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ENVIRONMENTAL PROTECTION ACT OF 1971

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HEARINGS

KANSAS STATE UNIVERSITY

BEFORE THE

SUBCOMMITTEE ON THE ENVIRONMENT

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

S. 1032

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

Part 1

APRIL 15 AND 16, 1971

Serial No. 92-17

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ENVIRONMENTAL PROTECTION ACT OF 1971

THURSDAY, APRIL 15, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON THE ENVIRONMENT,
Washington, D.C.

The subcommittee met at 11 a.m. in room 5110, New Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Present: Senator Hart.

OPENING STATEMENT BY THE CHAIRMAN

Senator HART. The subcommittee will be in order.

This morning we will hear from two witnesses and before our calling of the first witness, permit me to read a not so brief opening statement.

This is the resumption of hearings that we have held on a bill introduced by Senator McGovern and myself. It is a bill intended to facilitate citizens suits to protect the environment. Last year we had 4 days of hearings on this proposal. I think a study of the record supports my feeling that most witnesses stressed the need for legislation of this character.

The bill did suggest some fundamental changes and it was much too late in the session to hope for full consideration of the bill by the committee.

Since that last set of hearings¹ we have had some significant developments. The Michigan Legislature last summer passed a similar bill which was drafted by Prof. Joseph Sax of the University of Michigan Law School. Professor Sax will be our second witness today. That Michigan Act has been in operation for more than a half year and I understand the experience of the courts with the law has been favorable.

In addition, controversy over bills of this type has been stirred by a speech in St. Louis last August by the Chief Justice. I think it not inappropriate to comment briefly on Chief Justice Burger's remarks as they bear on the bill before us.

In that speech, at one point, Justice Burger said:

Meanwhile, not a week passes without speeches in Congress and elsewhere and editorials demanding new laws—to control pollution, for example, and new laws allowing class actions by consumers to protect the public from

¹ See Senate Committee on Commerce hearings record serial no. 91-80.

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

greedy and unscrupulous producers and sellers. No one can quarrel with the needs, nor can we forget that large numbers of people have been without the protection which only lawyers and courts can give.

Concluding this section of his remarks:

The difficulty lies in our tendency to meet new and legitimate demands with new laws which are passed without adequate consideration of the consequences in terms of caseloads.

Now, the Chief Justice's concern for court burdens is soundly based and I share his concern. Some have inferred that the Chief Justice is saying that we ought not now to pass such laws as the one we are considering, S. 1032, if they will, in fact, expand the number of lawsuits. With this approach, whether it is or is not the position of the Chief Justice, I would not agree.

Even if litigation is significantly expanded under S. 1032, I would suggest that the expansion is justified. We heard from the former Attorney General Ramsey Clark in our hearings last year and he put it this way:

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.

It may be that our judicial system would have to be expanded to provide for the increased caseload. Or, as Ramsey Clark said, we may have to adjust the priorities within that system. The time is now for us to take major action to compel that adjustment. It is in part for that reason that the sponsors of this bill have suggested the elimination of threshold procedural defenses that consume a court's time en route to its examination of the merits of cases. And it is in part for that same reason that others have suggested an end to the fault principle that monopolizes so much time and effort in automobile accident litigation, hearings on which this committee will hold in a matter of just a few days.

Chief Justice Burger also dealt in his speech with a related but distinct issue—that of the balance between Federal and State court litigation. I say distinct because it is an issue which will arise even if we are somehow successful in removing current backlogs. On this point, he said, "As to the future I can do no more than emphasize that the Federal court system is for a limited purpose and lawyers, the Congress and the public must examine carefully each demand they make on that system. People speak glibly of putting all the problems of pollution, of crowded cities, of consumer class actions and others in the Federal courts. We should look more to State courts familiar with local conditions and local problems."

Now, he is right in underscoring considerations which Congress often may neglect. In this bill, Senator McGovern and I have attempted to deal with the problem of Federal-State balance by providing that suits authorized by the bill may be brought either in Federal or State courts. I would hope the Congress further could encourage Federal courts—and perhaps legislative history could be developed on this point—to refrain from handling cases

which, for the reasons stated by the Chief Justice and others, are more appropriately handled at the State level. If it is thought that specific statutory language is needed to achieve that result, such language should be added.

All of us are indebted to the Chief Justice for having given us the benefit of his experience on the bench. The caution he voices in the class action and citizen suit areas is sound, but the creation of legal rights to which the public is entitled is the responsibility of Congress. In exercising this responsibility there is another remark of the Chief Justice that we should recall. He referred to it in a decision in the District of Columbia Circuit Court. In that opinion, referring to the right of citizens to appear before the Federal Communications Commission, he cited with approval this statement:

Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience.

That is advice that both the Congress and the courts should heed, and advice that should be the basis for our consideration of this bill.

(The bill and agency comments follow:)

92D CONGRESS
1ST SESSION

S. 1032

IN THE SENATE OF THE UNITED STATES

MARCH 1 (legislative day, FEBRUARY 17), 1971

Mr. HART (for himself and Mr. McGOVERN) 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 1971".

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
4 shall be construed to prevent or preempt State courts from
5 exercising jurisdiction in such action. Any complaint in any
6 such action shall be supported by affidavits of not less than
7 two technically qualified persons stating that to the best of
8 their 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
6 may remand the parties to such procedures: *Provided*, That
7 nothing in this section shall be deemed to prevent the
8 granting of interim equitable relief where required and so
9 long 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
13 be deemed to prevent the maintenance of an action, as
14 provided in this Act, to protect the rights recognized herein,
15 where existing administrative and regulatory procedures are
16 found by the court to be inadequate for the protection of
17 such rights: *Provided further*, That at the initiation of any
18 person entitled to maintain an action under the Act, such
19 procedures shall be reviewable in a court of competent juris-
20 diction to the extent necessary to protect the rights recog-
21 nized herein: *And provided further*, That in any such judi-
22 cial review the court shall be bound by the provisions,
23 standards, and procedures of sections 3, 4, and 5 of this
24 Act, and may order that additional evidence be taken with
25 respect to the environmental issues involved.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Washington, D.C., April 21, 1971.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510.

DEAR MR. CHAIRMAN. This replies further to your request for the comments of the National Aeronautics and Space Administration on the bill S. 1032, "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."

The legislation would declare 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. To protect this right and exercise this responsibility, the bill would create a cause of action in equity, which could be maintained against any person by any other person, either on his own behalf or on behalf of a class of persons similarly situated for the protection of the environment from unreasonable infringement. This action could be brought in any Federal district court which had venue without regard to the amount in controversy if the activity complained of affected interstate commerce and a case or controversy exists.

To succeed, the complainant must show that the activities of respondent may result in an unreasonable pollution, impairment, or destruction of the air, water, land, or public trust.

The complaint in any such action must be supported by affidavits of not less than two technically qualified persons stating that to the best of their knowledge the activity complained of damages or may reasonably result in damage to the air, water, land, or public trust of the United States by pollution, impairment, or destruction. After the complainant has made a prima facie showing, the respondent then has the burden of proving that there is no feasible and prudent alternative and that the activity at issue is consistent with and reasonably required for the public health, welfare, etc., despite the damage to the environment.

The relief which the court is authorized to grant is purely equitable; money damages and fines are not provided for in the bill. However, by directing certain actions, the court may require respondent to incur otherwise unanticipated costs. Hence, the equitable relief could not only result in lost revenue due to inability to perform as contemplated, but also require additional outlays. State and local courts are not preempted from acting on causes of action in this area and existing administrative and regulatory procedures continue in force with the exception that the Federal district court could at its discretion grant interim relief pending an administrative determination of a case, and if the court was dissatisfied with the administrative procedure or result, it could grant its injunctive relief, other laws notwithstanding.

The persons subject to the bill both for purposes of maintaining actions and being sued are "any individual or organization; or any department, agency, or instrumentality of the United States, a State or local government, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States."

This bill would, in effect, authorize any individual who could get two experts to agree that some sort of damage to the environment was taking place, to sue in equity to stop such activity. All persons, including individuals, organizations, and governmental instrumentalities, could be the defendants in such a suit. According to the bill, the basis for granting or denying the relief sought would turn on the court's judgment as to whether the activity was necessary, and, if no other alternatives could be employed, that the environmental damage was "reasonable." This test of reasonability occurs throughout the bill.

In our view, the bill would place the courts in a role which they would not appear to be constituted to perform. The questions of necessity for, and

reasonableness of environmental damage resulting from, an activity involving a use, consumption, or wasting of air, water, land, or the public trust of the United States require a judgment not based on law. To make this judgment, the court must establish the risk/benefit or cost/benefit equations of the particular activity, and then choose for society what degree of risk or cost the society is willing to bear and what benefits the society will have or forego. Traditionally, this risk/benefit and cost/benefit choice has been made by the people themselves in the market place or in the political arena through the elective process.

Thus, it appears to us that the bill gives the courts responsibilities better exercised by the executive branch of the Government. Moreover, the courts could be placed in the position of overriding a legislative judgment. For example, a political unit, pursuant to legal procedures (such as a referendum vote or public rulemaking) could determine to fluoridate water or construct a dam; the bill would seem to give a court, at the request of any person, the right to review the substance of such judgment and enjoin the execution of such judgment if it failed to meet the court's view of necessity and reasonableness. There seems no justification for allowing courts to second-guess such judgments made by political units responsible to the electorate. Perhaps even more to the point, the equitable relief authorized by the bill could be sought by a person not even within the political unit exercising its choice.

Further, the bill would place the courts in a position of having to make technical determinations without the benefit of legislatively determined standards. The bill does not indicate what constitutes pollution or reasonable pollution, and the courts are directed to look beyond the determinations of administrative and regulatory agencies for a finding of reasonableness. This places the courts in the difficult position of having to hear highly technical, expert testimony and then evaluate it without adequate guidelines for such evaluation.

NASA would be affected by this bill to the extent that it would be subject to suits enjoining any of its activities which had an effect on the environment. Since many of NASA's activities could be seen as affecting the environment, NASA might well anticipate numerous suits under this bill. The agency might be placed in the position of having received a mandate from Congress to carry out a program and having been enjoined from doing so by a court. Also, since much of NASA's activity is highly technical and experimental, questions such as the reasonableness of one composition of a rocket fuel over another (each of which might affect the atmosphere in some respect) would simply not lend themselves to judicial analysis and decision.

From a program point of view, NASA would not be able to anticipate what might be deemed reasonable and thus could not accurately anticipate what steps it should take and what it should avoid. This would make carrying forward complex programs for which planning must be accomplished years in advance, extremely difficult and uncertain.

It is noted that a broad overall framework for dealing with pollution and other environmental problems is now being developed as a result of a series of actions by the Congress and the President, including the recently enacted National Environmental Policy Act creating the Council on Environmental Quality and the President's reorganization plans establishing the Environmental Protection Agency and the National Oceanographic and Atmospheric Agency. In our view, the objectives of S. 1032 can be accomplished within this framework.

Based on the above observations, that the bill could subject highly technical and experimental governmental activities including those of this agency, to an undefined test of reasonableness in the courts, the National Aeronautics and Space Administration recommends against the enactment of S. 1032.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

Sincerely,

H. DALE GRUBB,
Assistant Administrator
for Legislative Affairs.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C. 20850, April 22, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510.

DEAR MR. CHAIRMAN: This is in response to your letter of March 10 requesting comments on S. 1032, 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."

The bill finds that every person is entitled by right to the protection, preservation, and enhancement of the air, land, water, and public trust of the United States and has the responsibility to contribute to the promotion and enhancement thereof.

The bill provides that any person may maintain an action in his own behalf or in behalf of a class of persons similarly situated for the protection of the environment from any activity which affects interstate commerce.

Any such action is required to 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.

The bill provides that the court may require the plaintiff to post bond to compensate defendants when relief sought by the plaintiff is wrongfully granted.

The bill would provide statutory authority for class actions by persons not themselves injured concerning activities of which they have no direct information.

This Department defers to the Council on Environmental Quality as to the specific recommendations regarding enactment of the bill.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. PHIL CAMPBELL, *Under Secretary.*

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C. 20240, April 28, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington D.C.

DEAR MR. CHAIRMAN: This responds to your March 10, 1971, request for the views of this Department on S. 1032 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."

We recommend that the bill not be enacted.

S. 1032 would permit any person to maintain either an individual or a class action for declaratory or equitable relief—

"... 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 ..."

Any person engaged in such activity may be sued and the term person is defined as meaning any individual or organization or any department, agency or instrumentality of the United States, a state or local government, the District of Columbia, the Commonwealth of Puerto Rico, or a possession

of the United States. In addition, when the plaintiff in such an action has made a prima facie showing of harm as specified above, the bill provides that the defendant must then bear the burden.

" . . . of establishing that there is no feasible and prudent alternative and that the activity at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of its air, water, land, and public trust from unreasonable pollution, impairment, or destruction."

The bill provides that the action it authorizes would be supplementary to existing administrative and regulatory procedures provided by law and that in any action under such provisions the court may remand the parties to such procedures. The bill expressly provides for maintenance of an action where existing administrative and regulatory procedures are found by the court to be inadequate for the protection of rights recognized in the bill and that such procedures shall be reviewable at the instance of any person entitled to maintain an action to protect such rights.

The principle on which the bill is based is citizen participation in enforcement of laws to protect the environment and we support that principle. In this regard we approve, as a matter of general policy, of the bill's broad obviation of standing and sovereign immunity defenses to environmental actions. The citizens suits conceived by S. 1032 are, however, unsatisfactory for a number of reasons discussed below.

Before turning to these reasons, it is well to note the provisions for citizens suits contained in recently enacted and proposed environmental legislation. Section 304 of the Clean Air Act, enacted by the Clean Air Amendments of 1971, Public Law 91-604, generally authorizes any person to sue for abatement of violations of the Clean Air Act. Such a suit may be against the Administrator of the Environmental Protection Agency if he fails to perform a nondiscretionary duty. Thus, if neither state nor Federal authorities move to correct a violation of air quality standards, a citizen may obtain a Federal judicial determination of the existence of a violation and an order that it cease. By its express terms, this provision does not deprive citizens of such other remedies as they may have under other laws. While eliminating the obstacles of sovereign immunity and restricted standing to sue, section 304 nevertheless provides a valuable means of effectively and efficiently enforcing applicable laws. A similar carefully circumscribed citizens suit provision is found in S. 1014, an Administration proposed amendment to section 10 of the Federal Water Pollution Control Act.

In contrast to these provisions, S. 1032 is not directed to citizen enforcement of specified environmental requirements established by the responsible state and Federal agencies after opportunity for public participation but instead permits suit against any "unreasonable" impairment of the environment by any person, private or governmental. Section 6 of the bill appears to authorize the courts to decide substantive questions despite the existence of administrative machinery which has not been utilized. Where administratively established standards exist, S. 1032 also appears to permit the courts to change those standards and where Congress has not dealt with a particular subject involving the public trust, the court could apparently establish significant environmental law requirements. In thus conferring on the courts broad responsibility for determining what is an "unreasonable impairment" of the environment, S. 1032 forces upon the courts a task for which they are generally less well-equipped than legislative bodies and agencies. In contrast, section 304 of the Clean Air Act presents the courts with specific issues for decision on which policy has been established.

At the same time, S. 1032 would apparently supersede Federal and state air and water quality and land-use legislation by authorizing courts to establish new standards and to disregard administrative procedures found to be inadequate. In view of the thorough consideration which the Clean Air Amendments of 1971 received by the Congress and which other environmental legislation is likely also to receive, we seriously question the wisdom of legislation such as S. 1032 which would affect those other statutes in such a significant way.

In addition, S. 1032 is clouded by uncertainty about the scope of environmental values it would protect. For example, section 3(a) of the bill authorizes suits to protect the "public trust of the United States." A broad reading of the term public trust would embrace virtually every function of government. S. 1032 would frequently require Federal courts to decide issues where the

Congress has neither established policy nor provided substantive standards. It would permit suits challenging the propriety of virtually any governmental action. In addition, matters traditionally regarded as the responsibility of state legislatures and courts, such as local land-use regulation and nuisance law, could fall within the purview of Federal courts. The result would be a significant (and, we believe, unwise) shift of responsibilities between Federal legislative and judicial functions and between state and Federal functions.

In short, we believe S. 1032 is inappropriate both because of the uncertainty and breadth of its scope and because of the significant modification it would effect in present environmental protection responsibilities. While we thus object to the enactment of S. 1032, we affirm our support for the principle of authorizing citizen suits within a soundly conceived framework such as that established in section 304 of the Clean Air Act. In meeting other environmental protection problems, citizens' suits are an appropriate supplementary tool, as in the case of protecting water quality. We believe a carefully tailored subject-by-subject approach is preferable to that of S. 1032 which, in effect, passes problems of environmental protection to the courts under an uncertain mandate and within an unsound framework.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

MITCHELL MELICH, *Solicitor.*

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C. 20301, May 10, 1971.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense on S. 1032, 92d Congress, 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."

The purpose of the bill is stated in its title. If enacted, any person could maintain an action in certain district courts of the United States, in his own behalf or in behalf of a class of persons similarly situated, against any other person, for declaratory or equitable relief for the protection of the air, water, land, or public trust from unreasonable pollution, impairment, or destruction which affects interstate commerce where the actions results in a case or controversy. "Person" is defined as "any individual or organization; or any department, agency, or instrumentality of the United States, a State or local government, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States."

The bill provides that a complaint shall be supported by affidavits, of not less than "two technically qualified persons" that attest to the damage or expected damage of the subject activity. Normally, a plaintiff would not be required to post bond to maintain his action.

The Department of Defense supports the environmental goals of the bill. We recognize the importance of considering the environmental aspects of our activities, as well as the need to take actions that restore and enhance the natural environment. We have expressed support for a number of bills that would further this objective by establishing reasonable controls over activities, insofar as they affect the environment. We do not, however, favor S. 1032 for the reasons discussed below.

Nearly all human activity has some effect on the natural environment. In view of the missions of the Department of Defense, the number of persons it employs and the magnitude of its budget, it is inevitable that its activities will significantly affect the environment. Our objective with respect to environmental values is to ensure that the environmental consequences of our actions are evaluated and appropriately balanced against other consider-

ations. It is our desire to carry out as many activities as practicable in such a manner as to enhance the environment, and to neutralize, to the extent permitted by other considerations, the adverse environmental impact of other actions. We believe that laws pertaining to the environment should permit us to achieve this goal in a manner that is consistent with accomplishment of our primary missions.

While the Department of Defense is extremely concerned about the potential effect of its activities on the environment, it is also aware of the complexity of environmental problems. For example, there frequently is disagreement among equally qualified experts about the effect specific activities will have on the quality of the environment. Also, the state of existing technology may impose limitations on alternate methods of accomplishing necessary actions. Finally, economic or national security considerations may become vital elements in particular decisions. Because of the complex nature of environmental matters, we favor control measures that establish standards for environmental quality or regulate the use of environmentally degrading substances. We believe that such standards, established by law and regulation, can best integrate existing knowledge into environmental control measure and can provide procedures for appropriately balancing competing interests during the decision-making process.

The President's 1971 Environmental Program contains proposals for legislation that would, in conjunction with existing environmental laws, provide the basis for a comprehensive program to protect and enhance the quality of the human environment. This program would give the general public full opportunity to comment upon proposed standards and thereby contribute to the decision-making process. It also includes, in legislation to amend the Federal Water Pollution Control Act, a proposed authorization for citizen suits to enforce water quality standards, similar to the authorization that already exists in the Clean Air Act. It is our view that allowing the general public to maintain legal action to enforce environmental control in accordance with the vague standards set forth in S. 1032 would not contribute to efforts to improve environmental quality. Under the procedures contained in the bill, Federal actions that were started only after a thorough evaluation of environmental consequences and that were being carried out under carefully developed environmental regulations or standards could, because of disagreements about the adequacy of these standards, become the subject of court action and be delayed or stopped altogether. We believe that the very real possibility of such occurrences would pose a serious threat to the effective operation of the Department of Defense, including its efforts to reduce the adverse impact of its activities on the quality of the environment.

In addition to these general policy objections to S. 1032, we have noted numerous technical legal deficiencies in the bill, but defer to the views of the Department of Justice on these problems of legal interpretation.

The Department of Defense recommends that no action be taken on S. 1032.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there would be no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

J. FRED BUZHARDT.

NATIONAL SCIENCE FOUNDATION,
Washington, D.C. 20550, June 15, 1971.

Hon. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510.*

DEAR MR. CHAIRMAN: This is in response to your recent requests for the comments of the National Science Foundation on S. 1032, "The Environmental Protection Act of 1971."

The bill would permit private or class suits to be brought in U.S. District Courts against persons responsible for polluting or adversely affecting the environment.

While the Foundation favors efforts to improve conservation and anti-pollution practices, it has no direct responsibility with relation to the subject matter of the bill. The proposed legislation, however, raises a number of complex problems involving our national judicial system and national pro-

grams and policies aimed at environmental protection with respect to which the Foundation defers to the views of the Justice Department, the Council on Environmental Quality, and other appropriate agencies.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the viewpoint of the Administration's program.

Sincerely yours,

W. D. McELROY, *Director.*

ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C. 20460, June 17, 1971.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510.

DEAR MR. CHAIRMAN: Your Committee has requested the views of the Environmental Protection Agency on S. 1032, 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."

S. 1032, the "Environmental Protection Act of 1971," would authorize any person or class of persons to maintain an action for declaratory or equitable relief for the protection of the air, water, land, or public trust of the United States from unreasonable pollution, impairment, or destruction from any activity which affects interstate commerce. When the plaintiff has made a prima facie showing that the activity affecting interstate commerce has resulted or will result in unreasonable pollution, impairment, or destruction of such resources, the defendant shall have the burden of establishing that there is no feasible and prudent alternative and that the activity is consistent with and reasonably required for promotion of the public health, safety, and welfare. The court may then grant declaratory relief, temporary and 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 such pollution. At the initiation of any person entitled to maintain an action under this bill, such procedures would be reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized therein.

The Environmental Protection Agency recommends against enactment of S. 1032.

We endorse the concept of citizen suits in the environmental protection field as a means of making both government and industry more responsive to pollution control requirements and of giving private individuals, citizen groups, and communities a greater role in the enforcement of environmental protection statutes regulations. As you know, Section 304 of the Clean Air Act, added by the 1970 amendments, authorizes any person to sue for abatement of violation of air quality standards or limitations under that Act. In addition, the Administration proposals to strengthen the water pollution control enforcement program, S. 1014 and H.R. 5966, contain provisions authorizing citizen suits to enforce standards for water quality limitations established under the Federal Water Pollution Control Act, as amended.

Although we endorse the citizen suit concept, the broad authorization in S. 1032 to the courts to hear such suits is ill-defined and the bill lacks a clear standard for determining "unreasonable pollution, impairment, or destruction" of the environment.

The citizen suit provisions of the Clean Air Act and the Administration's proposed amendments to the Federal Water Pollution Control Act are directed toward citizen enforcement of specific pollution abatement requirements or standards promulgated by appropriate State and Federal authorities after opportunity for public hearings. S. 1032 is based upon no such administratively or legislatively established pollution abatement standards. Section 6 of the bill would appear to authorize the courts to decide substantive questions, without regard for the mechanisms provided in Federal law for administrative determination and review of such questions. In the case of

administratively established standards, the bill would appear to permit the courts to override those standards, and, in cases in which the Congress has not yet acted, S. 1032 would appear to invite the courts to write new Federal environmental law.

We are also concerned with the lack of a clear standard for determining "unreasonable impairment" of environmental values. If a private person or business may be sued for "unreasonable pollution," standards should be provided as to how this responsibility may be fulfilled and how the suit may be avoided. In addition, the phrase "public trust of the United States" is not defined, but apparently contemplates environmental factors other than air, water, and land. Under these circumstances, it is unclear what standards, criteria, or considerations are properly before a court. We believe definition and clarification of this concept and its relationship to legislatively and administratively established standards and requirements are essential.

While we support a reasonable extension and careful delineation of citizen suit authority, the provision in S. 1032 for a virtually unlimited citizen enforcement role could seriously reduce the effectiveness of EPA's regulatory and enforcement functions.

If, as a result of citizen suit action under S. 1032, the courts overrode existing standards with which municipal and industrial polluters have been directed by EPA to comply, EPA's environmental enforcement authorities, carefully developed over the past decade, could be vitiated. Inconsistent citizen litigation would hover over all EPA enforcement efforts, and this Agency's ability to require compliance with pollution control statutes and regulations could be seriously eroded. In addition, Federal efforts and resources which could more profitably be directed to research, facility construction, monitoring, and enforcement would undoubtedly need to be redirected to litigation.

We therefore recommend against enactment of S. 1032 by the Congress for the aforementioned reasons.

The Office of Management and Budget has advised that there would be no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

WILLIAM D. RUCKELSHAUS, *Administrator.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,

June 17, 1971.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510.*

DEAR MR. CHAIRMAN: This letter is in response to your request of March 10, for a report on S. 1032, 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."

This bill would provide for procedures whereby individuals may bring actions in United States District Courts against any person engaged in activities affecting interstate commerce whose activities damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction.

This Department wholeheartedly supports the proposals set forth in the President's Environmental Message of February 8, 1971, which are designed to provide a comprehensive and innovative approach to the pollution problems of today. These proposals will enable the Federal Government to substantially minimize the present risks to the environment and public health. The President's proposals to improve water quality, which include provisions authorizing citizen suits to enforce compliance with standards and requirements developed under the Federal Water Pollution Control Act, are destined to be administered by the Environmental Protection Agency.

We would therefore defer to that agency in determining the need for

the legislation embodied in these bills in light of the President's proposals and the adaptability of these bills to such a program.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

(S) JOHN G. VENEMAN,
Acting Secretary.

Senator HART. We welcome again to the hearings the General Counsel for the Council on Environmental Quality, Mr. Timothy Atkeson. Good morning.

We appreciate having gotten your statement and it will be printed in the record in full. As you go along, if there is any modification you would like to make, feel free to do it.

STATEMENT OF TIMOTHY ATKESON, GENERAL COUNSEL, COUNCIL ON ENVIRONMENTAL QUALITY

Mr. ATKESON. It is a privilege for me to appear before you to discuss S. 1032, the Environmental Protection Act of 1971. The principle underlying this bill, that individual citizens and private groups have a critical role to play in the implementation of our national environmental policies, is one with which the administration is in complete accord.

I thought before going into the details of the bill, it would be useful if I traced some of the events in the development of the Council's thinking in this area.

You will recall that, last fall, there was a review of the question of whether the public interest law firms should retain the charitable status of litigation in this area and the Council addressed itself in a memorandum on the subject to the Internal Revenue Service. You may also recall that in that memorandum the Council took the position "Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs."

As you will also recall, there was a successful result in that review and the Commissioner of the Internal Revenue Service was kind enough to say that the Council's advice had been useful.

The second development that I think is worth referring to is the implementation of the National Environmental Policy Act which, as you know, was signed January 1, 1970, and which has been a very interesting background for the consideration by your committee of the proposal that we have before us today.

I think something that has been a striking development has been the extent to which courts have found teeth in this statute and though the results are far from in, there are a number of very important decisions in under Section 102(2)(C) of that act. I refer to the decision of the District Court for the District of Columbia in the *Alaska Pipeline* case, the decision of the District Court for the District of Columbia in the *Cross Florida Barge Canal* case, and the decision of the District Court in Arkansas in the *Gillham Dam* case, all of which show that the requirements of section 102(2)(C) of that act are a very significant requirement.

In order that the citizen groups who are concerned about these

environmental problems not be unaware of the Federal Government actions on which environmental impact statements are filed, the Council revised its guidelines under the act to provide that in the case of an administrative action (which is other than a proposal for legislation or a report on legislation), the agency should make its draft environmental impact statement available to the Council and the public at least 90 days before taking action, and that the final statement and the comments received by agencies be available to the Council and public at least 30 days before taking action.

So that to the extent private groups are concerned about governmental action, and in so many cases it is a government permit which is tied in with private action, there is a greatly expanded apparatus for information on these questions.

The Council has begun to publish a publication called the 102 Monitor, which comes out monthly and which has in it a discussion of agency procedures and a tabulation of the draft and final 102 statements filed to date. You might be interested to know that in the last month, March, over 200 draft and final statements were filed and made available to the public.

As I say, under the National Environmental Policy Act, the Council recommended to the President that he issue an Executive order that all agencies develop procedures to assure the provision of timely public information and understanding of Federal plans and programs with environmental impact; and as I have said, the Council's guidelines give some very concrete backup to that provision.

A third area which I thought worth drawing your attention to is the development in the law with respect to the standing of citizen groups to challenge violations of the National Environmental Policy Act and to raise environmental questions. The Council subscribes to the broadened concept of standing to sue expressed in judicial decisions such as that of the second circuit last April in *Citizens Committee for the Hudson Valley v. Volpe*, on which the Supreme Court denied certiorari last year, and endorses the position of its Legal Advisory Committee that "where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with Federal environmental policy, as exemplified in the National Environmental Policy Act and in other legislation."

As you know, this issue is now before the Supreme Court in the *Mineral King* case, so we will have some further clarification coming down in due course on that.

Another procedural obstacle, that of sovereign immunity, is one on which our Legal Advisory Committee took the position that the assertion of this defense in litigation under statutes designed to protect the environment is inconsistent with the policy expressed by Congress in those statutes. The position of our Legal Advisory Committee is, I believe, based on the conclusion that the relevant statutes, probably in conjunction with the Administrative Pro-

cedure Act, amount to a congressional waiver of sovereign immunity. This view is supported by the court's ruling in the *Citizen's Committee for the Hudson Valley v. Volpe* decision of the second circuit I referred to earlier.

The Council certainly agrees that the defense should not be invoked where there is no legal merit to it—that is, where a suit falls fairly within a congressional consent or is not actually a suit against the Government within the doctrine of *Larson v. Domestic and Foreign Commerce Corporation*. That case was to the effect that where it is asserted that an officer is acting outside of his legal or constitutional authority the court may proceed to a consideration of the claim on the merits and that sovereign immunity only applies in those cases where the officer is acting within his legal or constitutional authority. As a matter of fact, we know of no decision holding that a citizen is barred by sovereign immunity from reviewing Government action under the National Environmental Policy Act.

We believe there also remains an important role for Congress in reinforcing the legitimate role of citizens suits in protecting the environment. A major precedent in this area was set in the enactment by Congress last year of section 304 of the Clean Air Act; and in my outline of developments since your last hearings that are important for your consideration today I would submit that section 304 is an extremely important development.

Generally, it authorizes any person to sue for abatement of violations of the Clean Air Act or of regulations under it. Such a suit may be against a private polluter, a governmental entity, or against the Administrator of the EPA if he fails to perform a mandatory duty under the act. The provision eliminates the obstacles of sovereign immunity and of restrictive notions of standing to sue, and the courts may award costs of litigation, including attorney and expert witness fees where appropriate.

We believe that this provision and provisions like this in other areas of pollution control will prove useful supplements to governmental enforcement procedures in the Federal statutes. If neither State nor Federal authorities move to correct a suspected violation of air quality standards, a citizen may obtain a Federal judicial determination of the existence of a violation and an order that it cease. In our view, this provision, which expressly does not deprive citizens of such other remedies as they may have under other laws, has the further benefit of encouraging State courts to treat violations of the act's standards as prima facie evidence of negligence or nuisance in private actions under the common law.

We see no reason why the approach in section 304 of the Clean Air Act should not be equally valuable in the enforcement of other clearly established Federal environmental standards. The Administration has taken an important step in this direction by including a comparable citizens suits provision in its proposed amendments to the Water Pollution Control Act transmitted to Congress by Administrator Ruckelshaus on February 10. To give you a specific reference on that, I note that the bill in the Senate is S. 1014 and in the House it is H.R. 5966, and it is section 10(k) of that bill.

I turn now to the bill before us in today's hearing, S. 1032. The approach taken in S. 1032 differs in several important respects from that of the citizen suits provision in the Clean Air Act and that proposed by the Administration for the Federal Water Pollution Control Act. It is not, like those provisions, directed to citizen enforcement of specified antipollution requirements or standards fixed by the responsible State and Federal agencies, after public hearings. Rather, it would give plaintiffs the right to sue to prevent unreasonable pollution, impairment, or destruction of the environment.

Our Legal Advisory Committee last year, recognizing certain common themes between section 304 of the Clean Air Act and the predecessor of S. 1032, advised us of its support of the principles of both bills with certain provisos reflecting the differences between the two.

S. 1032 in section 6 appears to authorize the courts to decide substantive questions even where there exists machinery for administrative determination which has not been utilized. Where administratively established standards exist S. 1032 also appears to permit the courts to override those standards, and where Congress has not yet acted, the bill apparently contemplates that the Federal courts will write new Federal environmental law. Where administrative procedures have been utilized, the bill makes agency determinations reviewable to the extent necessary to protect the shall be bound by the provisions, standards, and procedures (ap-rights recognized herein, and provides that the reviewing court plicable to original suits under the bill), and may order that additional evidence be taken with respect to the environmental issues involved. I am not certain the extent to which this language is intended to alter accepted doctrines of the scope of review of administrative findings of fact.

Our legal Advisory Committee attached provisos to its resolution which were as follows:

In any legislation on citizen environmental suits—the present rule requiring exhaustion of administrative remedies prior to court action should continue to be followed where applicable; courts should be permitted to refer matters raised in suits before them to appropriate administrative agencies, whether or not the agencies have previously acted on them; incidentally, which is a feature in your bill; and third, there should be further study of the problem of the extent to which courts may review administrative environmental determinations.

The full text of our Legal Advisory Committee's resolution is attached as the last two pages of my statement. The Council agrees that each of these concerns expressed by our Legal Advisory Committee should receive careful attention to insure that legislation to expand the citizen's role in environmental enforcement does not actually hinder such enforcement by disregarding the special competencies of the different branches of government and an appropriate division of labor between Federal and State courts.

More specifically, the provision of S. 1032 raises a number of problems to which we do not have satisfactory answers. As you undoubtedly know, Professor Sax, who will be testifying after

me in support of this bill, is one of the distinguished members of our Legal Advisory Committee. I only mention this to say that when the Council considered these issues we invited a most careful discussion of all points of view and the issues that I am about to raise about S. 1032 were raised only after very full deliberation.

I now turn to those problems.

Senator HART. Deliberation by the advisory committee?

Mr. ATKESON. By the Council. (1) Will the lack of any standards for determining what is unreasonable impairment of the environment force upon the courts a task they are not institutionally equipped to handle? The Senate Public Works Committee, in its report on section 304 of the Clean Air Act, recognized this concern and stressed that the citizen suits provision they had drafted would present specific issues for decision on which policy would already have been established:

Section 304 would not substitute a 'common law' or court developed definition of air quality. An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision. Therefore, an objective evidentiary standard would have to be met by the citizen who brings an action under this section.

In contrast, section 4(a) of S. 1032 would require the courts to determine whether an activity "is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of" the environment—a determination in which the courts in many cases would not have the benefit of administratively or legislatively set standards, and they would have some very difficult policy conflicts. The difficulty faced by a court in such a situation was recently expressed by the Supreme Court in declining to exercise original jurisdiction in *Ohio v. Wyandotte Chemicals Corporation*.

In my previous appearance before your subcommittee in your hearings on the Refuse Act, you will also recall the concern expressed by Senator Baker that Congress, rather than the courts, should establish water quality standards.

A second problem is the uncertainty that exists about the scope of the environmental values that S. 1032 would protect. Section 3(a) of the bill authorizes suits to protect "the air, water, land, and public trust of the United States." The first three items in this listing are apparently intended to encompass all aspects of the physical environment, leaving some doubt about the meaning of the additional phrase, "public trust." I am familiar with Professor Sax's writing on the use of this concept in certain common-law decisions, but it is not clear what would be the legal effect of its inclusion in this bill. Specifically, we ask, is it intended to impose court-determined restrictions on the freedom of both the Federal and State governments to use public lands? Is it intended to restrict the uses to which private persons can put their lands, or to establish public easements over private lands that have scenic or other special values? Such important steps, if intended,

should be taken only with a full understanding and clear statutory delineation of the legal changes that would be effected. You will note that the President, in this year's environmental program, has proposed new Federal legislation to develop State-administered land use programs and to regulate strip mining. These, it seems to us, are the kind of specific legislative guidance we need in defining the public interest in our use of land.

A third problem, since the person who under S. 1032 can enforce the right to restrain unreasonable pollution of the environment includes both State and Federal government is, "Are the Federal and State environmental protection agencies to move over to S. 1032 as their basis for regulation?" I believe under the Michigan Act, a number of the actions brought have been brought by the Michigan Environment Protection Agency. If this is the case, at a minimum, there should be a clearly defined correlation of this bill and existing Federal and State pollution control legislation.

S. 1032 imposes on private persons the responsibility to contribute to the protection and enhancement of the air, water, land, and public trust of the United States and they can be sued for any unreasonable impairment or destruction of the environment; but the Act has no standards. An industry might conceivably build a quiet expensive new plant or treatment facility in reliance on the existing Federal pollution control standards and then be subject to suit after it has made this investment, under S. 1032, on the ground that there was still an unreasonable pollution or impairment of the environment.

In our judgment, the credibility and effectiveness of the Government as an environmental regulator would be seriously reduced if neither the Government nor industry have any insurance that compliance with Federal, State and local standards would preclude suit and enforcement of new judicially created standards.

A fourth problem to which I wanted to draw to your attention was whether we serve the interests of effective Government by instructing the courts to disregard administrative and regulatory procedures they find inadequate. We think there is plenty of room for improvement of administrative machinery. But we think the way to do that is by reform of outmoded procedures and to focus on the election and appointment of responsible administrators. If we need statutory deadlines to get things done we can enact those as we did in the Clean Air Act.

The recent decision by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe* indicates that the courts will be diligent in applying procedural safeguards designed to protect Federal environmental policies.

A fifth problem we have with S. 1032 is "Will factual determinations by agencies charged with environmental responsibilities be remade de novo on judicial review?" One of the points made I think by Senator McGovern in his discussion of this measure on the floor of the Senate this year was that these are barriers to effective citizen participation in administrative and regulatory procedures. We have had a further look at the question and we find that the major regulatory agencies are becoming increasingly open to participation by citizens and public interest groups.

To give you concrete illustrations, although a comprehensive tabulation was not possible in the time available, we have cited the procedures of the FPC, the AEC, the FCC, and we have drawn your attention to the standard applied by the courts in the case of the Department of Agriculture's regulation of pesticides which, of course, would now be applicable to the Environmental Protection Agency.

We feel that there is unprecedented acceptance of the value and legitimacy of citizen participation in administrative and regulatory procedures. If obstacles remain in specific instances, consideration should be given to their removal—by legislation where appropriate. Full citizen participation does not require a duplication of administrative and judicial functions.

A sixth problem with S. 1032 is:

Is it desirable to force the Federal courts to go into environmental regulation beyond the areas where the Federal Congress has acted? Specifically, unless Congress sets Federal policy and standards in these areas, should Federal courts be called upon to decide issues of local land use regulation and nuisance law, which are traditionally regarded as the responsibility of State courts and legislatures?

You, Mr. Chairman in your opening statement noted the same question in your comment on Chief Justice Burger's speech to the American Bar Association last August.

To direct the Federal courts to decide what is reasonable in all areas affecting environmental quality would entail a major shift in Federal-State relationships.

A final problem with S. 1032 to which I wish to draw your attention is a characteristically lawyer's question and that is the eleventh amendment, which you will recall provides that:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

I am informed that by judicial construction this also prevents the Federal Government from authorizing suits by citizens of a State against their own State, so that this would certainly be a legal problem for some of the implications of this bill.

I, therefore, question the present unqualified authorization in section 3(a) of citizen suits against States or their agencies or instrumentalities.

We raise these problems because we think the issues you have addressed in introducing the bill are important ones and that the hearings you have been holding are certainly a useful way of getting a careful focusing on this. We think that a more promising line lies in the implementation of the National Environmental Policy Act (NEPA) because that act is now in force and we are getting rulings on it from the courts and I think we are going to see within a fairly short space of time what sorts of environmental protection it might be capable of.

It would be premature to rule out the impact that the NEPA provisions may have, at a time when environmental plaintiffs are aggressively pressing the courts to give them judicial effect. I mentioned a number of decisions, in the *Alaska Pipeline* case, the *Florida Barge Canal* case and the *Gillham Dam* case, and I think

that the future course of decisions may indicate that NEPA provides a very effective means of judicial enforcement of national environmental policy. If so, it would appear to be a tool that does not share many of the difficulties presented by S. 1032. In the first place, the legislative history of NEPA makes clear that its commands are to be integrated with existing regulatory procedures, preserving the specific Federal pollution-control standards. Furthermore, NEPA is addressed to Federal Government activities, which present many of the most important environmental questions, and would not get the Federal courts involved in local and purely private disputes.

If you couple this role of NEPA with the citizens suits provisions like that in the air quality area and that which we have proposed in the water quality area, I think we have a formidable range of protections coming into being in the environmental area, the effect of which should be assessed before we go further.

In conclusion, we are unable to support S. 1032 and instead favor specific legislation by Congress in the various environmental problem areas—water quality, air quality, oil spills, ocean dumping, pesticides, toxic materials, noise, land use policy, strip mining, power plant siting and so forth—rather than throwing these problems into the courts to set standards and areas of regulation. You will notice that these are all items on the President's environmental action agenda. This is where we will put our prime reliance, and we invite the support of all those interested, as this committee is, in building meaningful environmental protection for citizens.

Thank you, sir.

Senator HART. Thank you, Mr. Atkeson. As always, your presentation to the committee is thoughtful and I think balanced.

Now, let me ask for your reaction to some of the specific objections or reservations that you note, and I would encourage Mr. Bickwit to pursue any others that he thinks would be useful to develop for our record.

Your first specific point goes to the appropriateness or the capacity or the ability, really, of courts to handle certain of the matters which the bill deals with. That is item No. 1.

Now, I am assuming that what you are referring to is the admittedly tricky business of balancing competing interests, especially when you are in a highly technical area, because that is what you have to do if you are going to determine what impairment is unreasonable.

Now, that sounds like a pretty sobering caution against proceeding further except, as you realize, our courts have been doing that very thing for longer than you and I have been out of law school. Is that not what they do already in malpractice cases and railroad accident cases, product liability cases and a whole range of areas where there is a high degree of technicality and lots of competing interests but nobody says that we should take that kind of jurisdiction away.

Why do you say that we should not add it?

Mr. ATKESON. Professor Sax had some pretty good illustrations of the complicated areas courts are able to go into. I think something that marks off the environmental protection problems from

such complicated litigation as malpractice or a patent suit is that it is not purely technical.

There are some very tough, almost political, questions of whether, for example, the courts should decide that all the industries on the shores of Lake Michigan shall be held to the highest standards which technology is capable of in treating of their discharges or whether that standard—and the question of what investment that translates into in actual terms—ought to be dealt with by legislation and administrative enforcement.

So I suggest in the environmental protection area you get into some very big costly questions of national policy. It is not purely the complexity, although there is a technical aspect which is sometimes hard.

Senator HART. I suspect that we will never really find ourselves in complete agreement on this subject. I could translate part of your answer this way. Those political judgments ought not be entrusted to courts. Let administrators handle it in an undemocratic fashion. Do not let the people get into a court and let the court make that judgment.

I know that is a harsh translation of what you said, but is it completely inaccurate?

Mr. ATKESON. I think it is inaccurate, Senator. What I think we have been asking here—and what we have talked previously about in the Refuse Act area—translates into:

To what extent should this type question be decided by the courts under a rather general law and to what extent should Congress pass legislation in this area to be taken as a guide to what Congress wants? Should the extension of Federal-State water quality standards to intrastate waters, for example, be left to Congressional decision?

So it is more our position that Congress ought to be setting policy in this area rather than the administrators.

Senator HART. What is Congress going to do about funding an answer to the Great Lakes Basin problem that you have raised? Do you want us to legislate things like that?

Mr. ATKESON. I hope that—I believe the group who are concerned in this area have made representations to the Senate Public Works Committee and I think this kind of problem is being considered in the hearings on water quality legislation.

Senator HART. You want us to write tariffs and statutes if that fails? There are three candidates for doing this: the Congress, the administrators, and the courts; and I would nominate Congress last as the one most appropriate to stand up to that kind of a lobby and technical jargon.

Now, on the second point that you make, this concept of public trust, you have mentioned several times the fact that Professor Sax will be heard today and reminded me that this is his special field. I am sure he will react to the comments you made with respect to your concern about the public trust concept here.

But you ask a question in your testimony. You ask whether the bill that we are considering intends to impose court-determined restrictions on the freedom of both government and private individuals in their use of the land. My answer is yes.

I know that makes the debate a little more intense, but it clarifies the burden. Sure, if the courts are already imposing these kinds

of restrictions—and I do not see anything wrong and unusual in their doing it—we welcome the development of State land-use plans which are included in the administration bill, as you remind us, but that bill does not require those plans and they are not going to come into being the day after tomorrow anyway.

It would seem unwise to me to throw out a court initiated body of law regulating the use of land. I would see some value in facilitating its enforcement by people in the fashion outlined in the bill that we are discussing.

I will not ask you a question. If you want to react to that, fine, but I think it is my reaction to your point.

Mr. ATKESON. My question was, "What do you mean?" and you have certainly clarified that.

Senator HART. Then, on the third one of your concerns, is it where the Government is a plaintiff and there is not a clear correlation between the remedy this bill would provide and the existing Federal and State legislative proceedings? I would answer for clarification purposes that we would here provide an additional tool for pollution control to be used at the discretion of government. There really was not any clearly defined correlation between the old Refuse Act and the Water Pollution Control Act last year, and yet you were glad you had the Refuse Act, I am sure, when the mercury problem surfaced.

What clearly defined correlation do you offer among the various weapons available to the Government under your S. 1014 to fight water pollution? Is there a correlation there?

Mr. ATKESON. Between S. 1014 and the Refuse Act?

Senator HART. No. You are expressing reservations with respect to our approach, wondering if there is not an absence of defined correlation between our remedy and existing remedies. What correlation do you offer among the various tools available to the Government under S. 1014 to combat water pollution?

Mr. ATKESON. Well, S. 1014 is an amendment to section 10 of the Federal Water Pollution Control Act, so it is actually just a revision of a part of the code on Federal water quality that has been developing for the last 15 years and it is integrated with that.

Senator HART. That it is hitched to water quality standards is your answer?

Mr. ATKESON. Yes.

Senator HART. You have two somewhat similar objections that you have numbered 4 and 5, and I think now we are at the point where we may see more clearly the basic differences that exist between us on the matter of citizens' suits.

Now, your bill, your water bill, calls for suits to enforce those standards, and I think it recognizes the failure of agencies to pursue adequate enforcement of the rules that they lay down. You arm the citizen to move in in such a situation and that is good. That is progress. But the failure of agency discretion is not found just in the matter as it exists at the enforcement level. Agencies have failed in their rulemaking function, in their standard-setting function, and in their adjudicatory function—approving airports or name your favorite poison or whatever it is.

Your solution on that score is not to widen court review of the agency action, but our bill would. You would call for more public

hearings and consultations and fuller citizen participation in the administrative process.

The view of those of us who have introduced the bill that is the subject of our hearing today that your approach does not get to the heart of the problem. You have reminded me that Professor Sax in his book cites instances where administrators have prejudged issues against the public interest and you could talk and consult and review and dance around with them forever and they would not change their minds. That is why those citizens who are committed to the protection of the environment, I suspect, will not be satisfied with the administration's approach in this area. They want more. They want the right to argue their case against an airport not just before the Federal Aviation Agency, which lives with the very crushing burden of finding airport space; they want to have the competing claims presented and argued before a court.

Let us take the FAA again on an issue like the airport. If the agency acts unreasonably, our bill provides—and we argue it is right—the citizen the right to full judicial review of the merits of the agency's action.

Now, that is not a question. It is a reaction to your point in order to make clear for the record the basic difference in our approach. But if you feel that the record would be helped by some response to what I have said, feel free to make it.

Mr. ATKESON. Senator, I am not sure this will clear the record, but let me say that the citizen is not as helpless at the moment in the face of your airport problem as it might appear to some. For one thing, the National Environmental Policy Act gives them a handle to require the filing of an environmental impact statement and, according to some courts, the filing of an adequate environmental impact statement.

Now, if you take the Supreme Court's rule in the *Overton Park* case that the court is going to hold administrative agencies to the letter of the law on procedural requirements to protect environmental considerations, I would think that the FAA is going to face a quite difficult court test unless it gives a very full and fair review and gets, of course, the comments of all the expert agencies so that the matter is fully aired in public.

Whether a court would make a better decision than the FAA once all those things are out on the table in public, I am not entirely sure; but it may be that if the FAA made something that is in the minds of many an unreasonable judgment there might be a further challenge under the National Environmental Policy Act. No court has gone that far yet, but I am suggesting that may be a possibility in future decisions.

Senator HART. Well, in the case you cite, though, did not the court indicate that it could not overturn the agency's decision unless there was a clear error of judgment? Clearly, the citizen can obtain relief now from a court if the agency either acts without having received the Council's comment upon the environmental impact or the agency carelessly has indicated that it received but did not read the Council's report, and it is unlikely that it would acknowledge that. But once it is established that the comments have been before the

agency, do you take the position that a court, nonetheless, can question for the agency's judgment?

Mr. ATKESON. A brief procedural comment first. The requirement of NEPA is that the agency do the detailed analysis and get the comments of other agencies so that when you get into litigation it is not so much the comments of the Council on Environmental Quality, which are not really a factor in the litigation, but the agency's compliance with the statutory requirements.

What I am saying is that if you look at the facts of the *Alaska Pipeline* case and you look at the facts of the *Gillham Dam* case, you see the court appearing to enforce a procedural requirement but also saying that this is not an adequate treatment of the subject. Then if you get on to what is an adequate treatment of the subject, if you enforce certain procedural requirements in the consideration of certain environmental objections, it may lead you to quite a different substantive outcome.

Senator HART. Well, if what you are saying is that while the court appeared to be making a procedural decision it actually was making a substantive judgment, then why do we not write the law clearly authorizing them to do just that, which is what our bill would do?

Mr. ATKESON. I think the courts find it much easier to work on a procedural basis when reviewing administrative agency decisions, and that in the case of this FAA decision we will have a sounder result if we get a full, fair, bona fide consideration of all the factors the National Environmental Policy Act requires than we would if you just say let the courts decide the thing de novo or decide what is reasonable.

Incidentally, in airport siting, that is just the kind of question we think should be addressed in statutory provisions like our Land Use Policy Act, where new airports are treated as key environmental developments in the State land use plan. You know we have this proposal on powerplant siting, a similar problem, where we think again the legislative framework for solving these problems is the way to start at them rather than just go from court decision to court decision.

You probably are aware that the *Scenic Hudson* case has been in the courts and administrative agencies now for 7 years and we still do not have an outcome.

Senator HART. I agree with your statement that courts can more comfortably handle technical matters, but there have been some clear instances in our judicial history where, using the explanation that the following technicality gives them the basis for throwing out the administrative decision, they then describe something that is, whatever else it is, not a technicality; it is a substantive judgment; and it would be much healthier, I would think. For us by legislation to make clear that they can make the substantive judgment if it is desirable, and not compel them to use in this new developing of environmental protection the old fraud of labeling the decision as one based on a technicality and then confusing law students as to why it is a technicality. Our bill at least would eliminate that problem.

You mentioned the legal advisory committee. I do not know whether it is appropriate to ask you or wait for Professor Sax, but

let me ask: Turning again to the Administration bill, S. 1014, is my information correct that your legal advisory committee recommended that the existing restrictions on court review of administrative decisions be eased substantially or abolished?

Mr. ATKESON. Senator, the text of that resolution of the Legal Advisory Committee—

Senator HART. You did tell me that it was at the back.

Mr. ATKESON. It is attached. I would have to take a quick look at it.

Senator HART. So do I. I guess this would be the source of the report given to me. It is the sense of the advisory committee that certain substantive and procedural impediments to the conduct of such litigation, such private litigation, should be abolished or substantially eased, including—and then they list five—lack of standing and sovereign immunity. Do you agree on those two?

Mr. ATKESON. Yes.

Senator HART. I am not sure the Justice Department has yet gotten the word on sovereign immunity or standing.

A third is the extent to which environmental decisions by administrative agencies, particularly those involving conflicting values and proposed dispositions of natural resources under the rules for review of administrative decisions, are required to be sustained unless arbitrary or capricious.

Do you buy that?

Mr. ATKESON. That is a pretty complicated transaction to purchase without some—

Senator HART. It is really a fancier way of putting the thing we were reviewing a moment ago, is it not, the technicality and/or substantive issue?

Mr. ATKESON. Well, we have tried to be specific on this point in point 5:

Recent developments in judicial doctrine, permitting closer judicial review of agency findings within the framework of accepted doctrine, would protect against agency misdirection without confusing the fact-finding and appellate roles.

I hate to refer to footnote technicality, but footnote 3 of my statement refers you to what we think are some very useful suggestions made by Mr. Sive in his Law Review article and some very useful examples of court flexibility in this area. So that is why I have to say my answer is rather technical.

Senator HART. Which again reminds me of the court explaining that it is making a technical judgment and then launching off.

Well, they added two other areas where they recommend easing or abolishing the existing restrictions on a court review, the absence of a clearly stated substantive right to proceed in Federal courts against unreasonable pollution and impairment or destruction of the environment resulting from an activity that affects interstate commerce.

Mr. ATKESON. Section (2) (d) is the heart of your bill, and that is where we say there should be statutory provisions like section 304 of the Clean Air Act or the one we proposed on water quality to authorize citizens suits.

Senator HART. The last of their items, the imposition of bond requirement, you did not make any comment on.

Mr. ATKESON. No. We think that bond requirements should not be such that citizens are effectively frustrated from raising issues under the National Environmental Policy Act. As you probably know, the bond in the *Alaska Pipeline* case was \$100.

Senator HART. Well, has the Council endorsed any legislation that is intended to liberalize the judicial review of administrative discretionary actions?

Mr. ATKESON. I think at the present time we adhere pretty much to one of the thoughts that is expressed in here, that many of the critical issues of administrative action may properly be viewed either as questions of law to be determined by the reviewing courts or the courts can set aside agency determinations where the agency has acted unreasonably by not taking into consideration all relevant factors. The National Environment Policy Act and similar legislation creates a whole new broad spread of relevant factors, and I think we would prefer to see the courts work on this line in their review of administrative action rather than propose some new legislation in this area at this time.

Senator HART. Well, that returns us to our basic difference, at least my concern, that what you are really saying is that, no, we do not want legislation to open to the citizen the opportunity to get into the meat and substance, but where there really should be that right, then make the court claim that all it is doing is a technical review.

I continue, though leaving that point, to have the feeling that that may be the road on which we are heading unless we do make clear the right of the citizen to take the administrative decision to a court and to have the court free not to pretend it is just checking the file as to proper entry and date and so on; but actually checking to see if all considerations, all elements, all factors, all concerns have been evaluated by the agency.

I reacted in my opening statement to that sixth item that you raise, and you remind us about the 11th amendment, which is an often forgotten part of our basic structure; and, as everyone does when cautioned to remember the Constitution, I respond by saying, yes, we will remember the 11th amendment.

Mr. Bickwit.

Mr. BICKWIT. You mentioned that the factors relevant to your water pollution bill are also relevant to other areas where the Federal Government either sets or approves standards in the environmental area, and you have also introduced in that bill a provision which is consistent with that, but it is not carried over into the other provisions of your environmental package.

I wonder if I might ask the simple question of why you have a citizens suit provision in the water pollution bill and not in the other standard-setting elements of the President's environmental package?

Mr. ATKESON. Well, that is a fair question and I think what you have to satisfy yourself about in answering it is "Where do we have pollution control areas where the Federal standards are sufficiently established for the citizens suit role to be useful?" This question has been raised, for example, with respect to ocean dumping. It seems to me a fair extension of the principle in the water quality area to apply it to ocean-dumping, although there may not

be too many citizens in a position off our shores to know about ocean-dumping violations, although that may undoubtedly vary. But it is a fair question that has been raised in hearings.

Mr. BICKWIT. Are we not going to have standards in some of these other areas?

Mr. ATKESON. In the water quality and ocean-dumping areas, certainly.

Mr. BICKWIT. In the noise area and the pesticide area and the toxic substance area?

Mr. ATKESON. Take noise, for example. The administration's noise bill is the first time, other than the noise study provision which was enacted by Congress at the end of last year, where you have had Federal legislation of this type. I would be hard put to say that there are as yet clearly established standards. It would seem to me more logical to have enactment in this area of some regulation and some feel for what enforcement by citizens would be useful, and then consider citizen suits as an additional enforcement technique.

Mr. BICKWIT. Well, the citizens suit provision of the noise pollution bill would not take effect until the standard-setting provisions of the noise pollution bill took effect.

Mr. ATKESON. You are right. Our thought was first to put to Congress the question "What sort of standards do you want to legislate in this area?" and then have some regulation, and see what is in fact regulated, and then determine whether a citizens suit provision would be useful.

Mr. BICKWIT. Are there any federally approved standards on intrastate waters as of now under existing water pollution law?

Mr. ATKESON. Yes.

Mr. BICKWIT. Federally approved standards for intrastate waters?

Mr. ATKESON. Intrastate?

Mr. BICKWIT. Intrastate waters.

Mr. ATKESON. Yes; in some cases.

Mr. BICKWIT. But not in many cases? Mostly not?

Mr. ATKESON. Yes.

Mr. BICKWIT. And are you not authorizing citizen suits for the enforcement of those standards once you get them?

Mr. ATKESON. Yes; but I think in the water quality area where you have been having Federal standard-setting for 10 or 15 years, you are much further down the road than you are in, say, noise. But this is obviously the kind of question which Congress will want to consider as it is looking at these bills. But I would suggest that there is a real difference between our experience on water quality where we have much more experience than there is yet on noise pollution.

Mr. BICKWIT. You mention that the courts are institutionally ill-equipped to handle the matters which we deal with in S. 1032. You then said that they were not institutionally ill-equipped to handle the technical matters, if I understood you correctly, but rather, ill-equipped to handle the political matters.

Are you removing from the controversy between us the issue of whether courts are competent to handle technical matters?

Mr. ATKESON. Let me give you an illustration of what I had in mind. The Supreme Court in declining to take original jurisdic-

tion in the suit of *Ohio v. Wyandotte Chemical*, referred to an earlier precedent, involving the suit of *New York v. New Jersey*—or maybe it was *New Jersey v. New York*—for dumping in the New York bight, as illustrating the sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand—involving interstate air or water pollution. The Court in the earlier case had expressed the view that such disputes could be solved better through the efforts of elected representatives than by proceedings in any court however constituted.

If, for example, regulation of ocean dumping involves a cost of \$100 million to the city of New York to dispose of its waste in another fashion—it is a big political question which Congress should decide.

Mr. BICKWIT. So it is both technical and political?

Mr. ATKESON. Yes.

Mr. BICKWIT. In your S. 1014, do you not, in effect, admit that the court has technical and political competence in this kind of pollution question?

Mr. ATKESON. As I recall, what we say is that a citizen or any person can commence a civil action against any other person who is alleged to be in violation of any standard or limitation under this section or a final order issued by the administrator or State with respect to such standard or limitation.

Our thought is that that is a reasonably specific indication of what the courts would enforce and is quite similar to the concept of the citizens suit provision in the air quality bill.

Mr. BICKWIT. There is one difference. It says that when the court enforces its standard it must take into account the practicability of compliance. Does that not require the court to make the rather delicate interest balancing political/technical judgment which you say they are ill-equipped to make under our bill?

Mr. ATKESON. Well, that involves the practicability of compliance in that particular case. Presumably, the courts will have available to them some more general rules that will give them an orientation on how to decide the suit, whereas in the case I suggested where the State of New Jersey sues the State of New York for dumping in the New York bight, under your bill there are no standards at all.

Mr. BICKWIT. Where do you get standards under your bill for practicability?

Mr. ATKESON. Well, the practicability issue in water quality cases will be, for example, addressed in the guidelines which EPA is about to publish on 22 industries on what is meant by secondary treatment.

Mr. BICKWIT. EPA is going to be prescribing schedules under this bill, as I understand it, standards and schedules. When the court looks at those standards and schedules, the court under your bill can disregard those standards and decide that it is impracticable to comply with those standards and schedules. Is EPA going to give them guidance for deciding when they can disregard what EPA has done?

Mr. ATKESON. I think my basic point is that a court moving into a question under this section 10(k) water quality citizen suit

provision has got much more guidance as to what is relevant and what is expected and what is reasonable for the industry than if New York or New Jersey were to sue New York under your S. 1032 for dumping in the New York bight.

Mr. BICKWIT. What guidance does it have for practicability? How does it determine what is practicable?

Mr. ATKESON. You have the effluent standards that will be issued by EPA.

Mr. BICKWIT. It is disregarding the effluent standards in this case. It is looking at the effluent standards and deciding if it is practicable to comply with those standards. Where is the guidance?

I suggest there is none and that the way you make that decision is by making this rather delicate interest balancing between political considerations on the one hand and technical considerations on the other, precisely what we call for in S. 1032.

Mr. ATKESON. Now, do not get the impression that the court will not have guidance on the practicability issue. What will happen is that a citizen will haul an industry into court and say, "Either the Federal or State people who are supposed to have regulated you and applied a standard governing your discharge have not done it and I am going to see that a court does it. The court is already going to have before it the general guidelines that EPA has issued for that industry as to what is the appropriate level of treatment. There are going to be probably in that State some general timetables for moving to that level of treatment. This citizen suit is where the citizen is saying, "I cannot wait for the administrative agency to enforce the law. We are going to have the court address the issue. For some reason the State enforcement people have been dilatory about applying it to this particular industry. The industry has been applying for extension after extension and it is now 3 years past the deadline for everybody else."

In that case the court will not be deciding *de novo*; they are just hearing the industry's argument that it will throw a thousand people out of work if we close the plant tomorrow and our investment is worth so much and it costs so much to put in the standard of treatment that EPA requests.

Mr. BICKWIT. That is what we want under our bill.

Mr. ATKESON. But I am saying that the court decision under our bill is surrounded by much more guidance than is available by just the general test of what is an unreasonable impairment of the environment in your bill.

Mr. BICKWIT. It seems to me the only way the court can get guidance on what is practicable is by deciding cases and looking around to what cases it has decided before, the old common law way of getting guidance on what is practicable.

In addition, there is one major distinction, I think, between what the administration is suggesting in S. 1014 and what we are suggesting in S. 1032, and that is if I read S. 1014 correctly, that the court is only competent to say that it is impracticable to comply with the standard. In other words, they can only say that the administrator is being too tough. We want to make them able to say that the administrator is being too lenient.

If I read S. 1014 correctly, the administration's position on citizens suits in this area is that the courts are competent to overrule administrators when they are too tough but incompetent to overrule them when they are too lenient.

Is that consistent and is it fair?

Mr. ATKESON. No. If you look at the language of the proposal, section 2, the limitations on when you can bring an action, it says, "A defense is that the United States has commenced and is diligently prosecuting an enforcement action." Well, a court can decide that they either have not brought the action or they are not diligently prosecuting it. So there is an opportunity for more rapid court enforcement under this provision.

Mr. BICKWIT. Let's assume that the administrator is not doing diligent prosecuting but has devised a rather tough standard. The court then must determine whether it is practicable to comply with that standard and he can decide that it is not.

Mr. ATKESON. Or he can decide that it is practicable.

Mr. BICKWIT. Certainly he can. Do you not think that if he can decide that it is not and decide that it is, he ought to be also able to decide that it is practicable to comply with something greater than the standard?

Mr. ATKESON. That would be a different provision of law. This—

Mr. BICKWIT. It certainly is.

Mr. ATKESON. This only provides for enforcement of the standards set under the law.

Senator HART. But precisely why would he be competent to make the judgment that it is not practicable to meet a requirement but not competent to evaluate the adequacy of the requirement? That is really what Mr. Bickwit is pushing.

Mr. ATKESON. This citizen suit provision in 10(k) does not exempt anybody from enforcement of the standards. It merely deals with whether a private citizen in his own suit can compel an industry to abide by the standards on what the citizen thinks is a reasonable timetable. There has been, as you know, this chemical plant down in Virginia that finally decided to close up. Under this provision a citizen group could have filed suit some time back and the issue of whether they could compel them to close up earlier would be before the court. When the State water quality people move in they move in under other provisions of law. They do not move in under section 10(k).

Mr. BICKWIT. We have listed the recommendations of the Legal Advisory Committee to the Council. Those recommendations were adopted by a vote of 10 to 2 in support of various principles in our bill. Are you distinguishing those recommendations or are you saying that you are just flat out ignoring them?

Mr. ATKESON. We certainly do not ignore them, but we do not agree.

Mr. BICKWIT. You do not agree?

Mr. ATKESON. We do not agree completely. I think you will see there is a very large area of agreement, but we do not agree completely.

Mr. BICKWIT. There is a very large area of disagreement I might point out for the record.

The last time you were before this subcommittee we discussed the Refuse Act permit program and it became quite obvious that there were substantial differences between the administration and members of this committee, and Congressman Reuss' subcommittee, as to the desirability of the proposed program. Senator Hart has written a letter, as you know, to the Honorable Chairman Russell Train setting forth his arguments as to why the proposed permit program is deficient.

Why was it felt that those arguments just could not be bought? I assume they have not been bought as a result of the final regulations promulgated by the Corps last week. First, is that a valid assumption; and if it is, why have these arguments been rejected?

Mr. ATKESON. Well, we appreciated the Senator's terseness in his letter and found that he very forcefully stated the positions that he took in the discussion he and I had, and I think if you have looked carefully at the Army regulations you will find that we took some of the advice we received at that hearing.

Mr. BICKWIT. That is right, but did you take any of the advice received in the Senator's letter?

Mr. ATKESON. You are probably much more satisfied on the fish and wildlife coordination aspects, for example. But on the basic value of the program, we still remain convinced on the necessity of having just one chief cook on the Federal side deciding water quality questions; that is, the Environmental Protection Agency, rather than having two, EPA and the corps. We remain convinced that under the authority given EPA in section 21 (b) and (c) of the Federal Water Pollution Act, the authority is there as we set it out in the Executive order and as I told you, this matter was referred to the Department of Justice and we did receive the advice of the legal counsel, Mr. Rehnquist, that the arrangements we proposed were legal.

Mr. BICKWIT. That was only one of the Senator's objections, an objection which Senator Baker shares with him, as I remember. The other rather more important objection was to the failure of the permit program to prescribe standards for intrastate waters, and my understanding, having read the regulations of the Corps, is that there will be no Federal standards for intrastate waters under the proposed program.

Mr. ATKESON. Not exactly. Here I am speaking from memory, but Mr. Ruckelshaus recently wrote a letter to the New York Times which set out about four respects in which intrastate water quality standards would be reviewed. I cannot accurately quote them here but it did seem to me to set out a degree of review over intrastate water quality determinations.

Mr. BICKWIT. Granted, there will be a degree of review. What we were suggesting was that there be actual Federal standards for intrastate waters, something the administration appears to believe is necessary, looking at S. 1014.

Mr. ATKESON. You are absolutely right.

Mr. BICKWIT. And we ask you why you have not done it.

Mr. ATKESON. Because we want Congress to act in that area.

Mr. BICKWIT. You believe it is desirable?

Mr. ATKESON. Certainly.

Mr. BICKWIT. We contend you have authority to act. If you accept that, the natural question is why must you wait for Congress to act?

Mr. ATKESON. Well, we have some differences of opinion on whether that is true.

Mr. BICKWIT. Well, thank you very much.

Senator HART. As I thank you, I just want to say that I have read again the section of S. 1014, your bill, that you were discussing with Mr. Bickwit, and unless it becomes clear to me as I read it a fourth and fifth time, I still cannot inhale this explanation that you have given us that you are not, in fact, authorizing a court to determine whether or not an order is practicable—permitting it to make the finding that the practicability is not there, but the burden that the administrative order would impose is onerous and it does not have anything to do about timing or anything else. It simply gives the citizen a right to go to court and assumes the court is competent to make the judgment that the order in question cannot be complied with as a matter of practicability.

Yet you do not want us to permit him to go to court and establish that the order could be, as a practicable matter, extended to impose a heavier—it is all right to treat the court as competent to know that it is too tough but somehow there is not competency on the court to know that it is not tough enough, that we can do better. I will have to follow that one further in the committee.

Mr. ATKESON. Senator, I understand that there has been some further exchange between the Administration and the Senate Public Works Committee on what was meant by this particular provision about practicability which may have to do with the timetable but not with the standard. May I submit something for the record on that so that there will be no mistake?

Senator HART. Yes. We would welcome it.

Mr. ATKESON. It has been discussed between the Senate Public Works Committee and EPA.

Senator HART. Thank you very much.

(The statement and letter follow:)

STATEMENT OF TIMOTHY ATKESON, GENERAL COUNSEL, COUNCIL ON ENVIRONMENTAL QUALITY

Mr. Chairman and members of the Committee, it is a privilege for me to appear before you on behalf of the Council on Environmental Quality to discuss S. 1032, the "Environmental Protection Act of 1971". The principle underlying this bill, that individual citizens and private groups have a critical role to play in the implementation of our national environmental policies, is one with which the Administration is in complete accord.

In his first Environmental Message on February 10, 1970, the President strongly emphasized that the task of environmental protection is not "to be left to a few hundred leaders," but requires "the help of every citizen." It demands not only effective action by government at every level but also "the aid of industry and private groups, and above all . . . the determined participation by individual citizens in every state and every community." The President repeated this theme in his second Environmental Message last month.

One very important means of citizen participation is resort to the courts to invoke the provisions of laws enacted for protection of the environment. Chairman Train expressed the Council's position on these activities in a letter to the Commissioner of the Internal Revenue Service in connection

with the IRS review of the charitable status of public interest law firms. He stated that:

"Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs."

The National Environmental Policy Act (NEPA) has opened new opportunities for citizen participation in Government decisions affecting the environment, and has created new rights enforceable by citizens in court. In the implementation of section 102(2)(C) of NEPA, the Council has recognized that a prerequisite to effective citizen participation is full and timely public disclosure of impending Government actions significantly affecting the environment. On the Council's recommendation the President directed, in section 2(b) of Executive Order 11514, that all agencies "develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs in order to obtain the views of interested parties." To give specific content to this directive, the Council's proposed new guidelines on environmental impact statements require that environmental statements be made available to the public in advance of administrative actions, and mandate the holding of public hearings, whenever appropriate, on agency decisions affecting the environment. All agencies must develop procedures for meeting these requirements. Violations of those procedures will be cognizable in future citizen suits contesting agency actions under the National Environmental Policy Act.

The Council has made clear its support for the elimination of procedural obstacles that bar citizens from litigating the merits of environmental controversies over Government action. The Council takes the position that the National Environmental Policy Act confers standing on concerned citizens and citizen groups to challenge violations of that Act, and, so far as I know, the courts have accepted this view. More generally, the Council subscribes to the broadened concept of standing to sue expressed in judicial decisions such as that of the Second Circuit last April in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F. 2d (1970), *cert. den.*, 39 U.S.L.W. 3246 (Dec. 7, 1970). In this connection the Council endorses the resolution unanimously adopted by our Legal Advisory Committee last fall that:

"Where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with Federal environmental policy, as exemplified in the National Environmental Policy Act and in other legislation."

The Supreme Court has given some indication that it supports this concept in its decision in *Data Processing Service v. Camp*, 397 U.S. 150 (1970). The Court will have an opportunity further to clarify the law on this question in *Sierra Club v. Morton* (the "Mineral King" case), in which certiorari was granted a month ago (No. 939, Feb. 22, 1970).

Another procedural obstacle, which arises in litigation by private persons against the Government, is the defense of sovereign immunity. In the same resolution quoted above, our Legal Advisory Committee took the position that the assertion of this defense in litigation under statutes designed to protect the environment is inconsistent with the policy expressed by Congress in those statutes. Their position, I believe, is based on a conclusion that the relevant statutes, probably in conjunction with the Administrative Procedure Act, amount to a congressional waiver of sovereign immunity. We certainly agree that the defense should not be invoked where it has no legal merit—that is, where a suit falls fairly within a congressional consent or is not actually a suit against the Government within the doctrine of *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). We have discussed this matter with the Justice Department, and are taking an active interest generally in the positions taken by the Government in environmental litigation.

Many of the recent developments that I have recited relate to administrative action to implement NEPA and judicial treatment of the concepts of standing and sovereign immunity. In addition we note an increasing incidence of state-court decisions invoking the common law of nuisance to handle certain citizen suits against pollution. Nevertheless, there remains

an important role for the Congress in reinforcing the legitimate role of citizen suits in protecting the environment. A major precedent in this area was set in the enactment last year of Section 304 of the Clean Air Act.

Section 304 generally authorizes any person to sue for abatement of violations of the Clean Air Act or of regulations under it. Such a suit may be against a private polluter, a governmental entity, or against the Administrator of the Environmental Protection Agency if he fails to perform a mandatory duty under the Act. The provision eliminates the obstacles of sovereign immunity and of restrictive notions of standing to sue. The courts may award costs of litigation, including attorney and expert witness fees, where appropriate.

These provisions should prove a useful supplement to the governmental enforcement procedures in the Act. If neither State nor Federal authorities move to correct a suspected violation of air quality standards, a citizen may obtain a Federal judicial determination of the existence of a violation and an order that it cease. In our view this provision, which expressly does not deprive citizens of such other remedies as they may have under other laws, has the further benefit of encouraging State courts to treat violations of the Act's standards as *prima facie* evidence of negligence or nuisance in an action under the common law.¹

We see no reason why the approach in Section 304 of the air quality act should not be equally valuable in the enforcement of other clearly established Federal environmental standards. The Administration has taken an important step in this direction by including a citizen suits provision in its proposed amendments to the Federal Water Pollution Control Act, transmitted to Congress by Administrator Ruckelshaus on February 10.

I turn now to Senate Bill 1032, under consideration by this subcommittee, which would give a broad authorization to the Federal courts to hear any citizen suit against "unreasonable" impairment of the environment by any person, private or governmental. The approach taken in S. 1032 differs in several important respects from that of the citizen suit provision in the Clean Air Act and that proposed by the Administration for the Federal Water Pollution Control Act. It is not, like those provisions, directed to citizen enforcement of specified antipollution requirements or standards fixed by the responsible State and Federal agencies, after public hearings. Rather, it would give plaintiffs the right to sue to prevent "unreasonable pollution, impairment, or destruction" of the environment. The bill in Section 6² appears to authorize the courts to decide substantive questions even where there exists machinery for administrative determination which has not been utilized. Where administratively established standards exist S. 1032 also appears to permit the courts to override those standards, and where Congress has not yet acted the bill apparently contemplates that the Federal courts will write new Federal environmental law. Where administrative procedures have been utilized, the bill makes agency determinations "reviewable to the extent necessary to protect the rights recognized herein," and provides that the reviewing court "shall be bound by the provisions, standards, and procedures [applicable to original suits under the bill], and may order that additional evidence be taken with respect to the environmental issues involved." I am not certain the extent to which this language is intended to alter accepted doctrines of the scopes of review of administrative findings of fact.

Recognizing certain common themes in S. 1032 and citizen suit provisions such as Section 304 of the Clean Air Act, the Council's Legal Advisory Committee advised us of its support for the principles of both bills, with certain provisos that reflect the differences between the two. The Advisory Committee's provisos were as follows:

If any legislation on citizen environmental suits—

the present rule requiring exhaustion of administrative remedies prior

¹ See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970); Note, Water Quality Standards in Private Nuisance Actions, 79 *Yale L.J.* 102 (1969).

² Section 6 provides in part: "This Act shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under the Act, the court may remand the parties to such procedures: . . . Provided further, That nothing herein shall be deemed to prevent the maintenance of an action, as provided in this Act, to protect the rights recognized herein, where existing administrative and regulatory procedures are found by the court to be inadequate for the protection of such rights. . . ."

to court action should continue to be followed where applicable;

courts should be permitted to refer matters raised in suits before them to appropriate administrative agencies, whether or not the agencies have previously acted on them; and

there should be further study of the problem of the extent to which courts may review administrative environmental determinations.

(I am submitting the full text of our Legal Advisory Committee's resolution for the record.) The Council agrees that each of these concerns expressed by our Advisory Committee should receive careful attention to ensure that legislation to expand the citizen's role in environmental enforcement does not actually hinder such enforcement by disregarding the special competencies of the different branches of government and an appropriate division of labor between Federal and State courts.

More specifically, the provisions of S. 1032 raise a number of problems to which we do not have satisfactory answers:

1. Will the lack of any standards for determining what is "unreasonable impairment" of the environment force upon the courts a task they are not institutionally equipped to handle? The Senate Public Works Committee, in its report on section 304 of the Clean Air Act, recognized this concern and stressed that the citizen suits provision they had drafted would present specific issues for decision on which policy would have been established:

"Section 304 would not substitute a 'common law' or court developed definition of air quality. An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision. Therefore, an objective evidentiary standard would have to be met by the citizen who brings an action under this section." S. Rep. 91-1196, at 36.

In contrast, Section 4(a) of S. 1032 would require the courts to determine whether an activity "is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of" the environment—a determination in which the courts in many cases would not have the benefit of administratively or legislatively set standards. The difficulty faced by a court in such a situation was recently expressed by the Supreme Court in declining to exercise original jurisdiction in *Ohio v. Wyandotte Chemicals Corp.*, 39 U.S.L.W. 4323 (March 23, 1971). You will recall also the concern expressed by Senator Baker in February in your hearings under the Refuse Act that Congress rather than the courts should establish water quality standards.

2. A related uncertainty exists about the scope of the environmental values that S. 1032 would protect. Section 3(a) of the bill authorizes suits to protect "the air, water, land, and public trust of the United States." The first three items in this listing are apparently intended to encompass all aspects of the physical environment, leaving some doubt about the meaning of the additional phrase, "public trust." I am familiar with Professor Sax's writing on the use of this concept in certain common-law decisions, but it is not clear what would be the legal effect of its inclusion in this bill. Specifically, is it intended to impose court-determined restrictions on the freedom of both the Federal and State governments to use public lands? Is it intended to restrict the uses to which private persons can put their lands, or to establish public easements over private lands that have scenic or other special values? Such important steps, if intended, should be taken only with a full understanding and clear statutory delineation of the legal changes that would be effected. You will note that the President has proposed new Federal legislation to develop State-administered land use programs and to regulate strip mining. These, it seems to us, are the kind of specific legislative guidance we need in defining the public interest in our use of land.

3. Since the "person" who may sue to enjoin activity unreasonably polluting the environment is defined to include the Federal and State governments, S. 1032 creates uncertainty about whether it is to supersede existing Federal and State air and water quality and land use legislation by authorizing new standards for air and water quality and land use which Federal and State agencies are to enforce. The bill has not been analyzed in this light,

but if this is intended, there should at a minimum be a clearly defined correlation of this bill and existing Federal and State legislation.

4. Will effective government be served by telling the courts (as Section 6 of S. 1032 would do) to disregard existing administrative and regulatory procedures they find "inadequate"? Administrative machinery can always be improved in light of experience, as the enforcement provisions in the air-quality laws were last year and those in the water-quality laws will hopefully be this year. The more direct approach is to improve our legislation to require reform of outmoded procedures and focus on election and appointment of responsive administrators. If administrative sluggishness is feared, we can also impose statutory deadlines for the promulgation of regulatory standards, as was done in the Clean Air Act Amendments of 1970, and permit citizens to sue to enforce these deadlines. The recent decision by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287 (1971), indicates that the courts will be diligent in applying procedural safeguards designed to protect Federal environmental policies.

5. Will factual determinations by agencies charged with environmental responsibilities be remade *de novo* on judicial review? Established law prevents such duplication, but this bill is susceptible of many interpretations. I refer in particular to the last two provisos of Section 6 (quoted on p. 9 above). Recent developments in judicial doctrine, permitting closer judicial review of agency findings within the framework of accepted doctrine, would protect against agency misdirection without confusing the factfinding and appellate roles.³

In this connection I believe I should deal with the argument sometimes made that the courts should remake agency findings because interested groups are frequently barred from intervening and presenting their case in the administrative process. This argument disregards the fact that the major regulatory agencies are becoming increasingly open to participation by citizens and public-interest groups. For example, the FPC has very liberally applied its rules allowing intervention. 18 C.F.R. § 1.8. The AEC likewise allows liberal intervention, 42 U.S.C. 2239; cf. 10 C.F.R. § 2.714, pt. 50, App. D. The role of public-interest groups before the FCC was established in *Unit ed Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). Citizen groups have been allowed to invoke the procedures for cancellation and suspension of pesticide registration, e.g., *Environmental Defense Fund v. Hardin*, 1 ERC 1347 (D.C. Cir. 1970).

As these examples indicate, there is unprecedented acceptance of the value and legitimacy of citizen participation in administrative and regulatory procedures. If obstacles remain in specific instances, consideration should be given to their removal—by legislation where appropriate. Full citizen participation does not require a duplication of administrative and judicial functions.

6. It is desirable to force the Federal courts to go into environmental regulation beyond the areas where the Federal Congress has acted? Specifically, unless Congress sets Federal policy and standards in these areas, should Federal courts be called upon to decide issues of local land use regulation and nuisance law, which are traditionally regarded as the responsibility of State courts and legislatures? To direct the Federal courts to decide what is reasonable in all areas affecting environmental quality would entail a major shift in Federal-State relationships.

7. A related question of Federal-State relationships arises under the Eleventh Amendment to the Constitution. This, you will recall, provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of

³ David Sive has analyzed the means by which the courts, in the still-developing field of environmental law, may exercise rigorous review of agency determinations within the framework of accepted legal principles. Many of the critical issues may properly be viewed as questions of law, to be determined by the reviewing courts, and the courts can set aside agency determinations where the agency has not taken into consideration all relevant factors. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law* 70 *Colum. L. Rev.* 612 (1970); see, e.g., *Scientific Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *Cert. denied*, 384 U.S. 941 (1966); *Parker v. United States*, 1 ERC 1163 (D. Colo. 1970); *Environmental Defense Fund v. Ruckelshaus*, 2 ERC 1114 (D.C. Cir. 1971).

any Foreign State. I question the present unqualified authorization in Section 3(a) of citizen suits against States or their agencies or instrumentalities.

I raise each of these questions about S. 1032 to indicate that the Council has serious reservations about some of the implications of the bill.⁴ As our recent actions indicate, we favor citizen suits as an important complement to Federal enforcement efforts where Federal environmental standards and procedures have been established. I should make clear that our reservations are addressed to the enactment at the Federal level of legislation such as S. 1032. We have not attempted to canvass the considerations governing the suitability of similar measures at the State level, except to note that a number of our concerns, relating to problems of Federalism, would not be applicable to that question. We will watch closely the experience in Michigan, where such legislation has been adopted, and in other States where it is being considered. That experience may indicate how the difficulties we see can be avoided.

Experience on another front will also be highly relevant to the need for legislation such as S. 1032. I am referring to the judicial implementation of the substantive requirements of NEPA. Besides its procedural requirements concerning environmental statements, the Act contains in Section 101 a strong statement of national policy and in Section 102 a number of directives to Federal agencies. It would be premature to rule out the impact that these provisions may have, at a time when environmental plaintiffs are aggressively pressing the courts to give them judicial effect. For example, plaintiffs are asking courts to enjoin agency actions where the environmental statement prepared under Section 102(2)(C) is inadequate in particular respects. Decisions such as *Wilderness Society v. Hickel*, 1 ERC 1335 (D.D.C. 1970), and *Environmental Defense Fund v. Corps of Engineers*, 2 ERC 1260 (E.D. Ark., Feb. 19, 1971), in which injunctions have been granted, have merely begun to spell out the law in this area. The future course of decisions may indicate that NEPA provides an effective means of judicial enforcement of national environmental policy. If so, it would appear to be a tool that does not share many of the difficulties presented by S. 1032. In the first place, the legislative history of NEPA makes clear that its commands are to be integrated with existing regulatory procedures, preserving the specific Federal pollution-control standards. Furthermore, NEPA is addressed to Federal Government activities, which present many of the most im-

⁴In addition, I would like to call your attention to an article by Joseph Thebodeaus, published in the Congressional Record for September 22, 1970 (page S16246), which raises practical objections to Michigan's Environmental Protection Act of 1970, a statute very similar to S. 1032. Mr. Thebodeaus is there identified as legal advisor to the Governor of Michigan.

"RESOLUTION ADOPTED BY THE LEGAL ADVISORY COMMITTEE TO THE COUNCIL ON ENVIRONMENTAL QUALITY SEPTEMBER 14, 1970"

"It is the sense of the Advisory Committee that:

"1. Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs.

"2. Certain substantive and procedural impediments to the conduct of such litigation should be abolished, or substantially eased, including:

"(a) The defense of lack of standing;

"(b) The defense of sovereign immunity;

"(c) The extent to which environmental decisions by administrative agencies, particularly those involving conflicting values and proposed dispositions of natural resources, under the rules for review of administrative decisions, are required to be sustained unless arbitrary or capricious;

"(d) The absence of a clearly stated substantive right and right to proceed in Federal courts against unreasonable pollution impairment or destruction of the environment resulting from an activity that affects interstate commerce; and

"(e) The imposition of bond requirements in preliminary injunction situations which in effect deny the standing of persons bringing environmental matters to the courts whose interests are not economic.

"3. Insofar as the Hart-McGovern and Muskie Bills are designed to remove such impediments the Advisory Committee supports the bills, provided that:

"(a) The legislation adopted does not substantially alter the rules requiring exhaustion of administrative remedies prior to court action, where such rules may be applicable;

"(b) The legislation, in express terms if advisable, permits courts to remand or refer matters raised in suits brought before them to appropriate administrative agencies, whether or not such agencies have acted on such matters previously;

"(c) There is continuing study of the problem of the extent to which courts may review administrative environmental determinations.

"4. This resolution shall not be deemed to represent an expression of the Committee that it regards private environmental litigation as the principal, sole, or sovereign remedy for enforcement of environmental standards, laws and rules."

portant environmental questions, and would not get the Federal courts involved in local and purely private disputes.

In conclusion we are unable to support S. 1032 and instead favor specific legislation in the various environmental problem areas—water quality, air quality, oil spills, ocean dumping, pesticides, toxic materials, noise, land use policy, strip mining, power plant siting, and so forth—rather than throwing these problems into the courts to set standards. You will notice that these are all items on the President's environmental action agenda. This is where we will put our prime reliance, and we invite the support of all those interested in building meaningful environmental protection for citizens.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C. 20006, July 7, 1971.

Senator PHILIP A. HART,
*Chairman, Subcommittee on the Environment, Senate Committee on Commerce,
U.S. Senate, Washington, D.C. 20510*

DEAR SENATOR HART. At the close of my testimony before your subcommittee on S. 1032, the "Environmental Protection Act of 1971", I offered to submit for the record a clarification of the meaning of the citizen suit provision in the Administration's proposed water-quality bill, S. 1014. The ambiguity in that provision was under discussion by the staffs of the Council on Environmental Quality and the Environmental Protection Agency, and at the time of my testimony efforts were underway to devise clarifying language.

The ambiguity relates to the breadth of the court's inquiry in a citizen enforcement action brought under Section 10(k) of S. 1014. The intent of the provision was that, where the EPA Administrator had already issued an order requiring compliance with a water-quality standard or limitation within a fixed period of time, the court would enforce that order. It would not redetermine either the standard to be applied or the timing of compliance.

Similarly, where no administrative order had been issued, the court would enforce the applicable standard or limitation. However, the court might have to determine for itself the time period for compliance, since it would lack a prior administrative order dealing with that question (in some situations the standards themselves might include a compliance schedule that would answer the timing question). Where the court had to set a deadline, it was to consider certain factors listed in Section 10(k), including the "practicability of compliance" within the deadline. The court was not intended to reexamine the appropriateness of the standard or limitation previously fixed by EPA. Rather, in the language of Section 10(k), the court was to "enforce such standard or limitation."

EPA has devised language to make clearer the intent of the provision in this regard. That language has been transmitted by EPA to the staffs of the Senate and House Public Works subcommittee considering S. 1014 and its counterpart, H.R. 5966. For your reference I attach the proposed clarifying language, which would replace the last paragraph of Section 10(k) (1) of the bill.

Sincerely,

TIMOTHY ATKESON, *General Counsel.*

Enclosure.

CLARIFYING LANGUAGE FOR SECTION 10(K) (1) OF S. 1014

[New language is italicized]

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, taking into account *the record of any hearing held or order issued pursuant to this section. In cases where no order has been issued, the Court shall determine the time for compliance with such standard or limitation, taking into account the practicability of compliance within such time;* any applicable compliance schedule which is a part of either the applicable standards or a permit issued under section 407 of title 33 of the United States Code; the requirements of subsection (1) hereof; the seriousness of the violation; and any good faith efforts to comply with water quality standards, requirements of subsection (1) hereof, or such permit."

Senator HART. Because of schedule obligations that some of us have later in the afternoon, I apologize that we shall not be able to a lunch recess; but we call now and welcome the next witness, who has been thoroughly advertised as we have gone along here this morning: The professor of law at the University of Michigan, Joseph Sax.

Professor Sax helped this subcommittee in our several days of hearings last year, and we are delighted that he could come back this morning.

STATEMENT OF JOSEPH SAX, PROFESSOR OF LAW UNIVERSITY OF MICHIGAN, ON BEHALF OF THE SIERRA CLUB

Mr. SAX. Thank you very much, Senator Hart. Let me begin by saying that I have submitted to the committee a prepared statement. I do not intend to read from it but would ask that you include it in the record.

Senator HART. It will be included in full.

Mr. SAX. Let me note that at the end of that prepared statement I have included a copy of testimony I gave several weeks ago before the house of representatives in Texas in which I set out in some detail our experience under the Michigan statute, with a listing and description of the cases there, so that you will have that in your record.

Also, just as a last matter by way of preliminaries, I have been asked by the Sierra Club if I would submit my testimony to you on their behalf as well as my own, and I am very glad to do that, and I hope the record will show that.

Senator HART. It will.

Mr. SAX. As you know, the directors of the Sierra Club passed a resolution last year giving their support to S. 3575, the predecessor bill.

I had hoped when I came here today that I would be able to testify in as kindly a way as I could, but it has been difficult for me to listen to some of the things that were said this morning by Mr. Atkeson on behalf of the Environmental Quality Council, and I am afraid I am going to have to say in a fairly harsh way—not harsh toward him as an individual but toward the attitudes that it seems to me he is compelled or feels compelled to represent.

Frankly, I think that the testimony he submitted and the testimony he gave today is a tissue of platitudes, legal nit-picking, inconsistency, and of quite nearly total unresponsiveness to the advice given the Council by its legal advisory committee.

Let me start with a couple of items to suggest why I think this is troublesome.

They say in their testimony, for example, that they are against invoking the doctrine of sovereign immunity where it has no legal merit. I don't suppose anybody could disagree with that. But they rely on the case of *Larson v. Foreign and Domestic Commerce*, the very restrictive Supreme Court decision which the Justice Department has used for years to invoke the defense of sovereign immunity to keep citizens suits from ever getting into the courts at all. And I might say that despite the advice of the Council, the Justice Department continues to invoke the defense of sovereign immunity, and

the Justice Department continues, as they have in the cases I cite in my testimony, to invoke the claim of no standing on behalf of citizen organizations.

It seems to me that as a first matter the Council could better expend its energy going over and trying to persuade the Justice Department to take these first rudimentary steps rather than come in here and tell you about all the highflung rhetoric that comes out of the Administration; because that is what is going on in the courtrooms right now. The Justice Department is losing in almost all these cases but that does not seem to deter them.

Second, one of the things that they say is "more study." Well, that is a traditional way of encouraging people not to do anything.

And they say that they are looking very carefully and want to study what has happened in some of the States that passed versions of this bill. But you notice that they do not seem to need any more study about the citizen suit provision in the Clear Air Act of 1970 before recommending a similar provision in S. 1014, the administration's Water Pollution Act.

This is an oddly inconsistent position. I am going to talk about S. 1014 in a minute because it is even worse than you have indicated it is in your earlier questions to Mr. Atkeson.

I find their statement very confusing. It seems to me the essence of their statement is that the court ought to limit itself to looking at procedural failings, but when you pin them down, as I think you did quite powerfully this morning, they recognize that the courts are willing—indeed, to a considerably greater extent in some instances than the Council—to take a look at the substance of these cases. Yet the essence of their argument is that the courts ought not to look at the substantive issues.

When you ask them whether courts do not in fact have the competence to look at substantive technical issues—as they have, of course, for years in the nuisance area—they say to you something that surprised me this morning, and that is "that these are not just technical issues. They are almost political questions."

Well, of course, that is what my book is all about, and that is the whole point of legislation like the proposed S. 1032. It is because administrators are making judgments that all too often arise out of political influence that it is necessary to bring in some external institution to exercise some scrutiny over them, and that is exactly the notion that lies behind this bill; and yet no such scrutiny would be allowed under the provision that the administration supports in this so-called citizen suit provision in bills like S. 1014.

Another thing that is very troublesome that Mr. Atkeson said this morning was, if we have all this diffusion of authority, isn't it going to be a terrible thing if people invested millions of dollars in plants and equipment and they have complied with the standards of some agency, and then someone runs into a court to challenge them?

Well, you know, that is exactly the argument that industry makes today in the absence of this bill as to the administrative standards themselves. And I would call to your attention a most interesting article that appeared in the Wall Street Journal on the 23d of December 1970, talking about this sort of problem under the administrative regulation, quoting an official of the Ford Motor Co. who says,

"It's like the eighth inning of a ball game and someone changes the rules and score on you."

A similar article appeared in the Detroit Free Press on the 31st of March this year, saying—

Major industries recognize that the standards they meet today may prove inadequate tomorrow, and worry about investing millions in anti-pollution facilities only to be told later that they will have to spend millions more on further improvements.

So that is not a problem created by this bill. That is a problem that exists under any system of environmental regulation.

And if you look at the President's message, the President himself says: "I propose that the Administrator of the Environmental Protection Agency be empowered to require prompt revision of standards when necessary." So they are going to have the same problem under any proposal that they get out of the administration. And there is a good reason for it. The reason, of course, is that this is a fast developing area technologically. We are learning things scientifically, the public is demanding increased air and water quality, environmental protections technology is itself growing, and there is simply going to have to be a response to this.

Industry is going to have to stop taking the position that they can amortize pollution control equipment over 30 or 50 years, which they have often done.

All of this is by way of introduction, to suggest to you that one needs to worry as much about the attitude of the Environmental Quality Council as about some of the particular things they say.

It seems to me—and I am sorry to have to put it this way—that the gravamen of Mr. Atkeson's testimony is, "Here is a new bill. It will provide some problems that existing law does not necessarily provide."

Of course, that is true because any new legislation is going to raise some novel questions by its very nature. Yet the suggestion seems to be that no risks really need to be taken on behalf of the public who is victimized by bad environmental quality; that every possible risk, every possible notion of delay must be put upon the public rather than taking some risks that there might conceivably be some inconvenience to administrators or to industry or some problems with the courts or, indeed, that after having a year or two experience under a bill like this, the Congress might wish to modify it in some sense. That is always a possibility.

But the attitude of the Council is completely at odds with this. And I find that most sad and discouraging.

Now let me turn to talk about S. 1014. Because this is a tissue paper type of citizen suit bill. This bill does not permit any citizen to bring suit against an administrator in any situation where the administrator is acting under discretionary authority. The problem is that it is in the administrator's discretion that the central problem of environmental governmental failure lies. Administrators are not often explicitly violating provisions of statutes.

It is in that area of discretion where the problem lies. And that is the area that citizens want to attack, and need to be able to attack under bills such as S. 1032.

If one wants to test his notions about how much we can rely on the discretion of administrators, I would suggest you take a look at some of the discretion that has been exercised by Federal administrators during the past few years. Are you satisfied to stand with the discretion of the Department of Interior in their statement on the Alaska pipeline? Are you satisfied to stand with the Department of Transportation's discretionary views about the building of the SST? Or with the corps on their views about the across-Florida-barge canal? Or with the Department of Interior on the Santa Barbara oil disaster a few years ago? Or with the U.S. Forest Service and their views about timber-cutting in the White River National Forest in Colorado? Or with the Forest Service up in the Tongass National Forest in Alaska, where there has just been litigation, and where the judge points out that six-tenths of 1 percent of the harvestable timber in that area is reserved from timbering, and 99.4 percent of all of the commercially harvestable timber is set out for commercial harvest.

And that is under the Multiple Use-Sustained Yield Act passed by the Congress setting out a policy that hardly seems appropriately to be implemented in that way. Or indeed, in the *Overton Park* case, in the Supreme Court, where the Secretary of Transportation said, "Well we have to decide whether there is a feasible and prudent alternative that is less environmentally destructive, and we say there isn't."

Now, is that discretion going to be left to the administrator? Because if it is, the very problems that citizen suit provisions are designed to deal with are simply going to disappear.

So I say to you that this provision in S. 1014, and the similar provision—although it is not quite as restrictive in the Clean Air Act—simply doesn't go to the real problem.

Now, in addition to that, as to S. 1014, everybody worries about judicial delay and about the problem of filling the courts up with a lot of work, but nothing is going to give the courts more work than deciding the kind of procedural issues that you have to get over as a hurdle in order to even be allowed to have the right to sue under S. 1014.

First of all, you are going to have to argue whether the function was a discretionary function or not. Then, once you get over that hurdle, you are going to have to determine whether the administrator is diligently enforcing the law. Because if he is diligently enforcing the law, that bars you from the right to sue.

In the time that lawyers are going to spend arguing over these kinds of questions, simply as a determination of the right to sue, you could have litigated these cases on the merits three-times over. And the beauty of S. 1032 is that it strips aside all of this procedural gibberish, in which the courts have involved themselves for years and years, and says "you can come in and get to the merits of the case, and get the case decided expeditiously on a determination of whether it is or is not environmentally sound."

That seems to me to make good sense. And it seems to me to be in accordance with any rational notion of preserving the court's time. In that sense the provisions in the administration bill are totally inadequate.

Let me just say one more thing about S. 1014. And that is that this discretionary business makes you look back to the previous provisions of the bill, to ask what kinds of discretion the administrator is given. Well, the administrator is given discretion to determine whether control programs or compliance schedules are practicable.

You may have seen an excellent article that Ned Kenworthy had some days ago in the New York Times about this provision. It is a time bomb. If "practicability" is within the administrator's discretion, and there is the kind of administrative softness that we have seen in so many other areas, there is simply not going to be any opportunity to challenge the most important issues under these suits.

We have found out in Michigan, for example, that the problem is not in the elaboration or definition of standards in the broad sense, because everybody by and large is glad to set out high-flown standards that sound very appropriate. The real problem in environmental control is down at the grass roots, where the question is, "Is this fellow going to have to clean up now, is he going to have to clean up this year or 5 years from now?" And that is the question of practicability.

For example, one of our cases that has come up in Michigan is a case in which the air pollution commission has perfectly wonderful standards for the control of gray iron foundries. The only problem is that a particular foundry in the western part of the State has been out of compliance with those standards for 31½ years, and nobody has done anything about it. And that is where the problem arises.

Most of the cases that have been filed in Michigan are essentially cases of this kind. It is the enforcement process that is troublesome. And the question of practicability is where the real pressure is put on in the environmental area.

S. 1032 permits you to get at those questions. I might say that the courts even in the environmental area have demonstrated competence on the occasions when they have been able to take jurisdiction of these cases. I cite in my book a most interesting case from a State court in New Jersey involving Texas Eastern Transmission Co., where an ordinary trial judge did a brilliant job of taking a look at the environmental consequences of laying a gas pipeline.

We saw Judge Doyle in the *Colorado Wilderness* case who looked at the merits and found out the kind of bureaucratic malaise that infected the Forest Service in that area, where they were building roads into potential wilderness areas, and then amortizing the cost of the roads by letting contracts to timber companies.

And even in what is thought to be one of the most complex areas, the area of radiation standards, Judge Arraj in the Federal district court in Colorado also took a look at this question and wrote a most scholarly, well-informed and powerful decision on the AEC Astral Oil Co., the so-called Rulison blast, the effort to free natural gas underground. I might say the plaintiffs lost that case. So these are not all cases in which the environmental plaintiffs win.

But the judges are able to look at the merits of these things.

Let me say just one more thing. There is implicit over and over again in the statement that Mr. Akeson submitted to you today the notion that the courts should not interfere with congressionally determined standards, and the claim that Congress ought to make standards. Two things need to be said about that.

And you, Senator Hart, said one of them earlier in questioning him. First, the Congress cannot and will not articulate specific quantitative standards in these environmental areas. You can't pass a statute telling them how to enlarge the airport on Martha's Vineyard, or what to do with an airport in North Carolina. So these standards that keep being talked about are not congressional standards. They are administratively set standards.

All the Congress can do is to set out a policy and to give authorization. What the courts are being asked to look at is the standards set by administrators, who are not elected by the people, and they are not being asked, despite the implications to the contrary, to overturn congressional policy. Indeed, the purpose of asking the Congress to enact S. 1032 is so that Congress can state a policy about environmental protection which the courts can then enforce. And to state it in the most precise and appropriate way you can in an area where you are dealing with a large problem.

Now the suggestion has been made that it is somehow inappropriate to set out a broad legislative standard, and to then leave it to the courts to fill in that standard by particular application. I would like to call to your attention a brief excerpt from a decision of the U.S. Supreme Court in 1932. The Court said:

The act has a generality and an adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to the legitimate enterprise, or through particularization defeat its purpose by providing loopholes for escape. The restrictions the act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, sets up the essential standard of reasonableness. . . . In applying this test a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment.

Now that describes S. 1032 to a "T." That is the Supreme Court upholding the validity of the Sherman Anti-Trust Act. And of course, as a legislative model, the Sherman Act is a most appropriate and apt analogy to this provision. It sets out a large legislative policy to cover an important and developing problem in areas where the Congress could not at the time articulate to precise standards to describe all the restraints of trade which ought to be prohibited; and left it to the courts to work these problems out on a case-by-case basis. Indeed the analogy goes further, because the Congress recognized in the Sherman Act that public enforcement was not enough, but there was a need to bring in private citizens to aid in the process of enforcement, and thus the so-called treble-damage civil provisions of the Federal antitrust law.

I must say that those who are so concerned about the generality, the largeness of vision, of a bill like S. 1032, would be well-advised to go back and take a look at the History and congressional approach toward bills like the Sherman Act, because the problem is a very similar one.

I think I have essentially exhausted what I wanted to say, if I haven't exhausted the committee. I feel very strongly that we need this bill. As I described in my written testimony, we have passed the bill in Michigan. As you know, Senator Hart, we have had good experience in the limited months that we have had the bill so far. The Courts have found themselves able to work with the bill. Public

agencies have instituted suits under the bill and found the bill an additional tool helpful to them, and have not viewed themselves as besieged victims of this kind of legislation. And that is a heartening fact.

And of course this provision in the Michigan bill exists side-by-side with some detailed legislative provisions in other environmental areas such as in the water and air pollution area. There is no necessary inconsistency between these two things. Indeed, if there is anything we need, it is a balance between detailed administrative applications and the opportunity to come in where the occasion warrants it under some kind of broad provision. This was something the Federal Government demonstrated for itself when the mercury problem arose, where they had to go into court and use the broad provisions of the Refuse Act despite the elaborate provisions of the Federal water quality laws.

I want to say just one last thing about this business of interference with State and local affairs. I must say it is late in the day for any instrumentality of the Federal Government to be making an argument like this. In area after area where serious problems exist, the Congress has, often at the behest of the administration, exercised the full scope of its powers under the authority to regulate interstate commerce, precisely the power that is sought to be brought to bear under S. 1032.

Indeed, it has come to the point where it is almost a Federal crime to cross a State line to blow your nose. And yet, the issue gets raised in this area where we are told the problems are so severe and the crisis so great. I must say this is most disturbing and troublesome.

Indeed, one would have thought this kind of argument was all over. This problem was raised vigorously when the first water pollution bills in 1948 were sought to be introduced by Congressman Blatnik, and everybody was saying, "isn't it terrible; what is the Federal Government doing in the water pollution business; that is a State and local matter."

Of course, with each revision of the Federal water quality bill, it has been recognized that there was an important role, and a needed role, for more and more direct Federal activity. This is hardly a time to begin reraising these punctilious concerns about States' rights in the environmental area.

Well, I am sorry to have taken so much of your time. Thank you.

Senator HART. Professor, you have not tired the committee, and, if I could presume to say, I doubt that you have tired anybody in the room.

I have read through your prepared testimony which was made a part of the record. If you have included in that testimony a summary of the specific experiences under the Michigan bill, I could not find it. If it is in there, fine. If not, would you state briefly for the record, in response to the understandable concern that is raised that this will open the courts to a flood of litigation with resulting harassment, as well as burdening a burdened docket, what has been the experience? Or is it in your testimony?

Mr. SAX. If you have a Xeroxed copy you may have only the first half. But I will see that you get a full copy. The last two pages of the

full copy contain a list of the Michigan cases, and the text of testimony which precedes them contains a discussion of the cases.

Let me try to give you a rundown of the cases so far in Michigan. To the best of my knowledge there have been 11 lawsuits filed. Three of these were cases brought by the Wayne County—which is the Detroit metropolitan area—Air Pollution Control Board to deal with recalcitrant polluters that it had been unable to bring under order. These three companies are Chrysler Corp., Huber Foundry, Edward Levy Co.—a problem of open slag piles and a dust problem; and the McClouth Steel Co. which has been a troublesome air and water polluter.

The attorney for the Wayne County Air Pollution Control Commission told me that they used this bill in Michigan to bring injunctive suits against these companies because previously they had felt themselves limited to a criminal misdemeanor provision in which they would go into court and ask for a fine of \$100, and they occasionally got a fine of \$100 awarded against companies such as Ford Motor Co.

This was not an adequate enforcement tool. And these suits were brought in order to strength their hand in bargaining with these companies, it has strengthened their hand and negotiations are going forward in these cases.

In one of the most troublesome cases, the Huber Avenue foundry of the Chrysler Corp., just last week some private citizens, 328 of them who live in the area, intervened in the case.

So those cases are going forward. And the attorney for the Wayne County Board, and I quote him in my Texas testimony, has made the point very strongly that they have not been harassed by citizen suits as an administrative agency, and indeed that they find the new citizen action bill in Michigan a very helpful and useful tool to them.

Another use of the bill was made by the State Attorney General, Frank Kelley, who was himself a strong supporter of the bill. He used it to intervene in a proceeding before the State public service commission involving the allocation of short supplies of natural gas. The problem was that the gas company had proposed to the commission a list of seven priorities, of which the use of natural gas for air and water pollution abatement as a substitute fuel was number six. The only problem is, as I understand it, that there is not enough natural gas to fill any but the first four priorities. And the Attorney General used the bill to intervene in the case and asked that air and water pollution abatement be given a higher priority.

Now, those four cases have all been brought by public officials, who, as I say, find the bill a useful tool. A case was brought in Livingston County, a rural county, in quite an interesting situation. A town had inadequately treated its waste water and piped it downstream and then dumped it in the river just above the next town. The people downstream did not like that very much.

Since 1963 they had been complaining to the State water resources commission, which is our pollution control agency, and no action of any consequence was taken. So when this bill became effective, they went into court and filed a suit to ask that no enlargements of this inadequate plant be given, and that new buildings and factories not

be allowed to tap on to the system and increase the load. They sought a preliminary injunction and the judge granted it to them.

The defendants in that case said, "Oh, my goodness, this is an interference with the work of the Water Resources Commission and this case should be remanded back to them." And the judge, who I might say is a fairly tough character, said, "Well, look, these people have been complaining to the water resources commission since 1963 or 1964 and they did not do anything about it, and that is why the Michigan Legislature passed this bill; I am going to take cognizance of this case and issue a preliminary injunction." Which he did, and set the case down for trial, which has a trial date some time in May of this year.

Another case of a similar kind I think I have already adverted to, and this was the suit by some local citizens and the West Michigan Environmental Action Council against a foundry, the Betz Foundry, in Grand Rapids, and against the State air pollution control commission, saying that this foundry had installed no pollution control equipment. The technology is well known. Other foundries have complied. These people have been recalcitrant. The regulations have been in effect for 3½ years, and let's get moving. That case was filed just recently, and I hear rumors that it has shaken up the air pollution commission in a healthful way.

Where is that file anyway, one of the commissioners was said to have asked.

Another case was filed very early under the bill by a State legislator challenging the oil and gas leasing program of the State Department of Natural Resources, claiming that adequate protective regulations had not been issued to cover drilling and exploration by the oil and gas industry, and as a result of this case (at least in substantial part), new regulations came out that were more restrictive, and the case was settled to the satisfaction of both parties.

There is another case filed against the secretary of state of Michigan and the State Department of Highways, claiming that these agencies which have control over the registration of automobiles and the use of the highways have not undertaken any sort of a program to deal with auto exhaust emissions, that there are not even standards adequate to give State highway patrolmen any knowledge of when to ticket people, and since these officials concern themselves with the safety of automobiles and their size, that they ought to use their powers to control driving, to get busy and begin worrying about excessive emissions from automobiles.

That case is pending. It has, I believe, sustained a motion to dismiss. All of the cases that I know of, to the extent they have reached this point, have successfully resisted motions to dismiss.

Another case is more far-reaching. It involves a suit against the water resources commission, claiming that the water resources commission is essentially too ready to permit the waters of the State to be used for waste water assimilation. And in essence, that the balance between the use of water for waste water assimilation and for other purposes is out of balance. It is an attempt to get them to tighten up in some degree their rules about discharges into the streams.

As you know, the Water Resources Commission has not been as vigorous as they might be. I think this case is likely to be helpful.

Another case was filed against several detergent manufacturers; this is a phosphate case. It will probably not go to trial. It essentially asks for restrictions on phosphates in detergents of the kinds that are now being dealt with legislatively in Michigan and in some other places, and I suspect that this case will meld into the legislative regulation of this problem, and I just would say parenthetically at this point, that that is as a practical matter, the way one deals with these problems that we discussed so much this morning.

That is, if there is a problem that the legislature has not yet dealt with, the problem can often be raised in the courts. If, as sometimes happens, the legislature does then move to deal with them, feels it has a solution, the case simply evaporates, and this is a healthy and desirable kind of interplay between the legislative and the judicial process. The court is essentially bringing important issues to the attention of the legislature via the judicial process. It is perfectly sensible and desirable.

The last case which was just filed very recently, I just got a copy of the complaint before I left my office yesterday, is a perplexing one. It involves a suit challenging the proposal to give some State parkland, the John Day State Park, I think it is called, to the Federal Government as part of the Sleeping Bear Dunes National Park.

The argument is a peculiar one here and an interesting one. First, the park was given by a private person under a so-called reverter clause. If it ceased to be used as a State park it would revert to the heirs of the private person. And there is a worry as to whether if title is transferred to the Federal Government it would not be lost as park land altogether. I do not know myself what the legal answer is on that particular issue.

But another interesting point is being raised, and it is this: If the State has a park and is managing it in a certain way, before a State gives over park land to the Federal Government ought it not to satisfy itself that there is a plan to manage the park at least as satisfactorily for public purposes as the State was doing, that the State has at least this obligation to its citizens, that it ought to assure itself of the Federal Government's intentions before it gives the park over.

I have no reason to believe that this is a practical problem. I do not know. But it is one example of the public trust issue being raised. If one could think of this kind of a problem in a more extreme form, if a State were to give away State park land to private interest groups, for example, or even to another governmental institution for uses that would not be environmentally appropriate, this would of course raise a trust problem. That is the obligation of the State to manage and to hold these areas for public uses and in a manner that is environmentally appropriate.

I do not know whether any of these questions are, as a practical matter, raised in this *Sleeping Bear* case, because as I say, the complaint was just filed the other day. So in general, as you can see the Michigan cases have been more or less conventional cases. They deal with some backlog problems of air and water pollution. They have been used by State agencies as plaintiffs.

The courts thus far, although their experience is limited, have not been baffled or buffaloed by the cases. And the courts have been (as I predicted, having spent 3 years running around from court to court watching cases of this general kind), quite responsive to the plaintiffs and have not shuffled them off, sent them packing to some administrative agency. They are willing to take the bit in their teeth because these are the same kinds of problems that they have dealt with traditionally in nuisance cases. They know how to deal with these things, have dealt with them for years. So, thus far, the experience is good.

Just as a footnote, there is considerable interest in this bill in a number of other States. I think there are now about 20 States that have the bill introduced.

As I told you, I was down in Texas testifying. They are moving along there, particularly with the Governor's support.

Just the other day I got an item from the Minneapolis Tribune that their bill, which is a somewhat watered down version of the Michigan bill, has been reported out of committee, which is a good sign. It received a great deal of public attention.

Last week I was in Raleigh, N.C., testifying before a joint House-Senate committee and I think the bill will get considerable attention there. It is getting some attention in Maryland. They have had hearings in New Jersey.

Those four or five States are the most promising ones this year, and a number of other States, such as California, Massachusetts, and Florida, are continuing to move along with versions of the bill. So we are making some progress on the State level. And I hope we are making some progress on the Federal level.

Senator HART. I think you are, although you unnerved me for a moment when you explained that this bill was being used in Michigan to raise a question about the establishment of the Sleeping Bear Dunes lakeshore. I have spent 10 years trying to get that thing established.

Mr. SAX. Yes, I know. I thought it was better for me to tell you than to hear it from somebody else.

Senator HART. But I am sure the court would understand the desirability of the transfer.

Mr. SAX. I am not worried about this. The courts have indicated they have good judgment. Of course, occasionally cases that are not meritorious are going to be brought before them and judges will have to deal with them and they are very good at throwing people out of court. I have had it happen to me many times.

Senator HART. Before you leave this, on a narrower aspect of the broad question of harassment, what do we say when somebody worries about the multiplicity of suits against a particular company or activity?

Mr. SAX. Let me submit for you a lengthy and most interesting study on this question in light of the Michigan law. It has just been done at the law school at Ann Arbor, and will be published next month in our Journal of Law Reform. This is a complex question. The answer to it basically is this: It is not much of a practical problem. Take this example. The Sierra Club files suit on a particular problem and loses. Does that bind the Isaac Walton League of America? Let's say it does not bind them. The chances of another

plaintiff coming in and using its energies and resources to gear up for a suit that has just been decided against a similar plaintiff are very small. In fact, in the environmental cases we have had so far in the Federal system this multiplicity question has not been a problem in fact.

So there is a self-restraint issue here. If a judge refuses to give a preliminary injunction to the first fellow, he is not only going to be likely to refuse to give it to the second fellow, but he is going to be angry at him as well.

That is one answer and I must say, although I like to play with technical issues, I think that is the real answer.

It is also possible that some of these suits will be brought into the ambit of class actions. The *Tongass National Forest* case, which I mention in the testimony, was a suit against the Forest Service in Alaska, and a private defendant. The defendant, U.S. Champion Plywood Co. sought to have the case made into a class action, for notice to be given and to bind other interested parties. And the judge granted that motion. Now that is a possibility that is open to the judge.

It is also possible, and has frequently been the case, that a suit will be brought by the plaintiff as a class action and will be very widely binding, because of the nature of class actions. Of course the Federal rules of civil procedure provide for this.

In addition to that a judge may always say I simply do not have enough people here, there are too many interested parties that are not before me. That is a common problem that comes up. The judge will say, for example, where is the State of New York in this case; they have an interest here. And he will say that these people are, whatever the precise wording of the Federal rules is, a necessary or needed party and he simply will not take cognizance of the case until you get these people in the case. That is a possibility.

Another legal rule which will help to deal with these cases is the fancy doctrine known as the mutuality of collateral estoppel, which simply says that sometimes when an issue has been litigated before people, and other people are essentially in privity with them as to their interests, the case will be held to bind them. That doctrine will sometimes apply.

Finally, there is the old, less formal doctrine of precedent which I was adverting to earlier, in which the judge says, "didn't we just talk about this one last week? I have essentially ruled on this question."

Of course, that is a very powerful judicial tool. In this article I will send you, one of the student authors suggests another interesting device, an old one, and one that is not used very much today, called the bill of peace. His notion is that this is an old doctrine to guarantee against harassment. That is exactly what the doctrine is for. If a suit has been filed and another suit and still another suit is filed, the defendant may institute a proceeding for what is known as a bill of peace; that is to say, a judicial order that says, "help, let me alone," and the court will then have before it the question of whether these additional suits are not simply efforts to reraise an issue that has already been litigated.

So we have a device for dealing with harassment at the point at which harassment arises. That is a somewhat involved idea. But

I think taken as a package this is not a problem that is going to be a troublesome one. You know there are lots of problems now in which you have large classes of people who have an interest in a particular kind of litigation, and the courts learn how to deal with these things, just as, for example, they do with the so-called multi-district treble damage antitrust cases. That is, you get, let's say, a drug conspiracy case. You get people filing treble damage antitrust cases in every district court in the United States.

Well, the courts have now learned how to consolidate these cases and to deal with them more expeditiously. I think the same kind of tactics could be used here

Senator HART. All right. And we will receive the about-to-be published Law Review article?

Mr. SAX. Yes, I will send a copy of that to the committee.

Senator HART. Mr. Bickwit?

Mr. BICKWIT. I have some questions, but in view of the hour—

Senator HART. No, go ahead.

Mr. BICKWIT. If we do not get this bill through, do you think the court-developed expansion of the National Environmental Policy Act will get us most of what we want?

Mr. SAX. That is a very troublesome question. I think the answer is no, and let me tell you why I say that. Some of the cases that were cited to you this morning, such as the *Gillam Dam Case* in Arkansas, which is an Environmental Policy Act case involving the Corps of Engineers are instructive. The judge said, well, the Corps has not provided us with an environmental impact statement, and if they do provide one that is probably all I will be able to require of them, because as far as I can tell, he said something to this effect, the Environmental Policy Act was a congressional compromise, and it is really nothing more than an environmental full disclosure law.

Now, that is the way some courts are reading this act. That *Alaska* case I mentioned to you, the *Alaska Forest* case, has similar language in it. So surely some judges are going to be reading the act rather narrowly as simply requiring assurances given by the court that the agencies will provide all of the necessary information. But of course that is only half of the job, because what is important is not having the information but deciding what is to be done with it. And certainly—let me put it this way: The Environmental Policy Act is not a mandate to the courts in any explicit way to get into the merits of these cases. You may remember when I testified last time that I said that one of the values of a bill like S. 1032, or its predecessor, is it at least makes clear to the courts that they may go to the merits of these issues and not flounder around as the Federal courts have been doing under the Environmental Policy Act cases.

Now, some courts are reading the act more broadly than others. In the District of Columbia court, particularly in the DDT cases, they seem to be going quite far towards substance.

But this ought to be clarified and this kind of a bill will clarify it. You know, it is always possible that the courts will by their own judicial processes eventually give you everything that this bill could give you. You know courts sometimes read laws awfully liberally. But as things now stand in some places, such as Alaska, Texas and

Arkansas, we are getting rather narrow readings. There is a need to get this thing straightened out, to tell the courts what they can do.

You see, simply getting procedural requirements fulfilled may be just a delaying tactic that does not serve anybody's best interests, including those people who want to build powerplants, dams, whatever it may be.

We have seen an example of this in the famous *Scenic Hudson Storm King Mountain* case. That case has been hanging around for 9 years now while the Federal Power Commission has been developing more and more thousands of pages of testimony sent back by the court. And just as everybody knew, they came out with the same decision the second time around as they came out with the first time around. Everybody knew that was going to happen, because as was said this morning, these are not technical questions; these are policy questions.

Mr. BICKWIT. Also, isn't it the case that the mandates of the Environmental Policy Act go only against the Federal agencies?

Mr. SAX. Yes, that is an important point, and I should have commented on that. The Environmental Policy Act regulates only Federal agencies. Sometimes it would be necessary under a bill like S. 1032 to bring suit against a private enterprise. An example would be the controversy not long ago in South Carolina over the BASF German chemical plant, where the suit had to be brought against them as a party.

So the Environmental Policy Act, even in its broadest interpretation, would not cover that, which this bill does. You are quite right.

Mr. BICKWIT. One final question. Under this bill clearly we are liberalizing the standard of review of a court over an administrative agency when a citizen who claims that there is unreasonable pollution brings the suit. Where a polluter claims that the regulation is unreasonably harsh he has no comparable rights of action and would have to proceed under the Administrative Procedure Act with all of the problems built into that act. Do you think that is fair?

Mr. SAX. I certainly do. Let me tell you why. First of all, the person in the situation you are talking about not only will have ordinary rights under the Administrative Procedure Act, but of course he has always been, and continues to be, free to claim that any regulation brought to bear against him is a violation of his property rights. And if you want to think about the important issues from the point of view of industry, it is the protection of their property rights.

They have always had full opportunity to do that. Indeed if you look at most regulatory statutes, traditional ones, the coin was reversed. That is, in most traditional regulatory statutes, where you did not have citizen standing, the only person who could challenge administrative regulation was the person being regulated, on the grounds that it was too harsh. Nobody had standing to attack it on the grounds that it was not rigorous enough. And I did not notice any industries complaining about inequality when it came to that.

Finally, most importantly, because I am not suggesting one ought to perpetuate something that is unfair, it is this: It is perfectly appropriate for the Congress to decide that some things are more important than other things. The Congress may decide, and I suggest

it would decide, if it passed S. 1032, that the problems of destruction of environmental values are so important and the dangers so irreparable that there is a need to have an especially expeditious and straightforward means of challenging that, whereas if all we do is decide not to cut down the trees in some forest for a particular month or year, that does not have the kind of irreparability, or it does not present the kind of environmental dangers that going the other way may do.

Let me give you an analogy to suggest that there are times when a legislature simply has to decide what is more important. Take the example that has been such a troublesome issue in the area of the Selective Service Law. You get people who refuse to be inducted into the Army. And then the question is, what do you do with them? Do you permit them to halt the induction process while they go through a legal challenge in the court? Or do you say, well, you have just got to refuse and subject yourself to a criminal proceeding and challenge it there or go into the Army and seek a petition for writ of habeas corpus? Whichever way you do it, it is kind of unattractive.

If you let the man litigate it first, it might be the next war by the time you finish deciding his legal rights. On the other hand, if you make him take the risk of being penalized as a criminal, that is very harsh.

Well, the Congress had to decide this issue. It decided it in favor of expediting the Selective Service System. I happen to personally not think that was a wise decision, but my point is that sometimes Congress has to decide which situation it thinks is more critical and more important. And these kinds of decisions are made all the time. Certainly one has only to look at the statements of Presidents and other prominent people to satisfy himself that protection of the environment is an issue of the first importance. And that therefore there ought to be an especially expeditious remedy for dealing with it.

I think that is all we are talking about.

Mr. BICKWIT. Thank you very much.

Senator HART. Thank you particularly for that last comment. Professor, again you have been very helpful.

Mr. SAX. Thank you very much.

(The statement follows:)

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

Among the hundreds of ideas for environmental legislation that have been advanced in the past few years, none has captured the interest and imagination of the public more than the proposal to permit citizens to go into the courtroom and enforce the right of the public to a decent environment with the same status and dignity allowed to one who goes into court to enforce a private property right. That is the principle and the central purpose of the bill before you today, S. 1032.

As you know, this bill was modeled after a Michigan bill which was signed into law by the Governor in July of last year, and became effective October 1, 1970. That bill passed both houses of the legislature with but three dissenting votes in each house; it was strongly supported by the Governor, the Attorney General and our Department of Natural Resources.

At each of the hearings held on the bill in Michigan many hundreds of citizens appeared to give the bill their support, in several instances on stormy winter nights. Indeed, there was no more well known or publicly desired bill passed by the Michigan Legislature in 1970 than this one.

This year adaptations of the Michigan law are pending in about 20 other States, and in each state where the bill is being actively proposed there has been a powerful outpouring of public attention and support. A month ago I testified on a version of the bill in Austin, Tex., at a hearing which filled the chamber of the House of Representatives. The Texas bill has been given a great deal of editorial support in the State's newspapers, and just recently the Governor of Texas issued a statement strongly supporting the bill's enactment. Similar activity has been going forward in Minnesota and New Jersey, and just 10 days ago a joint Senate-House committee meeting was convened in North Carolina to hear a presentation on a similar bill in that state. I mention these few examples as those with which I have been in closest contact. Indeed, hardly a day passes that I do not receive at least one telephone call from officials or legislators in one State or another seeking aid in advancing such legislation in their own States.

In light of these developments, I find it terribly saddening that each official of the executive branch of the Federal Government who has been asked to testify on the bill before you should come here and urge the Congress not to enact this legislation. Only a year ago, the Assistant Attorney General for the Division of Lands and Natural Resources in the U.S. Department of Justice came before you and testified strongly against the predecessor bill. Today you have heard the General Counsel of the President's Council on Environmental Quality raise one doubt after another about this bill, despite the fact that the Council's own legal advisory committee gave its support to the bill.

Not long ago Mr. Atkeson, whom you have just heard, gave a speech in which he spoke of "a quite remarkable evolution of the administration's position with respect to the role of citizen suits in protecting the environment". Evolution is the right word. It is a change whose effects are so small as to be imperceptible to the naked eye.

Let me call to your attention, for example, that it is still the case today, in the spring of 1971, that government lawyers seek to have suits brought by environmental organizations thrown out of court on the theory that such organizations have no standing to protect the public interest. This was the position of the Federal Government in the case of *West Virginia Highlands Conservancy v. Island Creek Coal Company and the U.S. Forest Service*, decided only 9 days ago by the U.S. Court of Appeals for the Fourth Circuit. It was their position in *Sierra Club v. The Department of Agriculture*, decided on March 25th in the District Court of Alaska. In *Environmental Defense Fund v. Corps of Engineers*, decided on February 19th in the District Court of Arkansas, the government not only argued that the plaintiffs had no standing, but even interposed the discredited defense of sovereign immunity. And they are fighting citizen standing still in the Mineral King case before the U.S. Supreme Court.

Moreover, in almost all the cases in which these defenses have been asserted, the government has lost; so there is certainly no legal compulsion that it continue to be interposed. Yet the Federal government's lawyers pull every legal technicality out of their bag to avoid meeting citizens on the merits of environmental controversies. If this is an evolution toward progress it is too subtle for me to perceive.

While the Department of Justice languishes in its ancient legal notions that the king can do no wrong, elsewhere in the administration some recognition is being given to the notion that citizens have a place in the courtroom. Mr. Atkeson notes with pride, for example, the Council's support of § 304 of the new Clean Air Act, and the similar provision in the pending administration water pollution bill, S. 1014. On the basis of these provisions it is said on behalf of the Council "We're for citizen suits too. Follow this model and you can push aside bills like S. 1032."

I want to say to you in the strongest way possible that these so-called citizen suit provisions in the Clean Air Act and in the pending water pollution bills *do not* do the job that is needed. They are watered down, inadequate, insubstantial, and fully unsatisfactory substitutes for the bill you have before you. They are rhetorical figers, made of the flimsiest paper. Let me explain why that is so, and why they cannot and will not do the job that is needed.

The key to the approach supported by the Environmental Quality Council is the provision stating that citizens may sue a federal official where there is alleged failure to perform any act or duty under the law "which is not discretionary with the" official.

The key problem with this formulation is that the limitation to acts which are not discretionary cuts out the opportunity to sue in the one area where the right to sue is most needed, and in the one area where official action affecting

the environment needs to be challenged—in the area where official discretion is exercised in a way that is claimed to be inconsistent with congressional policies for environmental protection.

Indeed, it is not clear that such provisions add anything at all to the present law, for under recent decisions in the federal courts, citizens have already been given broad standing to challenge violations of specific, detailed provisions of law under the Administrative Procedure Act.

Most importantly, however, these provisions assume that no judicial review is needed of discretionary acts of federal officials, and that no restraint on the traditional scope of that discretion is needed. This is wholly wrong and wholly at odds with the experience of environmental law thus far. You can test my statement for yourself by considering the exercise of discretion in some well known recent environmental controversies. Are you prepared to say that no review of administrative discretion was needed:

1. In the discretion which the Department of Transportation exercised as to the SST;

2. In the discretion which the Department of the Interior exercised as to the Alaska pipeline;

3. In the discretion exercised by the U.S. Forest Service in the White River National Forest, as revealed by the federal court's decision in *Parker v. United States* last year;

4. In the discretion exercised by the Department of Transportation in the Memphis highway case, *Citizens to Preserve Overton Park v. Volpe*, decided by the U.S. Supreme Court just last month.

These are just a few of the best known and most recent controversies in which it is made eminently clear that the issue truly at stake is in the discretion that the administrator exercises. Let me exemplify this by pointing to the *Overton Park* case. The case was a typical controversy as to whether a highway should be routed through a park. The court was able to take cognizance of the case because the area of highway construction is one of a very few problems in which the Congress has specified a broad environmental standard against which the work of administrators must be measured.

Indeed, notably, it is the standard that there be no "feasible and prudent alternative", a standard very similar to the legal standard set out in the bill now before you. As a matter of fact, the legal standard in the bill before you was largely drawn from this pioneering effort in the highway area.

The ultimate question in the case was whether the administrator had approved a route when there was a feasible and prudent alternative that would be less environmentally destructive than going through the park. Of course the officials who were defendants claimed that such judgments were mere matters of discretion to be left to them without the meddlesome interference of citizens who lived and worked in the area. And of course the whole controversy in the case was whether these officials were to be free to exercise their alleged discretion without any judicial scrutiny.

That, in essence, is what environmental controversies are all about. If these sort of environmental problems are to be left to the unfettered discretion of administrative officials, and if citizens are not to be allowed to challenge such judgments, we may as well close up the whole business of environmental law.

And that is where provisions such as that of the Clean Air Act and the pending water pollution bill leave us. It is packaged as a right of citizen participation, but it is in fact a shadow and a delusion.

Let me illustrate this by reference to the pending water pollution control bill itself.

What are likely to be the troublesome questions that arise under a bill of that kind? One, surely, is the decision of the Administrator that reduced standards for effluents are permissible because of what the bill calls [in § 10(d)(4)] the unavailability of "practicable treatment." Another has to do with the time set for compliance with water control standards where the Administrator determines that compliance is "impracticable."

Are such judgments as to the practicability of compliance "discretionary with the Administrator"? If they are, no citizen will be allowed to challenge such determinations under the bill. Yet these, of course, are the essential and significant sorts of decisions made in environmental matters.

It should never be forgotten that what is most important is not the general provisions dished out by cabinet officials in Washington, but the detailed applications made by men in the field. Should this particular highway go through this park or not? Is that particular abatement schedule "practicable"? Are the par-

ticular safeguards for a pipeline sufficient to protect the environment? Should that timbering contract be let, and should it be let this year?

These are the real issues of environmental law, as the decisions in the *Overton Park, Parker* (Colorado Wilderness) and other such cases make clear.

To withhold scrutiny of such determinations from the courts acting at the behest of citizens is to drain the meaning out of a so-called citizen suit provision. And if that is what is barred from judicial scrutiny under the Council's recommendations, and in the pending water quality bill, then such a view should be repudiated promptly and decisively.

If, on the other hand, such issues would not be viewed as "discretionary" and would be subject to citizen challenge, then the Council and the Administration should be here testifying in support of S. 1032; for that is precisely the kind of judicial scrutiny that S. 1032 allows.

Although I testified on the question last year and have spoken about it at length in my new book, *Defending the Environment*, let me reiterate briefly that judicial inquiry into the question of a "feasible and prudent alternative" is not beyond the competence or ability of the courts. Indeed the Supreme Court in the *Overton Park* case made clear that such a standard provides a standard of law to apply and which can be applied by a court. The Court interpreted that provision in the context of the Highway Act and sent the case back to the district court for a trial. As the Court noted, the question is one of ascertaining the congressional intent as to the relation between highways and parks, and assuring in the context of a judicial inquiry that the congressional policy (necessarily stated in broad terms) is not undermined by the decisions of any administrative official.

These are not questions which require judges to be scientists in order to receive and make decisions upon evidence, any more than is the situation in a medical malpractice case or a railroad accident case, where the evidence of technically skilled witnesses must be heard and evaluated.

Nor is it impossible for judges to cope with such cases upon the basis of a legislative mandate, or a broad public policy, such as is set out in S. 1032, any more than has been the case in the judicial handling of cases involving the right of privacy or the interpretation of the broad mandate of the federal anti-trust laws, charters of at least equal breadth with that set out in the legislation now before you.

What is needed, and needed very badly, in the federal judicial system, is a congressional mandate that will help clarify the judicial role in environmental cases, and will stop the terrible and wasteful expenditure of time on needless procedural debates, such as that over standing, which continue to take a disproportionate and unnecessary amount of judicial time and energy in environmental cases.

Let me comment briefly on these two matters as the last items in my statement.

The federal courts, by and large, have been commendably receptive to serious environmental matters that have been put before them. But they are in a dilemma about the scope of their function which only the Congress can resolve.

Even the Supreme Court, in the *Overton Park* case, which is one of the most thoughtful and thoroughly considered of environmental cases, illustrates the dilemma as environmental cases are sought to be squeezed into the existing legal format for review. The Court recognized that there has been emerging a congressional mandate for protection of the environment that could not be met by simply accepting on faith the *ipse dixit* of an administrator that he had protected the environment. At the same time, it found itself tangled in the traditional constraints on judicial review that now exist.

Thus one finds the Court saying, in remanding the case to the district court, that it must undertake a "substantial inquiry", a "scrutiny of the facts" that is to be "searching and careful." It is to ask whether there has been "an error of judgment", yet it is not to "substitute its judgment for that of the agency." Its test is to be the test of "clear error of judgment," yet it is not to apply the "substantial evidence test", a test which itself is to be distinguished from the question whether the administrative decision is "unwarranted by the facts."

One must feel sorry for the district judge who receives this mandate; yet our present law presses the courts into such hairsplitting.

It is one essential function of S. 1032 to put to rest this wasteful sort of legal nitpicking, and to tell the courts that they may go directly to the merits of the case, that they are to deal with such in essentially the same manner that courts have dealt with cases in the common law tradition for hundreds of years, and are to bring forth a decision as expeditiously as possible on the issues that actually divide the parties.

A second important, indeed urgent, need fulfilled by S. 1032 is that it allows courts to get to the merits and minimizes the hairsplitting over procedural questions which delay cases needlessly for years and years. Now we find courts, understandably reluctant to go to the merits of the environmental matter, falling back on various procedural failings and sending cases back almost endlessly for the correction of procedural errors. It may be another hearing, or a more ample report, or some required statement. The actual issue is thus delayed and deferred, often for up to a decade, because the courts are unclear about their authority to do more than clean up procedural failings. This is bad jurisprudence, and it helps neither environmentally concerned citizens or government agencies and industries which want a decisive determination about whether they may, or may not, go forward with a planned project.

S. 1032 is a good bill because it is, like a good lawyer's pleading, plain and straightforward. It is not designed to enrich lawyers who can spend months haggling over whether an administrative decision was "a clear error of judgment" or a "mere error of judgment."

Yet that is just the sort of haggling we have in store for us under bills like the pending water-quality bill that the Council on Environmental Quality recommends.

Let me call to your attention just a few of the issues under that bill's citizen suit provision that will engage the artifice of lawyers for years and will lead to endless Supreme Court decisions to be decided by 5 to 4 votes.

Is a decision one that is "discretionary with the Administrator"? I have already commented on that trap for the unwary.

Is the Administrator "diligently prosecuting" an action himself, or "diligently seeking to enforce an order"? Under section 10(k) (2) (A) (ii) of the bill, these tests must be met as a prerequisite to the right to file suit.

In the time that will be consumed determining if an order is being diligently enforced or prosecuted, one could probably try three average environmental cases on the merits.

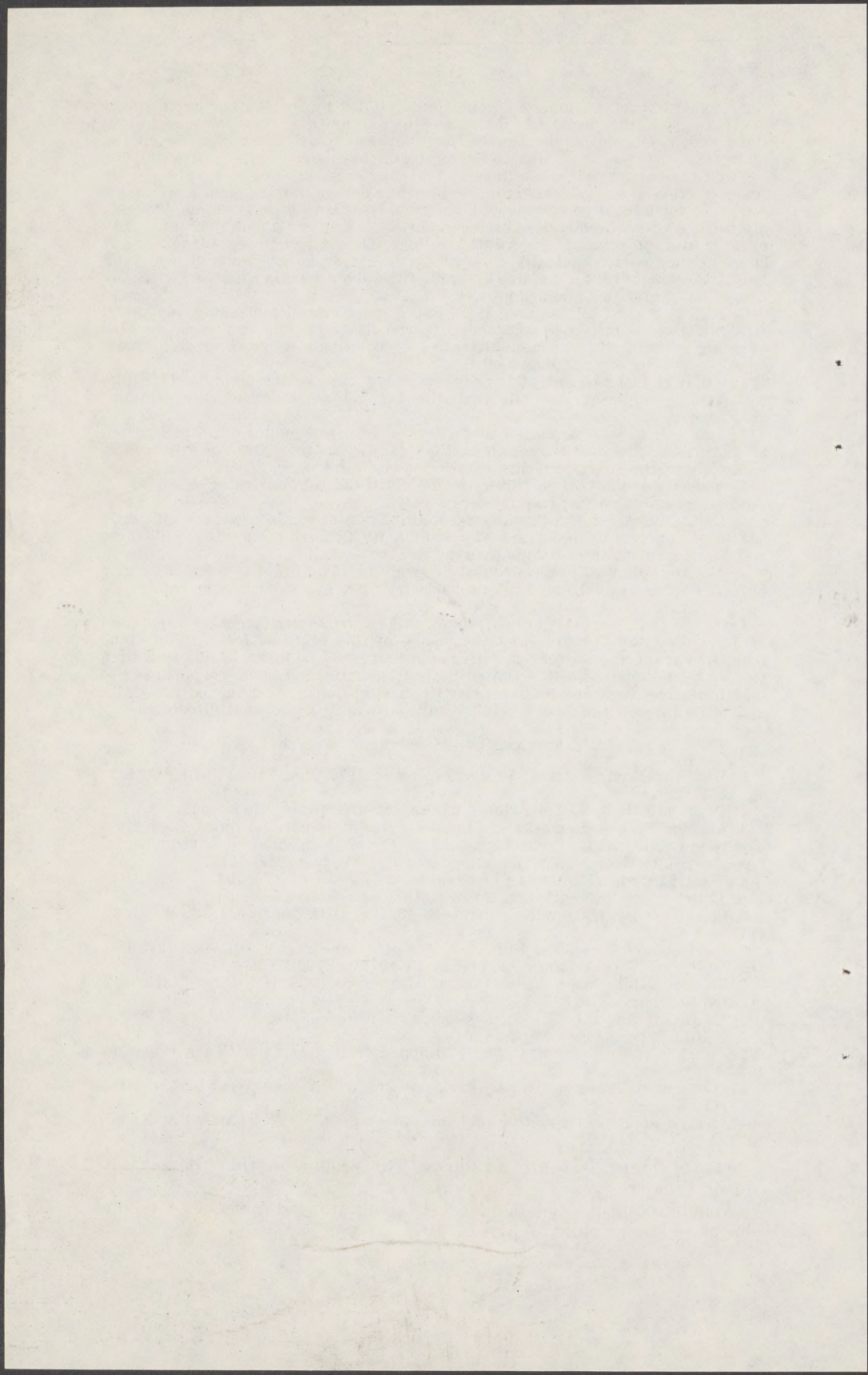
I urge you to report this bill out, to put this effort at environmental clarity and sanity before the Congress and the people of this country. I can think of no more important and useful legislative step that could be taken in this area than to give to the citizens of the United States a genuine and honest opportunity to take initiatives in seeing that their environmental destiny is managed rationally and in an informed manner. S. 1032 is an important step in that direction.

CASES AND OTHER REFERENCES CITED

1. Michigan Environmental Protection Act of 1970, P.A. 127 of 1970, M.C.L.A. 691.1201-1207.
2. Texas bill, H.B. 56 (introduced by Rep. Rex Braun of Houston).
3. Atkeson Speech, Remarks of Timothy Atkeson, General Counsel, Council on Environmental Quality, Environmental Law Course Sponsored by Environmental Law Institute, George Washington University, February 12, 1971.
4. West Virginia Highlands Conservancy v. Island Creek Coal Co., No. 15,028, U.S. Court of Appeals, 4th Cir., April 6, 1971.
5. Sierra Club v. Hardin, No. Civ. A-16-70, U.S. Dist. Court, Alaska, March 25, 1971.
6. Environmental Defense Fund v. Corps of Engineers, No. LR-70-C-203, U.S. District Court, E.D. Arkansas, February 19, 1971, e ERC 1260.
7. Mineral King Case: Sierra Club v. Morton, No. 939, U.S. Sup. Court, cert. granted February 3, 1971.
8. Clean Air Act, P.L. 91-604, December 31, 1970, § 304(a).
9. S. 1014, 92nd Cong., 1st Sess., §10(k).
10. Parker v. United States, 309 F. Supp. 593, U.S. District Court, Colorado, 1970.
11. Citizens to Preserve Overton Park v. Volpe, 39 U.S. Law Week 4287 (March 2, 1971).
12. Sax, Joseph L., *Defending the Environment*, (New York, Alfred A. Knopf, 1971).

Senator HART. We are adjourned, to resume in this room at 10 o'clock tomorrow.

(Whereupon, at 1:58 p.m., the hearing was adjourned, to reconvene at 10 a.m., Friday, April 16, 1971.)



ENVIRONMENTAL PROTECTION ACT OF 1971

FRIDAY, APRIL 16, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON THE ENVIRONMENT,
Washington, D.C.

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

Present: Senators Hart and Hatfield.

Senator HART. The committee will be in order.

I apologize for my late arrival.

First, I welcome a very remarkable Michigan constituent, Mrs. Verna Mize, who is our first witness. Mrs. Mize, I misspoke. I am sure I offended two Maryland Senators, but I still think of you as a constituent.

STATEMENT OF MRS. VERNA G. MIZE, POTOMAC, MD.

Mrs. MIZE. To me Michigan is still my home.

Senator HART. Mrs. Mize, you have given us a statement and I will order it printed in the record in full. As you give it to us, if there is anything you would like to expand on, or if there is any omission or footnoting, it will nonetheless appear in the record.

Mrs. MIZE. Thank you, Mr. Chairman.

Mr. Chairman, thank you for inviting me to testify here today.

I am Mrs. Verna Mize and presently reside at 11200 River Road in Potomac, Md. I was born and reared in Michigan's Upper Peninsula—and it is this fact that explains the activities I am about to outline. I believe my experience will illustrate the need for the kind of legislation you are considering.

For nearly 4 years, I have been waging a life-and-death battle—the outcome of which will affect the lives of Americans for centuries—a battle to save Lake Superior—the legendary “shining big sea water” that I have loved from the minute I first saw it as a small child—Lake Superior, clean and transparent—sweet to drink and surpassingly beautiful to behold!

To comprehend what is at stake, one must realize that Lake Superior contains one-twelfth of all the fresh water on earth. Its value for drinking water alone has been calculated at 1.3 trillion dollars! To this must be added its inestimable recreational, economic, and aesthetic worth.

Lake Superior is the last clean Great Lake and, since it flushes the

others, they can't be saved unless Lake Superior is. Yet, many feel that priceless Lake Superior is being "killed" by a giant polluter—and we who care are powerless to prevent it. Private individuals, and even groups of them, are no match for rich and powerful industries and their lobbies.

My appeals to officials who—it seems to me—should be protecting the public interest in this precious natural resource have been unheeded. Since the President has repeatedly expressed an interest in the Great Lakes, it is beyond my comprehension how officials can ignore or circumvent his wishes.

In the summer of 1967, I first learned of Lake Superior's peril when I boasted that it was so clean that one could drink directly from it. A friend informed me that this would be extremely hazardous because "the big lake"—as we affectionately call it—was being contaminated by millions of tons of taconite tailings which were being dumped into it by the Reserve Mining Co. at Silver Bay, Minn. My first reaction was disbelief. "Surely," said I, "no State would permit harm to come to pure Lake Superior." I was soon to discover that the situation was infinitely more grim than I had been told, as I gathered information about Reserve from every possible source.

It may be well to explain that taconite is iron-bearing ore—and tailings are the pulverized wastes that remain after the iron has been extracted. Simply stated—and perhaps it is oversimplification—the ore is ground and crushed to flourlike fineness, during which process it is repeatedly washed with enormous amounts of water from Lake Superior—some 600 million gallons a day. Giant magnets remove the particles of iron, and the waste is dumped into clean Lake Superior at the rate of approximately 67,000 tons a day—a day, mind you—or some 47 tons a minute.

Here is a sample of what Reserve is dumping into our lake. Here are their tailings. This water was clean and transparent, and now look at it, hideous with tailings! And here is a picture of the obscene "waterfall of tailings."

(The picture follows:)

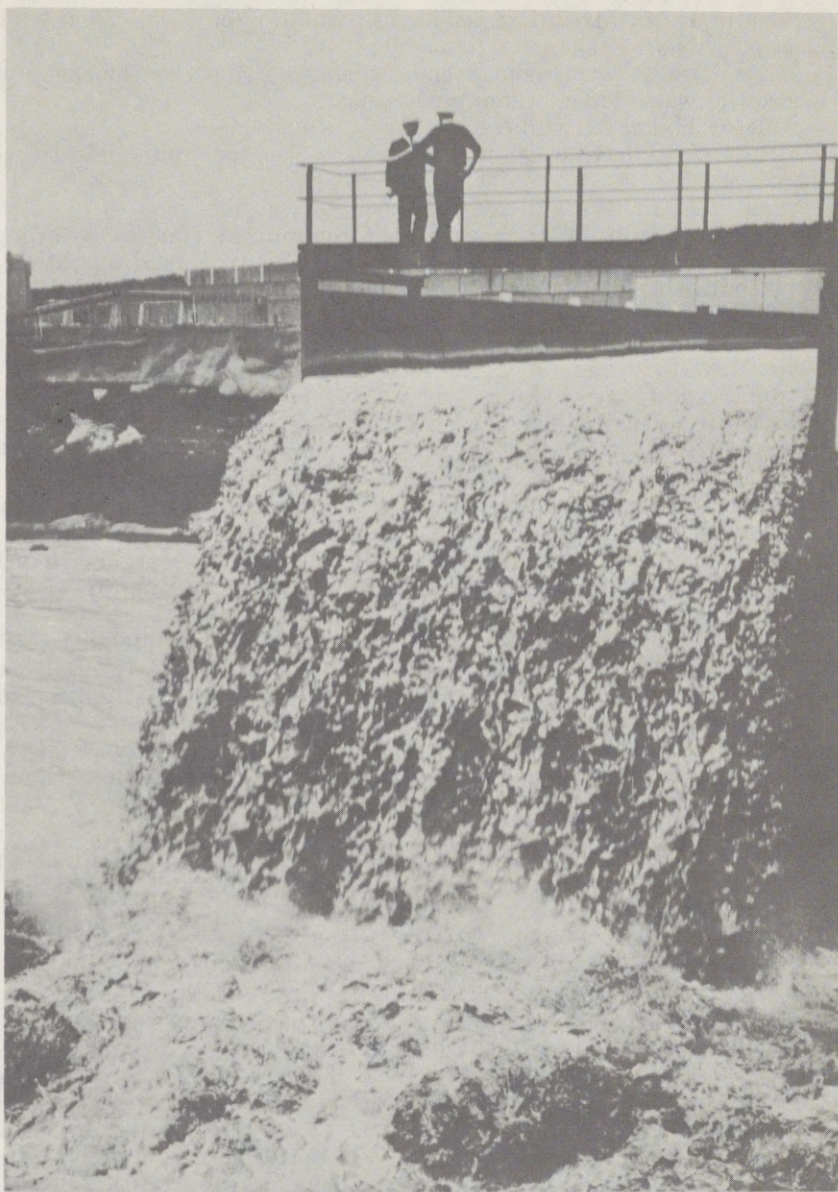


Plate 6-5. The dumping of large quantities of iron taconite tailings into the waters of Silver Bay, Minnesota, poses a potentially damaging and far reaching threat to the aquatic life and pristine waters of Lake Superior. (Photo by Alfred Eisenstaedt--Life Magazine.)

Senator HART. Mrs. Mize, let me ask you, do you recall from what location this was taken?

Mrs. MIZE. It was taken a short distance from the effluent pipe where the waste-laden water gushes out.

Senator HART. All right.

Mrs. MIZE. I have other pictures if the Senator would like to see them.

Senator HART. We will receive them for the file.

Mrs. MIZE. In order to conserve the committee's time by avoiding a lengthy recital of the history of Reserve's controversial operations, I ask that, with the committee's permission, the following documents be entered in the record:¹

An article entitled "Call It Lake Inferior," by George Laycock, from May 1970 issue of Audubon, the official magazine of the National Audubon Society.

Articles entitled, "The Art of Pollution," by Grant Merritt, and "Perspective on the Pollution of Lake Superior by Taconite Tailings," by Dr. Charles W. Huver, Ph. D., both from the March 1970 issue of the New Twin Citian magazine, published by Metropolitan Magazines, Inc., St. Paul, Minn.

An article, "The Pure Railroad," by David P. Morgan, in the January 1969 issue of Trains—The Magazine of Railroadings, published by Kalmbach Publishing Co., Milwaukee, Wis.

An article, "New Life for Waste Lands," from September 1970 issue of the Environment magazine, which, I understand, is published by the Committee for Environmental Information, St. Louis, Mo.

The Report of the Mesabi Trust, dated March 17, 1971.

Brochures of the Empire Iron Mining Co., Palmer, Mich., and the Reserve Mining Co., the latter with news clipping attached. These brochures outline the process used by each.

Senator HART. These will be received.

Mrs. MIZE. In order to be fair, I am including a copy of Reserve's beautiful full color brochure. You will notice, however, that it contains not one picture of their dumping.

The publication, "Your Visit to Reserve" states that they produce 10,800 million tons of pellets (iron) a year and that for every 1 ton of pellets there are 2 tons of waste—tailings—going into Superior. This means that 21,600 million tons of waste are dumped into pure Lake Superior by Reserve annually.

Not far from Isle Royale National Park and the new Apostle Islands National Lakeshore—the latter almost opposite the taconite plant at Silver Bay—Reserve is using clean Lake Superior for a convenient free private dump. Here is a map. Here is our beautiful northern Michigan. Here is Silver Bay. Here are the Apostle Islands; you see how close they are to Silver Bay. And here is Isle Royale. I daresay that few will travel to see them when Lake Superior is degraded.

I understand that Reserve operates under permits granted by the State of Minnesota in 1947 and by the Corps of Engineers in 1948. The permit from the corps has been renewed repeatedly, although it is revokable, and, in my opinion, should be revoked.

¹ See p. 121.

Naively, I thought that public officials in my native State of Michigan and also here in Washington were as unaware of Lake Superior's plight as I had been, so I determined to inform them. As it turned out, I had not only been "in the dark" about Reserve's use of the lake for an industrial dump—I was also ignorant regarding the power and influence of that multimillion dollar company, owned jointly by Republic Steel and Armco Steel.

I made up my mind to contact every official who might help—and I did so—but without getting any real action. Oh, I had polite replies and words of thanks "for bringing the matter to my attention," as bureaucrats put it—and even an occasional pat on the back for my efforts. Little more. Nobody seemed willing to be committed or involved. When concern—real or pretended—for the environment became popular, I wrote letters again—but with the same negative results.

When the so-called Lake Superior enforcement conference was convened in May 1969, I had high hopes for Lake Superior. I felt certain that Reserve would be required to stop its dumping and to deposit its tailings on land, just as all other taconite plants do. My hopes were dashed, however, as one session after another adjourned without substantive results—and Reserve continued its free dumping. Since the conference was first convened, 2 years ago next month, some 43 million tons of tailings have been dumped into that sweet water—43 million tons in that one period alone.

Last summer, after 3 years of writing letters without results, I decided to use my vacation to circulate in Michigan's copper country a petition to President Nixon, asking him to intervene. I felt that I could get at least a hundred signatures to prove that I was not the only one who cared about Lake Superior's fate. So, I started out for my native Houghton County. There, I found, each town and village had its Lake Superior devotees. In less than a day, a host of volunteers joined the campaign.

We posted copies of the petition everywhere—in banks, stores, restaurants, filling stations, resorts, bars, barbershops, a senior citizen center, and even in the tabernacle of a Bible Camp. A local radio station, whose manager had signed the petition on the airplane that took me "home," made daily announcements of where the petitions were located so that people could sign conveniently. The local League of Women Voters cooperated, as did the Chamber of Commerce. Everybody wanted to do his part for Lake Superior.

One zealous worker returned a sheaf of signed petitions with a note regretting that she had obtained only 390 signature because of the short time available; she got those in a mere 2 days. Another visited patients in the hospital and said, "Just think, even the sick and the dying want to do their part to save Lake Superior." A 16-year-old schoolboy from distant Monroe, Mich., wrote to inquire how he might help. Some tourists even took the petitions home and mailed them back filled with signatures. The tourists, who were from every part of the country, welcomed the opportunity to sign. Their recurring sentiment was that the only clean Great Lake must be saved at all costs. Their lakes, they said, were already polluted—unfit for drinking, swimming, fishing, boating—pleasure of any kind. They appreciated Lake Superior for the gem that it is. It is evident

from the addresses on the petition that people everywhere care about the fate of the Big Lake, and want it saved.

This was proved by not a mere hundred, but by 5,182 individuals who signed the petition in a brief 10 days—and here they are, Senators, 5,182 signatures of people from everywhere who say they want Lake Superior saved. Many wanted to continue the campaign, but I felt the message should reach the White House before the August session of the conference. I suspect that many would take advantage of the legislation that you are considering, if it is passed, which would enable them to sue to save their heritage.

You may be wondering if there is an alternative to using the lake as a dump. Indeed there is—and to the best of my knowledge, it is used by every other taconite plant. I understand that Reserve is the only one that dumps into pure Lake Superior. All of Reserve's competitors deposit their tailings on land. In Michigan, where not a grain of such waste is dumped into Lake Superior, the Empire plant near Ishpeming, for instance, uses an alternate method and even recycles the water. See their brochure. Yes, there are alternatives and, in my opinion, Reserve should be required to adopt one. No company should be allowed to purloin a priceless natural resource for private gain.

Now, to get back to the Lake Superior enforcement conference. After 23 months and five sessions costly to the taxpayers, Reserve's dumping continues unabated. I feel that the conference has been an exercise in futility. Saul Friedman, in the Detroit Free Press, reports that even Murray Stein, chairman of the Lake Superior enforcement conference, acknowledges "it has been a cumbersome and ineffective device in ending the pollution of Lake Superior."

After repeatedly failing to meet deadlines for submittal of an alternate method of tailings disposal, Reserve, at the fifth session of the conference last January, finally submitted the long-awaited plan. They proposed to continue dumping into Lake Superior. As I understand it, they would thicken the tailings with chemicals and pump them deep beneath the surface. This would be convenient, of course, because a horrified public would no longer see the ugly "waterfall" of tailings. In effect, the dirt would be swept under the rug.

Although the technical committee that studied Reserve's so-called alternate plan has, I understand, rejected it, I am told that the committee has recommended further study and a plan that would overcome the objections. I have yet to see or hear a forthright official conference statement that only on-land disposal will be acceptable. Officialdom continues to ignore the facts and/or to make compromises with them—and all the while, Lake Superior is being studied to death.

At this rate, Reserve can go on making unacceptable proposals indefinitely—leading to still more studies and delays. Indeed, according to the Minneapolis Tribune and other sources, Reserve saves from \$14,000 to \$24,000 each day they are permitted to postpone spending the necessary money to convert to on-land disposal.

There are indications that Reserve and its beneficiaries may actually be counting on delays and the savings derived therefrom. For instance, the report of the Mesabi Trust states: "It is likely that considerable time will elapse before a solution to this problem is found, during which various hearings and other proceedings may take

place." Worse yet, the volume of dumping is likely to increase and even more than the current 21½ million tons annually will be dumped—because Reserve's brochure states: "Reserve looks forward to continued growth. All of the company's facilities have been designed and built with expansion in mind." The foregoing statement is Reserve's own—not that of an enemy. Their own words betray them.

It was necessary to give you this background information so that you might know that my experience with officials did not concern some insignificant local problem, important only to a few—but the most precious water resource of all, Lake Superior.

In my efforts to rescue Lake Superior, I wrote or otherwise contacted officials from the State legislature level to the President of the United States, including Members of the Congress, the past and present Governors of Michigan, the attorney general and department of natural resources of that State—and also committees, commissions, surveys, bureaus, agencies, and councils.

On the eve of the August 1970 session, I saw the Lake Superior Enforcement Conference chairman, who was also the government's chief water quality enforcement officer. I even called upon a member of the staff of the President's Environmental Quality Council. It made no difference whom I approached—my efforts were in vain. Sometimes, the staffs of officials were enthusiastic, and help seemed imminent—but it always ground to a sudden and unexplained halt.

I even wrote to the Corps of Engineers with whose permit Reserve operates. I suggested certain lakewide tests and recommended that the rail cars that carry ore to the plant, and return empty, be used to haul away the tailings—either back to the pits from whence they came or to other abandoned mine pits, there to serve a useful purpose as fill.

The aforementioned article, "The Pure Railroad" is testimony to Reserve's capability right now to move the tailings away from Lake Superior. Yes, the capability exists now. Several engineers have told me my plan is an excellent one. Admittedly, it would be more costly than simply using the lake as a free private dump—but waste disposal is an expected business expense that Reserve should assume just as all its competitors—indeed, all businesses—and even we individuals—must.

As a matter of fact, some mining companies in northern Michigan are having considerable success in revegetating and reforesting tailings basins—and this with a view to conserve the land for game preserves and tailings for possible future use. There is a feasible alternative now, so further studies are, in my opinion, delaying tactics that may cost the taxpayers untold sums, posterity a back-breaking burden—and Lake Superior its very life.

Everybody in officialdom seems to agree that Lake Superior is a priceless natural resource—but nobody has been willing to take action to save it. Where else can a private citizen go for help? I hope that the frustrating experience of this private citizen will convince you that some recourse should be provided by the Congress. The individual citizen with limited time and funds is no match for rich—and therefore powerful—industries, which can hire attorneys and lobbyists who have nothing but time and almost unlimited resources to stall and delay action.

And now, gentlemen, since I try never to let pass an opportunity to intercede for Lake Superior, I here and now beg you—each of you—to help me save Lake Superior. Further delays are intolerable. The fate of Lake Superior is not negotiable.

I will close by quoting from a letter to the New York Times of September 28, 1969, from Dr. Loren R. Graham of the Institute for Advance Study, Princeton:

Lake Superior is the last of the Great Lakes that can be called clean. The saving of this magnificent lake from the fate of Lake Erie is a task that fully deserves a permanent effort of nationwide scope. It is the largest body of fresh water in the world. It follows automatically that its pollution would be the greatest crime in the pollution of fresh water of which man is capable . . .

He continued:

Let us hope that we never have to ask, "Who killed Lake Superior?"

Gentlemen, I believe Lake Superior is being killed. I cannot be an accessory by failing to defend it—and I hope that you cannot.

Thank you.

Senator HART. Thank you very much, Mrs. Mize.

You describe a specific case. I think you ought to add me to the list of people who have listened and wanted to be, and still aren't, very helpful.

I reacted very strongly when I read a newspaper story in the Free Press of Detroit, got on a high horse and ran around here and screamed and yelled, and said, "That is terrible." I suppose I didn't put it too forcefully, but the occasion was to shut it down. Then I have the unhappy limitation of being a lawyer. I learned there had been a lawsuit and that the matter was in litigation. It didn't take very long for me to understand that while it would have been fun to continue screaming, I felt a very strong inhibition about talking in a sense ex parte about a matter that was in litigation and was before a court. It is one of the hangups we have when we talk about being a government of laws.

Now, you are testifying in support of a bill that some of us have introduced to permit you to go to court, and without weakening one iota my conviction that the bill is desirable and would have great value, I am reminded, unhappily, that getting to court with an item like this doesn't necessarily cure it quickly. But permitting you to get to court would accelerate the day on which we could shut it off or find out whether, in fact, as the other parties would argue, that burying this deep in the deep crease of Lake Superior is indeed the most prudent thing we can do for the future, or that it is impossible to store it on the land because the dam cannot hold it, and the Contential Divide does something to it. I forget what that passage is out of the lawsuit.

I think one message here is you don't have to be an undergraduate to find that the system is enormously frustrating.

Mrs. MIZE. It certainly is.

Senator HART. And I congratulate you on the strength with which you voiced your outrage. You did not in any sense lessen our understanding of the fact that that is the way you feel about it.

I should add for you, Mrs. Mize, as well as for the record, that shortly after you began we were joined by the distinguished Senator from Oregon, Senator Hatfield.

Senator Hatfield?

Senator HATFIELD. No questions, Mr. Chairman.

Senator HART. Having made my confession, I will ask some questions.

If you have had responses which you have not included in your testimony from the several public authorities to whom you addressed your petitions or complaints, and specifically from the Corps of Engineers, the Lake Superior Enforcement Conference, the several Governors, and the President, would you furnish them to the committee so that those also can be included in the record?

Mrs. MIZE. I will, Mr. Chairman.

(The letter follows:)

STATE OF MICHIGAN,
OFFICE OF THE GOVERNOR,
Lansing, Mich., July 19, 1968.

Mrs. VERA G. MIZE,
Potomac, Md.

DEAR Mrs. MIZE: Thank you for your thoughtful analysis of the taconite waste disposal problem and its effect on Lake Superior.

I am glad to tell you that this matter is under intensive study by a number of Federal agencies working in collaboration with the affected States. We expect this study to result in timely and effective controls to the end that this priceless water resource will be fully protected, in the interests of all concerned.

Our agency people are following the study and will participate in it as may be appropriate.

Sincerely,

GEORGE ROMNEY, *Governor.*

DEPARTMENT OF THE ARMY,
NORTH CENTRAL DIVISION, CORPS OF ENGINEERS,
Chicago, Ill., March 26, 1969.

Mrs. VERA G. MIZE,
Potomac, Md.

DEAR Mrs. MIZE: Your letter of 4 March 1969 addressed to the Chief of Engineers, relative to the deposition by Reserve Mining Company of taconite tailings into Lake Superior at Silver Bay, Minnesota, has been referred to this office for reply.

The Department of the Interior's Regional Coordinator, Upper Mississippi-Western Great Lakes Area, submitted to the Corps of Engineers on 31 December 1968 a Summary Report based on field investigations during the spring and summer of 1968, dealing with possible pollution of Lake Superior by deposition of taconite tailings therein. The Secretary of the Interior chose to review this report prior to the Corps of Engineers taking any action in revalidating the Department of the Army permit issued to the Reserve Mining Company; and this review would include a re-evaluation of the basic studies upon which the Report was based and a re-appraisal of the Report's findings and conclusions. The Secretary also called a Federal-State conference to be held on 13 May 1969 in Duluth, Minnesota, to consider the total aspect of pollution in Lake Superior. The Corps of Engineers proposes to take no action in revalidating Reserve Mining Company's permit until the Secretary of the Interior's review of the Summary Report has been completed and the results of the Federal-State conference become available.

The basic studies upon which the Regional Coordinator's Summary Report was based involved a detailed biological, physical and chemical analysis of the methods and products of Reserve's processing plant, the gathering of water samples at various depths and at several locations along Lake Superior's North Shore from Two Harbors to a point about 16 miles southwest of Silver Bay and up to 10 miles out from shore and the deposition of tailings on the lake bottom within this area. The purpose of this analysis was to identify various chemicals contained in the tailings and going into solution into the lake, and the extent of toxicity of these chemicals on aquatic life. Admittedly, the recent study of the Department of the Interior was not

lakewise but was limited in extent to an area of Lake Superior contiguous to the site of Reserve's processing plant, because of limited time and funds. Studies by the Reserve Mining Company contend that the taconite tailings being deposited in Lake Superior are inert and have no effect on aquatic life or water quality in Lake Superior.

Studies of the U.S. Geological Survey indicate that traces of taconite tailing were detected on the lake bottom approximately 16 miles southwest of Silver Bay, and 10 miles lakeward of shore. Only continued observations will reveal possible further deposition of taconite tailings on the lake bottom; but this problem is complicated by the noticeable discharge of minerals from North Shore streams and sediments from streams along the south shore of Lake Superior. The Department of the Army permit issued to Reserve Mining Company did not impose any limitations of the area of the lake bottom on which tailings could be deposited. The permit issued by the Minnesota Water Pollution Control Commission restricted the zone of tailings discharge to any area from a point 1½ miles northeast of Silver Bay to a point 1½ miles southwest thereof, and extending 3 miles into the lake; any violation of this stipulation would be a matter to be adjudicated by the State of Minnesota.

Alternate sites and methods for disposal of Reserve's taconite tailings have been considered. Reserve's facilities, unlike other taconite processing plants in northern Minnesota, have no cheap, low-grade and readily available lands nearby, for the deposition of the tailings on land. Only one usable land area is available within approximately 4 to 5 miles of Reserve's processing plant; but this area is within both State and national forests, and contains almost totally undeveloped wooded and lake country, ideally suited for hunting and fishing. In addition, even if this area were available, acquisition of the land as well as dewatering the tailings and transportation of the waste over a high ridge would be technically impractical and prohibitively costly.

Refilling worked-over open mine pits in northern Minnesota with Reserve's tailings also involves problems of dewatering and transportation of the tailings. Reserve's pits presently contain a large quantity of raw taconite ore and consequently are not available at this time for refilling with waste material; and other worked-over pits from which natural ores have been completely removed, such as those on the western Mesabi Range, are sufficiently distant from Reserve's processing plant as to preclude their use within a reasonable cost.

I hope this discussion answers your questions.

Sincerely yours,

JAMES W. GILLAND,
Colonel, Corps of Engineers,
Deputy Division Engineer for Civil Functions.

DEPARTMENT OF THE ARMY,
Washington, D.C., March 6, 1970.

Mrs. VERA G. MIZE,
Potomac, Md.

DEAR MRS. MIZE: On behalf of President Nixon, I am replying to your letter of 22 January 1970 regarding consideration by the Department of the Army for revalidation of the permit issued to Reserve Mining Company, Silver Bay, Minnesota for deposition of taconite tailings into Lake Superior.

I am informed that the Chief of Engineers has just recently received the recommendations of the Department of the Interior in this matter. In accordance with established procedure the Reserve Mining Company will be given an opportunity to comment on Interior's recommendations as to stipulations that should be included in the permit, if and when it is revalidated. Consequently, the St. Paul District has not yet completed its review of the factors affecting the general public interest that have been developed in this case. In this connection, a copy of your letter will be forwarded to the District Engineer for his consideration and inclusion in the record of the pending case.

Subsequently, the District Engineer will submit a report, accompanied by his recommendation, through the Chief of Engineers to the Secretary of the Army for evaluation and final decision. Final action will not be taken until the effects on the public interest including effects upon water quality, recrea-

tion, fish and wildlife, natural resources and our national economy, as well as the effect on navigation have been fully weighed.

Your interest and concern in this matter are appreciated. As you know, President Nixon is concerned, as we all are, in the preservation of the natural resources of our country.

Sincerely yours,

(Signed) ROBERT E. JORDAN, III,
*Special Assistant to the
Secretary of the Army (Civil Functions).*

STATE OF MICHIGAN,
EXECUTIVE OFFICE,
Lansing, August 14, 1970.

Mrs. VERNA G. MIZE,
Potomac, Md.

DEAR MRS. MIZE: I appreciate your taking the time to write me regarding the environmental effects of the waste discharge to Lake Superior by Reserve Mining Company's taconite operations at Silver Bay, Minnesota.

We are concerned over this matter and we have made our concern known. At an early session of the Lake Superior Enforcement Conference, Michigan entered into the Conference record our belief that there was presumptive evidence of pollution from Reserve Mining Company's discharge. We feel most certainly that such an operation would not be permitted in Michigan.

The Lake Superior Enforcement Conference is currently in session and Michigan's conferee is Mr. Ralph W. Purdy, Executive Secretary of the Michigan Water Resources Commission. I have instructed Mr. Purdy to fully express your concern and the concern of your petitioners to the Conference.

Michigan's position on this matter is simply that we will support any actions formulated by the Enforcement Conference to handle this problem.

I would, however, call your attention to the fact that the State of Minnesota is pressing for the resolution of this problem. Minnesota is in active litigation against the Reserve Mining Company. The most expeditious course of action now is to conclude at the earliest possible moment the current litigation which hopefully will uphold the State of Minnesota and provide for adequate corrective actions by the Reserve Mining Company.

Sincerely,

WILLIAM G. MILLIKEN, *Governor.*

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., September 29, 1970.

Mrs. VERNA G. MIZE,
Potomac, Md.

DEAR MRS. MIZE: On behalf of the President, I would like to thank you for your letters of August 6, with the enclosed petitions, and of August 25. We share your concern about the taconite tailings discharge into Lake Superior and are impressed with the efforts of you and the other citizens to alleviate this situation.

We agree wholeheartedly with your objectives to preserve the beauty and natural environment of this great lake. I have been thoroughly briefed on this problem by Mr. Alvin Alm of my staff, who talked with you last month.

As you know, it was the conclusion at the August 12-13 meeting of the Lake Superior enforcement conference that the discharges into Lake Superior endanger the health or welfare of persons in States other than that which they originate and so fall within the jurisdiction of the Federal Water Pollution Control Act. This enables the Federal Government to participate directly in the enforcement activities. Also, you are aware of the progress of the court proceedings initiated by Reserve Mining Company.

I appreciate your interest in this problem and am impressed by your efforts to initiate broad citizen interest.

Sincerely,

RUSSELL E. TRAIN, *Chairman.*

STATE OF MICHIGAN,
EXECUTIVE OFFICE,
Lansing, February 17, 1971.*

Mrs. Verna G. Mize,
Potomac, Md.

DEAR MRS. MIZE: I wish to acknowledge your recent letter concerning the disposal of taconite tailings into Lake Superior by the Reserve Mining Company of Silver Bay, Minnesota.

Lake Superior is truly one of Michigan's greatest resources and it is imperative that we take all necessary action to safeguard its uniqueness. As you may be aware, Michigan is participating with the States of Minnesota and Wisconsin and the Federal Environmental Protection Agency in the Lake Superior Enforcement Conference. Among the priority items before the Conference is the matter of Reserve Mining Company's taconite disposal operations.

We in Michigan look to the Lake Superior Enforcement Conference to develop an acceptable program to resolve this matter. At the recent session of the Conference in January, I sent a telegram to the Governors of Minnesota and Wisconsin and the Director of the Federal Environmental Protection Agency expressing Michigan's position. I pledged our cooperation in solving Great Lakes problems, expressed our support for any protective actions taken by the Conference, and urged the development of definitive action programs for any unresolved problems which contribute to the pollution of Lake Superior.

Michigan intends to continue working through the Lake Superior Enforcement Conference to insure the preservation of the outstanding quality of Lake Superior. I am confident that the Conference will adopt an effective program regarding Reserve Mining's disposal activities and you can be assured that we will fully support that program.

I appreciate your taking time to write me of your concern over this matter.

Sincerely,

WILLIAM G. MILLIKEN, Governor.

DEAR MR. PRESIDENT: We, the undersigned, respectfully and urgently request your speedy intervention to rescue Lake Superior from the ravages of taconite tailing degradation at Silver Bay, Minnesota, by the Reserve Mining Company. Pure Lake Superior is eminently worthy of your personal attention. We appreciate the concern for the Great Lakes you have already voiced, and we earnestly ask that you stop Reserve's use of clean Lake Superior for its own free private dump! Please, Mr. President, save "the clear transparent water . . . the shining Big Sea water" for us and for posterity.

Senator HART. Mr. Bickwit?

Mr. BICKWIT. I take it from your statement that you have had inadequate responses, or at least responses that you considered to be inadequate, from the various officials you approached to attempt to do what you felt could be better done by you?

Mrs. MIZE. Right.

Mr. BICKWIT. Can you give us some understanding of how the bill that we are considering today could have been helpful to you?

Mrs. MIZE. Well, I was discouraged from even attempting to take this matter to court because of the limitations in the present law. Nobody wanted to touch it. I feel that if we had a law that would permit me to do this, it would certainly be a step in the right direction. We would at least have our day in court.

Now, Reserve has its day in court, but the people who love the lake that is being so degraded don't have their day in court.

Mr. BICKWIT. If you had brought a suit, have you any thoughts of whether you would have brought it in a State or a Federal court?

* In response to a subsequent letter of mine, I received from Governor Milliken a reply dated February 26, 1971, identical to this one, except for the complimentary closing line!

Mrs. MIZE. Oh, I am sure it would have been a Federal court, and not in the court of a State in which the polluters happen to operate. I would want it in a Federal court myself.

Mr. BICKWIT. Where is the litigation that Senator Hart referred to now taking place?

Mrs. MIZE. That litigation has been concluded and it was in the State of Minnesota. I understand it was a district court of that state.

Mr. BICKWIT. Who initiated the litigation?

Mrs. MIZE. As I understand it, Reserve initiated it.

Mr. BICKWIT. So, to paraphrase what you are saying, if you had had the opportunity to use a bill of this sort, you would have moved in a Federal court and you would have done it very much earlier?

Mrs. MIZE. I certainly would have.

Mr. BICKWIT. Thank you very much.

Senator HART. Thank you very much, and I commend you again for the crusade—crusade has a bad flavor to it anymore, I suspect, but in the finest sense—for the crusade that you have done.

Senator HATFIELD. Thank you, Mrs. Mize. I was happy to hear the comments you made. It always restores in my mind the belief that a citizen does have a way to express himself and this is why we hold these hearings. I take heart with the fact that you are willing to come here and express your viewpoint and probably the viewpoint of your friends and many other people as well.

Do you know about how many people you have contacted?

Mrs. MIZE. Thousands, Senator, thousands of people, I know.

Senator HATFIELD. I don't argue it at all. You articulated it very well. Congratulations.

Mrs. MIZE. Thank you.

May I have the bottle of tailings?

Senator HART. Yes. I wish I could describe for the record the small jar. I will have Senator Hatfield look at it for a moment.

Mrs. MIZE. This water was transparent, and this is what happens when Reserve's tailings are dumped into it. Shocking, isn't it?

(The statement follows:)

STATEMENT OF MRS. VERNA G. MIZE

Mr. Chairman and Members of the Committee: Thank you for inviting me to testify here today.

I am Mrs. Verna Mize and presently reside in Potomac, Md. I was born and reared in Michigan's Upper Peninsula—and it is *this* fact that explains the activities I am about to outline. I believe my experience will illustrate the need for the kind of legislation you are considering.

For nearly four years, I have been waging a life-and-death battle—the outcome of which will affect the lives of Americans for centuries—a battle to save Lake Superior—the legendary “shining Big Sea Water” that I have loved from the minute I first saw it as a small child—Lake Superior, clean and transparent—sweet to drink and surpassingly beautiful to behold! To comprehend what is at stake, one must realize that Lake Superior contains $\frac{1}{12}$ th of all the fresh water on earth. Its value for drinking water alone has been calculated at 1.3 *trillion* dollars! To this must be added its inestimable recreational, economic and aesthetic worth. Lake Superior is the *last clean* Great Lake and, since it flushes the others, *they* can't be saved unless Lake Superior is. Yet, priceless Lake Superior is being “killed” by a giant polluter—and we who care are powerless to prevent it. Private individuals, and even groups of them, are no match for rich and powerful industries and their lobbies.

My appeals to officials who—it seems to me—should be protecting the public interest in this precious natural resource have been unheeded. Since the President has repeatedly expressed an interest in the Great Lakes, it is beyond my comprehension how officials can ignore or circumvent his wishes.

In the summer of 1967, I first learned of Lake Superior's peril when I boasted that it was so clean that one could drink directly from it. A friend informed me that this would be extremely hazardous because "The Big Lake"—as we affectionately call it—was being contaminated by *millions* of tons of taconite tailings which were being dumped into it by the Reserve Mining Company at Silver Bay, Minnesota. My first reaction was disbelief! "Surely," said I, "NO state would permit harm to come to pure Lake Superior!" I was soon to discover that the situation was infinitely more grim than I had been told, as I gathered information about Reserve from every possible source.

It may be well to explain that taconite is iron-bearing ore—and tailings are the pulverized wastes that remain after the iron has been extracted. Simply stated—and perhaps it is oversimplification—the ore is ground and crushed to flour-like fineness, during which process it is repeatedly washed with enormous amounts of water from Lake Superior—some *600 million gallons a day!* Giant magnets remove the particles of iron, and the waste is dumped into clean Lake Superior at the rate of approximately 67 thousand tons a day—a *day*, mind you!

Here is a sample of the waste-laden water taken from near Reserve's "water-fall of tailings"—and here is a picture of that shocking scene.

In order to conserve the Committee's time by avoiding a lengthy recital of the history of Reserve's controversial operations, I ask that, with the Committee's permission, the following documents be entered in the record as if read:

An article, "Call It Lake Inferior," by George Laycock, from the May 1970 issue of Audubon, the official magazine of the National Audubon Society.

Articles entitled, "The Art of Pollution," by Grant Merritt, and "Perspective on the Pollution of Lake Superior by Taconite Tailings," by Charles W. Huver, Ph. D. both from the March 1970 issue of The New Twin Citian Magazine, published by Metropolitan Magazines, Inc., St. Paul, Minnesota.

An article, "The Pure Railroad," by David P. Morgan, in the January 1969 issue of Trains—the Magazine of Railroadng, published by Kalmbach Publishing Co., Milwaukee, Wis.

An article, "New Life for Waste Lands," from the September 1970 issue of the Environment magazine which, I understand, is published by the Committee for Environmental information, St. Louis, Mo.

The Report of the Mesabi Trust dated March 17, 1971.

Brochures of the Empire Iron Mining Company, Palmer, Michigan and the Reserve Mining Company, which outline the process used by each.

In order to be fair, I am including a copy of Reserve's beautiful full color brochure. You will notice, however, that it contains *not one* picture of their *dumping*.

The publication, "Your Visit to Reserve" states that they produce 10 million 800 thousand tons of pellets (iron) a year and that for every tone of pellets there are *two* tons of waste—tailings. Gentlemen, this means that *21 million 600 thousand* tons of waste are dumped into pure Lake Superior by Reserve annually. Not far from Isle Royale National Park and the new Apostel Islands National Lakeshore—the latter almost opposite the taconite plant at Silver Bay—Reserve is using clean Lake Superior for a convenient *free* private dump! It operates under permits granted by the State of Minnesota in 1947 and by the Corps of Engineers in 1948. The permit from the Corps has been renewed repeatedly, although it *is* revocable.

Naively, I thought that public officials in my native State of Michigan and also here in Washington were as unaware of Lake Superior's plight as I had been, so I determined to inform them. As it turned out, I had not only been "in the dark" about Reserve's use of the lake for an industrial *dump*—I was also ignorant about the power and influence of that multi-million dollar company, owned jointly by Republic Steel and Armco Steel.

I made up my mind to contact every official who might help—and I did so—but without getting any real action. Oh, I had polite replies and words of thanks "for bringing the matter to my attention," as bureaucrats put it—and even an occasional pat on the back for my efforts. Little more! *Nobody* seemed willing to be committed or involved. When concern—real and pretended—for the environment became popular, I wrote letters *again*—but with the same negative results.

When the Lake Superior so-called "Enforcement" Conference was convened in May 1969, I had high hopes for Lake Superior. I felt certain that Reserve would be required to *stop* its dumping and to deposit its tailings *on land*, just as all other taconite plants do. My hopes were dashed, however, as one session after another adjourned without substantive results—and Reserve *continued* its *free* dumping. Since the conference was first convened two years ago next month, some 43 million tons of tailing have been dumped into that sweet water!

Last summer, after three years of writing letters without results, I decided to use my vacation to circulate in Michigan's Copper Country a petition to President Nixon asking *him* to intervene. I felt I could get at least a hundred signatures to prove that I was not the only one who cared about Lake Superior's fate. So, I started out for my native Houghton County. There, I found, each town and village had its Lake Superior devotees. In less than a day, a host of volunteers joined the campaign. The petitions were posted everywhere—in banks, stores, restaurants, filling stations, resorts, bars, barbershops, a senior citizen center, and in the tabernacle of a Bible camp! A local radio station (whose manager had signed the petition on the airplane that took me "home") made daily announcements of where the petitions were located so that people could sign conveniently. The local League of Women Voters cooperated, as did the Chamber of Commerce. Everybody wanted to do his part for Lake Superior. One zealous worker returned a sheaf of signed petitions with a note regretting she had obtained *only* 390 signatures because of the short time available! Another visited patients in the hospital and said, "Just think, even the sick and the dying want to do their part to save Lake Superior!" A 16-year-old schoolboy from Monroe, Michigan, wrote to inquire how he might help. A college professor, in returning his, reported that he had no trouble getting signatures and would obtain more if I would send him the forms. In response to the flood of requests, I left supplies of blank forms at designated places. Some tourists even took them away and mailed them back filled with signatures.

The tourists, who were from every part of the country, welcomed the opportunity to sign. Their recurring sentiment was that the *only clean* Great Lake must be saved at all costs. Their lakes, they said, were already polluted—unfit for drinking, swimming, fishing, boating—pleasure of any kind. They appreciate drinking, swimming, fishing, boating—pleasure of any kind. They appreciated Lake Superior for the gem that it is. It is evident from the addresses on the petition that people everywhere care about the fate of the Big Lake and want it saved! This was proved by 5,182 individuals who signed the petition in a brief ten days. Many wanted to continue the campaign, but I felt the message should reach the White House before the August session of the conference. I suspect that many would take advantage of the legislation you are considering, if it is passed, which would enable them to sue to save their heritage.

You may be wondering if there is an alternative to using the lake as a dump. Indeed there is—and it is used by every other taconite plant. All of Reserve's competitors deposit their tailings *on land*. In Michigan, where not a grain of waste is dumped into Lake Superior, the Empire plant near Ishpeming, for instance, uses an alternate method and even recycles the water! (see their brochure.) Yes, there *are* alternatives and, in my opinion, Reserve should be required to adopt one. No company should be allowed to purloin a priceless natural resource for private gain!

Now to get back to the Lake Superior "Enforcement" Conference. After 23 months and five sessions costly to the taxpayers, Reserve's dumping continues unabated. I feel that the conference has been an exercise in futility. Saul Friedman, in the Detroit Free Press, reports that even Murray Stein, Chairman of the Lake Superior Enforcement Conference, acknowledges "it has been a cumbersome and ineffective device in ending the pollution of Lake Superior." After repeatedly failing to meet deadlines for submittal of an alternate method of tailings disposal, Reserve, at the *fifth* session of the conference last January, finally submitted the long-awaited plan. They proposed to *continue* dumping into Lake Superior! As I understand it, they propose to thicken the tailings with chemicals and to pump them deep beneath the surface. This would be convenient, of course, because a horrified public would no longer see the ugly "waterfall" of tailings. In effect, the dirt would be swept under the rug! Although the Technical Committee that studied Reserve's so-called "alternate" plan has, I understand, rejected it—I am told that the committee has recommended *further study* and a plan that would overcome the objections! I have yet to see or hear a forthright official statement that *only on-land* disposal of the tailings will be

acceptable. Officialdom continues to ignore the facts and/or to make compromises with them—and all the while, Lake Superior is being *studied to death*!!

At this rate, Reserve can go on making unacceptable proposals indefinitely—leading to still more studies and delays. Indeed, according to the Minneapolis Tribune and other sources, Reserve *saves* from \$14,000 to \$24,000 *each day* they are permitted to postpone spending the necessary money to convert to on-land disposal. There are indications that Reserve and its beneficiaries may actually be *counting* on delays and the savings derived therefrom. For instance, the report of the Mesabi Trust states: "It is likely that considerable time will elapse before a solution to this problem is found, during which various hearings and other proceedings may take place." Worse yet, the volume of dumping is likely to increase and even more than the present twenty-one and a half million tons will be dumped—because Reserve's brochure states: "Reserve looks forward to continued growth. All of the company's facilities have been designed and built with expansion in mind." The foregoing statement is Reserve's own—not that of an enemy. Their *own* words betray them!

It was necessary to give you this background information so that you might know that my experience with officials did not concern some insignificant local problem, important only to a few—but the most precious water resource of all!

In my efforts to rescue Lake Superior, I wrote or otherwise contacted officials from the state legislature level to the President of the United States, including member of the Congress, the past and present Governors of Michigan, the Attorney General and Department of Natural Resources of that state—and also committees, commissions, surveys, bureaus, agencies and councils! I saw the Lake Superior Enforcement Conference Chairman, who is also the government's chief water quality enforcement officer—and even a member of the staff of the President's Environmental Quality Council. It made no difference whom I approached—my efforts were in vain! Sometimes, the staff of officials were enthusiastic, and help seemed imminent—but it always ground to a sudden and unexplained halt.

I even wrote the Corps of Engineers with whose permit Reserve operates. I suggested certain lake-wide tests and recommended that the rail cars that carry ore to the plant and return empty—be used to haul away the tailings—either back to the pits from whence they came or to other abandoned mine pits, there to serve a useful purpose as fill. The aforementioned article, "The Pure Railroad" is testimony to Reserve's *capability* to move the tailings away from Lake Superior. Several engineers have told me this was an excellent idea. Admittedly, this would be more costly than simply using the lake as a FREE private dump—but waste disposal is an expected business expense that Reserve should assume just as all its competitors—indeed all businesses—and even we individuals—must. As a matter of fact, some mining companies in Northern Michigan are having considerable success in revegetating and reforesting tailings basins—and this with a view to conserve the land for game preserves and the tailings for possible future use. There is a feasible alternative *now*; so further studies are, in my opinion, delaying tactics that may cost the taxpayers untold sums, posterity a backbreaking burden—and Lake Superior its very life!

Everybody in officialdom seems to agree that Lake Superior is a priceless natural resource—but nobody has been willing to take action to save it! Where else can a private citizen go for help? I hope that the frustrating experience of *this* private citizen will convince you that some recourse should be provided by the Congress. The individual citizen with limited time and resources is no match for rich—and therefore powerful—industries, which can hire attorneys and lobbyists who have nothing but time and almost unlimited resources to stall and delay action.

And now, Gentlemen, since I try never to let pass an opportunity to intercede for Lake Superior, I here and now beg *you*—EACH of YOU—to help me save Lake Superior. Further delays are intolerable. The fate of Lake Superior is not negotiable!

I will close by quoting from a letter to the New York Times of September 28, 1969, from Dr. Loren R. Graham of the Institute for Advance Study, Princeton:

"Lake Superior is the last of the Great Lakes that can be called clean. The saving of this magnificent lake from the fate of Lake Erie is a task that fully deserves a permanent effort of nationwide scope. It is the largest body of fresh water in the world. It follows automatically that *its pollution would be the greatest crime in the pollution of fresh water of which man is capable . . .*" He continued: "Let us hope that we never have to ask, 'Who killed Lake Superior?'"

Gentlemen, I believe Lake Superior *is* being killed. I cannot be an accessory by failing to defend it—and I hope that *you* cannot!

Thank you.

Senator HART. The committee now welcomes a very distinguished group that we will ask to come forward very informally to participate as a panel. They are for the Wilderness Society, Doug Scott; for the Izaak Walton League, Ted Pankowski; William Butler of the Environmental Defense Fund; for the National Wildlife Federation, Joel Pickelner; and for the Natural Resources Defense Council, John Kecker.

Gentlemen, we are grateful you could adjust your schedules to permit this kind of presentation, and I would ask you to decide among yourselves how you can best make this record in support, I hope, of this bill.

STATEMENTS OF DOUGLAS SCOTT, WILDERNESS SOCIETY; ACCOMPANIED BY THEODORE PANKOWSKI, IZAAK WALTON LEAGUE; WILLIAM BUTLER, ENVIRONMENTAL DEFENSE FUND; JOEL PICKELNER, NATIONAL WILDLIFE FEDERATION; AND JOHN KECKER, NATIONAL RESOURCES DEFENSE COUNCIL

Mr. PANKOWSKI. I appear to be the senior member here in terms of age.

Before we started, I think we kind of decided among ourselves that Doug Scott of the Wilderness Society on my right would start off and we would proceed in that order.

Senator HATFIELD. I would just like to say for the record, I am interested to note that the seniority system has its roots elsewhere than in this institution.

Mr. PANKOWSKI. I worked 7 years in the House of Representatives, and I appreciate very much what the seniority system means.

Senator HATFIELD. Some of us are trying to reform it.

Mr. PANKOWSKI. Yes, I know.

Mr. SCOTT. Mr. Chairman, my name is Douglas Scott.

I am an educational specialist on the staff of the Wilderness Society, a nationwide citizen conservation organization of more than 70,000 members.

With your permission, I would like to have my prepared statement filed in the record in full, and I will extemporize on it.

Senator HART. Yes, that order will be entered with respect to all of these statements.

Mr. SCOTT. We appreciate your invitation to appear here today to express the full and enthusiastic support of the Wilderness Society for the proposed Environmental Protection Act of 1971.

In our judgment, this proposal is of the utmost significance across the whole range of environmental concerns, for it would bring much needed changes in the manner in which decisions, both public and private, are now being made with adverse affect on our environment. We believe the results of these changes would be of enormous benefit to the public interest.

If this legislation is enacted, in substantially its present form—and we hope it will be—it will certainly stand among the most significant

and far-reaching achievements of this committee and of the 92d Congress in the field of environmental protection.

In every part of the country today there are new and active local groups of citizens working for environmental protection and improvement. By the nature of the issues such groups are involved in, their efforts very often defensive, involve challenging and probing decisions made or being made by government agencies.

I would like to address my remarks this morning particularly to the problem of reviewability of decisions by Government agencies.

What is the experience of citizen conservationists when they thus seek effective involvement in these Government process? All too often, they come away disappointed, frustrated, and increasingly angry. For all too often, their objections and involvements seem to have no visible effect at all, to have been, at best, only pro forma participation in the rituals of public hearings and letter-writing campaigns which, in the end, leave the administrative agency decisionmakers totally unmoved from their own intentions.

We have heard just now from Mrs. Mize, who represents a sterling example of the remark made by now Chief Justice Burger when he said, "Consumers are generally among the best indicators of the public interest."

It is a fair conclusion to state that if the public is given the opportunity to effectively involve itself in reviewing and challenging day-to-day decisionmaking of administrative agencies, the effect will be wholly salutary.

The fundamental problem, it seems, lies in the lack of any real and consistent responsiveness of administrative agencies—which now have become enormous bureaucracies seemingly beyond the day-to-day, decision-by-decision control of their parent cabinet departments. Only the most controversial of decisions involving long campaigns by dedicated voluntary citizens to create the controversies have any hope of reaching the status where they can be reviewed by anything approaching an independent agency. In practice, the agency personnel can depend upon the fact that most of their day-to-day, piecemeal decisions will go unchallenged, simply because in practice there is virtually no means by which a challenge can be effectively mounted.

Perhaps this would not be so bad if we could rely on administrative bureaucracies as an efficient and broad-perspective mechanism for making decisions in the first place. Or if the decisions being made were merely technical matters best left to practicing experts. But such is far from the case.

While the decisionmaking of such agencies may be efficient, it is only because challenges arising from the public can be effectively ignored, patronized, or shrugged off, leaving the decision process to churn along in its wholly inexorable way.

The experience in many fields of citizen conservation groups which have existed now for a number of decades on the national scene reaffirms this conclusion time and again, and perhaps the most timely example that could be cited is the case of decisionmaking by the U.S. Forest Service on matters of timber management practices, wilderness designations, and similar fields.

Just last week in the Subcommittee on Public Lands of the Interior Committee, on which Senator Hatfield serves, we had 3 days of

terribly informative hearings on public outrage at certain practices and decisions which have been made in the field on a day-to-day and piecemeal basis by the Forest Service personnel.

Here is a record of efforts by citizen groups, by members of the Senate of the United States, to call a halt to the kinds of decision that were being made in the case of clear cutting, to review decisions on specific clear cuts, to call for an independent analysis. Each effort in that direction being completely ignored, bypassed and shrugged off by the agency involved.

Senator Gale McGee of the State of Wyoming has had perhaps the most frustrating experience in this direction. For 21½ years he has fought the blanket policy of clear cutting in the national forests in his home State of Wyoming, and his conclusions point to the seemingly inaccessibility of the agency decision to challenge and to chance to the point where Senator McGee is now introducing in the Senate a bill which would call for a moratorium on all such decisions and give Congress a chance to establish an independent authority to investigate.

Having to go to that extreme of challenge on the part of Senator McGee is nothing more than a testament to the fact that no simpler, easier, smaller scale method of challenge is available, and I think it would be appropriate to ask to enter in your records a two-page summary of his experience by Senator McGee from a booklet published by the Wilderness Society and a letter dated June 27, 1969, from Senator McGee to the Honorable Clifford Hardin, Secretary of Agriculture, in which he summarizes his frustrating experiences.

Senator HART. Without objection, they will be made a part of the record.

(The article and letter referred to follows:)

THE CASE FOR A BLUE RIBBON COMMISSION ON TIMBER MANAGEMENT
IN THE NATIONAL FORESTS

JOINT PUBLICATION BY ROCKY MOUNTAIN CHAPTER OF THE SIERRA CLUB AND
WESTERN REGIONAL OFFICE OF THE WILDERNESS SOCIETY

(Introduction by Senator Gale McGee)

For nearly two years I have had a grave and growing concern about the Forest Service's timber management policy of clearcutting. My concern first arose as I began to receive scattered reports from Wyoming constituents that clearcutting was raising havoc with the environment in the Rocky Mountain forests, particularly on the Bridger.

In June of 1968, my chief advisor on conservation matters, Mike Leon, toured the Bridger to look at the results of clearcutting practices. In his report to me, Mike pointed out by word and photograph the devastation in the clearcut areas on the Bridger National Forest. My concern turned to alarm. I began the *tedious and, I must say, unrewarding effort to get the Forest Service to do something about the damage to our forests in Wyoming.*

In the late Spring of 1969, I wrote to the Secretary of Agriculture asking that he appoint a Blue Ribbon Commission to study the results of clearcutting in the high, dry, shallow soiled forests of Wyoming. Not surprisingly, the *Secretary refused that request on the grounds that the Forest Service was not erring and if it were, it could correct its own mistakes.* Since that time, I have once more requested the Secretary to appoint a Blue Ribbon Commission. He again has refused.

In the Summer of 1969, I decided to tour the Bridger National Forest myself and in August of that year, I spent two days witnessing the devastation of clearcutting on the Bridger. My alarm increased.

During this time in the Senate Appropriations Committee hearings as well as in other places, I have raised questions about clearcutting a number of times with Forest Service officials. The responses to those questions are pretty much the same responses I have received since 1968—that there is *really no problem and if there is, the Forest Service can handle the problem.*

While Forest Service "explanations" were being repeated, the soil in the clearcut patches was eroding, reforestation was practically nil and clearcutting continued. On May 15, 1970, the Forest Service suddenly announced formation of an inhouse task force to examine clearcutting on the Bridger. The following day I issued a news release *protesting the inhouse approach* to the clearcutting problem.

In the first place, the Forest Service is late in its attention to the problem. In the second place, not a single person from Wyoming was included on the task force. In the third place and most importantly, the Forest Service is doing exactly what I warned them not to do—namely, they are *sitting in judgment of their own case.*

When the first rumbling about clearcutting began, one of the chief reasons that those who were concerned turned to their United States Senator was because little, if any, attention was being given by the Forest Service to their complaints. One of the reasons for seeking a Blue Ribbon Commission approach was to gain public participation in looking at the problem. *An in-house examination contradicts the need for realistic public participation.*

If our forests are in fact owned by the Forest Service, then no one can seriously question an in-house task force examination of its policies. The fact is, however, the forests belong to all of us, and therefore, the Forest Service must make room for public participation in the establishment and evaluation of policies affecting our (not just the Forest Service's) environment.

On June 4, 1970, I requested the Chairman of the Council on Environmental Quality to evaluate the timber management practices of the United States Forest Service with particular attention to the policy of clearcutting. The Council on Environmental Quality is charged by law to review and appraise activities of the Federal Government regarding environmental quality. Someway, somehow, out of all this we must conclude the devastation wrought by clearcutting. Someway, somehow, we will.

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, D.C. 20510, June 27, 1969.

HON. CLIFFORD M. HARDIN,
Secretary, Department of Agriculture,
Washington, D.C.

DEAR MR. SECRETARY: Thank you for your June 7 response to my request that you appoint a Blue Ribbon Commission to examine Forest Service policies on the Bridger National Forest.

You recognize, I am certain, my disappointment over your decision not to appoint a commission. My disappointment, Mr. Secretary, is intensified by your stated reasons in declining to authorize a commission.

On the one hand, you point out "there is a place for such commissions, perhaps in developing new information or viewpoints or in defining policy issues." But, on the other hand, you reject the Bridger National Forest as a "place" for a Blue Ribbon Commission.

It seems to me that "new information" about the effects of clear cutting on the Bridger is all too present. One need only go and look at eroded clear-cut patches on the Bridger. One need only go and look at the failure of reforestation in the clear-cut patches. And, as far as I know, the bark beetle (the *raison d'etat* of the Forest Service policy of clear cutting) has not diminished appreciably, let alone as a consequence of clear cutting.

It seems to me "new viewpoints" abound not only in the Pinedale area but from all over the state of Wyoming about the Forest Service policy of clear cutting. My mail from concerned and intelligent constituents pleads again and again for some surcease of Forest Service practices concerning timber management. These concerned constituents range the whole spectrum of socio-economic class. Ranchers, packers, postal employees, conservationists, school teachers,

guides, newspaper publishers, and chamber of commerce officers, to name only a few, are dismayed over the policies which they feel are denuding Bridger National Forest.

Your concern about "new information" and "new viewpoints" is a shared one. Further, it appears to me that an independent Blue Ribbon Commission would not only have access to the "new information" and "new viewpoints" which presently abound but would generate a real serendipity from the discovery of more new information and viewpoints.

It seems to me that "defining policy issues" is precisely what a Blue Ribbon Commission would help to do. As I have pointed out to you in my previous correspondence, Mr. Secretary, controversy over the Forest Service policy ought not to be settled by one of the parties to the controversy exclusively. If the Forest Service is to sit in exclusive judgment over its policies, then how do we get meaningful and participatory policy? The best we can get under those circumstances is a fiat. I need not, I am sure, elaborate on the shortcomings of such conduct in a democracy.

Your contention that Local citizens have "access" to Forest Service Administrators, in no sense, meets the issue of effective checks and balances on administratively derived policy. Nothing requires you or your administrators to give attention, let alone acceptance, to citizen suggestions. In my long study of the democratic process, I have yet to find anyone seriously advocating that a sympathetic ear is any substitute for shared authority.

If you are unable to view what many consider to be the havoc, present and future, on the Bridger National Forest because of clear-cutting practices, you ought to read the report by Mike Leon of the Forest Service Tour of Timbering Areas in the Pinedale Area of Wyoming, June 21-22, 1968. What is so clear in Mr. Leon's report is not a minor contest over who shall prevail but whether the grandeur of nature in the Bridger will continue to be within our heritage.

Sincerely,

GALE MCGEE, U.S. Senator.

Mr. SCOTT. These agencies, and I don't mean to single out the Forest Service—the experience is typical—seem to have abrogated to themselves the final power of decision in the small decisions which never reach controversial proportions.

Today under the increased pressures of citizen conservation involvement in environmental concern, these agencies are, of course, responding. The Forest Service, for example, is looking to new channels of public participation in its planning and decisionmaking, going more and more to hearings and ad hoc advisory commissions and the like. But all of it is on an in-house basis, and all of it leaves the final decision essentially unchallengeable as it was before. Thus, for example, in an excellent article which appeared in the *Journal of Forestry* in April 1970 by Neil Rahm, the then regional forester in Missoula, Mont., he concludes that—

Yes, we must invite the public to participate more in our decision making. Together we and the public must seek the decision that will serve the public interest better.

We know the decisions reached in this way will be far sounder than those reached by the agency alone. However, when the optimum course cannot be reached by the group, then we will make the decision. Rarely do such decisions please everyone.

The most common source of discord is the inability to agree on what is the public interest. But a clear-cut decision will generate conflict and in this democracy open conflict is an effective, acceptable way to resolve issues.

That is the close of the quote.

(The article follows:)

[From the Journal of Forestry, Apr. 1970]

PUBLIC PARTICIPATION IN NATIONAL FOREST MANAGEMENT DECISIONS

(By Neal M. Rahm)

The author is regional forester, Northern Reg., Forest Serv., U.S. Dep. Agr., Missoula, Mont.

All of us recognize, I believe, that we are living in a strange and restless time. It is strange because long-established qualities and standards are being challenged, and new values are being introduced. It is a restless time because new forces are loose in our society, with unmeasured dimensions and untested strength. And, as always, what is unknown arouses suspicion and even fear.

THE INGREDIENTS

Let's look at some of the ingredients of the situation as they relate to public forest land management. In a century already marked by radical transition we now find ourselves caught in a tide of unparalleled change, and facing the crises attendant thereto. We are deeply involved in an undeclared and, as yet, inconclusive war from which we seek honorable withdrawal. Inflation plagues our economic system; dollars buy less and taxes are higher than ever before. Cities have new political strength, and there is a growing disposition to concentrate attention and money on the people and problems of metropolitan America.

Government backing for conservation and resource development, especially financial support, is harder to get. The typical American is younger, generally more affluent, and increasingly remote from the countryside than were his predecessors. Preservation and conservation interests are fragmented, and often, through disputes, render themselves impotent. A parade of technological developments, most of which were undreamed of even 30 years ago, have profoundly altered our lives. More and more people look to science and computers, rather than to themselves, for answers to problems.

The changes that I have summarized, though intense, differ little from the situation 5 years ago, 10 years ago, or 20 years ago. The present problems in public land management stem not so much from unprecedented change, but from the failure of public land managing agencies to keep attuned to it.

It is not enough, however, to merely recognize that changes are taking place. We in the Forest Service must join with an informed public to bring about the kind of change that will allow national forests to make the maximum sustained spiritual, recreational, and economic contributions to the American people. Tremendous undertakings are involved here.

THE CHALLENGES

First, every area of land must be examined far more closely than ever before, and its key capability to produce tangible or intangible benefits identified and listed in order of priority. Then these results must be documented on maps and made known to all land managers and the public. This will provide needed guidance to land managers and a clear, understandable assessment of intrinsic values for all land and will be available to the public.

Secondly, the public need as it relates to national forests must be determined, including national, regional, state, and local requirements. This task includes assessment of long-range needs to maintain quality of life in America. It is a far deeper endeavor than a summary and compromise of the wants and desires of the numerous American publics.

Thirdly, public need and land capabilities must be brought together, and a management direction established for each parcel of land. It is at this point that we decide what to do or what not to do with the land. In the heart of the matter and the issue of most concern to land managers and the various American publics. Fortunately, the challenges to our long-established value system and the groping efforts to deal with the enormously complex problems of population growth, resettlement, and economic dislocation do not signify any widespread or deep-seated opposition by the public to conservation, to forestry, or to the countryside. Rather, they indicate a preoccupation with what seems most urgent to most people. The center of political power rests today in metropolitan areas. Both urban and rural dwellers see situations all around

them to which they are opposed—congestion, air pollution, water pollution, and environmental ugliness. Their response to these conditions has been a nationwide groundswell for preservation as contrasted to conservation through development and management. Though some don't understand conservation, and preservation offers what they believe they want, many more do understand present land management practices, and don't like what they see. Younger people and professional people in the cities are affluent. They couldn't care less about commodity uses and local economics in remote rural areas or their effect on the gross national product, but they are interested in trees and in high-quality environment.

In this setting, current and future policy, objectives, programs, and management direction for the land will evolve. No major national resource policies or decisions will succeed or long survive unless they are consistent with public interest, public welfare, and have public support. The major tasks ahead, then, are to determine capabilities of each acre of national forest land, relate those capabilities to the public interest, and then develop management direction for each homogeneous area of land.

MANY PUBLICS

The Forest Service is in an era within which many "publics" compete vigorously for the social and economic values of national forest resources. Current public opinion and our analyses of long-range public interest often may be in opposition. It is significant that each public group is a dynamic composite, shifting in its structure with the issue at hand. The decision-making process is complex today, but could be simplified and made effective by more thorough involvement of land managers and representative publics in the process.

Policies, administrative decisions, and management performance are watched closely by individuals and groups who feel or fear adverse impacts on their use or enjoyment of national forest resources. People are becoming less readily inclined to accept, express confidence in, or support Forest Service programs. Because decision-making processes are complex, ensuing policies and decisions are increasingly difficult for nonparticipants to understand. Thus, many segments of the public seek a voice in the formulation of these policies and decisions. Others solicit from Congress detailed insight into the local administration of each act. Perhaps the greatest number, however, seek only consideration of their knowledge and views in forming decisions on matters significant to them.

In many new planning ventures the Forest Service has made a basic assumption that every area of wild land possesses intrinsic suitability for a primary use or a combination of uses. This does not exclude spin-off resource values which can be integrated into management of any area, providing they do not sharply detract from primary values. Once it has been accepted that for any particular area the result of any plan is an inventory of social, economic, and natural factors (which can be inventoried), inferences can be drawn regarding optimum use to enhance social and economic aspects. If the method is rational and explicit, we assume that any person accepting the evidence is likely to reach the same conclusion as the planners. This approach permits an important improvement—public involvement and participation in the planning process. It is in direct contrast to the bulk of today's wild land planning where criteria are often obscure and esoteric, and people who are affected or interested are not usually brought into the planning discussions. Management and development of national forests are not done in administrative secrecy. It is not logical to plan for them in secrecy.

While the Forest Service is in the resource inventory phase and before decisions on management alternatives are frozen, we invite concerned members of the public, or their representatives, to participate in the studies. We not only welcome, but are searching for, both information and objective opinions from informed people whose interests span the entire natural resource spectrum—from wilderness users to Sunday drivers. We know that people who are affected or deeply interested will not be satisfied with our conclusions unless their viewpoints have been heard. By involvement early in the study process, these people will be better prepared to express themselves on decisions to be made at other levels because they understand the complexities and consequences.

SELECTING PARTICIPANTS

In an accompanying article, "Wild Land Decisions—By Whom?"¹ Daniel M. Ogden, Jr., offers some excellent guidelines for selecting participants, and equally sound thoughts on the best manners of involving them. Among those those Ogden feels should be consulted are various interested laymen. Bringing laymen into the decision-making process, however, hasn't been easy.

There is no magic about making decisions. Inventories, facts, relationships, and values are basic to the process. The ability to analyze, think logically, and evaluate the consequences of alternatives can be acquired. Sound judgment, on the other hand, is an inherent quality. In any event, the most frequent cause of conflict in matters of forest management occurs when reason is obscured by emotion.

Our initial programs of public involvement have drawn in other federal organizations and state agencies as well as private citizens. Since 1966, we have worked with the Bureau of Land Management, the National Park Service, the Bureau of Indian Affairs, state agencies, community groups, and individuals to study the Pryor Mountain country on the Custer National Forest in Montana. Its management and use are closely tied to those of other public and tribal lands such as the Bighorn National Recreation Area. Coordinated management programs with full public and interagency support are now operational.

Concurrently, we have invited public participation in the analysis of the North Yellowstone comprehensive planning unit, which encompasses a million acres of land in three national forests and two national forest regions. From the study's inception, we have worked closely with representatives of such organizations as the Wilderness Society, the Sierra Club, the Montana Wilderness Association, the Federation of Western Outdoor Clubs, and industrial interests. We are working also with informal public advisory groups from the communities adjacent to the planning area.

At the introductory meeting in the town of Big Timber, Montana, 300 citizens turned out to learn the objective of the study, its time schedule, the kinds of inventories to be taken, and the method of analysis. As the study progresses, subsequent meetings will be held with these same people to keep them abreast of the study and seek their advice in making management decisions.

Similar meetings have been held with both state and interstate agencies. Thus, the Governors' Council of Natural Resources and the Montana Technical Action Panel have been apprised of the Forest Service's activities. In addition, members of various state agencies contribute valuable information to the study and attend periodic public meetings. For example, a biologist has been assigned by the Montana Fish and Game Department to inventory wildlife and fishing potentials within the planning area.

Two current studies which emphasize public understanding are nearly complete. The Mallard-Larkin Pioneer Area plan was submitted to numerous organizations and individuals in North Idaho before the decision was made to classify the area. People in North Idaho gave the proposal overwhelming support as did state agencies, special interest groups, county commissioners, and the Idaho congressional delegation. Opposed to the plan were the Sierra Club, the National Federation of Outdoor Clubs, and some members of the Wilderness Society.

In developing management recommendations for the Middle Fork of the Clearwater River in Idaho, we used a combination of techniques to gain public understanding. We joined a widespread program of public information with an ad hoc advisory group whose members represented landowners within the study area as well as all of the groups with either a social or economic interest in the area. Public participation was very active and helpful. Private landowners imposed upon themselves more rigid restrictions than those proposed by the Forest Service.

SOLICITING PUBLIC VIEWS

From our experience two general methods of soliciting public views have evolved. One is to inform interested organizations that a study is to be undertaken and a decision to be made. Questions are answered and maps and

¹Ogden, Daniel M. Jr. Wild Land Policy Decisions—By Whom? *J. Forestry* 68(4): 200-204. 1970.

other material given to interested individuals. Following on-the-ground study the Forest Service prepares a brochure setting forth possible management alternatives, the probable consequences of each, and sufficient basic data to make a sound decision. Public groups and individuals are given adequate time to visit the area and study the proposals. Interested organizations and individuals are then invited to submit their written recommendations in the matter. The management proposal most recently promulgated was entitled, "Possible Management Alternatives—Mission Mountains Primitive Area." This plan concerned the reclassification of a portion of the Flathead National Forest in Montana as a wilderness area.

The Forest Service believes the second approach to involving the public is superior, although it is more time consuming. This method encourages public participation from start to finish through frequent, regularly scheduled public meetings or ad hoc committees representing interested groups. The latter system is particularly suited to wild and scenic classification studies similar to the one on the Middle Fork of the Clearwater River and to large planning areas.

In the Northern Region of the Forest Service, we have numerous additional areas urgently in need of coordinated resource management studies. Some studies are required by laws such as the Wild and Scenic Rivers and Wilderness Acts. Other studies are needed to assure proper coordination between resource uses and to ensure that public needs are met. Each will require the time and knowledge of many people—public representatives as well as personnel of the Forest Service and other government agencies.

In order to reach the best possible decisions we must determine the best means of gaining public involvement. This determination can only be made on a case-by-case basis if the level and nature of public involvement are to be appropriate to the issue at hand.

There are many techniques of working with the public and they must be selected to fit the situation. Basic to all, however, are candor and effective communication of ideas. Covert, obscure, manipulative approaches undermine public confidence.

THE GROUND RULES

Basic also is early understanding of the ground rules. We must build as broad a base of factual resource data as our combined knowledge will allow. In addition to collecting facts, we must also compile all viewpoints and opinions concerning the issue. Then, with participating agencies and individuals, we propose to identify the alternative courses of action and the consequences of each, and together, seek the decision which will best serve the public interest. We know that decisions reached in this way will be far sounder than those reached by the agency alone. However, when the optimum course cannot be reached by the group, then we will make the decision. Rarely do such decisions please everyone. The most common source of discord is the inability to agree on what is "public interest." But a clear-cut decision will generate conflict; and, in this democracy, open conflict is an effective, acceptable way to resolve issues.

Mr. SCORR. To that we would simply say amen and then plead that the public be given an equal access to means of conflicting and contesting what the public interest is.

The conservation groups are frequently accused of taking an arrogant note that they are speaking for the public interest. That is our duty. We feel we do speak for the public interest. We are willing to confess whether we speak for the public interest in a fair and impartial tribunal in any particular case.

Right now it is exceedingly difficult to do this in a court of law, for reasons of barriers of entry on certain days, for reasons that you can't get to the merits of issues and for technical reasons which this committee has discussed in detail.

As you consider this legislation, we view Senate bill 1032, the Environmental Protection Act, as affording a new opening for the citizen, opening a new window on decisions that should be chal-

lenged, that can only be improved by the rigors of a fair and equitable challenge, and to get these decisions before a judicial tribunal which can review them.

The most important effect that will result as far as agency decisionmaking is concerned, will simply be that the decisionmakers will have to temper their arrogance and their bureaucratic tendencies by the knowledge that citizens can initiate an independent judicial review on the merits of the decisions that they made.

The present proposal, S. 1032, offers the potential for this result applicable to all kinds of environmental decisions. It would develop the same salutary benefits of reviewability by the concerned public by opening the courts to an avenue appeals on the merits of agency decisions. We view this feature as perhaps the most important and urgently needed in this legislation.

Too many of the things that are wrong about our environment are the result of little decisions, little routines, and the good old way we have always done things. We need the means by which grassroots citizens can have effect on these piecemeal, local impacts. The resort to a court to argue the merits of the decision offers a logical, rational, and wholesome answer.

S. 1032 merits your support and approval in this committee and by the Congress. It goes far to give citizens an equal chance to have effect on public decisions, by declaring their fundamental rights to environmental protection and by giving them the tools, through the courts, to enforce and defend those rights in their own behalf. We see no objection of practicality which in any way offset, even in part, the desirability of enactment of the Environmental Protection Act of 1971.

Thank you.

Senator HART. Doug, if you have no objection, and others do not, I would suggest that you continue right through.

Senator Hatfield will have to leave perhaps before that finishes, but before he does we will interrupt you in order that he can make any comment he cares to. If it is all right with you, why don't you proceed in order without our interrupting.

Mr. PANKOWSKI. That is fine, Senator. Most of us at this table are used to working together almost daily anyway.

Mr. Chairman and Senator Hatfield, I am Ted Pankowski of the national staff of the Isaak Walton League of America. As you know, the League is a nationwide organization of citizens founded in 1922 to work for the protection and restoration of our environment. We very much appreciate this opportunity to testify in support of S. 1032, the Environmental Protection Act of 1971.

Our appearance here this morning has special significance for us. As we meet, our Cape May County Chapter in New Jersey is before the U.S. District Court in Camden arguing preliminary motions in a wetlands suit brought last August. The difficulties we have had in putting that case together read like the "Perils of Pauline" and since it highlights many of the problems which S. 1032 would solve, I would like to refer to it again in my statement. My personal involvement in issues such as this began with the widely publicized Hunting Creek affair and has carried through in other actions instituted since then by my organization. A listing and material on them

is attached for the committee's consideration, and I request that it be made part of the record.

Senator HART. Without objection, it shall.

Mr. PANKOWSKI. S. 1032, sometimes referred to as "the Environmental Class Action" bill, would, as we understand it, declare that each person is entitled by right to the protection, preservation, and enhancement of the air, water, and land and the public trust thereof of the United States; that each person shall have an adequate legal remedy in defense of these rights; that because violations are generally caused by persons engaged in interstate commerce or in activities affecting interstate commerce, citizen access to the courts will be guaranteed by Congress through the commerce clause of the U.S. Constitution.

The experiences of my organization indicate that these findings and declarations are indeed accurate and to the point. While the League has for 48 years sought environmental improvements through more traditional means, such as administrative and legislative remedies, we have found court action becoming more and more necessary to implement the gains made in these other areas. Good examples of this is the suit which the League brought in Federal Court in Minnesota to protect the Boundary Waters Canoe Area—a designated wilderness of the Superior National Forest—against mining claims; and the New Jersey wetland's suit—an attempt to halt indiscriminate filling of salt marshes which are subject to public rights because of their interdependence on tidal flows that constitute the navigable waters of the United States.

In both instances—and in other actions in which we have participated—League members have faced tremendous difficulties. First in getting assurances from public agencies that the damages which were occurring or which would occur would not be allowed to continue, and that the protections afforded by statute would be brought into play; secondly, having failed in that course, to determine for ourselves what legal remedies might be available and how we might pursue them; and finally, to "scrounge" around for the funds to bring an action; and, Mr. Chairman, I literally mean "scrounge." In the *Boundary Waters* case, the national organization with the assistance of our Minnesota division, had to solicit donations from our membership nationwide to pay necessary court costs. This is particularly ironic since the League many years ago purchased much of the land in the wilderness and transferred it to the U.S. Forest Service. Had we not received the gratuitous services of our past National President, Attorney Raymond Haik, we would not have been able to protect this public area against asserted mining claims. While the substantive issues in that controversy have yet to be decided—and the action was brought more than a year and a half ago—the court did decide preliminary motions by the Federal Government and others to dismiss in our favor.

In the New Jersey case, Attorneys Bernard S. Cohen of Alexandria, Va., and William Cook of Camden, N.J., agreed to represent us on the basis that we would do the best we could to obtain financing. Our members in Cape May solicited their friends and neighbors and managed to raise a minimal amount to get the ball rolling. It included, incidentally, bags of pennies collected by school children

who learned of the effort and decided on their own to assist us. We still need thousands of dollars to finance the cost of witnesses, reports and the like should the court give us the "go ahead" this morning. In the meantime, much of the dredging and filling continues despite five or six Federal laws and at least one recent Federal court decision which should protect the public against such practices.

I mention these difficulties to point out the fact that what limited resources we have had have been used up to defend ourselves against Government and private motions to dismiss on the basis of "standing," sovereign immunity and other legal niceties that keep citizens from protecting public property when the Government fails to do so. In view of these experiences which we believe are shared by citizens generally, claims by some that S. 1032 would throw open the courts to an unmanageable amount of work make little sense—even if that were at issue. We don't believe it should be. In fact, it may be—and as a nonlawyer, this is conjecture on my part—that the burdens of the courts may be far more than they should be because of the work involved in handling preliminary and delaying motions that resolve little and only encourage people to "try harder." S. 1032 would help solve such problems. In addition, the safeguards in the bill against spurious actions are more than adequate when added to the existing burdens which ill-financed and often, ill-organized, citizens must carry in defense of the environment.

It is difficult to pinpoint all of the exact circumstances, such as these, which make S. 1032 so important a piece of legislation. Some are rooted in our history and attitudes toward our living environment—the "frontier" phenomenon and perhaps an over-reliance on broad managerial mechanisms to deal with the problems caused by it. Many of us, for example, have no philosophical difficulty whatever with the concept that a person's right to a wholesome environment and to protection of the elements that sustain it may already be guaranteed by the Constitution as one of those unenumerated rights of the ninth amendment. In our society this would be very difficult to sustain. And as a practical matter, basing the protection of this right by legislation through the commerce clause is a surer and more prudent course—one that is consistent with our economic and legal traditions.

In either event, what is critical, as S. 1032 recognizes, is that we permit the development of economic and legal attitudes which will preclude unnecessary expropriations, by pollution or otherwise, of public resources that are vital to future generations as well as our own. Professor Sax has referred to this possible development as a "common law for the environment." And in our judgment, such a body of law, is long overdue.

Organizations such as the league have worked for decades to solve such basic problems as the contamination of our air and waters—to say nothing of far more complex issues as land use and resource distribution. We have participated in virtually every significant administrative and legislative remedy proposed for the past 48 years. Yet we find that they may be unworkable without the ability to test them on a case by case basis. In some instances, these

same "environmental" protections are used to circumscribe our interests and are raised as defenses against actions taken by the public for environmental improvements. Water and air quality standards, for example, as necessary as they are, have tended to lock us in rather than give expression to public concerns. We are pleased to note that S. 1032 does not isolate such programs from the process of refinement which this legislation will set in motion.

The league has only one difficulty with respect to the bill. That is use of the word "unreasonable" in sections 1 and 4: "to provide a right of action for relief of protection of the environment against unreasonable infringement" and so forth. Many believe that any pollution is unreasonable. Be that as it may, the a priori claim of "unreasonableness" is often thrown at citizens even before they have an opportunity to receive answers to the environmental questions they ask of Government and industry alike. We do not believe that the courts are immune from similar temptations, and we urge that this unnecessary qualification be deleted from the bill.

In summary, Mr. Chairman, the league is pleased with this legislation and the course that this committee is charting. We hope that the entire Congress will see its merit as well. S. 1032 has roots that are deeply imbedded in our common law tradition and it will greatly encourage a public which is struggling to give concrete meaning to the concept that the environment is a "public trust" for which we all have responsibilities.

Thank you.

Senator HART. Thank you.

(The information referred to follows:)

A LISTING OF RECENT COURT ACTIONS BROUGHT OR PARTICIPATED IN
BY THE IZAAK WALTON LEAGUE OF AMERICA¹

1. Izaak Walton League v. St. Clair et al, U.S. District Court, District of Minnesota, 5th Division, No. 5-69-Civ. 70, December, 1969.
2. Environmental Defense Fund v. Ruckelshaus, U.S. District Court of Appeals District of Columbia Circuit, No. 23813, October 31, 1969 (Intervenor).
3. Cape May County Chapter, Izaak Walton League v. Macchia et al, U.S. District Court for the District of New Jersey, Civ. 1037-70, August 1970.
4. Sierra Club v. Hickel. On writ of certiorari, U.S. Supreme Court, No. 939 February 22, 1971 (Amicus on Appeal from U.S. District Court, 9th District).
5. D.C. Federation of Civic Associations v. Volpe, U.S. District Court, District of Columbia, October 1969 (Amicus).

Mr. BUTLER. My name is William A. Butler. I am the Washington counsel for the Environmental Defense Fund. I practice environmental law in the courts and before administrative agencies. EDF's home office address is 162 Old Town Road, East Setauket, N.Y. 11733; its Washington address is 1910 N St. NW., Washington, D.C. 20036.

I might also say I am a registered voter in Michigan and hence, one of your constituents, Senator Hart.

The Environmental Defense Fund (EDF) is a nonprofit public-benefit corporation organized under the laws of the State of New

¹ Cited from *The Environmental Law Reporter*. Approximately six other actions have been undertaken by local chapters or state divisions of the Izaak Walton League, including actions under the Refuse Act of 1899.

York, with a national membership of over 18,000 scientists, lawyers, educators, and other citizens dedicated to the protection of our environment and the wise use of the Nation's natural resources.

As its bylaws provide, EDF's objectives are "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order * * * best [to] promote a quality environment."

EDF's "social action" includes education, research, and when necessary "to prevent * * * environmental degradation," legal action which is designed in part "to provide scientists fair and impartial forums in which their findings may be presented objectively to their fellow citizens."

In accordance with its objectives, EDF through its scientific and legal advisory committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that would otherwise go unrecognized. Its prosecution of many major environmental lawsuits has established it as one of the Nation's most effective and responsible litigants in this important field. Recent and current actions include, for example, the *DDT*, *Cross Florida Barge Canal* and *Alaskan Pipeline*, cases.

Given EDF's *raison d'être*, it is particularly gratifying to receive this committee's invitation to comment upon the proposed Environmental Protection Act of 1971, and more broadly, upon the general importance of legislatively stimulated and citizen-initiated litigation in defense of the environment. The current environmental crisis in our country underscores the failure of the present system for protecting and enhancing environmental values. This system must be re-ordered and strengthened, just as the Environmental Protection Act of 1971 promises to do.

The present system for protecting and enhancing environmental values looks primarily to government. Legislatures are to adopt the necessary laws for protection of the environment with enforcement and administration of these laws being delegated to administrative agencies. Many agencies are further empowered to perform the quasi-legislative function of establishing more specific environmental protection standards. In theory an enlightened public is to influence responsive legislatures to adopt sound environmental practices, with the legislatures then to oversee imaginative and thorough implementation of these policies by administrative agencies. In the environmental area this theoretical model has generally failed to date.

Courts until quite recently have played a relatively minor role in protecting environmental values. Increasingly, however, citizens and citizens' groups, frustrated by unresponsive legislatures and administrative agencies, have turned to the courts in their attempts to establish and to protect environmental rights.

Even here, progress has been slow because of the difficulty of a citizen or citizens' group in the environmental field to gain standing to sue. In fact, the Supreme Court currently has before it this very issue in the case involving environmentalists' attempts to halt Disney Enterprises' plans for a proposed ski resort in the Mineral

King area adjoining Sequoia National Park. I might add the Environmental Defense Fund has an amicus brief in that case.

Citizens have turned to the courts largely in frustration over the unresponsiveness of administrative agencies in recognizing environmental needs. Administrative agencies are not now sufficiently accountable to the public for their decisions having environmental impact. Agency experts deeply immersed in technical problems have little basis for knowing what technical benefits the public really wants, and what price environmentally the public is willing to pay for these supposed benefits.

The recent SST controversy is an excellent example of this observation. Whenever consideration is given chiefly to the use of technology, there are always strong vested interests, usually financially well-heeled, to articulate the projected economic benefits, but there are few to warn of the initially more remote and theoretical environmental risks and costs that upon careful examination may be revealed as overwhelming.

Administrative procedures tend to discourage and even to prohibit public participation in the decisional process. Agency decisions typically are based in environmental as well as other fields on narrow agency interests and upon those political pressures to which each bureaucracy is particularly susceptible.

Too often citizen environmental groups find governmental agencies to be adversaries rather than colleagues. Citizens decide they do not need and indeed cannot afford a bureaucratic agency middleman to identify and prosecute citizen interests in environmental quality. So citizens turn to courts.

Initiation of litigation is a means, maybe the only effective means, whereby a citizen or citizen environmental group may gain access to the decisional process and make his voice heard. He comes into court as a claimant of asserted rights, and not as a supplicant being given a purely pro forma due process administrative hearing.

But it is extremely important to emphasize that court suits should not be permitted to supplant legislatures and administrative agencies in making the society's decisions balancing environmental values against other considerations. Citizen-initiated environmental litigation should provide primarily an additional source of leverage in ensuring that environmental decisionmaking operates rationally, thoughtfully and with a sense of responsiveness to the entire range of citizen concern. Judges, as outsiders to the controversy, and as objective generalists, can take a fresh view of the contested matter on a common-sense basis to determine whether all relevant considerations have been taken adequately into account in planning the challenged action, and if not, a judge can in effect order a moratorium or can remand the controversy to the agency or legislature involved to so ensure that a democratic and public decision is made on the ultimate question.

Upon examination, the two major objections to increased citizen-initiated environmental litigation tend to disappear. I might add these would also be objections theoretically to your proposed bill.

The first objection concerns judicial competence to deal with complicated environmental questions. Here one must not forget that judges frequently deal with substantively complicated areas in many

civil cases, and therefore have experience in dealing with cases involving many and complicated issues.

Further, the judge's real job is to determine only which party has the burden of proof, and whether that party has met its burden, a far easier task than deciding on the basis of the technical merits of the case.

The second, and more major, objection revolves around the charge of judicial infringement on legislative policymaking. This objection misconstrues the proper purpose of citizen-inspired environmental litigation.

The role of the court is not to make public policy, but rather to help insure that public policy be made by the appropriate entity, rationally, and in accord with the aspirations of the democratic process. The job of courts is to raise important policy questions in the context where they can be given the attention they deserve, and to restrain essentially irrevocable decisions until those policy questions can be adequately resolved.

Especially if there is no demonstrated immediate urgency, a court may issue an injunction if it finds the proposed action at odds with legislative policy pronouncements on the environmental issues involved in a case, or if it finds conflicting legislative dictates as to what constitutes environmentally sound policy.

A lawsuit with its attendant publicity alerts citizens and legislatures to the problem, whereas the alternative is generally an administrative decision made at a low level of the bureaucracy without adequate public input, perspective, or even statutory authority.

The role of environmental litigation then is primarily to vent public concern and to focus issues for administrative, but particularly legislative, consideration. Courts are not properly the final arbiter of the balance between environmental rights and other considerations. This balance must ultimately be struck by the legislative branch, assisted by adequate public input.

When viewed in this way it becomes clear that citizen-initiated litigation will improve the operation of the democratic process in resolving environmental issues. Judicial intervention enhances both the legislative and administrative functions as it gathers and feeds useful information back into the legislative and administrative policy processes. Citizen-initiated environmental litigation is properly viewed as a catalyst and no usurper of the legislative process.

Yet paradoxically, though it is through the courts that citizens may most effectively and directly participate in the society's environmental decisions currently, this access is limited in many instances to circumstances of being able to show for standing-to-sue the existence of factors wholly unrelated to the environmental controversy, such as Plaintiff's economic damage beyond that of the public-at-large and as directly caused by the challenged project.

Bond requirements frequently strangle a plaintiff's case even before it starts. By removing many of the crucial barriers to environmental litigation which persist even in the face of our national environmental crisis, the Environmental Protection Act of 1971 would go a long way toward insuring that the courts become a forum for citizen participation in democratic processes and that environmental suits will serve as catalysts for legislative action.

Most previous environmental legislation has created agencies which themselves often become the most serious obstacles to environmental preservation, not out of the malice of the administrators, but because of the complexities of the administrative process and the gradual blurring of the distinction between the regulators and the regulated.

But in distinction to this sort of legislation, the proposed Environmental Protection Act of 1971 makes the critical contribution of recognizing that citizens enjoy a legally enforceable right to environmental quality. The act further provides each citizen with an adequate remedy to protect those rights.

For example, once a citizen plaintiff makes a reasonable *prima facie* showing of environmental harm, the proposed act specifically provides that the burden of proof shifts to the proponent of the challenged action to show that there exists no environmentally preferable alternative and that the society will be a net gainer for the action.

Waiver of plaintiff's bond under appropriate circumstances helps to redress the current economic imbalance between impecunious citizen plaintiffs and giant corporate or governmental defendants.

Last but not least, the provisions encouraging judicial review of the adequacy of administrative and regulatory procedures may well *per se* stimulate administrative reform and reduce the need for lawsuits in the environmental area.

Before closing this overly lengthy statement, permit me to make one final observation.

Just as the proposed Environmental Protection Act of 1971 will work indirectly to improve the decisional processes of administrative agencies by assuring greater public participation and fuller consideration of environmental and human values at the time decisions are first made, so too will it hopefully improve and democratize the decisional processes of legislatures, including the Congress itself.

I have levelled a good deal of criticism at administrative agencies and their unresponsiveness to public concerns about the environment. Much of this criticism could also have been tellingly directed at the legislative branch of government.

Let us hope that such indications as the recent rejection of the SST and the very fact of the introduction of the Environmental Protection Act of 1971 signal new found and sincere congressional awareness of a frustrated public's deep concern for the national impending environmental crisis.

Thank you very much for the opportunity to share these views with your subcommittee.

Senator HART. Thank you.

Before proceeding, realizing that Senator Hatfield will have to leave before the concluding two papers are given, I wonder if there are any questions you would like to raise with any of them.

Senator HATFIELD. Thank you very much, Mr. Chairman. I do have a matter to work out with the Marine Science program shortly, and therefore I will have to go to another meeting.

Mr. Chairman, I appreciate the opportunity to be here this morning and be educated on some of these problems that relate not only to your lake in your state but also to the overall problem of dealing

effectively with these environmental problems. I think the quality of the testimony has been extraordinary.

I would like to ask Mr. Butler one question. Mr. Butler, I am not an attorney; therefore, I ask you this purely from a layman's point of view. You talk about creating the procedure by which many of these controversies relating to the environment and resource uses might be settled in the courts. We are told, and I know from firsthand information, that in my State of Oregon the courts' dockets are very crowded. We are told by many people as well that part of our difficulties in the area of criminal justice is due to the overcrowded courts.

As I understand your testimony this morning, you are proposing now to put upon the courts additional responsibilities in this area, or at least provide citizens with the opportunity to bring into the courts these controversies.

We established in our State a new court to try to relieve some of the burdens of the existing courts in an area of great technicality and high specialty. We created and were one of the first States in the Union to do so, a special tax court to deal with specialized tax matters and tax law.

I don't know whether there is any similarity here or any analogy, but would it be logical to think about creating environmental courts, courts that would have certain expertise in the area to handle special cases that do involve our environment?

In Oregon, we are a public land State and, as you know, this has great economic meaning to us. Over 51 percent of my State is owned by the Federal Government. Our State's whole economic life is dependent upon utilization of resources from those Federal lands—grazing lands, timber lands, and so forth. So our case is perhaps a little different than maybe the State of Connecticut or even the State of Michigan. So, there are economic considerations as well as aesthetic considerations and recreational considerations and soil problems and watershed problems. There are all sorts of facets to this whole matter of the environment.

Would a court of this type be a logical answer perhaps to those who might raise objections to your proposal here on the basis of the crowded court dockets?

MR. BUTLER. In response to your question, I would say to begin with it does sound to be one way out if in fact the problem develops as critics of this bill have projected that it might.

However, it strikes me that several things will occur if this bill passes. First of all, the mere threat of a lawsuit very frequently causes settlements to be made that would not be made otherwise. I refer to an article which appears on the front page of the Wall Street Journal today which makes that very point in a number of different contexts.

So, in other words, the fact that the right of suit is there doesn't mean that a flood of suits are filed. In my home State of Michigan an act rather like the one proposed here has been on the books since January, and I think the flood of suits has been 12, although I am not sure that is a correct number. Professor Sax I think said that yesterday.

I think in many areas we simply need to have more judges and more courts. I do not think that any lawyer could possibly say that that is not the case looking at the crowded court dockets now. But it seems to me if these were courts of general jurisdiction, that the questions involved in environmental suits are not so complex that the average judge cannot handle them.

Within the last 2 weeks I have been involved in a potentially scientifically complex case here in the district courts involving the Department of Agriculture's use of Mirex, a persistent pesticide.

The technical issues are complex, but the legal issues are really rather simple. I believe the average judge who has to deal with medical malpractice cases, who is involved in antitrust cases, patent cases, and things of this nature by and large can handle the scientific material, and my preference would be that if you were to enlarge the court system of Oregon, and I know no more about it than what you suggested, that it would be perhaps more judges and more courts of general sessions which would handle, among other things, environmental suits.

One of the problems is in defining what constitutes an environmental suit. It is a very difficult area to define. Land and title cases and things of this kind are included. It is just this type of thing that courts of general sessions have been handling for a number of years.

Senator HATFIELD. Mr. Scott, you were talking about the wilderness problems here as you have faced them over the years. As you know, we have had again to fight the agency as far as their disapproval of our Minam River wilderness proposal in our State in which you participated—your organization did—and the citizen's voice there again prevailed over objections of agencies. The same was true with Mount Jefferson wilderness where we all worked hard.

My question here is really an observation rather than a question. The French Pete matter at this time is pending, I think, and has been suspended because of citizen objection. Do you feel that it is a question of procedure here being expanded to other agencies as much as it would be perhaps a thrust in perhaps reclassifying some of these public lands? In other words, is it a two-fold problem? Is it a matter of providing the procedures by which citizens may participate in these land management policy decisions but also in reclassifying and redefining perhaps, including the Wilderness Act—if I may tread now on sacred ground for a moment—even redefining some of the present provisions of the present Wilderness Act, because frankly I find some of these definitions within the Wilderness Act are becoming more like an obstacle than a help?

As you know, people are talking now about limiting the use of the wilderness because of the overcrowded conditions, creating permits or priorities or something of this nature. At the same time, my State is the lowest in percentage classification of wilderness of any of the Western States. We are that far behind.

So, it is just a matter of procedure for citizen involvement, or is it also a question of reclassification and redefining—reclassification of land and redefining some of these classifications?

Mr. SCOTT. Senator, I cited in my prepared testimony the historical experience that the wilderness conservationists have had initiated in

1929 and 1930's with the Forest Service creating a wholly administrative wilderness protection policy which was to be carried forth by certain reclassification procedures and public hearings, very nice procedures. What that did not allow was a challenge to the final decision.

The Forest Service would decide to cut 360,000 acres of the Three Sisters primitive area. The Senators of the State could go through the roof about this, the citizens of Oregon could be terribly agitated, and the Forest Service did essentially what it pleased and it carried the day on that decision primarily.

So the Wilderness Act was substituted after a very long and difficult legislative battle that Senator Hart will remember, having been here at the time, over 8 years, to provide a legislative out to say that yes, the Forest Service shall initiate these decisions as to where the boundaries should go, yes, there will be these public hearings conducted by the agency, they can review this decision again, but the final authority goes to Congress and the citizens have an appeal back to Congress.

So in Mount Jefferson the Forest Service did not want to put Marion Lake in the wilderness.

Now, these are relatively major decisions in each discrete case.

I think what concerns us more as regards to these court appeals and which is not obviated by this kind of process are the little day-to-day decisions, the decisions to insert a clear cut into a valley like French Peak. To get a review by the legislature on that kind of a problem requires an enormous investment of citizen energy and effort to raise the controversy, to cause a stink, to get a day in court with their elected representatives. That is a very difficult and time-consuming task.

Senator HATFIELD. May I interrupt at that point? We have been given a list of all of the activity the Justice Department is engaged in of late in enforcing laws that have been on the statute books, and especially as it relates to the Great Lakes and other such areas, and yet these do not relate to such specifics and what we would call everyday matters. How does that relate to this matter? Why can't the Justice Department involve itself on this lake problem?

Mr. SCOTT. An excellent question, and many of us have been asking it for years.

I think you should also get a list of all of the Justice Department cases where the Justice Department is on the other side arguing that the citizens do not have standing. Why are we in the Supreme Court on the technical matter of the barrier to enter? The Justice Department is saying don't let them get to the merits of the case.

We are encouraged to see the Justice Department moving into some of these antipollution suits. It is a good start, and that is about all. I do not think it is an answer. I think ultimately the decision to go into some of those suits turns out to be a value judgment that is made—again by a person in the agency, this time the Department of Justice, that citizens have no resort to.

Senator HATFIELD. Mr. Pankowski said in his testimony on this matter of definitions in section 1 and 4 referred to the unreasonable infringement, and then I think, Mr. Pankowski, you said many believe that any pollution is unreasonable.

To me as a nonsmoker, when you smoke a cigarette you are polluting the air as far as I am concerned. So this is pollution. So we get down I suppose to a legal problem of having to set certain guidelines or make certain standards.

I was interested in what you said when you said water and air quality standards as they are tend to lock us in rather than give expression of public concern. Could you expand on that a little bit? I am not quite sure I understand it.

Mr. PANKOWSKI. At the time the water quality standards were instituted they were meant as a device which would set a floor in terms of the kind of contaminants that could be put in any given body of water. As they have turned out, they have constituted in effect a ceiling which tends to keep existing water quality levels as they are.

Senator HATFIELD. Rather than a minimum?

Mr. PANKOWSKI. That is right. The difficulty with this is the world does not stand still. You can set a water quality standard for the Potomac, 10,000 new homes are built, the standard doesn't change. It has been written. It was written as a result of public hearings and so forth. But nonetheless, because of our growth rate, because of new economic development and growth and so forth, the contaminants still keep going into the river irrespective of the standard. There is no way to challenge the standard as it is now.

Senator HATFIELD. Do we eliminate them? How do we meet that problem? We have to have some kind of guideline, don't we, whether we call it a standard or something else?

Mr. PANKOWSKI. Yes. I think the important thing here is that people should have an opportunity to challenge the adequacy of a standard if it is not doing its job. I think basically that is it.

Senator HATFIELD. And they should be the minimum rather than setting them as the ceiling?

Mr. PANKOWSKI. They were meant as a minimum standard of performance, that is right.

Senator HATFIELD. But you do agree that there has to be some sort of definition, some sort of standard, some sort of a guideline, and you only are asking that they can be reviewed by public participation through some procedure set up for that purpose and that it be only a minimum standard and not looked upon as the ceiling or the maximum; is that right?

Mr. PANKOWSKI. I think when no one else is reviewing the standards (and I recognize the limitations of the legislative process—the workload is fantastic, so is the workload for administrations, I have great sympathy for our so-called bureaucracy) when no one is taking a look at these problems and has the time and resources to delve into improvements in our environmental management systems, then I think people have a right to take these matters under their own cognizance and to do what they can to bring these to the attention of not only the administration and the legislature, but to the courts when they can show that damages are in fact occurring.

Senator HATFIELD. I think your point is a very accurate one that these things often get frozen in and as time moves on and new circumstances create a certain obsolescence to the standards that were once created.

It reminds me in 1911 our state declared all the public beaches as a public highway. We did this in order to make our beaches public so that all people would have access to them, and we did it legally and constitutionally by declaring them to be a public highway.

Well, as time went along and cars became more prevalent and people saw this as a public highway, we had cars racing up and down the beach. Consequently, we had a conflict there between the pedestrian and the beach user and the car. So we had to change that law to have it declared as a public recreational area in order to abolish cars.

I think that is only one example of what, as I understand your point here, that these things do tend to get fossilized, and unless there is some procedure for a continuing on-going review, they no longer serve a purpose after a period of time.

Mr. PANKOWSKI. I am familiar with Oregon's Beach Act. We hope we will get national legislation in a similar vein despite the problem of dune buggies and that kind of thing.

I would say there must be some rules of the game, some management system, some standards. I recognize Professor Sax in particular refers to the public trust as a process of democratization. I have given that a lot of thought, primarily because of our involvement in Hunting Creek in which we attempted to take Professor Sax's theory, which I think is basically sound, and to apply it in that practical situation.

I believe in my own mind I go beyond his judgment in that respect. I think the public trust is more than a process of democratization, that the nonrenewable and the vital nature of our resources demand a standard of performance by government and by private citizens alike which goes beyond the ordinary affairs of men. I think it would be more analogous to the criterion which says you may not destroy vital resources, that is, resources on which we must live for our very existence, unless you can show it is necessary to do it to enhance our benefit. This is a standard of sort. There may be others.

I think unless we have the legal tools to start developing these kinds of standards which underpin a managerial system, we are really going to be spinning our wheels.

There is a natural tendency, I think, for an administrative government to want to balance the world. The Bureau of Outdoor Recreation wants to balance the world. The Federal Water Quality Office wants to balance the world. Everybody wants to balance the world, rather than doing their job which is to enforce the law.

I think it is up to the Congress to balance the world and not an administrative agency with respect to specific legislation.

Senator HATFIELD. Thank you, Mr. Chairman.

Mr. SCOTT. May I add one thought on this point having to do with the problem of standards? That is relatively easy in air and water, it is not easy there, but take something like the management of timber on public lands. I am a resident of the State of Oregon, a native, and I know the problem you refer to. There are no legislative standards there. There is the multiple use and sustained yield agency which in a very sort of general and glib way says who shall do such and so. But what if the administrator out in the field isn't doing that? How does that get appealed?

This is a question that concerns us. I think you heard a great deal of that concern in the Public Lands Subcommittee last week. Right now if his superiors don't get after him, which they sometimes don't, if he is way off in the boondocks and there is only one little citizen trying to stop what he is up to, he has carte blanche, and it is very difficult to challenge that.

The public servant is going to serve the public sufficiently better to the degree the public has some clout when it looks over his shoulders. That is the best standard I know of.

Senator HATFIELD. Thank you, Mr. Chairman.

Senator HART. I am grateful that the Senator from Oregon overstayed and made himself late for the next committee meeting because of the questions he has raised.

I would not want the two from whom we have not heard to feel estopped if in addition to their prepared statements they would want to make a comment on any of the things that Senator Hatfield referred to.

Mr. PICKELNER. Mr. Chairman, I am Joel Pickelner, legislative information specialist for the National Wildlife Federation which has its national headquarters at 1412 16th Street NW, here in Washington, D.C.

Ours is a private organization which seeks to attain conservation goals through educational means. Affiliates of the National Wildlife Federation are located 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 3 million persons.

Mr. Chairman, we appreciate the invitation and the opportunity to testify because we are greatly in favor of S. 1032. We feel that S. 1032 could be one of the single most important bills Congress could pass to protect and restore the environment. The need for citizen involvement in the area of environmental quality has only recently been recognized by the public. After years of apathy about the problems of pollution and environmental degradation, the general public is at long last becoming aware that if action is not taken soon, soon there will be no action left to take.

The seriousness of the environmental problem cannot be overemphasized. A great number of knowledgeable men in the environmental area have been warning that unless drastic action is taken immediately, man's chances of survival may be slim. Many people dismiss these predictions as overstatements, but as each day passes, more evidence points to the fact that they might be right.

The most desirable type of response for the elimination of environmental problems is legislation which will authorize and direct programs designed to restore, enhance and protect the environment. However, at the present time, and probably for some time in the future, the Government and Congress are hesitant to impede technological progress. In the absence of legislation, litigation is preferable to inaction. Successful litigation cannot only alleviate the harm caused by some forms of industrial pollution, but can also serve as a catalyst for a more widespread legislative response.

Because of the slowness of the legislative process the courts have been pushed into the spotlight in the battle to save the environment.

It must be noted, however, that the courts have been stepping lightly when it comes to enjoining environmental degradation. While courts often enjoin pollution when specific property damage is shown, they are only beginning to consider the more amorphous idea of damage to the environment in general.

However, values in America are currently undergoing a dramatic change which is eliciting response from both the courts and the legislature. As the Nation is becoming more affluent, production and consumption are becoming less important and the importance of environmental values is increasing.

There are a number of functions which may be served by the private suits fostered by S. 1032. First of all, there are a number of types of pollution which are not covered by existing statutes. Second, private actions may be used to fill in gaps in an existing governmental regulating structure.

In such an event, private suits would provide a means for attacking pollution violations that are ignored by governmental agencies either because the particular pollutant is considered too insignificant or the government agency is too overburdened with work to prosecute all offenders.

The judiciary has always been the one branch which has protected human rights and the courts are directly available to every citizen whereas the legislative and executive are only indirectly available. In order to give those concerned with the environment a forum, the National Wildlife Federation strongly recommends the passage of S. 1032.

Thank you for the opportunity of making these remarks.

Senator HART. Thank you for your testimony.

Mr. KEKER. My name is John Keker; I am a staff attorney with the Natural Resources Defense Council, and a member of the California bar. It is a privilege to appear before this committee in support of S. 1032, the Environmental Protection Act of 1971.

Yesterday Mr. Atkeson noted seven problems relating to S. 1032. These reservations, together with a conviction that there are better ways to handle environmental problems, led the Council on Environmental Quality to oppose the bill. Others in supporting S. 1032 have described significant benefits which it will allow; I will limit my remarks to comments on the problems raised by Mr. Atkeson.

The council's reservations exaggerate the extent to which S. 1032 alters relationships between various parts of our Government. At the same time, the council depreciates the importance of the substantive rights which the bill creates. Specifically, the council's seven reservations involve the relationship between the Federal courts and Congress, between courts and administrative agencies, and between Federal courts and State governments.

In my prepared statement, I discuss the Council's objection that this bill gives the courts power which Congress should keep to itself. That objection is highly misleading since all of the legislation which the administration introduced on environmental matters would have Congress delegate authority to administrative agencies to make the difficult policy decisions which must be made. Rather than belabor that point, and the inadequacy of the Council's objections, I would like to skip to the crux of the Council's position—that adminis-

trative agencies are more able to protect the environment without a court's help than with it.

The Council's reservation that courts are not institutionally equipped to make environmental decisions is directed largely at the supposed greater competency of administrative agencies. They note the concern about this issue of comparative competency shown by the Supreme Court in the recent mercury dumping case brought by the State of Ohio, and they quote the Senate Public Works Committee's report on Section 304 of the Clean Air Act, to the effect that the citizen suit provision of that bill would present limited and specific issues for decision. Further in its statement, the Council asks: "Will effective government be served by telling the courts * * * to disregard existing administrative and regulatory procedures they find 'inadequate'?" The possibility of de novo judicial consideration of environmental decisions made by an agency "confuses" the fact-finding and appellate roles and permits "duplication of administrative and judicial functions."

Those are the quotes from the Council's statement. And then Mr. Atkeson went on to worry about whether or not an agency would be confused over which set and standards to apply, the standards previously existing through legislative or administrative decisions, or whether to use S. 1032 as an enforcement device in any particular area.

The Council wants "at a minimum * * * a clearly defined correlation of this bill and existing Federal and State legislation." Finally, they gave examples of how open administrative agencies are to public intervenors and suggested that the best approach would be to reform outmoded agency procedures, elect or appoint more responsive administrators, and limit citizen suits to the enforcement of mandatory duties.

The Council's recommendation that administrative agencies be improved is unexceptionable. One of the principal advantages of S. 1032 is that it allows the court to look behind the administrator's mandatory duties to the substance of his decision. If his discretionary decisions were adequate, there would be no need for that aspect of this bill. The issue is whether S. 1032 would contribute to reforming outmoded administrative procedures and to producing more responsive administrators. Others today have spoken to that point, and I agree with them, that the answer is yes, it would contribute.

In the same vein, the pejorative connotation of "confusing" fact-finding and appellate roles, and "duplicating" administrative functions, assumes that there is no reason for allowing courts to consider agency decisions on the merits. In sum, this series of reservations reduces to a simply stated one:

Administrative agencies are more competent to make environmental decisions than courts, and meddling by the courts will result in more bad decisions than good ones.

This issue of comparative competency to make difficult environmental decisions has been well-treated by others today and yesterday, particularly Professor Sax. Sometimes agency expertise and experience with the problems of the regulated area make it the best forum. Sometimes that expertise and long experience lead it to give too much weight to the group it hears from most often—the regulated

industry—and ignore other values necessary for a decision in the public interest.

Alvin Toffler, in his book "Future Shock," suggests that bureaucracies are organized to deal with problems that no longer exist. That may be overstating a bit, but it does help explain the ironical fact that experts have become the problem, not the solution. Increasing expertise is often accompanied by a decreased capacity to think outside the area of one's expertise.

S. 1032 places courts in a supervisory role vis-a-vis agencies in environmental decisionmaking. When a suit is filed, the court can send the case to a Federal or State agency for resolution; there is no reason why this course will not be followed whenever an agency does provide a better forum than a court. A party who wishes to resist that procedure will have to present good reasons—and in the light of the case load in the courts I would suggest he would have to present very good reasons why the relevant agency would not deal fairly with his case. When a court does hear an environmental case on the merits it will consider matters no more complicated than other kinds of cases which traditionally are heard by courts. It is unfortunate that the Council did not explain their reservation about institutional competency more fully, since S. 1032 seems to provide the flexibility to insure that the most appropriate and competent forum consider each case brought under the bill.

Another important consideration ignored by the Council is what a citizen should do while he waits for a specific law to give an agency authority to set standards or otherwise provide environmental protection. Bills introduced into Congress in 1971, if passed, will not affect the specific problems addressed for years: offices, bureaus, and branches must be established and staffed; standards or rules must be drafted; comments and consultation must be solicited; and finally enforced will begin. In the meantime, S. 1032 provides citizens with a substantive right to protect themselves from environmental hazards.

Again referring to my prepared statement which I will comment on now, the next section talks about the Council's objections as to how this bill affects the proper relationship between Federal courts and the States, and again I suggest that their objections there are highly misleading because of the legislation which they actually do support, particularly in the area of land use regulation.

As an example, I will read the section 101(a) of the administration's proposed "National Land Use Policy Act of 1971." It states:

The Congress hereby finds and declares that decisions about the use of land significantly influence the quality of the environment, and that present state and local institutional arrangements for planning and regulating land use of more than local impact are inadequate. . . .

They go on to propose a different remedy for the inadequacy than that suggested by S. 1032, but I think the point is clear—the Council and the administration consider land use policy a national problem to be dealt with on the national level.

To conclude, the seven reservations which led the Council on Environmental Quality to oppose S. 1032 do not raise any substantial objections to passage. I hope that Congress agrees with that conclusion, and takes a much-needed step to protect the environment by passing the "Environmental Protection Act of 1971."

Thank you.

Senator HART. Thank you, Mr. Kekker. Thank you particularly for reacting to the testimony of yesterday.

I first want to thank everyone for his presentation. As Senator Hatfield said, it was excellent up to the point he left, and I will inform him it remained at that high level. Indeed in your testimony you, I think, have reacted to most of the points made in the criticism of the bill. Yet no one has been so blunt as to put a criticism, a possible criticism, as I am going to now. One of this reasons that we suggest makes desirable legislation of this sort is that agencies—Mr. Pankowski said the much-maligned bureaucracy—a short-sighted, unresponsive, and subject to the pressures of the narrow segment of the economic society that they are responsible for and so on. What makes us assume that judges are going to be any better? I ask this because implicit in this legislation is the proposition that the court gives you a better reading.

Mr. PANKOWSKI. Was that a question to us?

Senator HART. Anybody.

Mr. PANKOWSKI. We are all human beings, judges and legislators, citizens and the like. I personally don't think that anybody should have the arrogance to say that they have the answer—the answer—to our environmental problems. I don't trust anyone who speaks in those terms. They are just too complex. I think the thing that makes the court so important is that we get down to specifics. We don't deal in generalities as we ordinarily would with let's say administrative agencies or perhaps even with legislators. We are talking about a specific act which has specific repercussions to which men must specifically address themselves. I think Professor Sax talks about this at great length in his writings, that the law of the case has a strength which we don't find elsewhere, and through a series of decisions here in the decades ahead we are going to develop a common law of the environment, a basic standard of conduct, if you will, made up of thousands of decisions. I think that is value that is not found in almost any other circumstance. No longer will an industry come to us and say if we can't destroy this estuary to locate a refinery, there aren't going to be any jobs in this region. We want to know how many jobs, would you provide more jobs somewhere else, what is the cost of those jobs, whose other job is that going to cost, that particular act. I think it is the specificity of the adversary process that is going to give us the breakthrough that we have never had in our history in terms of environmental law.

Mr. KEKER. Senator, I am one of those who is not optimistic about the competence of judges to handle these problems, not because the problems are technical but because perhaps the judges are too conservative; perhaps judges as well as administrators would be timid in dealing with the kind of factual and value conflicts which will confront them in an environmental case. The point about judges really not being that much of an improvement over administrative agencies is an interesting objection to the bill, because if an opponent of the bill makes the objection, it tends to destroy the apocalyptic character of the rest of his objections to the bill—that it will bring chaos and cause things to fall apart. But I think the example of what has happened with State nuisance laws is instructive. There are probably more reasons than just procedural obstacles why State

nuisance laws have not been more important in environmental litigation. One of those obstacles is that in nuisance cases, for a judge to decide against the defendant, he often must tell the defendant to spend lots of money and take the chance of putting local people out of work; those things will weigh very heavily on him; these are difficult cases to win.

Mr. BUTLER. Senator, I would like to answer your question in a little different vein which is to suggest really what many citizens are asking, certainly what their lawyers are asking, is not that the judge decide the merits of the case, but that the judge delay proposed action until other competent agencies, be it the Congress on the SST or the administrative agency or even the executive branch itself, as in the case of the Cross-Florida Barge Canal, reexamine the project and give it the sort of careful look that it hasn't received thus far.

I would like to give three examples of this, which have occurred in major cases recently in which the Environmental Defense Fund, as well as various others of these groups represented here, have been involved.

The first one is the *trans-Alaskan pipeline system* case. That project was enjoined here in the District of Columbia by a district court judge who would not presume to answer the many technical issues involved in the project. He simply said, "Let's stop until the National Environmental Policy Act is complied with and the necessary studies are made." Now, for the last year, intensive legislative and executive branch studies have been going on, the matter has been discussed widely, and there may eventually be a trans-Alaska pipeline system, but it will be a very different system than would have been created a year and a half ago. The judge won't be the one to decide what sort of system that is. He simply delayed the company's plans immediately to go forward with what certain company engineers have admitted to us were inadequate plans.

Second of all, let's take the Cross-Florida Barge Canal. For years citizens groups had said this was environmental and economic folly. Here about 3 months ago, the Environmental Defense Fund finally got a local district court judge to suggest that the project should be halted pending a trial on its merits. Within 4 days after that, the President of the United States decided that perhaps the project should be halted permanently. The amount of publicity which has been generated by this case was sufficient to make the executive branch act, whereas perhaps otherwise they wouldn't have. The judge here didn't presume to say that "In my estimation as an environmentalist and ecologist this project is or isn't foolish." He simply said, "Let's halt and study this a little more."

Take the *DDT* case. For a year and a half the Environmental Defense Fund had a petition before the Secretary of Agriculture for a hearing—that's all—a hearing on the environmental damage done by DDT, the need to cancel DDT. Nothing happened for a year and a half. We went to the court of appeals here in the District of Columbia and said "inaction is action, this is a final order. We would like to appeal the final order, which in essence is that there is no problem and so a study doesn't have to be made." We presented a ream of scientific evidence; so did the Government. The

judges in essence threw up their hands and said, "We can't possibly answer the technical arguments here, but it is perfectly clear that there is a major issue," and so they ordered the Environmental Protection Agency to hold cancellation hearings on DDT. The judges didn't decide the issue. They simply said, "This is a problem, let's let the administrative experts now study this program as they were unwilling to before."

So the whole argument about judicial competence to decide the technical questions of an environmental case is very frequently misplaced.

Mr. PICKELNER. I would like to agree with what has already been said, plus add the point that with the responsibility thrown on the courts, there are a lot more than 51 forums such as when you are limited to the legislature or the Government agencies.

There are a lot more courts available to the people than if the people try to petition each legislature or each government agency. It would give them a greater opportunity to look into the minor matters that the legislatures don't have the time or the staff to look into.

Mr. SCOTT. I would just like to add on the question of forum, when you get it in front of a judge, you get it in front of a forum where not only will they listen to the other side but presumably they will hear something. Admittedly, I am talking about the very worse of our experiences. In saying that, all of this table can cite experiences with administrative agencies where they simply don't listen. They have made up their mind which way they are going to go.

You can file appeals, you can file documents, you can give them statements, you can send in experts, and nothing will move that mountain. They are in momentum; they are going and they will not be stopped. At least you get into an independent forum where you can do battle on what is the public interest in front of somebody who will have to listen to what you are saying.

Senator HART. I remember how we generated this discussion. Why put your money on a judge? And Mr. Scott's answer assumes that judges listen. My question suggested that some of them may not.

But to a question which I am sure an opponent of this bill would ask of Mr. Butler, because you ran through three very conspicuous instances where without the bill you were now considering the courts were available, so, why do we need the bill?

Mr. BUTLER. Well, for the first thing, these cases were brought at the District of Columbia where groups like the Environmental Defense Fund have standing to sue. They could not be brought in the Ninth Circuit in San Francisco, given the decision in the *Mineral King* case in the Ninth Circuit. The Supreme Court still has the issue before it as to whether groups like ours should have the right to go into court per se. It is still very much an open question.

In the Second Circuit, in the D. of C. Circuit, we do. In other circuits it is a little less clear. In the Ninth Circuit, we don't. To the extent that these problems arise in the Ninth Circuit, there is a very real problem as to what to do, I should say.

Second of all, these are problems, as you have suggested, of very great national prominence. Such important environmental cases really won't be great in number over the course of years, but there are

everyday problems across the country which require the same sort of "judicial moratorium" to be called, to use Professor Sax's words, for judges to take a look at the problem and say, "wait a minute, I can't decide this. But I don't think adequate attention has been given to this project yet by the proper authorities. Let's call a halt; I will grant an injunction, and you, the agency, or the legislature go back and make sure that you are doing." This is in highway projects, dam projects, shopping center developments, local zoning, so forth and so on.

In these instances I have just related to you, the *DDT* case, the *Cross Florida Barge Canal*, the *Alaskan Pipeline* cases, plaintiffs had difficulties in raising money and getting into court. The hassle with the administrative agencies and the immense time and effort involved would not in themselves be encouraging to a local citizen group, but it would be very discouraging.

In these three cases you are dealing with plaintiffs, many represented here, national groups whose national membership is upwards of a million people. But how about the small group who wants to oppose the highway or the small local group who wants to oppose the shopping center? They will take a look at these cases and say, "If we can't get one of the major environmental organizations in, we might as well not oppose the action."

So, if these have been victories on procedural grounds thus far, they have been very limited victories.

Senator HART. One of you, at least, I think had a comment on the testimony—Mr. Keker talked about the testimony of yesterday in opposition. Are you or any of you familiar with the position that the Legal Advisory Committee of the Environmental Quality Council took on this bill?

Mr. KEKER. Yes, sir.

Senator HART. They give a general endorsement to the bill and identify certain changes that they would recommend, and one would be the retention of the requirement that the plaintiff has exhausted his remedies.

If that were added to the bill that we are considering here, S. 1032, what effect would that have on the desirability or effectiveness of the bill?

Mr. KEKER. I do not know all the exceptions and covents to the rule of exhaustion of remedies, but I know that application of the rule is complicated. If that body of law were put into this bill, it wouldn't have a disastrous effect on the bill.

But there is this problem: As soon as you formally allow the exhaustion of remedies rule to apply, it gives the litigants an opportunity to spend time on the formal issue of whether or not remedies have been exhausted. The way the bill is written now, it seems to me clear that the intent of the drafters, and if S. 1032 is passed of Congress, is that where there is a good policy reason for remanding a case to an agency or State court, that policy reason will be accepted by the court, which will require the parties to exhaust their administrative remedies.

So, under S. 1032, the only thing you lose is the formalism of the rule on exhaustion of remedies, and that is no loss at all. I think that is an advantage.

Senator HART. Does anybody have any experience he could cite to respond to the claim made against the bill, that a business or a governmental unit, I suppose, can be sued endlessly, again and again, and harrassed by the multiplicity of suits?

Mr. BUTLER. This again is a specter which is raised by those who see themselves as potential defendants in these types of cases. However, the courts are perfectly well and able, and judges face it all the time, to make the decision as to whether what is before them is a meritorious lawsuit, or whether it should be dismissed as being frivolous or harassing.

After all, this isn't the only area in which a potential plaintiff might like to harass. There are many areas—libel, slander, corporate law, or labor law, for example, and in all of these fields judges have developed sufficient expertise to be able to grant motions to dismiss very early on in the case when it is perfectly evident that the major reason for bringing these suits is harassment, and that there is nothing substantive to the argument.

It seems to me to suggest that judges wouldn't be able to dismiss an environmental case under the same circumstances is just not true.

Mr. KEKER. Senator, I would like to recommend for inclusion in the record an article appearing in the Michigan Journal of Law Reform, either the current issue or a soon to be published one, that deals with exactly this problem under the Michigan bill. The conclusion there is that multiplicity is not a great problem.

Senator HART. We will make sure that it does get in.¹

That may be the article, if it is not yet published, that Mr. Sax talked about yesterday, but we will make sure it gets in.

Mr. KEKER. I am sure that it is, sir.

Senator HART. You have indicated—I speak now to Mr. Keker—or had some comment to make on the difficulty that has prevented the nuisance action from being more effective, the difficulty that is created by the pressure on the court because of the threatened payroll which will leave town if you require us to eliminate our practice of using the local streams as our own private preserve. I would like to think in the proposed bill that somehow or another we had eliminated that problem.

I have advertised the bill as very desirable, but I have never yet claimed that we are eliminating that hang-up that is perfectly understandable in the kind of society we have.

Mr. KEKER. As I understood what the plaintiff will be required to prove even to get to the point where the burden of proof shifts to the defendant, he is going to have to show that what the defendant is doing is indeed polluting, impairing, or destroying the environment. In some cases, believe it or not, that can be a substantial problem. For example, dumping a little bit of toxic substance into a large body of water—there will be a big argument about the effects of that.

And then second, the plaintiff must prove that the pollution is unreasonable. In this context unreasonable can mean one of two things: One, that the activity itself which is doing the polluting is

¹ See p. 143.

unreasonable, that it shouldn't be done at all; second, the way it is being done is not the best way, there is another way at a reasonable cost to do it, a less polluting way.

This adds up to a rather substantial burden on the plaintiff to even present a coherent and persuasive case. Considering the consequences of accepting that case, perhaps it will have to be even more persuasive for most judges than it would have to be for you and me listening to the plaintiff.

Finally, the defendant has an opportunity to prove that the alternative which the plaintiff suggests or other alternatives are not feasible and prudent, and that can mean just too much money.

So I agree it is something to be concerned about: whether this bill will really get to the problem that you want to address.

I think perhaps the first place to start if you thought about making the standard more lenient for the plaintiff would be to look at that word "unreasonable." Maybe it should not be eliminated altogether but somehow a judge must be encouraged to be rather strict in dealing with pollution and impairment of the environment.

Mr. PANKOWSKI. This relates to our comment in which we have urged that the qualification of unreasonability be deleted from the bill. I recall our experience at Hunting Creek. It took us months of history and involvement in the political process there just to draft a six-page bill of complaints. Even after months of activity, both by Federal and State agencies and local citizens over 9.6 acres of bottoms in the Potomac River, after months of frustration, we were called unreasonable for bringing that action, and yet the court didn't feel it was unreasonable.

He didn't throw us out on our ear. He could have done that.

I think when private citizens think about going into court, they don't make that decision lightly. Some of us almost got ulcers agonizing whether we should take such a drastic action. We wondered about countersuits, bonding and financing and all the other matters, and yet we decided to proceed and it had repercussions in terms of our discussions here today and in writings that have since gone far beyond the merits of that particular little acreage.

I think it would be good for the legal process itself to make determinations of reasonability and what is unreasonable. This is a standard which is going to shift and be decided in instance after instance. Dumping a minimal amount of waste in the Potomac River may be a reasonable act, but dumping a minimum amount of waste into a river which is scheduled for wild and scenic river designation might be a tremendous folly.

Senator HART. Does anyone want to react to a point I think has been raised against the bill, As you know, the bill authorizes action in State as well as Federal court, and the bill has established some procedural rules. They go to rejecting the argument over standing and the burden of proof shifting and, as written, exhaustion of remedies, and the sovereign immunity business.

Is Congress permitted to legislate with respect to these procedural rules for State courts?

Mr. KEKER. I think they are, Senator; Congress has done it in the past. As you know, the distinction between substance and procedure is often a hard one to follow. Consider as an example the

Federal Employers Liability Act. The Supreme Court has decided that FELA's procedural rights go along with the substantive right for recovery; it is all a package and the effectiveness of the bill is dependent upon both the substance and the procedure. The Supreme Court has held that State courts must follow the important Federal procedural rules in such a case.

I think S. 1032 would be considered a similar kind of law. All of the procedures that you have in this bill are for good reason. Indeed, they are perhaps as important as the substantive right. I see no problem with Congress passing this law to be enforced in the State courts.

Mr. BUTLER. I think I would agree with that. It is a troublesome area, but I think the most valuable preemption precedents for those defending this bill would come from the field of labor law. In those areas what is procedure and what is substance is melded. It is the procedures itself that is the substance of the Act. In the area of labor law, it is apparent that Federal law can be also constitute the procedure of the State courts.

But it is not a point to be passed over lightly, and it is one in which if research hasn't been done, it should be done.

Senator HART. Mr. Bickwit.

Mr. BICKWIT. I sense some difference of opinion within the panel on the question of competency of the courts, and perhaps we ought to get the matter clarified. Let's take a specific example. Take the DDT case pending before the second circuit. If the D. of C. circuit had the power now to decide the merits of the *DDT* case, and this bill certainly would give the circuit that power, would it as well have the competency to overrule the Environmental Protection agency's decision?

Mr. BUTLER. Since that is our case, I would like to respond. As plaintiff, E.D.F. would like to say yes, they would have the competency. But the judges, at least those that presently constitute the panel, have suggested no, they don't have the competency. I suppose in each case the plaintiffs would be arguing that the judges do have the competency, and it would be up to the judges to determine whether or not they did. In this particular case, we would like to think that the scientific evidence is so one-sided that they would be able to make the decision without a great deal of scientific competency in the biochemistry of chlorinated hydrocarbons.

However, the judges in their wisdom have suggested that at least at the present time they would prefer to have these decisions made by administrative agencies. I would guess this is a question which can't be answered in the abstract or even with this particular case.

It is exactly that sort of decision that the judge must make for himself.

Mr. BICKWIT. I now think there probably is agreement among the panel on that question.

Mr. PANKOWSKI. There is. For the record, I might mention that the Wisconsin Division of the Izaak Walton League spent something like \$20,000 on the hearing in that case with respect to the technical considerations involving DDT; it ran some 18,000 pages, and despite our position on the staff, I wouldn't even begin to understand all there is to know about that particular substance.

So I think my colleagues' remarks with respect to leaving it up to the judge are very much in order.

Senator HART. Actually, in this particular case, how did they voice the feeling that they do not have the competency?

Mr. BUTLER. In almost those exact words, unfortunately.

Mr. BICKWIT. Is it clear that they mean that if they had the right to look at it they would not have the competency?

Mr. BUTLER. Yes.

Mr. BICKWIT. I just have one final question. One point that is often made and has struck home to some extent is that under this bill it would be extremely difficult for a potential defendant to plan his operation so that he could comply with what this bill demands he comply with; namely, not to pollute, impair or destroy the environment unreasonably. He has no standard to look to. Is this a valid objection?

Mr. PANKOWSKI. If the protections afforded by this bill were instantly implement with respect to every decision which is made in this country regarding, let's say, development practice, I think the result would be chaos, but as a practical matter it would be virtually impossible for it to work that way because people are not going to sue in every neighborhood in the county to get rid of the corner gas station or to get rid of the corner shopping center or to stop every instance of water pollution.

I think the protections afforded in this bill have to be looked at in context, that is, what are those major problems that people are faced with and over which they have spent a good deal of time and energy to solve. Legal action on our part, for example, has always been a reaction to our frustration, having found other courses wanting. So I think the situation which you cite should not be a great problem to society at all.

I think it may be a great problem for the man who wanted to do business as usual.

Mr. PICKELNER. I think also on this, there might be a problem in the immediate future right after the bill is passed as far as some confusion goes, but once the courts do start handling these cases they will more or less start developing, as somebody mentioned, an environmental common law which will define reasonable and unreasonable pollution of the environment.

Once that is built up, then anyone attempting to or desiring to start something will have some standards to go by.

Mr. BUTLER. I think as one who does some work as defense lawyer in these cases, prior to having seen the light, I would say in most areas industries as well as Government agencies cannot argue that they don't know what the standards are to which they are being held, because the entire legal argument will revolve around what is "reasonable" and "unreasonable," or what is "pollution," and what is not "pollution," and the decision will revolve about what standards have been set by Federal, State, or local agencies.

Therefore, we are back to specific standards. Now, this will cover water pollution, air pollution, things of this nature, for which there are standards.

There may be environmental cases in which standards really haven't been studied by any agency, and these are the areas where there may be some problem. But in the overwhelming majority of these, the defense attorneys will immediately come into court and suggest under presently existing standards they are in compliance with the law.

For them to suggest they don't know what those standards are I suppose merely reveals their unwillingness to determine what the standards are.

Mr. PICKELNER. The problem, as I see it, is that the bill allows the court to replace those standards with what it considers to be the definition of unreasonable pollution. So, even if the defendant is aware of what the standards are not even if he does comply with them, he will be subject to an injunction under the act if what he is doing is unreasonable.

I guess my question is: Do you feel for the defendant under those circumstances?

Mr. BUTLER. I don't interpret the law under this fashion. It seems to me that the judge would run immediately to the closest standard he could find to avoid making that kind of value judgment that you are suggesting. I would not read this bill as providing the judge with an independent ability to make a standard where there already is a governmentally created standard in the area. The problem is in those areas, such as clear cutting of timber, for example, in which there are either no standards or where the standards are not specifically aimed at the problem. But in terms of air and water pollution, I would very much doubt that a judge would set a standard saying "It is true that the State of Maryland has set a standard, but this would be a better standard." I don't think he would.

Judges don't operate that way, and I don't think he would necessarily be authorized to do so under that act.

Mr. BICKWIT. It is intent of the draft that they be so authorized. I tend to agree with you that even once they are authorized they wouldn't do so.

Mr. PANKOWSKI. I would hope this wouldn't preclude the judge from saying that the evidence brought by the plaintiff is so overwhelming in its argument that the standard might not be challenged as to its adequacy or as to its effectiveness. So, if a standard is set which five years later is still poisoning life or creates a potential let's say for public health, the judge would say obviously, something is wrong here, the standard is merely a hollow thing.

Mr. BICKWIT. Thank you all very much.

Senator HART. Gentlemen, again thank you very much.

I know Avalon, N.J., very well, Mr. Pankowski, and I know the body of water, and I am one of those who hopes that you will prevail.

Mr. PANKOWSKI. Thank you very much, Senator. I might reciprocate. As you know, I am a Detroitier, and I know your record and reputation very well, and I hope you will continue and prevail.

Senator HART. I speak largely from pure conflict of interest. My brother and his family always have a cottage there and I use it whenever I can. I hope you win.

The testimony, save for one witness yesterday, clearly has been from those who are proponents of the bill. Questions have been raised I am sure to which those who would oppose the bill might want to respond. Several have already indicated the desire to testify either orally or to submit statements.

(The statements follow:)

STATEMENT OF DOUGLAS W. SCOTT, EDUCATIONAL SPECIALIST, THE WILDERNESS SOCIETY

Mr. Chairman, I am Douglas Scott, educational specialist on the staff of the Wilderness Society, a nationwide citizen conservation organization of more than 70,000 members. Organized in 1935 to fight for the preservation of wilderness, that remains our central purpose today. But we recognize that achieving lasting protection of wild and natural places makes it urgently necessary that our interests and involvements encompass the far wider spectrum which is the concern of the present environmental movement—in the cities where people are crowded, ill-housed, choked by foul air and water, in the suburbs where people live frightened lives, chained to their automobiles, in rural areas where people are held to a marginal existence and fed a doctrine of progress through pavement which can only destroy them in the end.

We appreciate your invitation to appear here today to express our full and enthusiastic support for the proposed Environmental Protection Act of 1971. In our judgement, this proposal is of the utmost significance across the whole range of environmental concerns, for it would bring much needed changes in the manner in which decisions are now being made which adversely effect the environment. We believe its results would be enormously beneficial to the public interest. If this legislation is enacted—and we hope it will be—it will certainly stand among the most significant and far-reaching achievements of this Committee and of the 92nd Congress in the field of environmental protection.

In every part of the country today there are new and active local groups of citizens working for environmental protection and improvement. By the nature of the issues such groups are involved in, their efforts very often involve challenging and probing decisions made or being made by government agencies. They see impacts on the environment and are challenging the actions that result in those impacts. They are involving themselves in the processes of government, earnestly, persistently and constructively, in their efforts to play a watchdog role on behalf of the public's interest in protection of environmental values.

What is the experience of citizen conservationists when they thus seek effective involvement in these government processes? All too often, they come away disappointed, frustrated, and angry. For all too often, their objections and involvements seem to have no visible effect at all, to have been, at best, only pro forma participation in the rituals of public hearings and letter-writing campaigns which, in the end, leave the agency decision makers totally unmoved from their own intentions.

By-and-large, it is a fair conclusion to state that citizen conservationists have been thoroughly disappointed by the administrative processes. This is why they are searching out alternative routes of appeal, to the legislative branch and to the courts, to obtain a reasonably fair and impartial hearing of their concerns.

The fundamental problem, it seems, lies in the lack of any real and consistent responsiveness of administrative agencies—which now have become enormous bureaucracies seemingly beyond the day-to-day, decision-by-decision control of their parent cabinet departments. As a result, only the most controversial of decisions really gets anything like a clean review, and then only when great

efforts are exerted over long periods of time. In practice, the agency personnel can depend upon the fact that most of their day-to-day, piecemeal decisions will go unchallenged, simply because in practice there is virtually no means by which a challenge can be effectively mounted.

Perhaps this would not be so bad if we could rely on administrative bureaucracies as an efficient and broad-perspective mechanism for making decisions in the first place. Or if the decisions being made were merely technical matters best left to practicing experts. But such is far from the case. While the decision making of such agencies may be efficient, it is so only because challenges arising from the public can be effectively ignored, patronized, or shrugged off, leaving the decision process to churn along in its wholly inexorable way. Nor are the kinds of decision we are concerned with merely technical, they are decisions which have lasting impact on the lives and environment of the people, decisions between what is presumed to be in the public interest and what is not, decisions which allocate scarce resources among competing demands.

The experience of organized conservation groups in areas such as national forest management decisions and wilderness designations offers an instructive case in point. Over a number of decades we have watched administrative agencies such as the National Park Service and the U.S. Forest Service as they worked in these fields.

The preservation of wilderness on national forests began in the 1920's and by the end of the 1930's had resulted in codified administrative policies for the identification and demarcation of areas to be "permanently" protected. As these decisions were made in the case of each potential wilderness area, procedures for public hearings and reviews were incorporated. Yet, despite the fine-sounding policy declarations and impressive procedures, out on the land the wilderness was simply disappearing, always more rapidly. Large areas might suddenly be carved out of a potential wilderness, opened for timber harvest and other incompatible uses, and simply lost insofar as their wilderness potential was concerned.

Appeals of such decisions by the Forest Service brought virtually no relief. The case of the Three Sisters Primitive Area in central Oregon was especially notorious. Your former colleagues, Dick Neuberger and Wayne Morse, fought for a reversal of the Forest Service decision, but to no avail. The decision to excise 53,000 acres from that Primitive Area was appealed to the Secretary of Agriculture, but the result was the same—and that is not so very surprising to those who have seen the degree to which the Department of Agriculture has lost any real and practical control over the Forest Service.

In that case—and in hundreds like it through the 1930's and 1940's—citizen conservationists had no recourse to effective appeal and review within the Forest Service nor to any independent review above the Forest Service. They could take the case to their legislators, but the results were not very satisfying. In effect, the Forest Service decision, once made, had a charmed life of its own, above and beyond any efforts by concerned citizens to get ahold of it and shake it a bit to see if it could stand up.

It was precisely such frustrations which finally led concerned members of Congress and citizen conservationists to initiate the Wilderness Bill and to carry that very controversial legislation through an eight year battle to enactment in 1964. The principal effect of the Wilderness Act has been to build in protections and review processes which render the administrative decisions of wilderness managing agencies subject to guaranteed review and reconsideration. The result is a complicated and time-consuming process in which Congress, in effect, directed the Forest Service, for example, to study a potential wilderness area, make a tentative decision as to whether it should be designated and, if so, what boundaries are most appropriate, take that tentative decision before the public in required formal hearings, and then to review that tentative decision following the hearings and perhaps modify it.

But—and this is the key element—the decision of the agency, even after the public hearing, is not final. Designation of wilderness can only be made by Congress, so the Forest Service decision is sent to Congress for further review and possible modification before actual wilderness legislation is enacted.

Here is a kind of decision for which a very elaborate decision-making process has been developed, for no other reason than to finally give full opportunity for the interested public to take a meaningful part, including real and practical means for challenging the administrative agency's decisions at every step of the way. The burden on citizen groups for sustained involvement is tremendous, but wilderness conservationists have welcomed and used this opportunity to really have an effective role.

I have elaborated this situation only to demonstrate how in one important area, the closed decision processes of the administrative agency have been completely redesigned to assure reviewability on a decision-by-decision basis. But it is important to note that the resulting decision process is long, involved and complicated. It is necessarily expensive and time-consuming. It is appropriate for the 160 or so cases in which it will actually be applied over the years, but it is hardly a model answer for the day-to-day, little decision-by-little decision problem. It demonstrates that, when effective reviewability is assured, the people will rise to involvement and the decisions will be improved and rationalized, and that is the key point to be made.

The present proposal, S. 1032, offers the potential of a similar result applicable to all kinds of decisions, rather than to one limited kind. It would develop the same salutary benefits of reviewability by the concerned public, by opening the courts as an avenue of appeal on the merits of agency decisions. We view this feature as perhaps the most important and urgently needed in this legislation.

There is nothing magic about administrative procedures—regardless of how much “public participation” is built in—that will guarantee responsive decision making. There is nothing magic about the people who staff these agencies which assures that they will render the best decisions. To a very high degree, administrative decisions can be hidden away and cut off from the citizens and it is clear that a great many tendencies and pressures of bureaucratic behavior operate to encourage such isolation and insulation from public impacts. Only if procedures are guaranteed by which concerned citizens can pull any such decision out into the open and into a fair tribunal for review, will bureaucratic behavior be tempered by the constant realization that the merits of the decision are subject to real challenge and that they are subject to real public accountability.

Mr. Chairman, it is our day-to-day observation that citizens are moving now to take a far more direct, active and persistent role in policy-making and decisions which impact on their lives and environment. Grassroots organizations are going strong in every part of the country. The people are demanding their rightful role in these decision making procedures. We cannot be satisfied with what we have now, a situation in which an unpopular decision can only really be challenged by mounting a great hue and cry, engaging in enormous controversy. Too many of the things that are wrong about our environmental actions are the result of little decisions, little routines and the good old way we've always done things. We need the means by which grassroots citizens can have effect on these piecemeal, local impacts. The resort to a court to argue the merits of the decision offers a logical, rational, and wholesome answer.

S. 1032 merits your support and approval in this Committee and by the Congress. It goes far to give citizens an equal chance to have effect on public decisions, by declaring their fundamental rights to environmental protection and by giving them the tools, through the courts, to enforce and defend those rights in their own behalf. We see no objections of practicality which in any way offset, even in part, the desirability of enactment of the Environmental Protection Act of 1971. We urge the Congress to enact this proposal.

Thank you.

STATEMENT OF JOHN KEKER NATIONAL RESOURCES DEFENSE COUNCIL, INC.

My name is John Keke; I am a staff attorney with the Natural Resources Defense Council, and a member of the California bar. It is a privilege to appear before this committee in support of S. 1032, the “Environmental Protection Act of 1971.”

Yesterday Mr. Atkeson noted seven problems relating to S. 1032. These reservations, together with a conviction that there are better ways to handle environ-

mental problems, led the Council on Environmental Quality to oppose the bill. Others in supporting S. 1032 have described significant benefits which it will allow; I will limit my remarks to comments on the problems raised by Mr. Atkeson.

The Council's reservations exaggerate the extent to which S. 1032 alters relationships between various parts of our government. At the same time, the Council depreciates the importance of the substantive rights which the bill creates. Specifically, the Council's seven reservations involve the relationship between the Federal courts and Congress, between courts and administrative agencies, and between Federal courts and state governments.

FEDERAL COURTS AND CONGRESS

The Council suggests that S. 1032 imposes on courts "a task they are not institutionally equipped to handle." (p. 11) Although their specific concern is unclear, I think the Council is making two points. One is that judges are not as capable as administrators or legislators in making the difficult decision required by the bill—deciding whether the environment costs of a particular activity outweighs its benefit to society, or more often, deciding whether the gain to the environment of conducting the activity in a manner which lessens the impairment of the environment justifies the additional cost of the alternate means. The second point made by the Council is thoroughly veiled, but their statement seems to suggest that these decisions are more legitimately made by Congress, i.e., it is more democratic for Congress to set standards than to pass a law allowing courts to decide environmental cases on the merits. For example, the Council favors "specific legislative guidance . . . in defining the public interest in our use of land." (p. 14)

The Council believes it undesirable for the courts to make environmental decisions in areas where the Congress has failed to act. The particular areas noted are local land use regulation and nuisance law, "which are traditionally regarded as the responsibility of State courts and legislatures." (p. 19) For the Federal courts to make decisions in these areas would, according to the Council, "entail a major shift in Federal-State relationships." (p. 19) Reasons why this shift is undesirable are not given, but I assume the reasons are those mentioned earlier—that judges are less competent than Congress, and that courts have less legitimacy than Congress in the field of environmental regulation.

More will be said later on the issue of a Federal judge's competence compared to that of an administrator, state or federal. Suffice it to say here that comparing a judge's competence to decide technical and difficult questions with Congress's ability to decide those same questions is misleading. Congress has shown no intention of making the difficult and technical specific decisions necessary to protect and enhance our environment. Instead, it has passed laws delegating that authority to federal agencies. Recent examples are the National Environmental Protection Act and the amendments to the Clean Air Act; proposals for legislation, including the Administration's environmental package, indicate that the same pattern will continue. Congress establishes procedures for making environmental decisions; S. 1032 is such a procedure. The Council's suggestion that courts may not be "institutionally competent" only makes sense, then, in relation to decision-making by administrative agencies, not Congress itself. As noted, this will be discussed below.

The Council's objection that Congress is the legitimate decision-maker in the environmental field is equally hard to understand, in light of past and proposed delegation to administrative agencies. Neither administrators nor judges are directly responsible to the electorate, in theory or in practice. Both groups are appointed: administrators can be totally replaced after a Presidential election, whereas judges can only be appointed to vacancies brought about by death or resignation; this difference, as it works in practice, is not enough to suggest that administrative agencies reflect the will of the people more than courts do. Congress can overrule agency decisions and non-consti-

tutionally based judicial decisions by passing new legislation, so that Congress has the last word over both agencies and courts in environmental cases.

In sum, the Council has not put forward any good reason why S. 1032 upsets the proper relationship between courts and the Congress.

FEDERAL COURTS AND ADMINISTRATIVE AGENCIES

The Council's reservation that courts are not institutionally equipped to make environmental decisions is directed largely at the supposed greater competency of administrative agencies. They note the concern about this issue of comparative competency shown by the Supreme Court in the recent mercury dumping case brought by the State of Ohio, and they quote the Senate Public Works Committee's Report on Section 304 of the Clean Air Act, to the effect that the citizen suit provision of that bill would present limited and specific issues for decision. Further in its statement, the Council asks: "Will effective government be served by telling the courts . . . to disregard existing administrative and regulatory procedures they find 'inadequate'?" (p. 15) The possibility of *de novo* judicial consideration of environmental decisions made by an agency "confuses" the fact-finding and appellate roles (p. 16) and permits "duplication of administrative and judicial functions." (p. 18)

Another area of concern is "whether [S. 1032] is to supersede existing Federal and State air and water quality and land use legislation by authorizing new standards for air and water quality and land use which Federal and State agencies are to enforce." (p. 14) The Council wants "at a minimum . . . a clearly defined correlation of this bill and existing Federal and State legislation." (p. 15) Finally, the Council notes that administrative agencies are open to public interest intervenors, and suggests that the best approach would be to reform outmoded agency procedures, elect or appoint more responsive administrators, and limit citizens suits to the enforcement of mandatory duties. The Council's recommendation that administrative agencies be improved is unexceptionable. One of the Principal advantages of S. 1032 is that it allows the court to look behind the administrator's mandatory duties to the substance of his decision. If his discretionary decisions were adequate, there would be no need for that aspect of this bill. The issue is whether S. 1032 would contribute to reforming outmoded administrative procedures and to producing more responsive administrators. If so, the Council's query about whether effective government will be served by the bill is Yes. The pejorative connotation of "confusing" fact-finding and appellate roles, and "duplicating" administrative functions, assumes that there is no reason for allowing courts to consider agency decisions on the merits. Similarly, the Council's concern that agencies must choose between existing standards and procedures and the opportunity for suing under S. 1032 is no objection at all, since one of the goals of S. 1032 is to require agencies to examine and improve outmoded enforcement practices which are unreasonably lenient. In sum, this series of reservations reduces to a simply stated one: administrative agencies are more competent to make environmental decisions than courts, and meddling by the courts will result in more bad decisions than good ones.

The issue of comparative competency to make difficult environmental decisions has been well-treated by others, particularly Professor Sax. Sometimes agency expertise and experience with the problems of the regulated area make it the best forum. Sometimes that expertise and long experience lead it to give too much weight to the group it hears from most often—the regulated industry—and ignore other values necessary for a decision in the public interest. S. 1032 places courts in a supervisory role vis-a-vis agencies in environmental decision-making. When a suit is filed, the court can send the case to a federal or state agency for resolution; there is no reason why this course will not be followed whenever an agency does provide a better forum than a court. A party who wishes to resist that procedure will have to present good reasons why the relevant agency will not deal fairly with his case. When a court does hear an environmental case on the merits it will consider matters no more complicated than other kinds of cases which traditionally are heard

by courts. It is unfortunate that the Council did not explain their reservation about institutional competency more fully, since S. 1032 seems to provide the flexibility to insure that the most appropriate and competent forum consider each case brought under the bill.

Another important consideration ignored by the Council is what a citizen should do while he waits for a specific law to give an agency authority to set standards or otherwise provide environmental protection. Bills introduced into Congress in 1971, if passed, will not affect the specific problems addressed for years: offices, bureaus, and branches must be established and staffed; standards or rules must be drafted; comments and consultation must be solicited; and finally enforcement will begin. In the meantime, S. 1032 provides citizens with a substantive right to protect themselves from environmental hazards.

FEDERAL COURTS AND THE STATES

The Council points out that S. 1032 will thrust Federal courts into areas "which are traditionally regarded as the responsibility of State courts and legislatures," (p. 19) giving as particular examples land use regulation and nuisance law. Concern is expressed over the "major shift in Federal-State relationships" which will result. The Council does not explain why such a major shift is undesirable.

There may be good reasons why States should be responsible for local environmental problems, particularly those relating to land use. Few environmental issues admit to one *best* solution; most require a weighing of diseparate values, so that any solution is good or bad only in the eye of the beholder. One way to make such decisions is to insure that they reflect as accurately as possible the interests of the people affected. Perhaps State and local governments respond to those interests more readily than does the national government.

However, it is quite probable that State and local governments are no more responsive to citizen concerns about environmental problems than are federal administrative agencies. For example, Section 101(a) of the Administration's proposed "National Land Use Policy Act of 1971" states:

"The Congress hereby finds and declares that decisions about the use of land significantly influence the quality of the environment, and that present State and local institutional arrangements for planning and regulating land use of more than local impact are inadequate, . . ."

The proposed bill authorizes the Secretary of the Interior to make grants to States for the purpose of preparing and implementing comprehensive land use programs which protect areas of special scenic value, prevent urban sprawl, and generally enhance our national environment. The "National Land Use Policy Act" is recommended by the Council as the best way to accomplish the goals of S. 1032 with respect to land use regulation. However, it is noteworthy that both proposed bills are compatible with one another, and that the Council does not explain why it does not support both except for its concern over a "major shift" in Federal-State relations. Possibly the Council fears that Federal court interference will upset the delicate balancing of interests which a land use plan will require. This fear does not seem justified, since S. 1032 gives the court power to rely on state procedures where they are adequate. Where a state has developed a land-use plan, and where that plan establishes a reasonable balance between the interests competing for the use of the land, there is no reason to expect a court to upset the state plan.

S. 1032 allows the courts to supplement established State and local procedures for making environmental decisions. The Council has not offered reasons for rejecting that supplemental role.

The Council's final reservation is that the Eleventh Amendment of the United States Constitution imposes a limitation on the power of citizens to sue state governments. Read together with Article III of the Constitution, this provision has been interpreted to give constitutional status to the defense of sovereign immunity. The courts refuse to allow the defense in certain circumstances, such as when the state official being sued has acted uncon-

stitutionally, or when the state has consented, expressly or impliedly, to suit. Certainly nothing in this bill can change the constitutional protection of a state's sovereign immunity. On the other hand, the already circumscribed right of a state to rely on Article III and the Eleventh Amendment to avoid citizens' suits does not detract from the necessity for this bill.

To conclude, the seven reservations which led the Council on Environmental Quality to oppose S. 1032 do not raise any substantial objections to passage. I hope that Congress agrees with that conclusion, and takes a much-needed step to protect the environment by passing the "Environmental Protection Act of 1971."

Senator HART. As we adjourn today, I would have the record reflect that those who would now prefer to come in and testify, please contact the committee at the earliest opportunity so that we may work out a date for such testimony.

The hearing is adjourned.

(Whereupon, at 12:25 p.m., the hearing was adjourned.)

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

[Audubon, May 1970]

CALL IT LAKE INFERIOR

(By George Laycock)

Set like a glistening gem in the heart of our continent, Lake Superior—second largest lake in the world—is an inland sea whose rocky shores and wave-swept white sand beaches bear the imprint of wilderness as it must have been when the world was clean. Her blue waters reach beyond the horizon. Her shoreline, rugged and scenic as any in the land, circles 2,980 miles.

With 31,820 square miles of water, and with a depth of 1,333 feet, size and remoteness have saved her thus far from the fate of other Great Lakes. In terms of aging, Lake Superior is thousands of years behind Erie, or Michigan, or Ontario. But in the words of a Department of Interior report, "Lake Superior is a delicate lake, and therefore great caution must be exercised when weighing the potential dangers to its ecology. Increases [in pollution] normally considered insignificant or acceptable in most lakes would dramatically alter this lake."

Considering this, there is dire trouble on the horizon of this last clean Great Lake. The polluters have found her. Into those cold clear waters pour the poisons of civilization. A recent statement from the Federal Water Pollution Control Administration tells of wastes being flushed into Superior and its tributaries from 61 industries, 91 municipalities, and 124 federal installations.

Even in this seemingly enlightened age, every effort to save Lake Superior develops into a toe-to-toe confrontation between conservation forces and the despoilers. The familiar drama, its trite theme dressed in a few new trappings, was paraded across the stage recently before a restless audience in Duluth. The scene was a public hearing to determine what to do about the biggest and richest polluter of them all, Reserve Mining Company, operator of a taconite processing plant on the shore of Lake Superior at Silver Bay, Minnesota.

Reserve Mining, jointly owned by Republic Steel Corporation and Armco Steel Corporation, processes low-grade iron-bearing rock mined 47 miles away at Babbitt, in Minnesota's Mesabi Range. In every three tons of raw materials shipped to the Silver Bay plant, there are two tons of waste materials. For 13 years, Reserve has been casually flushing its daily load of 60,000 tons of these unwanted tailings into Lake Superior—because this offers the cheapest manner possible to get it out of the way. If given continued freedom to pollute, the company would happily continue the practice for perhaps 40 more years. By then Reserve would have transferred a sizable part of the Mesabi Range into Lake Superior.

Company officials have frequently stated that this "sand" is, as one of them said in a public hearing, "like the sand which the North Shore streams have been pouring into Lake Superior for 3,000 years. There are no chemicals added."

But Professor Louis G. Williams of the Biology Department of the University of Alabama, formerly aquatic research biologist at the National Water Quality Laboratory in Duluth, says, "Today we know that some of the chemicals in taconite waste are highly metabolic, and that they significantly add to the aging process of Lake Superior." The tailings, he explained, were speeding the day when Lake Superior would resemble Lake Erie. In laboratory tests, Williams found that taconite enriched water enough to bring on serious algae bloom. And out in the lake proper, he found blue-green algae populations as high as 130,000 cells per millimeter, "an extremely bad indication of short-term eutrophication associated with taconite suspended particles."

Out of the plant and into Lake Superior each day goes an estimated 30 tons of phosphorous, $4\frac{1}{2}$ tons of chromium, 3 tons of copper, 3 tons of lead, about one ton each of nickel and zinc, and 373 tons of manganese. Further—

more, research people are unable to account for the location of about half of the tailings entering the lake. Presumably, they are drifting on the currents and eventually settling a blanket of silt over bottom organisms far from their starting point at Silver Bay.

Some disquieting conclusions come from the most authoritative investigation of this pollution to date, a Department of Interior paper known as the "Stoddard Report" and dated December 31, 1968:

"Every 12 days Reserve Mining discharges as much sediment into the lake as all of its U.S. tributaries contribute in a year.

"Evidence shows that tailings escape the boundaries of the 9-square-mile delta where the company is permitted by the State of Minnesota to deposit them.

"The tailings increase turbidity and cause "green water" for at least 18 miles to the southwest from the plant's discharge at Silver Bay.

"Lake currents hold the micron-sized particles in suspension for long times and over long distances.

"The tailings raise levels of iron, lead, and copper beyond the limits of federal-state water quality standards.

"Zinc and cadmium are in excess of levels as recommended for aquatic life production by the National Technical Advisory Committee.

"Levels recommended for phosphorus, the element chiefly responsible for increasing growth of algae, are exceeded.

"Bottom organisms important as fish foods are diminishing.

"Diluted taconite tailings were found lethal to rainbow trout sac fry.

"Alternate disposal methods are available."

There is, moreover, no hope that pollutants will flush quickly from Lake Superior. In contrast to Lake Erie, which has a complete change of water every two and a half years, Superior requires close to 500 years, I was told by Dr. A. F. Bartsch, director of the Pacific Northwest Water Laboratory, one of the federal government's leading authorities on lake eutrophication. And a single flushing will not remove such pollutants as phosphorus. So no one knows the real time needed for Lake Superior to cleanse itself. Pollution effects, according to Dr. Bartsch, could be felt for 1,500 years. We do know that Lake Superior feeds water into the other Great Lakes—and that unless it can be kept clean there is no hope of purging the others of pollution.

Iron mining first came to the Mesabi Range of northern Minnesota early in the 1890's. Vast deposits of good quality hematite lay so close to the surface that it could be removed from open pits, and over the years the pits themselves grew until they became major tourist attractions where awestruck visitors could marvel at man's technical accomplishments. The Mesabi, "hidden giant" to the Indians, proved to be a giant indeed. But industrialists could see that the ore was rapidly being depleted and would soon be gone.

This, however, was only the highgrade ore which had been "enriched" by weathering; more than 2,500,000,000 tons had come from the Biwabik formation of the Mesabi. There still remained far greater stores of low-grade taconite in a 600-foot-thick layer.

Taconite was spread widely through the rock formation. Although the high-grade ore held as much as 70 percent iron oxides, only 25 to 30 percent could be found in the lower grades. The problem was how to process the taconite to separate the particles of iron ore. Thus while they were still working the high-grade deposits, the mining companies began research on the challenge of utilizing the taconite. Reserve, organized in 1939, finally began production in late 1955.

In taconite the processors were dealing with a combination of iron and igneous rock so thoroughly mixed and firmly combined that before they could separate the materials they had to crush and grind the rock to a flourlike fineness. At this stage the minuscule particles of iron ore can be picked out of the mixture by giant magnets. The process sounds simple, and in principle it is. But the actual operation is a complicated and costly procedure of putting the taconite through a series of crushers and rollers accompanied by continual washing with great quantities of water.

Eventually the iron dust, mixed with bentonite as a binder, is fired in a kiln to convert it to marble-sized pellets. Production of a ton of iron ore pellets may require 10,000 gallons of water.

Northern Minnesota is not an economically flourishing region. Iron mining and processing long was the industrial giant—until the Mesabi was mined

out. So the new Reserve plant promised a revival of hundreds of jobs, and Minnesota officials would do everything to encourage it.

The only place Reserve might have run into trouble was in its simplified plan for disposing of the great tonnages of waste. Reserve, however, was a pioneer and pioneers are seldom noted for the care they take with the environment. But before it could dump tailings into Lake Superior, the company needed certain permits from both the State of Minnesota and the U.S. Corps of Engineers. From the state, in 1947, it obtained one permit from the Department of Conservation allowing it to remove water from Lake Superior for its processing of taconite, and a second permit from the Minnesota Pollution Control Agency to dump the water, plus its newly acquired load of waste materials, back into the lake. In public hearings dealing with the issuance of these permits, Reserve officials repeatedly and convincingly spoke of the harmlessness of their operation to the lake. Their long and careful studies, they emphasized, showed the innocuous nature of the "sand."

The original Reserve permit to discharge water from the Silver Bay plant at the rate of 130,000 gallons per minute was amended repeatedly until Reserve, within five years after starting operations, was flushing four times the original quantity of waste water and taconite tailings into Lake Superior.

At the time, the primary consideration of the Corps of Engineers was the effect of the plant and its waste disposal on navigation. Its permit to Reserve was granted in 1948. And in 1960, apparently assuming that the process would continue as long as Reserve Mining was in business and cared to use Lake Superior as its dump, the Chief of Engineers simply made the extension of the permit "indefinite," thereby cutting out periodic paperwork.

But in 1967 Reserve was jolted with the announcement that new Corps regulations called for longer permits to be reviewed and officially extended. Later that year the Corps issued notice that it was considering a five-year reevaluation of the Reserve permit. Comments were invited.

As expected, the State of Minnesota reassured Reserve, and so did the various chambers of commerce, that they surely were not about to question the operation of this giant of the economic community. But from across the state line, Wisconsin conservationists raised objections. And now the whole tide began to turn for Reserve and the nervous Minnesota officials who try to keep conservationists from nagging favored industry.

Several developments came in close succession. Today the Corps of Engineers, when granting permits to dredge, fill, or construct on the country's navigable waters, goes beyond its old singular concern with navigation. As a result of a letter of understanding between the Secretary of Interior and the Secretary of the Army, the Corps must now seek the opinion of Interior before making a final decision.

Early in 1969, aroused citizens along the north shore of Lake Superior organized the Save Lake Superior Association, and its membership soon skyrocketed to 1,600. "I had been gone for eleven years," Mrs Arlene Harvell, president of the association, told me. "My husband was in the service and when we came back I couldn't believe what had happened to the lake. I used to walk beside it when I was a little girl and you could see far into its clean water. Now the water was cloudy and the lake seemed foreign to me."

Others were seeing the same sad changes sweeping the western end of Lake Superior. I talked with charterboat fisherman Elgar Bremel of tiny Cornucopia, Wisconsin. "You can look at the lake," he insisted, "and tell whether or not to bother going fishing. It didn't used to be that way. Now you can see gray clouds of tailings when the wind blows wrong."

Clayton Howk, onetime commercial fisherman and a neighbor of Bremel, told of three fishermen on his boat who caught ten big lake trout on Friday of a Labor Day weekend. There was good fishing on Saturday, too. But on Sunday the wind changed. The water turned grayish-green with clouds of taconite. They caught no fish. To these people, there is no question that taconite waste has harmed Lake Superior.

Among those concerned over the growing pollution of Lake Superior was Wisconsin's Senator Gaylord Nelson. As evidence against the taconite mounted, and as public concern grew, Senator Nelson conferred with Secretary of the Interior Stewart L. Udall. The Secretary, seeking facts on which to base his answer to the Corps of Engineers, set up a study committee from within his department. He included research people from the U.S. Fish and Wildlife Service, Bureau of Commercial Fisheries, Federal Water Pollution Control

Administration, Bureau of Mines, and Geological Survey. Organizing the study was the department's experienced regional coordinator, Charles H. Stoddard. For the next ten months this committee probed every aspect of the taconite problem. The findings promptly sent Reserve Mining and its political defenders into spasms of protest.

The taconite study group concluded that Reserve Mining is seriously polluting Lake Superior. "Therefore, the Department of the Interior recommends," the report continued, "that the permit of the U.S. Army Corps of Engineers to the Reserve Mining Company be extended conditionally for a period of three years, sufficient to investigate and construct alternate on-land waste disposal facilities . . . to restore Lake Superior waters to their original high quality."

This would seem fair and reasonable. In the three-year period the company, reaping its added margin of profit at the cost of a great natural resource, could still add 65,000,000 tons of pollutants to Lake Superior.

Stoddard sent copies of the report to the Corps of Engineers, and although it was not required, he dispatched a copy to Reserve. At Silver Bay powerful men reached for their telephones.

The Congressman from Reserve's district is John A. Blatnik, who has long been regarded as a sound lawmaker on conservation matters. But there is little doubt among those close to the developments that Representative Blatnik—as Reserve Mining wanted—tried to put the lid on the Stoddard report. In Washington, pressure was apparently applied to top men within the Department of Interior. Max N. Edwards, Assistant Secretary for Water Pollution Control, and his assistant, Jack Bregman, had received copies of the report. "Edwards buckled under," Stoddard told me recently. "He made statements that the report was 'full of errors.' But hard facts are hard facts," Stoddard reaffirms, "and we found that taconite tailings are polluting Lake Superior." Significantly, the alleged errors were never pinpointed.

So the report was suddenly under wraps. For several weeks early in 1969, no one could obtain a copy.

But the time was approaching for a turnover in the administration. Four days before leaving office, Secretary Udall called for a public conference on the Reserve Mining Company case. Thus on May 13th to 15th, officials of the Federal Water Pollution Control Administration and the states of Minnesota, Michigan, and Wisconsin met in Duluth. Repeatedly, Reserve had its dirty taconite washed in public. But hanging over the whole affair were two points that gave the company an advantage. First, the Stoddard Report had been tampered with since its original version went out to the Corps of Engineers, Interior, and Reserve Mining. The rewrite was a watered-down version that, instead of calling for stopping the taconite pollution, simply suggested "keeping it under surveillance." Representative Blatnik, who spoke out at the conference in favor of this wording, was once known as the "fighting general in the war on pollution." Leaders of the Save Lake Superior Association lamented that "battle fatigue seems to have overcome our general."

The other ray of hope for Reserve was that proof of interstate movement of the pollutants had not yet been scientifically determined. Without such evidence, the federal government was powerless. And polluters much prefer to deal with their own folk in the state capitol.

Both sides were heard. Reserve told of its long and costly monitoring of the lake and its continuing studies in behalf of its obligation to the environment. The company insisted that nobody was more interested in keeping Lake Superior clean than it was. Company representatives then proceeded to explain how the 60,000 tons of tailings added to the lake daily were not really causing any harm.

Some witnesses insisted that the Corps of Engineers should simply deny revalidation of the permit on the basis that the tailings were flowing beyond the limits the state had set on where the company could dump them. But the Corps, with long experience in such frays, maintained a discreet silence.

By this time, with the changeover in Washington, Charles Stoddard like many others, had left Interior. But he appeared at the hearings to speak in behalf of Lake Superior. Standing before the throng of people crowding the hearing room, Stoddard asked, "Can our complex legal and administrative machinery really enforce pollution control lays in the face of heavy economic and political pressures to study, to postpone, to discredit, and even to use improper influence not to act?"

He explained that his committee's study had "undergone revision" since he departed from government service. He called "further and continued study" a timeworn bureaucratic evasion tactic. "Must we wait for more evidence of the pollution of Lake Superior of the kind found in Michigan and Erie before we have the courage to act? If so, we'd better quit the kind of farce we are engaged in today."

The evidence read into the record during the Duluth hearing was so voluminous—and perhaps politically tacky—that an "executive session" of the Lake Superior federal-state enforcement conference was called for September 30, 1969, simply to pound out some conclusions from the first hearings.

During these later sessions the FWPCA presented some new evidence gathered during the summer months. The National Water Quality Control Laboratory in Duluth, under the direction of Dr. Donald I. Mount, had taken samples of water as well as core samples from the lake bottom at widely scattered and mathematically selected stations throughout the 50 miles of the western end of Lake Superior. Dr. Mount and his staff categorically stated that taconite tailings were found both in Michigan and Wisconsin waters, and that they were killing important organisms, including fish foods on the bottom of the lake.

This, it might seem, should spell an end to the prolonged game of patty cake between the polluters and the agencies and individuals trying to soften the blow against the multimillion-dollar company. With the pollution obviously crossing state lines, the original undiluted version of the Stoddard Report could be accepted and a date set to spell the end of Reserve's Lake Superior pollution. But the telephones still ring. Arms are still twisted. Concessions are still the stuff of which political reality (and pollution) are made. Out of the executive sessions in Duluth came a halfway effort to please all parties.

H. W. Poston, Great Lakes regional director for the FWPCA, was sticking to a tough line. Six months, he insisted in the executive session, was adequate for Reserve Mining to come up with a timetable for its completion. But in the meantime, Poston's boss and the chairman of the Duluth conference, Murray Stein, was beckoned from the hearing room for a long-distance telephone call, presumably from Washington. Upon the return of the FWPCA's chief enforcement officer, the clean water agency's line softened. Reserve could have six months just to study ways to solve the taconite problem.

Moreover, the six-month period would not begin with the end of the Duluth conference, but rather with the date the Secretary of Interior issued a summary of the proceedings. This came on January 26th, nearly four months later, giving Reserve Mining ten months—time to flush 18,000,000 tons of taconite tailings into Lake Superior—before it had to issue its report. And at that time, next July 26th, its report need only be a survey of possible answers to the problem and a tentative timetable to accomplish its corrective actions. Preliminary reports from Reserve are expected ahead of the deadline.

To Reserve Mining officials, even this slight closing of the net was a bitter pill. Said the firm's president, Edward M. Furness, following the close of the October session: "We are disappointed, but we will, of course, comply with the recommendations of this conference. We do not believe that any sound scientific evidence has yet been produced to prove that Reserve is harming the aquatic life or water quality of Lake Superior."

Citizen conservationists who had worked hard to end the taconite pollution of Superior were even less pleased. They could not reconcile the soft line of the Federal Water Pollution Control Administration with the facts. The original Stoddard Report had stated plainly—if you could find a copy of it—that the "evidence clearly points to an acceleration of eutrophication of Lake Superior by taconite tailings discharge." Recent research has verified this.

Meanwhile, Reserve Mining has filed a suit against the State of Minnesota, claiming that its water quality standards are unfair. And the state has filed a countersuit charging that the company is violating state standards on turbidity and solids in suspension.

What would it cost Reserve to change its disposal system? A study by the U.S. Bureau of Mines figured the cost at \$7 million. Reserve set it at \$250 million, although the company refused to show its data publicly. But whatever the cost, two facts are evident to anyone concerned over the ruin of Lake Superior. First, the need for corrective measures is there. Second, Reserve can afford to dispose of its wastes in closed recirculating pools just as its competitors must all do now. For Reserve the change might increase production

cost as little as 2.5 percent. In 1967 Reserve's two parent companies had a retained income, after paying taxes and stockholder dividends, totaling \$65,-837,000.

But the pollution of Lake Superior drags on, and every stalling tactic is employed for maximum delay. Pollution in pursuit of profit is no vice.

We refuse to come to grips with the staggering mass of wastes flavoring our lakes and the floating solids that ride our rivers. Confronted by this, educated men assemble and debate at length whether or not there is pollution.

And if we find one lake which to date has escaped its fate as a public dumping ground, we hasten to fill it with the refuse of our civilization and leave it polluted as a monument to progress.

Lake Superior, you *were* a gem.

[Twin Citian, March 1970]

THE ACT OF POLLUTION

(By Grant J. Merritt)

Lake Superior is on the brink of disaster. If the "billowy gray clouds" of "fines" from 67,000 tons of taconite tailings dumped daily in Lake Superior continue to peel off the delta at Silver Bay much longer, they irreversibly will pollute this delicate Gem of the Great Lakes.

The rugged shorelines and vast ocean-like expanses of Lake Superior have inspired generations of Americans. These crystal-pure waters, unequalled anywhere in the world, are now being polluted because certain business interests place monetary dividends above human needs and ecological consequences. Although there are others, the leading Lake Superior polluter is Reserve Mining Company, which has dumped approximately 200,000,000 tons of tailings in the Lake since beginning operations in 1955.

Connected by U.S. Highway 35, Twin Citians are closer to Lake Superior today than ever before. The great interest expressed during the past year by Twin City residents in the continuing controversy over the pollution of Lake Superior demonstrates the widespread concern that we may soon lose this valuable resource. Unless the public continues to express concern, and appropriate action is soon forthcoming, the Twin Cities may be connected by concrete to another Lake Erie.

Amid charges of pollution by conservationists and denials by Reserve Mining officials, intrigue and politics, suppression of reports by high government officials, the reluctance of the State of Minnesota to recognize the problem—the events of the past year have aroused ever greater concern in Minnesota and elsewhere.

The story of what has happened since Reserve received its permit to discharge tailings in Lake Superior from the State of Minnesota in 1947 could fill a book. In brief outline, this is what has occurred.

In 1947 the State of Minnesota granted Reserve, owned by Republic and Armco Steel Corporations, a permit to appropriate Lake Superior Waters for the beneficiation of taconite near Beaver Bay on the North Shore, and a permit to discharge the suspended solid wastes from this taconite process directly into the Lake.

These permits were issued after a series of hearings at which scientists hired by Reserve testified that the tailings were mere sand particles which would stay on the delta or sink to the bottom of the "Great Trough" off Silver Bay. Several conservationists, union representatives and one politician opposed issuance of these permits, but their arguments were futile in the rush to encourage new industry. Minnesota's "Mr. Taconite," E. W. Davis, referred to this opposition in his book "Pioneering with Taconite." He stated that "One of these witnesses even maintained that the fine taconite tailings 'would be carried out into the Lake' where they would 'stay in suspension.'" Davis characterized this evidence as "outlandish." He said these opponents were obviously attempting to drag out the hearings and delay construction—"Why they were doing this was never clear to me!"

The state permit to dump tailings was issued for an indefinite period subject to revocation only for violation of its conditions, which will be discussed below. Several hearings on the state permits have been held since 1947, at which Reserve ridiculed the testimony of North Shore commercial fishermen who claimed the tailings were destroying fishing southwest of the plant. Although these hardy fishermen along with those few who spoke out at the

earlier hearings were not biologists or ecologists, they could see the destruction. So could others, including nearby residents in the Beaver Bay vicinity. But their voices were no match for the propaganda machine of Reserve.

Meanwhile in 1948 the U.S. Army Corps of Engineers issued a federal permit authorizing dumping of tailings with the sole condition relating to obstruction of navigation. This permit was renewed in 1950 and again in 1960 at the request of Reserve. The permit granted without hearings by the Corps of Engineers in 1960 was originally to expire December 31, 1970. Reserve objected to this time limit, and by a mere exchange of correspondence the Corps removed this deadline and extended the permit for an indefinite period.

Pursuant to an agreement between the Secretaries of the Army and Interior, the Corps of Engineers District Office in St. Paul issued a notice on November 1, 1967, requesting interested parties to submit comments on revalidation of Reserve's permit from the Corps. This action led to the first comprehensive study of Reserve's dumpings in Lake Superior. Five agencies of the Interior Department formed a taconite study group headed by Charles H. Stoddard, Regional Coordinator of the Interior Department. This study, issued on December, 1968, reflected ten months of concentrated effort. While the study was in progress, Reserve attempted to hold off mounting public criticism until the study was completed, confidently assuring interested inquirers that this study would confirm the Company's test showing absolutely no harmful effects. Ed Schmid, Reserve's Public Relations Director, on June 17, 1968, after a charge I had made in Duluth that Reserve was polluting Lake Superior, told me that a "thorough, in-depth study of Reserve's use of the Lake is under way."

The Stoddard Report, as this historic study is now called, was submitted to the St. Paul Office of the Corps on December 31, 1968. It consisted of two parts—a 36-page summary and several hundred pages of detailed scientific findings. Copies were sent to Reserve and Washington officials. For 16 days Reserve had time to line up opposition to the report, which was highly critical of Reserve's operations, before the public was informed of the results on January 16, 1969. In an article by Ron Way in the January 16, 1969, Minneapolis Tribune, the public first learned the results. The major findings were: 1) "Pollution is occurring" in Lake Superior from Reserve's dumping of taconic tailings; 2) the "green water" or turbidity extending miles down-current from Silver Bay is caused by suspended waste particles from the Reserve effluent, contrary to the official explanation by Reserve that this "green water" is either an "illusion," or a natural phenomenon; 3) substantial reductions of bottom fish food organisms attributable to tailings were found; 4) Federal-state water quality standards were being violated and 5) Reserve was violating its Minnesota permit for the discharge of tailings. The report recommended that the tailings be disposed of on land in a stilling basin back of Silver Bay, and secondly, that the Corps permit be extended three years to give Reserve a reasonable time to construct such alternative disposal facilities.

Immediately after public disclosure of the Stoddard Report, it was subjected to a barrage of criticism from Reserve officials, Congressman John A. Blatnik, John Badalich, Executive Director of the Minnesota Pollution Control Agency (PCA), State Senator Ray Higgins, Duluth, and others. Congressman Blatnik said the report was "preliminary," "had no official status" and was "completely false." Joseph Moore, former Commissioner of the Federal Water Pollution Control Administration, defended the official status of the Report and stated that Stoddard was "charged with the responsibility of developing the departmental position, which he did in this case."

John Badalich of the Minnesota PCA stated on January 16, 1969, that the conclusions in the Stoddard Report "contained errors," were "not supported by the analytical data collected and represent irresponsible interpretation." He referred to the conclusions as "speculation and conjecture." Max Edwards, former Assistant Secretary of the Interior, also charged that the Report contained errors. Neither Badalich nor Edwards ever specified these errors or substantiated their charges. Edwards later was hired by Reserve as Washington counsel shortly after he left government service and is presently under investigation by the Justice Department for possible violation of federal conflict-of-interest laws.

Following release of the Stoddard Report, former Secretary of the Interior, Stewart Udall, called a Federal-State Conference on Lake Superior to abate pollution in accordance with federal water quality laws. For several years

Senator Gaylord Nelson of Wisconsin had urged the Governors of the involved states and Secretary Udall to convene this Conference. Conferees were appointed by the states of Minnesota, Wisconsin and Michigan and the Federal Water Pollution Control Administration. The first session was set for the Hotel Duluth in Duluth, Minnesota on May 13-14, 1969.

The Conference opened with demonstrations in front of the Hotel Duluth and more than 600 people assembled in the Hotel Ballroom. Under the leadership of Mrs. Arlene Harvell, the Save Lake Superior Association (SLSA) had publicized the conference and arranged for the presentation of over one hundred statements from interested citizens. A large number of citizen groups participated. The conference began with speeches by Congressman Blatnik, who said that if and when we find any pollution, it will be stopped; and Governor LeVander, who welcomed "this fact-finding conference on the status of Lake Superior," and said he looked forward to this conference "so that we can update our information on Lake Superior."

These and other calls for delay were not echoed by any of the anti-pollutionists present. Indeed, the conference brought out the clash of philosophy between those who testified that there is no vested right to dump in Lake Superior. The latter group included MECCA and SLSA which believed the Stoddard Report justified immediate action to end the dumping at Silver Bay.

A variety of witnesses testified, including fishermen, government scientists, conservationists, former Reserve employees and scientists hired by Reserve. It soon became apparent to David Dominick, Commissioner of the Federal Water Pollution Control Administration (FWPCA), that the dozens of spokesmen for the participating citizen groups could not all be heard in two days. Commissioner Dominick, who took over as Chairman after Assistant Secretary of the Interior, Carl Klein, departed during the first day, kept the conference in session into the evening hours the second and third days in order to finish.

Before the conference had convened, reports from informed sources indicated that new evidence showing the presence of taconite tailings in Wisconsin waters obtained by FWPCA scientists had been suppressed by high government officials. Efforts by news reporters to make public these "bottom samples" were unsuccessful.

Armed with the "Freedom of Information" federal law, MECCA successfully demanded disclosure of this concealed data. Commissioner Dominick made the evidence available at the National Water Quality Lab in Duluth, but refused to receive it into the conference record on the ground that the samples had not yet been fully analyzed. As discussed below, the evidence was later received at the next session. This proof of tailings in interstate waters was important because without it the federal law governing the proceeding does not permit enforcement action unless one of the three governors from Minnesota, Michigan or Wisconsin join in the formal call for the conference, which they refused to do despite repeated requests of citizens, especially of Governor LeVander.

The agenda for Minnesota witnesses was handled by PCA Director and conferee Badalich, who manipulated it to Reserve's advantage on several occasions and allowed Reserve to have the final word. With obvious advance knowledge of this maneuvering by Badalich, Reserve brought in substantial numbers of employees at the appropriate time on the final day to swell the pro-Reserve ranks, apparently because the applause previously had been noticeable anti-Reserve.

After the conference adjourned, Gladwin Hill of the New York Times reported from Duluth that Assistant Secretary of the Interior, Carl Klein, had determined that these federal-state conferences were just "cumbersome formal proceedings" and that the Lake Superior Conference would be the last one for the time being. Informal conferences and talking problems out with officials in the states would be "much more effective," Klein said. These comments created a storm of protest forcing Klein to retract what he had told the New York Times.

By the time the conference reconvened for an executive session held nearly five months later in Duluth to discuss recommendations for abatement, Klein was firmly in control of federal water pollution control policy, and Murray Stein, FWPCA Enforcement Officer, replaced Dominick as Conference Chairman. Federal scientists led by Dr. Donald Mount, Director of the National Water Quality Laboratory in Duluth, testified that extensive tests conducted during the summer of 1969 produced conclusive evidence that the taconite tailings had traveled across state lines well into Wisconsin waters.

The tailings were found throughout a wide area of the lake up to forty miles from Silber Bay. The Reserve tailings are killing "lake shrimp", which are important food for trout, whitefish and herring, according to these government scientists. The accumulation of tailings on the Lake bottom also was found to have a potentially harmful effect of trout and herring eggs. The evidence also showed that tailings are going into solution and suspension in the water, thereby degrading the high quality of Lake Superior.

Despite this strong evidence, Badalich stated afterwards that he "is not convinced the tailings are in interstate waters," Badalich objected repeatedly during the executive session to FWPCA recommendations. The most that can be said of his performance is that he demonstrated consistency in his view, expressed in January, 1969, after issuance of the Stoddard Report, that Reserve is not polluting the lake.

Badalich and Robert Tuveson, Chairman of the Minnesota PCA, arrived at this October, 1969, session with a recommendation which obviously had the blessing of Governor LeVander—that another study be conducted, this time by the polluter! The Minnesota recommendation, which was adopted by the conference, was that "Reserve be requested to undertake further engineering and economic studies of the ways and means of reducing to the maximum practicable extent the amount of tailings discharged in the lake" and report back to the conferees in six months. After all this evidence of pollution, the most Minnesota could offer was to suggest that the polluter conduct a study! Even worse, this recommendation, which was reported in the press before the conference began, obviously was not altered in the least after the clear and convincing evidence by the federal scientists, who had proven their fairness and impartiality to close observers of the conference.

The recommendations stated that Reserve's report was due "within six months of the date of issuance of the Summary of Conference by the Secretary of the Interior." On January 26, 1970, four months after the executive session closed, Secretary Hickel finally signed the recommendations proposed by the conferees. In order to make up for this lost time due to bureaucratic delay in issuing these recommendations, Hickel directed that Reserve submit a "progress report" by April 1, 1970, which is six months after the executive session and the date the conferees set for Reserve to submit a full report to the conference. The net result is that Hickel moved up a deadline, which had been delayed because of his failure to act, and then tried to convince the public he was adopting a tougher line on Reserve pollution. Most important, however, is the terminology "progress report" used by Hickel—the conferees had recommended that Reserve issue a report in six months, which was interpreted by conservationists, the news media and others present including John Badalich as a full report from Reserve on April 1, 1970, after which a time-table for action would be established. Thus, the already weak recommendation of the LeVander Administration was further weakened by Secretary of the Interior Hickel.

With a minimum of discussion, the conference adopted the following recommendation which was approved by Hickel: "The dumping of polluted dredged material into Lake Superior be prohibited." Instead of recommending a similar course for the dumping of taconite tailings, with a reasonable time for construction of on-shore facilities, Minnesota proposed another study.

Further study seems to be the policy of the LeVander Administration for taconite pollution of Lake Superior. In addition to recommending the six-month study, John Badalich reacted typically to the evidence of pollution presented by the outstanding federal scientists at the October session—he announced that an independent study by the Minnesota PCA would be conducted to determine the validity of these findings.

Shortly after the October conference session closed, Governor LeVander proposed formation of an International Commission to study the problem. Such a Commission would be purely advisory with no enforcement powers. Furthermore, an International Joint Commission established in 1913 for the express purpose of studying pollution in the Great Lakes area has issued only three reports—in 1918, 1950 and 1969. The last study of Lakes Erie, Ontario and the international section of the St. Lawrence Seaway took nine years to complete after funds were appropriated. While these studies were in process, Lake Erie was dying, and by the time the last study was issued, it was dead.

Late in August, 1969, MECCA demanded that Governor LeVander call a

hearing to revoke the discharge permit issued to Reserve by the state. The Governor responded by directing the PCA to evaluate the question and report to him whether such a hearing should be held. This was the first time LeVander had reacted to conservationist demands on Lake Superior with any sort of action. It took court action, however, to obtain the desired hearing.

On September 19, 1969, Robert Share, a Minneapolis attorney, went to court in Hennepin County on behalf of the *Sierra Club* and the Minnesota Committee for Environmental Information (MCEI) seeking a writ of Mandamus ordering the PCA and the Conservation Department to hold a hearing on the matter of the revocation of the state permits issued in 1947 by the Conservation Department and the PCA's predecessor. *This Sierra-MCEI lawsuit was successful. The State of Minnesota, represented by Attorney General Douglas Head, vigorously opposed the MCEI-Sierra action, but Judge Donald Barbeau, Judge of District Court, Hennepin County, denied the state's motion to quash and struck the affirmative defenses raised in opposition. Judge Barbeau said:*

"If environmental quality is now of such major concern that the public will demand, and will sue for, strict enforcement of anti-pollution laws, the Court views that as a salutary development. The grim warnings of the ecologists that if we continue raping the land, befouling the water, and polluting the air, mankind itself will surely perish are barren admonitions unless they can be fortified by legal sanctions."

The state had argued that LeVander's request on October 7, 1969, that the PCA hold a fact-finding hearing on the state permits rendered the lawsuit moot. As Judge Barbeau correctly held, the hearing LeVander requested was not the one sought by MCEI-Sierra; instead, it was a hearing to determine whether another hearing should be held. After Judge Barbeau's order of November 3, 1969, the state gave up the fight and entered into a stipulation providing that the proper hearing be held before May 30, 1970.

In accordance with the court order, the PCA will charge that Reserve has violated the following conditions of the state permits which prohibit Reserve from discharging its tailings so as to:

1. Result in material clouding or discoloration of the waters of Lake Superior at the surface, outside of the zone of discharge specified in said permits, contrary to the conditions of said permits;

2. Materially and adversely affect fish life;

3. Otherwise materially and unlawfully pollute the waters of Lake Superior.

Considering the evidence presented at the two sessions of the conference, there is no longer any doubt that Reserve is violating the state discharge permit in at least four respects:

1. Material quantities of matter soluble in water are being discharged into the lake.

2. There is material clouding or discoloration of the water at the surface outside of the 3-mile zone specified around the plant.

3. The tailings are causing material adverse effects on fish life in the lake.

4. The tailings are a public nuisance.

It remains to be seen how effective a case the state will build against Reserve at the revocation hearing.

The only direct action taken by the state is the adoption of WPC-15—interstate water quality standards which include Lake Superior. The maximum amount of suspended solids allowed is 30 milligrams per liter, which Reserve exceeds by 867 times according to FWPCA testimony at the conference. Reserve is presently contesting WPC-15 in Minnesota District Court contending that the criteria were adopted without due notice and public hearings as required by law. Reserve states in its notice of appeal that even if the criteria had been legally adopted, the standard is unreasonable as applied to Reserve or, in the alternative, Reserve should be granted a variance because enforcement would "cause undue hardship."

Lake Superior is a priceless resource. Just how valuable it is, is vividly shown by a recent calculation of Dr. Charles E. Carson, Professor of Geology, Wisconsin State University, River Falls, Wisconsin. Dr. Carson computed the value of just one aspect of Lake Superior—the pure, cold drinking water. Based on a figure of 40 cents per 1000 gallons, which is the approximate average municipal cost of fresh drinking water in the U.S., the 3000 cubic miles of water in Lake Superior are worth in excess of 1.3 trillion dollars!

This 1.3 trillion dollars does not begin to establish the total value of this beautiful, blue expanse of water including its aesthetic, recreational, and other values. Despite this astounding value, we allow Reserve to dump into the lake every day the equivalent of 30,000 standard-size automobiles—which is a line of cars bumper-to-bumper stretching ninety miles from the Twin Cities to Rochester, Minnesota, every day!

If we are to save Lake Superior, we cannot accept further study or more delay as a legitimate policy of either the state or federal government. The record shows that the more we study, the more confirmation we get of the Stoddard Report and the first-hand observations of ordinary citizens.

The efforts to end tailings pollution prove that public pressure can bring results. The challenge remaining is to continue the pressure until Reserve stops the dumping completely. The use of Lake Superior as a dumping ground must be prohibited.

[Twin Citian, March 1970]

PERSPECTIVE ON THE POLLUTION OF LAKE SUPERIOR BY TACONITE TAILINGS

(by Charles W. Huver, Ph.D.)

The question of possible pollution of Lake Superior by taconite wastes was first brought into public focus during the 1947 hearings before the State Commissioner of Conservation and the Water Pollution Control Commission on a permit application of the Reserve Mining Company to deposit its tailings in Lake Superior at Silver Bay. Considerable concern was expressed about the finer particles that would be part of the tailings deposit and the question of whether or not they would remain suspended and have any adverse effects on the quality of Lake Superior water.

Testimony paving the way to the granting of the permit was given by Dr. John Moyle of the Minnesota Department of Conservation and by Dr. E. W. Davis of the Mines Experiment Station of the University of Minnesota. These witnesses testified that fine particles have been carried into Lake Superior for thousands of years by the streams entering the lake. In particular, Dr. Moyle referred to the St. Louis River which flows over the bed of an old glacial lake, and testified that it carried down finer material in larger quantities than would come from Reserve's plant. Recent data from a Department of Interior study, Special Report on Water Quality of Lake Superior in the Vicinity of Silver Bay, Minnesota, December, 1968, refutes the testimony of Doctors Moyle and Davis in that the FWPCA found that the Reserve tailings were a much more significant source of fine particles than the inlet streams.

Every day the Reserve Mining Company discharges an average of 700 million gallons of water containing some 60,000 long tons of taconite waste solids directly into Lake Superior. Of the waste solids discharged per day, some 5,400 long tons are less than 4 microns in diameter. Particles of this size would stay suspended for considerable lengths of time after discharge. Since the plant went into operation in 1956, more than 190 million tons of taconite tailings have been put into the lake.

An obvious polluting influence of this discharge is the greatly increased turbidity in the water of the Silver Bay area. For photographic evidence of this form of pollution, one can refer to a report entitled, *Studies on the productivity and plankton of Lake Superior*, June, 1961, published by the School of Public Health, University of Minnesota. Recent turbidity measurements taken $\frac{1}{4}$ mile in front of the Reserve tailings delta reveal 210 Jackson units of turbidity. This is a high level of turbidity, for the water is 42 times as cloudy as the U.S. Public Health Service drinking water standard of 5 Jackson units. The major biological effect of increasing turbidity is to decrease the primary productivity of the lake, but the aesthetic effects are more obvious.

A more serious aspect of the Reserve discharge problem is chemical pollution from the finely-ground tailings particles. Analyses of samples collected by the FWPCA from the vicinity of the waste disposal area indicated that copper and zinc were present in concentrations normally considered to be toxic to aquatic life. The FWPCA investigations of June-July, 1958, in the Silver Bay area revealed lead and copper levels in excess of Federal-State Water Quality Standards. The federal report (Special Report on Water Quality of Lake Superior in the Vicinity of Silver Bay, Minnesota, December,

1968, U.S. Dept. of the Interior) concluded that aluminum, lead, copper, zinc, cadmium and nickel were "found to be in concentrations in excess of commonly accepted levels for supporting aquatic life." Recent analyses for copper in our laboratory indicate unusually high levels in the vicinity of Silver Bay as compared to other North Shore stations.

The high concentrations of various trace metals in the vicinity of Silver Bay suggested that the tailings may not be inert but could be a major source of chemical pollution of the lake. According to the FWPCA report, "An Appraisal of Water Pollution in the Lake Superior Basin," if chemical analyses are projected to the probable daily discharge, the following chemicals will be released to the lake in terms of pounds per day: copper, 4,100; nickel, 2,500; zinc, 2,500; lead, 6,100; chromium, 6,200; phosphorus, 51,500; and manganese, 629,000. Additional elements in the waste effluent include silica, arsenic, and substantial quantities of iron.

Reserve's consultants, Dr. Robert Bright of the University of Minnesota and Dr. F. Fred Lee of the University of Wisconsin, testified that the tailings would not be a source of chemical pollution, because they do not leach various trace metals to the water. This contention was refuted by the data collected over an 11-year period by Reserve's chemist, Mr. Haley, whose results showed major increases in several trace elements between the water intake and the water discharge of the plant. These Reserve analyses described by Dr. Gary Glass, a research chemist at the National Water Quality Laboratory, were done with filtered water samples to demonstrate the solubility of many of the components of the tailings.

The heavy metals in Lake Superior are of special concern. Several of the commercially important species of fish such as lake trout, whitefish, and lake herring are highly sensitive to copper, zinc, and chromium. Experiments done by the author at the Hydrobiology Laboratory of the University of Wisconsin demonstrate that the eggs of the lake herring are more sensitive than the adult to the toxic effects of copper.

Another problem with potentially serious biological consequences is the settling-out of fine grey taconite silt on the bottom of Lake Superior. According to a study entitled, "Should some beneficial uses of public waterways be illegitimate?" by Louis G. Williams in the January, 1968, issue of *BioScience*, taconite silt can be found in bottom sediments from 10 miles north of Silver Bay to Duluth and to the Apostle Islands. Bottom cores later taken by staff members of the National Water Quality Laboratory largely confirmed the results of Dr. Williams. This material could affect the invertebrates which are important sources of fish food. That this is actually the case is indicated by a study conducted jointly by the Department of Conservation and the Minnesota Pollution Control Agency (Bottom fauna off the Minnesota North Shore of Lake Superior as related to deposition of taconite tailings and fish production, Special publication No. 57, October 10, 1968) which found that the numbers of the important shrimp *Pontoporeia* were significantly lower than above the plant at most depth sampled. This shrimp is an important food item for small lake trout, smelt, and whitefish.

The deposition of the taconite silt on the demersal eggs of lake herring and lake trout would be expected to do damage to these important commercial species. The lake herring have undergone severe decline in numbers since the 1940's. A recent report of the Wisconsin Department of Natural Resources (Progress Report of Fish Management on Lake Superior, 1968) reveals that over 90% of all lake trout sampled during the two previous years are of hatchery origin which suggests that unsuitable environmental conditions may be interfering with the hatching of naturally spawned trout in the lake.

Of considerable concern to the aesthetics and health of the lake is the possibility of increased algal blooms and periphyton eruptions due to trace metals from the taconite tailings. Dr. Williams has pointed out: "High plankton populations south of Two Harbors to Duluth have always been associated with high water temperatures, 65° F or above and winds blowing out of the northeast, which tend to accumulate warm water masses along the north shore. These warmer surface waters contain higher populations of plankton than the main masses of cold water of Lake Superior." He further adds, "... When a combination of warm surface water and winds tend to mass bodies of warm water. Under these conditions nuisance blooms of planktonic blue-green algae become evident above the thermocline." The synergistic

effect of the taconite tailings with higher water temperatures on nuisance algal forms is a powerful argument against the siting of a nuclear power plant on Lake Superior. Such a plan would be completely unacceptable from an ecologic viewpoint.

While the beginning symptoms of aging or eutrophication are visible in Superior due to man's misuse of this magnificent lake, we are fortunate in that it is not yet too late to save the most valuable of the Great Lakes. However, our time is short, and we cannot afford to delay firm pollution abatement action. That we cannot afford to wait until Lake Superior becomes grossly polluted before taking corrective measures is well illustrated in an article entitled, "Natural displacement of pollution from the Great Lakes," by Robert H. Rainey, published in the March 10, 1967, issue of *Science*. Mr. Rainey reports on the basis of model studies that if Lake Superior were to become seriously polluted, it would take more than 500 years to recover at a 90% level. Can society afford to wait this long to regain our most valuable freshwater resource?

[Trains, January 1969]

THE PURE RAILROAD

WHY RESERVE MINING'S LINE IS A LESSON AS WELL AS AN INTRAPLANT ROCK-HAULER

(David P. Morgan)

Imagine a Big Rock Candy Mountain railroad, an operating man's railroad, a railroad under no obligation whatsoever to be anything but a railroad. Railroad, we are told, is inhibited, compromised, and/or victimized by terminal expenses, passenger-train losses, loss-and-damage claims, interchange delays, World War I work-rules, punitive regulation, adverse gradients, traffic cycles, highway grade crossings, nonregulated competition, deferred maintenance, excess plant, and obsolescent equipment. It follows, then, that our imaginary line would haul an inexhaustible tonnage of a single captive, nonperishable, damage-free bulk commodity . . . operate 24 hours a day, 7 days a week . . . pays its crews by the hour instead of the mile . . . run loads downhill and empties up . . . interchange with no one . . . carry no passengers . . . be equipped with new diesels and cars of common design . . . possess reverse-signalized double track under radio surveillance from A to B, free of crossings, branches, class yards, and intermediate stations . . . and ignore the ICC.

That is, a pure railroad.

Idealistic, yes.

Illusionary, no.

For the pure railroad exists. In Minnesota. It is 47 miles long, owns 21 locomotives and 990 ore jennies (and 9 cabooses), seldom uncouples and never classifies or interchanges its cars, encounters no more than a mild 0.6 per cent grade against loads (vs. 1.5 against empties), was built from scratch during 1953-1955, runs three-man/four-unit/160-car/18,430-ton trains, hauls nothing but crude taconite, and operates beyond the province of the ICC. All this is the railroad department of the Reserve Mining Company, jointly owned by Armco Steel and Republic Steel.

Reserve itself describes the line as a "private, intraplant railroad," but lest that conjure visions of a GE 44-tonner shoving rusty air-dumps through 20-degree curves in the shadow of a smelter, look again. For between Babbitt, Minn. (population 2587, and no relationship to Sinclair Lewis' novel of the same name), on the eastern tip of the Mesabi Range, where Reserve open-pit mines and crushes taconite, and Silver Bay (population 3723), on the north shore of Lake Superior, where the rock is further crushed, then concentrated and pelletized for shipment beyond in lakeboats to Cleveland, South Chicago, and Toledo, the company maintains a railroad of extraordinary specification and productivity:

Opened in 1955 and double-tracked in 1961, the railroad skirts the south side of the Laurentian Divide on a line through the Superior National and Finland State Forests. Both mains are laid with 140-pound rails (in jointed 39-foot lengths on the north side; in welded 819-foot sections on the south, or new, line) firmly anchored to ties sung in 1¼-inch taconite ballast, noted for its stability and drainage.

Trains operate by signal indication, with each running track signaled for movement in either direction. Power-operated double crossovers are located at Mileposts 12½, 25, and 36 (from Silver Bay), and are remotely controlled from a vest-pocket CTC machine at SB. Three fixed radio stations allow verbal communication between the dispatcher and every engine, caboose, and piece of Hy-Rail equipment, as well as between trains.

The equipment of Reserve's railroad reflects its bulk-commodity, low-speed nature. Electro-Motive built the power: 17 SD-model C-C's perform the line-haul work, and 4 switchers handle the loading, and unloading cycles at the terminals. ACF Industries delivered the ore cars—1000 of 'em (now minus 10 owing to a derailment, half of which were salvaged as homemade M/W cars)—and they are rated at 95 tons capacity, measure 29 feet 10 inches over pulling faces, and feature tightlock couplers and roller bearings. Item: The ore cars are never turned because they have rotary couplers (for the dumper in Silver Bay) on their west, or Babbitt, ends only.

Operationally, the Reserve road is budgeted to move 8000 carloads of taconite (at 88 tons of rock per car) a week, which requires 53 round trips of four-unit, 160-car trains every 7 days. Typically, they depart Babbitt at 2, 5, 8, and 11 a.m., and 2, 5, 8, and 11 p.m. Except in the winter, each SD is rated at 40 loads or 45 empties, and is allowed 35 mph with loads (except 30 mph downgrade) and 40 with empties. This works out to an eastbound or loaded-train running time of 2 hours 45 minutes, and a return empty movement of 2 hours flat.

Only 160 employees man this flanged-wheel conveyor belt—40 in the shop in Babbitt, 35 in M/W, 4 in signal and radio maintenance, 72 in train service, and the rest in clerical and supervisory capacities. The basic train crew consists of an engineer, a front brakeman, and a conductor, all of whom belong to the United Steel Workers, work a basic 8-hour day, and—like all Reserve employees—wear hard hats and safety glasses.

Reserve's railroad is not for the romanticist. Its double iron runs through bleak, sparsely populated (less than 1 person per square mile) muskeg country, where the thermometer can record 100 degrees-plus in the summer and sink to 45 degrees below zero in the winter. Its locomotives wear a somber dress of maroon and yellow (school colors of the Case Institute of Technology, alma mater of the man who laid out the line). Its tide of look-alike 160-car drags is tempered only by an occasional local bringing fuel oil and other company supplies in from the Missabe Road connection at Norshor Junction, or setting out M/W cars and the Hy-Rail automotive vehicles that ferry maintenance and supervisory personnel up and down a railroad which has no highway access. Very infrequently, an ex-Great Northern parlor-observation is wheeled out for a tour or an inspection trip. But Reserve is 99 per cent those 160-car taconite trains, loads east, empties west, usually 8 a day, 53 a week . . . an operation that would fascinate a John Barriger and certainly would have appalled a Lucius Beebe.

Reserve clearly fascinates its rail superintendent, George J. Sennhauser—a 42-year-old Purdue graduate who was Lima-Hamilton's chief electrical engineer in locomotive-building days, then went into Chesapeake & Ohio's research department, and thereafter became by choice a night yardmaster for C&O in Chicago. Trains readers will recall his rebuttal to the catenary crusaders ["Why We Don't Electrify," page 40, December 1962]. He's old enough to recall the mellowness of a Monon in steam, professional enough to slide-rule a question before he answers it, seasoned enough to grasp and appreciate the awesome rail significance of a railroad plant and operation like the one outside his office door in the shop at Babbitt.

For as Sennhauser is the first to cheerfully admit, he has the traffic and the tools, and a better way to run a railroad hath no operating man.

Taking the measure of Reserve's railroad is complicated by the fact that the company need report its operations only to its two parents; and while Reserve is openhanded with tonnage statistics, it is mum on the dollars and cents involved. And understandably. Not only does Reserve not report to the ICC, but it also operates at cost to its owners rather than as a profit center in the sense of the U.S. Steel common carriers; thus one can only speculate on its cost per ton-mile.

Happily, Reserve's mileage and tonnage statistics still leave the reporter much to work with. Let's begin with a simple yardstick—average daily loco-

motive and car milage. The average American freight locomotive runs off about 150 miles a day and the average freight car goes 51½ miles. On Reserve those figures are 250+ and 135 respectively at peak season. Item: SD9's 1220 and 1222, both delivered in June 1955, passed the million-mile mark in June 1968, which means each has averaged well in excess of 200 miles per day for 13 years, including all down time for inspection and repairs—on a *short low-speed railroad*.

Or ponder this: Since 1964 Reserve's railroad has been hauling more than 30 million tons of crude taconite a year (and hit 34.7 million in 1966). That traffic approximates all the bituminous moved per annum by Louisville & Nashville, the nation's fourth largest rail hauler of soft coal. It's about five times the tonnage of the 541-mile Monon, and on occasion nearly twice the business of the 4692-mile Soo Line. Or one can express it this way—Reserve's railroad originates in a decade as much tonnage as all the railroads of the South do in a typical year.

Of course, each Reserve ton travels only 47 miles vs. a national railroad average (in 1967) of 485 miles. Yet the mining road still looms large, very large, when compared in kind. The likeliest candidate is Pittsburgh & Lake Erie, a heavily trafficked, short (212 route-miles), mostly bulk-commodity carrier. In 1966 P&LE produced 1.4 billion ton-miles; in the same year Reserve's figure was more than 1.6 billion.

It follows that Reserve's unpublished operating and transportation ratios, and out-of-pocket and commercial ton-mile costs, must be equally impressive. Indeed, they might well surprise those who from either experience or force of habit would automatically credit the lakeboats that tie up at the dock in Silver Bay with a better cost performance than the trains which relay their lading down from Babbitt. It also follows that the Reserve line, in a bulk-commodity reference, comes as close as perhaps any railroad on the continent to test-tubing and to proving the essence of the Barringer super-railroad doctrine.

There are several ways in which to interpret, gauge, and apply the real lesson of Reserve. For instance, Reserve is *not* the ultimate railroad despite its almost incomprehensible productivity. Its off-the-shelf hardware is man-operated over a conventional track structure, thus it does not exploit automation or integral trains or broad gauge or motion unloading or electric propulsion. Even "as is," the Reserve railroad is being worked at only a fraction of its inherent capacity (e.g., each of the two running tracks is occupied on an average of but once every 3 hours). Double the size or efficiency of its terminals, add a few more SD's, and the line could tote 70 million tons of taconite a year down to Lake Superior.

Also, there is no sacred matrimonial bond between Reserve's Rails and the rocks they carry. Relocate New York City at Silver Bay, replace Babbitt with Washington, D.C., substitute 12-car multiple-unit expresses on half-hourly headway for those every-3-hour, 160-car ore trains—and those same tracks could carry 300,000 people every 24 hours (or triple the daily load of United Air Lines).

The one pity of Reserve Mining's railroad is its remoteness. Its physical isolation and single-purpose industrial nature (both a blessing to its owners) have rendered it to date railroading's great unspoken sermon and unpublished text. Railroading is judged in the legislatures and press by a New Haven which fears it may not be able to cover its payroll this month, by a Rock Island which pleads for the succor of merger lest it come unglued, by a strike-bound Belt Railway of Chicago . . . by example after example that obscures the basic mechanical formula of railroading which Robert S. Henry so masterfully defined in his book *This Fascinating Railroad Business* [Bobbs-Merrill Company, 1942] as "this marvelous enginery for multiplying man's powers and possibilities." That is why Reserve's railroad department is so infinitely more than simply a way of moving rocks from a company town called Babbitt to a port named Silver Bay in the middle of nowhere, Minnesota.

[Article from Reserve Mining Company]

ECOLOGY AND THE ECONOMY, REACHING A BALANCE

Until the 1960's not many could have explained "the balance of nature." Few could have defined "ecology."

Today, though, more and more Americans can discuss both the natural balance and the interests of the ecologist with reasonable accuracy. They can tell you that the balance of nature is the natural scheme that maintains plant and animal life in the proper relationship for survival. They recognize ecology as the branch of science concerned with organisms and their environments.

The new public concern for the condition of our environment and for the conservation of our resources is clearly justified.

During a century of unprecedented industrial advance, man has sometimes been expedient and wasteful when he should have been deliberate and watchful. He frequently has been extravagant with raw materials. He has spoiled rivers, soiled air, scourged land. Particularly in the early years of industrial growth, man moved head-long and unheeding through his environment.

More recently, enlightened industries have seen the wisdom of establishing their own programs to assure resource conservation and environmental health. And government controls have helped check excesses by both municipalities and private interests.

Most recently, the general public has become aware of problems that once had the attention only of industrial leadership, government, and special-interest groups. If "ecology" is not yet a household word, "conservation" certainly is.

As community discussions of conservation grow more knowledgeable, a dilemma becomes apparent. It is this: we want what nature gave us, but we also want what industry provides. Few of us would surrender the comforts and conveniences of our highly industrialized life in order to regain the "natural life" of the past.

What most of us really want is an industrial system that respects nature while it provides the goods, the services and the employment we have come to expect. What we need is a balance between nature and industry.

"America's New Conservation," a publication of the United States Department of Interior, recognizes this dual need. It points out that we now live with two distinct external environments. One is the world of nature, The other is the world we have built around nature. "In an ecologic age," the Department says, "our technologies . . . are just as much national resources as fossil fuels, forests and wildlife."

The following pages provide a case history of one American corporation moving into the 1970's in the center of an effort to keep a proper balance between nature and economic need. The corporation is Reserve Mining Company of Minnesota.

THE MESABI—WAR HERO . . .

Since 1956, Reserve Mining Company has been mining and processing taconite for the nation's steel industry. Mining is done at Babbitt, Minnesota. The company's processing plant is at Silver Bay, 47 miles away on the shore of Lake Superior.

Taconite is a hard, gray rock with tiny particles of high-grade magnetic iron ore imbedded in it. For the people who live in the communities on Minnesota's famed Mesabi Range, it also is a life saver.

Twenty years ago, much of the easily concentrated and high-grade natural iron ore that had made the Mesabi one of the world's most celebrated mining regions had been mined out. The enormous requirements for steel during World War II had accelerated its decline as a source for high-grade, natural ore. America's steel producers had begun to look elsewhere—South America, West Africa and Canada—for the ore they needed to keep their mills busy.

As the Mesabi's rich, natural ore was depleted, Northern Minnesota's economy declined sharply.

Unemployment on the Range soared. Duluth and other communities which served the Range folks were hard-hit. Young people were leaving the area for better opportunities elsewhere. Despairing cries were heard in the state and nation's capitals that the Iron Range was becoming another Appalachia.

. . . WAR VICTIM

Fortunately, a few farsighted individuals saw this situation taking shape back in the 1930's and began investigating ways to process the plentiful supplies of taconite, looking to the day when natural ores would give out. Reserve Mining was incorporated in 1939 with this aim.

An earlier attempt in the 1920's to process taconite into a usable ore had been a complete failure. Babbitt, on the east end of the Mesabi Range, where

that attempt had been made, became a ghost town. By 1950 there was only one family living there, and that was the family of the caretaker who watched over empty homes, schools and stores.

Major economic and technological problems delayed development of a practical method for processing taconite. Taconite is one of the hardest rocks found on the surface of this continent—hard enough to scratch glass like a diamond. It contains only 20 to 25 percent iron. About three tons of the rock are needed to produce a ton of iron ore pellets.

Reserve Mining Company was one of the companies that demonstrated in the 1950's that transforming taconite into iron ore pellets for the steel industry was economically feasible. It was the first company to go into large scale, commercial production—the birth of a new industry so desperately needed by the Range country.

FROM TACONITE, A TURNABOUT

Reserve crushes and grinds taconite, then separates the iron ore particles from the rest of the pulverized rock by magnetism. The "concentrate" that results—jet black iron ore—is rolled into marble-size pellets. These are fired to make them hard enough for shipment down the Great Lakes by ore vessels to the steel mills. The sand left over from this process (it is called "tailings") is deposited harmlessly on the bottom of Lake Superior in a 500- to 900-foot deep trough near the Minnesota shore at the Reserve plant.

Before Reserve Mining began construction of its facilities, the company held many meetings with Federal and State government agencies, discussing its problems and plans. Disposal of the waste sand on land near the mine—common practice in mineral dressing—was not feasible because of inadequate water supply for processing the taconite. Neither was there available the very large area needed for the deposit of the tailings. The Babbitt area borders a National Forest, and much of the adjoining land was restricted by forest and water preservation Acts of both the Federal Congress and the Minnesota Legislature.

Investigations and scientific studies indicated that the discharge of the inert sand would not harm the lake or its aquatic life. In short, disposal of the inorganic material in the lake posed no conservation dangers and unanimous decision placed the processing plant at Silver Bay, with its adequate water supply and close access to the deep trough.

Construction began after Reserve's proposed use of Lake Superior had been studied and approved by appropriate authorities in Minnesota, Wisconsin, Michigan, and the Federal government.

The decision to approve Reserve's plan for the permanent, deep-water storage of its waste and sand off-shore from Silver Bay was influenced by a natural phenomenon called a "heavy density current." Federal research of density currents in both natural and man-made lakes provided detailed documentation of the age-old phenomenon.

Reserve Mining, the Mines Experiment Station of the University of Minnesota, the St. Anthony Falls Hydraulics Laboratory, and others made additional surveys and studies to prove that Reserve's "density current" system for disposal of the waste sand would work.

Proof—not reasonable assumption—was necessary from a conservation and an economic standpoint. Lake Superior, the largest and purest of our Great Lakes, was involved. So was a huge capital outlay: \$350 million dollars have been invested in Reserve's facilities to date.

A density current forms when sufficient solid material is suspended in water to give it a greater density than the density of surrounding water. At Silver Bay, the discharge water—heavily laden with sand—flows by gravity from the plant toward the lake. The coarse sand, about half of the total, is heavy enough to settle out promptly, forming a stable, solid beach or delta in front of the taconite plant. The fine particles of sand are carried over the beach to the lake where the density current forms. The current flows down the sloping lake bottom into the depths of the great trough. There, the density current comes to rest and the particles of sand settle on the lake bottom.

"... MODEL COMMUNITIES"

The trough is so huge that Reserve's entire mineral body could be deposited there without any appreciable change in its depth.

Occasionally, Lake Superior may have a "thermocline"—a layer of warm water above the cold water of the lake—caused by unusual extended heat periods, surface currents carrying warm water from shallows, or heavy summer rains draining from shore areas. Because of the different temperatures, these layers of water have different densities.

As a result, some fine particles of tailings—as well as fine particles of beach sands and stream sediments—when they encounter a thermocline, may detach from the density current and go into temporary suspension. The light reflection from water containing such particles, or merely having different temperatures and densities, may give a "green water" appearance. This is a very temporary phenomenon lasting only a few days. It is not a true color. Viewed in a glass, or subjected to color tests, the "green water" is as colorless as is so-called "blue water."

This interesting "green water" phenomenon is seen in many lakes. It existed in Lake Superior before Reserve began operations. Federal scientists and others have sampled and analyzed "green water" in Lake Superior which had no relationship whatever to Reserve's operations and contained no tailings.

KEEPING THE OUTDOORS GREAT

Six companies now mine and process taconite in Minnesota. The effect of this new industry on the region and the State has been remarkable. Reserve itself is the major source of iron ore for companies producing 15 percent of the nation's domestic steel.

More than \$1 billion has been invested in Minnesota Range country taconite facilities. Nearly 12,000 persons are employed year-round by taconite producers. Thousands more work for the businesses that furnish the \$110 million worth of materials, supplies and equipment the producers purchase annually.

Babbitt and Silver Bay—the two new cities Reserve carved out of wilderness—have become model communities. Though entirely dependent on Reserve's operations, they are by no means "company towns." More than 95 percent of their homes are privately owned.

Both communities boast superb school systems. Independent businessmen, bankers, merchants, and professional men have prospered. Rival political parties vie at the polls. Like other American communities, Babbitt and Silver Bay elect their own officials and maintain their own fire and police departments and their own water and sewage systems.

OBLIVIOUS BENEFITS, NATURAL CONCERN

Northern Minnesota is outdoor country. Nearly every family in Babbitt and Silver Bay owns a boat and camping trailer. In winter, snowmobiles are seen in great numbers. Perhaps more than most Americans, men and women in this part of the nation are concerned with conservation. Their concern is shared by Reserve Mining. The company regularly takes an active, vigorous role in conservation projects.

This is great sports country all year around. Even during the long, hard winters, the people are active. They hunt, ski, skate. They explore forest trails on snowmobiles. In summer they golf, fish and haul their trailers to nearby campsites. In the fall they hunt deer, grouse, ducks, and geese.

The region is picture-post-card America in many ways. Reserve Mining helps keep it that way while it goes about the business of processing the taconite that is at the root of the region's economic well being. Reserve has tried to maintain this balance from the beginning.

Reserve's facilities were enlarged importantly some years ago. Prior to that expansion, amendments to its permits were needed to allow the expanded use of the lake. Again, after public hearings, the permits were amended and approved by governmental agencies confident that the public's interests were fully protected.

BEAUTIFUL ENVIRONMENT

Amendments to the permits were required by law. Much of Reserve's conservation work is not.

The company has developed one of the finest industrial water science organizations in the nation. Its \$5 million Research and Development complex includes fully equipped water laboratories staffed by biologists, chemists, geolo-

gists, physicists and engineers who go well beyond the letter of the law in the spirit of conservation—sampling, testing and investigating to preserve the best possible balance between natural resource and needed industry.

Despite the obvious economic benefits taconite processing has brought to the North country, and despite the elaborate efforts Reserve Mining has made to guard the water quality and aquatic life of Lake Superior, the company finds itself the target of criticism.

"Why not dump the waste sand someplace inland where it can't possibly pollute the water?" critics ask. A site on high ground above Silver Bay a few miles inland from Reserve's plant, has received considerable attention as a potential disposal area.

Briefly, the answer is this: First, no change is necessary as there is no evidence of damage or potential harm; no state or federal permits are being violated.

INTENSIVE AQUATIC STUDIES . . .

Second, the use of an inland disposal site in the area high above Lake Superior beyond the rocky ridge in back of Silver Bay presents difficult conservation, engineering and economic problems. Inherent in this high land disposal scheme are safety hazards since dams several hundred feet high would be needed. One would be more than two miles long, another more than one mile long.

The region in question is not at all like the inland areas used successfully for tailings disposal by other taconite companies. Their tailings basins are nearby the processing plants and are below—not high above—the point of discharge. What few dikes or dams they need are of only moderate height and length—safe and secure by normal engineering standards. Their tailings ponds originally were mostly swamp land.

The region high above Silver Bay is quite different. It is splendid forest country. Lake and stream fishing is excellent. Moose, deer, bear and small game thrive.

The Federal government itself is pessimistic about inland disposal in this particular area. The Bureau of Mines stated publicly that the dumping of waste sand inland, near the processing plant, would pose serious conservation problems. Independent consultants, who made an extensive study of the question, agree.

Yet Reserve has launched a major program to investigate any and all ideas for altering or modifying its discharge of waste sand—not because it has any reason to believe harm has been done or may be done to the lake, but because Reserve is eager to relieve the concern some people have about its use of the lake.

Reserve has created a special engineering task force to study alternate methods and to investigate any serious suggestions that are submitted. This task force is made up of representatives from several independent and nationally recognized engineering consulting firms, along with engineers specialists from Reserve and the companies which use its iron ore pellets. They evaluate the proposals in terms of workability, economic feasibility and—of equal importance—practicability from a conservation standpoint.

Reserve has pledged that the appropriate governmental agencies will be kept informed of these studies and that, from time to time, reports will be made to the general public as well.

Reserve recognizes its responsibilities to its employees, its stockholders, its neighbors and the public. But it recognizes a further responsibility to nature.

The company pledges to balance these obligations as judiciously as it can.

YOUR VISIT TO RESERVE

Reserve Mining Company is a Minnesota corporation. Its general offices are located at Silver Bay, and every employee, including all members of top management, is a resident of Minnesota. The company is owned jointly by Republic Steel Corporation of Cleveland, Ohio, and Armco Steel Corporation of Middletown, Ohio.

After years of research and planning, construction of Reserve's taconite mining and processing facilities began in 1951.

The cost of Reserve's initial project was about \$190 million—all private capital. Most of the funds were borrowed from a group of leading life insurance companies—the balance was advanced to Reserve by Armco and Republic. Taconite requires huge investments, which in turn call for steady operations. This contributes to stable, year-around employment.

Reserve's commercial mining and processing facilities went into operation in October, 1955, with a rated capacity of 3,750,000 tons of iron ore pellets annually. This capacity was exceeded in the first full year of production. By 1960, an extensive, continuing program of adding new facilities and enlarging existing equipment had raised Reserve's annual capacity to 6,000,000 tons. In that same year, a huge expansion program, requiring an additional investment of \$120 million, was launched. On completion of this four-year building project, Reserve produced more than 9,600,000 tons of iron ore pellets—a high-quality, "tailor-made" blast furnace feed—during 1964. The company's annual productive capacity was increased to 10,800,000 tons on completion of a \$25,-000,000 expansion and improvement project in 1966.

Taconite is the mother ore from which deposits of high-grade iron ores were formed by nature. About 95% of the iron formation on the famous Mesabi Range is taconite, one of the hardest of rocks. Where nature took millions of years to make taconite into iron ore, Reserve Mining Company does it in a few days.

Reserve's ore property is a deposit of magnetic taconite on the eastern tip of the Mesabi Range at Babbitt in St. Louis County, Minn. It is about 9 miles long, averaging 2,800 feet wide and 175 feet deep at the thickest point (wedge-shaped cross section).

Before the actual mining can start, the dirt, gravel and boulders brought by the glaciers thousands of years ago are stripped from the top of the taconite. Then, jet piercing machines sink blast holes 40 feet deep in the taconite. These machines use oxygen and fuel oil to create a flame of fantastically high temperatures—about 4300° F.—which pierces the holes at an average of 18 feet per hour. Sprays of water help carry away the flakes of rock broken loose by the flame. Each machine weighs 77,000 pounds, has a 50-foot derrick. Ejected particles are small, half of them being paper thin and less than 1/16" in size.

Taconite mining begins as the taconite is blasted loose and loaded into 90-ton diesel-powered trucks which carry it to one of two coarse crushing plants. There, the taconite is crushed in two stages, to about three inches in size, and is then conveyed by conveyor belt to storage bins which load it into trains that haul it to Silver Bay.

The rail line is a private, intra-plant, double-track railroad, 47 miles long, running between Babbitt and Silver Bay. It uses 140-pound steel rail—the heaviest made. Diesel-electric locomotives haul trains averaging 140 cars. Each car has a capacity of 87½ gross tons and is equipped with a specially designed swivel coupling which permits dumping without uncoupling the cars from the train. The cars are dumped at Silver Bay in a huge rotary dumper which turns the cars over, two at a time, automatically.

The processing of taconite at Silver Bay begins when the taconite is crushed in two stages to ¾" pieces. These, with water, are fed into rod mills. The tumbling action of the rods inside the rotating mill breaks and grinds the taconite into particles about the size of coarse sand.

The taconite is then passed through magnetic separators which reject part of the non-magnetic material—about 30%.

The magnetic material is then ground finer in ball mills which are the same type equipment as the rod mills except that steel balls do the work of grinding instead of rods. When the material has been ground very fine, it passes through a series of magnetic separators which attract the magnetic iron ore particles and reject most of the remaining, unwanted material.

After the excess water has been sucked out by the filters, the final product—"concentrate"—is about the fineness of flour and jet black in color. This material is rolled and re-rolled in a huge revolving drum so that the moist particles adhere to each other, snowballing into pellets approximately ½" in diameter. These are made hard and porous by baking them at high temperatures in horizontal pelletizing furnaces.

Competition is one of the principal challenges Reserve faces in its future growth and development. High-quality iron ore pellets made from taconite have revolutionized the iron ore market the world over and have had a great

impact on steelmaking. An excellent blast furnace feed, pellets are in increasing demand from steelmakers. This has led to construction of numerous other taconite plants in the United States and in foreign countries, particularly Canada.

Today, competition in taconite—from Minnesota, other states and foreign countries—is intense. Some of these competing taconite deposits are richer in iron and easier to process than Reserve's.

Pioneering has become a tradition at Reserve, and the creation of an entirely new division devoted to research and development makes clear that this determination to lead the way will continue. This program of research and development embraces the entire operation—from mining at Babbitt to the processing and loading of the finished pellets into Great Lakes vessels at the Silver Bay plant.

Construction of a \$5 million complex to house the scientists and technicians of Reserve's Research and Development Division was completed in 1966 . . . dedicated to making the jobs of all Reserve men and women more secure and providing Reserve's owners with an economical, but high-quality blast furnace feed today and in the future.

Like all healthy business concerns, Reserve looks forward to continued growth. All of the company's facilities have been designed and built with expansion in mind. When this will take place will depend on business conditions, generally, the growth of the demand for steel, and Reserve's ability to improve the quality of its product and its competitive position.

As Reserve's production has grown, so have its payrolls. Already more than 3,200 people are employed directly by Reserve in steady, year around jobs. Many more new jobs have been created in service and supply companies.

Countless others—merchants, teachers, doctors, etc.—have come to serve the families of the taconite workers.

Reserve spends many millions of dollars each year for materials and supplies needed for normal operations. A few of the major items last year:

Tires.....	\$2, 100, 000
Explosives.....	3, 600, 000
Grinding rods and balls, liners, and other wear parts.....	12, 000, 000
Natural gas, oil, and coal.....	7, 700, 000
Truck, bulldozer, and shovel parts.....	2, 900, 000

Reserve is also a big taxpayer. Some people have the mistaken idea that the company enjoys special, low taxes. They are surprised to learn that in such a short period of time Reserve has become one of the state's biggest taxpayers. The facts: Reserve's state and local taxes paid in 1967 totaled \$4.1 million! In Reserve's first dozen years of operation, state and local taxes have amounted to more than \$34,000,000—or about 40¢ for each ton of pellets produced.

The new towns were built originally by Reserve. Now, private building is underway and they are incorporated villages. Located just minutes from their respective Reserve facilities, both Babbitt and Silver Bay are planned communities—a far cry from the historic concept of the “mining camp” and “company town.”

Most of the homes are single-story, three-bedroom structures with full basements. Some are split-level or two-story houses. All were designed with the aim of providing attractive, top-quality structures which exceed FHA standards.

Virtually all these new picture-window homes are owned by their occupants and the pride of ownership is reflected in the carefully cultivated lawns, shrubs, flower gardens, and in freshly painted houses.

Employees were quick to buy their new homes when Reserve offered them for sale at prices far below cost and without a down payment.

Today, private home building is encouraged. Lots are for sale to employees for only \$200—lots which cost Reserve over \$5,000 to develop, including paved streets, curbs, gutters, sidewalks, sewage and water facilities in and paid for.

Before Reserve's development, both Babbitt and Silver Bay were in the center of sparsely-populated regions—less than one person per square mile. Today, each community has the facilities customarily found in towns of comparable size for the educational, religious and recreational life of their residents.

The new public schools are exceptional institutions of modern education, not surpassed anywhere in the state. The high schools, for example, have swimming pools, rifle and archery ranges, fully equipped shops, huge indoor gymnasiums, complete theater facilities, and specially designed rooms for choral and instrumental instructions.

Both Silver Bay and Babbitt have outstanding recreational facilities, too. These include excellent bowling lanes, golf courses, tennis courts, baseball and softball diamonds, skating and hockey rinks, rifle and archery ranges, teenage centers, and community auditoriums.

Forests, lakes and streams within a few minutes of every home, offer top-notch hunting, fishing and water sports. Silver Bay and Babbitt, with a combined population of about 8,500 have many clubs and organizations which contribute to the active life of the communities. Practically any interest—from flying to skin-diving, gardening to art and music—can be satisfied in these modern communities which have grown up with the new concept in the iron mining industry.

[From the D.C. Star, Dec. 12, 1970]

NADER AT GW PARLEY IN BID TO UNITE TAX REFORM GROUPS

(By Robert Walters)

More than 300 persons gathered on the campus of George Washington University today to discuss overhaul of the country's system of property tax assessment.

The session is part of Ralph Nader's first attempt to build a nationwide grass-roots organization as the base of a reform campaign.

During the past half decade, Nader has launched a wide variety of crusades, jousted with scores of government officials and jabbed at countless business firms—but virtually all of the work in those cases has been done either by Nader himself or by his Washington-based staff of young assistants.

Now Nader is trying a markedly different approach—the organization of scores of citizen groups and taxpayer organizations to work for the reform of a tax assessment system he describes as “nothing short of scandalous.”

With the assistance of an aide, Sam Simon, a University of Texas Law School graduate, Nader since mid-August has attracted the support of dozens of such groups in communities such as Cheyenne, Wyo.; Des Moines, Iowa; Dodge City, Kans.; Hackettstown, N.J. and Neptune, N.H.

All were asked to send representatives to the day-long meeting here, where speakers include Nader; Milton Shapp, Pennsylvania's governor-elect, Sen. Edmund S. Muskie, D-Maine; John B. Rackham, of the District's Department of Finance, and others.

Nader's view of the problem was outlined in a letter he wrote four months ago to Muskie:

“The extent to which large business properties fail to pay their proper share of the property tax, given stated assessment ratios, is a national scandal of corruption, industrial extortion toward local communities and discriminatory impact on the small businesses and home owners who have to pay the bills.

Among the examples of alleged abuses of the tax assessment system cited by Nader and Simon:

“In the Permian Basin of West Texas, some of the world's largest oil and gas companies own immensely rich properties which are undervalued by more than 50 percent.” As a result, small businessmen and home owners in the area “are paying nearly one-third more in taxes to meet local revenue needs.”

“The corporate owners of East Texas timberlands pay taxes that do not remotely reflect the true market value of their properties.” A study conducted by the University of Texas Law School alleges that land valued by paper and lumber companies at \$200 to \$300 per acre is being assessed at \$10 to \$20 per acre.

“In Minnesota, taconite producers have taken hundreds of millions of dollars out of the state after extorting a shockingly low tax rate from state authorities as the price of their production. The profits for these companies—such as Republic Steel and Armco Steel—from this production have been enormous.”

Throughout the country, “special ‘industrial zones’ receive special property tax treatment in the most discriminatory manner. Through deliberate under-

assessment, these industries are not even paying the price of their own pollution of local communities."

In Augusta, Ga., firms such as Babcock & Wilcox, Inc. and the Continental Can Co., Inc. automatically receive a 12½ percent discount in the assessment of their property for local taxation purposes.

On Skidaway Island, off the coast of Savannah, Ga., the Union Camp Corp. holds land assessed at \$5 to \$10 an acre—but the state paid the company \$2,000 an acre when it took some of the land for a roadway.

Says Nader: "There is no doubt whatsoever that the grossest inequities, discrimination, illegalities and incompetence prevail on a scale well beyond the episodic. . . . In example after example, we have seen situations in which corporate taxpayers have used their economic influence to obtain favorable tax treatment."

Nader's nationwide organizing campaign to bring equity to assessment rates already has had an effect. On Dec. 3, the town council of Anmore, W. Va. declared that it was "through with handouts"—relatively small corporate donations to various civic understandings—and substantially raised the taxes being paid by the Union Carbide Corp.

The company's 96-acre plant had been paying only 0.03 percent in a gross receipts tax to the town. Even at that rate, Union Carbide would have been liable for about \$90,000 in taxes during the current year—but company lawyers persuaded town officials to place a \$20,000 ceiling on the payments for any firm each year.

After Nader's associates presented a report on the situation to the council, the town officials removed the ceiling. The move, which will make the company liable for about \$400,000 in new taxes, was hailed by Anmore's mayor, Buck Gladden, as the end of one form of "corporate colonialism."

Other local projects also are already underway. Law students at the University of Alabama, Minnesota and Kentucky and Wayne State University "already have begun studies of property tax abuses in their states," according to Simon. The University of Pennsylvania plans to offer a course on property taxation in Pennsylvania.

[Michigan Journal of Law Reform]

MICHIGAN ENVIRONMENTAL PROTECTION ACT

I. POLITICAL BACKGROUND

The Michigan Environmental Protection Act of 1970 was signed by the Governor on July 27, 1970, after more than a year of intensive lobbying by citizen groups and environmentalist organizations on the one hand, and by a few individual industries and the Michigan Chamber of Commerce on the other. Its primary purpose is to facilitate, through the medium of legislation, the creation of an environmental common law by the Michigan courts.

The Act permits the "attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof" as well as any "legal entity" to maintain an action in an appropriate circuit court for declaratory and equitable relief against the state, its agencies and subdivisions, or any other "legal entity" for the "protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." Once the plaintiff has made a *prima facie* showing that the defendant has, or is likely to pollute or otherwise damage any of the state's natural resources the defendant may either rebut the plaintiff's evidence or establish by way of an affirmative defense, that "there is no feasible and prudent alternative" to his conduct, and that such conduct is "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."

The Act permits a circuit court to grant temporary and permanent equitable relief or to impose conditions on a defendant necessary to protect the natural resources of the state. Alternatively, the circuit court may remit the parties to administrative, licensing or other proceedings or promulgate a standard of conduct where the court, after determining the "validity, applicability and reasonableness" of an agency standard, finds it deficient. If the court chooses not to immediately adjudicate an action, it is required to retain jurisdiction.

pending completion of the proceedings to which the action was referred for the purpose of determining whether adequate protection from pollution has been afforded. In addition, the Act authorizes intervention by a "legal entity" in any administrative proceeding whose subject matter has environmental implications, and judicial review of the agency decision upon the assertion that the administrative proceeding "involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein."

In order to safeguard defendants from frivolous and spurious claims, the court, if it has reasonable ground to doubt the plaintiffs solvency or his ability to pay the costs of a possible adverse judgment, may require a plaintiff to post a surety bond or cash of up to five hundred dollars. Moreover, the court is empowered to apportion costs and apply the doctrines of collateral estoppel and *res judicata*.

A 1967 suit by the Environmental Defense Fund against the Michigan Agriculture Department was indirectly responsible for the effort to enact a law allowing individual suits as a means of safeguarding the environment. The plaintiffs unsuccessfully sought a writ of mandamus to prevent the Agriculture Department from spraying the pesticide Dieldrin on certain farm areas to eradicate the Japanese beetle. Frustrated by what they considered to be a problem of national scope confronting environmental law—the judiciary's unwarranted confidence in the determinations of administrative regulatory agencies which too often tended to identify with the interests of those groups ostensibly being regulated—local supporters of the pesticide suit began searching for a means by which persons interested in protecting the environment could gain more adequate responses from the legal system.

In early 1969 the West Michigan Environmental Action Council (W.M.E.A.C.), whose members had participated in the 1967 case against the Agriculture Department, sent a letter to Professor Joseph L. Sax of the University of Michigan Law School requesting him to propose legislative reforms which would facilitate the bringing of actions to protect the environment. Sensitive to the apparent inability of environmentalists to obtain adequate relief from administrative agencies, and the deference with which courts have traditionally reviewed administrative determinations, Professor Sax drafted a bill which hopefully would create "a more responsive and sensitive forum in which to continue the . . . struggle for a better environment." In essence, the bill would allow a citizen to bring his complaint against activities harmful to the environment directly before the courts without first seeking relief from an administrative agency.

Once drafted, the bill's supporters turned their attention to the problem of obtaining favorable legislative action. To offset the strong opposition expected from government agencies and industry, the proponents sought to mobilize public support with an extensive campaign encompassing a broad spectrum of environmental concerns. In the early stages, leadership and organization came from the membership of the W.M.E.A.C. This group was soon joined by other influential organizations such as the Mackinac (Michigan) Chapter of the Sierra Club, the Parent-Teachers Association, the League of Women Voters and the United Auto Workers. Seeking to minimize duplication of effort and to provide organizational efficiency, these groups joined an umbrella organization known as the "Coalition to Pass H.B. 3055." The Coalition, working through constituent groups, became the bill's primary proponent.

The Democratic representative who was co-chairman of the House Conservation and Recreation Committee was asked to introduce the bill. His selection may have been crucial to the eventual passage of the law, for the Michigan House was controlled by a Democratic majority and the bill was referred to the Conservation and Recreation Committee.

Following the introduction of the bill, preparations were made for the first public hearing. Believing that the ultimate success of H.B. 3055 depended upon the amount of public support that could be generated, the proponents of the bill devoted substantial amounts of time and energy to assuring that the first and every subsequent public hearing was well attended, and that the witnesses for the bill were prepared to present well-documented testimony. Notice of each meeting was distributed by various means to the membership of all interested organizations and, judging by the number of people who attended, each hearing was considered by the proponents of H.B. 3055 to be entirely successful.

Recognizing the more parochial and immediate political realities confronting passage of the bill, the proponents attempted to secure the support of both Republicans and Democrats. In this effort, the Coalition benefitted from the fact that 1970 was an election year. With an increasing public awareness of and concern for environmental issues, neither party wished to become known as opponents of the bill. Since the Coalition had previously secured support from the Democrats in the state legislature, it focussed its efforts on the Republican Governor and his administration whose endorsement would undoubtedly have been helpful in enlisting the support of Republican members of the legislature.

An initial setback to the Coalition's efforts to gain gubernatorial support took the form of an unfavorable "analysis" by the Attorney General. This analysis, issued three weeks after H.B. 3055 was introduced, set forth several grounds underlying the Attorney General's opposition to the bill: (1) the bill was not needed in view of present statutes which provide means for citizens to file complaints with state agencies to initiate correction of state law violators; (2) the bill could disrupt presently established and proven state agency methods and procedures; and (3) the bill might encourage the initiation of spurious suits. Although most state agencies felt obligated to adopt the opinions of the Attorney General, the Department of Natural Resources, striking a more independent course, released the first of its analyses of H.B. 3055, immediately preceding the first public hearing, supporting the bill and suggesting only some "purely mechanical and minor" changes. The fact that some public agencies expressed approval of the bill not only thwarted any attempt to present a united agency opposition, but also cast some doubt on the Attorney General's argument that to allow individual suits in the environmental arena would thwart administrative efforts in this area.

As it turned out, the Governor looked neither to the Attorney General, who was a Democrat, nor to the state agencies for guidance in formulating his position on H.B. 3055. Since the Governor was not a lawyer, he generally relied on his appointed Republican Legal Advisor for "objective" legal counsel as well as for liaison activities with the legislature. This advisor was presumably the source of legal information utilized by the Governor in forming an opinion regarding the bill.

Soon after the first public hearing the Legal Advisor submitted his analysis of H.B. 3055 to the Governor, and assumed a neutral position by limiting his report to an outline of the bill's provisions commenting only on certain "weak" sections. His major concern with the bill was the absence of any "definite standards" to guide the court in actions brought under the proposed act, and the inclusion of several terms which he felt should be more specifically defined.

By the time this analysis was made available to legislators and the public, interest in H.B. 3055 had grown considerably and the strength of its advocates had increased proportionally. Public hearings were being held across the state adding to the already high level of enthusiasm surrounding the bill. The Governor was probably feeling pressure to take a stand on the bill, and although the proponents were not certain of the Governor's endorsement, they thought it would be extremely difficult, given the tremendous public support, for him to actively oppose it.

Approximately two months after submitting his initial analysis to the Governor, the Legal Advisor presented another expanded analysis to the House Committee on Conservation and Recreation. Although expressing the Governor's support for the *concept* underlying the bill, he clearly intimated that the Governor's support was to be contingent upon certain changes in the phraseology of the bill. The Governor's major recommendations in regard to the definitional problem were: (1) insertion of the word "unreasonable" before the phrase "pollution, impairment or destruction" wherever it appeared in the bill; (2) insertion of the phrase "considering all relevant surrounding circumstances and factors" before any mention of a "feasible and prudent alternative to defendant's conduct;" and (3) deletion of the term "public trust" wherever it appeared in the bill.

The proponents objected to these definitional changes asserting that an innovative act demands flexibility in its execution and that the courts should at least be allowed the freedom to adopt new and different approaches to individual protection of the environment. Nevertheless, to obtain the Governor's support, several of his suggestions were incorporated into a substitute bill which was drafted by his Legal Advisor after consulting with University of Michigan Law Professors Pierce and Sax.

Although the substitute bill was reported out of the House Committee on Conservation and Recreation by a vote of twelve to one, some committee members and several of the proponents outside the legislature were still dissatisfied with the Governor's modifications. The fact that the *substitute* rather than the original bill was reported out of the committee chaired by the sponsor of H.B. 3055 was interpreted by many legislators to be indicative of the great importance attached by the proponents to the Governor's support. Nevertheless, the substitute measure did not pass the House without further dispute and alteration. The conservationist groups decided to oppose on the floor the insertion, made pursuant to the Governor's recommendation, of the word "unreasonable" before the phrase "pollution, impairment or destruction" wherever it appeared in the bill for fear the word might establish a "loophole" in the bill. This one word became the sole point of heated partisan disagreement. The majority of Republicans favored retention of the word on the ground that it would provide some guideline for the courts in enforcing the Act. However, the House Democrats, outnumbering the Republicans fifty-seven to fifty-three, were joined by a few Republicans and successfully voted to delete "unreasonable" from the bill. Moreover, the other two amendments recommended by the Governor were also deleted from the final version of the bill.

Opposition to H.B. 3055 came from two principal sources: state manufacturers and regulatory agencies. However, because of the early widespread skepticism of the bill's chances of success, and because of the hesitancy of many manufacturers to publicly oppose an environmental protection proposal, opposition to the bill never became especially strong or vocal. Similarly, because of their concern for public opinion, individual manufacturers remained in the background and allowed the Michigan Chamber of Commerce to wage the major fight against the bill. One important consequence of this strategy was to make the outpouring of support for the bill seem all the more impressive. For example, at public hearings on H.B. 3055 only a very few of the hundreds of participants and spectators were opposed to the bill.

As public support for the measure grew, the organizations opposing the bill became more concerned with the potential impact of individual provisions rather than with the chances of the bill as a whole. Instead of broadside attacks, the opposition began to think in realistic terms of ways in which the scope of the bill could be narrowed. Thus, the battle between those for and those against was reduced to a dispute over whether the proposal would be adopted in broad terms allowing for the development of an environmental common law for Michigan, or whether the proposal would be more limited in scope.

Several amendments were offered which, in effect, would have drastically limited the scope of H.B. 3055. The first of these amendments, offered by the Water Resources Commission and supported by the Attorney General, other regulatory agencies, and the various manufacturing organizations, would have required a plaintiff bringing suit under the Act to file a petition with the court for leave to commence an action. The plaintiff would have to show, in the petition, that all germane administrative procedures had been exhausted or the suit would be dismissed. In view of the fact that the amendment was introduced by the Water Resources Commission, one of the two state "watch-dog" agencies (the other being the Air Pollution Control Commission), it is not unreasonable to conclude that the motivation for the amendment was, in part, a defensive reaction on the part of these agencies to the central premise of the bill that existing environmental protection agencies were not responsive to the needs of the public. Another of the underlying bases for the amendment was the consideration often raised during legislative debates of whether the courts are competent to hear these complex questions of environmental quality which have traditionally been determined by administrative agencies. Thus, the amendment was designed to ensure that persons could not circumvent normal administrative procedures, and to make it easier for the court to dismiss the suit so that the agencies would not be constantly called upon to provide information for these suits. These agency objections to H.B. 3055 were substantially quieted, however, by the subsequent support given the bill, without the proposed change, by the Attorney General. Not only did the Attorney General's reversal of opinion place the weight of the state's legal advisor behind the bill, but because of his official position, the agencies in large part felt bound by his opinion.

A second issue dealt with what the Chamber of Commerce considered to be the problem of spurious and harassment suits. The Chamber of Commerce offered a number of solutions by way of amendments, the most significant being that the Attorney General should have the power to review and "*dismiss* a complaint if *he* determines that no public interest is involved. (Emphasis added). This proposal, in effect, would have given the Attorney General the power to make a final, non-appealable decision on whether a suit could be brought to trial—a determination the proponents felt would be more suitable for the judiciary. Those supporting the bill without the amendment set forth two reasons for not adopting the proposed change. First, in many cases the Attorney General would be the *defendant's* lawyer (*e.g.*, in a suit against a regulatory agency) and surely should not in that capacity have veto power over plaintiff's case. Second, it was argued that H.B. 3055 had a built-in safeguard against frivolous or spurious suits in that such claims are not only easily defeated but are generally more costly to the plaintiff than to the defendant. Although the above proposal was never voted upon by the legislature, concern over the possibility of frivolous suits did result in the adoption of an amendment allowing the court to require the plaintiff to post a bond or cash not in excess of five hundred dollars.

Following passage of the substitute bill in the House, the Chamber of Commerce introduced an amendment in the Senate concerning the problem of burden of proof. Section three of the bill, as passed by the House, provided that when the plaintiff had established a *prima facie* case, the defendant could show, by way of affirmative defenses, that there is not a feasible and prudent alternative to his conduct "*and* that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction." (Emphasis added). Although those who were in favor of the bill as it passed the House argued that this provision merely made certain that the defendant would explain his conduct, the Chamber of Commerce considered it to be the imposition of an "almost impossible burden on any defendant." They consequently proposed an amendment to change the "*and*" to "*or*" thereby giving the defendant the option of showing either that no feasible and prudent alternative to his conduct exists *or* "that such conduct is consistent with the promotion of the public health. . . ." The opponents of the proposed amendment asserted that by permitting a defendant to continue conduct for which he could show there was no feasible and prudent alternative, even though inconsistent with the promotion of the public health, the efficacy of the bill would be seriously impaired; conduct damaging to the environment could continue for an indefinite period of time subject to little, if any, public restraint. Although the Senate Committee on Conservation and Tourist Industry reported this amendment out with a favorable recommendation, it was defeated on the floor of the Senate.

The Chamber of Commerce also submitted an amendment which would allow as affirmative defenses, "compliance with existing standards set by rule or law," and the "state of the art defense," *i.e.*, that the technology necessary for control of this particular type of pollution had not been developed or made available. The Chamber of Commerce asserted that it would be unfair to penalize the defendant for his good faith attempt to meet existing regulations. An alternative amendment submitted by proponents of the bill explicitly rejecting the Chamber's suggestion was enacted by the Senate: the courts may determine the "validity, applicability and reasonableness" of standards set by rule or law, and, if found to be deficient, "direct the adoption of a [more appropriate] standard." This amendment was drafted to ensure that the court would not dismiss an action simply because the industry was complying with promulgated standards. It was successfully argued that plaintiffs should be given the opportunity to prove that the agency standards were inconsistent with the bill's legal standards of environmental protection. Thus, both the polluter and the appropriate agency could be forced to improve their attempts to alleviate damage caused the environment.

CONCLUSION

Several factors combined fortuitously to bring about the passage of H.B. 3055. First, relatively few organizers, aided by extensive media coverage, were able to stimulate public awareness of the environmental crisis and attract

the support of thousands of citizens. Second, important political leaders reacted to the public support by aligning themselves with the bill's proponents. Third, the chairman of the committee to which the bill would be referred was chosen as the sponsor of the proposal before the legislature. Fourth, the Governor, Attorney General and most state departments eventually saw fit to add their support, further reducing the possibilities of political fragmentation of this issue. Fifth, the objections of the regulatory agencies were rather cautiously advanced in view of the formidable public support, the support of the Attorney General, and the strong backing of the bill by the Department of Natural Resources. Sixth, the major industries let the Michigan Chamber of Commerce fight the battle for them, giving the opponents but a single, though potentially powerful, voice. Finally, most of the strength of the opposition was never able to reach its potential because of a failure to accurately appraise the overwhelming public support from the outset of the campaign. As a result, the proponents of H.B. 3055 successfully opposed the attempts to limit the possible effect of the legislation, thereby achieving enactment of an instrument which should allow the development of an environmental common law.

II. MULTIPLICITY OF SUITS

A. Introduction

With the enactment of the Environmental Protection Act of 1970, the Michigan legislature has enabled any state citizen to institute legal action against polluters of the environment. Because of the large number of possible plaintiffs—eight million Michigan citizens—a potential problem exists of excessive anti-pollution litigation and a multiplicity of suits against any single polluter's activity. The possibility of multiple suits entails complex and conflicting interests. While the general public shares an interest with potential defendants in avoiding further encumbrance of overloaded courts by repeated litigation on identical questions, the people of Michigan, particularly potential plaintiffs under the Act, also have an interest in ensuring that claims are fully and fairly litigated.

The defendants' interest can perhaps best be illustrated by a hypothetical situation in which individuals living adjacent to a factory sue the owner under the Environmental Protection Act to compel installation of anti-pollution devices. If the court rules favorably to plaintiff, other environmentalists would have no desire to relitigate the issue, but if the court rules unfavorably, parties not involved in the initial litigation may bring numerous new actions against the polluter. Such redundant litigation compels the owner to defend himself against repeated attacks based on identical claims, and may well hinder environmental reform by provoking adverse reaction from the judiciary and the general public.

The multiplicity problem, however, cannot be equitably resolved by having the initial suit against any particular act of alleged pollution preclude further litigation. Since the original plaintiff may have been poorly financed, inadequately represented, or may have sought inappropriate or inadequate relief, the foreclosure of subsequent litigation would radically curtail the effectiveness of the new Act. The purpose of this note is to explore the extent to which multiplicity problems will actually arise, whether any existing legal techniques can be applied to solve such problems, and to suggest new techniques to deal with multiplicity problems.

B. Possible Extent of the Multiplicity Problem

Relitigation of issues previously argued on the merits is unlikely for several reasons. Environmentalists will realize that repeated attempts to gain injunctive relief against an alleged polluter on the basis of facts and law previously considered by a court will probably afford no positive results. Moreover, the high financial costs of bringing complicated environmental suits will undoubtedly have a chilling effect on multiple litigation since environmental groups are unlikely to squander their resources relitigating hopeless causes.

The court's power to consolidate will also tend to curtail multiplicity where concurrently pending actions involve a common issue of law or fact. Although the Michigan court rules require the common issue to be "substantial or controlling," it is clear that both the legal and factual issues in any two suits

under the Environmental Protection Act will be identical regardless of the plaintiffs, which means that the process of consolidation, as well as the management of consolidated suits, should be relatively easy. In addition, the venue provision of the Act authorizing suits to be brought only where an alleged violation occurs will facilitate consolidation by eliminating the problem of consolidating actions pending in the different circuit courts.

Other constraints will exist where the third or fourth party asserting the same environmental claim was influenced by an improper motive (e.g., harassment), for the court has the power to apply the clean hands doctrine and dismiss the action. Similarly, in extreme cases of multiplicity where the plaintiff has failed to join in prior suits against a particular act of pollution and is, thereby, guilty of unconscionable delay the doctrine of laches is applicable. More generally, a court, in "doing equity" between the parties to an action brought under the Environmental Protection Act, can look askance at a party who is merely relitigating a previously litigated case.

Finally, the doctrine of stare decisis may dissuade some potential plaintiffs from relitigating issues previously adjudicated. Since environmental cases are likely to raise more novel issues of law than the typical lawsuit it is probable that a fair number of devisions in environmental cases will be decided on legal rather than factual grounds, particularly during the first few years when the courts are building a new common law of environmental disruption. If a first suit has turned on a legal point, potential plaintiffs will surely be reluctant to file a second identical case, since doing so would be likely to produce nothing more than summary judgment in defendant's favor.

C. Some Traditional Solutions

1. Single Forum Solution

The most direct solution to the problem of multiple suits is to bring all potential litigants into the courtroom whenever an action under the Act is commenced. In this way, a single suit would have binding effect upon all future litigants under the doctrines of res judicata. This solution, however, seems utterly impractical. Leaving aside the question of whether there are any presently known devices which the courts may use to bring all potential litigants under the Environmental Protection Act into the same courtroom, it is perfectly clear that it is not practical to force eight million or so people (plus assorted government agencies and private groups) to attempt to work together in the same suit. Though no such extreme solution seems feasible, the possibilities for bringing a *substantial* number of interested parties into an initial suit under the Act are worthy of discussion.

2. Joinder

Compulsory joinder is a device traditionally used to promote judicial economy by requiring persons with similar or related interest in the subject matter of the litigation to be present before the court. In addition to reducing the number of actions necessary to dispose of a claim against a particular defendant, compulsory joinder guards against one person affecting the interests of others without allowing them to participate in the disposition of the matter.

To qualify for compulsory joinder, essential parties must be found who have an interest in the action or without whom complete relief cannot be granted. If such parties are found but cannot be joined, the question becomes whether the action should proceed in their absence. The joinder statutes provide the framework for determining who qualifies as a necessary party and whether the action should proceed without his joinder. The most relevant considerations are:

Whether failure to join this person would result in a multiplicity of suits, putting an unnecessary burden on the courts and causing harassment to the defendant.

Whether a judgment without this person would have an adverse effect upon his rights as well as the rights of those already parties.

Whether the court would be able to render a valid judgment.

Whether the plaintiff would be able to assert his claim elsewhere if the court dismisses the action for failure to join this person.

Whether the court could fashion a decree in such a way as to eliminate prejudice to all persons involved.

Under the Environmental Protection Act, compulsory joinder is probably inappropriate since the plaintiff does not fit within traditional concepts of an essential party. The crucial factor for joinder is the interest that the parties share which is generally thought to be an interest in the same dollars or in the same piece of property. Without the necessary common interest, there is no compulsory joinder. No such specific interest would normally be present in a suit brought under the new Act. Since no damage amount is relevant, money is of no concern. Similarly, no interest exists in a particular piece of property, only an interest in attacking ways in which certain properties are used.

Compulsory joinder also seems unlikely because, under the Environmental Protection Act, the right of one plaintiff to sue is separable from another's right to sue the same defendant on the same claim. One person can ask for equitable relief without affecting the rights of another to bring a similar action. This separability of claims provided by the statute itself inhibits attempts to join all such claims. Even when the Environmental Protection Act case is compared to a tort action where defendant injures several persons at once giving rise to the same claim by each injured party, joinder would not necessarily follow, there being no requirement under traditional notions of joinder and due process that all those injured in a single incident be joined. Thus it does not seem likely under the usual concept of compulsory joinder that possible plaintiffs under the Act can be required to join together in the action.

Even assuming joinder could be required, in order to solve the multiplicity problem by having the greatest number of possible plaintiffs bound by the disposition of the action. It would be necessary to join everyone in the state. The costs of this endeavor would be tremendous. In the first place, all potential plaintiffs must be notified of their joinder. If the cost of notification is to be borne by the plaintiff, as it most likely would be, he would undoubtedly be discouraged from continuing the suit. Even if he did continue, the fact of having eight million people tied together in the same suit would be more disruptive of the judicial process, as well as more burdensome to defendants, than would be a multiplicity of suits. Because this would be the only opportunity for plaintiffs to be heard, each plaintiff could be expected to exert as much energy in the joint trial as he would had he been allowed to bring a separate action. As much court time would be consumed in hearing motions and arguments, and the defendant would have to answer as many interrogatories and attend as many depositions as would have been necessary in a series of suits. Furthermore, with such a large group, stipulations on anything would be impossible. Finally, a plaintiff joined in this action might be forced into a position in which it would be difficult for him to properly present his case. For example, he might be required to join at a time inconvenient to him either in terms of finances or in terms of collecting necessary information. Every time he wished to file a motion or request interrogatories there would be pressures from other plaintiffs to do so in a different fashion. The cost of notifying all the plaintiffs of actions he takes during the course of the trial would be quite high and might well discourage him from taking necessary strategic actions. Thus, the notion of requiring every person in the state to join in a single suit in order to avoid the multiplicity problem would create far more complex problems than would the multiple suits.

3. *Class Actions*

The class suit has significant advantages over joinder as a device to limit litigation to a single suit binding upon all subsequent plaintiffs litigating the same claim against the same defendant. For example, the class suit permits the court to hear actions on behalf of large numbers of people without the necessity of jamming the courtrooms with litigants and their attorneys. As one commentator notes, a class action "can achieve economies in the administration of the court system and in the enforcement of [the] numerous claims." Also, courts have greater flexibility in administering a class action than would be possible in cases of mass joinder. Many class action rules, including the present Federal Rule 23 and Michigan Rule 208, grant the presiding judge significant authority to assure the fair and full conduct of the action. In part, subdivision (d) of the Federal Rule permits broad measures to prevent undue repetition or complication in the presentation of argument and authorizes the imposition of conditions on representative parties or interveners. Such pro-

visions are not only necessary to allow the courts to protect the interests of class members but create a flexibility in management which allows judicial control of suits involving vast numbers of plaintiffs.

Despite these advantages, the class suit as a practical solution to the potential multiplicity problem of the Environmental Protection Act is in many respects little better than compulsory joinder. Even with the administrative flexibility available in class suits, it is still possible that sheer numbers might overwhelm the litigation and prevent the court from protecting the rights of individual parties or from reaching the merits of the action at all. Moreover, the courts will often require those originally bringing a class action to seek out additional named plaintiffs to represent certain interests within the state. Although class actions are more efficient than joinder in dealing with tremendously large numbers of possible plaintiffs, they are nevertheless immensely complicated proceedings often resulting in substantial waste of judicial time and the litigant's resources. Additional financial problems for potential plaintiffs are generated by due process requirements of notice to interested parties; if class members are to be bound by a judgment, they must receive notice of the pendency and significant developments of a class action. The courts are divided on the question of who is responsible for bearing the cost of notice, but most often it has been held that the representative plaintiffs are responsible for this cost. Plaintiffs, precluded from seeking damages under the Environmental Protection Act, might well find the costs of initiating a class action prohibitive.

Apart from these practical difficulties, there remains the problem of whether the courts may *force* plaintiffs to utilize the class device. There is little authority allowing a court to compel litigation as a class rather than as an individual. To be sure, a court could apply pressure toward this end by requiring joinder of excessively large numbers of persons; but forcing the plaintiff to choose between Scylla and Charybdis does little to alleviate the substantive problems of either joinder or class actions. Whether a court could order a plaintiff to convert an individual suit into a class suite is very doubtful. Neither Federal Rule 23 nor Michigan Rule 208 provides for compulsory class suits. Although Professor Moore argues that it is permissible for a court, at least under present Federal Rule 23, to order a suit transformed into a class action, he does not cite any cases in which this power has been exercised. Certainly if Professor Moore had been discussing the old version of Rule 23, his position would have been wrong, for at least two cases hold to the contrary. The history and policy of the present rule suggest that its drafters had no intention of overturning these cases; during the drafting of the rule, a proposal allowing a court upon its own initiative to convert an individual action into a class suit against plaintiff's wishes was dropped from the final revision. The implication of this history is supported by the central policy embodied in the rule, which according to Professor Kaplan is to safeguard the interests of "the smaller guy." To achieve this goal, the rule provides for collective redress of wrongs which, although involving only small claims by each individual, affect a great number of people. It is difficult to infer from this purpose the authority to force compulsory class actions on small and unwilling litigants at the request of corporate defendants in order to protect such defendants from multiple suits. While there is no Michigan authority on the compulsory use of class actions, it is likely that the Michigan courts would follow the interpretation of old Federal Rule 23, on which the Michigan rule is based.

At a different level of analysis, it does seem clear that the courts can require the plaintiff, who on his own initiative seeks to litigate on a class basis, to define his class to include all potential plaintiffs under the Environmental Protection Act. Federal Rule 23(d)(3) permits the "imposition of conditions" on representative parties. Section 208.4 of the Michigan rule appears to contain analogous authority. Quite frequently, these rules have been used to require redefinition of classes as a prerequisite to continuing an action on a class basis. Although such redefinition typically is designed to reduce a class to a more coherent or manageable size, the power to impose conditions seems to provide an equally appropriate device in which to require expansion of a proposed class. However, since the power to require class redefinition initially depends upon the plaintiff's decision to bring a class action it is doubtful whether this power will significantly curtail the multiplicity problem. Not many Environmental Protection Act plaintiffs are likely to make this decision.

Because of the administrative problems which they create, class actions are generally useful in only two situations: when damages are sought and the class device can be used to aggregate a number of smaller claims which might not have been economically maintained as separate actions, and when injunctive relief is needed on behalf of a group of similarly situated individuals and an injunction, if obtained by a single member of the group, will benefit only that member and not the other members of the group. Actions under the Environmental Protection Act do not fall into either of these categories; damages cannot be awarded under the Act, and injunctive relief is as adequate when obtained through an individual action as through a class suit. Thus, it is difficult to see why environmental plaintiffs, particularly when faced with having to litigate for everyone in the state, would choose to bring a class action. Moreover the sanction available to enforce a condition imposed under Rule 23(d)(3)—denial of an opportunity to litigate on a class basis—is obviously not effective in a situation where the court is seeking to compel people to litigate on a class basis. Finally, at least under the Federal Rule, individuals within the defined class are permitted to opt out of the class if they so desire, removing themselves from the litigation entirely. Thus, without a change in the underlying theory and practical administration of class action rules, the device cannot be counted on to bring all possible plaintiffs under the Environmental Protection Act into the same courtroom, and, even if it could, the urblems created by using the device might well outweigh the benefits of avoiding multiple suits.

4. *Collateral Estoppel*

Under a theory of collateral estoppel, the decision of the first suit directed at an alleged act of environmental disruption would be binding on all possible plaintiffs under the Act without actually bringing all these persons into the first suit as parties. Before collateral estoppel may be asserted, however, certain limitations on the application of the doctrine must be overcome.

One prerequisite is that the issues which are sought to be given conclusive effect must have been fully litigated. The purpose of this requirement is reasonably clear. A party may not consider it worth his time and expense to raise and argue every possible issue involved in a case, and his failure to do so should not prevent him from subsequently raising that issue should it be relevant to some new cause of action.

Not only must all issues for which collateral estoppel is sought be fully litigated, but the issues must have been necessary to the outcome of the litigation. Conclusive effect should only be given to "ultimate" facts not "mediate" or "evidentiary" facts. Both the "full litigation" and "necessary to judgment" requirements increase the attractiveness of collateral estoppel as a solution to the multiplicity problem. Because they limit the binding effect of a prior judgment which is being asserted as conclusive in a later suit, they could be employed by the judiciary to assure that the use of a first Environmental Protection Act suit to collaterally estop later suits did not foreclose important environmental issues which had never actually been litigated. On the other hand, estoppel provides some assurance that defendants will not be subject to harrassing litigation and that the courts will not be forced to expend time on issues previously adjudicated.

Mutuality of estoppel, where a litigant could not invoke the conclusive effect of a judgment unless he would have been bound had the judgment gone the other way, was at one time a general requirement for collateral estoppel. However, a number of recent cases have discarded the mutuality requirement on the theory that where there is an identity of issues in two suits, a party against whom judgment has been rendered in one suit is consequently bound in subsequent suits regardless of the identity of his adversaries. The most notable examples of the breakdown of the mutuality doctrine have been in the area of multiple party disasters, particularly airplane crashes.

The use of collateral estoppel to resolve the problems of multiple suits faces the more troublesome consideration of whether non-parties to an Environmental Protection Act suit are in privity or otherwise sufficiently connected to the party-plaintiffs who brought the case. If this connection between the plaintiffs is established, then collateral estoppel would apply to all decided issues. It is quite possible, however, that such a broad determination of privity would evoke significant problems of due process. Typically, collateral estoppel is used to give conclusive effect to determinations made in one suit when a party

to that suit subsequently attempts to re-litigate these determinations in another suit. Moreover, it is generally assumed that binding non-parties to a former adjudication is a denial of due process because it deprives them of their opportunity for a day in court. Although it is clear that a non-party may be bound by the outcome of an action if he is in privity with a party to the action, it is exceedingly unclear whether successive plaintiffs in suits brought under the Act can be said to be in privity under traditional privity notions. Privity is generally found (1) where there is a common interest in property either through a concurrent or successive relationship in the same property, and (2) where there is substantial identity between two or more persons. Potential plaintiffs under the Environmental Protection Act do not seem to fall into either of these categories.

They do not have a traditional common interest in particular pieces of property; rather, they have an interest, recognized by statute, common to all members of the public in the natural resources of the state. Thus while there is a similarity of interest, there is not—because of the diversity of the citizenry—a common interest or a “substantial identity” in the sense of the conventional law of property. Even though there is no conventional common interest, all potential plaintiffs under the Act sue as members of the general public and not simply on their own accord. In this sense, it might be said that any two plaintiffs under the Act represent at the same interest and share “substantial identity.” The problem, however, is that the Environmental Protection Act does not embody the idea of a monolithic “public interest” which must necessarily be represented once and for all by a single attorney general, whether public or private. It contemplates that the public interest may incorporate a variety of interests and views that have not traditionally had their day in court; and it leaves open the opportunity for representation of a plurality of interests, different though none the less each legitimate, in litigation under the Act.

Even assuming that it would be possible to develop a new privity rule to bind environmental plaintiffs—for example, such a rule might deem plaintiffs under the Act to be in privity because of their analogous rights to sue in the public interest as private attorneys general—due process requirements might preclude such innovation. The Supreme Court in *Postal Telegraph Cable Co. v. Newport* has suggested that due process requires privity to be narrowly construed. In that opinion, the Court stated that “[t]he opportunity to be heard is an essential requirement of due process of law in judicial proceedings.” This opportunity is denied where actual privity is lacking.

Besides the opportunity to be heard, due process requires that proper notice be given. Conceivable safeguards could be built into suits brought under the Act which would assure adequate notice, a fair opportunity to appear, and constitutionally sufficient representation which might avoid the constitutional difficulties of expanded notions of privity. The trouble with this remedy is that it gives environmental suits a quasi-class aspect with the panoply of problems (e.g., high costs and complicated administration) associated with class actions.

D. Towards an “Innovative” Solution

The fundamental difficulty with attempts to solve the problem of multiple suits through the doctrines of joinder, class action and collateral estoppel is that these devices try to use the first suit directed at a particular act or alleged pollution as a vehicle to avoid multiple litigations. By trying to bring everyone together in the same courtroom, joinder and class actions (to the extent that they work at all) would probably burden environmental protection litigation with costs far out of proportion to the multiplicity problem. The safeguards necessary to avoid the constitutional difficulties of binding non-parties with collateral estoppel have much the same effect.

This suggests that perhaps the better approach to the problem of multiple suits is to deal with it when it arises, not before. Thus, litigation arising under the Environmental Protection Act need not be burdened with safeguards against future suits based on identical claims, especially when such suits are little more than a remote contingency. Instead of telling the successive claimants that their rights have been determined in a previous action, a better solution is to allow a defendant faced with yet another *identical* suit to seek *de novo* judicial protection against further litigation (so long, at least, as the subsequent litigation raises no new issues). Although no device in modern

procedural codes is suitable for this task, it may be possible to construct a new device to deal with multiple suits out of an old and virtually forgotten equitable tool, the bill of peace.

1. Origins of Bills of Peace

Bills of peace originally evolved in the English chancery courts in the mid-17th century because of difficulties encountered in attempting to join a multitude of individuals with similar interests in a single action. Bills of peace became a general means of confining litigation of multiple claims in two situations: first, where a large number of persons were suing or threatening to sue a defendant or group of defendants in a series of parallel suits involving common issues; second, where further litigation was threatened after a right had been determined in one or more previous actions. In the former case, equity would order a halt to the further prosecution of separate litigation and would bring the whole controversy together in a single action to determine the respective rights and duties of the parties. In the latter, equity would simply halt all further litigation of the issues previously decided.

2. Characteristics of Bills of Peace

The question whether some variation of the bill of peace can be as effective in dealing with the multiplicity of suits under the Environmental Protection Act requires consideration of the characteristics of bills of peace and possible difficulties which may arise from their use. Two characteristics are couched in terms of prerequisites to the use of bills of peace: first, the multiplicity of suits against which the bill is sought must contain some common element; second, the person seeking the bill must possess an existing cause of action or right of relief against future litigants. As Pomeroy expresses it, a bill of peace will not issue unless the suits at which it is directed have "some common relation, some common interest, or some common question. . . ." Although it is clear that a complete identity of issues between the pending suits is not necessary, some commonality is required. This requirement stems from the fact that the function of a bill of peace is to produce economies in the judicial system by reducing repetitive litigation.

The first prerequisite poses no problems for the use of bills of peace in environmental cases. As stressed earlier, all possible plaintiffs under the Act stand in exactly the same respect to any potential defendant. Issues of the impact of defendant's conduct on the *particular* plaintiff bringing a suit will not be relevant in suits brought pursuant to the Environmental Protection Act. The only relevant issues in such actions will be the impact of the defendant's conduct on the public generally, and any two suits directed at the same defendant over the same alleged pollution will pose identical questions in all respects. Thus the only restriction imposed by the first prerequisite would be to preclude a potential defendant under the Environmental Protection Act from resorting to bills of peace until he had actually been subjected to a multiplicity of suits. The rationale for this restriction becomes quite clear when considered in the context of the Environmental Protection Act. If a defendant, immediately after litigating a single suit, could freely obtain a bill of peace to preclude the possibility of suits at some future time, however, remote, the underlying purposes of the Act might be easily frustrated.

The second prerequisite, that of an existing cause of action or right of relief in the *person seeking the bill*, evolves, according to Pomeroy, from the principle that "[t]he very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. A bill of peace, in other words, cannot be used to create a cause of action where none at all existed before. In typical cases, this requirement was usually satisfied because the party seeking a bill and each member of the multitude against whom the bill was sought had existing rights of action against the other. For example, in *How v. Tenants of Bromgrove* the lord had a right of action at law against each of his tenants to restrict their rights of common and, conversely, each tenant had a right of action against the lord to enforce his rights of common. All that the lord did in obtaining a bill of peace was to consolidate his existing causes of actions at law into a single suit in equity in order to avoid having to sue each of the tenants separately. It is clear, however, that the availability of the bill will not be absolutely precluded by the fact that an individual seeking

a bill of peace has no existing and independent right against those to whom he seeks to have the bill applied. A defendant in several nuisance actions, for example, could not have originally sued the plaintiffs over the matter. Still, beyond question, a bill of peace will issue against the suits. The requirement of an existing cause of action as a prerequisite to the availability of bills of peace, then, is really only a bar against the use of a bill by an individual who fears that at some future time persons against whom he has no existing causes of action may sue him.

It is just this restriction, however, which could impede the use of bills of peace against environmental suits brought under the Act. To be genuinely effective against the problem of consecutive suits over identical issues being filed against a defendant, bills of peace will have to be available against all possible plaintiffs under the Act. The process of obtaining a bill of peace will involve some, perhaps substantial, relitigation of the issues raised in prior cases. Thus obtaining bills of peace against only present plaintiffs would not be markedly less expensive to a defendant than defending the suits brought by them on their merits. The use of bills of peace as a cure for the multiplicity problem will make economic sense only if they can be used to preclude more or less *all* future suits on the same claim.

Since a potential environmental defendant has no cause of action under the Act against potential plaintiffs, a bill should theoretically issue only if a new cause is created in him by a multiplicity of suits. Historically, a cause of action would arise with multiplicity; however, the focus in all prior suits where bills of peace were granted included only present parties to the dispute. Yet under the Environmental Protection Act every consecutive suit would necessarily involve a new plaintiff, and not a present party (any single plaintiff would be barred by *res judicata* from suing repeatedly on the same cause). The question thus becomes whether a series of consecutive suits brought by separate parties creates a cause of action in the defendant allowing him to sue for a bill of peace against all possible plaintiffs. An affirmative answer might be achieved through the kind of analysis used in the discussion of collateral estoppel to suggest that subsequent claimants would not be asserting personal rights, but instead would, in effect, be representing the public in vindicating a right held generally by the public. Since the prior suits were also brought by claimants vindicating a public right, not a personal one, maybe there does exist a multiplicity of suits between two "parties:" the public and the defendant.

Although there is value in suggesting that a cause of action does arise with environmental suits, it is probably more satisfactory to examine whether a substantial portion of the existing cause of action doctrine might be dispensed with in the situation arising under the Act. Presumably, no constitutional difficulties would be raised by easing the restriction. Clearly if a bill of peace is going to be used to preclude someone from exercising the power of suit given to him by the Environmental Protection Act, it will have to do so within the context of constitutionally mandated procedural requirements. Adequate notice has to be given and there probably has to be a fair opportunity to resist the bill. Similarly, there might be some concern if the bill of peace device were being used to preclude possible plaintiffs from availing themselves of a jury trial. The upshot is that a bill of peace may require substantial expenditures; but these concerns have nothing at all to do with whether a bill of peace ought to be available to a defendant faced with the possibility of multiple suits in the absence of an existing right of relief.

Although the matter is not particularly well articulated by Pomeroy or other equity treatise writers, it would appear that nothing in the nature of bills of peace inherently requires the existing cause of action requirement. Rather it is likely that the requirement grew out of a variety of practical or public policy concerns. One of these was surely a general reluctance among judges and chancellors to multiply causes of action; the very purpose of bills of peace was to make "one lawsuit grow where two grew before." It would have been exceedingly anomalous to allow use of the device created for this purpose to promote new litigation where there had been none before.

Yet the Michigan legislature in passing the Environmental Protection Act has at least intimated a very strong counter-policy for allowing a bill of peace to issue despite the complainant's lack of an existing right of relief where he previously has won suits brought against him under the Act. The

purpose of the Act is to create a broad class of private attorneys general authorized to bring suit to vindicate the general public interest in a non-polluted, healthful environment. The Act does not give any individuals any special rights, but only the general right to sue on behalf of the public. Given these facts, there is no reason for everyone to have an unfettered right to sue under the Act. Once a defendant has been sued on identical claims, assuming the claims have been adequately prosecuted, the function of the Act has been fulfilled. The environmental merits of the defendant's conduct will have been examined and ruled upon. If the defendant has managed to prevail, the public's interest is not to be served by yet more attacks on exactly the same conduct. Indeed, at this point, there may be a greater public interest in avoiding court congestion resulting from repetitive litigation.

The traditional policies underlying the existing cause of action requirement, on the other hand, lack force in the Environmental Protection Act situation. Since there is a clearly definable group of individuals eligible to sue under the Act, the practical problem of identifying against whom the bill should issue dissolves entirely. The fear that cause of action will be multiplied by allowing persons without existing rights of action to seek bills of peace against potential plaintiffs is groundless so long as availability of bills of peace is limited to defendants who have been sued at least once previously under the Act and are presently faced with a second or third suit on the same claim. Moreover, imposition of the prior suit condition on the availability of bills of peace minimizes the possibility that potential plaintiffs would be forced into court on the defendant's terms. If, for example, a defendant can only seek a bill of peace while a second, third or fourth suit is pending against him, his ability to favorably time litigation will be almost eliminated. To be sure, the availability of the bill will force potential litigants who have not yet filed an action under the Act to come into court when they might have preferred not to do so. But if the public's interest has already been represented in several prior cases on the same claim, it seems of little importance to permit these potential plaintiffs to relitigate the public's interest whenever they choose. In this context, the policies involved in the multiplicity of suits problem favor relaxing the "existing cause of action" prerequisite for bills of peace.

3. Bills of Peace Practice and Procedure

The procedural characteristics of bills of peace applicable to the multiplicity problem will depend on several factors. Since the paramount concern in issuance of a bill in an Environmental Protection Act situation will be the protection of the public interest, the traditional flexibility of chancery bills of peace should be retained to enable a bill to conform to the particular needs of the Act. However, issuance of a bill of peace against all eight million potential plaintiffs may encounter constitutional difficulties if individual rights of action were cut off without notice or hearing. Furthermore, joinder of all possible plaintiffs in opposition to a plea for a bill of peace, though theoretically possible, would be practically unworkable because of the almost incomprehensible procedural problems involved.

Since the use of the class device to sue defensive classes is well known, the use of a class action to join all potential plaintiffs as defendants does seem within the realm of possibility. Although issuance of a bill of peace against a defensive class of eight million would pose some difficult administrative problems, these problems would be considerably less troublesome than those discussed above in the use of class actions as a "single action" solution to the multiplicity problem. For example, an individual seeking a bill of peace would clearly have an interest in suing against a defensive class, and although notice costs and other charges would be quite high, those seeking bills of peace may be better able to pay these costs than Environmental Protection Act plaintiffs are able to pay the high cost of class actions as a "single action" solution. Furthermore, since the surcharge in the bill of peace situation is placed not on one's right to litigate against environmental disruption, but rather only on the availability of a remedy for curbing the hardship of having to defend against repeated environmental suits, the financial burden seems less objectionable. Finally, whereas suits brought as class actions entail possible problems of case management that might hinder judicial efforts to reach the merits, in the bills of peace situation the underlying environmental issues will have previously been litigated and the court will be pri-

marily concerned with less complicated questions such as the content of previous litigation.

One possible problem of bills of peace against defensive classes is that the party seeking the bills might be tempted to sue named representatives of the class of potential plaintiffs who could not adequately defend the class' interest. The court, however, can avoid this problem simply by invoking its power to require a strengthening of class representation by directing that the attorney general, other interested government agencies and private groups with a particular interest in the environmental problem at stake be named as representative defendants in a class suit seeking a bill of peace.

E. Conclusion

Because it is impossible to determine exactly how multiplicity problems under the Environmental Protection Act will develop, it is probably best that precise conditions for issuance of bills be developed on a case by case basis. However, some general specifications can nonetheless be suggested. As an initial matter, the very right to seek bill of peace relief ought to be conditioned on the happening of two events; first, the person seeking a bill of peace should have been previously sued at least once on a particular environmental claim under the Act: second, an identical suit should be pending at the time the bill of peace is sought. These requirements seem necessary to prevent abuses by persons seeking bills of peace for reasons other than dealing with an actual multiplicity of suits: for example, a company seeking a bill of peace to quiet suits against smoke emissions from its factory at a time when there was no real public concern over the emissions.

Furthermore, in entertaining a claim for a bill of peace, the courts should attempt to accommodate all of the conflicting interests involved in each case. They must determine whether relief from a multiplicity of suits is really required to protect the plaintiff's interests, and whether granting a bill might foreclose future litigation of important environmental points which have been inadequately or ineptly litigated in previous cases.

Traditional equity principles, such as denial of a bill's issuance to a defendant with unclean hands, or a defendant who has slept on his right to relief and to whom laches applies, are clearly appropriate in the multiplicity context. Going beyond this, however, the courts should formulate some specific standards to determine whether all of the environmental issues in a claim against which a bill of peace is sought have been fully and fairly examined. Relevant factors should include whether circumstances have changed since previous litigation over the claim, whether all the issues were crucial to the decision in the previous litigation, who were the plaintiffs, whether these plaintiffs were in a position to adequately represent the general public interest, the type of relief sought, whether the quality of the legal representation was adequate, whether the previous cases were appealed, and to what appellate level.

Analyzing these various standards will require that the courts in bill of peace cases conduct fairly extensive trials involving not only an examination of previous cases, but also some reconsideration of issues in order to provide some basis for determining whether the previous litigation adequately covered the environmental issues involved in the claim in question. The burden of persuasion in these cases would, of course, lie on the person seeking the bill of peace.

Having applied these standards, a court which has been asked for bill of peace relief ought to issue an order accommodating the interest of the defendant to that of the public interest. If, for instance, only some of the issues involved in the claim in question have been fully litigated previously, the order ought to preclude relitigation of only these issues. Similarly, if the particular concerns of some special interest group—back packers, persons living in proximity to the source of the alleged pollution, etc.—were not represented in previous litigation, the order should allow future litigation on behalf of these groups. Bill of peace relief should be denied if the first litigation was collusive, if the plaintiffs presented the case in a shockingly inadequate manner, or if the previous plaintiffs' presentation of their case had been hampered by a lack of funds. In some cases in which bill of peace relief is partially or wholly denied on one of these or other grounds, the court might still retain jurisdiction over the various parties and attempt to litigate the underlying

claim fully and properly on the merits. Since the bill of peace claim will have necessarily brought all of the interested parties before the court, the court might find that the case presented the only real opportunity for complete litigation of this underlying claim; but this solution should not be used if trial at the particular time would cause any plaintiffs undue hardships. If the case were fully relitigated and Environmental Protection Act relief denied, a bill of peace could then issue. Finally, as an equitable decree, a bill of peace would be modifiable after their issuance on a showing of changed circumstances.

III. THE CONSTITUTIONAL QUESTION: VAGUENESS AND DELEGATION OF POWERS

The Environmental Protection Act of 1970 allows private individuals to seek judicial protection of the state's substantial interest in environmental quality. To accomplish this objective, the Act establishes an obligation in both public agencies and private citizens to prevent or minimize environmental damage. To enforce that obligation, the Act also gives the courts significant authority to shape the law of Michigan on environmental protection. The purpose of this note is to consider whether the provisions of the Act placing a new burden on polluters and vesting discretion in the courts transgress constitutional prohibitions on grounds of vagueness, or as an improper delegation of authority.

A. Vagueness

The Act describes the obligations which it imposes in broad terms. Persons shall not pollute or otherwise destroy the environment as long as there is a "feasible and prudent alternative." If there is no such alternative, the conduct may continue only if it is consistent with the "public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources." The Act does not explicitly define pollution. The fact that the Act was drafted in broad, general terms raises a question of vagueness: whether the legislature is constitutionally prohibited from imposing duties couched in such expansive language on private citizens.

1. A Bill in the Common-Law Mold

The sweeping language of the Act was consciously adopted by the draftsmen. The Act was written with a view towards creating a common-law right to a quality environment, a right inuring to the people as members of the public.

The common-law approach is particularly appropriate to environmental protection. Research is constantly revealing activities to be dangerous which were once thought to be harmless. The breadth of the bill assures that the courts will be open for private citizens concerned about the quality of their environment to raise such issues as evidence becomes available. Conversely, the existence of a specific definition is an invitation for the artful lawyer to argue that it excludes his client. This fear was articulated by the Texas Court of Appeals in *Houston Compressed Steel v. Texas*:

"The science of air pollution control is new and inexact, and these standards are difficult to devise, but if they are to be effective they must be broad. If they are too precise, they will provide easy scape for those who wish to circumvent the law."

An expansive, flexible standard is further necessitated by the complexity of the pollution problem. Commentators have asserted that specific regulations which do not take into consideration the dynamic and changing quality of the evidence both with regard to the effects of pollution and the techniques for control are inappropriate. Similar warnings against environmental measures narrowly restricted in scope were expressed during recent Congressional hearings on techniques to more thoroughly assess the impact of technology before its introduction into widespread use. Nevertheless, to establish the propriety of the legislature's creating the framework for development of an environmental common law is not to resolve the constitutional question of vagueness resulting from the legislation's language.

2. Trend in the Courts

Courts have never required laws to define precisely the nature of the burden they impose. A legislature can rarely anticipate every fact situation to which a statute may be applied, nor articulate its intent in language so precise as

to be incapable of different interpretations. On the other hand, there is a judicial policy, reinforced by the command of due process, to avoid the fundamental unfairness of a law so vague that one is unable to determine if his conduct is proscribed. Courts have harmonized these two policies differently according to the interests affected by the legislation. Although the basic standard remains constant, the manner in which it is interpreted and the required certainty and warning fluctuates depending on the court's construction of the statute, the nature of the subject matter restricted, and the sanction involved. Along with these factors is an overriding desire to give effect to the legislative intent whenever possible.

When a person can lose his freedom for violating a law, courts naturally examine it with a critical eye to assure that he could know his act was illegal. The Supreme Court has stated that the primary purpose of the "void for vagueness" doctrine is to prevent the injustice of enforcing an overly vague criminal law. In recent years the "void for vagueness" doctrine has been used to strike down overly broad statutes which were used to restrict freedom of speech and expression.

The courts are in agreement that where criminal penalties and limitations on personal freedoms are involved, the standard of certainty is higher than when economic interests are regulated. The prevailing judicial policy is to allow legislatures when regulating economic interests to protect the public interest to proscribe conduct in very broad terms. In *Winters v. New York*, the Court explained, "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." The Court stated further: "This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. Justice Brennan, in *Smith v. California*, went on to explain why specificity is required of statutes affecting such fundamental rights: "[S]tricted standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

Courts recognize that frequently statutes cannot be both specific and effective due to the nature of the activity being regulated and the dissimilar fact situations to which the law would apply. In *Boyce Motor Lines, Inc. v. United States*, defendants challenged a penal regulation of the Interstate Commerce Commission which required all motor vehicles transporting explosives and other dangerous substances to avoid, as far as practicable and where feasible, driving through congested thoroughfares, tunnels, viaducts, and other places where many people were likely to be. The Court responded to the charge that the statute was unconstitutionally vague by saying:

"[F]ew words possess the precision of mathematical symbols, and most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently no more than a reasonable degree of certainty can be demanded."

The Michigan Supreme Court followed the same approach when reviewing a statute allowing the Board of Registration to revoke the medical license of doctors who engaged in advertising of medical business in which grossly improbable statements were made. The court rejected the vagueness argument on the ground that "[i]t would be quite impossible for the legislature to enumerate all of the specific statements which might be grossly improbable."

In *People v. Associated Oil Co.*, the California Supreme Court reviewed a statute in many respects similar to the Michigan Environmental Protection Act: the Michigan Act proscribes "impairment of the environment" where there are "feasible and prudent alternatives"; the California provision prohibited "unreasonable waste" of natural gas, and provided for equitable relief as a remedy. The court, in upholding the statute under challenge for vagueness, noted the necessity of the broad terminology: "because of the many and varying conditions peculiar to each reservoir and to each well . . . it would be impossible for the legislature to frame a [specific] measure . . . (Emphasis added)."

Perhaps the best known example of the judicial approval of broadly drafted legislation is the Sherman Anti-Trust Act, which was passed in response to a public outcry over the monopolistic practices of the large trusts of the late 1800's. Prior to its enactment, a body of law existed which pro-

hibited restrictive arrangements between competitors, but that approach was not sufficient to protect the public interest. The legislative response was the Sherman Act which (1) restated the rights and obligations of private enterprise in the broadest terms (actions became unlawful which amounted to a "restraint of trade"), (2) provided criminal sanctions for violations, and (3) established a cause of action in private citizens for equitable relief and treble damages. The Supreme Court did not find the broad language of the Act constitutionally troublesome, but rather held it an appropriate response to the problem. As Justice Hughes wrote in *Appalachian Coals, Inc. v. United States*:

"As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape."

Of the standard established in the law, the Court said the Act's "general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce. . . ."

Justice Hughes' opinion is germane to Michigan's Environmental Protection Act of 1970 in two important respects. First, it accepts a statute which is phrased in expansive terms. Second, it recognizes that the broad language of the Sherman Act adequately describes a judicially enforceable standard. Indeed, the Environmental Protection Act goes beyond the anti-trust law's statement of the wrong, and describes the issues which are to be considered and the factors which are to be weighed in determining the propriety of the defendant's conduct. Thus, the Act asks whether there are feasible and prudent alternatives to the pollution. If not, the court must determine the public need for the defendant's conduct to decide whether it should be allowed to continue given the great weight which is to attach to the public interest in the preservation of the environment. The Environmental Protection Act, like the Sherman Act, provides workable guidelines for judicial inquiry.

3. Clear Legislative Intent Required

To be sure, the application of each of the statutes previously discussed to specific fact situations could not be predicted with precision. Forthright courts have acknowledged, none more lucidly than Justice Holmes in upholding the Sherman Act against a charge of unconstitutional vagueness, that "[t]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." Yet, it would be wrong to say that the courts have given cavalier treatment to the interests of defendants in knowing what the law requires of them. The courts realize that the defendant usually understands full well the intent of the regulation at issue, is well aware of the alternatives he might have chosen, and frequently comes to the court hoping to win a battle which he lost in the legislature.

This point is well illustrated by the Minnesota Supreme Court's decision in *City of St. Paul v. Haugthro*. The City of St. Paul passed an ordinance prohibiting the emission of "dense smoke" from chimneys. The court answered the vagueness challenge by saying:

"[N]or will any subtle distinction be indulged as to what is meant by 'dense smoke' as the terms are used in the ordinance. The terms used will be understood as commonly employed and this court will understand by 'dense smoke' a volume of dark, dense smoke as it comes from the smokestack or chimney. . . ."

"The court knew that the defendants and all citizens were aware that heating with soft coal was one of the most serious causes of St. Paul's substantial winter air pollution problem. As a result, the court would not tolerate defendant's effort to postpone the implementation of the legislation until the adoption of a specific regulation for each class of polluters.

The implication of these cases on vagueness is that while a few of the terms of each act in question may admit of some ambiguity in the abstract, the court will look to the statute as a whole—and the practical context from which it emerged—in order to determine whether the law is sufficiently clear. Once the policy decision of the legislature is articulated, the court's role is

to implement, not frustrate that policy. As the Indiana Supreme Court stated in *Illinois Steel Co. v. Fuller*,

"When it is asserted that a statute is so indefinite . . . the court must consider the enactment *in the light of the problems with which the Legislature was undertaking to deal*. . . . [S]uch statutes are valid when they clearly designate the dangers and hazards against which the Legislature sought to provide protection and reasonably indicate the means or methods by which that is to be accomplished." (Emphasis supplied.)

Courts often rely on the use of commonly used words as a factor in the determination that the policy of an act is adequately set forth so as to enable defendants to determine obligations. In *Smith v. Peterson*, the California Court of Appeals dealt with statutes making it a criminal offense to operate an automobile with a muffler which made "excessive noise." The court concluded that the policy underlying the enactments was made clear by the use of commonly used terms: "while these are abstract words, they have, through daily use, acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Analogously, the words in the Environmental Protection Act of 1970, "feasible and prudent alternatives" to "impairment" and "destruction of the environment," have become familiar terms in the law. "Feasible and prudent alternatives" appears in numerous statutes and court opinions. Of course, "public health, safety, and welfare" is a familiar legal phrase that describes concisely the public interest, and "pollution, impairment, and destruction of the environment" have been the subject of public and private nuisance law for centuries. No one would argue that the law of nuisance is unconstitutionally vague, even though it is manifestly clear that the doctrine proceeds from broad principles, and often individuals cannot know exactly what the outcome in a particular fact situation is going to be. To say that the Michigan Environmental Protection Act is unconstitutional is to argue that the legislature cannot create a new right in the common law tradition. Courts have disposed of this question with little difficulty. In *Air Comm'n v. Coated Materials*, a Pennsylvania court examined a statute prohibiting pollution "which unreasonably interferes with the comfortable enjoyment of life." To the argument that the definition was unconstitutionally vague the court responded:

[T]he present contention that the definition of 'air pollution' is uncertain . . . cannot stand. The language employed in the statute is equivalent to the definition of a nuisance which is certainly firmly established in the law."

The plain fact is that courts have accepted statutes regulating economic interests in terms far less precise than the Environmental Protection Act. When complex activities require broad, inclusive regulatory statutes, courts require only that the legislature articulate a clear policy direction. The court will render the legislative effort nugatory only if the statute is so conflicting, unclear or internally inconsistent that the court cannot ascertain its intent. The policy behind the Environmental Protection Act is well understood. The legislature stated concisely its desire that all persons, public and private, examine with greater care the social costs of their activities, and consider a broader range of alternatives to protect the public right to environmental quality.

The vagueness argument is especially inappropriate in the case of the Environmental Protection Act because of the context in which the bill is to operate. Potential defendants under the Act were subject to greater uncertainty about their duties not to pollute before the bill was passed. For example, a Michigan industry which is a source of both air and water pollution falls under the rules and regulations of the Michigan Air Pollution Commission, which specify that

"[n]o person shall cause or permit the emission of an air contaminant or water vapor . . . which causes or will cause detriment to the safety, health, welfare, or comfort of any person, or which causes or will cause damage to the property of business."

The standard of care for emissions into waterways is similarly described:

"It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to . . . domestic, commercial, industrial, agricultural, recreational or other uses which are being or may be made of such waters. . . ."

Not only are the terms in these standards undefined, but neither statute prohibits the agency from changing its interpretation of the application of these broad prohibitions to a particular company or industry. In addition, industries can be subject to suits under private nuisance doctrine by nearby businesses and homeowners and actions under public nuisance doctrine by a local prosecuting attorney or a crusading State Attorney General.

The tendency of the Environmental Protection Act is not to create greater uncertainty, but rather to coalesce these various approaches into a single, unified standard for environmental guardianship over the resources of the state. The real source of uncertainty for potential defendants under the Act is not created by the lack of precise definitions or specific regulations in the statute, since that situation existed long before the Act became law. The uncertainty derives from the fact that enforcement of the law is no longer left to an understaffed administrative agency and an overworked attorney general's office; any citizen can now enter a court and insist that environmental quality be maintained. Uncertainty has increased as to the likelihood of the law being enforced, and it is not surprising that potential defendants are unhappy at the prospect. Nevertheless, the prospect of more vigorous law enforcement initiated by a variety of sources is precisely the value sought by the legislature. It is hardly the proper function of the courts to restrike that legislatively determined balance.

B. Separation of Powers

While vagueness deals with the ambiguity of obligations imposed by the statute, the separation of powers or delegation question focuses on the nature of the tasks assigned to the court. Historically, the separation of powers doctrine has been used to prevent delegations of non-judicial functions to the court. In the context of the Environmental Protection Act, two separation of powers questions may arise: (1) whether the broad language of the law delegates too much of the legislature's policy-making authority to the courts, and (2) whether the Act delegates to the courts too much control over decisions made by state administrative agencies.

1. Delegation of Legislative Authority

By following a common law approach, the legislature vested significant discretion in the courts to elucidate the precise impact of the Act in particular cases. In large part the reason for this broad delegation was the fact that new evidence is constantly being discovered about the effects of current policies and technologies upon the environment. Since the legislature cannot re-examine annually every policy or regulation set down in the past, a substantial time lag has resulted between the development of scientific knowledge and changes in specific legislative programs. The common law approach, constructed upon a general policy of maintaining environmental quality, results in a decision-making process more sensitive to new evidence and discoveries.

Much like the vagueness question, the improper delegation issue involves the determination of whether the bill must be more specific to avoid excessive delegation of the legislature's policy-making authority to the courts. Unfortunately, judicial attempts to define the degree of power which may be delegated to the courts have done little more than restate the issue. It is tempting simply to argue that the Act does not violate the separation of powers principle because it sets forth existing obligations which the courts only interpret in each particular case. Nevertheless, there is much judicial rhetoric which, taken literally, suggests that functions of one branch must not be related to the functions of another branch.

The determination and implementation of legislative policy is, of course, an appropriate function for the courts. In fact, most laws require the courts to interpret and shape the legislative policy as it is applied to specific fact situations.

In each of the cases cited previously in which broad remedial statutes were upheld, the court performed a policy-shaping function. In this context, the essential role of the courts is to implement, not frustrate, the legislative will. Once a policy is articulated in language which, though broad, has a meaning given by common usage and the historical context from which the legislation emerges, the courts will apply the law in individual cases. In

Johnson v. Kramer Bros. Freight Lines Inc., the Michigan Supreme Court upheld an amendment to the garnishee statute which stated: "the court may, at any time before judgment, for good cause shown, discontinue proceedings against the garnishee, or make any such other reasonable order as in its discretion seems advisable." The court reasoned that the legislature was asking it to perform a function with which it was very familiar; "[j]udicial discretion upon good cause shown as a standard in itself sufficiently to satisfy all constitutional requirements."

The First Circuit Court of Appeals responded similarly in upholding the Auto Dealer's Day in Court Act. The Act gives automobile dealers a cause of action against a manufacturer who fails to act in "good faith" in terminating, or failing to renew, a franchise. The court concluded that the language and history of the Act made it clear that Congress intended to prohibit "unfair and inequitable" conduct. Thus, while "[i]t may be true that the statute in effect delegates some responsibility to the courts . . . this is neither unusual nor unconstitutional." By this standard the Environmental Protection Act is not an unconstitutional delegation of legislative authority. Furthermore, the bill is no more a usurpation of the legislative role than is the prior common law in Michigan, since common law courts have been deciding what is "pollution" and "feasible and prudent alternatives" thereto for many years.

Consider, for example, *Attorney General ex rel. Township of Wyoming v. City of Grand Rapids*, a Michigan public nuisance case. It was alleged that the City of Grand Rapids was dumping raw sewage into Grand River in such quantities that the river was becoming severely polluted. The Supreme Court first examined the evidence to see whether the pollution was sufficient to constitute a public nuisance. After hearing testimony from citizens of the affected cities, academic experts, and state public health officials, the court concluded that the polluting substances were coming from Grand Rapids sewers, and that the effects were significant enough to constitute a public nuisance. The defendant responded that the city could not practically dispose of the sewage in any other manner. Evidence was taken regarding possible alternative methods of treatment; whether they could accomplish sufficient purification of sewage so that it can be emptied into a stream without damage or creating a nuisance; and whether such facilities "for a city the size of Grand Rapids [were] feasible."

After considering all of the evidence the court concluded that the public nuisance created by the city's dumping was "inflicting irreparable injury, which it is the peculiar office of a court of equity to prevent." (Emphasis added). It went on to hold that "the construction of a septic tank or septic tanks by the defendants within a reasonable time is feasible and practicable (Emphasis supplied). *Grand Rapids* is only one of many examples where courts have examined the impact of defendant's conduct, the availability of feasible and prudent alternatives, and implemented the public policy against pollution. The courts have clearly not usurped the legislative function in developing the law of nuisance, despite the policy-making necessarily involved. Had the Environmental Protection Act granted standing to private citizens in actions to abate public nuisances, surely no one would have objected that an unconstitutional delegation of legislative authority was involved. Yet the bill describes in greater detail the issues to be considered and the policy to be followed in individual cases than does the concept of nuisance, the content of which is simply the principle "[u]se your own property in such a manner as not to injure that of another."

Both the unquestioned role of the courts in nuisance cases and the broad statutes regularly upheld by the courts suggests that the Environmental Protection Act does not grant unconstitutional law-making powers to the courts.

In addition, the charge of improper delegation seems inappropriate considering the recent development and application of the concept of delegation of powers. Courts have invalidated delegations of policy-making authority to administrative agencies in part to prevent the exercise of excessive power which could be allowed by overly broad delegations. The Environmental Protection Act is consistent with this approach, for its fundamental purpose is to limit the scope of agency discretion by imposing a legal standard, enforceable by the courts, in place of the extremely broad discretion the agencies previously had.

Finally, where the legislature intentionally determined that the courts should develop a common law for protection of the environment, it would be

ironic to argue that the bill gives too much power to the courts. For in the same breath the defendant would be asking the same court to arrogate to itself the ultimate power of reversing the legislature's fundamental policy decision that the courts should play a larger role in environmental protection. The proper response of the courts is perhaps illustrated by Justice Frankfurter's comments when construing the phrase "substantial evidence on the whole record" in the Administrative Procedure Act.

"It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the Federal Judiciary."

2. Delegation of a Non-Judicial Function

The widespread use of administrative agencies is an experiment launched in full force only this century. The Environmental Protection Act of 1970 should be viewed as a part of a current movement in the law to make the administrative system a more effectual, responsive one. To that end the Act is a fundamental departure from the traditional model in which initiative rests solely with an administrative agency. The citizen no longer "comes to a regulatory agency as a suppliant, requesting that they undertake to examine and to pursue his rights." Instead he comes "as a claimant [with] no insulation of administrative discretion between him and his claims. Hopefully in the courts, citizens' concerns will obtain a more receptive hearing.

In order to effectuate the Act's concept of individual action and policy of environmental protection, the courts are given three powers: (1) where regulatory agencies have not acted to halt pollution, the court may issue an order upon the request of private or public plaintiffs; (2) where the plaintiff demonstrates that an agency has not enforced the standard established in the Act, the court is to adjudicate defendant's conduct and determine whether the agency is allowing him to pollute despite feasible and prudent alternatives; (3) where plaintiffs show that a defendant's conduct violates the Act, even though in compliance with the standard of an agency, the court is not bound by the standard, but may "direct the adoption of a standard approved and specified by the court." The consideration requiring discussion is whether any of these powers conferred upon the courts is a non-judicial function.

a. Administrative Agencies Fail to Act—One difficulty faced by regulatory bodies is that they are rarely given staffs commensurate with the number and size of the problems which they must resolve. The inevitable result is that some violations are overlooked or prohibitory action is postponed. In response to this problem, the Act allows private or public attorneys general to bring a court action against an alleged polluter who has not been subject to regulatory sanction.

Whether the agency or a court must decide the case in the first instance is a primary jurisdiction question. Primary jurisdiction is not a constitutional doctrine, but a judicial doctrine developed to provide orderly and efficient management of cases in which the courts and agencies have overlapping jurisdiction, and to give effect to the intent of the legislature—when expressed—that the agency should decide first. The Environmental Protection Act provides that if the pleadings show a need for the agency to examine the case, the court may remand. Nevertheless, where the only value likely to be gained by a remand may be further delay, with continued unnecessary degradation of the environment, the legislature has given the courts jurisdiction to hear and decide the case. The question of whether the court should be *required* to remand is a question of policy which the legislature has resolved.

b. Review of Agency Action—The legislature was also concerned that agencies maintain a vigorous effort to prevent the further destruction of the environment. For this reason the legislators incorporated into the Act a standard for all agency action affecting the environment. Moreover, the Act provides that citizens may challenge an agency action as inconsistent with the Act, and provides that on review of such agency determinations the court *shall determine* whether there is or is likely to be impairment of the environmental, and *shall not permit* the agency to authorize such conduct where there are feasible and prudent alternatives, consistent with the public welfare.

There were two important reasons for allowing the courts to adjudicate the defendant's conduct in accord with the standards of the Act and not be bound by the rulings of the agencies. First, the present scope of review of administrative action is complicated at best, and totally confusing at worst. *Citizens to Preserve Overton Park, Inc. v. Volpe*, recently decided in the United States Supreme Court, is illustrative of the problem faced by courts in attempting to review administrative determinations. The Federal Aid to Highways Act of 1968 provided that the Secretary of Transportation should not permit a highway to be built through a park unless there were "no feasible and prudent alternatives" to the construction. The court decided that the appropriate standard for review of the administrative action was whether the choice made by the secretary was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Delineating the proper scope of judicial review under this standard, Justice Marshall noted that the court should allow a "presumption" in favor of the secretary, but conduct "a probing review;" the court's inquiry is to be "searching," but "narrow;" the court is to invalidate any "clear error in judgment," but not "substitute its judgment for that of the agency." The opinion reflects the confusion which presently pervades the law on review of administrative decisions, a confusion resulting from the limitations inherent in a test which does not allow the court to determine issues on the basis of the weight of the evidence. An additional consequence of this confusion is the unpredictable variety of outcomes when courts review administrative rulings.

To avoid these shortcomings, the Michigan legislature chose to establish a legal standard, and provide for judicial determination of whether an agency action is in compliance with the policy of the legislature. The court is not asked to substitute its judgment as to the reasonableness of an administrative decision, but only to determine whether the administrative decision is consistent with a legal standard.

Article 6, section 28, of the Michigan Constitution of 1963 provides the framework for judicial review of administrative decisions:

"All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts *as provided by law*. *This review shall include as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law*; and, in cases which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." (Emphasis supplied.)

Given the explicit command that courts, at a minimum, should examine whether agency decisions are "authorized by law," the power to decide whether an agency decision authorizes conduct in violation of the Environmental Protection Act seems well within the power given the courts. Moreover, by adding that administrative decisions "shall be subject to direct review *as provided by law*," the constitution authorizes the legislature to detail the scope of review in subsequent legislation.

In enacting the Environmental Protection Act, the legislature made full use of this constitutional authorization by allowing the courts to make a fresh determination of whether certain conduct is causing pollution, and whether there are feasible and prudent alternatives less environmentally destructive.

The range of judicial review now available under Michigan law is illustrated by *Fisher-New Center Co. v. Tax Comm'n*. The petitioner argued that his property was substantially over-valued for state property tax purposes. At issue was whether the Tax Commission's finding of the rate of return on investment was proper. The commission argued that the determination of the figure was within its discretion, and that the court must uphold its determination in view of the fact that there was conflicting expert testimony in the record. The court held, however, that it must make an independent evaluation of whether the decision was supported by the evidence on the record. After undertaking such review, the court concluded that

"the commission findings are not supported by competent, material, and substantial evidence, are unsupported by substantial evidence in view of the entire record as submitted, and are contrary to the overwhelming weight of the evidence; that this constitutes an error or law; that such error presents a question for judicial determination and, upon judicial review, the constitu-

tional grounds and requirement for reversal, under Const. 1963, art 6, § 28, namely, error of law and adoption of wrong principles."

The court then directed the commission to "recompute the valuation and assessment of the taxpayer's property at a capitalization rate *within the range established by the competent evidence in this record* (emphasis added), as determined by the court.

Thus, the court not only made its own determination of whether the Tax Commission's decision met legal requirements set forth in the Administrative Procedure Act, but also determined the range of alternatives the commission could choose in light of those requirements. Had the court merely reversed the decision, the agency could well have reached a new determination outside the range supported by the evidence, and still another appeal and remand would have followed. The court avoided this possibility, as does the Environmental Protection Act, by requiring the court to adjudicate the existence of pollution and whether there are feasible and prudent alternatives.

The same approach was followed in *Thomas v. Busch* where the Michigan Court of Appeals reviewed the grant of a variance by a zoning review board for the construction of an insurance office building. The court refused to accept the "mere repetition" of the language of the zoning ordinance, and independently determined whether the facts met the legal requirements in the ordinance for the grant of a variance. The court concluded that the "rambling, conclusory and inferential findings" of the board were insufficient to support the variance, and proceeded to grant a permanent injunction against construction. Realizing that a remand might bring the same case again before the court with the same facts but more carefully drafted findings, the court explicitly rejected the alternative of remanding the case to the zoning appeals board.

"Such a course of action, in effect permitting the board to repair its faulty performance, does not recommend itself to us as the proper course of action"

These cases indicate that courts have in the past made independent evaluations of the legality of agency action. Some commentators have gone further to suggest that it is always the role of the courts to ultimately determine whether the decision of an administrative agency comports with a legal standard set down by the legislature. Thus, in giving courts the authority to decide whether an agency has allowed pollution where there exist feasible and prudent alternatives, the Act cannot be said to delegate a non-judicial function.

c. Agency Standards—Section 2 of the Act describes the proper posture of the court when plaintiff alleges that "standards for pollution or for anti-pollution device or procedure" are not strict enough, given the legislative policy set down in the Act. Section 2(a) provides that the compliance with an agency standard is not a complete defense, for the court may "[d]etermine the validity, applicability, and reasonableness of the standard." Section 2(b) provides further "[w]hen a court finds a standard to be deficient, [it may] direct the adoption of a standard approved and specified by the court."

The legislature in enacting section 2 did not intend that the court should conduct *ex parte* hearings, call in experts to testify, and assume the rule-making function of the agency. The Act need not and should not be read as imposing that responsibility on the courts. Indeed the language and structure of the statute make clear that the legislature intended no such role for the courts. Section 2 begins with the phrase, "In granting relief provided by subsection one;" that is, that the validity of a standard is to be determined only in the context of a particular case in which one defendant's conduct is being adjudicated. Thus, in an appropriate case the court may determine the proper remedy for the individual defendant before it, and inform the agency that the agency standard is inadequate and another must be adopted that is consistent with the legal requirements of the Act.

As a practical matter, the standards set by the courts will affect future parties not before the court in several respects. Where a court ruling in a particular case would be equally applicable in other, similar situations, it is to be expected that the public agency will go back and reconsider its rules of general application, rather than requiring the same issue to be litigated numerous times. And, of course, the decision in any given case may have a powerful precedential importance for other potential cases. These result from

the conventional *stare decisis* effect of a particular decision, and so long as the court's judgment is issued in a particular controversy, as the decision in *that case*—which is what the Environmental Protection Act contemplates—no problem is raised of exceeding the judicial function rule that courts should decide only the cases before them.

Thus the key issue in deciding whether a power is non-judicial is whether the question facing the court arises in a traditional adversary setting. As a Michigan court explained in *Chamberlain v. Detroit Edison Co.*,

"Whether a function is nonjudicial, for purposes of the separation of powers principle, often will depend on the manner in which it is expected to be discharged. . . .

"In most cases, as long as the court can function as a court in deciding the question, receiving and applying factual testimony against identifiable standards, laws and rules of law, the function conferred will not be regarded as nonjudicial."

It is therefore significant that the Act contemplates that the court may direct the adoption of a different standard only in the contest of a particular case. The fact that a new agency standard of general application is likely to emerge from the decision in a particular case does not change the nature of the proceeding before the court from a judicial to an administrative one.

So long as this fundamental limitation on the judicial function is not violated, the question remains one of ascertaining legislative intent. That is the true issue raised by the Act and is not a constitutional matter. Professor Cooper has pointed out that legislative intent—rather than constitutional considerations—has been the key factor influencing judicial willingness to thoroughly examining agency standards:

"Where the purpose of the statute is to vest broad discretionary powers in an agency . . . a broad measure of autonomy will be accorded the agency; and there will be a tendency to view its rules as in harmony with the statute and reasonable. Where, on the other hand, the statute does not disclose a purpose of any such broad grant of power to the agency . . . the courts will be more ready to discover a conflict between the statute and the rule, or to hold that the rule attempts to enlarge the statute, or is unreasonable."

In the context of the Environmental Protection Act, the legislature sought to restrict the role of administrative agencies by allowing the courts to subject agency discretion, as reflected in administratively adopted rules, to a legal standard; and to do so in a way calculated to conserve private and judicial energy traditionally expended on unnecessary multiple suits or remanded actions. Clearly, in some cases, a range of policies not before the court will need to be considered prior to the adoption of a new standard, and it would seem that the agency could best serve this role. However, to approve remand in this limited case suggests only that the court should resolve the question of whether it can properly direct the adoption of a different standard according to the facts of each case, and not that it should erect a constitutional barrier preventing it from enforcing a standard it finds legally determinative in an appropriate case.

There is no single response appropriate to all cases. The court, where necessary, should remand to the agency. Where the issue is capable of judicial resolution, and the public interest requires an expeditious resolution of the matter, the correct response is for the court to specify the proper standard. A third way in which the court may implement section 2(b) is to order the agency to adopt a new standard which falls within a range, any of the points of which it finds consistent with the requirements of the Environmental Protection Act. This approach has the advantage of preserving some flexibility in the agency's decision-making, while avoiding repeated judicial review and remands by indicating the range within which the agency can properly exercise its discretion.

A final alternative is suggested by the decision in *In re Ten Mile Drain*, which involved a review of an intra-county drainage board's decision that the state should be charged a percentage of the estimated cost of the drain's construction. The board had applied a formula which it had been using for thirty years to determine the state's proper assessment. The state, however, offered a detailed engineering study which indicated that their share should

be decreased. Faced with the two alternatives, the court found the state's evidence decisive and ordered that

"the drainage board shall hold a new hearing . . . and requiring further—in the absence of new proof tending to overcome the State's present showing—that the board enter an order accepting the State's calculation of the "State highway" share."

The order in *In re Ten Mile Drain* is analogous to that which might be made under the Environmental Protection Act. The Attorney General did not challenge the standard in the abstract, but rather in the context of a particular case. In order to decide the case before it, the court had to determine the validity and reasonableness of the prior agency practice, and it specified a standard to be adopted in the absence of further relevant and conflicting evidence. Judge Friendly explained in a recent environmental case that such questions are

"entirely appropriate for judicial consideration at this time. The formulation of standards for suspension is entrusted to the Secretary in the first instance, but the court has an obligation to ensure that the administrative standards conform to the legislative purpose. . . ."

C. Conclusion

Each of the questions discussed in this note revolve around the same basic issue: the propriety of vesting broad power in the courts to prevent environmental destruction, and to develop an environmental common law. The need for the broad standard of the Act derives from the complexity of the problem. The clear authority of the courts to decide cases which have been, or should have been dealt with by an administrative agency is important both for the relationship it establishes between citizens and agencies, and to insure that the policies of the Act will be implemented. In responding to these needs the legislature appears to have violated no constitutional barrier.

Perhaps the best way to conclude this note is to call attention to one of the first cases to be filed under the new law. The case involved a small local township which was piping inadequately treated sewage just upstream from the plaintiffs—a community and a property owner. Defendant planned to enlarge the capacity of the sewage system without adequately improving its waste treatment facility. The case is a model of one situation for which the Act was created. Plaintiffs are challenging in court a municipal decision which affects their daily lives, where pollution is continuing despite the existence of readily available alternatives, and where the appropriate administrative agency has not been moved to act. At this stage a preliminary injunction has been granted by the judge (1) prohibiting the proposed enlargement of the facility, and (2) prohibiting additional business and dwellings from tapping into the sewage system until the case is resolved.

This initial decision upholds the confidence of the legislature in the capacity of the judiciary to understand and deal with environmental problems. As expressed by Professor Joseph Sax in recent testimony before a committee of the Texas Legislature:

"It is notable that the judge recognized the fundamental purpose of the law . . . [and] felt free to enter an order responsive to the genuine problem with which he was faced; the problem of residential and industrial growth outstripping the ability of the community to provide needed public services. He saw the new law as allowing him to take steps designed to bring those two matters into phase.

"I say this is heartening because the judge in this case recognized—and responded—to the legislature's effort to bring back to environmental regulation the . . . approach of the common law. The problem is recognized in a straight-forward manner and those who are adversely affected are authorized to bring their complaint to a court for investigation of the facts and an equitable resolution."

ROGER L. CONNER.

SIERRA CLUB V. HICKEL (MORTON)

Brief for the Wilderness Society, Isaac Walton League of America and Friends of the Earth, as Amici Curiae for Certiorari, *SIERRA CLUB v. HICKEL*, ___ F.2d ___, 1 ELR petition for cert. filed, No. 939, 39 U.S.L.W. 3215 (U.S. Nov. 5, 1970)

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JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970, and the petition for a writ of certiorari was filed on November 5, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a national conservation organization has standing to sue to prevent permanent damage to Sequoia National Game Refuge, Sequoia National Forest and Sequoia National Park under statutes intended to protect these areas.

2. Whether defendants may allow the construction of a large resort and a connecting highway and electric transmission line in Sequoia National Game Refuge, Sequoia National Forest and Sequoia National Park even though such uses are inconsistent with the purposes for which Congress reserved these federal lands. More specifically, whether defendants may:

• Circumvent the 80-acre limitation on long-term permits for national forests (16 U.S.C. 497) by issuing supplemental permits for 13,000 acres which are not revokable either in fact or law;

• Ignore a statute (16 U.S.C. 688) requiring that all use of Sequoia National Game Refuge be consistent with the purposes for which the refuge was established;

• Authorize a major highway across Sequoia National Park for a non-park purpose despite requirements that the Park be conserved (16 U.S.C. 1, 43); and

• Ignore a statute (16 U.S.C. 45(c)) requiring Congressional approval of any transmission line in Sequoia National Park.

INTEREST OF AMICI CURIAE

All three amici curiae are major, national conservation organizations with deep and well-established interests in protecting America's great scenic resources. They are increasingly relying upon litigation as a principal means for carrying out their purposes.

The Wilderness Society is a nonprofit citizens' organization with approximately 80,000 members. It was organized in 1935 to obtain protection for the Nation's remaining wild lands, to carry on education programs concerning the wilderness, and to conserve our natural resources.

Friends of the Earth is a nonprofit organization with 8000 members and is dedicated to the preservation, restoration and rational use of the environment in the United States and throughout the world. It is particularly interested in preserving the world's natural ecosystems and remaining wild places.

The Isaac Walton League of America is a nonprofit organization with approximately 50,000 members. Its pri-

mary goal is restoring and maintaining the quality of the environment through the protection and wise use of our natural resources.

Both the petitioner and respondents have consented to the filing of this brief.

STATEMENT

The amici curiae adopt as their statement of the case the statement contained in the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Is In Direct Conflict With Two Court of Appeals' Decisions on an Important Issue of Standing*

The Court of Appeals held that the plaintiff, the Sierra Club, did not have standing to sue pursuant to various federal statutes which restrict the authority of the Secretaries of Interior and Agriculture to permit use of national park, refuge, and forest land. The court recognized the standing of "local conservationist organizations made up of local residents and users of the area affected by the administrative action" (Pet. App. 17). The court distinguished the Sierra Club on the ground that "there is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them" (Pet. App. 16).

The holding of the Court of Appeals for the Ninth Circuit is in square conflict with decisions of two other circuits and several district courts. The court below specifically rejected (Pet. App. 17, note 9) the holding in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (C.A. 2, 1970), that the national conservation organizations, and specifically the Sierra Club, have standing.¹ In contrast to the Ninth Circuit's holding, the Second Circuit explicitly upheld the Sierra Club's standing on the ground that the Club (425 F.2d at 102):

made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic action, claiming that they were "aggrieved" when the Corps acted adversely to the public inter-

¹ In its petition in this case the Sierra Club noted (p. 10) correctly the conflict between the decision of the court below and that of the Second Circuit in *Citizens Committee v. Volpe*. However, in its Brief in Opposition to Petitions for a Writ of Certiorari in *Citizens Committee v. Volpe*, Nos. 614 and 615, this Term, the Sierra Club said (p. 25) that the disagreement between circuits "is not material . . . to the Ninth Circuit's principal holding and constitutes no reason for review by this Court." In fact, the Ninth Circuit's decision is in direct conflict with one of the holdings by the Second Circuit—i.e., that national conservation organizations have standing to protect the environment—and therefore fully justifies review by this Court of the Ninth Circuit case. But since both the Second and Ninth Circuits agree that some of the plaintiffs in the Second Circuit case, the local conservation organizations, have standing, there is no basis for this Court to review the Second Circuit case on the issue of standing. For even if the Ninth Circuit is correct and national conservation organizations do not have standing, this will affect only one holding, not the decision, of the Second Circuit.

est. They are . . . serving as "private Attorney Generals" to protect the public interest.

Similarly, the decision below is in conflict with *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (C.A. D.C., 1970), where the Court held that national conservation organizations had standing to attack the continued marketing of DDT:

[T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.

On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the adverseness required by Article III of the Constitution.

The national organizations whose standing was upheld included the Environmental Defense Fund, the Isaac Walton League, the National Audubon Society and the Sierra Club, the plaintiff in this case. Accord, *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083, 1085, note 2 (C.A. D.C., 1970). And several district courts have also upheld the standing of national conservation organizations. *Isaac Walton League v. St. Clair*, D. Minn., Civ. No. 5-69, decided June 1, 1970 (standing upheld because "the League has a long history of activity in conservation matters and natural resource preservation"); *Parker v. United States*, D. Colo., Civ. No. C-1368, decided December 24, 1969 (upholding, *inter alia*, the standing of the Sierra Club); *Wilderness Society v. Hickel*, D. D.C., Civ. No. 928-70, decided April 23, 1970.

It is possible that the issue of standing in this case could be overcome if this Court remanded the case to the district court to allow plaintiff the opportunity to amend its complaint. The Sierra Club has a national membership of 78,000 of whom 27,000 reside in the San Francisco area. Some of its members probably use the Mineral King Valley and the portion of Sequoia National Park affected by the proposed development.

However, the holding of the court below is of fundamental importance for the protection of the environment—possibly for this case but certainly in other cases. Environment cases increasingly raise issues which do not involve, or only incidentally involve, direct users: The protection of wilderness areas, the preservation of wildlife refuges, the survival of rare and endangered species, the integrity of natural rivers, and the natural or scenic aspect of landscape. Those who bring the suits may incidentally be users in that they or their members have walked, watched and beheld the subject of the litigation. However, such use is often incidental to the larger purpose to protect the integrity of the environment.² And if the only persons with standing are users no one will have standing where there is no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to prevent the chemical poisoning of eagles).

Even where there are users, they will frequently be unwill-

ing to sue. Nearby resident-users of a wilderness area may desire development because of the economic benefits which will result. National conservation organizations may be the only parties who will represent the national, as opposed to local, interest by opposing development. This conflict between local and national interests is particularly obvious and significant with regard to national parks, refuges, and forests which must be preserved even if local residents desire to develop them.

Furthermore, as the statute creating the National Park Service makes clear, one of the purposes for which these lands are reserved is "to conserve the scenery and the national and historic objects and the wild life therein . . ." 16 U.S.C. 1. It follows that conservationists, as well as users, must have standing to protect the national interest in preserving the national parks. Analogous reasoning applies to national refuges and forests. See 16 U.S.C. 476, 694.

The plaintiff—the Sierra Club—and the four amici curiae—the Wilderness Society, Friends of the Earth, the Isaac Walton League, and the Environmental Defense Fund³—all have as their principal interest the protection and conservation of the environment. While the Sierra Club, Wilderness Society and the Isaac Walton League are also interested in appropriate uses of natural areas consistent with conservation of the environment, this is not their principal interest. They should not be required to assert this subsidiary interest in order to obtain standing to prevent despoilment of the environment. The other two organizations do not represent users at all and cannot assert standing on that basis.

Finally, Congress, in enacting the National Environment Policy Act, has recognized the standing of national conservation organizations to protect the environment. That Act declares that it is federal policy to use "all practical means and measures" to protect the environment in cooperation with "concerned . . . private organizations." 42 U.S.C. 4331 (a). Russell E. Train, the Chairman of the President's Council on Environmental Quality, which was created by the Act, has stated that (BNA Environment Reporter, 1970, p. 745):

Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs.

The Council has itself specifically noted with approval the decisions in *Wilderness Society v. Hickel*, *supra*, and *Citizens Committee for the Hudson Valley v. Volpe*, *supra*, upholding the standing of national conservation organizations. BNA Environment Reporter, 1970, p. 746.

2. The Decision of the Court Below Allowing Use of Federal Parks, Forests and Refuge Lands for Uses Inconsistent with the Purposes for Which Congress Reserved Them Raises Issues of Major National Importance

The issues raised by this case on the merits involve actions by the Secretaries of Interior and Agriculture in permitting use of Sequoia National Refuge, Forest, and Park inconsistent with their purposes as specified by Congress.

³The Environmental Defense Fund has filed a separate brief supporting the petition for a writ of certiorari.

²Two important examples other than the instant case are *Wilderness Society v. Hickel*, *supra* (the Alaska Pipeline case) and *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, D.W. Va., Civ. No. 70-82-E (involving use of a possible wilderness area).

Congress has provided that the Department of Interior shall regulate national parks to conform to the fundamental purpose "... which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. Congress has provided specifically with respect to Sequoia National Park that the Secretary of the Interior has the duty to establish regulations "for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." 16 U.S.C. 43. Sequoia National Game Refuge was established "to protect from trespass the public lands of the United States and the game animals which may be thereon" and permitted the Secretary of Agriculture only to allow uses within the Game Refuge which "may be consistent with the purpose for which said game refuge is established." 16 U.S.C. 688.

The court below has in effect ignored the well established rule that Congress has plenary power under the Constitution concerning federal lands (Article IV, § 3, cl. 2) and that defendants have only the powers given them by Congress. *United States v. California*, 332 U.S. 19, 27; *Udall v. Shale Oil Corp.*, 406 F.2d 759, 764 (C.A. 10, 1969). The defendants have allowed major, permanent uses—a large resort, highway, and electric transmission line—to be built in a national park, refuge, and forest in conflict with both the purposes for which they have been reserved by Congress and specific statutory limitations.

a. First, Congress has authorized the Secretary of Agriculture to grant permits for constructing hotel or resorts in national forests only for 80 acres and for 30 years. 16 U.S.C. 497. Nevertheless, the Secretary has given a permit for 13,000 acres for the construction of ski lifts, sewage treatment facilities and parking structures as part of the development of a large resort. The court of appeals justifies this permit on the ground that the Secretary has traditionally exercised the broad power to issue revocable permits.

It is clear, however, that the admitted power of the executive to issue revocable permits cannot be allowed to circumvent Congressional limitations on the use of land in federal forests. The Secretary of Agriculture cannot be permitted to issue what are in fact long-term permits for extensive acreage in the guise that they are revocable. If the Secretary is allowed to issue such permits, the 80-acre limitation imposed by Congress will become virtually meaningless.

The revocable permit involved here is not truly revocable.⁴ The ski lifts, sewage treatment plants, and parking facilities cannot be removed and the use of bulldozers to create ski slopes will permanently damage the area. Plainly the permit is not revocable before the termination of the 30-year

⁴An opinion of the Attorney General in 1962 recognizes the difference between revocable and term permits by stating that a revocable permit is valid only if (1) the permit is expressly revocable at will; (2) the permitted structures are capable of being removed in case of revocation; (3) the permitted use will not permanently damage or destroy the land; and (4) the permitted use will be of direct benefit to the United States. 35 Op. Atty. Gen. 485. Similarly, Attorney General Stone concluded that a revocable patent license is valid only if "the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government." 34 Op. Atty. Gen. 320, 328.

permit since the developer is making a 35 million dollar investment contingent on the use of 13,000 not 80 acres.⁵

b. Congress has provided that the Secretary of Agriculture has authority to permit other uses of lands in the Sequoia National Game Refuge only "so far as they may be consistent with the purposes for which said game refuge is established." 16 U.S.C. 688. The refuge was established to protect scenically outstanding public lands and game animals and their habitat. *Ibid.* Personnel of the California Fish and Game Commission stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer" (R. 119). And the Secretary of Agriculture has neither made a finding nor could he make a finding that a large ski resort was compatible with the purpose of the refuge.

c. Defendants propose to allow the State of California to build a modern highway through Sequoia National Park purely to give access to the resort in Mineral King. This is a new modern highway which will have a different alignment than the present inadequate mountain road and will cause extensive damage to the scenery and ecology of the park, including the Giant Sequoias, the great trees for which the park is named.

The Secretary of Interior has no authority to use land in a national park for a non-park purpose—to build a road to give access to a private resort outside the park. Such use is inconsistent with the responsibilities placed on the Secretary by Congress, both as to national parks generally and Sequoia in particular, to allow uses which preserve the scenery, the trees, the wildlife and the natural wonders.

d. Congress has provided that no permit for "transmission lines" will be issued in Sequoia National Park. 16 U.S.C. 45c. Without explanation, the court below held that this section was intended to apply only to hydroelectric projects and related facilities (Pet. App. 25). This decision is directly inconsistent with the plain words of the statute.

Two of these issues, those relating to revocable permits in national forests and the construction of highway across national parks for non-park purposes, are of major importance in their own right since they apply to national forests and parks throughout the country. Indeed, as the court below noted (Pet. App. 22), so-called revocable permits seem to be frequently employed to avoid the 80-acre limitation on the use of national forest land. While the other two issues involve statutes applying specifically to Sequoia National Game Refuge and Park, they too have broader significance. All four issues warrant review by this Court due to the importance of preserving national park, refuge, and forest lands for the Congressionally specified purposes for which they were created.

3. *The Preservation of Sequoia National Refuge, Forest and Park Is of Such Importance as to Justify Review by this Court*

This case involves the actions of defendants in allowing Walt Disney Productions to build a large resort in Mineral King Valley and allow construction of a highway and electric transmission line through Sequoia National Park. The Val-

⁵The Court below implicitly admitted both that the permit is not truly terminable "at will" and that the improvements cannot be removed by holding that a revocable permit can be issued regardless. (Pet. App. 21).

ley is in the Sierra Nevada Mountains of California and is surrounded on three sides by the National Park. While geographically and ecologically the Valley is part of the Park, Congress did not include the Valley in the Park because of the existence of mining claims. Congress did recognize its importance to the Park, however, by designating the Valley, which is part of Sequoia National Forest, as constituting, in addition, the Sequoia National Game Refuge. 16 U.S.C. 688.

If defendants and the developer are allowed to proceed, magnificent natural and scenic resources of this country will be irrevocably lost. Hotels, restaurants, parking, ski lifts, ski slopes and other recreational facilities will be spread over 13,000 acres of the Valley and nearby mountains. As many as 14,000 visitors will use the Valley daily, twice as many as now use Yosemite Valley on busy days. A major highway and transmission line will be cut across Sequoia National Park to Mineral King.

This Nation in the last few years has become increasingly concerned with the serious environmental dangers facing us, including the need to preserve the scenic and wildlife resources which are still left. Congress has recognized these dangers in several major pieces of legislation and particularly the National Environmental Policy Act. That Act, *inter alia*, places on the Federal Government the responsibility to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. 4331 (b)(4).

We submit that the proposed destruction of significant portions of the Sequoia National Game Refuge, Forest and Park is of such importance as itself to justify this Court in granting the writ of certiorari. Even if the decision below were not in conflict with holdings of other federal courts of appeals and raised no major issues of continuing importance in future environmental litigation, the subject matter of this case requires review by this Court.⁶

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

BRUCE J. TERRIS,
JAMES W. MOORMAN,
Attorneys for the Amici Curiae

November, 1970

⁶While the opinion of the court of appeals is not entirely clear, it appears that the district court on remand will be obliged to dismiss the complaint because, in the view of the court below, the plaintiff both lacked standing and failed to state a cause of action. However, even if plaintiff is permitted to amend the complaint to improve its position with regard to standing (by alleging and showing that it has members who use the Sequoia National Refuge, Forest and Park) and to offer further evidence on the substantive issues, the court of appeals did deny the preliminary injunction. If plaintiff is allowed to continue the litigation, irreparable damage will still occur as the developer starts work in the Valley to build the resort and the State of California begins to construct the highway across Sequoia National Park. It is therefore essential for this Court, in order to prevent this damage, to grant the writ and either (a) hear the cause on the merits or (b) continue the present injunction until plaintiff has had the opportunity to amend its complaint in the district court and has received a full hearing on its prayer for a permanent injunction.

IZAAK WALTON LEAGUE V. ST. CLAIR

(6) Defendants' Motion to Dismiss on the matter of violation of the Commerce Clause of the U.S. Constitution was granted.

(7) Defendants' Motion to Dismiss Plaintiffs' argument based on the due process clause of the 14th Amendment in that Defendants through State action deprive Plaintiffs of life, health and property was denied.

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Documents Available from ELI:

- A. Complaint, filed November 7, 1969. (5pp. \$0.50)
- B. Motion to Dismiss Defendant John F. Ward, Purchasing Agent of the City of Chicago as a Party Defendant, filed December 11, 1969. (5pp. \$0.50)
- C. Motion to Dismiss, filed December 12, 1969. (3pp. \$0.30)
- D. Reply Brief of Defendant Director of Mines and Minerals of the State of Illinois, filed January, 1970. (14pp. \$1.40)
- E. Motion for Trial by a Three Judge Court, filed January 7, 1970. (2pp. \$0.20)
- F. Amendment to Complaint, filed January 7, 1970. (2pp. \$0.20)
- G. Memorandum for the Defendant, the Director of the Department of Mines and Minerals of the State of Illinois in Support of Motion to Dismiss, filed January 13, 1970. (16pp. \$1.60)
- H. Plaintiffs' Memorandum in Reply to Answer of the Director of the Department of Mines and Minerals of the State of Illinois Regarding Plaintiffs' Motion for the Empaneling of a Three Judge Court, filed January 14, 1970. (2pp. \$0.20)
- I. Memorandum of Defendant, the Purchasing Agent for the City of Chicago in Support of the Opposition of Said Defendant to the Motion for a Trial by a Three Judge Court and in Support of its Motion to Dismiss, filed January 21, 1970. (10pp. \$1.00)
- J. Second Amendment to Complaint, filed January 22, 1970. (2pp. \$0.20)
- K. Letter from William J. Scott, Attorney General of Illinois to J. Theodore Meyer, Chairman, Air Pollution Study Committee on the Constitutionality of the Illinois Mined Coal for Public Institutions Act, filed February 2, 1970. (4pp. \$0.40)

L. Plaintiffs' Memorandum in Answer to Motion to Dismiss by the Defendant Purchasing Agent of the City of Chicago. (2pp. \$0.20)

M. Memorandum for the Plaintiffs in Answer to the Memorandum of the Defendant, Director of the Department of Mines and Minerals of the State of Illinois in Support of his Motion to Dismiss. (14pp. \$1.40)

N. Memorandum Opinion and Order on the Constitutionality of the Illinois Statute, filed July 7, 1970. (15pp. \$1.50)

[22] **IZAAK WALTON LEAGUE v. ST. CLAIR**, Civil No. 5169-Civ-70 (D.Minn., filed December 23, 1969)

Plaintiff brought this action in U.S. District Court (D. Minn.) to block private mineral exploration in the Boundary Waters Canoe Area (BWCA) of the Superior National Forest in Minnesota.

On December 23, 1969 Judge Neville granted plaintiff a temporary restraining order on the ground that continued mineral exploration by defendants would result in irreparable harm to plaintiff.

On June 1, 1970 Judge Neville of the District Court denied defendants' motion to dismiss on the grounds that plaintiffs had standing, that plaintiffs had stated a cause of action, and that the suit was not barred by the doctrine of sovereign immunity. In November 1970 defendants St. Clair and Yawkey filed separate answers.

Plaintiffs' Argument

Plaintiff is the Izaak Walton League, a non-profit conservation organization incorporated in Illinois. In its Amended Complaint, filed January 7, 1970, plaintiff makes the following assertions:

(1) Defendants' proposed mineral exploration violates the intent of Congress and of the Minnesota Legislature that the BWCA be maintained in a wilderness state. Defendants' action would cause irreparable harm to plaintiff, who has no adequate remedy at law.

(2) Defendants have lost their right to remove minerals from BWCA by laches, inaction, and failure to pay taxes.

(3) Defendants' anticipated action would violate *Minn. Stat.* §84.43, subd. 2; The Wilderness Act of 1964, 16 U.S.C. §1131 *et seq.* and the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §528 *et seq.*

(4) Defendants have failed to obtain the necessary state permits to cross state land and use public water, as required by Ch. 90, 110 *Minn. Stat.*

(5) Defendants cannot lawfully remove minerals from BWCA until they comply with Minnesota statutes requiring the assessment and payment of taxes on separately owned mineral rights.

(6) Defendants have been afforded preferential tax treatment, given the right of eminent domain, and the use of public land and water in violation of Minnesota law, the public trust and plaintiff's rights secured and established by Art. I, Sec. 8; Art. IV, Sec. 3; the supremacy clause of Art. VI; and Amendments V, XI, and XIV of the Constitution.

In its Brief in Opposition to Motions to Dismiss, plaintiff makes the following arguments:

(1) Plaintiffs Amended Complaint states a claim upon which relief can be granted.

(2) Federal defendants are necessary parties under Fed. R. Civ. P. Rule 19(a), because they are charged with the duty of enforcing federal regulations applicable to the BWCA.

(3) Plaintiffs Amended Complaint states a claim against defendants St. Clair and Yawkey under *Conley v. Gibson*, 355 U.S. 41 (1957). Plaintiff has standing to sue and may bring this action under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, and under *Parker v. U.S.*, 309 F.Supp. 593 (D. Colo. 1970); *Barlow v. Collins*, 397 U.S. 159 (1970), and *Association of Data Processing Services v. Camp*, 397 U.S. 150 (1970).

(4) Federal defendants must comply with the National Environmental Policy Act of 1969, 42 U.S.C. §4321, before allowing any mineral exploration in the BWCA.

Relief Sought

In its Amended Complaint, plaintiff seeks the following:

(1) A declaratory judgment that defendants Yawkey and St. Clair have no right to enter BWCA for mineral exploration purposes, and a permanent injunction restraining them from doing so;

(2) A permanent injunction prohibiting federal defendants from acknowledging the right of St. Clair and Yawkey from entering BWCA for such purposes;

(3) A permanent injunction restraining defendant Minnesota Commissioner of Conservation from granting permits to St. Clair and Yawkey to enter, cross or use public lands or waters for mineral exploration purposes;

(4) In the alternative, if defendants are found to have a right to enter and explore BWCA, an order directing the Commissioner of Conservation to show cause why public hearings should not be held on any permits issued to defendants St. Clair and Yawkey;

(5) An order directing the Commissioner of Conservation to show cause why he should not promulgate rules regarding the use of public lands and waters in the BWCA;

(6) An order directing the Commissioner of Taxation to show cause why the property and interests of defendants should not be assessed and taxed;

(7) If St. Clair and Yawkey are found to have a right to enter and remove minerals from the BWCA, an order declaring the applicable Minnesota laws to be: (a) unconstitutional, (b) in violation of the public trust, (c) void except insofar as said laws conflict with applicable federal laws and treaties.

Defendants' Argument

Defendants are George W. St. Clair and Thomas Yawkey, holders of subsurface mineral rights in the BWCA; Clifford Hardin, the Secretary of Agriculture; Edward P. Cliff, Chief of the U.S. Forest Service; Craig Rupp, Supervisor of the Superior National Forest; Jarle Lierfallom, Commissioner of Conservation of the State of Minnesota and Rufus T. Logan, Commissioner of Taxation of the State of Minnesota.

In their Memoranda in Support of Motion to Dismiss, federal defendants assert the following:

(1) Plaintiff has failed to state a cause of action against the federal defendants.

(2) Plaintiff's suit is barred by the doctrine of sovereign immunity.

(3) Plaintiff lacks standing to sue federal defendants because plaintiff fails to claim infringement of a legally protected interest.

(4) Plaintiff fails to allege "injury in fact" and fails to come within the "zone of interests" established by a protective statute, as required by *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

In their separate answers, federal defendants additionally assert:

(1) The court lacks subject matter jurisdiction.

(2) There is an improper joinder of alleged causes of action.

(3) Plaintiff is not an "aggrieved person" within the meaning of the Federal Administrative Procedures Act or, if he is, has not established compliance with its provisions before seeking judicial review.

(4) The complaint fails to join indispensable parties as required by Fed. R. Civ. P. Rule 19(a).

(5) The complaint does not state facts, but merely asserts inappropriate and incorrect conclusions of law which require no answer.

Decision

On June 1, 1970 Judge Neville, for the U.S. District Court (D. Minn.), issued an order denying federal defendants' motion to dismiss on the following grounds:

(1) Plaintiff has made sufficient allegations to support a cause of action. *Thomason v. Hospital T.V. Rentals, Inc.*, 272 F.2d 263, 266 (8th Cir. 1959).

(2) Plaintiff's complaint is not barred at this preliminary stage by the doctrine of sovereign immunity since it alleges that officers of the U.S. have acted beyond their statutory powers. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *State of Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969).

(3) Plaintiff meets the requirements of presenting the case in an "adversary context" and of "... injury in fact, economic or otherwise," necessary for standing under *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The court said that *Data Processing* establishes that the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, is to be "generously construed" as granting judicial review of administrative action, unless Congress has specifically withheld that remedy.

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Documents Available from ELI

- A. Notice of Motion and Motion for Temporary Injunction, filed December 23, 1969. (2pp. \$0.20)
 B. Order to Show Cause and Temporary Restraining Order, filed December 23, 1969. (2pp. \$0.20)
 C. Affidavit of Robert L. Herbst, Executive Director of the Izaak Walton League of America, filed December 23, 1969. (9pp. \$0.90)
 D. Amended Complaint, filed January 7, 1970. (19pp. \$1.90)
 E. Federal Defendants' Supplemental Memorandum in Support of Motion to Dismiss (standing). (7pp. \$0.70)
 F. Defendant Commissioner of Conservation's Brief in Opposition to Motions to Dismiss. (6pp. \$0.60)
 G. Affidavit of Minnesota Commissioner of Conservation's Brief in Opposition to Motions to Dismiss, filed March 13, 1970. (3pp. \$0.30)
 H. Memorandum of Points and Authorities in Support of Motion to Dismiss. (6pp. \$0.60)
 I. Plaintiff's Brief in Opposition to Motions to Dismiss. (12pp. \$1.20)
 J. Order Denying Motions of Defendants Hardin, Cliff and Rupp for Dismissal, filed June 1, 1970. (11pp. \$1.10)
 K. Separate Answer of George W. St. Clair, filed November, 1970 (5pp. \$0.50)
 L. Separate Answer of George W. St. Clair to the Cross-Claim of Defendant Jarle Leirfallom, held November, 1970 (1 pp. \$0.10)
 M. Separate Answer of Thomas Yawkey, filed November, 1970 (3 pp. \$0.30)

[23] **BRAND v. SHAFFER**, No. 2746-69. (D. Mass. filed Jan. 22, 1970)

Plaintiffs, landowners and vacationers on Martha's Vineyard, a nationally recognized resort island, brought this suit in the U.S. District Court (D.D.C.) to enjoin the expenditure of federal funds which are necessary if the island's airport facilities are to be expanded to accommodate large jet aircraft. They also sought to enjoin the proposed cutting of woodlands for airstrip expansion.

Defendants moved to transfer to the U.S. District Court (D. Mass.), contending that the maintenance of the action in the District Court (D.D.C.) would expose the defendants to multiple actions in several federal districts, although relief was based on the same factual considerations. The defendants assert that under Rule 23 of the Fed. R. Civ. P. the litigants should not be subjected to possible inconsistent adjudications and the action should be transferred to Massachusetts. The case was transferred to the U.S. District Court (D. Mass.) on April 13, 1970. Briefs were filed on the Motion to Dismiss on July 27 and August 5. The case presently awaits decision on that motion.

A motion to dismiss was incorporated in the defendant's answer and a hearing was held on the motion on October 2, 1970. In November, 1970 because the activity plaintiffs sought to enjoin had been completed, plaintiffs filed a Supplement to Complaint. The case presently awaits decision on the motion to dismiss.

Plaintiffs' Argument

Plaintiffs assert that:

- (1) Defendants denied plaintiffs due process of law when they granted approval of the application for federal funds without a public hearing under Section 1108(d)(3) of the Federal Airport Act, 49 U.S.C. 1108.
- (2) In the hearing in this case the Administrator did not permit witnesses to be cross-examined. Therefore, he denied plaintiffs due process under the U.S. Constitution and the Federal Airport Act, 49 U.S.C. §1108(d)(3), 1108(e).
- (3) The Administrator has the duty to determine the best interests of the public by hearing expert testimony on the engineering, economic and environmental aspects of the proposed expansion of airport facilities.
- (4) Data on the need and feasibility of the project, and on alternative airport and air transport plans, were not submitted, although they are required by the National Airport Plan (pp. 15, 23, 1968 Ed.). Further, no such materials were placed in the record where they could be subjected to cross-examination and rebuttal.
- (5) The Administrator may not delegate decision-making to a local official. The Administrator, in granting the application, relied on the determination of the local governing body, the county commissioners and the applicants. He thus breached his administrative duty in violation of the Federal Airport Act.

In their Supplement to Complaint plaintiffs continue to request a declaratory judgment of the unlawfulness of the grant, but delete their request for recovery of funds and seek only an order requiring the Administrator to hold a new hearing to determine the conditions necessary for a lawful grant.

Relief Sought

Plaintiffs originally sought:

- (1) A permanent injunction requiring defendant to suspend the grant of federal funds for a runway extension at Martha's Vineyard and requiring him to seek recovery of funds already transferred;
- (2) A declaration that the Administrator must make an independent investigation and present his studies at a public hearing for discussion;

- (3) A determination by the Administrator of the effect which the proposed project will have on the community;
 (4) A Court determination of the compatibility of the project with the peace and tranquility of the island.

Defendant's Argument

Defendant, who is the Administrator for the FAA, contends that:

- (1) The complaint fails to state a claim upon which relief can be granted;
 (2) The Court lacks jurisdiction over the subject matter;
 (3) Section 1108(d)(3) of the Federal Airport Act does not require the Administrator to hold public hearings or to publicly justify reasons for airport development.

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Documents Available from ELI

- A. Project Application submitted to FAA, January 27, 1967. (7pp. \$0.70)
 B. Motion to Reopen to Redetermine Finding of Public Convenience and Necessity and Request for Permission to Intervene, filed May 14, 1969. (6pp. \$0.60)
 C. Report of Hearing Officer at Federal Aviation Administration Hearing, filed July 25, 1969. (7pp. \$0.70)
 D. Answer to Complaint civil Action No. 2746-69, filed January 22, 1970. (2pp. \$0.20)
 E. Motion to Strike, filed February 11, 1970. (1p. \$0.10)
 F. Interrogatories to the Defendant, filed February 16, 1970. (2pp. \$0.20)
 G. Motion for Protective Order, filed February 20, 1970. (2pp. \$0.20)
 H. Plaintiff's Answer Opposing Defendant's Motion for Protective Order, filed March 3, 1970. (2pp. \$0.20)
 I. Plaintiff's Memorandum of Points and Authorities in Support of Answer Opposing Defendant's Motion for Protective Order. (2pp. \$0.20)
 J. Memorandum of Points and Authorities in Support of Motion for a Protective Order. (2pp. \$0.20)
 K. Plaintiff's Answer Opposing Defendant's Motion to Transfer, filed February 24, 1970. (4pp. \$0.40)
 L. Memorandum of Points and Authorities in Support of Motion to Transfer. (4pp. \$0.40)
 M. Memorandum of Points and Authorities in Support of Answer Opposing Defendant's Motion to Transfer. (4pp. \$0.40)
 N. Affidavit of Wallace Edward Brand, filed February 24, 1970. (2pp. \$0.20)
 O. Memorandum of Law in the U.S. District Court for D.C. (16pp. \$1.60)
 P. Complaint for Declaratory Judgment and Injunction. (8pp. \$0.80)
 Q. Order for filing of briefs on motion to dismiss, filed June 25, 1970. (1p. \$0.10)

R. Brief for Plaintiffs Concerning Sufficiency of Certain Defenses Raised by Defendant, filed July 17, 1970. (32 pp. \$3.20)

S. Defendant's Memorandum of Law in Response to the Courts Order of June 25, 1970 as Amended July 13, 1970, filed July 27, 1970. (4 pp. \$0.40)

T. Reply Brief for Plaintiffs Concerning Sufficiency of Certain Defenses Raised by Defendant, held August 5, 1970. (9 pp. \$0.90)

U. Order that Further Briefs be Filed, filed October 5, 1970. (2 pp. \$0.20)

V. Motion for Leave to Submit Supplement to Complaint, filed November, 1970. (1 p. \$0.10)

W. Supplement to Complaint filed November 1970. (4 pp. \$0.40)

X. Supplemental Memorandum of Law, filed November 1970. (5 pp. \$0.50)

[24] **FAIRFAX COUNTY FEDERATION OF CIVIC ASSOCIATIONS v. HUNTING TOWERS OPERATING COMPANY**, Civil No. 4963-A (E.D. Va., filed October 2, 1968.

Plaintiffs filed a class action October 2, 1968 in the U.S. District Court (E.D. Va.) to prevent the defendants from obtaining 36.5 acres of subaqueous land located in the Hunting Creek estuary of the Potomac River, Virginia. The defendants plan to fill the land in order to construct an apartment housing complex. The Corps of Engineers revoked the defendants' permit for a landfill necessary to the project and the case was dismissed as moot.

Plaintiffs Argument

Plaintiffs, the Fairfax County Federation of Citizens' Associations, Inc., the Northern Virginia Conservation Council, Inc., and the Citizens Council for a Clean Potomac, Inc., all of whom are non-profit organizations, assert that:

(1) Virginia has dominion over its submerged lands. *Hiller v. Commonwealth*, 159 Va. 924, 166 S.E. 557 (1932); *U.S. v. Smoot Sand and Gravel Corporation*, 248 F.2d 822 (4th Cir. 1957).

(2) Submerged lands under navigable waters are held in trust by the state for the benefit of all the people. *Illinois v. Central RR Co.*, 146 U.S. 387 (1892).

(3) Since the state holds the land as a public trust, it cannot make a substantial grant of lakebeds for private purposes. Even for a public purpose the state cannot change an entire lake into dry land or alter it so as to destroy its character as a lake. *Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954). *Resort Development Company v. Parmele*, 234 N.C. 689, 71 S.E. 2d 474 (1952); *State ex rel Squire v. City of Cleveland*, 150 Ohio 303, 82 N.E. 2d 709 (1948); *Silver Springs Paradise Company v. Ray*, 150 F.2d 354 (5th Cir., 1931), cert. denied 52 S.Ct. 29 (1931). The power of the state to dispose of lands under navigable waters is limited by public trust, and the state's power of alienation is subject to the rights of the public, including the right of navigation.

(4) The public interest in subaqueous land is a property right and is protected from unreasonable state infringement by the due process clause of the 14th Amendment.

(5) Proposed dredge and fill operations will be detrimental to the ecology of the area and will contribute to the destruction of estuarine resources and the reduction of the natural habitat of aquatic life.

(6) Because of the irrevocable damage which landfills cause, a high degree of responsibility rests with public and private agencies which license and approve landfills. *Udall v. FPC*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); *Berman v. Parker*, 384 U.S. 26 (1954).

(7) There has been a denial of equal protection and due process under §§1, 11 of the Constitution of Virginia.

(a.) The exclusion of other purchasers keeps the price of the land low and deprives the state and its taxpayers of a larger amount of money which could be derived from a public auction.

(b.) Section 185 of the Virginia Constitution prohibits lending by the state, county, city or town. Prohibiting the state from becoming interested in internal improvements would bring less money than the \$30,000 sale price provided in Chapter 546 of the Acts of the Assembly of 1964, and the difference between the public sale price and the legislatively determined price would equal the amount of credit extended by the state to named purchasers.

(8) Subsection 63(18) of the Virginia Constitution specifically prohibits the grant "to any private corporation, association or individual of any special or exclusive right, privilege or immunity."

Relief Sought

(1) That a three-judge Federal District Court panel sit in this case;

(2) That Chapter 546 of the Acts of Assembly of 1964 be declared unconstitutional and that deeds granted under it be voided;

(3) That a temporary restraining order, and subsequently a permanent injunction, be issued to prevent the proposed landfills.

Defendants' Argument

Defendants, Hunting Towers Operating Co., Inc., Howard P. Hoffman Associates, Inc., and Francis T. Murtle, Trustee, contend that:

(1) Defendant riparian owners own the land to the low water mark. The state has ownership of the land only below the low water mark.

(2) Courts in Florida and New York have repeatedly approved conveyances to private individuals for private purposes. *Zabell v. Pinellas County Water Navigations Control Authority*, 171 S.2d 376 (Fla. 1965); *Deering v. Martin*, 116 S. 54 (Fla. 1928); *Tampa Port Authority v. Deen*, 179 S.2d 418 (Fla. 1965); *Applebey v. New York*, 271 U.S. 364 (1925).

(3) The Supreme Court of Appeals of Virginia has on at least two occasions acknowledged that the state may sell to private individuals for private purposes. *James River and Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 470, 122 S.E. 344 (1924); *Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932).

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Documents Available from ELI

A.Brief for Petitioners, filed December 16, 1968. (26pp. \$2.60)
B.Defendants' Answer, filed January 12, 1970. (13pp. \$1.30)
C.Petitioners' Reply Brief, filed January 19, 1970. (7pp. \$0.70)

[25] **GANDT v. HARDIN**, — F.Supp. — (Civil No. 1334, W.D. Mich. 1969).

Plaintiffs brought this action on November 12, 1969 in the U.S. District Court (W.D. Mich.) to block logging, clearing and roadbuilding operations which were authorized by defendants in their management plan for the Sylvania area of the Ottawa National Forest.

On December 11, 1969 Chief Judge Kent dismissed the case after finding that plaintiffs had standing and that Forest Service decisions under the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §528 *et seq.*, are subject to judicial review.

Plaintiffs' Argument

Plaintiffs are the Michigan Audubon Society, the Wisconsin Ecological Council and eighteen citizens of Wisconsin, Michigan and Minnesota. In their complaint plaintiffs assert the following arguments:

(1) The District Court has jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*; the Declaratory Judgments Act, 28 U.S.C. §§2201-02 (declaratory judgments); 28 U.S.C. §1341; 1346 (U.S. as defendant) and 1361 (mandamus).

(2) Defendants' logging contract with the Kimberly-Clark Corporation violates the 1964 Wilderness Act, 16 U.S.C. §1131 *et seq.* (Assertions made under the Wilderness Act were dropped before trial.)

(3) Defendants have not adequately considered the recreational and wilderness qualities of the Sylvania area, in violation of the Multiple Use-Sustained Yield Act of 1969; regulations issued pursuant to this Act, 36 C.F.R. §221.1; and the Wilderness Act of 1964.

(4) Plaintiffs will suffer irreparable harm to the wilderness, water and recreational qualities of the Sylvania area unless defendants are immediately restrained from carrying out cutting and clearing operations. Plaintiffs have exhausted their administrative remedies.

Relief Sought

In their Complaint plaintiffs seek the following:

- (1) A judgment declaring that the defendants' decision to cut and clear trees in Sylvania is arbitrary, capricious and unlawful;
- (2) An injunction restraining defendants from further cutting and clearing until the resource and wilderness values of the area have been fully studied and evaluated;
- (3) Preliminary injunctive relief pending trial.

Defendants' Argument

Defendants are Clifford Hardin, Secretary of Agriculture; Edward P. Cliff, Chief, U.S. Forest Service; Ralph Kizer, Supervisor of the Ottawa National Forest; and Marsh Lefler, Watersmeet District Supervisor, Ottawa National Forest.

In their Memorandum of Points and Authorities in Opposition to a Preliminary Injunction, defendants make the following arguments:

- (1) Plaintiffs lack standing. *Jenkins v. McKeithen*, 395 U.S. 411 (1969).
- (2) Plaintiffs' suit is barred by the doctrine of sovereign immunity. *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949).
- (3) Plaintiffs will not succeed on the merits, since Forest Service has already studied exhaustively the proposed Sylvania project.
- (4) Plaintiffs will suffer no irreparable harm from defendants' management plan.

Decision

On December 11, 1969 Chief Judge Kent granted judgment for defendants in an oral opinion which held that:

- (1) Decisions of the Secretary of Agriculture under the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §528-*et seq.*, are mandatory and subject to judicial review under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Knight Newspapers, Inc. v. U.S.*, 395 F.2d 353 (6th Cir. 1968).
- (2) Plaintiffs have standing to bring this action under the Administrative Procedure Act, 5 U.S.C. §§701-06; *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Utility Users League v. FPC*, 394 F.2d 608 (2d Cir. 1968); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965) *cert. denied*, 384 U.S. 941 (1966), and *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 661 (S.D.N.Y. 1967).
- (3) Plaintiffs were guilty of laches in allowing the government to proceed with road building operations for several months before bringing this suit.
- (4) Plaintiffs have failed to sustain their burden of proof that defendants' action is arbitrary, capricious and unlawful.

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Documents Available from ELI

- A.Complaint, filed November 12, 1969. (8pp. \$0.80)
 B.Opinion of U.S. District Court, filed December 11, 1969. (26pp. \$2.60)
 C.Brief in Support of Plaintiff's Complaint. (12pp. \$1.20)
 D.Brief in Support of Plaintiff's Motion for Injunction, (on standing). (29pp. \$2.90)
 E.Memorandum of Points and Authorities in Opposition to Preliminary Injunction. (9pp. \$0.90)

[26] **MAGNAGHI v. VOLPE**, — F.Supp. — (S.D. Fla., 1970).

Plaintiff, a Vermont resident who owns property adjacent to the Everglades National Park, brought this class action in U.S. District Court (S.D. Fla.) to permanently prohibit defendants' operation of a jet training airport near the Everglades National Park. On May 7, 1970 Judge Eaton for the District Court granted defendants' Motion to Dismiss on the grounds of plaintiff's lack of standing and of defendants' sovereign immunity.

Plaintiff's Argument

Plaintiff is Charles J. Magnaghi. In his Amended Complaint plaintiff made the following claims:

- (1) The Everglades National Park Acts, 16 U.S.C. §§410-410(o), require that the Park be permanently maintained as wilderness. The operation of jet aircraft at the training strip will, by air and noise pollution, threaten and destroy the existence of flora and fauna in the Everglades National Park. Such destruction will cause irreparable harm to plaintiff for which he has no adequate remedy at law.
- (2) Plaintiff and all others similarly situated have a property interest in the Everglades National Park. The threatened destruction of the flora and fauna in the Everglades National Park constitutes a taking of plaintiff's property without due process of law and constitutes a denial of equal protection of the law in violation of the Fifth and Fourteenth Amendments.

Relief Sought

Plaintiff sought a permanent injunction restraining defendants from permitting aircraft to use the training strip and from permitting the operation of aircraft below ten thousand feet over the Everglades National Park and its supporting ecosystem.

[From Izaak Walton League of America]

FEDERAL OFFICIALS SEEK FORMAL DISMISSAL FROM BOUNDARY WATERS CANOE AREA SUIT

WASHINGTON, Feb. 18.—Attornies for the U.S. Department of Agriculture have filed a motion in Federal Court seeking a summary judgment and formal dismissal from a suit filed against government officials by the Izaak Walton League of America in an attempt to prevent mineral exploration and mining in Minnesota's famed Boundary Waters Canoe Area (BWCA).

Filed in December 1969 in U.S. District Court, Minneapolis, the suit names as defendants Clifford Hardin, secretary of the U.S. Department of Agriculture; Edward Cliff, chief of the U.S. Forest Service; George W. St. Clair and Red Sox Baseball Team owner Thomas Yawkey, both of New York; Craig Rupp, supervisor of Superior National Forest, and several Minnesota state officials.

The suit seeks to enjoin St. Clair and Yawkey and any others allegedly holding mineral rights in the BWCA from entering the area for mineral exploration or mining. It also seeks a court decision permanently barring any commercial exploration in the BWCA.

The BWCA is a 1.5-million-acre tract of public land within the Superior National Forest, adjacent to the Minnesota-Canada border. St. Clair and Yawkey have asserted they hold mineral rights within the BWCA which they intend to explore and develop.

The Forest Service, a division of the Agriculture Department, holds title to the BWCA lands where Yawkey and St. Clair claim mineral rights.

Raymond A. Haik, Minneapolis attorney and past national president of the Izaak Walton League, is handling the BWCA suit for the League. Following the recent motions by the Federal defendants to dismiss them from the suit, Haik said, "They have indicated that the government agencies involved may take a much stronger position of opposition to any type of mineral activity in the area until such time as there has been a specific determination of the rights of claimants seeking to exercise their mineral rights."

Haik also noted that motions have been filed recently by Yawkey and St. Clair, seeking to remove Yawkey from the case and to expand the lawsuit to include as defendants anyone else claiming mineral rights in the BWCA.

"In effect," Haik added, "they are attempting to turn this into a class action. But they (St. Clair and Yawkey) do not necessarily represent the views of other persons who may claim mineral rights in the area. In fact, no one else has made a claim to mineral rights in the BWCA."

Haik said that no trial date has been set for the case but that a hearing on the recently filed motions is scheduled for early March.

The main thrust of the League's suit is to establish that the BWCA is a wilderness area and that mineral exploration or mining would destroy its wilderness values.

"Since signing of the Shipstead-Nolan Act by President Hoover," Haik said, "millions of dollars have been spent by the public and the League to set aside land for wilderness designation in this unique and beautiful area. Mining claims there and in other such unspoiled areas throughout the country constitute a major threat which conservationists and the public should not allow."

 CRISIS IN THE BOUNDARY WATERS CANOE AREA

BACKGROUND

The Boundary Waters Canoe Area (BWCA) is an outstanding land and lake country, consisting of more than one million acres stretching along the northeastern Minnesota-Canadian border for approximately 145 miles. The route of the voyageurs passed through the area—this country of vast forests and countless lakes and streams connected by short portages.

It is a place for solitude and canoe travel. It is America's prime canoe area, managed as a part of the National Wilderness System by the Forest Service of the U.S. Department of Agriculture. It adjoins Canada's Quetico Provincial Park, also managed as a canoe area.

The BWCA is best suited for high-quality outdoor recreation. It provides an opportunity to escape the sights, sounds, and smells of mass civilization, exchanging these for the vista of unspoiled lakes, the cry of the wolf, the sighting of the moose, the weird laugh of the loon, the soft dip of the paddle, and the fragrant wood smoke of the campfire.

Through the eons of time Nature made this a unique area. The glaciers carved it out. Then, in its relentless path to the sea, the water carved its way through the glacial drift, forming the streams, but leaving behind the many lakes, like shining jewels within the green of the forest.

ADMINISTRATIVE HISTORY

The Superior National Forest was established by Presidential proclamation in 1909.

The BWCA came into existence as a planned roadless-type recreation area in 1926. Before that, beginning in 1921, Arthur Carhart, then an employee of the U.S. Forest Service, made intensive studies of the then Superior Primitive Areas, that they be preserved as a recreation resources for all the people. Plans resulting from the studies called for "the enhancement, preservation, and development of the canoeing features of the Forest." The BWCA was thus one of the first large tracts in America to be managed as a primitive-type recreation area.

The Shipstead-Newton-Nolan Act of 1930 prohibited logging within 400 feet of shorelines, and any alterations of the natural water level of any lake or stream thus preserving the natural beauty of shorelines.

In 1934 President Roosevelt created a Quetico-Superior Committee. Its purpose was to consult and advise Federal Agencies and the State of Minnesota, and to make timely recommendations. This committee composed of dedicated citizens knowledgeable concerning the BWCA, has been extended by succeeding Presidents.

The Thyé-Blatnik Act of 1948 expedited the acquisition of lands within the area. In 1949 President Truman established an airspace reservation, prohibiting commercial or private airplanes from flying lower than 4,000 feet above sea level over the area except in cases of emergency or official public business.

In 1958 the name "Superior Roadless Areas" was changed to the "Boundary Waters Canoe Area".

In 1964, Congress passed the Wilderness Act, which established the National Wilderness Preservation System, and the BWCA was included as a unit of that System. That same year, Secretary of Agriculture Orville L. Freeman appointed a special BWCA Review Committee to study and make recommendations on its management and administration. Secretary Freeman issued regulations in December 1965, governing the administration of the BWCA in keeping with its primitive type recreation qualities. The regulations were for the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages.

THE PRESENT CRISIS

The BWCA has gone through many periods of crisis during its history as a primitive-type recreation area. Because of well defined and firm administrative policies, stalwart and well informed friends, and an alerted public opinion, the canoe area has withstood pressures brought to bear against it. It is today still the unique high quality outdoor recreation area it has long been. It attracts more recreation visitors than any other unit of the National Wilderness Preservation System.

The BWCA is now faced with the gravest threat to its continued existence which has long been recognized as a possibility, but only lately has it come out into the open. The threat is mining, an activity that would be most incompatible with this canoe area. This threat comes from all manner of adverse effects from mining upon the primitive environment within this unique area.

The Government does not own all the mineral rights within the BWCA. Of the total 1,029,000 acres involved, the Federal Government owns only 455,000 acres or approximately 44% of the mineral rights. Over 289,000 acres are

controlled by private interests, and the remainder by the State and County units of government. When the Federal Government acquired land in the area, only a small part of the mineral rights were sold to the United States with the surface. Most of the Federally owned mineral rights in the BWCA underlie original public domain tracts which were never patented.

Late in 1969, a mineral rights holder announced his intention to start core drilling in the BWCA. He proposed to move drilling equipment into the heart of the area in the early winter of 1970, when the ice was thick enough to support heavy equipment. The Forest Service has announced that it will use every official means at its disposal to protect the BWCA from the adverse effects of core drilling and mining.

In December 1969, the Izaak Walton League of America brought suit to prevent mineral exploration, drilling or mining in the Canoe Area. Besides seeking an injunction to prevent such activities, they also seek to prevent Forest Service officers from acknowledging that the prospectors have a right to conduct mining operations in the BWCA, and to prevent the State of Minnesota from allowing them to carry on mining activities over which they have control.

A Hearing was held in Duluth on January 14. Federal Judge Philip Neville took under advisement the matter of whether the plaintiff has the right, in this case, to sue the Federal Government.

Through its legal counsel the State advised the Court that it was willing to join the Izaak Walton League in legal efforts to prevent mineral explorations.

Because two defendants had not been personally served with a formal notice of the complaint against them Judge Neville ordered a recess. At the request of the plaintiff he ordered a continuation of the suit at a later date.

The Forest Service will enforce existing BWCA Regulation to the extent legally possible to: prohibit widening of trails and portages; prohibit construction of new portages, trails and roads on routes disapproved by the Forest Service; prohibit use of motorized equipment; prohibit use of aircraft; prohibit construction of permanent or semi-permanent camps and buildings; and particularly to maintain the primitive character of the area in the vicinity of lakes, streams, and portages.

(Prepared by: U.S. Forest Service, Division of Information and Education, Milwaukee, Wis.)

[From the Evening Star, Apr. 17, 1971]

FIVE GROUPS ASK COURT TO ORDER DDT BAN NOW

(By Roberta Horning)

Five environmental groups have returned to the U.S. Court of Appeals here to challenge Environmental Protection Agency Administrator William D. Ruckelshaus on his decision not to ban DDT immediately.

Calling Ruckelshaus' decision against the ban "irrational," the environmentalists asked the court to review or reopen their case against the pesticide.

The court papers were filed late yesterday by the Environmental Defense Fund, Inc.; the Sierra Club; the National Audubon Society; the Izaak Walton League of America and the West Michigan Environmental Action Council, Inc.

Ruckelshaus announced in January that he would "cancel" all DDT uses. The cancellation triggers lengthy administrative hearings that are expected to last about a year, but does not prohibit use of DDT meanwhile.

Ruckelshaus' action followed an order handed down by the appeals court as a result of the suit on DDT filed by the environmentalists.

In March, Ruckelshaus announced he was carrying out part of the court ruling by reviewing all remaining uses of DDT. But he announced he would not yet ban the pesticide, saying there is insufficient evidence that it poses an "imminent hazard to people or wildlife."

Yesterday the environmentalists called that decision "irrational in light of his finding that DDT is an acute hazard."

They also challenged Ruckelshaus' contention that removal of DDT from interstate commerce would result simply in pesticide users' resorting to other equally hazardous chemicals.

They said Ruckelshaus apparently was referring to Parathion. But if he believes this pesticide is more dangerous than DDT, it, too, should be ordered off the market, the environmentalists said.

They argued that it is appropriate for the court to review now the latest decision by Ruckelshaus because of the persistent failure by either Agriculture or EPA to respond adequately to their request for a ban.

Their suit was filed originally against Agriculture in December 1969. Ruckelshaus later became the defendant when pesticide registration responsibilities were transferred to his new agency in December.

Yesterday's legal action marks the first time environmentalists have moved against President Nixon's environmental enforcement agency.

EPA plans to begin public hearings late this month on the advisability of allowing continued use of DDT.

DDT is used mainly for cotton and citrus crops.

[From the Evening Bulletin, Aug. 5, 1970]

\$1.5 MILLION ASKED IN MARSHLAND DESTRUCTION SUIT

(By Donald B. Proctor)

The Cape May County Chapter, Inc. of the Izaak Walton League of America has filed a \$1.5 million damage suit in U.S. District Court, Camden, charging real estate developers with spoiling the marine life in tidal waters in and around the county by dredging operations and "destroying" marshlands on Gravens Island by filing them in.

Also named in the suit as defendants are Middle Township, its mayor, and several federal and state agencies.

The suit also asks the court to award \$1 million in punitive damages and \$500,000 in compensatory damages for the "malicious willful and illegal dredging and filling of Gravens Island" being carried on by the developers.

Gravens Island is located in the Great Sound, an inland body of tidal water between Stone Harbor and Avalon. The island comprises 360 acres, of which 250 are tidal marsh.

In the suit the developers are identified as Tito and Antoinetta Macchia, and James H. and Kathryn M. Ruetschlin, all of Avalon. They are identified as the owners of two real estate firms, John Doe, Inc., No. 1 and No. 2.

Filed late Monday afternoon by lawyers over the name of Walton chapter president, Jonathan Sayre, the suit charges that the real estate developers get fill and dike building material by dredging from navigable waters, to the detriment of fish and other marine life.

The purposes of filling parts of the island, the suit alleges, are to prepare for an eventual housing development and at another place what is called a housing subdivision.

The court is asked to enjoin the U.S. Army Corps of Engineers, the state Department of Environmental Protection and the state Division of Water Policy and Supply to stop issuing dredging and filling permits and to halt the issuing of land grants for the island.

It is asked further that Middle Township and Mayor Leroy H. May, Jr. be ordered specifically to repeal a zoning variance which has allowed the developers to "store sand" on a segment of the island.

Other defendants named in the suit are U.S. Secretary of the Army Stanley A. Resor, U.S. Army district engineer Col. James A. Johnson and commissioner Richard J. Sullivan of the Department of Environmental Protection.

The Izaak Walton groups says that because of tidal action, the island waters are rich in the production of fish and other marine life and the area, as a nursery and feeding ground, is essential to the success of commercial and sports fishing all along the Continental Shelf of the Atlantic Ocean.

The suit proposes that the money in damages, if awarded, be put in a trust fund to aid in the "protection and restoration of the marine and marine-related resources of Cape May County and the Middle Atlantic Eco (ecological) System."

Suggested as administrators of the trust are the Department of Environmental Protection and the Bureau of Sport Fisheries and Wildlife of the U.S. Department of the Interior.

The court is asked to tell the developers to remove all the dikes and other "impediments," including the sand storing area which impede the tides and block the navigable waters "on and around" the island. The developers also should be enjoined from developing all portions of the island north of Avalon blvd., the suit says.

Since August, 1965, according to the suit, the developers have carried on dredging and filling operations which are resulting in the "destruction" of the island and its "tidal marshes, tidal waters and related natural resources."

In 1966, the state gave the real estate firms a permit to dike off and fill 65 acres north of the boulevard but, the suit contends, they filled more than 90 acres. Now they have applied to the state for a riparian grant which would give them title to the 90 acres, the suit says.

South of the boulevard, it says, the developers have riparian title to a 600-foot wide strip, gaining this in 1967.

Before that year, claims the suit, the developers diked off about 200 acres of marshland south of the boulevard without getting a permit to do it "for the purpose of filling said marshland and eventually constructing a housing development thereon."

Up to now about 20 of those 200 acres have been filled, according to the suit.

In the United States District Court for the District of New Jersey (Camden Division)

Civil Action No. —

CAPE MAY COUNTY CHAPTER, INC., IZAAK WALTON LEAGUE OF AMERICA, BY JONATHAN SAYRE, PRESIDENT, R.D., No. 1, Box 36, CAPE MAY, NEW JERSEY 08204

On its own behalf and on behalf of all those people whose beneficial rights and interests in subaqueous lands, tidal marshes, tidal waters and related natural resources are being irreparably diminished, permanently damaged and destroyed by indiscriminate dredging and filling and other deleterious activities in and around Cape May County, New Jersey; and on behalf of all those people who are entitled to the full benefit, use and enjoyment of their environment free from damage caused by the failure of certain Federal, State and local government agencies to prohibit the filling, dredging and other activities adversely affecting the subaqueous lands, tidal marshes, tidal waters and related natural resources of the Middle Atlantic ecosystem; and on behalf of all those entitled to the full benefit, use and enjoyment of the unique natural resources of the United States and the Middle Atlantic ecosystem in which plaintiffs reside; and on behalf of all those people similarly situated, not only of this generation, but of generations yet unborn.

PLAINTIFFS

v.

TITO MACCHIA, ANTONIETTA MACCHIA, JAMES A. RUETSCHLIN, KATHRYN M. RUETSCHLIN, AVALON, NEW JERSEY

AND

JOHN DOE, INC., #1 AND #2 (FICTITIOUS NAMES FOR CORPORATIONS OWNED BY TITO MACCHIA, ANTONIETTA MACCHIA, AND/OR JAMES H. RUETSCHLIN, KATHRYN M. RUETSCHLIN)

AND

STANLEY A. RESOR, INDIVIDUALLY AND AS SECRETARY OF THE ARMY, WASHINGTON, D.C.

AND

COL. JAMES A. JOHNSON, INDIVIDUALLY AND AS DISTRICT ENGINEER, U.S. ARMY CORP OF ENGINEERS, CUSTOM HOUSE, 2ND AND CHESTNUT STREETS, PHILADELPHIA, PENNSYLVANIA 19106

AND

RICHARD J. SULLIVAN, COMMISSIONER, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, TRENTON, NEW JERSEY 08609

AND

LEROY H. MAY, JR., MAYOR, TOWNSHIP OF MIDDLE, COUNTY OF CAPE MAY, CAPE MAY C. H., NEW JERSEY 08210

DEFENDANTS

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES

JURISDICTION

1. The jurisdiction of this court is invoked under Title 28, United States Code, § 1331(a) (Federal question); and, under Title 28, United States Code, §§ 1343(3), 1343(4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights. . . ." and, under Title 42, United States Code, § 1983:

"Every person who under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

and, under Title 28, United States Code, § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

2. This action also arises under Article VI, Section 2, of the Constitution of the United States:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby; any Thing in the Constitution of Laws of any State to the Contrary notwithstanding." and involves the declaration and interpretation of the rights of the plaintiff and all the People of the United States secured by the Ninth Amendment of the Constitution of the United States:

"The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

and under the *due process clause* of the Fifth Amendment to the Constitution of the United States:

"... nor shall any person . . . be deprived of life, liberty or property, without due process of law . . ."

and under the *due process, equal protection, and rights, privileges and immunities clauses* of the Fourteenth Amendment of the Constitution of the United States:

"... no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and under the *commerce clause*, Article I, Section 8, of the Constitution of the United States.

3. This action also arises under the following Federal statutes:

The National Environmental Policy Act of 1969, 42 U.S.C.A. § 4331-47:

"The purposes of this act are: To declare a national policy which will encourage productive enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a council on environmental quality."

And, under the Fish and Wildlife Coordination Act, 16 U.S.C.A. § 661, *et seq.*:

"Except as hereafter stated in subsection (h) of this section [not applicable], whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or

agency of the United States, or by any public or private agency under federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular state wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development. (§ 662(a))."

And, under the Rivers and Harbors Act of 1899, Title 33, United States Code § 403:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

And, under the Refuse Act of 1899, Title 33, United States Code, Section 407:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States offices supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgement of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

And, under the Water Quality Improvement Act of 1970, Public Law 91-224, Section 21:

"Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards . . . (§ 21(b)(1))"

REQUEST FOR DECLARATORY RELIEF

4. Plaintiff seeks a declaration of rights under 28 U.S.C. § 2201 and § 2202.

CLASS ACTION

5. The members of the class are so numerous as to make it impracticable to bring them all before this Court. There are substantial questions of law and fact common to the class and common relief on behalf of all members of the class is sought.

6. This action is brought by the plaintiff, CAPE MAY COUNTY CHAPTER, INC., IZAAK WALTON LEAGUE OF AMERICA on its own behalf and on behalf of all those people whose beneficial rights and interests in subaqueous lands, tidal marshes, tidal waters and related natural resources are being irreparably diminished, permanently damaged and destroyed by indiscriminate dredging and filling and other deleterious activities in and around Cape May County, New Jersey, and on behalf of all those people who are entitled to the full benefit, use and enjoyment of their environment free from damage caused by the failure of certain Federal, State and local government agencies to prohibit the filling, dredging and other activities adversely affecting the subaqueous lands, tidal marshes, tidal waters and related natural resources of the Middle Atlantic ecosystem; and on behalf of all those entitled to the full benefit, use and enjoyment of the unique natural resources of the United States and the Middle Atlantic ecosystem in which plaintiffs reside; and on behalf of all those people similarly situated, not only of this generation, but of generations yet unborn.

7. The claims of the representative being typical of the claims of the members of the class, and the defendants' actions having substantial effect upon all members of the class thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole, this action is proper class action under Rule 23 (b) (2), Federal Rules of Civil Procedure.

8. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants, so that this action is a proper class action under Rule 23(b) (1) (A).

9. Adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members of the class not party to this litigation so that this action is a proper class action under Rule 23(b) (1) (B).

10. The members of the class are fairly and adequately represented by this plaintiff and the plaintiff has no interest adverse to that of any individual who might be entitled to the relief sought herein.

PARTIES

11. Cape May County Chapter, Inc., Izaak Walton League of America, is a non-profit organization of citizens incorporated in the State of New Jersey and dedicated to the preservation and restoration of the environment. As a local component of the Izaak Walton League of America, an Illinois Corporation, the Chapter has been chartered among other educational functions to foster public appreciation of marine and marine-related resources, and to engage in action programs for their protection. The League has a long history of activity in conservation matters and natural resource preservation. It has been active for many years in urging Congressional and other legislative action and has participated before as a plaintiff in class actions involving environmental litigation.

12. John Doe, Inc., #1 and #2 are fictitious names for corporations in which Macchia, et al have a controlling interest. The plaintiff believes that Macchia, et al may have applied for various permits from the Department of Environmental Protection, State of New Jersey, under the name of unknown corporation of which Macchia, et al have a controlling interest. Some of the allegations applying to Macchia, et al may apply to other corporations and plaintiff intends to name the corporations upon their discovery.

13. Defendant Colonel James A. Johnson is Director Engineer of U.S. Army Corp of Engineers, Custom House, Philadelphia, Pennsylvania and is charged

with the responsibility of issuing permits for all dredging activities in U.S. navigable waters and with the enforcement of the Rivers and Harbors Act of 1899 and the Refuse Act of 1899 within the Philadelphia District, Corp of Engineers.

14. Defendant Stanley Resor is Secretary of the Army and has under his control and jurisdiction the activities of the U.S. Army Corp of Engineers.

15. Defendant Richard J. Sullivan is Commissioner of the Department of Environmental Protection, State of New Jersey. He is charged with the responsibility of protecting New Jersey's wetlands and the State's natural resources.

16. Defendants Tito Macchia, Antonietta Macchia, James H. Ruetschlin, and Kathryn M. Ruetschlin are real estate partners having an interest in the lands which are the subject of this suit. In addition, they may be involved in other corporations, at this time unknown, which have an interest in the above lands.

17. Defendant Jerry H. May, Jr., is Mayor of Township of Middle from whom Macchia, et al secured a zoning variance allowing them to "store sand" on twenty acres within the dyked area on the southern end of Gravens Island.

FACTS

18. Since August 28, 1965, Tito Macchia, Antonietta Macchia, James A. Ruetschlin, and Kathryn M. Ruetschlin (hereinafter referred to as Macchia, et al) with the knowledge, and on occasion with the consent, of the U.S. Army Corp of Engineers, the State of New Jersey, and the Township of Middle, Cape May County, New Jersey, has undertaken a series of dredge and fill operations which are now resulting in the destruction of Gravens Island and the subaqueous lands, tidal marshes, tidal waters and related natural resources thereof.

19. Gravens Island now consists of approximately 110 acres of filled land and 250 acres of tidal marsh, located in the Township of Middle, Cape May County, New Jersey (Tax Map 5D—Block 121, Lot 1.) It is bounded on the west and north by Ingram Thorofare, on the east by Gravens Thorofare and on the south by Long Reach. These waters are the tributaries of Great Sound and are in fact and in law the navigable waters of the United States.

20. The entire 360 acres of Gravens Island are, or at one time were, laced with minor and unnamed tributaries which are, or at one time were, in fact and in law "navigable," and subject to the ebb and flow of the ordinary mean high tide.

21. Free-flowing tidal action makes the Island highly productive for finfish, shellfish, and other marine life as well as habitat, nursery, and feeding grounds essential to the fisheries of the Continental Shelf of the Atlantic Ocean which is in close proximity to it and essential to the food chain of the Middle Atlantic ecosystem.

22. On May 22, 1953, through the Submerged Lands Act (Public Law 31, 83rd Congress) Chapter 65, the Federal Government confirmed the title of the State of New Jersey in the subaqueous lands of Gravens Island which were for the most part "permanently or periodically" covered by the mean high tide.

COUNT I

(Relates to Portion of Gravens Island North of Avalon Boulevard)

23. Plaintiff incorporates by reference paragraphs 18 to 22.

24. On August 28, 1965, Macchia, et al held, by virtue of riparian ownership, certain limited interest in and to portions of Gravens Island and conveyed the same to the Cape May County Bridge Commission, Cape May Court House, New Jersey for the sum of ONE DOLLAR (\$1.00). (Deed Book No. 1133, page 679). The conveyance to the Commission, for the purpose of constructing "new" Avalon Boulevard, was made "Under and subject to the rights of the State of New Jersey, the United States, and the public in any part of the premises in question lying below the ordinary high water line of Ingram Thorofare, Gravens Thorofare or any other tide waters crossing or bounding the premises in question . . . Also under and subject to rights, if any, of the State of New Jersey, in and to that part of the premises in question now or formerly flowed by tide water."

25. The conveyance of the deed was also subject to a reservation by Macchia, et al of the right to construct one intersection across Avalon Boulevard, a distance of 70 feet from curb to curb, so that he, his heirs and assigns would have access to and from the lands and waters of Gravens Island north and south of Avalon Boulevard.

26. In 1966, the Department of Conservation and Economic Development, State of New Jersey, granted a permit (No. 66-301) to Macchia, et al to dyke off and fill 65 acres of Gravens Island north of the then newly constructed Avalon Boulevard.

27. Macchia, et al, exceeding the terms of the permit, dyked and filled more than 90 acres, completely obliterating the tidal character of the northern portion of the Island, including several small, unnamed tributaries which were in fact and in law navigable and subject to the ebb and flow of the ordinary mean high tide. The action of Macchia, et al caused irreparable damage to publicly-owned marine and marine-related resources which depended on that portion of the Island for their existence, and over which the State of New Jersey exercised a fiduciary obligation for the public benefit.

28. On information and belief, plaintiff avers that the dyking material was obtained from construction of Avalon Boulevard and from dredgings in the navigable waters of the United States adjacent to the Island.

29. On information and belief, plaintiff avers that the permit by the Corps of Engineers to Macchia, et al, if any, to dredge such material and deposit it on the northern portion of Gravens Island was a clear violation of the Fish and Wildlife Coordination Act, the Refuse Act and the Rivers and Harbors Act.

30. On information and belief, plaintiff avers that Macchia, et al has applied for a riparian grant from the State of New Jersey for title to the filled acreage of Gravens Island north of Avalon Boulevard, which application is still pending.

31. The plaintiff asserts that the granting of such title by the State of New Jersey to Macchia, et al would further violate the public trust and result in further damage to the ecology and resources of Gravens Island and the adjacent environment of Cape May County.

COUNT II

(Relates to Portion of Gravens Island South of Avalon Boulevard)

32. Plaintiff incorporates by reference paragraphs 18 to 22.

33. On May 17, 1967, Macchia, et al applied to the Resources Development Council of the State of New Jersey for a riparian grant of a strip of land 600 feet wide, south of and parallel to Avalon Boulevard, stretching from Ingram Thorofare to Gravens Thorofare. Macchia, et al submitted a surveyors report stating that the entire area named in the application was .4 to 1.0 feet above the mean high tide, thereby implying that the State of New Jersey had no further interest in and to said lands.

34. On or about May 17, 1967, the Resources Development Council granted this land to Macchia, et al. To plaintiff's knowledge and belief, the application is still pending and has not been approved by the Commissioner, Department of Conservation and Economic Development, nor by his successor, the Commissioner of the newly constituted Department of Environmental Protection.

35. On information and belief, plaintiff asserts that only a portion of said 600 feet wide strip had been filled as a consequence of the construction of Avalon Boulevard.

36. Plaintiff asserts that a riparian grant of this land to Macchia, et al would result in further damage to the ecology and resources of Gravens Island and to the adjacent environment of Cape May County.

COUNT III

(Relates to Illegal Dyking and Filling of Portions of Gravens Island South of Avalon Boulevard)

37. Plaintiff incorporates by reference paragraphs 18 to 22.

38. Prior to April 11, 1967, Macchia, et al, without a permit from the State of New Jersey or the United States Army Corps of Engineers, dyked off approximately 200 acres of Gravens Island marshland south of Avalon Boule-

ward for the purpose of filling said marshland and eventually constructing a housing development thereon.

39. The dyking of this southerly portion of Gravens Island obstructed the flow of tidal waters, damaging the publicly owned marine and marine-related resources thereof and jeopardizing the adjacent environment of Cape May County and the fisheries of the Middle Atlantic ecosystem.

40. On April 11, 1967, the Commissioner of the Department of Conservation and Economic Development ordered defendants Macchia, et al to cease further dyking.

41. Plaintiff asserts that it is feasible to remove these dykes, which are still in existence, so as to aid in the restoration of the southern portion of Gravens Island and the public resources thereof.

42. On information and belief, plaintiff avers that the dyking material was obtained from dredgings in the navigable waters of the United States adjacent to Gravens Island.

43. On information and belief, plaintiff avers that the permit by the Corps of Engineers to Macchia, et al, if any, to dredge such material and deposit it on the southern portion of Gravens Island was a clear violation of the Fish and Wildlife Coordination Act, the Refuse Act and the Rivers and Harbors Act.

44. Prior to December 4, 1969, defendants Macchia, et al began filling in the extreme southern portion of the dyked area with material dredged from Long Reach, a navigable waterway of the United States. By December 4, 1969, approximately 5 acres had been filled.

45. On or about January, 1970, the Township of Middle halted the filling as a violation of Zoning Ordinance No. 236-69, Article 7, Section 2, under which the southern portion of Gravens Island had been designated for its highest and best use as a wetlands district.

46. On April 16, 1970, the Township of Middle, on recommendation from the Township Zoning Board, granted a variance to said ordinance #236-69 to Macchia, et al for the purpose of "storing sand," in that portion of Gravens Island inside of the dykes which Macchia, et al had already begun filling.

47. Plaintiff asserts that the variance was a subterfuge to permit Macchia, et al to continue their illegal filling for the purpose of eventually constructing a housing subdivision thereon.

48. Plaintiff asserts that at the present date approximately 20 acres of the southern portion of Gravens Island have been filled from dredge material obtained from Long Reach, a navigable waterway of the United States.

49. Plaintiff asserts that a permit from the U.S. Army Corps of Engineers, if any, to Macchia, et al to dredge such material for the purpose of filling the southern portion of Gravens Island was a violation of the Fish and Wildlife Coordination Act, the Refuse Act of 1899 and the Rivers and Harbors Act of 1899.

50. Plaintiff asserts that any permits issued to Macchia, et al by the Department of Environmental Protection for the purpose of continuing the dredging and filling and other related activities on the southern portion of Gravens Island will lead to destruction of Gravens Island and the publicly-owned marine and marine-related resources thereof over which the State of New Jersey has a fiduciary obligation; and plaintiff further asserts that any such permits will result in irreparable damage to the environment of Cape May County and to the Middle Atlantic ecosystem.

51. Plaintiff asserts that any further permits issued to Macchia, et al by the United States Army Corps of Engineers for the purpose of continuing the dredging and filling and other related activities on or near the southern portion of Gravens Island will lead to the destruction of Gravens Island and the navigable waters and related marine resources thereof, and will be in violation of the Fish and Wildlife Coordination Act, the Rivers and Harbors Act, the Refuse Act, the National Environmental Policy Act, and the Water Quality Improvement Act.

COUNT IV

52. Plaintiff incorporates by reference paragraphs 18 to 22.

53. On June 11, 1970, Macchia, et al applied to the Department of Environmental Protection, Division of Water Policy and Supply of the State of New Jersey, to divert up to 500,000 gallons per day of fresh water from wells in the Township of Middle, Cape May County (Application No. 1525) to serve the proposed development of Gravens Island in said Township.

54. Plaintiff asserts that issuance of such permit by the Department of Environmental Protection, Division of Water Policy and Supply, will contribute to the permanent destruction of Gravens Island and the publicly-owned marine and marine-related resources thereof as well as to the irreparable damage to the environment of Cape May County and to the Middle Atlantic ecosystem.

REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES

Wherefore, the plaintiff respectfully requests:

1. A declaration of the rights of the people of the United States and of the State of New Jersey, in particular, to the protection of their environment and of the natural resources of the Middle Atlantic ecosystem which are held in public trust for the full benefit, use and enjoyment of the people by the State of New Jersey, the several States, and the United States.
2. A declaration of the rights of the people of the United States and of the State of New Jersey, in particular, to the full benefit, use and enjoyment of the environment and natural resources of the Middle Atlantic ecosystem without degradation from the indiscriminate dredging, filling and other related activities in the navigable waters of the United States and their tributaries in and adjacent to Cape May County, New Jersey.
3. A declaration of the rights of the people of the United States and of the State of New Jersey, in particular, to the protection of the subaqueous lands, tidal marshes, tidal waters and related natural resources of Cape May County in the Middle Atlantic ecosystem, all of which public property is held in public trust for the full benefit, use and enjoyment of the people of this and future generations.
4. A declaration that the continued failure of defendant Federal, State and local authorities to protect the ecological and commercial value of subaqueous lands held in trust for the public is in violation of the rights of the people of the United States guaranteed under the Ninth Amendment of the Constitution of the United States and protected by the due process clause of the Fifth Amendment of the Constitution of the United States, by the due process, equal protection, and rights, privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States, by the commerce clause of the Constitution of the United States, and by the Rivers and Harbors Act of 1899, by the Refuse Act of 1899, by the Fish and Wildlife Coordination Act, by the National Environmental Policy Act of 1969, and by the Water Quality Improvement Act of 1970.
5. That the United States Army Corps of Engineers be enjoined and ordered to revoke and suspend any and all permits issued to Macchia, et al for the purpose of dredging and filling Gravens Island.
6. That the United States Army Corps of Engineers be enjoined and ordered from issuing any further permits to defendants Macchia, et al for the purpose of dredging and filling Gravens Island.
7. That the State of New Jersey, Department of Environmental Protection, be enjoined and ordered from making any grants of subaqueous lands, or lands which were at one time subaqueous, of and adjacent to Gravens Island.
8. That the State of New Jersey, Department of Environmental Protection, be enjoined and ordered from issuing any permits to dredge and fill additional subaqueous lands of Gravens Island.
9. That the State of New Jersey, Department of Environmental Protection, Division of Water Policy and Supply, be enjoined and ordered from issuing any permit to defendants Macchia, et al for the purpose of diverting well water to supply and serve the proposed development on Gravens Island.
10. That the Township of Middle, Cape May County, New Jersey, be enjoined to repeal any variance to Zoning Ordinance No. 236-69 granted to defendants Macchia, et al for the purpose of "storing sand" on Gravens Island.
11. That defendants Macchia, et al be enjoined and ordered to remove all dykes and other impediments to the tides and navigable waters on and around Gravens Island.
12. That defendants Macchia, et al be enjoined and ordered to pay any costs associated with necessary and practicable measures, as determined by the New Jersey Division of Fish and Game, Department of Environmental Protection, to restore that portion of Gravens Island south of Avalon Boulevard to its original condition.

13. That the defendants Macchia, et al be enjoined and ordered from developing for any purpose that portion of Gravens Island north of Avalon Boulevard.

14. That the Court award judgment in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000) for compensatory damages, and judgment in the amount of ONE MILLION DOLLARS (\$1,000,000) for punitive damages for the malicious, willful, and illegal dredging and filling of Gravens Island by defendants Tito Macchia, Antonietta Macchia, James A. Ruetschlin, Kathryn M. Ruetschlin, and John Doe, Inc., #1 and #2; such compensatory and punitive damages to be placed into a special trust fund, administered by the State of New Jersey, Department of Environmental Protection, and by the Bureau of Sport Fisheries and Wildlife, United States Department of the Interior, with accounting to the court, for the purpose of aiding the protection and restoration of the marine and marine-related resources of Cape May County and the Middle Atlantic ecosystem.

15. That the Court award reasonable costs and attorneys' fees.

16. That the Court award such other relief as it shall be just and proper under the circumstances.

Respectfully submitted,

CAPE MAY COUNTY CHAPTER, INC.;
IZAAK WALTON LEAGUE OF AMERICA
By Counsel

COHEN, HIRSCHKOP, HALL & JACKSON
Attorneys for Plaintiff

BERNARD S. COHEN,
110 North Royal Street,
Alexandria, Virginia 22313

Of Counsel:

BROWN, CONNERY, KULP, WILLIE, PURNELL & GREENE
518 Market Street,
Camden, New Jersey 08102.

VERIFICATION

State of New Jersey,

City/County of _____, to-wit:

JONATHAN SAYRE, being duly sworn, upon his oath, deposes and says:

1. I am the President of the Cape May County Chapter, Inc., Izaak Walton League of America, the plaintiff herein.

2. I have read the foregoing complaint.

3. The allegations are true based upon my personal knowledge and where indicated upon information and belief.

JONATHAN SAYRE,
*President, Cape May County Chapter, Inc.,
Izaak Walton League of America.*

Subscribed and sworn to before me this _____ day of _____, 1970.
My Commission expires: _____

AMERICAN TRIAL LAWYERS ASSOCIATION,
Cambridge, Mass., March 29, 1971.

MEMBERS OF SUBCOMMITTEE ON ENVIRONMENT,
*Senate Commerce Committee,
Old Senate Office Building,
Washington, D.C.*

GENTLEMEN: In behalf of the Environmental Law Section of the American Trial Lawyers Association, I would like to submit the following statement concerning Senate Bill 1032 establishing, among other things, a right of action for relief for (sic) protection of the environment.

First, I would like to compliment the drafters of the bill, as it is basically well conceived and well delineated. I would however, like to go on record favoring the following changes in the said bill:

1. I believe that the bill should be amended by adding Section 5 sub "a" to the following effect: The court may award actual damages to the plaintiff where damages are proven to the court's reasonable satisfaction and that

further the court may award to the plaintiff's attorneys reasonable attorney fees and costs of expert witnesses as required in the preparation and proof of evidence.

2. The bill should, in our opinion, provide for punitive damages where the acts of pollution or environmental impairment are proved to be as a result of willful or wanton misconduct of the defendant.

3. We believe that in as much as the act should be uniform throughout the United States as to statutes of limitation, that a specific statute should be provided for actions proved under this bill, and that such statute of limitations cover a sufficient period of time subsequent to the commencement of damage or environmental impairment and after the discovery of the fact of damage or impairment so as not to substantially interfere with the plaintiff's right to obtain full redress under the act.

We note the House Bill 5074 is comparable to Senate Bill 1032 and that the house bill incorporates the referred to features of reasonable attorney fees and expert witness fees. We respectfully suggest that it may be in order for Counsel for your respective committees to communicate concerning these comparable bills.

I am taking the liberty of sending a copy of this communication to our Washington Co-ordinator, Mr. Wayne J. Smith of 201 Massachusetts Avenue N.E., Washington, D.C. 20002, phone (202) 546-4833. In the event you wish any further statement or elaborations upon this statement, please contact Mr. Smith and we will be glad to oblige.

We respectfully submit that the trial lawyers should retain meaningful roles in bringing actions against polluters in particular situations. It is doubtful that any governmental agency can hope to replace the well informed, well qualified courtroom advocate in coping with particular local situations of environmental degradation. Hence legislation in this area should provide for the lawyers fees and expenses.

We appreciate the considerable efforts of Congress in working toward passage of truly meaningful legislation in terms of ultimate improvement or protection of our environment. The issues have truly "come of age". The evidence coming in from all sides—from every scientific quarter—is truly staggering in its portent and it now appears we must all completely dedicate ourselves towards aborting the accelerating pace of environmental degradation or our answers to the predictable questions of the next generation will be admissions of guilt of severest magnitude.

Respectfully submitted,

ROSCOE B. HOGAN.

STATEMENT OF THE COUNCIL OF HOUSING PRODUCERS

The Council of Housing Producers is an organization made up of twelve of the largest housing producers in the United States. In 1970 the members of the Council produced in excess of 55,000 units of residential construction. Since its inception in 1968, the Council has been concerned with the problems of low and moderate income housing; sources of equity funding and mortgage capital; more feasible utilization of land; changes needed in building codes and zoning regulations; construction techniques; product research and development of building materials; federal, state and local taxation policies; and other constraints and issues of concern which affect housing production in the United States.

As producers of housing, Council members are all closely involved with environmental questions. The members have an awareness to the environmental matters which affect our ecology and take them into account in the planning of their developmental programs. The Council is in full support of the basic goal of environmental protection which the sponsors of the bill are endeavoring to achieve. It is concerned, however, about the means by which S. 1032 seeks to achieve that goal. Specifically,

The bill is excessively broad in its coverage;

The bill may be subject to abuse; and

The bill remits important technical and policy decisions to courts which probably lack the technical knowledge and experience necessary to make valid judgments.

The bill would authorize "[a]ny person [to] maintain an action for declaratory or equitable relief in his own behalf or on behalf of a class of persons similarly situated" upon complaint supported by affidavits of two technically qualified persons stating that "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." [emphasis added]

Once the plaintiff has made a prima facie case that the development activity may harm the environment, the defendant has the burden of proving that there is no such harm or that there is no feasible or prudent alternative to the activity undertaken, and that such activity is required for the public health, safety and welfare. This immediately shifts the burden of proof to the developer on the basis of a subjective judgment that an activity may cause the proscribed consequence.

The bill makes it relatively simple for an individual or a group to restrict a housing development for a long period of time while the question of whether the development "may reasonably harm the environment" is litigated. The litigation process may take years. In the meanwhile, the developer may have millions of dollars tied up in a project with which he is unable to go forward. Only one such suit could put a small developer or builder out of business.

The bill also provides that the plaintiff, while seeking a declaratory judgment or equitable relief need not provide a bond to cover the damage to the defendant-developer which would result from an interruption of development, if the court reasonably believes that the bond requirement would hinder the plaintiff in the maintenance of the action and tend to prevent a full and fair hearing on the development activities. This provision serves to encourage frivolous or specious litigation and affords no protection for the developer who may suffer considerable economic damage as a result of a suit authorized by the bill.

In addition to the impact this bill would have on individual builders, it might also have an impact on the production of housing in the United States. A few actions of the type authorized by the bill against large development projects could interrupt or stop entirely the production of a large number of housing units. In fact, the mere threat of time-consuming and expensive class action could inhibit the development of new housing. Indeed it well could impede the development of new communities which are sorely needed in order to disperse our burgeoning population from the central cities. Thus, one of the effects of the proposed bill may be to interfere with the achievement of the national housing goal of the construction or rehabilitation of 26 million housing units within the next decade as set by Congress in the Housing and Urban Development Act of 1968.

The Council also believes that the bill is sufficiently broad to be used for purposes other than those for which it is intended. For example, under the proposed bill it would be possible for suburban residents to postpone indefinitely low and moderate income housing projects in suburban areas under the guise of environmental protection. There has been considerable resistance to low income and minority housing in some suburban areas. Suitable sites with the necessary zoning are becoming more difficult to obtain. This bill would greatly facilitate the effort of those dedicated to maintaining the status quo to keep lower economic groups or racial minorities out of a particular community.

The Council also is concerned about the bill on the grounds that it remits to courts decisions of a technical nature in which courts and judges have little knowledge or experience. The Act requires a determination that "unreasonable pollution, impairment, or destruction . . . reasonably may result" from the activity challenged. But it does not create standards against which this determination must be measured. The bill also permits a court, in granting relief, to "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."

It is the Council's opinion that these provisions give courts an excessively broad mandate. The bill leaves to the courts the resolution of major policy issues which should be resolved by the local and federal legislative bodies.

The Council believes that the important question of environmental policy should not be developed by the courts in piecemeal fashion. Rather, it would be preferable for environmental questions to be resolved by general rules prescribed pursuant to statutes containing clear guidelines. The rules should

be developed only after all affected persons are afforded a hearing on the merits. This procedure has several advantages to recommend it over the piecemeal evolution of environmental policy by the courts in the preemptory manner which could result under S. 1032.

First, the rule making procedure permits greater access to technical and scientific knowledge and facilitates the development of a broad policy which takes into consideration all of the relevant factors. Courts, on the other hand, are limited to an examination of the specific issues in dispute. Second, under a rule making procedure, the relevant restrictions will be stated *before*, not after, developers have made large financial commitments to a particular project. Thus, developers will be able to proceed with much needed housing production with the assurance that the environmental requirements have been met. This is both fairer and more economic than having to litigate the environmental questions after development has begun. Third, broad social policy, such as the question of what constitutes "unreasonable pollution, impairment, or destruction," should be determined in the context of the broad range of national policies. The legislative bodies are far better suited for this kind of policy making than is the judicial system.

The Council is of the view that irreparable damage could result to the housing industry, developers, builders and the achievement of the housing goals. It could also be used by the opponents of low and moderate income housing and retard its production. For these reasons, the Council would urge that the measure not be enacted.

NEAR, FRIEDMAN & CRAWFORD,
ATTORNEYS AT LAW
San Francisco, Calif., April 20, 1971.

MR. BICKWIT

*Environmental Subcommittee, Senate Commerce Committee,
U. S. Senate, Washington, D.C.*

DEAR MR. BICKWIT: I have been asked to comment on the proposed Environmental Protection Act of 1971. As a lawyer actively engaged in environmental law matters I heartily endorse this Act. Accordingly, if my comments seem excessively critical the explanation is that I would like this Act to become effective legislation rather than a mere declaration of policy.

1. The concept of a right to a decent environment embodied in the preamble of the Act is vital and would serve as a make weight argument in any lawsuit involving environmental issues.

2. I surmise that the theory of liability contained in Sections 3 and 4 is that of common law nuisance. As you know, this concept has not been an effective tool to protect the environment, so perhaps this is a specious right.

3. In Section 3 the standing to sue conferred to any person or class of persons is a noteworthy feature and allows for entry into the courts. Conferring this right to private persons is a recognition that persons can initiate legal actions themselves if the government defaults in its obligations. The mere existence of this right should have the salutary effect of stimulating more vigorous enforcement by the government.

4. In Section 3(b), what does interpretation of "person" mean when you mention any department, agency, . . . of the United States? Does this mean that any governmental agency can bypass their respective enforcement agency, i.e. the District Attorney, and initiate a lawsuit? Does it mean that the government itself can be sued if it is engaged in the forbidden activity?

5. In Section 4(d) you allow for costs of suit. I might suggest that the success or failure of any lawsuit usually depends on the skill and vigor of the attorneys. This is no surprise to anybody engaged in litigation. The implication of this contention is that some provision for reasonable attorney's fees is certainly desirable as an incentive to attract competent legal representation. In my judgment this is essential. I've reviewed all the grounds for allowing attorney's fees in public interest cases and would be willing to forward this information or testify if necessary.

6. Concerning the granting of relief in Section 55, maybe it is politically unrealistic but the notion of damages, even treble or punitive damages, should be considered. This would put some sharp teeth into the Act.

I hope these comments will be useful to you and the Committee. Please feel free to solicit further information from me.

Kind regards,

GARY J. NEAR.

CHAMBER OF COMMERCE OF THE UNITED STATES,
Washington, D.C., April 29, 1971.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Environment, Senate Commerce Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the 3,800 chambers of commerce and trade and professional associates and the over 39,000 business firms which comprise our membership, the National Chamber takes this opportunity to oppose the Environmental Protection Act, S. 1032, now before your subcommittee.

From a judicial standpoint, S. 1032 has several shortcomings, including its failure to adequately protect defendants (in Section 4) from groundless suits which might be initiated if this bill were enacted. However, the subcommittee will no doubt receive testimony on the specific legal provisions of S. 1032 from witnesses highly competent in the law profession.

The National Chamber's opposition to the bill encompasses the very principle on which the bill is based—reliance on the court system to define "pollution" on a case-by-case basis.

The most effective, equitable, and expeditious procedure to prevent and abate pollution of the physical environment is through adoption and enforcement of environmental quality standards, such as are authorized by the Federal Water Pollution Control Act and the Clean Air Act. These standards (regional, state-wide or national), in effect, define "pollution." Pollution would occur if the quality of the physical environment were to fall below these established standards.

The chief advantage of the quality standards approach to pollution is that a mechanism is provided to protect man's *total* environment—physical, social, and economic. Actions directed at any one of these components of the total environment must affect the other two, and by striving for improvement of the total environment, over-emphasis on a single component will be avoided. Neither economic growth without regard to its effects on the physical and social environments, nor protection of the physical environment without concern for social and economic costs, should be allowed to occur.

Congress, in federal legislation on water pollution control and air pollution control, has continuously recognized the wisdom of the environmental quality standards concept. The establishment of these standards requires maximum participation of all sectors of society—individual citizens, as well as private organizations—at public hearings. Based on the public record and the technical competency of regulatory agencies, such standards are developed through administrative procedures. The promulgation and enforcement of properly developed quality standards assure the greatest net benefit to our total environment. Current law—federal and state—provides for review of promulgated standards on their merits.

Enactment of S. 1032, or any bill under which pollution would be defined on a case-by-case basis, would destroy any systematic approach to pollution control and prevention. Existing federal, state, and local pollution control efforts—all of which are based on the quality standards principle established in the Federal Water Pollution Control Act and the Clean Air Act—would have to be abandoned until a court ruling was obtained on individual emissions or effluents. This could take years, maybe decades.

The court system is simply not capable of handling such a case load, nor is it generally equipped to deal adequately with the highly technical issues involved. As recently as March 23, 1971, the Supreme Court of the United States, in rejecting a suit filed by the State of Ohio concerning pollution of Lake Erie, stated that the Court is "illequipped for the task of fact-finding," a task which S. 1032 would impose on the entire district court system of the United States.

It is the view of the National Chamber that S. 1032 precludes expeditious action to prevent and abate pollution of the physical environment. The necessity of improving our total environment—social, economic and physical—also mandates that the underlying principle of S. 1032 be rejected.

We will appreciate your consideration of our views—and request that this letter be made a part of the hearing record on this legislation.

RUBBER MANUFACTURERS ASSOCIATION,
Washington, D.C., April 30, 1971.

Senator PHILIP A. HART,
Chairman, Subcommittee on Energy, Natural Resources, and the Environment,
Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: In behalf of the almost 200 member companies of the Rubber Manufacturers Association we wish to submit the following statement for the record of the hearings on S. 1032, the Environmental Protection Act of 1971.

We are in complete accord with the intent of this legislation, as stated in Section 2, that every person has the right and responsibility to protect the air, water and land from unreasonable pollution. This has been incorporated in previous laws. Such has been the stated purpose of environmental control legislation recently enacted by Congress and certainly will be a subject of continuing concern.

The RMA considers existing environmental statutes to be sufficient to achieve and maintain a healthful environment. Furthermore, the existing legislation adequately provides for governmental or citizen redress against polluters. Any addition to existing law regarding class action is unnecessary and would indeed be a detriment to effective pollution control.

The awarding of bounties or damages, as provided for in class actions, would invite numerous actions predicated upon either the crass desire for financial gain or malicious harassment of industry rather than a sincere attempt to insure the enforcement of environmental quality standards.

Implementation of the Water Quality Act of 1965 and the 1970 Clean Air Act amendments provide the means to attain a quality of environment consistent with the highest levels of available technology. And we submit that the penalties already provided for in statute and pending legislation—such as fines of up to \$25,000 per day and/or possible imprisonment—are inducement enough to insure compliance.

In addition, the RMA feels that S. 1032 could dilute the effectiveness of State and Federal environmental programs. Section 5 of the bill gives the courts the authority to "impose conditions on the defendant which are required to protect the air, water, land, or public trust." Such provision gives the courts an apparent precedent setting authority to establish environmental standards of their own.

If the intent of the bill is to place the establishment of standards in the courts, we submit this is not desirable. The public interest is best served when all parties are afforded the opportunity to comment on proposed Federal and State regulations, and State implementation plans.

We submit that court authority in this area could well result in the dual enforcement of a condition already under state jurisdiction.

Further, we find the absence of any consideration regarding the compliance programs and the availability of technology to carry out the program is of great concern to us.

This Industry has clearly demonstrated its willingness to comply with environmental standards. As a consequence, we fail to see how national goals would be furthered by the establishment of the class action pollution suit. It is our strong opinion that the direct opposite would be accomplished.

Sincerely,

W. J. SEARS,
Vice President.

NATIONAL ASSOCIATION OF HOME BUILDERS,
Washington, D.C., May 6, 1971.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Energy, Natural Resources and the Environment,
Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This statement is submitted on behalf of the National Association of Home Builders with respect to S. 1032, the Environmental Protection Act of 1971.

The National Association of Home Builders is the trade association for the American home building industry. Our membership consists of some 52,000 in 492 local and state associations throughout the 50 states and Puerto Rico. Our members build approximately two-thirds of the homes and apartments in this country built by professional builders.

There is probably no industry more deeply involved or concerned with environment than the home building industry. Evidence of this is contained in NAHB's 1971 Statement of Policy adopted by our 800 member Board of Directors at its annual meeting in Houston, Texas in January of this year. On the subject of environment that statement says:

"Increased public awareness of the environment has been a major contributing factor to daily decisions influencing how we live and will live in the future. NAHB is on record as being in accord with this awareness. We support government programs to improve the environment as they affect community development. We do not believe that full housing production is incompatible with environmental issues. We call on conservationists and others concerned with preserving and re-establishing acceptable environment levels to join with us in developing orderly programs which will permit reasonable progress toward both goals. We strongly urge full funding at all levels of government of programs already established."

We are as equally committed to doing our part in attaining the 10-year housing goal of 26 million new and rehabilitated dwelling units established by the Housing and Urban Development Act of 1968 as we are to the principles of environmental protection. It is for this reason that we are concerned about the provisions of S. 1032, although we subscribe wholeheartedly to its purposes.

We feel that the bill is so broad that it will result in creating problems as serious as those it attempts to solve. Without setting forth any standards for environmental protection or establishing a qualified administrative body to develop any kind of criteria, the bill gives any person the right to sue on his own behalf, or on behalf of a class of persons similarly situated, to stop "unreasonable pollution, impairment, or destruction" of "the air, water, land and public trust of the United States." To initiate such a suit all that the plaintiff need do is to produce "two technically qualified persons" who believe such damage will result from the defendant's action.

Once the plaintiff makes a prima facie showing that the defendant's actions have resulted or may result in such pollution, the burden of proof is shifted to the defendant, who then may have to expend considerable resources to overcome this presumption of guilt. In addition, the plaintiff is not required to furnish bond from which some recompense for such expenditures can be drawn unless the defendant can show irreparable damage, and then only if such a requirement would not reasonably hinder plaintiff's maintenance of the action.

It is the lack of any objective standards of what would constitute unreasonable pollution, impairment or destruction of the environment that gives us such concern about this bill. A builder or anyone else would have no way of knowing prior to undertaking an activity covered by the bill whether a court could be expected to hold that the activity would have the proscribed effect. He would in effect be proceeding at his own risk and at the possible risk of suffering substantial financial losses. In addition to the general lack of standards, the term "public trust" is also undefined and frankly we have no idea of what would be covered by it.

There is nothing in the bill to prevent the bringing of capricious class action suits under its proposed authorization. Such suits and even their prospect could have serious disruptive effects on home builders and their operations. The single family and the tract builder, the subdivision developer and the constructor of multifamily units daily face a myriad of problems. Long before the first foundation footings are poured he has had to concern himself with, among other things, an adequate supply of construction and mortgage financing; sufficient land to make the project feasible; compliance with local zoning and building codes; an adequate labor force; a suitable and sufficient supply of construction materials; and satisfactory utilities arrangements.

These are all problems of frequently great difficulty but ones which are of a known quantity and therefore capable of being coped with. The types of problems that would be presented by S. 1032 are unknown and, therefore, impossible in many cases to plan to avoid ahead of time.

Actions brought under the authority proposed in the bill could seriously hamper the production of housing to meet the nation's 10-year housing goals, without necessarily contributing towards protection of the environment. The threat of possible harassment and obstruction by class action suits, brought without regard to any known standard, could well play havoc with building

plans and operations throughout the country. These unsettling prospects neither the nation's housing needs nor its environment need.

Because the bill as presently drawn is so broad and unclear; subjects builders to possibly expensive, time consuming law suits; and offers no machinery for establishing reasonable environmental protection standards, other than by individual court action, we feel we must oppose it.

Sincerely,

JOHN A. STASTNY,
President.

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 nations' manufactured goods.

Before commenting on the specific provisions of S. 1032, the Environmental Protection Act of 1971, we make the general observation that many legitimate questions have been raised as to the wisdom of using the class action suit mechanism as a remedy for various social problems. Chief Justice Burger, for example, speaking to the American Bar Association on August 10, 1970, stated:

"The federal court system is for a limited purpose and lawyers, the Congress, and the public must examine carefully each demand they make on that system. People speak glibly of putting all the problems of pollution, of crowded cities, of consumer class actions and others in the federal courts. We should look more to state courts familiar with local conditions and local problems."

Class actions, at least as applied to consumer protection, also have been faulted on the basis of being unnecessary and inefficient, and inviting harassment of business and abuses by the legal profession. Certainly, great caution should be exercised in considering their possible application to environmental protection, a field already covered by a complex system of regulation.

Turning to S. 1032, the announced purpose of the bill 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. 1032 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."

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 contains 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. 1032 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.

Testifying before this subcommittee on April 15, 1971 in opposition to S. 1032, Timothy Atkeson, General Counsel of the Council on Environmental Quality, stated:

"The bill in Section 6 appears to authorize the courts to decide substantive questions even where there exists machinery for administrative determination which has not been utilized. Where administratively established standards exist S. 1032 also appears to permit the courts to override those standards, and where Congress has not yet acted the bill apparently contemplates that the Federal courts will write new environmental law."

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 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. 1032 will not be helpful in producing a better environment for all the citizens of this country but rather would have the unfortunate effect of hindering earnest efforts in that direction.