and you have lived with this, and I haven't. Help me, and the reader of the record and other members of the committee, to get a better feel for this. First of all, to the extent that you can identify the reasoning of the agency, what is their rationale for wanting to limit the doctrine of standing?

You conclude in your statement, I noted that the defense should be legislated out of existence, as the act does?

Mr. SIVE. Yes; I do—with the observation which I made in the prepared statement. I think the courts will from now on hold it out of existence.

If you will simply follow the train of cases beginning with the *Scenic Hudson* case and ending with the *Citizens' Committee v. Volpe*, in the Second Circuit, which I think will be the subject of a petition for certiorari to the Supreme Court, you can study the trend.

The second named case, I think, is the climax of the development. It holds, in so many words, where there is a public interest in resources, and that public interest may be found in the statutes or in

common law, standing is granted to any adequate representative of that interest, which means any person meeting the definition of that term in rule 23 of the Federal Rules of Civil Procedure.

I think that in the Federal courts, at least now, standing is no longer a problem. But I would nevertheless urge that it be legislated out of existence, because, until today—although I understand there are some reconsiderations of this under some issues raised by the Environmental Quality Council—until today the defense or purported defense of standing is automatically thrown in, simply as one of the several defenses which, as you may know, lawyers pull out of the books. It seems to me there is some basic injustice and some contradiction between the declaration of environmental problems being a national concern and the declaration in the Environmental Quality Act of 1969—that protection of those resources is the responsibility of the citizens—and the Government agencies' continuing to use this doctrine purported lack of standing because it is in the same form book.

So you can see there is very much in favor of legislating it out of the existence, although I think the courts in this instance and in others have preceded Congress.

It is important to remember, however, that standing is only the privilege of being in court. Standing means that you will not be thrown out simply because you don't have the interest.

Once you have your standing, then you begin to fight, and you must have your substantive law with you. That is where I think the act makes the most fundamental advance, in that it legislates a substantive right, a substantive environmental right.

Thus far, I don't think any of the Federal litigations, including several which I have been involved, have evolved in the courts a substantive environmental right.

Where we have been successful, it is through generally a kind of trick, such as taking an old statute and an old term such as the one used by the Rivers and Harbors Act of 1899, or some similar term, and using it. But we must have a substantive right. That should be done by Congress, as your act does.

I hope we can go on to declare that that is to become a constitutional right.

Senator HART. Now, you say that the bill declares the right with sufficient clarity.

Is the question of standing equally clear in the bill, as drafted?

Mr. SIVE. Yes. Section 2(b) provides each person with an adequate remedy. That goes even beyond the mere standing, because the standing means standing to be in court, having a remedy which may or may not be adequate.

So, 2(b) goes beyond the standing problem.

Senator HART. Now, help us get a better understanding of this concept of sovereign immunity. Is the defense of sovereign immunity a defense that is separate and distinct from that of limited review of administrative actions?

Mr. SIVE. Yes; it is.

Senator HART. Now what is the general attitude of the Government lawyer in court on this defense? What is the basis of his argument here?

Mr. SIVE. The basis of the sovereign immunity argument is the basis of the doctrine that kings and sovereigns can do no wrong. Of course, it is a basic principle of law that the State or the sovereignty or its agencies—State or Federal—may not be sued unless it consents to being sued.

The sovereignty immunity argument has been raised in a number of environmental cases. It was raised at some length and with some refinement in the last case that I referred to—the *Hudson River Expressway* case, the Government stating, in substance, that unless the Government has specifically consented to be sued, or waived immunity, it has that immunity. Now, fortunately, along with the sovereign immunity doctrine there has grown up over a number of years a doctrine that a Government officer may not perform an unconstitutional act, and a second doctrine which is not quite as definite—that a Government officer may not perform an illegal act. He is not immune from responsibility for an illegal act.

The present state of the law of environmental matters concerning the sovereign immunity defense is still, I think, unclear. The sovereign immunity defense raised in the recent case which I have mentioned was not even considered in any express language in the circuit court decision affirming the district court, which, in effect, said, "There is no sovereign immunity for the Army Engineers to perform certain kinds of work in navigable waters"—that the statute requires consent of Congress. But sovereign immunity is still a matter which is a problem, and the act does not specifically address itself to that in so many words. But I think that the declaration of the right, plus the adequate remedy, would wipe out the defense of sovereign immunity, where one has the substantive right, the degree of which, of course, would be defined by the court decision under 2(a).

Senator HART. The Government I gather either tends traditionally toward—or always takes a narrow view of the extent that administrative action can be reviewed in court. The Administrative Procedures Act, I take it, is a point from which we begin to develop an appreciation of the limitations that are attached to the review.

Comment, if you will, on the standards for review under the act. To what administrative actions does the act apply?

Mr. SIVE. The Administrative Procedures Act applies—

Senator HART. I am aware that that is an awful question. To answer it would require a memorandum to be filed.

Mr. SIVE. To answer it fully would require a book, which others are far more competent than I—I think I do understand the problem which you are addressing yourself to.

I would just identify it in two aspects: Whether an administrative action is reviewable in a court is one question. I think there the Supreme Court and other cases have given a sufficient answer to that.

Once it is made reviewable, the scope of the review is the real problem, the rationale basis rule under which the administrative decision will almost always be upheld. That is the problem I have referred to before.

Now, as to where the review lies, I think the Supreme Court case of *Abbott Laboratories v. Gardiner*, the citations of which I can furnish, establishes the rule. And this is again referred to in the Second circuit case I referred to—that, unless the statute creating the administrative

agency expresses, or clearly from the implication of its words, bars review, review lies.

The problem, though, once you have the right to review the administrative action, is that of how much the court is going to look at what they did. That is the problem which I referred to before, which I think section 6 of your act is the beginning of a study of ways of reforming that administrative principle which grew up in the 1930's and 1940's.

Senator HART. Mr. Bickwit.

Not that I have lost interest, but I have a problem that has just been handed me. A bill on the floor is the Interior Department appropriation bill. As do the 49 other States, Michigan has an interest in that bill. I am finding out where it stands.

Mr. BICKWIT. One matter I would like you to clarify for us with regard to all the questions Senator Hart has asked you thus far. It is a difficult one, because what I want to ask you to do essentially is to make the Government's case against you, which is made every time you argue a case in court. What is the rationale for the defense of lack of standing, the defense of sovereign immunity, the defense of lack of review, and the defense of limited scope of review? Is there anything to those defenses?

Mr. SIVE. I think the rationale is two: One is the fear—and I think it is sincere and legitimate but misplaced—of irresponsible litigation.

Second, the theory of nonreviewability, or of limited reviewability, of the administrative determination—the Federal Power Commission, the Army Engineers, et cetera—is based upon the expertise of the administrative agencies. This is part of the whole theory of administrative agencies, and basically a part of the administrative law, which is discussed in the several leading texts, on which I insist I am not really an expert.

What has happened, I believe, is that the questions of the use of resources, which come before a Federal Power Commission or U.S. Forest Service, or the Army Corps of Engineers, require many degrees, many kinds of expertise—not only the kind of expertise which is within the Commissioner and the staff.

The Environmental Quality Act of 1969 requires in so many words an interdisciplinary approach to the problem. Stating it differently, and again referring to what Representative Udall said: We need the generalist to make the critical determination as to the value of the kilowatt.

Against it is often the consideration of the preservation of mountains or rivers. That requires, not the expertise involved in the administrative agencies, but the expertise of the court.

I might say that I have spent a good part of the last few months trying to analyze this. The result of that is an article in the current *Columbia Law Review*, where my ideas on this are stated.

Mr. BICKWIT. Given that the bill would nullify or at least greatly limit these defenses, is there any greater reason for doing this in the pollution-environmental area than in other areas of the law?

Stated another way, are there any good reasons for these defenses outside of the pollution area, or are these defenses merely meritless throughout, and are we merely concentrating on pollution by chance in this bill?

Mr. SIVE. If the question is, is there greater justification for sovereign immunity in any area of Government activity other than environment, the answer is no. I think sovereign immunity should be wiped out completely. We are beyond the age where the kings or the governments can do not wrong. I think much of it has been wiped out by the courts.

The other question you raise about wiping out the defense of absence of standing is much more difficult and also involves construction of the cases-in-controversy sections of the Constitution—which I haven't recently studied. I think it requires a good deal of further analysis.

I assume you may have received such advice, or will procure it, from other witnesses.

Sovereign immunity I would keep out completely in every area of Government activity.

Mr. BICKWIT. How about reviewability of administrative action?

Mr. SIVE. Reviewability of administration action? I think the problem has been solved by the courts themselves very well. I refer again to *Abbott Laboratories v. Gardiner*, at 387 U.S. 136. I think that, and cases which have followed, have evolved a rule accepted now throughout the Federal courts. I think that cannot be improved upon by any change in the Judicial Code or in the Federal rules.

Mr. BICKWIT. You have differentiated the concept of "reviewability" from "scope of review."

Mr. SIVE. Yes.

Mr. BICKWIT. Could you address yourself to the question of whether a limitation on scope of review ought to be removed outside the pollution area, as well as within it?

Mr. SIVE. Yes; as to whether the scope of the reviewability—and I might call it the degree of review—of administrative decisions should be outside of the environmental area, I really have no opinion.

Mr. BICKWIT. I have another question that is related to this last one. If we enlarge the scope of review of administrative action so that the citizen is in all cases entitled to a *de novo* determination of reasonableness in the courts, which, as I read it, is the intention of this bill, is it fair not to extend this right to the parties on the other side?

In other words, if the citizen can set aside a lenient administrative decision as permitting unreasonable pollution, should not the polluter be able, under similar scope of review, to set aside decisions to prohibit reasonable pollution?

Basically, is there an equal protection problem here? Are we being unbalanced?

Mr. SIVE. I think there is an equal protection problem there. Perhaps legally and constitutionally, and I think certainly politically, from the standpoint of policy, there is. The requirement of the *de novo* trial by the court of the issues in administrative agencies, I think, may go too far. I think that has to be limited, and I think that is precisely the point which requires some real further study, on which I think we will submit some ideas on to you. Such ideas can come from experts like Professor Sax, or Louis Jaffe, or Walter Gellhorn, and others, whom I hope you can call on.

But to have *de novo* review is a problem, and I think you can't justly deny it to one party in the case and grant it to the other party.

Mr. BICKWIT. The bill clearly does this now.

Mr. SIVE. It does. That is one of the points which I want to try to think through a little further and see what ideas I might have, and give them to staff counsel—also conferring with my good friend, Joseph Sax, and a couple of others.

I might also say that the bill—and others—which would provide for a citizen—probably will be studied in some detail, I hope, by the Advisory Committee to the Council on Environmental Quality, of which committee I am a member; and actually one subcommittee of those into which that advisory committee is divided, is to deal with environmental litigation. I will be chairing that subcommittee. That committee will study the bill, I think, in detail, and submit some reports to the Council on Environmental Quality.

What position they may take, I do not know. I speak here solely as an individual, and not as a member of that advisory committee, but there will be some real study of that which certainly may be of help to you.

Mr. BICKWIT. Can you give us some idea of time, as to when the Council on Environmental Quality will receive that?

Mr. SIVE. I think the request that I received from the chairman of that committee, Whitney North Seymour, Jr., is that the subcommittee studying that specific matter should try to report to the whole advisory committee by October. They are going to try to do that.

Mr. BICKWIT. Your prepared testimony concentrated on the use of the bill to take and overturn Federal administrative decisions.

Do you believe the bill will be useful in contesting State and private activities as well? Perhaps you could preface your answer to that with some generalized description, if you could give it to us, of what—under law—conservation groups can do to set aside the granting of permits and other activities by the State governments.

Mr. SIVE. There I would summarize first by stating that the State courts, by and large, have not gone as far as the Federal courts, in the very first right of standing. The States are far behind the Federal courts, in my view, in granting standing. So we have still that heavy problem in the State courts, the extent to which State administrative actions are reviewable in the State courts and the problem there—I couldn't give you any sophisticated opinion about, but I would suspect, and be certain without having studied it, that whatever inroads are that we have made on the power of the administrative agencies in the environmental field in the Federal courts they are far greater than have been made in the State courts so far. The State courts are far behind the Federal courts.

The last part of your question deals with the effect of the act upon the States. I haven't considered whether the act would directly affect State action. I don't think it would. But certainly there would be, I think, a very strong and very important and helpful political effect, to the extent that the State legislatures in the environmental field, may follow Congress, and to the extent that the leaders of the very committee here will lead opinion in their home States such as Michigan, as I know they do.

There is a very good discussion of some of these problems, to which I might refer you, in this month's Michigan Law Review, which is a symposium. A good part of it is addressed to the subject matter of your discussion this morning.

Senator HART. Would you give us the citation?

Mr. SIVE. It is the Michigan Law Review of May 1970, volume 68, No. 6.

Mr. BICKWIT. What about the situation where government action is not involved, where a private entrepreneur builds a plant and doesn't need to ask for a State permit or approval by a Federal agency? How does the conservation group contest this kind of action? Is it generally under nuisance laws?

Mr. SIVE. I don't think you can generalize what they do. It is based upon the fact that no courts have yet declared an environmental right, per se. In New York State, where we have such a constitutional declaration, no court has yet decided whether that constitutional provision is self-executing without further legislation. What the conservationists do, the national and the ad hoc groups, is just pick any argument they can make, however technical it may be—and those include nuisance, or breach of a particular statute. Really, there is no generalizing. We just grab anything we can, and try to litigate.

Mr. BICKWIT. What are the limitations of nuisance laws in dealing with problems where no government action is involved?

Mr. SIVE. There, again, I am not an expert. I would simply say—and this is based upon really just my law school torts learning, of nuisance—that however we can expand “nuisance,” I think we should. It is historically subject to the restriction, of a clearly dangerous or unhealthy aspect of the environment. It may not be usable to the extent that we may be in court litigating matters of scenic beauty. I doubt that we could do that under a nuisance doctrine.

We wouldn't protect an area of scenic beauty against something which destroys the scenic beauty, but doesn't have any real effect upon health or comfort of the people around. That subject was very much discussed about a month ago. I think you can easily get some guidelines there.

Just a month ago the American Law Institute had its annual convention here in Washington. There was a proposed provision of the nuisance section of the “Restatement of the Law of Torts” by a committee headed by Professor Prosser. Unfortunately, I think, it disregarded the whole environmental movement. There was a little bit of reaction to the draft, which does not give effect to environmental matters and recent cases on the standing problem. I think this very subject is being discussed and studied by several law professors at this time.

Mr. BICKWIT. Thank you.

Mr. SIVE. Thank you very much.

Senator HART. Mr. Sive, I again thank you. Your testimony is enormously helpful.

Mr. SIVE. Thank you.

(The statement follows:)

STATEMENT OF DAVID SIVE, OF WINER, NEUBURGER & SIVE

I am honored to have been asked to appear before this Committee to express my views on S. 3575, the Environmental Protection Act of 1970, (hereinafter the “Act”). I am deeply interested in and for several years have been deeply involved in the legal aspects of environmental protection. In such work I have been associated with and represented a number of organizations, including the Natural Resources Defense Council, the Sierra Club, and Friends of the Earth. I do not appear at this time, however, in any representative capacity.

PURPOSE AND BACKGROUND OF THE ACT

There is no need for me to document the several aspects of the non-violent political and social revolution of the last year which has placed environmental problems in the very forefront of those calling for Congressional action. The Act would, in my opinion, significantly advance basic environmental rights by enabling the branch of government in which the movement started and which must remain a powerful force in the environmental movement to act more responsively and vigorously. That branch is the judicial branch.

Consideration of the Act, with its plain declaration of a substantive right of "each person . . . to the protection, preservation, and enhancement of the air, water, land and public trust of the United States", (Sec. 2(a)) and its specific provision of a remedy (Sec. 2(b)) for any violation of that right, requires first an appraisal of the place of the Courts in the environmental movement.

Such appraisal involves also the broadest and deepest analysis of the adversary process. Are truth and wisdom secured by having advocates battle under rules which preclude or severely limit the independent search for facts by the arbiter? I have neither the experience nor the talent to make that analysis. Senators and others who have used adversary, legislative and other fact and wisdom finding processes are better able to do so. I will limit myself in considering this is-it-good-or-bad question to showing that under our system major use of the litigation process is inevitable, and to demonstrating a few of its advantages.

Use of it is inevitable because we live under a government of laws and not of men. However cynical we may be about the ability to turn and twist the law of those who are in, to keep out those who are out, the very obligation to do so is still one of the distinctions between justice and tyranny.

Laws are words and words are ambiguous (or, if they are not, lawyers will make them so). In the field of environmental matters, the imprecision of words and the consequent limitations of the legislative process are major. The great advances in the law of the environment have been essentially by changing the directions to be taken by, and changing the minds, and hopefully the hearts, of the administrators in the Federal Power Commission, the Army Engineers and the Department of Transportation. (I like to think of much of our pleading to such administrators, to let wildness order some parts of the universe, as simply urging recognition of the talents of the Great Administrator, the outlining of the form of whom, or which, I leave to the clergy).

I think that the best way in which a breath of fresh outdoor air can be mixed into the bureaucratic smoke in which such projects are conceived is by litigation process, in which the tools of the adversary artist, the lawyer, can be so sharply effective. We have the power to secure the evidentiary bases if there are any, of the conclusion that this road, airport or dike is necessary. The processes of pre-trial discovery and trial, with the right to frame and compel the answers to questions, are the two keys. It is often, of course, unfair and even abusive to compel the answering of specific questions, framed by the advocate. I sincerely believe, however, that there is no better way to get at truth buried in pompous professions of platitudinous positiveness.

The incapacity of words to be precise, in the environmental field, is the basic reason for the importance of the litigation process. Only case by case, in the same way that our common law and the meaning of many important statutes (e.g., the term "comprehensive plan" in Section 10(a) of the Federal Power Act) have developed in other contexts, can environmental law develop. To do so, however, there must be two bases: 1) a substantive right and 2) a clear remedy. The Act would provide both of these.

It might be argued that the development of recent case law, at least in the federal Courts, has fully provided the remedy, in that conservation groups are now assured their standing. The development began in the Scenic Hudson case¹ with its holding that "those who by their activities and conduct have exhibited a special interest in [the] area of the aesthetic, conservational and recreational aspects of power development" were aggrieved parties, under the Federal Power Act, able to have court review of the grant of a license by the Federal Power Commission. It has taken a few years for courts to hold that "aggrieved party" means the same in the Administrative Procedure Act as it means in the Federal Power Act.

¹ Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608, cert. denied 384 U.S. 941.

Until ten weeks ago, the federal courts also hung on to an undefined condition, that the person claiming the standing had to have a "legally protected interest" in the subject matter. No lawyer has ever really attempted to define what that means, any more than the prisoners of some equally vague disciplines have ever defined for me terms such as "viable alternative."

Ten weeks ago, the same circuit court that decided ² Storm King affirmed the permanent injunction granted last July, by a District Court, against the proposed \$200,000,000 Hudson River Expressway. The decision is important in several respects, one of which is that it may help my good friend, Marvin Durning, in turning back the Portland Airport expansion into the Columbia River. The aspect of it that I feature here is the final demolition, subject to what our Supreme Court may do if the case is appealed to it, of the "legally protected interest" requirement. It is now law that, if public policy, expressed in the form of statutes or regulations (citing in this case the Hudson River Compact Act and the Army Corps of Engineers' own regulations) is the protection of a resource, that public interest is the "legally protected interest."

It may be that "standing" is no longer a problem in the federal courts in environmental cases. The government agencies, however, still mechanically assert lack of standing as a defense. The defense should be legislated out of existence, as the Act would do.

The provision of an "adequate remedy" goes, however, beyond mere standing. Procedural aids are given by Section 4. The importance of these procedural aids has been described in the earlier testimony of Professor Sax. I will not repeat his points.

I do want to comment on the administrative review provisions of Section 6 of the Act. It is an interesting irony of history that in the Thirties and early Forties—the New Deal period—the persons and groups fighting for broad reviewability of administrative decisions were primarily right of center. They looked to the court to stem the tides of social and economic reform being effected by the National Labor Relations Board, the Securities and Exchange Commission, and other New Deal agencies. "Big government" was evil to those on the right; it was salvation to those on the left.

In large part, the struggles of the conservationists and environmentalists are now struggles against big government. Virtually every important project that would appropriate for a special use any resource which the conservationists seek to preserve, by representing what they hope is a large majority just awakening from silence, involves approval or actual construction by a government agency. Unless some mechanism exists for review by an agency of government whose orientation and training is general, conservationists feel that literally every river, mountain, plain, and city will be appropriated by the Federal Power Commission, the Army Corps of Engineers, the Atomic Energy Commission, or some other administrative agency whose purpose and *raison d'être* are parochial.

The Act addresses itself to this problem in the provisos of Section 6. They are succinct and simple. They would, however, effect a basic change in the rule that a ruling of administrative agencies must be upheld by courts if it has any rational basis unless there is some error of law.

This rule places a hard enough burden on the litigant in the ordinary case where there is a limited record of clearly identifiable papers and proceedings upon which the administrative decision was based, and only one or a small number of agency personnel investigated and determined the matter.

Without some error of law, it is an almost impossible burden upon the citizens' group litigating the factual issues when the project is vast. The record of administrative action literally fills rooms with papers of every kind and description. The number and identity of persons who worked on the matter are unclear, and the agency vigorously defends its own determination. To this should be added such problems as the limited means of the citizens' committee; the remarkable talent of most administrators and their biologists, engineers, and other professionals and artisans to mask the answer to the simplest of questions in gobbledegook and erase from the dictionaries the words "yes" and "no."

There is insufficient time and space herein to analyze in detail the means by which Section 6 of the Act would ease the environmentalist's problem of the "rational basis" rule.³ I believe that much of the harshness of the rule

² Citizens Committee for the Hudson Valley et al v. Volpe et al (not yet reported).

³ An article in the current Columbia Law Review sets forth my own analysis of the rule.

would be erased. I will be glad to discuss this further if the Committee so requests.

I would assume that the main attack on the Act will be the oft stated warning that the courts would be opened to flood tides of litigation. The answer is based on both pragmatic experience and principle. In *Flast v. Cohen*⁴ Mr. Justice Douglas stated:

"I would not be niggardly in giving private attorneys general standing to sue."

The wisdom of not being niggardly has been proven.

There has been no great rash of frivolous or unprincipled suits by environmentalists. The main reason is that such suits are hardly ever commercially feasible. The lawyers and litigants are generally acting *pro bono publico* because the rights they are asserting are the precise reverse of vested economic rights. They are rights to an unquarried mountain, to a free flowing river, to a coastal wetland—to their beauty and to life undivorced from such beauty.

The Act would, in my opinion, materially aid the struggle to proclaim and protect those rights.

Senator HART. This concludes the testimony that we were scheduled to receive today. We were scheduled also to meet tomorrow. Unfortunately that meeting will have to be postponed—not because the Senate will be out of session tomorrow, but rather, because of the death of I suppose one who could be said to be the voice of conscience for conservation in Michigan—whose funeral will be tomorrow—Jim Roumann, who for long years directed the activities of the Michigan United Conservation Club. He will be buried tomorrow. Any of us from Michigan who have had any association with him will want to be there. For that reason I suggest we attempt to reschedule this for sometime next week.

(Whereupon, the hearing was adjourned at 12 noon, to be reconvened at the call of the Chairman.)

⁴ 392 U.S. 83.

ENVIRONMENTAL PROTECTION ACT OF 1970

FRIDAY, JULY 10, 1970

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY, NATURAL
RESOURCES, AND THE ENVIRONMENT,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 5110, New Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Present: Senator Hart.

Senator HART. The committee will be in order.

Our opening witness today as we resume hearings on S. 3575 is the able Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice, Mr. Shiro Kashiwa.

STATEMENT OF SHIRO KASHIWA, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY WALTER KIECHEL, JR., DEPUTY ASSISTANT ATTORNEY GENERAL, AND MARTIN GREEN, ASSISTANT CHIEF, GENERAL LITIGATION SECTION

Mr. KASHIWA. Thank you very much.

I ask that I be permitted to have Mr. Walter Kiechel, Deputy Assistant Attorney General, and Mr. Martin Green, Assistant Chief, General Litigation Section of my Division, aid me in this presentation.

My name is Shiro Kashiwa. It is my privilege as the Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice to present the Department's views on S. 3575, which, in its first section, is identified as the "Environmental Protection Act of 1970."

The basic effect of this legislation would be to greatly expand the rights of individuals, for the purpose of protecting the environment, to maintain actions on behalf of themselves and others similarly situated for declaratory or injunctive relief in the Federal courts, and to intervene in proceedings before administrative agencies.

The Department of Justice is very much in favor of the stated purpose of this bill: the protection, preservation, and enhancement of the environment. However, while the bill does present problems which I will discuss in a moment, the Department of Justice takes no position at this time as to the desirability of other proposed legislation giving

expanded authority for suits by citizens in Federal courts to protect the environment.

The Council on Environmental Quality, created by the act of Congress of January 1, 1970, is at the present time conducting an intensive study of means for accelerating improvement in the quality of our environment.

We understand the Council is awaiting a report from its legal advisory committee before arriving at its position respecting such legislation. We would prefer to defer our own recommendations in this area pending determination of its position by the Council.

Turning now to S. 3575, it is to be observed that the philosophy of S. 3575 appears to be so sweeping as to be inconsistent with existing Federal environmental legislation.

The Clean Air Act, as amended, states a finding of Congress that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." The Federal Water Pollution Control Act, as amended, provides: "* * * it is hereby declared to be the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution * * *."

Action by Federal administrative agencies and by the Attorney General through the courts is provided for by these laws, but in a manner consistent with the stated philosophy.

S. 3575 provides that, as part of each person's right to a good environment, "it is in the public interest to provide each person with an adequate remedy to protect the air, water, land and public trust of the United States from unreasonable pollution, impairment or destruction." The bill thereupon vests in individuals the right to maintain suits in district courts of the United States "for the protection of the air, water, land or public trust of the United States from unreasonable pollution, impairment or destruction which results from or reasonably may result from any activity which affects interstate commerce * * *."

Section 3(a) of the bill authorizes private litigation to protect "the air, water, land or public trust of the United States from unreasonable pollution, impairment or destruction" notwithstanding a defendant may be in compliance with other laws.

I want to emphasize that, "notwithstanding a defendant may be in compliance with other laws." Under such circumstances we can see no justification for allowing court actions by individuals.

And section 6 of the bill, while perhaps recognizing this problem in its provision for remand to existing administrative and regulatory procedures provided by law, serves to authorize judicial supervision of such procedures while they are in progress. In fact, it authorizes the court to grant relief notwithstanding existing procedures if in the court's judgment those procedures are inadequate to provide the protection sought by the plaintiff.

Section 6 further provides for judicial review of existing administrative and regulatory procedures and that the court shall be bound by the "provisions, standards and procedures of sections 3, 4 and 5 of this Act * * *."

I would like to emphasize that portion again, that the court shall be bound by the "provisions, standards and procedures of sections 3, 4 and 5 of this Act."

At no place in this bill can we find any "standards." If "unreasonable pollution," or the "public trust" are standards, we do not find them defined. In each individual action, the court would have to arrive at its own judgment as to what these terms mean.

Section 3(b) also includes in its definition of suable persons "any department, agency or instrumentality of the United States, * * * the District of Columbia, the Commonwealth of Puerto Rico or a possession of the United States."

Thus it not only authorizes suits against private individuals and local governments notwithstanding they are in compliance with other Federal laws, but against Federal agents and agencies as well.

To permit a suit against the Secretary of the Interior because the procedures he must follow in carrying out the provisions of the Federal Water Pollution Control Act may be considered by one or more persons to be inadequate would be anomalous.

Suits against Federal officers on the ground they are acting in excess of statutory authority, which may be maintained under existing law without additional legislation, are one thing; but authorizing suits against them because the laws in compliance with which they must perform their functions are "inadequate for the protection of" the rights of individuals would be to substitute the judgment of the judicial branch for that of the legislative and executive branches, and would not, in our view, be either efficient or desirable in the conduct of the public business.

We do not view this bill as primarily a "class action" bill. Federal class actions are provided for under Rule 23 of the Federal Rules of Civil Procedure. This bill primarily allows individuals to maintain declaratory or equitable actions in the Federal courts when they differ with governmental procedures.

Environmental cases are lengthy, complicated, and extremely expensive. It is appropriately the responsibility of government to bear the burden of such litigation and we question the advisability of shifting a part of such responsibility to individual citizens in the manner provided by S. 3575. Our experience demonstrates the greater need is for a strong coordinated intergovernmental policy, with firm standards and enforcement. This could be done by amending existing environmental laws to correct existing inadequacies.

We are also troubled by the provision of this bill that no bond for damages which may flow from the issuance of an injunction shall be required of the plaintiff "if the requirement thereof would unreasonably hinder plaintiff in the maintenance of his action or would tend unreasonably to prevent a full and fair hearing of the activities complained of."

We cannot see why an environmental plaintiff should not be as responsible as any other plaintiff. Successful defendants could, under this bill, nevertheless be subject to heavy financial losses.

In summary, then, we find this bill troublesome because it contradicts and appears to be inconsistent with existing Federal environmental law; because of the degree to which it allows for intervention by private citizens in, and judicial supervision of, ongoing administrative proceedings; because it sets no enforceable "standards;" because the provision that no bond should be provided by the plaintiff could subject successful defendants to heavy financial losses; and be-

cause the problem it seeks to solve, in our opinion, requires strong governmental action more than the private actions provided for by S. 3575.

In addition, because of the effect on many Federal and State agencies of litigation which may be brought under S. 3575, we suggest that it would be appropriate to canvass the Federal agencies and possibly the Governors of the States before action is taken on the bill.

Lack of this legislation will not prevent suits by private individuals or groups of individuals against polluters or threatened pollution. Such suits, for damages as well as for equitable relief, presently may be brought in state courts, and in Federal courts where the normal requirements for Federal court jurisdiction are present.

I will be very pleased to try to answer any questions which the subcommittee may have on this subject.

Senator HART. Thank you, Mr. Kashiwa. I am sure that your statement makes this clear, but let me paraphrase it and make sure we do understand it.

You say that the Department favors and supports the purpose of the bill

Mr. KASHIWA. Yes, very much.

Senator HART. You describe the problems that you see in the bill.

Mr. KASHIWA. Yes.

Senator HART. And reserve final judgment at least until the Council on Environmental Quality analyzes the general field of laws that may be needed to protect the environment?

Mr. KASHIWA. No, the Council is going to look into this problem of private litigants.

Senator HART. And the Department defers recommendations in the matter of private rights of action to protect the environment?

Mr. KASHIWA. Yes.

Senator HART. Until the Council has made its findings?

Mr. KASHIWA. Yes. We would at this time ask the committee to be permitted to file a supplementary statement after the Council acts in view of the circumstances.

Senator HART. Notwithstanding all of the reservations or problems you see with it, I hope when the Department does take a position on it, it will support the bill.

Mr. KASHIWA. Well, first the Council must make a decision and we will analyze its report.

Senator HART. Perhaps as a means of identifying for the Council and Department and the committee some of these areas in advance of your final position, let me go through some of these problems that you describe.

You say, you express the opinion that the bill appears to be so sweeping as to be inconsistent with the existing Federal environmental acts, and you point out that the Clean Air and Federal Water Pollution Control Acts fix primary responsibilities on the States in the matter of environmental control.

Now expand on that a little, and your associates are free to join you as you see fit.

Are you worried about granting additional authority to Federal courts to overrule the actions of the State agencies, for example?

Mr. KASHIWA. I would like to point to the provisions of the proposed legislation. On page 5 of the proposed act, at the bottom, it states that "In any such judicial review, the court shall be bound by the provisions and standards and procedures of sections 3, 4, and 5 of this act and may order additional evidence be taken with respect to the environmental issues involved." In other words, although the original proceeding is under the Water Pollution Control Act, when an action authorized under this proposed act is brought and judicial review is sought, immediately the standards as described in sections 3, 4, and 5, of this proposed act go into operation. One of the standards described in said section is "unreasonable pollution." Said sections also use the words "public trust."

Senator HART. Well, I got that from your prepared testimony, the specific concern you voice now. But I was trying to get a little better understanding of why in your opening criticism or reservation about the bill you emphasize the fact that both the Air and the Water Control Acts fix primary responsibility for environmental protection in the States. I was attempting to get a clearer understanding of whether your concern is that this bill would give additional authority to Federal courts to overrule actions, activities, and environmental efforts by State agencies.

Is that a concern?

Mr. KASHIWA. I want to make it clear that State responsibilities are standards set by the State. Although the States set certain standards, still there is a Federal approval required. This is being done through the Interior Department.

Senator HART. But even the present Federal acts allow for Interior or the appropriate Federal agency, whatever it is, to overrule the State when the standards or the enforcement procedures established by the State are insufficient. In other words, even under the two acts you cite, isn't the last word left with the Federal agency that is concerned?

Mr. KASHIWA. It is. But if the State submits reasonable standards in a certain area which the Federal deems sufficient and approves, still the standard originates with the State.

Senator HART. Under the two acts cited, where the Federal agency finds the State action has been inadequate, the law does reserve to the Federal authority the right to overrule the action of the State. So I make this point only to suggest the possibility that there may not be anything inconsistent with the spirit of those two Federal Acts in the bill we are considering, which leaves the last word to the Federal courts.

Mr. KASHIWA. But even if the Federal Government does set the standards under the conditions you state, still these Federal standards seem specific. Under this proposed act, in sections 2, 3, and 4, prescribe a vague standard "unreasonable pollution," which in my opinion is a rather indefinite standard.

These water standards under the Federal Water Pollution Control Act are very exact. My assistant, Walter Kiechel, knows a great deal about them. If you want him to go into them, I can permit him to do so. It is not a vague standard such as this proposed act seeks to set.

Senator HART. Well, now if the standards that the State has established are unreasonable, what is unreasonable with allowing the in-

dividual citizen the right of action that this bill provides in order that they be set aside?

Mr. KASHIWA. It operates in this way, if the State, for example, has specific standards and certain provisions thereof are unreasonable, then parties who are affected may negotiate with the State to see if that which is unreasonable may be made reasonable. But the standards as finally adopted are very specific. If the whole of the State standards are set aside, and Federal standards are substituted, still the standards prescribed are very specific. But coming back to the problem you pose, unreasonableness generally and certain unreasonable provisions in a group of standards are not parallel problems. If one puts himself into the position of the person who is trying to comply with the law, to tell him that these are standards A, B, C, D, E, F, G, H, which he can follow is one thing, but to say that the standard is that of reasonableness makes it rather difficult to ascertain and follow. And in actual litigation it may be very difficult to define what "unreasonable pollution" is.

Senator HART. Well, assume that to be the case. We nonetheless permit and require the Federal agency in reviewing Federal standards to determine whether those standards are reasonable. Why can't we, as this bill does, permit the Federal court to make the same judgment with respect to standards, whether Federal or State?

Mr. KASHIWA. Well, I would like to go back to the reasonableness or unreasonableness of specific provisions. That is a different approach as compared to taking the whole matter and saying that this whole problem is to be judged by a single standard of unreasonable pollution. There is a difference there, a vital difference.

Senator HART. Yes; but in all cases what you are doing is reaching a judgment with respect to the reasonableness of a given course of action. The question is whether the activity is unreasonable. I would assume no reasonable standard would ever permit an unreasonable action.

Mr. KASHIWA. Let's go back to the case where the State standards are not acceptable and the Federal Government does establish standards. When such Federal standards are set, they are set after hearings and the standards are circulated ahead of time. And these are spelled out in A, B, C, D fashion. They are very specific. Anyone objecting may file objections. It is all very fair. What I am saying is that here is one statute under which the specifics will be laid out, but in this proposed statute the sole standard is unreasonable pollution. There is a difference. And if the courts are confronted with the problem created by this proposed statute I am sure there are going to be difficult problems.

Senator HART. When the court overrules a Federal agency on the question of the reasonableness of its standards, what it is doing is making a judgment based on the totality, isn't it?

Mr. KASHIWA. I will be very seldom that a Federal court will be requested to rule on the reasonableness of Federal standards in toto. The court will pass on the question of whether these A, B, C, D requirements set by the Federal agencies have been met. The court will have a guideline A, B, C, D, E, F, G. The defendant has met it or he has not met it. But under this proposed bill, you don't have the A, B, C, D, E, F, G standards, you have just unreasonable pollution.

If, Senator, somebody says that provision B of the set of rules set by the Federal Government is unreasonable, he may challenge it in court on constitutional or other grounds, but I think a case would seldom come up where standards A, B, C, D, E, are all objectionable.

Senator HART. Well, then I guess what this bill would do would be to encourage that kind of testing of the reasonableness of the standards A through F. The fact that heretofore it hasn't occurred doesn't mean it might not be well to be permitted to occur. But I do sense the conviction you hold about this distinction.

Mr. KASHIWA. We are interested in orderly litigation and we try to have law so drafted that it will be easily understood and beneficial to the person who is affected by it, to the courts who enforce it and to the enforcement agency.

Senator HART. All right.

Now another point you make is that if a defendant, one who would be a defendant under this bill, is in compliance with other laws, you can see no justification for allowing court actions by individuals. Were there any laws violated by the oil companies at Santa Barbara? Did Dow Chemical violate any law when it was dumping mercury into the St. Clair River?

Mr. KASHIWA. May we take this up one at a time?

Senator HART. Sure.

Mr. KASHIWA. Going back to the Santa Barbara situation, your question was whether any law was violated. That is with relation to specifically Union Oil Co. there

Senator HART. Yes.

Mr. KASHIWA. The original leasing through the Interior Department as far as the leasing procedure is concerned, was proper and lawful. In the communication which was sent to the Senate at the time this proposed Senate bill 3575 was introduced, the complaint and objection voiced was that a private person had no chance before the time the lease was entered into to complain. This was the gist of the argument made with reference to the Santa Barbara case. No arguments of legality on illegality were made.

As far as violation of law, there was none. There was an accident, to be sure.

Senator HART. What I am trying to suggest is this: If, in situations like that, the two I described, the conduct did violate a law, a law the enforcement of which nobody had gotten around to, this bill would have permitted an individual to act to insure compliance.

On the other hand, if in situations such as the two that I described and others there was no violation of law, in other words, the point you make in your statement, if there is no violation, aren't you saying—

Mr. KASHIWA. No; on the mercury pollution incidents I differ. There were violations there. We have asked the Department of Interior to refer some of those mercury cases to us and our intention is to sue the responsible parties in a civil injunctive suit under the Refuse Act. The Refuse Act specifically prohibits this type of pollution. As soon as the cases are received, I will have no hesitancy about going to court.

Senator HART. Are you satisfied—

Mr. KASHIWA. With relation to the mercury pollution suit by the State of Ohio in the Supreme Court of the United States. If and when

the Supreme Court exercises jurisdiction, we are going to ask leave from the Solicitor's Office to be premitted to participate vigorously in that suit.

Senator HART. On the *Dow* case, is it your opinion that the Refuse Act does reach the activity, notwithstanding the fact that it occurs in Canada, the initial action?

Mr. KASHIWA. Aren't there portions of that case which occurred within the jurisdiction of the United States? I think there were.

Senator HART. Does introduction of the mercury into the water occur only in Canada?

Mr. KASHIWA. We did go into that case, and spoke to Interior about it, and while we were in the process of preparing a possible case the attorney general of the State of Michigan brought a suit against Dow Chemical. It is our policy that where a State attorney general prosecutes, we don't double-prosecute.

This is a very common understanding.

Senator HART. Let me get to the point that I sought to arrive at through a series of questions.

You have reservations about this bill because a defendant may be in compliance with all of the laws affecting the activity, and under this bill nonetheless suit could be filed claiming that his conduct was unreasonable with respect to the environmental damage. You say, really, if the fellow is complying with all of the laws, you have doubt that individual action should be permitted.

Doesn't that really suggest that you would oppose any common law addition to existing statutory law? In other words, aren't you arguing that a fellow could be in compliance with all of the statutory requirements in his activity, and if that was the case, then the common law action based on nuisance or negligence should not be permitted.

Mr. KASHIWA. No; I am not saying that.

I would say that it is inconsistent and unfair where the Federal Government provides specifically one set of standards and this party, working with the agency which is enforcing that statute, complies with its every request, to then impose another statute with ambiguous provisions and to say that although he has been complying with the first, here is another statute, a new one.

We are very much in favor of laws that would correct this pollution situation, but we would like to do it in such a way that it will be consistent and understandable.

For example in the case just mentioned if we take the defendant into court, the defendant company would say we have been following the law, and these are the standards. This is what the defendant company will say. Do we say no, there is a new law providing a new standard "unreasonable pollution?" If we get into court in the manner indicated, it is going to be very, very difficult for the Government.

It may be better to change the proposed law.

Senator HART. To provide standards.

Mr. KASHIWA. Yes, make it more definite. Once we get into these cases, since they are substantial cases, we meet real opposition. It is good to have the statute straightened out before we get into court.

Senator HART. You would not want the change which experience indicates is needed in the standards to be permitted to be made in the litigation which this bill would permit?

Mr. KASHIWA. If you are going to have standards, have just one, instead of having several. Here we have standards set under the Pollution Act and here we have another standard called unreasonable pollution. Instead of having that, why not amend the Federal Water Pollution Control Act, and create one standard?

Senator HART. Why not let the court, the matter having been clearly established as one where the standard is not reasonable, make the correction in the form we propose? You think that is not as orderly?

Mr. KASHIWA. Not that it is not as orderly, but once you get into a very debated case with counsel on the other side pushing to the utmost, I think, Senator, it is better to have definite laws which are easily enforced. We want the law to be so written that it will be definite, something we can really put our teeth in and enforce.

But, if we have two standards and one standard is a little vague, we may run into difficulty.

Senator HART. Now to a third reservation which you had. You say that the bill serves to authorize judicial supervision of administrative procedures while they are in progress.

At what point in the bill do you get that feature?

Mr. KASHIWA. On page 5.

Senator HART. The first and third proviso, is that what you had in mind? "Provided nothing will prevent * * *"

Mr. KASHIWA. From line 12 on page 5, to line 21.

Mr. Green has been following this. Could you elaborate on that?

Mr. GREEN. The proviso, beginning at line 12, permits anyone entitled under that statute to maintain an action, where existing administrative and regulatory procedures are found by the court to be inadequate.

And then, the proviso, beginning at line 17 says that any person entitled to maintain an action under this act may go to court to have such procedures, and the reference is back to the administrative procedures referred to in the preceding proviso, to have such procedures reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized therein.

This permits the complete review by persons entitled to bring an action under this act of administrative procedures.

Senator HART. Well, the authors did not regard this as providing a blanket authorization for courts to supervise ongoing administrative procedures.

We shall make that clear. Our intention was that only in rare cases where there is likelihood of irreparable harm to a plaintiff, that otherwise adequate administrative procedures would be bypassed to allow interim equitable relief and only in the case where the plaintiff can prove that existing procedures are inadequate to control unreasonable pollution, and that would be a rather heavy burden, would the administrative procedures be dispensed with entirely.

I make that statement simply to clarify the intention of the drafters.

Now, on this business of the preliminary injunction provision, I take it you do oppose it, or would oppose it? I hate to drive you into a position on the record of opposing anything, since you have come in and said you are not in opposition, but you are going to study it.

You have serious reservations about this feature, is that correct?

Mr. KASHIWA. You mean the bonding provision?

Senator HART. No, the preliminary injunction provision, the first proviso, at line 6, on page 5.

Mr. KASHIWA. We haven't specifically referred to that section in any portion of our statement here. I have not objected to it.

Senator HART. Not having made a note that you have a reservation about it, I take it we can assume that as of now you are not offended by this provision; is that right?

Mr. KASHIWA. If this type of proceeding is to be permitted, then interim equitable relief is a common remedy in equity cases. If this type of proceeding is to be permitted, well, these interim proceedings come together with it.

I concede it is very possible in a case under a properly drawn statute there would be room for interim equitable relief.

Senator HART. That was its purpose, to provide an individual protection from inadequate, unwise or unresponsive administrative and regulatory procedures while they are developing rather than requiring him to await the final outcome of those procedures.

For example, we had in mind the jet airstrip, whatever they call it, the Everglades air training strip. In that case construction of the strip was begun before approval of the airport by the FAA. The FAA was pondering the problem and in that sense there was an ongoing administrative procedure.

We intend by this feature of the bill to permit a citizen to move notwithstanding the fact that there is this ongoing regulatory procedure. That is the purpose.

Mr. KASHIWA. Senator, in that type of case, at the present time, even without this proposed statute, suits brought by environmental societies are entertained and they get temporary injunctions under the inherent power of the court of equity.

Senator HART. What standard is the court applying in that case?

Mr. KASHIWA. Well, these agencies—

Senator HART. Reasonableness, isn't it?

Mr. KASHIWA. No, where the allegation is, for example, in a suit against the Department of Agriculture, that certain trees are being cut down or certain contracts are being let, and the usual allegation is that certain regulations of the Department had not been followed. That is the usual type of case.

The court would go to the regulations and see if the regulations were followed. And in one of the cases the court held, no, the regulation had not been followed, and an injunction was issued. No question of reasonableness was involved.

Senator HART. And we would suggest by this bill that additionally if the court found that a regulation was unreasonable, the correction could be made as a consequence of the individual action that this bill would establish. And we get back to the same point we left from.

Mr. KASHIWA. No, in those cases it is not a question of the unreasonableness of the regulation. The question is, did the agency official follow the rules and regulations and the statute. That is the question. And where the courts have found that defendant did not follow it, the court will issue a temporary injunction.

What I want to emphasize is that even without this proposed statute, the suggested relief is available at all times.

Senator HART. But in the jetport, the Everglades Jetport case, the regulations were being followed, the agency procedure was consistent. But it was just too slow. The environmentally threatening strip was already underway. Isn't it desirable that—you say an environmental group could have stopped that even though the FAA procedures were underway and being complied with?

Mr. KASHIWA. Well, the whole matter should have been attacked before the construction was ever started. But for some reason nobody raised the issue until the airport was built. Then the question of an FAA permit came up. You cannot have an airport without the Federal Aviation Administration permit. And the FAA did not give a permit. And that was the end of that case. There was no litigation necessary in that case.

Senator HART. If an individual had gone to court would not the court have remanded him to the FAA procedures? You say all of the activity went on, but nobody sought to stay it. If somebody had gone to court, wouldn't the court then have said go to the FAA and follow the procedures?

Mr. KASHIWA. Well, the way that was done, if I had to build an airport—in the State of Hawaii I did build airports—the proper approach is to get the FAA clearance before you build the airport. That is the proper procedure.

In the *Everglades* case, why did they not get the proper Federal Aviation Administration permit? I do not know. Although I heard about the case, it was never litigated. And it ended without a permit from FAA.

We did get into a subsequent *Everglades Airport* case where a private citizen brought suit against a touch-and-go landing on the same airport. That is a different case. But the first case you mentioned did not come to litigation.

Senator HART. It was my understanding that the construction under the FAA Act can go forward without a permit or license. The only procedural recourse is if the FAA then determines that the installation is inappropriate or undesirable or unsafe, money assistance is withheld. It is simply a matter of approval, but there is no preconstruction license required.

Now, given that set of circumstances, absent a bill such as the one we are considering, would an individual, had he sued, have had any standing?

Mr. KASHIWA. Senator, your hypothesis there assumes certain rules and regulations and the correctness of the factual situation. Because the case was never referred to our office, I really do not know what the exact facts were.

If we discuss this any further here, we would be discussing things without a firm foundation of facts and applicable regulations. I shall be glad to supply the committee with the factual background as to why they went ahead without that permit.

Senator HART. I appreciate fully the situation we are in. We would appreciate your comment after review on why they went ahead as they did.

But more specifically, absent legislation such as the pending bill, could an individual in that case, the *Everglades* case, have prevented the construction? This is the point we are trying to get at.

Mr. KASHIWA. Well, an environmental group like the Sierra Club could have filed a suit, like for example what we have in the *Alaska Pipeline* case right now. They have come in and said, Mr. Secretary, do not issue the pipeline permit. Likewise in the *Everglades* case, they could have come in, as parties petitioner, and said to FAA, do not issue this permit, we want a temporary injunction and a permanent injunction. That is the nature of the present *Alaska Pipeline* case.

Senator HART. When you check this for your statement for the record, see if it is not correct that in the case of the pipeline the law requires a license before construction, but under the Federal Airport Act the law does not make such a requirement.

Mr. KASHIWA. Well, again we are going into the details of the licensing procedure in the *Everglades* case and I would be willing to look that up, yes.

(The following letter was subsequently received for the record:)

DEPARTMENT OF JUSTICE,
Washington, D.C., July 21, 1970.

Hon. PHILLIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: This is in response to your request, made at the hearing on S. 3575 held on July 10, 1970, for information as to whether or not permits were required for the construction of the new jetport facility for Miami, Florida, located near the Everglades National Park.

Construction of the airport was begun by Dade County in 1968. No federal permit or license was required for Dade County to begin the construction.

Even the most recent federal law concerning airports does not appear to relate in any way to the construction of airports. This new law, the Airport and Airway Development Act of 1970, P.L. 91-258 (84 Stat. 219), which became effective on July 1, 1970, authorizes the Administrator of the Federal Aviation Administration to certify airports concerning minimum safety standards. Lack of certification can prevent the operation, but not the construction, of an airport.

Thus it appears that prior to or during the construction of the airport, there was not, and could not have been, any federal proceeding or action to which the provisions of S. 3575 could apply so as to confer upon persons adversely affected standing to intervene or sue.

I hope this answers your question; please call upon me if you require any additional information.

Sincerely,

SHIRO KASHIWA,
Assistant Attorney General.

Senator HART. You have reservation about the provision in the bill that allows courts to act where existing procedures are found to be inadequate for the protection of the rights that this bill seeks to recognize.

I think I should indicate again that it is the intent in filing the bill that it is a rare case in which a court would bypass existing procedures that have been established by Congress, that in only a few rare cases has Congress required the use of procedures which allow for unreasonable pollution of the environment. The basic problem has been that Congress has established procedures which frequently are dependent upon agency discretion for this successful operation and when the discretion is exercised unreasonably, it is the basic theme of this bill that such action ought to be overturned.

Mr. KASHIWA. But that is not what the bill says. If that is what it was intended to say, we would like to help the committee correct it. That is not what it says.

Senator HART. All right.

As the bill is drafted it does substitute the judgment of the court, the judicial branch, for that of the executive branch when the executive branch in the judgment of the court is performing unreasonably. It does not, however, as we understand it, substitute the judicial judgment for the legislative mandate.

Mr. KASHIWA. Senator, you know we go through these cases every day where the plaintiff says that the agency is acting capriciously and arbitrarily. We have cases day in and day out. You do not have to have a statute like this proposed statute if that is the real intent of this legislation because that is the ordinary rule on review of the actions of an administrative agency.

Senator HART. In your view, is "capricious" the same as "unreasonable"?

Mr. KASHIWA. Capricious is a little harsher word to use, but this is the language which the courts use. And arbitrary; capricious and arbitrary, is the usual language.

Senator HART. There are a series of further comments that you make that I thought we ought to ask you to react more fully to in response to some questions.

Let's assume that the Council and the Department in turn should conclude that it is undesirable to enact a bill such as this, a bill that the purpose of which is to facilitate the enforcement of environmental rights.

How adequately, how effectively do you think your Department has been and can be in the future in doing that environmental protection job?

Now you mentioned the Refuse Act. That is an effective tool in the battle against water pollution. Do you think that the Department's use of that tool has been as forceful as it could have been? In fact many times has it been used?

Mr. KASHIWA. I received appointment to this position lately, just about a year ago. In the prior administration, the Refuse Act was not too often used. But since I came into office I have increased that percentage, if you want to talk figures, over 100 percent, because, through my encouragement, the U.S. attorneys have filed many, many Refuse Act cases. We have also developed something new, using the Refuse Act, as a basis of civil injunction suits. And we are trying the *Florida Power* case at the present time on this basis.

This is an injunctive procedure, a strange type of action, but Mr. Kiechel and Mr. Green have both been in the Federal Florida district court testing the question of thermal pollution, which is not an easy question, but we are going to see that case through. And that is under the Refuse Act. It is a very important case. And it affects many utilities.

Senator HART. In the statement that was filed with the committee by the witnesses who will follow you, it said that your guidelines to U.S. attorneys encourage the U.S. attorneys to use the Refuse Act to punish or prevent significant discharges which are either accidental or infrequent, but which are not of a continuing nature resulting from the ordinary operations of a manufacturing plant.

Why do you restrict the act?

Mr. KASHIWA. That is a quotation only in part. That is a very dangerous way to quote. I have a copy of the rules——

Senator HART. Well, that is all we got.

Mr. KASHIWA. For the record, then, I would like to submit this guideline for litigation under the Refuse Act, the complete guideline, so there will be no misunderstanding.

May this be marked as an exhibit in this hearing? Because I don't want any misunderstanding.

Senator HART. That looks like a pretty long statement.

Is it possible to state what is left out?

Mr. KASHIWA. Instead of quoting verbatim, I would like to state this: The intended purpose was, if company A on a river is discharging into the river, and company A is under Interior's supervision and is in compliance with Interior's orders to put in a \$200,000 improvement on so and so date, another \$200,000 improvement on so and so date, all to prevent pollution, then since the company is under Interior's supervision, and it is obeying orders of Interior, it is our opinion that it is obeying the Water Pollution Control Act. And in a case of that nature, while they are in compliance, we do not use this Refuse Act.

Senator HART. All right. But the Water Pollution Control Act states explicitly I think it wasn't meant to affect the provisions of the Refuse Act. It was my impression, in listening to some of the testimony we heard on the mercury poisoning of the St. Clair River, that the Refuse Act is a much more potent, effective tool than the Water Pollution Control Act.

Mr. KASHIWA. I am sure that nobody in Interior really knew that this type of pollution, mercury pollution was going on. Had they known, they would have immediately done something about it. Lately it has come to their attention and they are doing much about it. They have called us. What I am saying is even if a company is under supervision, if someone from the company takes a rowboat out with a drum of oil and pumps the oil into the river, we will prosecute; we will bring an injunction suit if they do it successively. That is our point. And if they go out and drop mercury in the stream, we certainly under the Refuse Act will bring the proper action.

Senator HART. Have you?

Mr. KASHIWA. This mercury matter has come up just lately and we have been talking to Interior. In fact the Michigan case, we were going to—I didn't know there were international complications—but Mr. Green was anxious to do so, but we immediately got notice that the attorney general of the State of Michigan brought the action.

Senator HART. Under the Water Pollution Control Act it is my impression that the passage of months is involved before the matter ever can get to the hearing stage.

Mr. KASHIWA. Senator, we are litigation specialists. As to the administration of this law in Interior, why it does not proceed properly or what is wrong with it in Interior itself, I am not at liberty to speak to, because I know this only from hearsay and I don't know the details of the workings of the Interior Department and at this time even though you asked me a question why it is so, I cannot answer.

Senator HART. My hunch is that it is probably the fault of Congress, not the Department of Interior.

Mr. KASHIWA. I don't know.

Senator HART. I assume they are complying with the law.

Mr. KASHIWA. Yes, Interior should be asked to come here to point out the difficulties. I think that is the only fair way.

Senator HART. If this bill we are considering had been adopted or was law, an individual could move a lot faster than Interior does under the Water Pollution Control Act.

Mr. KASHIWA. I don't know. Suppose an individual does bring suit. A water pollution case is not an easy case to prove. You have to have scientific evidence. All right. Where does he get that? Eventually he will have to go to Interior.

Senator HART. Well, they are not possessed of all of the wisdom.

Mr. KASHIWA. No; in our experience it is very expensive to litigate about pollution. Although they do have experts in the department, we have gone outside to get expert testimony and these experts are very, very expensive. For a private individual to foot this bill, it is going to be very, very expensive. What happens is they will subpoena Interior records and we go back to Interior again. And use the Interior experts.

Senator HART. Perhaps a reason that persuaded us to introduce the bill is that perhaps late, but we hope not too late, everybody wakes us to the fact that there are many actions which substantially damage the environment that go on day after day. You are litigation experts, but by reason of limitation of staff and the usual problem of priorities, you can do only so much. We have discussed the problem that Interior has in moving against these environmentally damaging actions under the Water Pollution Control Act. Given the enormity in terms of numbers of the actions which are damaging the environment in this country and the limitations that Interior and Justice operate under, why in heaven's name doesn't it make sense to give explicit basis for individual action, a sort of self-help operation? That is really what the bill intends.

Mr. KASHIWA. Well, Senator, first the inference that we are not adequately staffed, that we don't have sufficient men if actions are referred to Justice, this is not so. We have in addition to the 90—

Senator HART. I am on the Judiciary Committee, too, and I haven't heard a Justice Department witness since I have been here, say, other than, when we ask him about a particular case "Yes, but you know we have only got so many people, and there are so many demands on us," that is a paragraph in every hearing record I think.

Mr. KASHIWA. That may be true of other divisions, but in Natural Resources, I have not said that. And if this becomes heavier, of course, Senator, I will come in with an additional request for more budget. But whatever merit there may be in private environmental litigation I think it probably can effectively be handled through Justice, using the expertise of a Department like Interior. In order to win a good, a substantial pollution case you must have testimony of experts, otherwise you have no evidence. Of course you can easily win a simple pollution case like somebody throwing an automobile tire into a river. But that is not the substantial kind of case we are talking about. I feel that with the proper administration or amendment of the present law, and proper working together of all of the departments, we can accomplish the purpose.

Just yesterday President Nixon signed an order of reorganization. I think the consensus is that is a very good order. The environmental functions have been put under one roof. I think that this is good and in the right direction. I am in favor of it, I hope that the reorganization improves the picture a great deal.

Senator HART. Well, I agree that putting environmental functions in one, at one point under one roof does make good sense. I will ask Mr. Bickwit to continue. But before I conclude, I return to the one thing that was basic in most of our questions. It gets back to this concern you have about the absence of standards in the bill. And you make the point that the court would be compelled under the bill to reach its own judgment as to what the term "unreasonable" is. And yet that is what a common law court does every day of the week.

Mr. KASHIWA. Yes, Senator, in a typical automobile accident there is usually a question raised, was that conduct unreasonable? We are speaking of an accident which takes only a moment to occur. It is all right to say that reasonableness is the lost standard in such a case. But here we have factories operating, with hundreds of men employed, and in order to operate with any proper financial forecast, they must have a path defined for them. It is good to have a schedule, a definite policy which they can follow so that they can meet the expenses. Some of these expenses for eliminating pollution are enormous. And taking it from the point of view of the factoryowner, how is he going to measure or define his future operations? If we have definite standards, it will be better for that person.

Maybe the present water pollution law should be changed. In what respects, I think you should ask Interior.

On the other hand—I notice Mr. Moorman is going to testify—with relation to actions by private individuals, the environmental societies have been very successful coming into court. In discussing this problem we must draw a line between two types of cases. One is type A, brought under the Water Pollution Control Act. That is the usual type case. The other is type B. We have in this type of pollution case actions where an environmental group questions the act of a governmental agency. These are two entirely different types of actions.

Mr. Moorman is engaged in the second type. In that second type, plaintiff environmental groups have been able to come into court, for example the Wilderness Society in the *Alaska Pipeline* case, and obtain very effective injunctive orders. And Mr. Moorman's association the Wilderness Society is no more than a group of private individuals. So in type B proceedings, where the action of a governmental agency is questioned, doesn't the public already have sufficient remedy?

Senator HART. Mr. Bickwit.

Mr. BICKWIT. In those cases that you mentioned, the *Alaska Pipeline* case and others like it, what has been your position on the defenses of sovereign immunity, scope of review, reviewability of the administrative action, standing to sue, defenses which we have sought to eliminate by this legislation?

Mr. KASHIWA. Well, I don't like to go into the law of sovereign immunity here. Objections of sovereign immunity, were raised, in the *Alaska Pipeline* case, but the court still allowed the injunction. Where the action—

Mr. BICKWIT. Who raised the defense of sovereign immunity?

Mr. KASHIWA. Well, that defense is raised because if the Secretary of Interior is acting within the scope of his regulations and law, then he should not be sued. But if he has gone beyond, the courts say all right, we will enjoin him. We plead sovereign immunity because if the governmental agency is acting lawfully, he should not be sued. The courts say then the rule of sovereign immunity applies. In certain cases it is difficult to determine before we get into court whether a certain person is or is not following a rule or regulation. This becomes the issue in the case.

When I represent an agency, I plead whatever defenses that may be pled based on the evidence presented us. We do prepare for the ultimate. I have a duty to defend every department, to do the best I can. And when I have an opportunity to plead a defense, I will plead it.

Mr. BICKWIT. You regard your duty as analogous to the duty of a private attorney defending his clients?

Mr. KASHIWA. Under the duties of my office, my client is, for example, Interior; and we must defend it to the best of our ability.

Mr. BICKWIT. Is there a statutory obligation for you to make all defenses possible available?

Mr. KASHIWA. Not that, as an attorney I must do this.

Mr. BICKWIT. Do you not think—

Mr. KASHIWA. You certainly don't think that there are areas where we could, just for the goodwill of the office, omit some defenses?

Mr. BICKWIT. It seems to me you are not precisely in the same position of a private attorney defending his clients. It seems to me that you are also in the position of a public official and in that position it would seem to me that you would have an obligation to find out all of the evidence possible before raising those defenses just in case the evidence showed you the agency was acting arbitrarily or capriciously, or was acting outside of the law.

Mr. KASHIWA. But in the areas involved when one gets before the court, sometimes it is very difficult to determine ahead of time exactly what the situation is. In such cases if the agency maintains that its position is correct, it is my duty to defend the actions of the agency.

Mr. BICKWIT. Shouldn't you be making every effort to find out whether what they say is correct prior to raising those defenses?

Mr. KASHIWA. I agree, if they have a false position, I will tell them that this is not so. But this may be difficult to determine, for example, in the *Alaska Pipeline* case, there were two statutes, and the question was whether these two statutes were interrelated.

Even Mr. Moorman, before he went into court, didn't know exactly. We didn't know. And it is only because of the decision of the judge that we had guidelines to follow. The judge held that these statutes were interrelated. And that was the basis of the temporary injunction.

Mr. BICKWIT. But if you are convinced through your examination of the evidence prior to raising the defenses—

Mr. KASHIWA. I will never plead anything which is not there.

Mr. BICKWIT. That is not what I am asking you. If the evidence leads you to believe that the defendant agency has behaved unreasonably, in this situation, will you raise other defenses like the defense of sovereign immunity?

Mr. KASHIWA. You used the word whether the defendant agency behaved unreasonably. This itself is a very difficult question. I can't be answering any questions like that. Whether they followed the law, the regulation? That would be the test.

Mr. BICKWIT. Okay, whether they behaved arbitrarily and capriciously then. It is legally required that they do not so behave.

Mr. KASHIWA. When one goes into the arbitrary and capricious field, these are themselves very difficult questions. We go into court and the agency says it did not so act, the plaintiff says it did. The court will go into the facts or the record find out whether the agency did or did not. But we in Justice will try to uphold and defend the Secretary to the best we can.

Certainly, if you were Secretary of Interior, and referred a case to me, you want me to fight for you, don't you? This is way it is done.

Mr. BICKWIT. But do you feel an obligation to do all you can to determine whether there has been arbitrary and capricious action before you raise some of the other technical defenses, or do you merely raise these defenses as a matter of course.

Mr. KASHIWA. You ask me what is arbitrary and capricious under the circumstances of any case, it is sometimes a difficult question to determine.

Mr. BICKWIT. I realize that. But do you make every effort?

Mr. KASHIWA. Yes.

Mr. BICKWIT. And you make that effort prior to raising defenses like sovereign immunity and the like?

Mr. KASHIWA. Oh, yes, yes.

Mr. BICKWIT. Because if you don't, what is going to happen is we are going to spend a lot of money and a lot of time litigating defenses which stand in the way of the real problem at issue, and it is because we want to get around the expense of that money and time that we feel this bill which breaks down those technical defenses is essential.

Mr. KASHIWA. It seems to me, if we are going to talk about administrative procedures, when the proceedings is in the administrative state, anybody interested should present their views, and the administrator should have all of the evidence.

People who feel that the prepared act is not correct should come in. Or they can write to the Secretary. And then the administrator on all of the evidence presented, makes a decision. Under the present law, to review this, one may go back to the arbitrary and capricious position. Once the case is decided, then it is not set aside unless there is a finding of arbitrariness and capriciousness. That is the rule.

I think that is a good rule. If anybody has any objection, get in there and make the proper objection at an early stage.

Mr. BICKWIT. What if the defendant has behaved unreasonably, but not arbitrarily and capriciously?

Mr. KASHIWA. Well, you try to draw a line between unreasonably, arbitrary, capriciously, that is a very difficult thing.

Mr. BICKWIT. You see no distinction?

Mr. KASHIWA. No.

Mr. BICKWIT. Retruning to the Refuse Act, we quoted you and you said out of context. Was the reason you said it was out of context because we omitted the reasons that you gave us for your position; that is, that in the area of water pollution we ought to defer to the Depart-

ment of Interior and the States under the Federal Water Pollution Control Act? And that only when those agencies fail to move that there is an obligation to move under the Refuse Act?

Mr. KASHIWA. That is not exactly what I said.

Mr. BICKWIT. Could you clarify in what way I misinterpreted it.

Mr. KASHIWA. You say where the agency failed to move? What I am saying is where an industry is under the supervision of Interior, and they have been following Interior's directions and the company puts improvements under a schedule and they are complying—

Mr. BICKWIT. Why do you feel the Federal Water Pollution Control Act has to take precedence over the Refuse Act when there is a specific statutory declaration that it should not?

Mr. KASHIWA. Because the Federal Water Pollution Control Act is very specific. That was the purpose of the whole Federal Water Pollution Control Act, and that was what Congress said it was, and it is being carried out as such. I am not saying that it is being carried out perfectly, there may be delays and this may be the reason for the present reorganization.

Mr. BICKWIT. But Congress also said the Federal Water Pollution Control Act shall not be construed as affecting or impairing the provisions of section 13 through 17 of the River and Harbor Acts of 1899; i.e., the Refuse Act.

Why do you feel obligated to give it precedence?

Mr. KASHIWA. Let's say you are faced with the problem. Here, there is one law under which Congress spells out an administrative procedure for pollution correction, and you also know that these huge pollution problems can't be cured by one Refuse Act criminal charge. Isn't it proper to conclude that the proper and reasonable way to do it is by proper administration of the pollution statute by Interior. It is all right to say do this, do this, but many of the improvements can't go in because there are financial problems. You may get Interior to testify about these difficulties. It is not just a minor matter of a misdemeanor charge, for example dropping some oil in the water. The major problems are not that easy.

Mr. BICKWIT. We have two tools here, tool A and tool B. You are saying because tool A can't do the whole job, we ought to defer to tool B. Can't we use both of them?

Mr. KASHIWA. We are using both. For example, there was a case of certain companies under Interior's supervision but they went ahead and did something which we thought was out of the ordinary. In those cases we are charging them and they have pleaded guilty too.

Mr. BICKWIT. So even though Interior is handling the matters on occasion, you will move into them under the Refuse Act?

Mr. KASHIWA. Oh, yes; if the facts warrant it. If you read our directions very carefully, it so provides.

Mr. BICKWIT. Even in areas of continuing pollution?

Mr. KASHIWA. Yes. In the areas of continuing pollution, if, for example, a company takes a barrel of oil and in the nighttime goes out into the river and dumps it, we charge them. There is no question about that.

Mr. BICKWIT. Even if Interior is handling the matter?

Mr. KASHIWA. Oh, yes, and we have so done. We have cases to show you that. But on the other hand, the cases in which a long

existing pollution is being phased out, that type is being handled in the administrative manner as the law provides.

Mr. BICKWIT. But in that case you will not jump in?

Mr. KASHIWA. We will not, because that is the administrative procedure Congress provided.

Mr. BICKWIT. But Congress also provided that that administrative procedure should not affect the Refuse Act in any way.

Mr. KASHIWA. Yes, for the dumping of oil for example intermittently, in the way I indicated, we do charge them. I can show you cases.

Mr. BICKWIT. But Congress didn't confine its exemption to that matter.

Mr. KASHIWA. That is why I say we have charged them. Just because they are under supervision, it doesn't mean they are immune from prosecution. We have prosecuted them.

Mr. BICKWIT. But you will not prosecute them in the case of long, drawn-out, continuing pollution, when Interior is handling the matter?

Mr. KASHIWA. Yes, because the fine is \$2,500. What are you going to do?

Mr. BICKWIT. Is that the only criminal penalty provided for under the Refuse Act?

Mr. KASHIWA. Yes, \$2,500.

Mr. BICKWIT. That is not my understanding, sir. My understanding is that the defendant can be compelled to clean up all of the pollution that he discharges in violation of the Refuse Act?

Mr. KASHIWA. There is no such provision in the act, but that is what we are trying to do under the Water Pollution Act. The administrative agency is trying to do that.

Mr. BICKWIT. I know they are trying to do that. But Congress has said that—

Mr. KASHIWA. In the criminal law we have many, many instances where for example the prosecutor says all right, the State has taken that up, so we will not prosecute this person. The State is doing it. Or in Hawaii when a soldier engages in a criminal act we had this problem, should the military prosecute, or should the State courts prosecute? The committee decided that in certain cases military courts prosecute. We could double charge him, but we don't.

Mr. BICKWIT. I am asking you why you do not do it. You have not pointed to any statutory provision which prohibits you from doing it. I am wondering why it is you do not do it.

Mr. KASHIWA. Well, we use reasoning. Here is a statute which Congress provided, Interior is doing it, and that is the way we operate.

Mr. BICKWIT. If the situation were one of an urgent nature which required immediate action, immediate injunctions, which would be available to you under the Refuse Act but would not be available under the Federal Water Pollution Control Act, even if the pollution were of a continuing, long continuing nature, would you move?

Mr. KASHIWA. Yes. For example, if you bring to us the mercury type of case, I will institute whatever action I can under the Refuse Act.

Mr. BICKWIT. Are you saying I should bring it to you?

Mr. KASHIWA. No, by that I meant Interior, if they provide me with

the evidence. You understand that in the Justice Department the cases are referred to us.

Mr. BICKWIT. Who refers cases to you under the Refuse Act?

Mr. KASHIWA. Engineers, Coast Guard or Interior.

Mr. BICKWIT. Are they referring many cases to you?

Mr. KASHIWA. Oh, yes. The reference is usually to the U.S. attorney. Many, many cases.

Mr. BICKWIT. Do you not feel that guidelines like the one you laid down here would discourage reference of continuing pollution cases from the Corps of Engineers to the Justice Department? You are stating that in a continuing pollution case the Federal Water Pollution Control Act takes precedence. Is that designed to solicit referrals from the Corps of Engineers to you?

Mr. KASHIWA. By that, do you mean where there is continuous pollution and the company is under supervision of Interior?

Mr. BICKWIT. That is right.

Mr. KASHIWA. Interior knows all about it; why would the Engineers, if they know Interior knows all about it, refer the case to us?

Mr. BICKWIT. Because it may be of such an urgent nature that only action under the Refuse Act could solve the problem.

Mr. KASHIWA. Those are the exceptions. For example, if they throw a barrel of oil into the water, that is urgent. Bring the case in, and we will prosecute. We have prosecuted in those cases; very much so.

Mr. BICKWIT. Don't you think it is worth while to specify those exceptions in the guidelines?

Mr. KASHIWA. All of the U.S. attorneys have been instructed; not only by these instructions; I have spoken to most of them.

Mr. BICKWIT. But the Corps looks at the guidelines and sees you are not intending to prosecute in a continuing pollution case where Interior is handling the matter.

Mr. KASHIWA. The Corps in the region calls up the U.S. attorney, and the U.S. attorney should know.

Mr. BICKWIT. So the Corps knows of the exceptions to the guidelines, which are not in the guidelines?

Mr. KASHIWA. They should.

Mr. BICKWIT. If you would move on a case like that——

Mr. KASHIWA. Like what?

Mr. BICKWIT. The urgent case.

Mr. KASHIWA. The mercury case?

Mr. BICKWIT. Yes, you would?

Mr. KASHIWA. Yes.

Mr. BICKWIT. What is wrong then with a citizen doing so, even if Interior is utilizing the procedures provided for under the Federal Water Pollution Control Act?

Mr. KASHIWA. What is the difficulty with a citizen doing it? You mean under this law here?

Mr. BICKWIT. Yes.

Mr. KASHIWA. In a very extreme case of water pollution by mercury, I think even a citizen may bring action, if he is affected. An environmental group may bring action, there is no question about that.

Mr. BICKWIT. But your view is, if it is being handled by administrative procedures and is not violating any particular water quality standards, there should be no action here?

Mr. KASHIWA. No, I did not say that. If there is an urgency, I will step in.

Mr. BICKWIT. You will. I am asking you, why shouldn't the citizen also?

Mr. KASHIWA. They are perfectly welcome to file private suits if they want to.

Mr. BICKWIT. And should we not facilitate their doing so?

Mr. KASHIWA. Yes, but what I am saying is the way this statute reads, the policy whether they should or should not, as I said in the original portion of my statement, the Environmental Council must make a decision on that; that is a basic policy. I am not speaking for or against that. But what we are saying about this statute is there are certain defects—I should not call them defects—but the way it is drafted it may not be workable and therefore I am making suggestions perhaps to perfect it.

If the committee calls on me on how the statute may be drafted, I would be glad to cooperate with you. That is our position.

As I said in the beginning, we are very interested in solving this pollution problem. If you want us to help you, we are perfectly glad and willing to help you.

Mr. BICKWIT. I was just focusing on one of the problems you have with it, which seems to me to be basic, which is that if the defendant is in compliance with existing procedures and existing standards you can see no grounds for a citizen suit under those conditions. And now you have just said that in the extreme case you would see some grounds for it.

Mr. KASHIWA. What I am saying is that, without this statute, if a person can prove he is damaged personally, he can go into court. There is no question about that.

The environmental type of suit also allows them to go into court. For example, I refer to the Sierra Club suit and all the like. They are entitled to go to court in environmental cases. There is also no question about that.

Mr. BICKWIT. What we are trying to do is to facilitate their right to go into court, as you agree we would under this bill.

Mr. KASHIWA. Yes, as far as the Sierra Club being able to go into court, you do not have to facilitate it; it is already able to do so.

Mr. BICKWIT. Yes, but when the Sierra Club goes into court it has to deal with you on the questions of sovereign immunity, scope of review, standing to sue—

Mr. KASHIWA. When was the *Data Processing* case decided? That is a very recent case, you know. Up to that time one did not know, I did not know, Mr. Moorman did not know, what the exact status of the law was.

Mr. BICKWIT. That is true. But does the *Data Processing* case mean you are going to stop making these defenses?

Mr. KASHIWA. This is not an easy question to answer. If an environmental plaintiff brings a certain type of suit—we have run into this question in the office—where they raise certain questions which is beyond the environmental questions, then we are thinking about raising the standing question.

I am sorry, Senator, I do not want to—

Mr. BICKWIT. Thank you very much. I am sorry we have kept you so long.

Mr. KASHIWA. I will be frank with your legal counsel here. We of the Justice Department, anytime you want us to come and discuss these problems with you, we shall come up. We handle this type of litigation day in and day out, and our books are open. Anytime you want my help or the help of Mr. Green or Walter Kiechel, we shall be only too willing to help.

Senator HART. Thank you. We will take you up on that, and we have indicated the record will be held open for your reaction to that Everglades example.

Mr. KASHIWA. Yes, sir. And we do want to reserve a right to file a statement if and when the Environmental Council makes a recommendation.

Senator HART. I was about to ask you whether you could give us any indication as to the time when we could anticipate the Council's decision.

Mr. KASHIWA. September. This is the target date for a report by a lay committee. First is not the Council itself, but a lay committee, and they meet in Washington periodically, as I understand it, not all of the time. Then the Council will act.

Senator HART. I am sure you share our feeling that time is of the essence; this is an important national concern and to the extent that you can persuade the Council and encourage them to consider and decide as promptly as possible we would appreciate it.

Mr. KASHIWA. Yes, I shall ask them to expedite it as fast as possible.

Senator HART. Now, you have suggested that we get agency comments on the bill. I will ask you to give us the same help with the agencies as I have asked you to give us with the Council; see if you can encourage them to get their responses in promptly. I do not know if they consult Justice on that, but even if they do not, you tell them.

Mr. KASHIWA. Thank you very much.

Senator HART. Thank you very much.

We now turn to a person who was mentioned more than once in the earlier exchanges here. Mr. James Moorman.

STATEMENT OF JAMES MOORMAN, CENTER FOR LAW AND SOCIAL POLICY, WASHINGTON, D.C.

Mr. MOORMAN. Senator Hart.

Senator HART. Welcome back.

Mr. MOORMAN. Thank you, sir.

I am a practicing lawyer and a member of the bars of the State of New York and the District of Columbia. I am presently engaged in several cases that fall generally in the category of environmental litigation. For example, I represent the environmental defense fund and others in a suit against the Secretary of Agriculture relating to DDT, and I represent the Wilderness Society, Friends of the Earth, and EDF in the *Trans-Alaska Pipeline* case.

Prior to entering private practice, I was with the Land and Natural Resources Division of the Justice Department. In fact, I worked for Assistant Attorney General Kashiwa, who just testified, and have the highest regard for Mr. Kashiwa.

I might add that I have brought with me the guidelines for litigation under the Refuse Act, which I quote. I am sure that it is the same document which Mr. Kashiwa handed up to the committee, but I hand up my copy which I have turned to page 3 to make sure it is the same document.

I appreciate this opportunity to testify because I am greatly in favor of S. 3575, the Environmental Protection Act of 1970. I am here to testify in favor of its passage.

I believe that S. 3575 is the singlemost important—

Senator HART. Let me interrupt and state the document you have handed us is the document that we were discussing with the Department of Justice witnesses and is the guidelines.

Mr. MOORMAN. My quotes came from page 3. I place S. 3575 on a par with the recently enacted Natural Environmental Policy Act of 1969. That act established national policies standards and procedures for Federal decisionmaking. This bill, S. 3575, establishes or will establish the rights of individuals and the obligations of our commercial enterprises to protect the environment.

As I understand it, S. 3575 will confirm every American's right to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States.

These are rights which the courts are not in the habit of recognizing, constructing, or upholding. I am afraid they involve things which we have taken too much for granted; never realizing that we would ever need legal rights to protect them. We have made ourselves unaware and the law is unprepared for our environmental crisis. It seems absurd but it is a fact that we now need S. 3575 to establish rights to the basic present conditions of life itself: clean air and clean water.

Not only does this act confirm rights to the protection of the various elements of the environment, it provides that citizens may maintain a legal action to protect those elements "from unreasonable pollution, impairment, or destruction resulting from activity which affects interstate commerce." Thus this act makes enforceable the rights earlier declared. It provides a means for enforcing them by actions of the court. For that reason, S. 3575 will allow the courts to play a meaningful role in the national effort to bring our environmental problems under control. It will provide in addition a role for citizens who presently feel alienated from the governmental process, and frustrated over their lack of influence with administrators, legislators, and large commercial enterprises.

The results of this act will be a sizable number of actions and resulting orders from various courts forcing our polluters to clean up. These orders, I believe, will complement larger administrative schemes such as Assistant Attorney General Kashiwa referred to and will give pollution control agencies backbone and credibility. I believe that with this act as a backdrop, State enforcement officers will for the first time, be able to make real progress in cleaning up pollution problems.

I have often discussed the need for such a bill as this with friends and acquaintances knowledgeable about environmental problems. Some feel that the courts really should not meddle in the problem of pollution, because they are unable to make, the courts, that is, are

unable to make the multifaceted decisions based on expertise that administrators can make.

I believe, however, that the courts do have the competence to deal with the complex problems of this kind. Moreover, the fact is that the administrative process just is not protecting our environment. The failure of administrative agencies to carry out their program goals has become a way of life in our Government.

Today if one wishes to solve any problems, one must find a technique for forcing agencies to act. S. 3575 I think provides such a technique. The problems with the administrative agencies are well known, but it is well to list some of the reasons they go astray. Agencies often come under the influence of another governmental entity, which controls their fates and which has other goals in mind.

For example, a Congressional Appropriations Committee, another agency in a parent department, the Bureau of the Budget, and so forth.

Often regulatory bureaus are staffed with people of another era, with a different scale of urgency, with deficiencies of incentive or vigor. The result is simply a lack of meaningful action.

Agencies develop their own sense of priorities. They will emphasize some part of their program at the expense of another. One of the benefits to be derived from this bill is that it will allow the citizens to fill in the gaps and take care of those problems which are low on the agency scale of priorities. It was with regard to that problem that I included in my statement the quote from the Guidelines for Litigation under the Refuse Act of the Department of Justice. That act as I undersand it says roughly that no one can put refuse in navigable water without a permit from the Chief of Engineers. It provides criminal penalties and also civil remedies are available.

It is my understanding, although I am not an expert in this field, that violation of the act is widespread and if fully enforced we would not have the industrial pollution problem that this country has today.

Now the Justice Department Guidelines, the policy statement on page 3, which is long and which I have not quoted in full, does state, however, that the policy is to encourage U.S. attorneys to use the Refuse Act "to punish or prevent significant discharges which are either accidental or infrequent, but which are not of a continuing nature resulting from the ordinary operations of a manufacturing plant."

This statement admits the discharges omitted are the greatest threat to the environment, but then goes on to state a policy of nonenforcement, leaving the problem to the Department of Interior Federal Water Quality Administration.

I did not read the statement to say, as assistant attorney General Kashiwa suggests, that they would only leave a continuing pollutor to the Federal Water Quality Administration when that administration was giving the pollutor active attention. I don't believe that is in the policy statement.

In any event, the statement goes on to say that "civil and criminal actions against manufacturing plants which continuously discharge refuse into the navigable waters of the United States are not among the types of actions which the U.S. attorneys may initiate on their own authority."

Now if they may not initiate action on their own authority, against continuing polluters, I think there are many citizens who would like to initiate such actions under this bill, S. 3575.

Often agencies are saddled with low budget; they are not given the resources to get the job done. This bill will free the pollution control movement from the vagaries of undeclared wars in Southeast Asia and things of a like nature which usurp funds from what many citizens believe to be a constant and urgent need to keep our house clean and in order.

Last, I might add that there is the problem of the influence of the lobbyist and pressure groups on the regulator. They have an influence through their advocacy on Federal timetables and schedules. That scene is repeated in State capitals. Those who are concerned about cleaning up tend to be citizens who are weekend warriors. They cannot compete with the persuasive pressure of the paid lobbyist. Environmental protection is their avocation, not their vocation. They cannot afford to send well paid representatives or very many, that is, to either Washington or Tallahassee or other State capitals. However, in their own districts, they can collect evidence, obtain the aid of a sympathetic lawyer and go to court. This bill will help correct an imbalance of advocacy.

Large polluters faced with the prospect of defending the reasonableness of their conduct may then begin to find it is cheaper to clean up than to pay legal fees. One thing we know, lawyers will not represent the 500 largest corporations listed in Fortune magazine as charity cases. Those corporations will have to pay to defend their actions as well as pay to clean up. And that is as it should be. The Nation is losing its vital life support resources for the short term benefit of a few. And the flow of capital must now move toward restoration.

Now recently we have witnessed some startling legal victories on behalf of the citizen groups, and that raises the question of whether and why S. 3575 is necessary.

First, I believe the bill is absolutely necessary despite some recent successes of conservation groups. I would like to explain why. The recent victories which we have heard a lot about have by and large concerned one problem, the standing to obtain review of the lawfulness of Federal administrative action. Those precedents do not cover many of the things which will be covered by S. 3575. In particular, it represents standing decisions, gives citizens standing under specific underlying statutes. To the extent that the underlying statute does not provide an adequate citizen remedy, they are not the standing doctrine that is now evolved is of high value.

I believe our air and water pollution control laws are just such laws. They are complicated and involve lengthy administrative proceedings, conferences, hearings, and eventually in certain circumstances judicial review. They are designed to give a maximum input, a low maximum input by State agencies and a minimum input by citizen groups. Frankly, standing to participate in these proceedings does not advance the ball much and may even have a negative impact by preempting and exhausting citizen energies. This act, S. 3575, has the effect of creating a right to protection of air and water and hold-

ing polluters to a standard of reasonableness; thus, S. 3575 provides new basic rights and obligations as well as standing to bring suit.

Another reason why S. 3575 is of such great importance is the fact that most of the standing cases go only to Federal governmental actions. The new National Environmental Policy Act of 1969, for example, places many obligations on Federal officers but does not place obligations on the decisionmaking process of industry, which of course has a vast impact on the environment. S. 3575 reaches industry. The present citizens by and large have only certain common law remedies against industrial enterprises. The law in the past has not been very sympathetic to private attempts to collar polluting industries and judge-made doctrines impede the success of a suit in nuisance, trespass, or negligence against the polluter. For example, the law is that you cannot bring a suit to abate a nuisance when you are not hurt any more than the public at large. In that case it is considered a public nuisance, and only the Attorney General may abate that nuisance. If, however, you are in the posture of an individual suffering particular damages and have a genuine private interest, your injury is then balanced against the benefits to society of the entire enterprise. Consequently, while you may be able to get damages, you again are unable to abate the nuisance.

S. 3575 will have its effect of correcting this problem.

Another question I have been asked is whether this bill will open the gates to a flood of suits, many of which are frivolous. I think there will be a good many suits. There should be as many as are necessary to get the job done. There is a lot of frustration in society about the pollution problem and this act will channel and make constructive uses of the pressure which is there. I don't think, however, that the number of suits will be overwhelming. Both the Second Circuit Court of Appeals in the well-known *Scenic Hudson* case and the District of Columbia Circuit Court of Appeals in the *United Church of Christ* decision have stated they doubted whether citizen suits would be of a greater burden than the courts could handle. (In the *United Church of Christ* decision the opinion was delivered by then judge and now Chief Justice Burger.) I think the situation with regard to the suits under S. 3575 will be analogous to the type of cases that were involved in the *United Church of Christ* decision and the *Scenic Hudson* decision.

Certainly, however, there will be some frivolous suits, but the courts have long been familiar with frivolous suits and have been able to distinguish them from the serious suit and will be able to deal with the problem here. In any event, the provision of S. 3575 that requires the affidavits of two qualified experts will certainly cut the number of such suits to a very small percentage.

I have also been asked whether this will not result in the inordinate meddling by citizens in decisions of business and government. It will result in some citizen participation, but it is a necessary participation. Congress can pass antipollution laws from now on, but neither bureaucrat nor businessman will pay much attention to these laws unless the potential exists for the citizen to take them to court. Indeed no act could be better designed to protect the integrity of the congressional policy than one providing for suit to enforce it.

Again I have been asked whether this act gives an unfair advantage to conservationists in obtaining judicial review of administrative ac-

tions. Such advantage would ostensibly be based on the reasonable standard built into the act. I don't think so, because the act really is not basically an act designed to establish a standard of review of administrative action, though it will have an effect on such review. The act is more basic, establishing an environmental rule of reasonable conduct for government and those engaged in interstate commerce.

As for the standard of reasonableness, it is a standard which the court has dealt with in many areas, but in a new area, we must await the definitions which arise out of litigation. I believe, however, we can make a few predictions of some things the courts will find unreasonable.

Polluters will find that it is unreasonable not to use the latest and best methods of pollution control available for their particular enterprise. Polluters will find it is unreasonable to continue to use antique manufacturing plants that have long since returned their investment many times over but which cannot be adapted to pollution control.

I think polluters will find it is unreasonable to preempt the air and water of any area for a use that is inimical to the integrity of life.

That ends my prepared statement, Senator, and I will be happy to answer any questions you might have.

Senator HART. Well, you have helped us on one or two points of definition, the absence of which the Department of Justice commented on unfavorably. They made the point that the bill doesn't define reasonableness. You have helped us on the matter of reasonableness.

They criticize it also because it didn't define the public trust.

Do you have any suggestions as to how that might be defined?

Mr. MOORMAN. Well, I believe the public trust is the property of the United States in resources which are not held for disposal, but which are held for a public purpose or public use. I would think that a suit to protect the public trust would be one to prevent the Government official from unlawfully disposing of the public trust property or from allowing it to be used for private gain in a way which is not authorized by Congress.

Professor Joseph Sax has written an article which has appeared recently in the Michigan Law Review in which he has collected many of the cases which have dealt with the question of public trust. There have been quite a few over the years.

Senator HART. It is my impression that that law review article was printed in the record in one of our earlier hearings. If not, it should be made a part of this record.

Mr. MOORMAN. I will be glad to get the citation for the committee.

Senator HART. You heard our exchange with the Department of Justice on the use of the Refuse Act. You have discussed in your prepared testimony the departmental guidelines bearing on that act.

What is your view as to when that act, the Refuse Act, should be utilized?

Mr. MOORMAN. Well, I am not happy with the concept that the Refuse Act should be allowed to fall into disuse when Interior is handling the matter under the Federal Water Pollution Control Act. Although, parenthetically, I think that is a kind of interpretation of the policy statement, because I had read it to say in effect that where there was continuing pollution, they would assure then that Interior would han-

dle it. But I think it is really the obligation of both Interior and Justice to recognize they have the Refuse Act as a tool and Interior should welcome the use of the Refuse Act whenever you have a polluter who is causing serious and irreparable harm to the navigable waters of the United States; they should use that act to speed up the process of enforcement under the Federal Water Pollution Control Act.

I admit there is perhaps discretion as to when they should do this. But I don't think they should rely totally on Federal Water Pollution Control Act. Congress did not intend for them to.

By the way, Assistant Attorney General Kashiwa said there needs to be more Federal coordination. Perhaps this is an area where they should coordinate. Perhaps they should pick out the worst cases of continuing pollution in the country and send the polluters notices that they will bring action under the Refuse Act if they don't improve the condition by a certain time.

The Refuse Act does have flexibility, and it allows government to move fast if it wants to.

Senator HART. We were reading and talking about the new Environmental Protection Agency as a common center point. The Corps of Engineers, under the Refuse Act, would be the key agency. I am not sure how, if at all, it would be possible to get the Refuse Act into the new Environmental Protection Agency, but assuming it would be possible to transfer the administration of the Refuse Act to the new agency, wouldn't you then have the coordination of the two major acts in this center point and wouldn't it automatically foster a more coordinated effort?

Mr. MOORMAN. Yes. I think that might be good. But let me say that under existing law, as I understand it, Justice does not have to wait upon the Corps of Engineers to enforce the Refuse Act. They may receive evidence from citizens, from the Coast Guard, or from any other Federal agency. So, the inherent power to enforce violations of the Refuse Act exists already, I would say, in Interior.

Now, the problem comes from—

Senator HART. In Justice.

Mr. MOORMAN. In Justice, but Interior may also supply evidence of the violation to Justice and ask for enforcement.

Now, the problem I suspect is this, the Refuse Act says essentially that you cannot put refuse into navigable waters without a permit from the Corps of Engineers and violations depend upon whether or not the corps has given the permit. The function of authorizing the refuse—of granting the permit, which creates an exception from the act, is a function which perhaps should be transferred to the new Environmental Protection Agency.

It is my understanding though, that significant pollution is taking place now in violation of the act, that is, without permits from the corps.

Senator HART. What about two further criticisms, one made by the Department of Justice—probably I should have thought to ask them to expand on their comment here—but they object to the limited obligation for a bond in the act.

Mr. MOORMAN. Yes.

Senator HART. How do you view their argument on that one?

Mr. MOORMAN. Well, the bonds come into play when you move for and obtain a preliminary injunction. Generally speaking, the

citizen is unable to post such a bond if it involves the possible expense and loss of a major polluting facility. So, to provide as a matter of course large bonds covering those losses would mean, in effect, that the citizen would always lose the preliminary injunction.

Now, when you move for a preliminary injunction, you must prove to the court several things, and I have been up against this myself. First, you have to show irreparable harm. Furthermore, you have to show a probability of victory on the merits when you have your full trial; and you have to show that the balance of the equities is in your favor.

What this will mean, I think, is that the judges will make these findings a bit more seriously perhaps than they would if they knew they could fall back on bonds in case they made a mistake.

In addition, too, as I recall it, the bill does not entirely prohibit bonds. Isn't there a provision in the bill which provides for the bond if the manufacturer produces hard evidence of serious damage?

Senator HART. That is correct.

Mr. MOORMAN. So, I think the result will be that the judges, under this bill, will recognize that the citizen is not the type who can post meaningful bonds, will examine the questions of irreparable harm, probability of victory on the merits and balance of equities carefully, and make careful decisions. Good judges generally have the courage to stick by their findings. There will, of course, probably be a few mistakes.

Senator HART. The second criticism has not yet been voiced, but it is on file with the committee in the statement of Mr. Coleman, who will follow.

He thinks the bill doesn't go far enough in that it doesn't provide for recovery of damages by the plaintiff.

What do you think we ought to provide with respect to that?

Mr. MOORMAN. Well, as it happens, there is another related question, too, the question of attorney's fees that is not covered. I would rather not take a position on this. But the question is, on the one hand, whether with this bill you are simply trying to get orders from the courts which will work out schedules which will allow polluters to end their pollution, or whether you are trying to get damages which will, in effect, punish polluters for really what has been a general lax attitude in our Nations past.

Perhaps at this stage, it is not well to do that. However, the counterbalancing consideration is, will this bill provide the proper incentive for the commercial bar to get the job done. Obviously, if the bill provides for damages, we will have more lawyers interested, more citizens interested, more activity and perhaps faster action.

Those are the competing judgments. I would prefer not to come down on one or the other of them.

Senator HART. Very well.

Mr. Bickwit?

Mr. BICKWIT. No questions, Mr. Chairman.

Senator HART. Thank you.

Mr. MOORMAN. Thank you.

Senator HART. I had hoped and I am sure Mr. Coleman hoped we could continue without taking a luncheon break. Would it be possible—

Mr. COLEMAN. I would prefer to continue without taking a break, Mr. Chairman, but I am at your indulgence.

Senator HART. So would I, except that a group of us are hosting the Secretary General of the United Nations at 12:30.

Mr. COLEMAN. I think that answers the question.

Senator HART. With that explanation, I suggest a recess until 2 o'clock.

(Whereupon, at 12:30 p.m., the hearing was recessed, to reconvene at 2 p.m., this same day.)

AFTERNOON SESSION

Senator HART. The committee will resume and as indicated at our recess, we now shall hear from a distinguished lawyer, active in the environmental litigation field, William T. Coleman, Jr., of Philadelphia.

Mr. COLEMAN. Good afternoon, Senator Hart.

Senator HART. I have learned since I returned from the recess that requiring you to wait while we had luncheon with U Thant was not altogether disagreeable with you since you had served at the United Nations in our delegation, so I am sure you would give us an excuse for delaying our return.

STATEMENT OF WILLIAM T. COLEMAN, JR., OF DILWORTH PAXSON, KALISH, LEVY & COLEMAN, PHILADELPHIA, PA.

Mr. COLEMAN. Thank you, Senator Hart. I appreciate the opportunity to appear before this Senate subcommittee this afternoon, which is considering Senate bill No. 3575.

As you indicated my name it William T. Coleman, Jr. I am a member of the Philadelphia bar.

At the outset I should disclose two relationships which might or might not be considered as affecting my views. I don't think they do, but at least I have a duty to disclose them. One is that my law firm, Dilworth, Paxson, Kalish, Levy & Coleman of Philadelphia, Pa., is one of the counsel for certain plaintiffs in lawsuits in the Federal court in the southern district of California known collectively as the *Multidistrict Vehicle Air Pollution* cases in which the plaintiffs—certain States, cities, and other public entities, several citizens' groups, and many individuals—are claiming that the automobile industry violated the Sherman Antitrust Act by agreeing to eliminate competition in, and suppress the development of, effective air pollution control equipment for their automotive vehicles.

Secondly, I am also a member of the recently appointed Legal Advisory Committee to the Council on Environmental Quality which Council is provided for in section 202 of the National Environmental Policy Act of 1969. I hasten to add that the views expressed here are my own and in fact have not been even discussed in that Legal Advisory Committee.

Public concern for unreasonable damage to the physical and human environment is high, immediate, and active. The public wishes to cut down or eliminate those activities which will contribute to unreasonable, unnecessary, and avoidable damage to the environment. The knowledgeable polluter, as well as the antipolluter, is aware that this

laudable goal must be accomplished but that it must be accomplished in the context of a vibrant, technological society which wants to provide the best types of goods and services to its people at the lowest possible costs.

Government—Federal, State, and local—has the primary responsibility to take all steps necessary to see to it that its activities and the activities of persons and corporations do not cause unreasonable damage to the physical and human environment. Ideally the citizens of a society should be able to rely, in most instances, upon its officials to enforce the laws by way of criminal and civil suits against all who would pollute the environment. As Charles A. Lindbergh said the other day, the *New York Times*, Tuesday, July 7, 1970, page 25:

It seems to me essential that our overall environment be protected by government just as certain smaller areas are protected through zoning.

Much as I believe in the utmost practical freedom for man, I do not see how his essential environment can be maintained in this technological era through commercial organizations acting independently.

Contemporary pressure lobbies, together with the often ruthless exploitation and spoilation of our country, stand witness to the need for quick and firm governmental action.

We need a policy and plan that covers our entire planet and extends to the utmost of human capability into space and time.

Experience, as you know, Senator Hart, has shown, however, that Government alone does not, and cannot, do the full job, and that private enforcement by way of suits for injunctive relief and for damages is a necessary supplement to governmental action. The necessity for private enforcement of statutes which seek to eliminate or regulate a deleterious activity which has an adverse effect on interstate commerce perhaps is best demonstrated by the experience of Congress and the courts in the areas of securities regulation and antitrust. As you will recall, Congress in 1933 and 1934 determined that improper securities and financial transactions which took place in interstate commerce were seriously damaging investors, and that the Federal Government should take various steps to make sure that the investor was not defrauded and was given the proper information with respect to the purchase of securities. Thus, Congress enacted statutes providing for civil and criminal sanctions, and established an official administrative agency—the Securities and Exchange Commission—to enforce compliance with those statutes. The courts soon determined, however, that this type of enforcement was not sufficient. Starting with the landmark case of *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), the courts have developed a body of law granting the individual investor the separate right to bring a private suit, for equitable relief or for damages, based on a violation of the securities laws.

So far 10 of the 11 Federal courts of appeals have recognized such an implied right of action. The Securities and Exchange Act, as I have pointed out, states merely that if one sells fraudulent securities in interstate commerce it is a criminal act. There is no provision in the statute which provides that the private person who is injured can recover monetary damages. There is no provision in the statute which provides that the private person affected can seek an injunction. But the courts imply or found that Congress intended to confer on the private individual private causes of action so that they could recover damages or obtain an injunction.

Indeed, the Supreme Court of the United States has declared in *J. I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) that:

Private enforcement of the proxy rules (under Section 14 of the Securities Exchange Act, 15 U.S.C. Section 78n) provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.

Congress reached the same conclusion, in the first instance, with respect to enforcement of the antitrust laws. The antitrust laws provide for civil and criminal enforcement suits by the Federal Government. 15 U.S.C. subsection 44, 15a, 25. They provide, in addition, however, for a private cause of action for both damages to the business or property of an individual, or corporation, and for injunctive relief in favor of private litigants against threatened loss or damage by reason of violations of the antitrust laws. 15 U.S.C. subsection 15, 26. In *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U.S. 134 (1968), the Supreme Court of the United States characterized such private suits as "a bulwark of antitrust enforcement" and observed that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to anyone contemplating business behavior in violation of the antitrust laws" (p. 139).

Similarly, the courts have recognized implied causes of action for damages under the Civil Aeronautics Act, the antiwiretapping legislation, and other types of laws which attempt to regulate or abolish deleterious effects on interstate commerce. See generally, Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

Thus, I disagree with the Assistant Attorney General who testified this morning that it is wrong to have a statute which shifts part of the responsibility of enforcement to individual citizens. I assure you that there is no intent and I think I speak—well, I hope I spoke for the sponsors—that there is no attempt to shift responsibility, but that this bill which is being proposed is the result of a decision on the part of the sponsors that the governmental action is not sufficient and the aid of the private citizens' groups is also needed. In other words, the proposed bill would supplement enforcement, not shift the burden or in any way reduce the job that Government would otherwise have.

Thus the sponsors of Senate bill No. 3575 should be congratulated for their foresight in attempting to fashion a remedy to be used by citizens to aid their governments in their enforcement programs against those who would unreasonably pollute the environment. The bill is not only timely, it is basically well drawn; thus the comments which follow are presented with the intention of strengthening it and making it an extra more effective tool.

Experience has shown that in order for a law which regulates deleterious activities in interstate commerce to be effective, it should meet the following minimal standards:

- (1) It should clearly state that it was the intention of Congress to provide a private remedy giving rise to damages and injunctive relief.
- (2) The burden of proof placed upon the plaintiff should not be unreasonable.

(3) The procedure under the statute should be clear, simple and precise.

(4) There must be a recognition that it is sometimes difficult to prove actual monetary damages with precision.

(5) There should be a recognition that the wrong is often massive, that numerous persons are injured and that the injury occurs in such a way that it is unlikely that any one person will have the resources to bring the suit.

(6) There should be a provision for substantial monetary damages and for a reasonable counsel fee for the attorney of the successful plaintiffs.

I now turn to an analysis of S. 3575 to determine whether it meets the above criteria.

The bill has been designed to create a Federal common law of environmental protection (Cong. Rec. S. 3325, remarks of Senator Hart, Daily Edition, March 10, 1970). Section 3(a) of the bill, therefore, should provide that it is wrong for a person to take action which unreasonably causes pollution, impairment or destruction of the environment and that such action gives rise to a private cause of action making the wrongdoer liable for monetary damages. In other words, it should be made clear that monetary, as well as declaratory or equitable relief, can be granted for violations of the act, granted by the courts once it has been determined that there has been a violation of the act. Thus there should be a damage provision that should be added to section 5. Of course I am speaking about those instances in which the alleged polluter is a private person or a corporation. I am not speaking about those instances in which the polluter is a governmental body. I think that distinction should be made in the bill.

At this point I would like to indicate my disagreement with the Assistant Attorney General's testimony this morning that the bill is not needed. If it is true, as I understand it to be the case, that government, whether it is Federal, State, or local, is one of the major polluters of the environment, then certainly it is hard to expect that government in all instances would proceed in the way they should.

For example, as I read the newspapers, there is a controversy as to whether the city of New York takes its garbages far enough out in the ocean to dump it. In that type of situation it is hard to expect that the mayor of New York or even the Governor of New York would be active in preventing that type of pollution and it usually takes a citizens' group of some type to bring it to their attention. In that case, I would say that an injunction would be an appropriate remedy and I don't believe the citizens should also be able to get damage. But where it is a private party or private person I think in all appropriate cases they should be awarded damages.

Another reason you can't depend on government alone to eliminate unreasonable pollution is that government just doesn't have the time or take the interest to make a hundred percent effort to end all wrongs. For example, even though I would have to compliment the Congress, in part under your leadership, Senator Hart, for the bill that got through and got into law which are known as the Civil Rights Act, I certainly assure you that speaking now as vice president of the Legal Defense Fund, we would never be happy if we also didn't have the right of private enforcement of those same acts. We would not want

to be in a position where what the Attorney General or the Secretary of HEW says is the standard for desegregation of schools, for example, that we couldn't go into court and challenge that and say even more should be done. I think you have a similar situation here.

The next point I would like to make is that I feel that the last full sentence in section 3(a) should be eliminated. That section now provides that the complaint must be supported by affidavits of not less than two technically qualified persons, and that such affidavits are to support the allegations that the activities of the defendants cause damage to the environment. There is a serious contention, especially among the young, that industry is the great polluter of the environment and that all of the experts, even those who are in academic life, are either in the hire or expecting to be in the hire, of industry. Thus, there is a feeling that it might be very difficult at the outset of a suit to find two technically qualified persons who would support the complaint of the plaintiff. I am sure that the reason for the present provision in the bill is to prevent unfounded and irresponsible suits. That problem, however, can be adequately met and solved by the existing laws regulating procedure in civil suits in the Federal courts. For example, rule 11 of the Federal Rules of Civil Procedure provides that "The signature of an attorney constitutes a certification by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." This is all that the ordinary civil suit in the Federal courts needs to meet the problem of meritorious causes of action.

Moreover, where the law has felt that additional safeguards against nonmeritorious suits were necessary, less onerous terms have been imposed than are proposed by this bill.

Thus, in derivative suits brought by corporate shareholders, long referred to as "strike suits," corporations complained that they were sued by irresponsible shareholders and that because it would cost so much to defend the suits, they were forced to settle them even though they were without merit. This problem was met by rule 23.1 of the Federal Rules of Civil Procedure, which requires, in addition to the rule 11 certificate of counsel, that the plaintiff himself must take an affidavit as to the truth of the allegations. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1961).

It is submitted that this is the practice which should be followed in the present bill rather than making a requirement that the complaint cannot be filed unless sworn to by two technically qualified persons. Indeed, the requirement of "technically qualified" persons could provide any defendant with a ground for moving to strike the complaint, without getting to the merits, by arguing that a particular expert was not the proper type of expert, or lacked the specific academic degree proper for the particular type of lawsuit. Interminable delay could arise on the threshold of the suit.

Section 3(a) of the bill talks in terms of "case or controversy" and the statement is made that this is meant to expand standing of a plaintiff to bring the suit to the maximum extent permitted by article III of the U.S. Constitution. See Congressional Record at S. 3324 (Senator Hart.).

I commend the sponsors of the bill for having the foresight to recognize that this is a problem. I am pretty sure that what the sponsors

had in mind was that the Supreme Court of the United States has divided the plaintiff's standing problem into two separate issues:

(1) The constitutional problem of the required "personal stake and interest that impart the concrete adverseness required by article III;" and

(2) Whether the particular plaintiff is "within the zone of interests protected by the (specific) act." *Barlow v. Collins*, 397 U.S. 159, 164 (1970). See also *Association of Data Processing Service Organizations, Inc. v. CAMP*, 397 U.S. 150 (1970).

The bill I presume means to eliminate any such limitations as may be imposed by the second requirement. I would suggest that the bill be redrafted to clarify this point as follows:

"Any person possessing the minimum requisite adverse interest required by article III of the Constitution may * * *."

Section 3(a) also, fortunately, eliminates the need for any jurisdictional amount and confers a broad venue privilege ("resides, transacts business, or may be found") which language I assume is taken from the antitrust laws. These provisions are both good, since jurisdictional amount is often hard to value where pollution losses are concerned, and a broad venue privilege removes one source of fuel for an early motion to dismiss.

To the extent that national activities are involved in a suit, it may be profitable to use the wording of the Securities Act and add, as a basis for venue, "the district in which any act constituting a source of the pollution occurred." See 15 U.S.C. 78aa.

The definition of "person" in section 3(b) to include "any department, agency or instrumentality of the United States, or other States or local government," is, moreover, very helpful since sovereign immunity seems to be an involuntary response built into every Government lawyer.

The section 4(a) reference to prima facie showings will cause great difficulty in the actual enforcement of the act. I would suggest that it be reworded to state that where a plaintiff has demonstrated a source of pollution emanating from defendant's activities, and the possibility that it might constitute unreasonable pollution, the burden is then shifted to the defendants.

As already noted, there should be a provision in the bill which makes it clear that the plaintiff has the right to recover monetary damages in the event the plaintiff can show injury. In addition, section 4(d) of the bill should make it clear that costs which can be awarded against the defendant include reasonable attorneys' fees. Such a provision for attorneys' fees should be granted only in favor of plaintiffs, or otherwise, the fear of imposition of costs will serve as a deterrent to the bringing of suits under this bill.

Section 4(e) of the bill, limiting the requirements of the posting of a bond by the plaintiff is a crucial provision of the bill and is well worded. This matter has come up, for example, in cases where citizens' groups have attacked certain procedures of building projects by redevelopment authorities. It is quite important that the present provision of section 4(e) be preserved since often the inability of the plaintiff to secure and post a bond deprives the plaintiff of the injunctive relief which it sought.

Section 5 should be amended to include the words "including mandatory relief" after the words "equitable relief" since an argument is often made that mandatory or affirmative relief requiring the undoing of the past effects of pollution is not available. This should be clarified.

It would also be helpful if there were a provision that docket preference should be given to pollution cases since prompt action is often required. Likewise there should be a provision which provides for jury trials to permit the public to sit in judgment of alleged polluters.

I feel the drafters of the bill should be commended for first recognizing that the subject of environment is one in which the States as well as the Federal Government have interests, and secondly, for attempting to accommodate the interests.

For this reason I do not quite understand the criticism made this morning by the Assistant Attorney General when he indicated that because a particular Federal act indicates that pollution is basically a problem of the State, there is no need for a Federal bill which creates a Federal right of action against polluters. This bill deals with the problem just the way it should, to act, if a State is active and has appropriate legislation, then the Federal courts will stay their proceedings until the State has concluded its proceeding; if the State does not have adequate legislation, then the Federal courts have jurisdiction and a duty to act.

For example, many States have already enacted or are in the process of enacting bills quite similar to Senate bill 3575. There is a parallel bill now pending in the Pennsylvania Legislature known as H.B. 2000, and once again, Senator Hart, your State of Michigan beat us to the punch; apparently you enacted a similar bill just last week.

Where the State statute is well drawn, provides an effective remedy, its application does not raise Federal constitutional problems, and there is no problem of breadth of coverage, the State courts should have the first opportunity to handle the controversy. On the other hand, if the State statute does not afford an effective remedy, then obviously the Federal statute takes over. That is what you intended to do in the present bill.

This matter can be handled by stating that where the defendant on motion can show that the State statute covers the complaint made by the plaintiff, and the State remedy is plain, speedy and efficient—incidentally, those are the words that now appear in the Federal Statutes 28 United States Code, section 1341, which is the statute, as you recall, being a member of the Judiciary Committee, which provides that the Federal court cannot enjoin the enforcement of a State statute levying taxes unless the plaintiff can show that the State remedy which permits the taxpayer to challenge the taxing statute does not provide a plain, speedy, and efficient remedy—in those instances the Federal court has the right, under the so-called abstention doctrine, to delay the Federal proceedings until the State proceeding is completed. The Federal courts understand this procedure quite well and have applied it in many other fields. See generally, *C. A. Wright*, Federal Courts 167-177 (1963).

In conclusion I feel that S. 3575 is basically a good bill, has much to recommend it, and should be adopted. There are certain changes which should be made to the bill by way of amendments, including (1) making it clear that the bill gives rise to a private cause of action

for damages where the alleged polluter is a private person or a private corporation; (2) that the plaintiff, if successful, is entitled to counsel fees; (3) that suit can be brought on a sworn complaint; (4) that the parties have a right to a jury trial; and (5) that these cases should take precedence on the Federal docket.

Thank you, Senator. I am available to answer any questions.

Senator HART. Thank you, Mr. Coleman.

You were here this morning when another able lawyer, Mr. Moorman, replied to a question I asked him on this business of including damages. He cited the competing goals suggesting that the principal reason for this legislation was to bring the industrial practice into line and that it might work against the achievement of that if there was a damage feature attached to it. He reserved judgment.

You listened to that. How did you react to that? I see you did not change your testimony.

Mr. COLEMAN. Well, he is a very persuasive lawyer but I did not change my testimony. I think it is a matter of judgment.

In the first place I should say that the courts are quite competent and skillful, and can handle this problem. For example, if the alleged polluter is taken into court and it is determined that even though he has been following all the existing State and Federal statutes, that his practice nevertheless results in unreasonable pollution, the court can, rather than retroactively imposing damages, tell him that from the time of decision, he must stop doing this and if he does not stop doing this, then the plaintiff can come back into court and get damages.

Second, I think that the pollution problem is so massive and requires such dedication, that even if every U.S. Attorney devoted his skill to this problem, if every young man like Mr. Moorman, if his organization and the other organizations devoted their skills to the problems, you still would have a lot of this problem not met.

Now, in this society, whether you like it or not, when there exists the threat of imposed damages to the defendant who is caught acting improperly, there is provided an additional reason for defendants to clean up their own business before there is a suit.

Getting back to the civil rights movement, I have always been greatly irritated that we could litigate cases against the Governor of Mississippi for 8 years while he continued to deny children the right to go to school and that at the end of that litigation, after having been to the Supreme Court of the United States, and all through the Federal courts two or three times, the only thing that happened was that there was an injunction against that State official. If, in addition to the injunction, the governor of that State had been exposing himself to a possible case of damages I think you would find in the history of this litigation that people would have faced up to the problem long ago.

Now, consider, not government—because I would concede that you ought not to provide for monetary damages against government—but a case of one of the major companies. If these companies are allowed to pollute the atmosphere and engage in one of these lawsuits for 10 or 12 years at the end of which all you do is say that in the future it must not pollute anymore, then the company has gotten 10 or 12 years of these extraordinary profits without having really to meet the issue to determine whether it is going to have to pay damages. In the Carter

Liver Pill litigation before the Federal Trade Commission with which you are familiar, the Federal Trade Commission has been attempting for more than 12 years to get Carter to eliminate the word "liver" from the words "Carter's Little Liver Pill."

That case is not over yet. If Carter knew that it was exposing itself to the possibility of a recovery of damages as has happened in the drug industry, for example, as happened in the electrical industry, then I think you would begin to get more of a self-policing by the companies themselves.

Third, it is my fond hope that ultimately lawyers and citizens will spend as much time trying to meet this problem as they now spend trying to put together successful corporate mergers. One way to encourage lawyers in the regular private practice to face up to some of these problems, is to introduce the possibility of a monetary recovery.

Senator HART. Two other comments you make refer to jury trial and giving suits under this bill precedence. On the jury trial provision, aren't you liable to be really slowing things down in view of the fact that you have got a jury docket and it may already be heavy. On precedence, why, important though environmental areas are, should we sort of deny the judge the right to make the decision as to what is the most compelling thing in front of him on a case to case basis?

Mr. COLEMAN. Well, Senator Hart, in a lot of instances, both parties will waive a jury trial.

Secondly, where there is injunctive relief, often there would not be a jury trial. Where there were damages there would be a jury trial and these cases, if handled properly, move just as fast as the other cases.

As I noticed it—you are the expert in the Federal court, because you sit on the Federal Judiciary Committee—what clogs up the Federal courts particularly in the Eastern District of Pennsylvania, and I am pretty sure the Southern District of New York, is the automobile personal damage litigation. Something like 90 percent of the cases in the Federal court are that type of litigation. I want to make sure that an environmental policy case gets a precedent and the judge would have to move it ahead of that type of case.

I don't think the provision for jury trial will really slow up the case any more. The main thing is to get it on the docket to get it ready to be tried. I don't think that the jury trial would slow it up.

Senator HART. You make a point that was made earlier in our hearing that a prevailing plaintiff should have counsel fees awarded to him. I am inclined to agree with that point.

How about the reverse of it, though, where a plaintiff has gotten in and it finally becomes evident that the suit is frivolous or otherwise inadequate; what about fees for the defendant if he prevails?

Mr. COLEMAN. Well, as you know, in the American system there is never a provision for counsel to the prevailing defendant. In the British system there is. This is something that we have lived with and it is just a way of life in the United States.

I think Mr. Moorman was the one that made the point today and I think he is 100 percent correct that these great Federal district judges have an extraordinary skill of being able to come to grips with these problems and determine which suits are phony and are nonmeritorious. You have, one, the motion to dismiss. If you don't state a cause

of action, you get thrown out before any evidence is taken. Next, you have available the whole procedure of summary judgment where on an affidavit you can get the matter resolved. Thirdly, is the pretrial conference.

These great Federal district judges, and most of them are really skillful people, know how to handle that type of litigation. It isn't time consuming in those cases which are not serious and not of immediate importance.

Furthermore, it seems to be clear that in most of the cases the defendants have the ability to pay as far as the counsel is concerned. On the other hand, it is usually a citizens' group or an individual when even though the pollution has gone on and he has written to the Federal agencies and they haven't acted and he has written to his mayor and he hasn't acted and he has written to his Governor and he has not acted, finally gets so irritated that he calls a meeting in his community.

I am pretty sure you have attended some of these meetings. They are able to raise \$750. They go to see a lawyer, he is interested and takes the case, he fights these major corporate giants and is successful. It seems to me that in that case a provision to award counsel fee, controlled by the court, would be appropriate.

On the other hand, if the defendant could go into court and say, "Your Honor, you realize that if I prevail in this lawsuit I can get counsel fee and to protect me, you have to post a bond to make sure the plaintiffs can pay," then what, in effect, you have done, Senator, is to say that these lawsuits are not going to move forward.

Mr. BICKWIT. I have just one question which relates to some of the proposals you have made, specifically those to provide damages, to substitute the "sworn complaint" for the "complaint attested to by technically qualified witnesses," and to substitute the showing of a possibility of unreasonable pollution rather than to require an actual prima facie case. These proposals were considered by the drafters in the preliminary stages and one of the reasons that they were rejected was because of the "floodgate of litigation" argument.

Do you think there is anything to that argument and do we weaken our case for the bill at all by making things even easier for the plaintiff?

Mr. COLEMAN. I think I would have to say that some people would concede there is something to the argument; I have had it made by many distinguished lawyers. The fact is however, that life just doesn't work that way. Those members of the bar who have ability do not get involved in cases that are utterly without merit.

Private citizens' groups do not spend their evenings and their afternoons trying to think up law suits that have no merit. The whole history of this country is just the opposite; that Government has not discharged its responsibility and citizens' groups have gotten together and brought good law suits. I would tend to predict that if anybody ever did a statistical study of the law suits brought by the so-called nonprofit organizations, which everyone accuses of just flooding the courts, you would be utterly surprised by the high degree of success and the percentage of cases won of those law suits. Until you get a situation where when these citizens' groups bring these law suits, 90 percent of them are thrown out, I think you have to weigh closely the argu-

ment that, "Well, if you open up the Federal court or if you make it easy for the plaintiff, there will be a floodgate." In fact, I am not asking to make it easy for private citizens to bring pollution suits.

All I am asking is that you don't make it any harder for the citizens' group in upstate New York that gets upset by the highway coming through, than you make it for General Motors when it brings litigation. Don't make it any harder for the citizen that gets upset by the water pollution in the Great Lakes than you make it for the plaintiff who feels that some corporate giants have conspired against them under the antitrust law.

What you are doing in this bill is for the first time making a much higher threshold for entrance to the Federal court than in any other instances that I know of. I just urge you to read previous testimony by the same lawyers saying that the antitrust law provision on private suits would open the floodgate of litigation? I am pretty sure in 1914, when the provisions on private recovery and counsel fees an antitrust litigation were put into the law—that you will find a lot of testimony that says, "You are just going to open up the Federal court and everybody is going to come with phony suits."

Just read the literature on the strikes suits. You will find the same complaint. You will see the whole procedure where they will try to get State statutes enacted which would require the plaintiff to post security for costs including counsel fees before the shareholder suit could be prosecuted. There was a lot of talk that there were a lot of plaintiffs around who wanted to make trouble," but the fact is, if you look at the securities industry today, that the great cases that establish real corporate responsibility have not been the cases brought by the Securities and Exchange Commission, but those brought by private lawyers; for example, the *Texas Sulfur* litigation. Thus this argument which is made all the time just doesn't hold water.

The fact is, to get effective enforcement of statutes against major corporations and major business interests or major labor unions, you need the inducement of private litigation. That inducement has to be on terms no more onerous than it is for the Federal Government or anybody else to bring suits.

One other matter which you didn't ask about, and I would like to mention goes to the testimony of the Assistant Attorney General. That is the idea that the bill is vague because it talks in terms of unreasonable pollution.

Well, the fact of life is that almost every statute which regulates business activity is no more specific. I refer to the Sherman antitrust laws which say that the defendant is prohibited from engaging in restraint of trade. That is all it says. There is a body of law which is then developed to determine what that means.

In the Interstate Commerce Act, the only thing the railroad is told to do is not to charge an unreasonable or discriminatory rate. There is no spelling out. I also would like to call his attention to the constitutional amendment which provides merely that there shall be no unreasonable searches and seizures. It doesn't spell out in detail which is an unreasonable search or seizure.

You just can't regulate important human activities by specific statute that in every detail sets forth what is improper conduct. You need a

statute that is general. Then, in the Federal court, you get the sophisticated application of that statute. I urge that that is the type of statute you should have, not one which attempts to spell out in great detail what is pollution and what isn't pollution.

I don't think I know, and I am pretty sure very few other people know.

Mr. BICKWIT. Thank you very much.

Senator HART. You have been very, very helpful, Mr. Coleman. Thank you very much.

We are adjourned subject to the call of the Chair.

(Whereupon, at 2:55 p.m., the hearing was adjourned, subject to the call of the Chair.)

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF THOMAS L. KIMBALL ON BEHALF OF THE NATIONAL WILDLIFE FEDERATION

Mr. Chairman, I am Thomas L. Kimball, Executive Director for the National Wildlife Federation which has its national headquarters at 1412 Sixteenth Street, N.W., here in Washington, D.C.

Ours is a private organization which seeks to attain conservation goals through educational means. The Federation has independent affiliates in all 50 States and the Virgin Islands. These Affiliates, in turn, are made up of local groups and individuals who, when combined with associate members and other supporters of the National Wildlife Federation number an estimated 2½ million persons.

We welcome the invitation to make these comments about S. 3575, "to promote and protect the free flow of interstate commerce without unreasonable damage to the environment; to assure that activities which affect interstate commerce will not unreasonably injure environmental rights; to provide a right of action for relief for protection of the environment from unreasonable infringement by activities which affect interstate commerce and to establish the right of all citizens to the protection, preservation, and enhancement of the environment."

Mr. Chairman, our organization long has sought to protect natural values of the environment in the strong conviction that natural areas such as forests and fields, lakes and streams, and wildlife provide the types of inspirational and educational values which make life worth living.

Our organization was created in the mid-1930's out of a crisis resulting from depleted wildlife resources. However, our organization recognized that different species of wildlife were entirely dependent upon their environments and, in truth, often were indicators of damage to the environment. Fish cannot live in polluted waters. Birds cannot live in areas where air pollution is heavy. Many forms of wild creatures are destroyed or damaged by chemical poisons, by unproductive land resulting from strip-mining, and from hazards created through solid waste disposal. In fact, at the present time, most of our activities are directed towards protection and enhancing the values in the natural environment. It was in this context that we expressed our extreme satisfaction earlier in this Congress when it appeared that the bill which became the National Environmental Policy Act would contain language giving each person an inalienable right to a clean environment. As a consequence, we were dismayed and distressed when this feature was left out of the final bill which became law of January 1, 1970.

Therefore, we wish to express our approval of the principles expressed in S. 3575, particularly in Section 2(a), "The Congress finds and declares that each person is entitled by right to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States and that each person has the responsibility to contribute to the protection and enhancement thereof." In this, we are pleased to note that this bill would call attention to the fact that each person has an individual responsibility for the protection and enhancement of the environment as well as a right to the enjoyment of it. We also are in accord with the subsection which states that the Congress "further finds and declares that it is in the public interest to provide each person with an adequate remedy to protect the air, water, land, and public trust of the United States from unreasonable pollution, impairment, or destruction."

Legal authorities tell us that the National Environmental Policy Act well may become one of the most significant enactments in the Congress in recent years because of its long time effect upon the management of natural resources. We believe that it is important that citizens be allowed the opportunity to seek legal relief when the situation so warrants from "unreasonable pollution, impairment, or destruction" of the air, water, land or public trust resources of the United States. We also are in agreement with the principle that "the defendant

shall have the burden of establishing that there is no feasible and prudent alternative" to unreasonable pollution, impairment or destruction of these resources when a plaintiff has made a prima facie case.

We also agree that no bond should be required of a plaintiff because citizens might be deterred by taking action which they otherwise deemed part of their right.

This does not mean that the Federation is unsympathetic to difficulties which might arise. We would not sanction actions whereby suites can be instituted for frivolous purposes or for the purpose of deliberate delaying action. Consequently, we would hope that the Subcommittee can come up with a legislative history which safeguards both parties. However, we believe that this principle is so important to the individual citizen so as to override any possible inconvenience to agencies, industries or others which might be defendants in such suits.

It is our hope, Mr. Chairman, that the Subcommittee can act expeditiously on this proposal in time that it can be sent to the House in order that it will be another accomplishment of the 91st Congress.

Thank you for the opportunity of making these remarks.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

This statement is submitted by the National Association of Manufacturers, a voluntary Association of business and industrial firms, large and small, located in every state, and producing a major part of the nation's manufactured goods.

The announced purpose of S. 3575, the Environmental Protection Act of 1970, is "to provide each person with an adequate remedy to protect the air, water, land, and public trust of the United States from unreasonable pollution, impairment, or destruction." This legislation would seek to achieve its objective by opening the federal courts to class actions brought by citizens seeking declaratory or equitable relief and claiming that the air, water, land, or public trust is being unreasonably polluted, impaired, or destroyed or is in reasonable danger of becoming so.

We must begin by questioning the legitimacy of this approach. A close analysis of what is being proposed reveals that under section 6 of S. 3575 a class of citizens, once having instituted action before a regulatory agency, would then have standing to come before "a court of competent jurisdiction" and pray for (1) interim equitable relief, and (2) a determination that existing administrative and regulatory procedures are "inadequate" for the protection of their rights. In such an event, section 6 would authorize the court to grant the equitable relief prayed for, to review the administrative and regulatory procedures challenged and ostensibly to grant such relief as it believed warranted. In reviewing these procedures, the court would be bound by the standards outlined in sections 3, 4 and 5 of this Act which are left undefined.

Analysis of section 3 reveals provisions stating that actions for declaratory equitable relief may be brought in either federal or state courts if supported by the affidavits of at least two technically qualified persons who are willing to state that, to the best of their knowledge, the activity complained of "damages or reasonably may damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction."

Section 4 would seem to provide that a complaint, coupled with the two affidavits mentioned in section 3, would constitute a prima facie showing that defendant's activity has resulted in, or reasonably may result in, unreasonable pollution, impairment, or destruction.

Still in search of "standards" we quote section 5 in its entirety:

"The court may grant declaratory relief, temporary and permanent equitable relief, or may impose conditions on the defendant which are required to protect the air, water, land, or public trust of the United States from pollution, impairment, or destruction."

We submit that neither sections 3, 4 nor 5 contain any kind of "standards" which would supply reasonable guidance for a court or, for that matter, for the parties in interest. This lack becomes crucial in view of the fact that S. 3575 envisions a state or federal court superimposing its judgment on that of regulatory agencies for the purpose of determining whether their administrative or regulatory procedures are adequate for the protection of citizens' rights with regard to pollution.

In our view, not only is such a scheme of court review unworkable through its lack of specificity but it is unreasonable on its face since it would inject the judiciary directly into a framework of administrative regulation established by Congress. To enact this legislation would be a tacit admission on the part of Congress that the regulatory schemes envisioned by the Clean Air Act, 42 U.S.C. 1857, and the Federal Water Pollution Control Act, 33 U.S.C. 466, are unworkable and, in order for private citizens, individually or as a class, to gain relief, intercession of the Judiciary is necessary. We do not think such is the case, nor do we think Congress should so conclude upon proper reflection and examination of the facts.

Returning to section 4, we note there a provision that, plaintiff having established a "prima facie showing" of unreasonable pollution, impairment, or destruction of air, water, land, or the public trust, the burden shifts to defendant to prove that no feasible and prudent alternative exists and that the activity complained of is consistent with and reasonably required for promotion of the public health, safety and welfare. This is logically inconsistent in that it suggests that unreasonable pollution can be consistent with promotion of the public health and safety.

Finally, with regard to section 4, it contains this anomaly: In spite of a recognition that proceedings under this Act could result in irreparable damage to defendant, plaintiff would not be required to post bond if to do so would unreasonably hinder him in the maintenance of his action or "would tend unreasonably to prevent a full and fair hearing." Such a result is plainly unconscionable. In addition to the irreparable harm which may ultimately result, such as having to close down a plant, it can easily be recognized that defendant may be put to considerable time, effort and expense in protecting his interests against unsupportable allegations. Should there be a final determination that plaintiff's suit was groundless, surely equity demands that defendant be allowed to recover the cost of his defense, plus damages, particularly in view of the fact that suit was brought in a direct effort to supersede established regulatory and administrative procedures.

Section 5, earlier quoted in its entirety, would allow the court to impose conditions on the defendant required to protect the air, water, land, and public trust. It is in this precise area of working out reasonable, administrable solutions that the administrative process works at its optimum. To attempt to burden the court with hearing a maze of expert testimony and then consider this in admixture with conflicting proposals emanating from plaintiff and defendant, ultimately saddling the court with the task of resolving the whole to a workable solution is not a reasonable way to proceed. Again we submit the proper function of the Judiciary does not, and indeed should not, protrude to this extent into the administrative processes.

We recognize statutory regulation of certain aspects of private enterprise as an essential function of the federal government, and as being in the public interest. However, we believe that where such regulation is proper and advisable, it should be prescribed in advance by specific statutes, and should embody provisions which will, without overlapping or duplication, assure uniform application and interpretation, and deal impartially with all; and that such laws should be administered insofar as possible by the established executive departments of the government.

When administrative powers are granted by federal statute, the authority to issue rules should be limited strictly to those required for the purpose of administering the law within the limitations and standards fixed by the Congress. The statute should also provide that any orders or decisions should be based upon the preponderance of the credible evidence, as found in accordance with the rules of evidence applicable in courts of law, and should be subject to adequate judicial review of the law and the facts by the judicial branch of government.

Further, provision should be made for the periodic review by the Congress of the need, soundness and fairness of both the statutes and all administrative orders issued in connection with their enforcement.

The greatest practical gains in industrial pollution control have come about through cooperation between industrial companies and regulatory officials in working out effective programs based upon reasonable timetables. To have the Congress of the United States encourage civil litigation on these problems rather than cooperative efforts would seem to be counter-productive. Furthermore, there are difficulties flowing from the use of the class action mechanism which the Bar itself would need to consider. It seems quite likely that a highly

damaging situation could come about which would find lawyers competing to represent a class or filing conflicting class actions. This could also lead to solicitation of class members and funds and of misrepresentation of the purpose of the suit and of the possible effect of court orders.

In our view, S. 3575 will not be helpful in producing a cleaner, more congenial environment for all the citizens of this country but rather would have the unfortunate effect of hindering earnest efforts in that direction. We join the Assistant Attorney General in this critical view of S. 3575.¹

STATEMENT OF DAVID SWAN, VICE PRESIDENT—TECHNOLOGY, KENNECOTT
COPPER CORP., ON BEHALF OF THE AMERICAN MINING CONGRESS

Mr. Chairman and Members of the Committee :

I am pleased to submit this statement for the record of the hearings of this Committee on behalf of the American Mining Congress, a trade association of United States companies that produce most of the nation's metals, coal and industrial and agricultural minerals. Its membership includes also more than 200 manufacturers of mining and mineral processing equipment and supplies as well as financial institutions with a business interest in the mining industry.

One of the stated purposes of S. 3575, the Environmental Protection Act of 1970, is "to provide each person with an adequate remedy to protect the air, water, land and public trust of the United States from unreasonable pollution, impairment or destruction." This legislation would seek to achieve its objective by opening the federal courts to actions brought by a citizen on his own behalf or in behalf of a class of persons seeking declaratory or equitable relief and claiming that the air, water, land or public trust is being unreasonably polluted, impaired or destroyed or is in reasonable danger of becoming so.

Certainly, it is true that the public interest requires that the environment be protected from pollution, and this policy is evident in the Federal laws on this subject, as well as in any number of state pollution control statutes. It does not, however, follow that it is in the public interest to provide each person with access to the courts for the purpose of raising his private objections to whatever activity he considers to be causing unreasonable pollution.

At the present time, most of the legislation in the field recognizes that pollution is a complicated problem requiring evaluation of technical data, consideration of practical alternatives with respect to abatement of pollution, and resolution of complex questions of judgment involving economic repercussions which may result from overhasty action against a source of pollution. It has long been recognized that problems of this nature are more appropriate for administrative consideration than for decision in our courts which, in many cases, are already severely taxed.

To permit suits of the type called for by the proposed legislation would inject the judiciary directly into the administrative process established by Congress and by the state legislatures. This would seem to be an admission that pollution control regulation has failed and, that in order to obtain relief, private citizens, individually or as a class, must resort to the courts. We do not believe this is the case. Progress in pollution abatement is being made although, perhaps, not at the speed which pleases some individuals.

It is difficult to see how the complex factors of pollution control can be considered in an orderly fashion if each individual in a community is at liberty to resort to the courts in pursuit of private remedies. In this connection, it should be noted that Section 6 of the proposed bill would permit any individual to intervene as a party in "existing administrative and regulatory procedures provided by law." If this provision allows any citizen of a community to become a party to administrative procedures under the community's local pollution statute or regulations, it can only lead to confusion and delay in the work of the administrative body charged with enforcement.

A serious difficulty, which we believe is inherent in S. 3575, is that it merely states that any person may maintain an action to protect the air, water, land or public trust of the United States from *unreasonable pollution, impairment or destruction*. Nowhere in S. 3575 do we find a definition of what is considered to be

¹ See the statement of Mr. Shiro Kashiwa, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, before the Subcommittee on Energy, Natural Resources and the Environment, July 10, 1970.

unreasonable. Thus, the proposed legislation lacks standards. All that is necessary to bring suit is that a complaint "be supported by affidavits of not less than two technically qualified persons stating that, to the best of their knowledge, the activity which is the subject of the action damages or unreasonably may damage the air, water, land or public trust of the United States by pollution, impairment or destruction." Clearly, this is an inadequate basis upon which to bring a suit of this nature. Such suits should not depend on the subjective opinion of "two technically qualified persons."

Further, even if the court is able to determine what is "unreasonable pollution", the results of the suits could very well be discriminatory as between competing manufacturers, only some of whom might be sued. Another difficulty is that the proposed legislation places upon the defendant the burden of establishing that his activity is consistent with the public health, safety and welfare "in light of the paramount concern of the United States for protection of its air, water, land and public trust." Certainly the United States, as well as the individual states and local governments, and each individual citizen, has an important concern for the protection of the environment. States, local governments and individuals also have important concerns with respect to the operation of their local economies. The balancing of the many concerns involved is, as indicated above, a highly complex problem. To resolve every action seeking to abate pollution in terms of the "paramount concern" of the United States might well do injustice to other local concerns.

In summary, the American Mining Congress strongly opposes the enactment of S. 3575. We believe it interjects the judiciary into an area already adequately administered and controlled by Federal, state and local executive departments and agencies. Further, environmental cases are extremely complex and involved and the courts do not possess the expertise necessary to make reasonable judgments concerning the cases. In addition, the present language of S. 3575 lacks standards, and more importantly, we believe would encourage a spirit of contention and hostility rather than to develop the spirit of cooperation between government and industry, which is an absolute necessity if our environmental problems are to be solved.



