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ENVIRONMENTAL PROTECTION ACT OF 1971

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HEARING

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 2

SEPTEMBER 27, 1971

Serial No. 92-17

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HEARING
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SUBCOMMITTEE OF THE ENVIRONMENT
OF THE
COMMITTEE ON COMMERCE
UNITED STATES SENATE

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ENVIRONMENTAL PROTECTION ACT OF 1971

MONDAY, SEPTEMBER 27, 1971

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

The subcommittee met, pursuant to recess, at 11:10 a.m., in room 5110, New Senate Office Building, Hon. Philip A. Hart presiding.

Present: Senators Hart, Moss, Pearson, Baker, and Cook.

Senator HART. The committee will be in order.

This morning we are continuing and hopefully hearing the end of our hearings on the Environmental Protection Act, a bill which seeks to facilitate environmental lawsuits. I have no opening remarks except to note that since our last set of hearings, Senator McGovern and I have been joined by Senators Anderson, Kennedy, Humphrey, Mondale, Moss, Nelson, and Pastore as cosponsors of the bill we will be considering this morning. That is a total of nine. And, of course, it is encouraging they should indicate their interest.

We welcome our first witness. I suspect when historians rake through the 1960's and 1970's, they will find Ralph Nader to be as extraordinary in retrospect as current observers find him as of the moment. And certainly if the system responds, in time, it will be because the young people see in Ralph Nader the proof of the argument we advanced to them to stay within the system—namely, that an individual can influence it and change it.

And we welcome you.

STATEMENT OF RALPH NADER; ACCOMPANIED BY DAVID ZWICK, PRINCIPAL AUTHOR OF "WATER WASTELAND"

Mr. NADER. Thank you, Mr. Chairman, members of the committee. With me is David Zwick, who was the project director and principal author of the study on water pollution and Federal water pollution policy entitled "Water Wasteland."

I appreciate your invitation to present comments on S. 1032, the Environmental Protection Act of 1971.

In growing frustration over the contamination and destruction of our natural environment, the public has increasingly begun to give up hope that the solution lies in trying to prod the bureaucracies into action. This attitude is fully justified, given what citizens have been shown so far. The history of government's involvement in defending the public from environmental abuse constitutes a massive indictment of these related institutions as they now operate.

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

I think it is important to stress that a regulatory process does not have a momentum of its own; it has an inertia of its own. And the fact that there has been an increase in the legal equipment that these agencies bring to their task does not mean it is going to be exercised.

The failure points to an entire governmental apparatus misdesigned for dealing with the most serious problems that face it. In particular, administrative bodies have shown themselves institutionally unsuited to carrying the entire load in the area of environmental protection. If regulatory officials do not assume office with an already well-developed business bias or a loyalty to the political expediencies of the party in power that transcends their concern for our natural resources, they typically develop such a leaning from their day-to-day contacts—almost exclusively external contacts, I might add—with the representatives of the corporate regulated. It is becoming almost a cliché to note that agencies will go as far or nearly as far as the discretion they are granted permits in protecting the polluters from the public.

The abuses of excessive administrative discretion usually go unchecked in the courtroom. This is the great gap, I might add, between the theory of administrative law and as it is actually developed. The great problem in administrative law is how to control discretion because discretion attaches to the overwhelming bulk of administrative activities and inactivities.

Early in administrative law history, the courts abandoned their historic role of review of substantive questions. Premised on the rationale that agencies possessed an "expertise" which the judges who review their actions could not hope to develop, courts applied a constricted standard of oversight to agency decisions. They asked only whether an administrative ruling was "arbitrary and capricious."

Congress later ratified the courts' self-restraint by passing the Administrative Procedures Act in 1946. It is time to recognize that the APA with its narrow view of the judicial role is not engraved in stone. The daily damage being done to our air, our water, and our land should be sufficient to convince us that what passes for agency "expertise" is often nothing more than institutionalized private power against the public interest. By giving our industry-ridden administrative agencies a monopoly in the area of discretionary decisionmaking, we have in effect handed over the job of defending the environment to the wealthy and powerful institutions who are destroying it.

The public's defenselessness is exacerbated by a host of additional legal barriers to redress in the courts. This administration's Justice Department, for example, has invoked the traditional defense of "sovereign immunity" from suits against public officials in an attempt to forestall environmental claims. Despite the direct injury to their health, property, livelihood, and simple pleasure, which citizens suffer at the hands of environmental despoilers, they must still combat the assertion that they lack "standing" to sue to protect our natural resources—or another way of putting it, the eventual prerequisites of human survival and health—a holdover from the time when the most myopic view of personal property prevailed in the courts and the long-run health damage caused by pollution was an unknown.

If a citizen is fortunate enough to ever get to the merits of his case, he may run into precedent extending from the early days of the industrial revolution which holds that the payrolls and progress industry provides justify whatever unfortunate environmental side-effects ensue. This has been known as the balancing-of-the-equity doctrine, one of the most consistently rigged scales in the administration of justice I am aware of. The balancing of the equities always came out against environmental restriction of pollution.

Our air, water, and soil have been the victims of a system of justice geared to provide the greatest protection to those who need it least. On the scale of judicial priorities, the environment comes out somewhere near the bottom.

I can think of no better example, Mr. Chairman, than the General Motors foundry in Saginaw, Mich., which is a fantastically endemic pollutant to the point it even impedes visibility on the roads, traveling the roads, nearby.

It has done wonders for the sale of paints in that city by homeowners who have their porches and homes corroded so quickly. And yet this is a foundry which has in effect been protected by this brooding omnipresence of balance-of-equity doctrine, notwithstanding that the owner of this foundry last year and years before grossed anywhere from \$3.5 to \$4 billion in before-tax profits.

That is an example of how far this balance-of-equity doctrine will go in protecting a company with an immense financial and technical capability to reduce the pollution from this particular foundry.

The result is not only a shameful waste of our natural resources, but also a massive waste of valuable human resources. This is quite apart from the violence of these environmental pollutants on human health. It includes a vast network of some of our brightest college graduates in law schools, practicing attorneys, and judges expending most of their problem-solving talent working on disputes between wealthy economic institutions while the most pressing problems of our time, including preservation of the environment, go largely unattended. A public-interest law movement is beginning to develop, but only to find the doors to the courtroom closed or difficult to open in many instances.

This is like a modern version of keeping all horses away from Paul Revere.

Now is the time to liberate our country's legal system to make its contribution to solving the environmental crisis. Our natural resources are too precious to leave their protection in the hands of just a few bureaucrats—and I use that word technically rather than in a deprecatory sort of manner—operating even fewer agency forums for decisionmaking, no matter how omniscient they happen to be. We need to strip our atrophied administrative agencies of their near monopoly in the field of environmental decisionmaking by bringing in the courts and the people. The resulting "competition" will be healthy for the agencies and healthy for the world at large.

Mr. Chairman, I think it is not often recognized that one of the great contributions of our courts, which the legislators and agencies cannot hope to match, is that they have a great many more doors open

to citizens for resolution of conflicts irrespective of who that citizen may be in terms of political influence. It is quite clear that access to legislative forums is severely restricted, not only by geography—there is only one in every State and one Congress—but also by the little pressure that a citizen or citizen groups can bring to bear on these bodies.

On the other hand, the genius of the judicial system is that a citizen who has a grievance, or case, or controversy to ask a resolution of, can enter into that forum as a matter of right no matter what his lineage, genealogy, color, or political influence may be. And not only that, but he has many, many more forums close to his place of residence to enter. So it is a decentralized system providing potential access as a matter of right to millions of citizens, providing they can obtain the lawyers.

Now, there is no other branch of the Government that can match that kind of exposure. That is why it is so very important to avoid some of the very, very ancient restrictions on standing and other procedural obstacles, as well as to simply recognize that harm comes in new forms, and these new forms have to be given the application of the ancient protection under the law of torts.

These are not very marked departures from our basic value systems or our very analogous precedents, but such is the rate of change in the approach to judicial access that they seem to be very convulsive-type proposals.

The bill before this committee would take a needed beginning step in the right direction. By giving a right of action against "unreasonable pollution," it would lay the groundwork for the development of a common law of the environment, much as the Sherman Act did in the antitrust field. By enunciating each person's right to a clean and decent environment, the bill would cut the courts loose from the antienvironmental precedents of the past and give them a fresh start.

The bill overcomes also the defense of sovereign immunity, which stems back to the theory the king can do no wrong, by providing that agencies and public officials may be sued under the act. By making every person in effect a trustee for our natural resources, the bill eliminates problems of standing and sets forth a new ethic of public participation in environmental protection.

Let me just indicate how minimally conservative this expansion is. If instead of sulfur pollutants or particulate matter of beryllium or lead or any number of forms of contaminants that flow from a company smokestack, a thin spray of red paint was emitted by these smokestacks, which then alighted on people's cars and people's clothes and people's homes, there would be no question that would be considered a tort against property and would receive all the traditional remedies that treat that kind of tort. Yet, this spray of red paint, let us assume, is nowhere near as harmful or as violent toward people's health and safety as the chemicals, gases, and particulate matter that stream forth from factories all over the country every day and alight on people's private property and on their right to a healthful environment.

And yet, that same expansion has not been offered to include citizen rights so people can resolve these injustices in courts of law. And that is just how conservative this bill's expansion is in terms of really recognizing simply a different form of violence that has been around a long time, but has not been recognized by the law.

I am speaking of environmental pollution.

Fears that this bill would create a flood of litigation that would inundate the courts, based on experience with an almost identical law in the State of Michigan, are totally ungrounded. Michigan has seen only 22 suits filed under its citizen suit law since it was passed over a year ago. About half of those decided or settled to date have gone for the plaintiff.

The Nixon administration, as represented by the Council on Environmental Quality, before this subcommittee earlier this year, has criticized this bill because it would permit the courts to decide questions in cases where no administrative body has yet set standards and where the legislatures have laid down no rules.

Far from being a failing, its grant of power to the courts to act in advance of specific legislative provisions is one of this bill's virtues. Each year, industry comes up with hundreds of new ways to destroy the public health and the environment by accident or inadvertently.

Congress cannot possibly think of everything to prohibit. Even when they do first recognize a problem, legislatures often do not have the experience they need to lay down broad rules or standards in the law. It may take years to get a law passed.

In the meantime, precious irretrievable resources are slipping away.

The first Federal laws dealing specifically with water pollution, for example, were proposed in the early 1930's. It took until 1948 to get the first one passed, and nothing on the books today has prevented the continued contamination of our water resources.

That is a rather broad and challenging statement which was documented in several hundred pages of analyses by Mr. Zwick and his task force in the study, *Water Wasteland*.

What we need is a gap-filler so that the individual is not defenseless until Congress follows its tortuous path to effective legislation. This is the same function the common law has fulfilled in other areas. It offers protection on a cautious case-by-case basis until the legislators see enough of a pattern to enact general prescriptions.

Today's criminal codes are offshoots of longstanding crimes at common law. The environmental laws of the future will be better designed if legislators have a backlog of court experience in the area to call upon for information. Court actions under this act would get more facts out in the open and thus alert the public and the legislatures to a need for additional protection. This bill will help guarantee that there will be something left for Congress to save when it finally gets around to acting.

I might also add what this bill is trying to do is far less ambitious than what was done in the automobile injury law under common law in 1917 when Justice Cardozo in cases like *McPherson v. Buick* awarded the plaintiff the right to sue the manufacturer for defective construction of an automobile. And that was done obviously 54 years ago, and it was done under the common law. And it was far greater ground breaking than is contemplated in this bill and is being criticized for excessive ambition by the Nixon administration.

I might also add that since most of these pollution bills do not have deadlines which administrative agencies have to meet in the setting of X Y Z standards for X Y Z contaminants, there is all the more need

to provide the added safeguard, interstitial safeguards, that the judicial process can provide under such a bill as S. 1032.

Of particular merit is the provision in the bill which shifts the burden to the defendant to show no "feasible and prudent alternative" once a *prima facie* case of pollution has been made out. This shift is needed to pry loose information that only the defendant possesses—suppressed facts about new control technology developed behind closed corporate doors and discussed in the secrecy of unpublicized trade association gatherings. All too often, the companies keep the answers to pollution problems hidden in the hip pocket, waiting until maximum pressure develops to put them into practice. This law will help bring new technology out of the hip pocket and into the plant.

In short, the bill in a very remarkably simple way forces the industries to disclose that they have the technological capability and they have the economic resources to put these controls into practice. In a way, it forces the industries to put their best foot forward, something they have not been willing to do.

It is rather discouraging to see the large auto companies refusing to disclose the best types of engines that they have. The recent disclosure just a couple days ago that a Ford-manufactured engine for military purposes has turned out to have some hitherto unique levels of pollution control capability is an illustration of just how reluctant these companies are.

Furthermore, look at the situation inside the company. Look at the engineers who want to do the right thing, who want to liberate their imagination and solve these problems with technical solutions. This bill will, in effect, encourage and give greater support to the tiny coalitions inside these companies who are trying to wage a more ambitious allocation of resources for human technology in the pollution area.

I would recommend in this regard that section 4 of the bill be strengthened by adding the following provision:

If the defendant succeeds in establishing that there are no feasible and prudent alternatives, the plaintiff shall be permitted to show that the absence of such alternatives is due, in whole or in part, to defendant's failure to make reasonable efforts, including research, to discover and develop such alternatives. If the plaintiff succeeds in making such a showing, the court may order appropriate relief, including a requirement that defendant expend specified sums of money on research and development of feasible and prudent alternatives.

There is an ancillary consideration which the subcommittee may want to give attention to. And that is to provide the judiciary with as strong a legislative guideline in terms of encouraging the disclosure of information by companies under legal process directed toward these companies by plaintiffs.

This provision, for example, is going to be less effective if discovery procedures are not given a healthy legislative support in terms of getting information from the company.

This law should, in other words, make it clear that it is the polluter's responsibility to solve the problems he creates.

Another weakness of the bill, in my judgment, is its limitation to injunctive relief. The bill should provide that any person as a trustee

for the public's resources may sue for damages to the public trust. The right to damages should apply whether or not the pollution is "reasonable" and whether or not a "feasible and prudent alternative" to the damaging conduct exists.

This is no more extreme than the strict liability doctrines that are being applied by State courts and Federal courts all over the country in conventional tort actions.

Prospective relief provides little or no deterrent to destructive activity; it makes good sense from a company's narrow standpoint to pollute for free until it is enjoined. As in other areas of tort law, damage awards serve as a deterrent to similar destructive activity. They thus provide a strong measure of prevention at the same time they offer a measure of cure.

Because companies currently need not take the costs of the social damage they cause into consideration in planning their activities and their future investments and plant equipment, we often sacrifice social benefits for far smaller private benefits at a net loss to society. This is the most inefficient kind of subsidy. Not until we force a full social cost accounting will we have an efficient economy in the full sense. An efficient economy will be a clean economy as well.

The bill should make it clear that Government officials are liable not only for their damaging "activity," but for their inactivity as well. Inactivity is the great deficiency in the administrative process. The enormous discretion that agencies have not to act, not to enforce, not to require compliance with views, not to investigate, not to provide standing, not to expedite, not to liberate information, is part and parcel of a great portion of the activities of these agencies and how they affect the public interest.

Officials whose willful or continuingly negligent nonfeasance leads to environmental harm should be actionable for damages along with the polluters whose activity they have ignored. Such a rule involves nothing more complicated than applying the age-old principles of the common law of torts to environmental damage.

Because of the special access public officials have to information about impending environmental danger and the public's dependence on them to properly sound the warning, these officials have an implied duty—if not an explicitly stated statutory duty—to take reasonable action in defense of the public. Holding them jointly responsible along with the polluters for harm done to the public's environmental property will produce a new and needed ethic of vigilance in the halls of government.

The bill should provide that citizen plaintiffs who succeed in bringing about an order for equitable relief or an award of damages are to be awarded reasonable attorneys' fees, including the cost of providing expert witnesses. Citizens who bring successful actions under this law are providing a valuable public service and should not be financially penalized for their efforts.

Neither should the environment be made to suffer because the right to seek its reclamation is too expensive for many to purchase. Experience indicates that, in the absence of an explicit legislative directive, courts will often refuse to make such awards. A legislative presumption that potential plaintiffs may be deterred from exercising

their rights under this act by litigation costs, but that most defendants will be amply funded, is clearly justified. The cost of policing and stopping environmentally destructive activity is one of the social costs of this activity and is properly charged to the polluter.

I think Mr. Halpern, who will be a witness today before the subcommittee, can elaborate fully on this particular point.

Finally, the bill could be improved by adding a "saving" clause to section 6. It should be explicitly stated that nothing in this act should be deemed to prevent the maintenance of an action under the common law, the laws of any State, or the Federal Government.

In conclusion, I would again point out the necessity of providing the citizen with an alternative route of action when the administrative process does not give our environment the protection it deserves. Multiple access points to Government by citizens is the essence of a responding democracy.

It is obviously essential that we focus a great deal of our energy in trying to repair the administrative system itself. We need to open up the administrative agencies to greater citizen scrutiny, to insulate public officials from pressure to weaken standards and to have the pollution laws enforced by depriving them of unbridled discretion to the greatest degree possible, and to find ways to promote full-time advocates before the agencies for the public's point of view.

But this repair job will not happen overnight. And it can serve as no substitute for a standard of judicial review which recognizes environmental restoration as the priority need that it is. This bill will help to breathe new life into both the environment and the administrative process. I would urge that the committee strengthen it and that the Congress pass it.

Let me just, if I may, summarize very simply what I think this bill is all about.

All over the country, there is an enormous devastation of people's health and safety, and the value of their private property, by industrial and agricultural pollution and contamination of the air, water, and soil. There are now, increasingly, laws being passed, or already on the statute books at the local, State, and Federal level, which are supposed to provide some protection against such pollution and such devastation.

These laws are very weak. They are very little enforced. And in many instances, they work actually to delay the advance against pollution in the country.

All this bill does is to provide the average citizen who doesn't have a high-priced lawyer or isn't a member of a special-interest group the right to go to court, the right to exercise his or her substantive right to clean air, water, and soil and to a healthful environment, the right to challenge industry polluters, and the right to make sure that the Government bureaucrats are doing their job as laws and regulations are supposed to require them to do.

Senator HART. As you define that in summary, the purpose of the bill, I would be amazed if anyone would oppose that bill. But we have had some testimony that would not accept in full the definition as you just gave it to us.

I happen to think that is the purpose of the bill, but one of the arguments that has been directed against this approach is that the kind of cases that we anticipate of the protection of land and water and air, the courts—judges and the court system—are very poorly equipped to handle. It gets back, indeed, to the notion that my generation of lawyers grew up with, that the good thing about administrative agencies is that they will be experts. And the run-of-the-mill lawyer judge is exposed to a lecture in brief when somebody gets up and tells him about the chemistry of this element.

How do you respond to that?

Mr. NADER. In two ways.

First of all, the recognition which has been documented again and again that political injections into these so-called expert regulatory agencies are, if not decisive, very much part of the fabric of everyday decisionmaking or nondecisionmaking. So this means that politics are involved, which means power is involved. The courts have been admirably suited in theory to resolving clashes of power at that level of impact.

Second, these standards may be the product of complex expert input shaped and reshaped and distorted by political influence. But whether or not they are enforced by the regulatory agency is clearly within the capability of the judiciary, clearly.

Another question which the judiciary should be asked to respond to is whether the particular industry or company has the technology or has the economic resources to remedy the situation. These also are clear questions which the courts have been asked to decide.

In fact, in many other areas, such as medical malpractice or accident litigation, the technical issues can be even more detailed, and the courts have been deciding these questions.

There are a lot of answers to your question which we can go into, one of which is the provision in the bill which provides for the court to appoint a master to take testimony and make a report to the court in the action. That can provide a more specific application of specialized knowledge if the court so desires.

Look at the kinds of problems that would arise under this case. For example, the problems as to whether the agency is performing its discretionary duties. That is an issue that the courts are suited to decide.

Suppose there is a situation where the agency is required to issue interim standards or issue standards which affect the region of the country. Whether or not the law authorizes that, whether or not the law requires it and the agency isn't doing it, are all matters of agency discretion and agency recognition of explicit statutory deadlines. And again, the judicial review is the traditional form we have relied upon.

With your permission, Mr. Chairman, I would ask Mr. Zwick if he has anything to add to that.

Senator HART. Mr. Zwick?

Mr. ZWICK. No.

Senator HART. So you would reject for these reasons the claim that we are assigning to the courts something not appropriate?

Mr. NADER. Yes, I would. You have all the requirements for judicial action. You have a case or controversy which is stipulated in the proposed bill. And you have the basic macroquestions that are decided.

Now, let me also add that, in the areas where the court believes it doesn't have such expertise, it is totally within the court's discretion to defer to the agency's expertise, you see. And that is what has been done.

In fact, our contention is that the courts have in the past, although decreasingly, gone overboard in virtually giving carte blanche to regulatory decisions on the expertise theory.

What the opponents of this bill want is basically a blanket exclusion of the judicial review function in these environmental cases on the basis that in every instance, in every level of decision that the agency involves itself in, in every level of indecision or of nonenforcement, that all these levels are within the ambit of agency expertise which is simply not true.

Senator HART. What about the objection—and it has such a ring of reasonableness to it—that if an agency establishes a standard and an industry adopts, performs to the level of the standard, under this bill, nonetheless that industry can be hit any time with a lawsuit, introducing uncertainty as to whether you are going to be sued and a feeling that even after I have complied with the agency standard, a court may second-guess both the standard and me.

To what extent is that an argument against the bill?

Mr. NADER. I do not think it is much of an argument.

First of all, the courts can be relied upon to always take the path of restraint. There is nothing in the history of our country to indicate that in the areas of controlling industrial injuries and violence that the courts have been in the vanguard, way, way ahead of the public and of the statutes that they are interpreting.

But more to the point is the following: Suppose there is a statutory standard which says that any standards issued by this agency must go to the level of feasible technology and supposing the agency puts out a standard that is way, way below the level of feasible technology. Then, it is certainly within the proper realm of judicial review to entertain a suit which is designed to challenge that standard because the agency has established a pollution standard in violation of the congressional mandate that it conform the stringency of the pollution standards with the available technology.

Senator HART. Given the kind of testimony that you offer us, all of us would like, I am sure, to ask you to field a good many questions. But time and fairness to many other members who have joined us, I think, would suggest that I turn to the able Senator from Utah, Senator Moss.

Senator Moss. Thank you, Mr. Chairman.

And thank you, Mr. Nader, for a good presentation.

I have one or two questions that I would like to ask. Some have been concerned about the ability of the plaintiffs in this to just leap over the administrative process and go directly into court and suggest there ought to be a requirement of exhaustion of administrative remedy first. What is your response to that?

Mr. NADER. I think there is some merit, obviously, to having the citizen use the procedures that the agency has. But the merit has to rest on two assumptions:

First, that there is time; that it is not an imminent peril because the bill provides for equitable relief, injunctive relief.

Second, that the agency has the kinds of procedures which will permit such access. Suppose the agency prohibits citizens from challenging or exhausting the agency's administrative remedies because there is no standing accorded to the petition that is before the agency. Then, it is really sort of futile to say the citizens have to exhaust the administrative remedies before they go to court.

So I think on two bases—one, the imminence factor, and the absence of expeditious administrative procedures within the agency—that that objection has to be narrowed. It still has, I think, limited validity.

Senator Moss. Well, your testimony suggests that the administrative agencies have been rather lax and let us down, as it were, in the past. Do we have reason to believe the courts will respond better than the administrative agencies in this regard?

Mr. NADER. I think there is clearly a higher probability that that would be so for two reasons:

First, it will permit a far greater portion of our population to appear before judicial forums to get resolution of these problems. And many times, the great cases in the common law have come from a lawyer and a plaintiff in a rural area or area that is not anywhere near a regulatory agency in a State capital or in the National Capital.

I think, secondly, where there are really serious environmental crises involving, for example, a foundry like in Saginaw, Mich., there is a higher likelihood that a judge will respond.

Now, I am not saying that it is still impossible for a judge not to respond. We have seen that too often. But at least both doors are open, not just one door.

Senator Moss. Since this bill would extend this concept of standing for bringing action, some fear there will be a multiplicity of plaintiffs that hound the defendant time after time on the same matter. What is your feeling on that?

Mr. NADER. Well, this is, again, a very traditional argument that has not got any merit whatsoever. The courts have long dealt with this particular problem.

First of all, there is the doctrine called mutual collateral estoppel which would in effect serve as a brake on other cases being filed on the same issue after the issue was resolved on similar facts in case No. 1. And that can cut across jurisdictions as well as in the same jurisdiction, local jurisdiction.

The other point that is important to note is that some of these cases will be class actions. And judicial procedures are quite capable of dealing with class actions and consolidating them as well as providing the doctrine of res judicata in case the class action case goes one way or the other so there cannot be 17 tries on the same issue by members of the same class.

Third, the Federal courts have a procedure for multiparty litigation, particularly in antitrust treble-damage cases which have consolidated very complex and geographically dispersed cases in a fairly orderly procedure.

So there are a great many safeguards here against multiplicity.

I might add that if class actions are not permitted, if these kinds of actions are not permitted, you may get just the reverse. You may get a multiplicity that operates on a repeated basis. The more class

actions are permitted, the more likely that diverse injuries alleged by plaintiffs from the same source of the injury or the fraud will be handled in a single case in a very orderly procedure.

Senator Moss. Maybe one more question. You, of course, criticize this bill because it does not provide for damages simply for injunctive relief restraint. There are at least two arguments, I think, that are made on that that I would like to have your response to.

One is that a citizen already has an action for damages where he can show that his property or even his health is damaged by action of another that constitutes an invasion of his right. So there is some right to damages now, provided a person gets in the right forum and presents his proof.

The second is how do you measure the damage of some polluting factor—say the pollution causes a degree of emphysema in an area.

How are you going to measure that? And how wide would it spread?

These are practical problems that bother me some.

Mr. NADER. Well, the first problem, I think, can be answered in the following way: The courts have been quite reluctant to recognize environmental pollution as a tort. As you know, it is a cumulative impairment of health. And it is not as physically graspable by the courts as an automobile crash-injury, to take one common illustration.

So anything that legislators can do to provide statutory encouragement for the judicial recognition of this is to the plus.

There are some retrograde judicial doctrines which I think have been so basic in opposition to the recognition of pollution as a compensable tort that the lawyers involved in these areas and some of the commentators have asked for a constitutional amendment to recognize a right to a healthful environment free of pollution.

I think there is everything to the plus to have that kind of recognition in as many environmental statutes as possible.

Now, because there certainly is no empirical obstacle to recognizing carbon monoxide or hydrocarbons or any number of other contaminants as forms of violence that are impairing people's health.

The second is a more difficult one. How do you measure damages? And, fortunately, we can say that there are many other injuries that have been presented before courts that have presented similar difficulties in measuring damages. However, the fact that in many instances actuaries have to be brought into court as expert witnesses to project a discounted loss over an average life expectancy of 20-percent permanent disability, these are very complex questions, and they have been handled in specific ways by courts.

I would suggest that in some of these areas where the damage is collective and, shall we say, brooding in the sense that we know people have been exposed to these toxic contaminants, but we do not know to what extent John Smith has got a 10-percent affliction of emphysema or what, that we want to develop an equitable remedy scheme whereby industries or companies that pollute can contribute a significant fund to a public trust which would then be used:

A. For a preventive way; and

B. In a compensatory way as the diseases begin to be documented on a case-by-case basis and lead to a general community policy about dealing with the damage here

This means that you put a fund in trust and then applications are made on a case-by-case basis. As people get sick and think that their sickness is due to the beryllium plant they have lived near for 15 or 20 years, they can apply. It can be like a court of claims.

And that would tend to be more fair in providing compensation for those who need it most.

Senator Moss. Well, thank you very much. Thank you, Mr. Chairman.

Senator HART. The Senator from Kentucky, Mr. Baker.

Senator BAKER. Mr. Chairman, we'll share the jurisdiction.

Senator Moss. Just amalgamate those two States.

Senator BAKER. We have a common, unfortified boundary, Mr. Chairman.

Senator HART. That made it a little difficult for them to understand which one I thought had seniority. But I looked at this environment subcommittee, and it's a Senator from Tennessee.

Senator BAKER. Mr. Chairman, thank you very much, and not being one to stand on seniority—primarily because I have so little of it—I'll be glad to proceed.

Mr. Nader, I won't go into details on your commentary on the bill, nor into detail on the bill itself. I think you've covered your points of view in your usual thorough way, and, of course, it would burden the record unnecessarily for me to engage in a long analysis on my views of the pending legislation at this point. That would come later, but I would be interested in hearing your response to one or two questions that hopefully will shed further light on the general philosophical conflicts involved in the opposition to this bill and the support for this bill.

Isn't it so that, what we are really involved with here in this legislation—and similar legislation that is now pending before the Air and Water Pollution Subcommittee of the Committee on Public Works, on which I also serve—is the conflict between which of the three branches of Government has the primary responsibility for enforcement of environmental quality? We now have a judicial approach, as per the 1899 Refuse Act; an administrative approach, as is involved in some of the earlier air and water legislation where the overall quality of the air and water is at stake, and the administrator is required to prescribe corrective measures; and a legislative approach, in which Congress very particularly expresses its desire about what can and what cannot be discharged into the air and water, and in what concentration.

My preference is that the legislative department should, to the greatest possible extent, express with great particularity what they require as a national objective and that the administrative department should be required by reason of that particularity to enforce the law and that the judiciary should monitor the performance of both. Would you feel, Mr. Nader, that that general statement of my position is at variance not with the particulars of your statement, but the philosophy which underlies your commentary on this bill?

Mr. NADER. Yes, Senator Baker. In many ways the gaps in the statutory framework which neglect, for example, to establish guidelines and which neglect to establish kinds of procedural access to the agency

by citizens groups or citizens would make use of the courts even more necessary.

Senator BAKER. It's clearly within the province of the legislative department to set deadlines, as with the Clean Air Act of 1970, relating to the 1975 and 1976 standards for automobiles, for instance, and to set emission standards in certain other situations, such as hazardous substances.

Mr. NADER. It's long been known—

Senator BAKER. The legislative department has it within its authority to do this and, apparently, there is some tendency to move in this direction. What we have then is the question of whether the Congress should continue on the course or whether it's best to invest additional power with the judiciary. Is that not the gross outline of the dimensions of the conflict?

Mr. NADER. Not quite. I think your point is well taken that the vaguer the delegation to the agency, the more resort there has to be to the courts to find out what the duties of the agency are, what the words mean and the statute and the like. But, however much I would like to see the pollution laws redrafted and reenacted in a more explicit manner, there will always be a role for the judiciary. First, where the law does not cover a particular environmental peril; second, where the agency has not acted under a general grant of authority on a particular environmental peril; third, where time is a critical factor, where there's an imminent peril and fourth, where the agency has, in effect, not obeyed its own mission; its statutory mission or statutory procedures.

For all these reasons I think we need to consider a bill of this kind as a major second line of defense, or last resort, as the courts always are or should be to supplement even a good legislative delegation performance.

Senator BAKER. All right. Would you feel that the enactment of a bill of this sort, which, in effect, gives new powers to the judiciary to monitor the discretionary functions of administrative officers, would produce another effect in addition to the monitoring of administrative officers by the judiciary?

Might we not find that many pieces of environmental legislation would be drawn in a very different way in order to make sure that the administrative official had a minimum of reviewable authority and that the Congress had a maximum of explicitness in its statement of national policy?

Mr. NADER. You mean, the Congress might react to this bill by later on further restricting judicial review?

Senator BAKER. That's right. I think the Congress has it within its power, probably by the nature of the allocation of authority under the Constitution, to negate what you're proposing and to simply provide that the Congress will express its viewpoint on the percentage and concentration of pollutants allowable and leave nothing for the judiciary to pass on except possibly the administrative function of the executive.

Mr. NADER. Certainly, they can tighten the area of judicial involvement, but they can't close it out altogether; not under our constitutional system. Although the Congress can always do that, I would think that it would not.

Senator BAKER. Mr. Nader, thank you very much. I think you have proposed some very interesting problems and posed them in a very interesting way. I would express my concern that we consider the ramification of support and opposition to this bill very seriously, because it seems to me that we must decide which is better qualified in the long term, not only to establish national policy, but to modify and change national policy, the courts or the Congress.

I happen to think that the Congress is. I happen to think that the judiciary might be well-suited to monitoring this performance, but not to substitute its judgment for initiation of national policy by Congress.

Mr. ZWICK. Could I make a comment, Senator?

Senator BAKER. Yes, sir.

Mr. ZWICK. It would seem to me that if Congress responded to a provision such as the ones in this bill by tightening down on the range of discretion, in other words, by deciding they could set standards more explicitly, then you would in many instances have a constructive effect.

Instead of this wide range of discretion, I think that explicitness would be a very helpful effect in many cases.

Senator BAKER. I think so. I think, as a matter of fact, that is occurring not as a direct response to this bill, but as a direct response to the realization that, to be really effective, air and water pollution control must be very explicit. I think, frankly, that we are in the painful process of abandoning the establishment of average ambient air and water qualities with maximum flexibility on how the level is attained and going instead to a nationally stated system of emission controls. I happen to think that we should and I think it would produce a better result and that it's in response to the sort of conversation and commentary you have given today, though not directly to this bill.

Mr. ZWICK. Just one more moment. As I understand, the difference between the amendments you mentioned the Public Works Committee is now considering with respect to the Federal Water Pollution Control Act, and this act on the citizen suit matter, are very small, because the amendments on the Federal Water Pollution Control Act before the Air and Water Pollution Subcommittee, now, would provide, as I understand it, for a right of a suit against the Administrator of EPA claiming that he did not carry out any act or duty under the Water Pollution Control Act.

In other words, it contemplates reviewing the discretion—of the discretionary authority of—the Administrator just as this act would, and I see it in effect as saying very much the same thing, the same recognition.

Senator BAKER. Well, that depends on which committee print you read. It's been written both ways, and because we are still in executive session I won't disclose how the proceedings are going at this point, but it's my judgment it will not end up that way. It will probably end up as an adaptation of the Clear Air Act of 1970.

Mr. ZWICK. Am I correct in believing that the Air Pollution Act as passed by the Senate and not as it came out of the conference committee, the Clean Air Act, did provide the brother provision of the Citizen Suit Act?

Senator BAKER. I will have to defer to your judgment. I don't recall.

Mr. NADER. Once again, I might pay a tribute to the effecting impact of the courts on the legislative process. I think it's a very good example.

Senator BAKER. You're getting very close, now, to jurisdictional jealousy.

Mr. NADER. When I read the history of the 1899 Refuse Act, which wasn't discovered by the Federal Government until 1969, I can look back and say if the courts were given more emphasis here they might have made the Federal Government enforce that act more thoroughly. What enormous impact on 1971 water quality.

Senator BAKER. I think that the discovery of the 1899 Act in 1969, in fact, has launched the greatest archeological study for statutes that man has ever witnessed.

Senator HART. The able Senator from Kentucky, Mr. Cook.

Senator COOK. Thank you, Mr. Chairman. First of all, Mr. Nader, I don't really see anything in this bill that would prohibit a judge from ruling on a complaint that administrative remedy had not been sought, do you?

Mr. NADER. Within the framework of this bill?

Senator COOK. I see nothing that would prohibit a judge from dismissing a suit under the present language, by saying that administrative remedies had not been pursued, do you?

Mr. NADER. No.

Senator COOK. And second, in response to Senator Moss' question relative to the court's relying on the expenditure of administrative remedies, it would be within the framework of the court to make a determination, for instance, that when regulations had not been established, it would be futile to attempt to expend administrative remedies, if no administrative action had been taken.

I refer to the language of the 1970 Clean Air amendments as passed by the Senate. In that bill, individual suits could be brought against an administrative agency for failure to establish standards according to legislative enactment.

The one thing that bothers me about it, and I return to the matter of damages, in an act that was brought under Rule 23, the *Pfizer* case, which was a multimillion-dollar settlement, Judge Wyatt, in his opinion to the multiplicity of plaintiffs, was that they should accept the settlement, and he made it very clear in his language that one of the reasons they should accept it was that many of these claims stand a 50-50 chance of recovery if not less.

Now, this is the real thing that bothers me about the injection of major damages. It becomes a matter of determination with one's client, whether it's better to make a large settlement, or whether it's better to litigate. It was never more clearly spelled out than when Judge Wyatt told the plaintiffs that their chance of recovery was very small, 50 percent if not less, and that they should accept the settlement.

We then find ourselves in a position where all the money sits in a bank in Chicago, and very few of the claims have been paid.

Mr. NADER. I think, Senator, that Judge Wyatt was speaking to the difficulty in proving economic damage, not to the right of purchasers of these drugs to have recovery.

Senator COOK. That's correct.

Mr. NADER. Because they just didn't keep their bills 5, 8, 10, or 12 years ago, so the point on this 50 percent of recovery was not to the substance of law but to the mechanics of getting to prove that a patient lost \$50 because of the price-fixing conspiracy on that particular drug.

Senator COOK. Don't you think that, if you don't take into consideration the mechanics of recovery, we would be doing the plaintiff a great injustice, by telling him that he has a cause of action and a right of recovery, when in fact that cause of action and that right of recovery may inure to him at a time when it would be insignificant?

Mr. NADER. I agree. With every right that an individual obtains under our court system, there should be remedies and there should be a system whereby if he's damaged he can show records for being damaged.

For example, our hospital, our medical records are so inadequate, in 16 different dimensions, that their inadequacy very much impairs the recognition by the courts of the person's already existing rights, the mechanics as you say. But about the strike suit, let me say the following: First of all, the history of treble damage under the antitrust laws shows quite clearly that very few lawyers in this country, even if they wanted to do a strike suit, have got the resources and have got the time to take it as far as the defendant companies can take these plaintiffs' lawyers.

Senator COOK. As a matter of fact, I don't know of one that's been adjudicated to finality.

Mr. NADAR. Right. It's quite clear that there have been suits without merit that have been just dismissed, as you say. The judge still has the prerogative to dismiss the case in his discretion.

Now, my other point is the following: That even—let's take the lawyers who specialize in these types of class actions, and let's say they are willing to be unethical and try a strike suit, and let's say they are willing to invest \$50,000 in order to run this to its full extent—and we're down to very low probability, now—but even at that low probability that lawyer is going to so impair his credibility in front of the courts and in front of the judges for other more meritorious cases that he's going to think twice before undertaking such a case.

The multiple safeguards in our judicial system against irresponsible litigation and strike suits, against defendants that can well defend themselves, are really very, very impressive; sometimes they are very depressive.

Senator COOK. The other thing that poses some problems for me is that, by not preempting State actions, you run the risk of a multiplicity of suits, because the Federal court does not have the authority, under its rules, to take a State court action and consolidate it with its own. Probably, the only way you would be able to go about this is if the defendant moved on a matter of diversity, to bring them into Federal court and to combine them. Thus we do have the problem of a number of suits going at the same time, with no legal basis upon which

the Federal court could act, and the State court could dismiss the suits.

Thank you, Mr. Chairman.

Senator HART. Senator Pearson?

Senator PEARSON. Well, I have a couple of thoughts left.

Mr. Nader, you make some of our most powerful arguments with relation to inactivity, and you are also a student of this system. When courts don't want to rule, the opinions are filled with citations about Congress having the power to act if they would act, so we won't rule, and then in the agencies and in the Congress it's a common cause to hold on to when action isn't desired if matters are in litigation before the court, so we won't rule at this time.

And I was thinking about one instance in relation to rail transportation where litigation went on for years in court and the ICC didn't act because of the litigation. Without reference to the particular merits of this bill, is there some danger that we'll end up with greater inactivity than ever before, given just the mechanics of the system that I have made reference to?

Mr. NADER. Certainly, there is a greater amplitude of exercising an unjustified pretext for the agencies not acting, but in the areas where there is heavy private litigation, such as in the drug industry, the FDA has—for all the pretext that it can develop the FDA has not used that excuse.

Furthermore, there are many instances where the Congress has acted in order to avoid the undesirable consequences of litigation in involving corporate interests. The bank merger case, cases where the decisions were going against the banks by the Justice Department led to legislation, I believe, through the Senate Judiciary Committee, so as I say, nobody can deny the use of that pretext, but I think it can be exposed for what it is.

Senator PEARSON. I think that's all I have, Mr. Chairman.

Thank you, Mr. Nader.

Senator HART. As always, your testimony was helpful and I thank you.

Mr. NADER. Thank you.

If I may make one comment relating to Senator Baker's performance a few years ago, I can't resist commending you for your cross-examination of the auto companies when they came before the Senate Commerce Committee in the hearing in 1968 relating to external combustion engines or steam engines.

Your engineering background proved the importance of expertise on the part of Congressmen and Senators.

Senator BAKER. With all immodesty, I must say I'm glad you couldn't resist.

Mr. NADER. Thank you.

Senator HART. Next we'll have the benefits of testimony from Mr. William F. Kennedy. Mr. Kennedy is the associate general counsel for General Electric Co., and has served on a number of committees which seek to clarify some of the problems that we all understand exist when we move in the direction that this bill suggests we do.

Additionally, we should acknowledge now that he is a member of the Legal Advisory Committee to the Council on Environmental

Quality. As the reader of the record will see, Mr. Kennedy brings to the committee testimony voiced against a considerable background of experience and we welcome you.

STATEMENT OF WILLIAM F. KENNEDY, ASSOCIATE GENERAL COUNSEL, GENERAL ELECTRIC CO.

MR. KENNEDY. Thank you very much, Mr. Chairman, and members of the committee.

If I may, I'll read portions of the statement, but not all of it.

Senator HART. The statement will be printed in full as though given.

MR. KENNEDY. Thank you, Mr. Chairman.

Let me begin by thanking the committee for this opportunity to present views on S. 1032. The bill deals with a crucial aspect of the Nation's total approach to environmental improvement, namely, what will be the decision process by which a balance is struck between the environment and the economy and how will citizens and citizen organizations participate in that process.

It also raises fundamental questions about the proper function of the Federal courts. These issues deserve the more thorough and careful analysis and debate and your hearings can become a forum for this analysis and debate.

S. 1032 would assign to the Federal courts and to litigation a central role in determining environmental policy. In so doing the bill would drastically affect the division of responsibilities between:

- The Federal courts and the Congress;
- The Federal courts and the executive branch;
- The Federal courts and State governments;
- The Federal courts and Federal administrative agencies; and
- State courts and Federal agencies.

The question posed by S. 1032 is, therefore, how should environmental policy choices be made, and specifically should they be made by the courts in individual lawsuits?

I do not believe that this question can be answered by generalities about the virtues of litigation and of citizen participation.

Citizen lawsuits can sometimes play a useful role. In other contexts I have indicated that I have no sympathy with defenses of lack of standing interposed against substantial environmental organizations. Also, I have no sympathy with defenses based on sovereign immunity; I think this unintelligible doctrine should be abolished by Congress across the board.

In cases arising under the National Environmental Policy Act, I regard both defenses—lack of standing and sovereign immunity—as inconsistent with that act. I believe it is proper that in interpreting and administering the National Environmental Policy Act, both the administration and the courts are encouraging citizen participation. Again, I think environmental rules should be effectively enforced and I have endorsed the provisions of the 1970 Clean Air Act Amendments authorizing citizen suits to require compliance with regulatory standards.

S. 1032 would go far beyond any of this—it would confer on the Federal courts the authority to make the policy judgments balancing

the claims of environmental protection against conflicting social and economic claims. By creating a Federal cause of action and establishing a Federal common law of environmental quality, the bill would override the policy of other Federal statutes, and Federal administrative agency rules, and under the supremacy clause of the Constitution, the bill would override State legislation.

Let us explore some examples:

1. Suppose an emission standard has been established under the 1970 Clean Air Act Amendments. These amendments prescribe a mode of judicial review which purports to be exclusive, Clean Air Act, section 307 (b).

However, S. 1032 can be read as trumping all other environmental legislation including judicial review provisions. It would seem open to a plaintiff to disregard the judicial review provisions of the Clean Air Act and to bring a suit relying on S. 1032; under the bill the court could make an independent judgment and set a new standard.

Senator BAKER. May I interrupt—

Mr. KENNEDY. On the basis of the provision of the statute that says that the court can make a finding that a given emission is unreasonable pollution of the environment. This is a substantive criterion which the court is independently directed to apply and it's also expressly instructed not to be bound by other action but to apply independently the standards of S. 1032.

Senator BAKER. You are thinking of one section; I was thinking of another. I was thinking you might have reference to the appellate reviews procedure on the specific performance and dates as it refers to automobile emission.

Mr. KENNEDY. I believe the bill could be read as in conflict with those provisions also although there is a question of interpretation on that where there is such explicit treatment in the Clean Air Act Amendments.

Senator BAKER. That's the reason I brought it up. If you believe that S. 1032 would trump that provision of Clean Air Act Amendments of 1970, I would really like to hear it explained a little further.

Mr. KENNEDY. I think there is a question whether it trumps that, but I think the bill, if you give it its full effect in terms of the sweep of its language, does authorize the court to make an independent judgment, not by way of judicial review but an independent judgment, as to whether an emission standard should be revalued in an independent suit.

Senator BAKER. I won't stop you but I would like to ask one more question.

Is it your view that there is a possibility, for instance, that S. 1032 would extend beyond 1976 the requirement for control of oxides of nitrogen, for example.

Mr. KENNEDY. There is a possibility. There is an ambiguity in reading the two statutes together. A possibility.

Senator BAKER. Thank you.

I'd like to talk to you later about it but that is good enough for now.

Mr. KENNEDY. Now, suppose a standard is not required. I am not talking about the kind of case that Mr. Nader was discussing earlier

where there is an informal election not to exercise discretion, but they hold a proceeding and they conclude that a standard is not required and suppose they permit citizen participation in that procedure.

The judicial review procedure of the Clean Air Act could be disregarded and a suit brought under S. 1032 asking the court to set its own standard.

Suppose the EPA has a proceeding under way to establish a standard. Under S. 1032 a district court could proceed to set its own standard and without having to await the outcome of the EPA proceeding.

The administration and Senator Jackson and Congressman Aspinall have proposed legislation calling upon the States to establish land-use plans on a statewide level. Suppose a State land-use plan is developed under procedures prescribed by State law; S. 1032 would authorize a Federal court to upset this plan or particular features of it as not consistent with a Federal common law of environmental quality.

The administration has proposed and this committee has before it legislation to deal with electric powerplant siting. Suppose a State either under this legislation or otherwise establishes a comprehensive scheme to regulate electric powerplant construction.

Under S. 1032 a Federal court could take the decision about a powerplant project out of the hands of State agencies and State courts, and as a matter of Federal common law decide whether a plant should be built and where and how.

Under S. 1032, the Federal courts could take away from the Federal Power Commission the authority to decide whether a hydroelectric facility should be authorized and it could take away from the Atomic Energy Commission its authority over nuclear electric generating stations.

As a last example, let me invite the committee's attention to the effect of the bill on the relationship between State courts and Federal agencies. It is sometimes the case that a federally created cause of action governed by Federal common law may be pursued in a State court.

Senator BAKER. May I ask one more question, Mr. Chairman.

Federal common law?

Mr. KENNEDY. Federal common law can be applied concurrently by State courts. That is the gist of the *Dowd Box* decision which I have cited in the testimony, sir, and I believe that the proviso in 3(a) can be read as giving State courts concurrent jurisdiction of the cause of action created by S. 1032, applying in that cause of action Federal common law, which is mandated to be developed under S. 1032 and the effect of this is, if this is the case, a State court would have the power under S. 1032 to override State regulation and State agency action as inconsistent with Federal common law.

But this isn't all. State courts might also under S. 1032 rely on Federal common law to disregard Federal agency standards and Federal agency decisions.

Now, some of these issues were raised in colloquy with Mr. Nader earlier, for example, the question of exhaustion of administrative remedies and part of the response was that as a matter of discretion the court wouldn't do these things. Perhaps sometimes it would not and many times, perhaps it would not, but the point is that the bill

gives the courts this power. These are all things authorized by the bill, and the court might not exercise the power, but the bill gives it this kind of authority.

The American people need a good environment but they need other things as well, and so conflicting considerations must be weighed and choices must be made. Some of these choices are so fundamental that they should be made not by the courts but by representatives accountable to the electorate.

For example, there are those who believe that all current modes of electric power generation are so objectionable environmentally that it would be better to limit consumption of electricity than to permit expansion of generating capacity to meet demand. They are entitled to propose this point of view, but a decision to ration electricity is a decision to curtail economic growth and to affect the daily lives of people. I would submit that kind of decision should be made by elected representatives and not by courts.

Again, I would argue that the ultimate merits of the proposed Alaska pipeline, involving a balancing of energy demands, ecological effects, the economy of Alaska, the national security, and our relations with Canada, should not be decided by judges as a matter of Federal common law. One can multiply examples of major environmental choices which ought to be fought out in the legislative and even the electoral process and not in lawsuits.

Even when the choices involved are not so fundamental that they should be decided by the legislature, it does not follow that courts are the best mechanism for making the choices. Many environmental controversies involve land use and it is now clear that we need new legislatively prescribed policies and procedures for broad-scale land-use planning on a statewide basis, and not case-by-case adjudication.

Another class of cases involves operating programs of the Federal Government. The National Environmental Policy Act provides a mechanism through which these programs will be subject to thoroughgoing environmental appraisal. There are procedures for citizen participation in the appraisal process. The courts are insisting that the appraisal be conducted in accordance with the statute before the operating program proceeds, and they are also insisting that the appraisal must be a meaningful one; but once the statute is complied with, shouldn't judgment on the merits be made by the executive branch and the Congress rather than the courts.

A third class of cases involves discharges to air or water and the Congress is creating comprehensive regulatory mechanisms to deal with these issues in air and water quality legislation. S. 1032 would permit a complete bypassing of these mechanisms.

The air and water legislation indeed suggests some general observations about administrative agency rulemaking versus court litigation as a way to deal with environmental issues growing out of industrial activity. Leaving aside questions of land use, these issues are generally three:

What are the ecological and health effects—matter which may require appraisals from biologists, epidemiologists and others?

What technology is available to control these effects and at what costs and on what time scale?

And what is the value of the activity?

The first two questions can in particular cases be extremely technical and difficult of determination and the third question can sometimes be of fundamental social import. In the light of this, what is the rational process by which new environmental requirements should be developed—requirements which may increase the cost of an industrial activity, or delay an innovation, or in the extreme case compel withdrawal of a product or service or the shutting down of a plant?

S. 1032 would say that courts should make these decisions, both the scientific and engineering judgments and the judgments as to social policy.

Moreover, it says that they should be made instance by instance, at the instigation of individual plaintiffs.

A strong case can be made for a different approach—one which calls for general rules prescribed under a statute with clear guidelines and developed under a procedure where all affected persons are afforded an appropriate hearing. The rulemaking approach has a number of things to commend it.

First, rulemaking by an agency permits better access both to scientific and engineering expertise and to industrial experience, through the use of advisory panels and similar techniques.

Second, the rulemaking approach enables an agency to build up a continuing technical staff capability to deal with the problem—an opportunity not available to a court.

Third, rulemaking can reach all segments of an industry, not just portions of it, and by the same token, can assure consistent treatment of all members of an industry.

Moreover, rulemaking can take account of the nationwide effect of a given policy, something it is very difficult to do in a court case involving a particular facility.

Fourth, in rulemaking the balance between environmental effects and other considerations is struck under a legislative mandate developed in a political process and not by utilizing the courts as developers of major new public policies.

Fifth, rulemaking proceedings, if properly conducted, have the potential for being reasonably expeditious.

Sixth, rules can be changed, if conditions change, more easily than can common law court decisions.

I have referred to the desirability of expedition, and this leads to some more general comments on the virtues and limits of court litigation. I have observed earlier that some litigation by environmental groups has been constructive, but it must also be conceded that not every lawsuit brought in the name of protecting the environment will be automatically meritorious.

Certainly, the working premise of the committee should be that some lawsuits will not be justified, and the question then becomes: What safeguards will there be against groundless cases? It is not an answer to say that the courts will filter the good claims from the bad. I agree that ultimately this will be true most of the time—one has to assume the courts will do a good job; but I stress the word “ultimately” because one thing you can fairly say about litigation is that it is not a quick or inexpensive process.

Under S. 1032 very desirable activities could be enjoined for the duration of the lawsuit and the provisions relating to bonds are so

framed that this could be done without any financial consequences to the plaintiff, even though the defendant incurred great costs and ultimately prevailed on the merits. Even where an injunction was not granted, desirable projects could be held up because of the reluctance to undertake large investments or commitments while the project was in litigation.

I am not inventing this concern. There is a real danger of brownouts in sections of the country caused in part by delays in contested proceedings about powerplants. When this committee comes to consider power-plant siting legislation, I hope it will explore this problem in depth.

To put it another way, we should face squarely one major point about litigation as a tool of environmental policy—the present system does not provide adequate disincentives for groundless claims nor for dilatory or harassing tactics. We should consider developing substantial disincentives before placing any further reliance on lawsuits as an instrument of national policy.

History does teach us that there is one thing we should not rely on—namely, professed championship of the public interest. If we do that, we may be reminded of the words of Lord Clark about the leaders of the French Revolution—that they “suffered from the most terrible of all delusions. They believed themselves to be virtuous.”

I have made the case against S. 1032 in plain terms. It is an advocate's case, and, of course, you have heard from advocates on the other side. I would close this testimony by raising with the committee the question of whether this competing advocacy might not usefully be supplemented by seeking the views of leading law teachers in the fields of Federal jurisdiction and administrative law.

S. 1032 deals with some profound and vital issues—decisionmaking in environmental policy, the role of citizen participation, the merits of trial-type adjudication as against legislative-type rulemaking hearings. Above all we are dealing with the proper role of the Federal courts, the relationship of Federal courts to other branches of the National Government, the relationship of Federal courts to State government, and the relationship between State courts and Federal regulation.

These questions go to the heart of our political and judicial and legal system, and I hope that before it concludes these hearings the committee will seek from the legal scholars of this country the most searching and thorough and unbiased analysis.

Senator HART. Thank you very much, Mr. Kennedy. I have had an opportunity to read the full statement thanks to your thoughtfulness of last week. And I know all of the members and our staffs will do that.

Before getting in your prepared remarks, you make strong recommendation that because of the very sensitive relationships upon which this bill may touch, we should have the input of the academician.

Mr. KENNEDY. Yes, Mr. Chairman.

I hope that the committee will be able to do this because these are very profound issues that the bill proposes.

Senator HART. They are. And while we have heard from some of them, I think that the suggestion is both appropriate and sound. We will invite their counsel and I'm sure they'll respond with their advice because you're right.

We are touching important relationships here and we'd better be sure where we stand. Having said that, let me give you my reaction on

the problem you raise on the air standards or whatever you call that 1975-76 preoccupation of Detroit at the moment.

I will explain the goal we seek to achieve by legislation. If the language here does not reach it or reaches another end, we'll put our minds to getting the language to make clear this to be the purpose.

When Congress reaches a legislative decision that by 1975 everybody should wear blue suits, no matter how outrageous and unreasonable that may be, that decision shall not be available under the bill for judicial direction. But if we add the provision that some agency can extend a requirement for blue suits in 1976 and provide a mechanism for review of that administrative extension decision, we do intend to provide by this legislation a second means of reviewing the reasonableness of that extension of 1976.

That as I see it is what we have in mind.

Senator Baker, do you have any reaction to that?

Senator BAKER. No, I have no answer to that, Mr. Chairman. I think that I'd like to study the analogy further, but if I can say just one thing and I do have to leave for another engagement, I am very gratified that the chairman has indicated a desire to have other witnesses, hopefully nonadvocate or nonadversary witnesses, to testify from the academic community or otherwise.

I thoroughly endorse that proposal. I would especially like to hear their testimony. I hope that at the time we have such testimony someone will get to the close question of how we are changing and modifying the inherent balance of powers between the three departments.

Let me give you an example. Section 3(a) provides an action may be maintained against any person engaged in such activity; that is, pollution, and may be brought without regard to the amount in controversy, and 3(b) defines person as "any individual or organization; or any department, agency, or instrumentality of the United States." That raises an issue that is intriguing in the extreme because when coupled with the colloquy we have already had about the right we are conferring to sue as a result of inaction, I wonder if it also means there might be citizen suits against the Congress to compel legislation.

Senator HART. Intriguing. I'm sure that all or a lot of people would love to hear us say we are doing that. But we are not.

Senator BAKER. That depends on which ones you are talking to and about which legislature, I suspect.

Thank you.

Senator HART. Mr. Kennedy, for the record, let me put to you some of the questions the staff, on reading your testimony, has suggested. You have cited some examples in title II.

Here you question the treatment of the Federal-State relationship.

Mr. KENNEDY. Yes.

Senator HART. Chief Justice Burger has also addressed himself to the concern that we are allowing the Federal courts to wander into what are really essentially State roles.

What we're trying to do here in handling this aspect of the problem is to provide that suits authorized by the bill may be brought either in Federal or State courts. I would hope that Congress could encourage Federal courts to refrain from handling cases which for reasons stated by you and the Chief Justice among others, are more appropriately are handled at the State level.

Now, clearly you think that explicit statutory language should be added to achieve that result and we would welcome submission of language that might achieve that.

Mr. KENNEDY. Let me say I'd be happy to do that, Senator, but let me say I wasn't here making any dogmatic case that the States are better than the Federal Government for this or that.

I don't have any dogmatic views on that. I think some things ought to be done federally, some it's better to do through the States, some you want to do concurrently. Two instances I did call out specifically—one was State land use plans and I hope there will be State land use legislation, that is Federal legislation calling upon the States to do this.

I think it's a highly desirable kind of proposal that's before the Congress now. If the Congress elects to have the States do this and if the Congress, as I think it should, calls on the States to provide for full citizen participation, public participation in that process so that it's an open process, and if the States then have a prescribed mode by which the outcome of this planning process can be challenged in court on whatever grounds the State thinks appropriate, I don't think it would be helpful in a bill of this kind to have a provision which says, but there's a Federal common law which overrides all this, and you can have a citizen action under a statute of this kind which would challenge the State land use planning process.

Again, you can make a number of arguments pro and con about Federal versus States roles or perhaps regional mechanisms in electric powerplant siting. I think the one observation I would make at this stage is we surely do need new mechanisms and I hope the committee will be able to turn to that bill in the near future; but whatever the judgment is about how the environmental concerns about powerplants ought to be handled—and I think we need to do a good deal more than is now being done—whatever the judgment is it seems to me there ought to be a well defined and self-contained mechanism with its own provision for judicial review, and there shouldn't be an overruling statute which says somebody can come in from outside the scope of this and bring an independent suit, and the court can decide whether you should build a powerplant and if you were going to build it, where you were going to build it, and what kind of plant it ought to be and what the emission levels from the plant should be.

No, I know on this issue as on many others I am talking to the language of the bill and perhaps not to the intent of the sponsors or the intent of the committee, but still the language is that broad.

The language is that broad and does give the courts the authority to make an independent policy judgment and it seems to me to say as a broad matter, almost constitutionally, that the courts will have this role regardless of its impact in particular cases. It is a very sweeping proposal indeed, sir, and I doubt that this was the intent in cutting across so many different areas, whether they are governed by existing Federal regulation or will be governed by new mechanisms that the Congress has under active consideration right now.

Senator HART. Moving to your title III, you return to what is really, I guess, the basic theme of your counsel to us: Some environmental decisions are so fundamental that an elected body such as the Congress or legislature should make decisions.

Mr. KENNEDY. Yes, sir. This, I think, is a central point. Some of these things, take the Alaska pipeline—and I am not expressing any opinion on the merits of that—but one element of the Alaska pipeline situation is our relations with Canada. The Canadian Government has expressed some serious concerns here—and not to speak to the merits—but I don't really see that the judgment, on whether you should build that pipeline or where or how, should be made by a court applying some standard developed as a common law matter, a court-made standard.

Now there is a role for the courts. I think the courts should assure that the National Environmental Policy Act is complied with, and they have been diligent in assuring that. They have sent the Alaska pipeline case back and demanded a new environmental statement. I think the courts have a role to make sure the procedures for public participation are fair and reasonable but I don't believe we should have legislation which says the court should decide concerns of that kind. Other choices don't involve our foreign relations, but are very central and fundamental, and I think ought to be made by people who are accountable to the electorate, by the Congress.

Senator HART. Then would you agree that it's a decision that should not be reserved for the Interior Department, either?

Mr. KENNEDY. Well, in several cases I've said that I thought the decision ought to be made by the executive branch and the Congress, and there are obviously all kinds of permutations here as to the degree of congressional involvement, but I certainly don't think major decisions of this kind should be made at low levels.

I think certainly when you talk the Alaska pipeline and our foreign relations, I assume that the President would have a hand in it and if Congress elected to have a hand in it, I would think that would be eminently appropriate, and that's the legitimate process, defining legitimate now as the process which is fair and which will be widely accepted as fair, accepted by the general public as fair.

Senator HART. You do make some comment as others have about the fear of harassing or frivolous litigation as a result of this bill. The Michigan experience, which covers admittedly only a year, has been made a part of the record. About 22 lawsuits have been filed, and it's my understanding that at most, only three of those could be termed frivolous. Each of these was disposed of with dispatch.

Doesn't that give us experience that argues against a flat opposition to legislation of this kind on the ground of frivolity?

Mr. KENNEDY. Well, I hope the testimony didn't convey that that was the principal burden of my—

Senator HART. Indeed not. I have expressed my understanding of your basic concern. That is, as I did in the earlier questions, but I just want to get your reaction to this experience.

Mr. KENNEDY. Could I speak a little bit at length to this? First, as to the Michigan experience, I have not studied that and so I am afraid I can't comment. There is an area with which I have some familiarity—and I won't use words like frivolous or other words at this stage—but I will say this: That in the litigation about powerplants, I think we have a national problem right now and that is that we have so structured our situation now that there is no expeditious or reasonable way to settle these controversies.

Now, this is not anybody's fault in particular; it's the consequence of a series of historical developments, but it does provide a situation where people who are, no matter what, opposed to a particular project—let's leave aside the merits of the opposition—have an endless opportunity to hold up the project. I think it's nearly impossible to get a nuclear powerplant which is vigorously resisted, into operation under the existing structure. I hope the committee will look into this.

I want to suggest not that we will have a big flood of frivolous suits—that is the kind of epithet that I don't care to indulge in—but I do want to say something else—and that is that this can happen sometimes, just as on a number of occasions there have been very meritorious suits brought by conservationists and environmental groups, and these suits have made a great contribution to the public interest and I think the United States is ahead of where it was some years ago because of this. But I have a modest point, which is that not every suit is automatically meritorious because it invokes the name of the environment, and there are no disincentives currently on the other side; there is a problem when you create avenues like this and opportunities like this, shouldn't there be disincentives against the possibility that there will be some nonmeritorious suits, and that some worthwhile things will be held up? And I don't think they ought to be held up just because somebody invokes the name of the environment and says, "Because I am pleading an environmental cause, this automatically gives me a stature, which somebody else might not have."

Where are the disincentives? How can there be some responsibility for the opponents as well as for the proponents? I think that's the policy point.

Senator HART. I think the bill attempts to give basis for the disincentive. It's my impression that paragraph (d) of section (4), authorizes the apportioning to the parties of costs if the interest of justice requires. I think this reflects an effort to permit a court to hang a dollar sign on the fellow that came in in a frivolous fashion.

Mr. KENNEDY. That is my understanding of the provision and I think it's a desirable one, and I suppose the reservation I have is how ready will courts be to apply it? I'd certainly like to see the intent spelled out in a very explicit and direct way on this.

Senator HART. I think we can do that.

You supported the citizens' suit provision in the Clean Air Act. May I ask why?

Mr. KENNEDY. Yes.

Senator HART. I was going to make an assumption. I'd better not.

Mr. KENNEDY. Well, the citizen suit provision in the Clean Air Act is basically a provision that says that if there is a standard there, that the Congress means to open every avenue to assure compliance with that standard, that simply because a prosecutor doesn't get around to the case or elects for some reason not to pursue it or, more plausibly, that the volume of business is so great that he can't turn to it, the standard will not become a dead letter.

And I think that's very sound. I think if we are going to have environmental progress we need not only to have standards but, obviously, we need enforcement of the standards, and what the Clean Air Act provisions seem to me to say is that they offer greater assurance that the standards will be enforced and complied with, and I think

this is in the interest of complying in industry as well as other people, to be sure that everybody has to comply.

Now, the other side of the coin, the provisions of the Clean Air Act, however, don't give the court the assignment of making the independent policy judgments as to whether there ought to be a standard and what the content of the standard should be. The standard is given in the enforcement action. It's there and the question is: Was the standard issued and is it being complied with and presumably if it's not being complied with, the court will direct the compliance, and I think that's sound.

Senator HART. You would provide for enforcement?

Mr. KENNEDY. Yes.

Senator HART. In the case of an agency that had fixed a standard, you would provide a citizen right of action to compel an agency to issue a standard?

Mr. KENNEDY. No; I have questions about forcing the agency. I certainly would give citizens a right to petition the agency, and I would give a right of review to citizens if the agency didn't on their petition come up with a result that they believed in compliance with the policy of the law. But as to an injunction action against an agency, I see some policy questions about that. I also think that the standard of review should leave the agency with some latitude so the court can't say, "Well, if we were in their shoes, we would just do something different." I think there ought to be some notion of abuse here as a standard of judicial review.

Senator HART. I think I understand your position, but let me make sure:

You said that citizens' suits should lie where a standard had been issued but because the prosecutor or the enforcement agency had some chores it never got around to doing it—think, if you will of an agency which because it has a lot of chores, doesn't get around to issuing a standard. What remedy do you see?

Mr. KENNEDY. I think an aggrieved citizen ought to have the right to petition the agency to initiate a proceeding to promulgate a standard. He ought to have a right to participate in that proceeding and try it out before the agency, and if the agency comes out with an unsatisfactory result, I think he ought to have the right to seek judicial review of the agency action—however, allowing some latitude for agency discretion.

What I don't believe is that he ought to be able to just go to court and obtain an injunction against the agency saying "put out a standard." I think he ought to pursue his agency remedies and he ought to have a right of review, but a limited right of review—the big point being that the courts wouldn't insert themselves in the place of the agency and make the judgment that Congress had asked the agency to make.

Senator HART. The reason you wouldn't have the citizen limited to petitioning the agency to go about its enforcement business is that there the agency has already fixed the standard and direct appeal by the citizen to the court doesn't involve that kind of judgment business.

Mr. KENNEDY. Yes. In the enforcement action provision of the Clean Air Act, the court is not making a new judgment about a standard. It's simply saying there was a standard, lawfully promulgated.

Senator HART. The agency should enforce the standard?

Mr. KENNEDY. Yes; that the standard should be complied with. It's saying to the violator, "You comply," and this is simply a means of being sure that when standards are put out, that they are meaningful, that they are obeyed, and they should be obeyed.

Senator HART. Mr. Bickwit?

Mr. BICKWIT. If that decision is subject to question—that is, the decision not to enforce the standard that exists—why not subject the decisions about what standard should be adopted to the same kind of question?

Mr. KENNEDY. Well, let's assume a standard is issued. Obviously it's there, it's the law; noncompliance with it now becomes a violation of the law, and the citizen action provision is simply one more weapon in the arsenal to assure compliance.

I think that's a very reasonable thing. If standards are there, they ought to be obeyed; that seems to be what the Clean Air Act provisions fundamentally say. They recognize the burdens on the administrative agency and on prosecutors that arise out of the volume of the work they have to handle, and the act says this will be supplemented by actions by private individuals to be sure that there is obedience to the law; I think this is a perfectly sound and reasonable provision.

Now it gets coupled in discussion—the trouble with "citizen participation" is it embraces a number of things such as this and standing—it's coupled in discussion with questions as to whether or not the courts shouldn't make policy judgments, and this is where I would differ.

Mr. BICKWIT. Well, isn't it a policy judgment whether or not an agency sues to enforce its own standard?

Mr. KENNEDY. In a sense, but I think it's a very modest and second order kind of question, and certainly what Congress said in passing these provisions, it seems to me is this: Environmental reform is a major national objective. We are serious about it. We don't want a set of standards on the books which are just a set of verbiage, a dead letter. We want the standards to be promulgated, we want them to be rigorous enough to improve the quality of the environment, and we want them to be obeyed, or we won't have accomplished our objective.

Mr. BICKWIT. We want all the agencies to enforce their standards and we want all the agencies to set decent standards. It seems to me when the agency refuses to enforce the standards you are saying let the citizen get in and do it, but when the agency refuses to set decent standards you fall back and say the citizen should not be involved in it.

Mr. KENNEDY. No, I think I did say—I think there ought to be a limit on the role of the court in it.

Mr. BICKWIT. What I cannot grasp is the basis for distinction between the limit you would impose in one and not the other. It is the theory of the bill before us that there should not be any distinction.

Mr. KENNEDY. Yes, and I think if I can articulate the theory, I think the courts have had a traditional set of responsibilities in reviewing administrative-agency action. One obvious one is if there is a requirement of law, some legal error in the agency action, that is what the courts are there for. That is their constitutional function and obviously they should review that.

A second one is to be sure that the procedures are fair, that proper hearings are accorded and so on, and this again is a very natural and proper function for the courts.

Now, the third one is the area where there is controversy. What the courts have said over a period of time is that there is an outer limit to their review of the merits of the administrative-agency decision, and this was a judge-made doctrine really. They said that they would not go beyond a certain point in reexamining the merits of the decision, and the point is defined as abuse of discretion or some rubric like that, and to my mind it is the court saying the Congress did not charge it, the court, with the responsibility of making the policy judgments. They charged the agency with that responsibility. And I think that is a rational way to do a lot of the country's business, to do it that way.

Now, I am not arguing for agency adjudication so much as for agency rulemaking. I think we do not do enough in agency action by general rule. This is a common criticism, and I think it is an appropriate one, but where you do this by rulemakings with public participation I think you do it in the most effective way certainly in the environmental area, if you are talking about a whole range of environmental problems.

MR. BICKWIT. Now, on rulemaking, in your No. IV, after talking about those decisions which are so fundamental as to require that they should be made by the legislature you say even if the decisions are not that fundamental that rulemaking is the way to go. And that you prefer an administrative rulemaking approach to that offered by this bill. When you refer to rulemaking as a different approach to the one we are advocating, that concerns me because S. 1032 as I read it is not a bill to get rid of rulemaking; our intention is to insure that administrative rulemaking and all administrative action is subject to complete and thorough review, and it is true that under a very strict reading your reading might be the one that the court gave sanction to. However, I think we should make absolutely clear that it is our intention to supplement and not to dismantle the existing rulemaking and other administrative processes.

MR. KENNEDY. I regret that I conveyed the impression that I read the bill as just wiping out all of the existing rulemaking mechanisms. It does not do that obviously, and it would be unfair to suggest that and I did not mean to suggest it. I did mean something else, which is that some kinds of environmental problems it seems to me ought to be addressed on a general basis nationally and that they ought to be addressed in such a way that the outcome is a broad disposition of what to do about the problem—such as automotive emissions, but not just that, a lot of other things—and I think it is very hard for a court in the context of a case or controversy to do that kind of a job.

You can argue that on adjudication they may do about as well as an agency and in many cases they would. Perhaps in some cases better. But on rulemaking they simply do not have the mechanism to do it. They do not have the techniques, they do not have the facilities, and they get out of the framework of the case of controversy, and I must say that if you go to rulemaking I think you are pretty well constrained to do it through an agency process.

Now, I do not mean to suggest that the bill eliminates all rulemaking, but I think it does call for a number of environmental policy

decisions to be made otherwise than by rulemaking and that is the point I was differing with.

Mr. BICKWIT. Another think we should clear up is that it is not our intention that the courts should be making the rules in a rulemaking procedure; it is our intention that in a case or controversy where the advisability of a rule is called into question that the court can decide that the rule is inadvisable. If that decision has ramifications for other similar cases, as I assume it would under a common law approach, then it may have the force of a rule. But we are not advocating that the court shall assume the, as you point out, nonjudicial function of making rules per se.

Mr. KENNEDY. No, but I think the bill does say, if I read it correctly, that the court in the case before it makes for that case the substantive judgment that would have been made otherwise by a rule, and even if there was a rule that applied, they could upset that rule.

Mr. BICKWIT. That is right.

Mr. KENNEDY. As not consistent with the statute.

Mr. BICKWIT. That is right.

Mr. KENNEDY. Making their own judgment.

Mr. BICKWIT. That is right. And can we have for the record exactly why you feel a court is not competent to do this. Also could you explain to us whether you feel that the court is not ever competent to do this or in some cases is and in some cases is not?

Mr. KENNEDY. Well, to say they are not ever competent is an extreme view and I would not propose it. I would say something else, and this has nothing to do with the caliber of the men on the Federal bench, which in general is very high, but I would say several things. One, they do not have the opportunity to develop a capability to deal with a problem on a continuous basis that an agency does. If you look at the Environmental Protection Administration it has an extensive staff, but beyond that it is able to draw on all kinds of expertise. It lives with that problem day to day.

Now, there are those who say that is a disadvantage because they live with the people who are part of the problem, and that may be a disadvantage to some extent, but it is an advantage in other ways, the fact that they live with it continually, that they have a broad range of expertise available to them, they can draw on all kinds of panels and scientific advisory groups and industry people.

I know it is not popular to say that, but once in a while it is useful to talk to industry people and with all kinds of people including the challengers and those who would controvert what they are doing. A court cannot do this effectively. They can hear a case and they are constrained by a set of procedures and rules of evidence and traditions which confine them in a way that is not applicable to an administrative agency, but above all, they cannot live with the problem, they cannot develop the expertise to deal with it. They cannot deal with it on a national basis, on a uniform basis, and they cannot turn around as fast.

Suppose they do the wrong thing. An agency can reverse itself fairly readily or modify itself or its action and fairly quickly and responsively in the rulemaking context. All of these things are not available for a court. It is not a matter of comparative caliber of this director of this agency as against this Federal judge; it is an institutional matter.

Mr. BICKWIT. But if it looks only at the particular case, then would you be inclined to say that it would have the mechanisms available for analyzing that case effectively?

Mr. KENNEDY. If you decide that somehow the questions posed by environment involve a set of discrete situations with some common elements but basically distinct situations that could be dealt with one by one, then you could argue that if you expand the courts—you would have to have a great many more judges to handle this volume of work—you could argue that a court could do this, but environmental problems do not come that way; they come either as very broad policy choices or they come as matters involving a high technical content—I do not mean in the engineering sense, but technical in many ways—and there is a problem of continuity and consistency. Courts are not good mechanisms to handle problems that come in that shape and size; these are not the kinds of things that courts handle well.

Mr. BICKWIT. Do you think throughout the tradition of common law nuisance the courts have been ill suited to handle the cases imposed on them by that doctrine?

Mr. KENNEDY. No; because there were not that many. But what we are really talking about is something else again which is changing the way in which we do things industrially and commercially and in other ways in the United States, across the United States. This is a massive thing we have to do. We have to have new ground rules for land use, we have to have new emission standards, we have to have new technologies, we have to put an awful lot more money in research and development toward these new technologies.

It is a congressional problem, and Congress ought to use the best tools it can to deal with it, and so it becomes secondarily an administrative problem. The courts could make a contribution here and there, but it is not something you can rely on the courts to do as your major vehicle.

Mr. BICKWIT. If it is a congressional problem, if it is that sort of thing that is so fundamental that we want the Congress to decide, I hope the colloquy between Senator Hart and Senator Baker and you made it clear that we do not intend to remove anything of that nature from the Congress. All this bill is saying is that when the Congress farms a decision on a particular subject out to an administrative agency that that agency's action is subject to complete and thoroughgoing review. And if you will acknowledge, as you have, that in some cases the court will be competent to handle that kind of matter, then it strikes me that we ought to let the court do it in that case.

Mr. KENNEDY. I have acknowledged that in some cases. I hope I did not acknowledge, because I did not mean to, that they are generally competent to handle it, because they are not.

Mr. BICKWIT. You did not.

Mr. KENNEDY. I would contend the contrary, I assume that the intent of the committee and the sponsors of the bill is not to give the last word to the courts as against the Congress, but you will not find that intent in the bill. You have to have new provisions in the bill, or you would have to have new overriding legislation that took you out of this if this were on the books.

Mr. BICKWIT. I agree with this.

Mr. KENNEDY. It is not there now.

Mr. BICKWIT. Well, if we put it in I hope we will get your support for it.

Mr. KENNEDY. Well, I have, as you know, a number of reservations about the bill.

Mr. BICKWIT. I understand that. Thank you very much for spelling these out as clearly as you have. Your testimony has been very helpful.

Mr. KENNEDY. Thank you, sir.

Senator HART. I will close as I opened. You have, by identifying some of the basic relationships that are affected by this bill, persuaded us to extend the hearings to include, if such men and women live and breathe, students who have no advocate's role, even subconscious in this effort. We welcome some suggestions from you as to who in the academic community will be most helpful in providing this kind of testimony.

Mr. KENNEDY. Thank you, Mr. Chairman. I will be glad to give you some suggestions.

Senator HART. Thank you.

In the testimony of our first witness, Mr. Nader, reference, if not introduction, already has been made to our concluding witnesses, Mr. Charles Halpern and Mr. Robert Hallman, speaking for Common Cause.

Mr. LAGOMARCINO. Mr. Chairman, if I may start this matter on behalf of Common Cause, my name is John Lagomarcino. I am director of legislative activities for the organization. The statement for the record which has already been submitted to the committee contains a brief summary of the backgrounds of our two witnesses.

I would be happy to answer any questions directed in regard to the organization, in regard to the substance of the legislation before the subcommittee. Mr. Halpern and Mr. Hallman are better able to handle that and I would like to introduce first Mr. Halpern, who will direct himself to some aspects of the question to the commentary in our testimony.

Mr. Hallman will follow Mr. Halpern.

Senator HART. Mr. Lagomarcino, I shall say if there are questions about Common Cause, we would be glad to address them to you in terms of the nature of the organization. But it is my understanding that it is about—I was going to say the only game in town—it is the best game in town, in persuading Congress to understand more clearly what we should do.

STATEMENT OF CHARLES HALPERN; ACCOMPANIED BY ROBERT HALLMAN, REPRESENTING COMMON CAUSE

Mr. HALPERN. Mr. Chairman, Mr. Hallman and I are appearing on behalf of Common Cause, which, as you know from our written statement, favors the passage of S. 1032.

We will also try to draw on our experience in environmental litigation in stating and summarizing briefly for you, our views on this legislation.

Senator HART. May I interrupt you at this point?

As you go along, if either of you want to make comment to any of the exchanges we have had this morning, we would appreciate it.

Mr. HALPERN. Thank you, Mr. Chairman.

In fact, we shall submit our written statement for the record, and confine our comments largely to what has gone before.

Senator HART. The statement, as prepared, will be printed in full.

Mr. HALPERN. During the past several years, there has been a growing role for and a growing recognition of the importance of environmental litigation. In its most recent annual report, the Council on Environmental Quality spoke of the importance of environmental litigation by citizen groups and the important impact such litigation has had in stimulating agency action for environmental protection.

Mr. Kennedy has suggested that while he supports some citizen litigation, he is concerned with the fundamental restructuring that S. 1032 will accomplish in the relationship of the Federal courts to the other branches of the Federal Government and to the State governments.

I would submit that there is one central relationship that the bill would affect, and that most of the other relationships are peripheral.

The critical impact of this legislation is on the relationship between the Federal courts and the Federal administrative agencies. It is there that I think that the major thrust of the bill is directed.

Mr. Kennedy mentioned the *Alaska Pipeline* case in his prepared testimony and came back to it in his oral statement. It is a case I know something about, since I have been counsel for the past 18 months for the environmental protection organizations involved in that case. I think it is proper for me to say this much outside the judicial forum.

That case is as dramatic as any to illustrate the important role of citizen litigation and the judiciary in decisions affecting the environment.

Eighteen months ago, the Department of the Interior was about to issue a permit for the beginning of construction of the pipeline system. It took judicial intervention at the request of environmental protection groups to defer that action by the Department of the Interior.

Mr. Kennedy has suggested that he has no problem with the standing of large environmental groups in environmental lawsuits.

Unfortunately, that enlightened view is not universally accepted, and even now in the *Alaska Pipeline* case, where I think the major contribution of the environmental groups has generally been recognized, the industry is still questioning the standing of the environmental groups to bring that lawsuit.

This bill would have the vitally important effect of erasing those questions once and for all.

I think the *Alaska Pipeline* case is particularly important because it shows the failure of the administrative process in most graphic form. The Department of the Interior has worked closely with the oil industry for the past several years on plans for the construction of the Alaska pipeline. Its deliberations had always been closed to the public, and it was only after judicial intervention was invoked that public procedures on the Alaska pipeline were begun.

The proposed legislation would clarify some of the open questions regarding standing of citizen groups to bring suits of this nature. But

more important, it would clearly state that courts can properly decide whether an environmental action is unreasonable.

This bill would not give the courts the authorization to interfere in decisions of American and foreign policy. It would simply authorize them explicitly to look for unreasonable environmental hazards and issue appropriate relief against such hazards.

Mr. Kennedy suggested that this is a dispute between courts and Congress. That is not the case.

The *Alaska Pipeline* case has never been undertaken for resolution by Congress. The issue in this case is whether the Department of the Interior in closed proceedings between Interior personnel and the oil companies, will make the decision on the Alaska pipeline, or whether that decision will be shared in part by the courts, functioning in open procedures with the participation of environmental groups.

Whatever role the legislature could have had prior to this litigation in resolving that dispute, had it chosen to intervene, it will still have after this litigation is concluded.

The question is really one about the responsibility of administrative agencies and the roles of the courts in assuring that they discharge their statutory responsibility in a responsible fashion.

Common Cause's contention is that suits of this nature should be facilitated. This bill would go far to do that and my associate, Mr. Hallman, will speak more precisely on the terms of the bill.

Mr. HALLMAN. Thank you, Mr. Halpern. I will proceed, if that is all right.

Mr. Halpern, as well as Mr. Nader, has focused on the essential need which this proposed legislation is designed to satisfy, and for which a remedy and legislation is drastically needed: That is correction of the imbalance of power that currently exists and has existed for some time among citizens, administrative agencies, and established economic interests, with respect to the management of the environment.

It is an imbalance of power that is reflected in a variety of ways. It is an imbalance of power which shuts citizens out from the board rooms of industry. It shuts out citizens from the deliberations of the Secretary of the Interior, for example, when finally deciding and making policy judgments on the *Alaska Pipeline* case.

It is an imbalance of power which effectively denies those people most affected by decisions with regard to health and public welfare, a right to participate effectively in them, and to affect them.

I would like for just a moment to recount an experience of mine at the Environmental Protection Administration in New York City, where I recently served as the Deputy General Counsel, to provide some insight into the desirability of citizen pressure to assist those in Government who have an interest in furthering environmental objectives, in pursuing those environmental objectives within the Government.

One of the major problems that faced us was how to deal with the proposal by the major electric utility in New York City to double the capacity of a fossil fuel generating facility in a portion of the city which is, concededly, the most polluted corridor in the country in terms of various air pollutants, produced by powerplants.

We in the General Counsel's Office of the Environmental Protection Agency, saw this as a very significant, very important environmental

problem. At the outset, we faced not only the problem of convincing the Administrator of the Agency that this was an important problem; but, the Administrator, with our backing, faced the fundamental problem of convincing other interests in the city government that this was an issue that deserved careful consideration and should be debated publicly. And, if it should be raised publicly, in what posture it should be presented to the public.

After considerable informal debate the issue was brought out into the public where EPA pressed its opposition to the proposal. The mayor ultimately authorized only one-half the proposed generating capacity. The serious environmental problems raised would never have been effectively factored into this decision had we not been able to cite and call upon citizen pressure exerted upon us, and to be able to point to outside citizen pressure, to support our objectives on the inside. Growing citizen opposition was also an important factor in deciding to permit completing governmental interests to debate this important issue in public and to seek public guidance on its resolution, which is essential to achieving a decision that satisfies the public interest.

The point is that citizen pressure can be of great assistance to those within government that are favorably disposed to act in the public interest, and may free up untapped resources within government, as well as those outside.

I would like at this point to briefly summarize the aspects of the bill which we consider most important, most critical and essential to providing the kind of charter for citizen action, which we deem essential.

The most important, as Mr. Halpern has pointed out, is the opening up of discretionary activities on the part of administrative agencies to meaningful challenge and review in an unbiased form; a role, I would submit, and I think reasonable arguments can be made, for which the courts are eminently well suited.

Senator HART. It is to that point as you go along, I wish you would address yourself, this business of competence, not just whether procedurally it is manageable or not, but to the competence of it.

Mr. HALLMAN. The reason the courts are competent to deal with environmental problems is because of the nature of the ultimate issues presented for resolution.

In most cases the determinative factor will be a requirement for an objective analysis and balancing of many competing public interests, one of the most fundamental of which is environmental protection.

I would submit that single interest agencies, designed and established to promote narrow developmental types of interests such as, the Atomic Energy Commission, the Federal Power Commission, the Department of Transportation, cannot and should not be relied upon to exercise ultimate responsibility for making those kinds of policy-type judgments. They simply are not designed for that purpose. Institutionally they are ill-equipped to finally determine those kinds of issues.

The legislation is not intended, as has been pointed out in prior testimony, to inject the courts into the technical issues from the first instance.

The legislation is, however, and common laws support this objection—trying to provide a form in which will operate as a check on the

more wide-ranging and important policy issues now passed on without public scrutiny by agencies. One such issue has been called to the committee's attention this morning; the decision under the Clean Air Act of 1970, as to whether or not to extend the requirements for automotive emission standards from 1975 to 1976.

I forget exactly what provision it is, but authority is delegated to the Administrator of EPA to make that determination in view of certain standards that are set forth.

One of the basic standards is whether or not an extension of time would be "in the public interest."

Now, is the Administrator of the Environmental Protection Agency, knowledgeable as he is regarding the effect of carbon dioxide and hydrocarbons on health, which he can document those, should he have final authority to exercise ultimate responsibility to decide whether or not Detroit should be able to have, should be allowed another year, to meet important pollution standards which Congress has decided are essential to protecting the public welfare?

I submit that he should not have ultimate responsibility for that decision, that in the absence of Congress stepping in, which it apparently has decided not to do, the court, as an unbiased arbiter, should be available to citizens for a review of the merits of this important decision.

I would now like, just briefly, to note a few recommendations we would like to suggest to the committee for strengthening the proposed legislation.

The committee has been apprised of various obstacles that have faced citizens in attempting to bring litigation in the environmental area. One obstacle has not received adequate attention, and has not been adequately dealt with in the bill itself, and that is the very real economic constraints on citizen litigation. Most precisely, I am offering to attorneys' fees, fees for expert witnesses, who are essential to the intelligent presentation of the types of cases.

For example, in the *Alaskan Pipeline* case, over 2,000 hours of time have been spent by the public interests firm handling that piece of litigation already, by the lawyers themselves. I wonder what that effort would cost if outside counsel had to be compensated at the going rates. It would be a astronomical figure. More, I would think, than the total annual funding available to the public interest institution.

So it is important, we feel, Mr. Chairman, for this bill specifically to provide the courts with the authority, in fact, mandate them, to award attorneys' fees and fees for expert witnesses in meritorious cases brought by citizen plaintiffs. By mysterious case, we mean, more simply than getting a final judgment. We mean also to include situations where the litigation results in abatement of the pollution problem short of Supreme Court action such as might result from settlement. Cases, in other words, in which the citizen has performed valuable service in the public interest.

If I might, I would just like to quote three lines from a very recent Supreme Court decision, which emphasizes the economic constraint problem. The decision involved the enforcement of the public accommodation section of the Civil Rights Act of 1964. In holding in a per curiam decision, that plaintiffs who successfully enforce that act

ought ordinarily to be awarded attorneys' fees, the Court has this to say, and I think it applies to this situation:

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts.

That decision was rendered 2 years ago.

I would also like to call to the committee's attention the fact that the kind of provision we are asking for is not unprecedented in legislation designed to encourage and promote the public interest.

The Truth In Lending Act, passed in 1968, provides for the mandatory award of attorney's fees to successful plaintiffs under the law.

And indeed, the Congress has to some extent recognized the usefulness of private citizen actions to fulfill the public interest in the Clean Air Act itself, and in title VII of the Civil Rights Act of 1964.

Mr. HALLMAN. Two other points I would like to make with respect to strengthening the proposed legislation. First, one of its most important aspects is to provide, and we think rightly so, a citizen with an opportunity to be able to challenge the validity of agency standards. That purpose could not be achieved if defendants were allowed to advance as a defense that compliance with agency standards is a defense to the suit and automatically makes their activity consistent with the public health and welfare.

We think that the bill should make perfectly clear that compliance by private parties with agency standards is not a defense. I believe this point has been raised in prior testimony on the bill.

Another important aspect of the bill is to open up agency discretion to review in the courts. The bill in this connection provides that a court may adduce additional evidence on "environmental issues raised." We are afraid that the phrase "environmental issues" might be narrowly construed. We would rather see the bill expressly provide the courts with the authority to consider any additional evidence it deems relevant to resolving the issues before it.

For example, it would not make sense, if the Court were reviewing the propriety of an electric powerplant proposal, to preclude the Court from looking at additional evidence concerning the need for more power, as well as the availability of less harmful alternatives. Those are the fundamental recommendations we have for strengthening the bill, Mr. Chairman. We feel it is a very essential bill; it is one that is going to make environmental protection legislation valuable and meaningful.

Thank you.

Senator HART. Thank you for the specific suggestions.

Certainly we would not want to, assuming we were persuaded that this sort of legislation should become law, we ought not restrict the testimony that a court could receive to elements affecting the environment. Either by explicit language in the bill or in committee report we ought to make clear that we are not providing a citizen's right to have a court review only the environmental elements when it considers taking new evidence, because the clearest example is the one you used. If the decision of the Administrator to extend to 1976 the auto emissions standard was subject to a court review through the device of this bill,

and the new evidence the court could receive would be limited only to environmental evidence, you would have a very unsatisfactory kind of review. And I can imagine that massive economic testimony would be a part of that kind of review if in fact the court was to find whether the extension was in the public interest.

When all of the secondary considerations are boiled off, isn't the most basic decision that we must make the one as to whether a judge in fact is competent or more competent than the agency?

After listening to today's testimony and the earlier witnesses it strikes me that if we are satisfied that the judge, given the limits of the laws of evidence, and so forth, if in fact the judge nonetheless is competent to identify the competing claims which you say operate in all these instances, if he is competent, then the only question that remains is whether we can insure that in providing the citizen the right to get to that judge we do not dislocate these Federal-State relationships and other things that are cited to us as reasons for not doing anything.

Mr. HALLMAN. If I might respond to that, Mr. Chairman, I think certainly that is a key decision that one has to make in order to find that this type of legislation is, should be supported. I would suggest, however, that I have seen virtually nothing in the testimony or anywhere else that demonstrates to me that judges are incompetent to perform this kind of task. In fact, I would think that this is where judges' expertise, if we can use that term in connection with the judiciary, lies in balancing our problems, in sifting out the relevant from the irrelevant, getting to the heart of the issue and making an objective appraisal. And I do not think Mr. Kennedy addressed that question really.

The attack generally taken is that, well, Congress is more competent. But when you start talking in that vein you are back a step from the issue we are addressing; we are talking about agency versus court, it seems to me, and whether or not an agency should be subject to some kind of check where Congress cannot do that or has chosen not to do it, and that is the question. And with respect to that question I think that the courts are clearly competent.

I would like also to commend you for providing a mechanism in the bill for the courts to get at expertise and develop specific factual matters, and that is the ability to appoint a master to develop a detailed record when necessary to making an informed judgment. This is done frequently in litigation, bankruptcies, for example.

I also think it appropriate to comment briefly on Mr. Kennedy's contrasting of rulemaking to the role of the courts. There is no real limitation on access to expertise, relevant expertise on the part of the courts. Moreover, I would suggest that the court, just as well as the agency, when assessing a regulation has to follow the legislative mandate. That is the intent of this bill. It is not the case that the agency is bound by the legislative mandate and the court is not; it is clearly the court's function to see whether the mandate has been responsibly carried out.

Also, I think it is somewhat misleading to suggest that court action is not flexible enough, by noting that agency rules can be easily changed to fit circumstances. Court decrees are often made subject to change

and modification if conditions later change. Antitrust decrees provide a good example. So I think there is built into the judicial process a flexibility to meet changing circumstances.

As a matter of fact, that is what the common law is all about. Moreover, there is a real question whether agencies are able to respond in timely ways to changed circumstances. It takes an awful long time to get an agency to consider anything, at least that is my experience, and I would hate to rely on them entirely in this instance.

Senator HART. We are so worried about the fact that interest groups have more access, and without suggesting any impropriety, more influence on agencies than the citizens. We have not asked a question from the other point of view. If legislation of this sort was adopted, would there be any unfairness to the interest group inasmuch as the interest group would be subject to the administrative procedure route and the citizen would not.

Mr. HALLMAN. I guess what you are getting at is equal protection type of argument.

Senator HART. I was not. We would welcome your reaction to it as a matter of law, but I was raising the question more in terms of fairness.

Mr. HALLMAN. Well, in terms of fairness I think I would have this to say: the present situation is, in our judgment, so out of balance right now that I really do not think that fairness can be the measure at this point. We have to correct the existing imbalance and get the agencies—I know this is going to take a long time in Government agencies—to respond and open up to the citizen and to correct this existing imbalance. So no, I do not think it is unfair at this stage at all. I think we and I think Congress has indicated that it would not be unfair, for example, in setting out the National Environmental Policy Act.

We have made some decisions here in terms of certain priorities, and those priorities arguably are that environmental interests may now have to be given greater weight and at least equal weight—but perhaps greater weight now in an interim period anyway—to get things back on the track so that we can deal intelligently with these environmental problems. So I do not think it is unfair to provide the power to citizens to obtain access to and review of agency action in a situation in which they have been so badly relegated to an ineffective status to date.

Senator HART. Mr. Bickwit?

Mr. BICKWIT. Mr. Nader advocated that we should put a damage action into the bill which presently contains none. In your prepared testimony you commend the bill for the absence of any right to recover damages. I wonder if you could elaborate on why you make that commendation.

Mr. HALLMAN. Our commendation relates to the general criticism made that frivolous suits are going to arise out of this type of legislation. As a curb on frivolous suits, it seems reasonable to exclude damages because the opportunity to recover damages could serve to motivate and generate private economic interests into bringing suits to further intents which the bill is not intended to strengthen or to carry out.

By staying away from the damages issue here, you are going to insure that the public rights—which the legislation is designed to cover—are going to be vindicated as opposed to private economic rights. That is not to say, of course, that economic injuries suffered as a result of

pollution are not a major problem and should not be compensated, but I have some doubt as to whether or not it should be handled in as broad a way and is necessary to achieve the objectives of this particular legislation.

Mr. BICKWIT. Thank you very much.

I have nothing further, Mr. Chairman.

Senator HART. Gentlemen, again thank you for your testimony and the support you voiced for the bill.

(The statements follow:)

STATEMENT OF ROBERT M. HALLMAN AND CHARLES R. HALPERN ON BEHALF OF
COMMON CAUSE, INC.

ENDORSEMENT OF S. 1032

Mr. Chairman, you and Senator McGovern are to be strongly commended for offering and supporting the Environmental Protection Act of 1971. Common Cause fully supports the objectives and thrust of this exceptionally important piece of legislation. It should be enacted into law as quickly as possible.

This committee needs no introduction to the peril of environmental pollution, the progress that has been made in legislation enacted since 1965, or the problems that remain to be solved by new legislation. Common Cause believes that there is no serious contesting of the fact that our environment is endangered. And because our surroundings are endangered, we are endangered. Moreover, there is simply no good reason why we should not do as much as we can about it.

Many pollution problems result primarily from industrial activity. It is inevitable, then, that citizens seeking environmental protection and businesses trying to get or stay competitive, will lock horns. It is almost always an uneven contest. In no arena is this more clear than in the battles for really tough pollution control legislation—legislation with teeth, with strong enforcement powers. We have seen bill after bill start its way through the system, and they almost always come out watered down—as a result of industry pressure. We are witnessing that same sequence right now, in the National Water Quality Standards Act of 1971 which is before the Senate Public Works Committee. It will be a miracle if the bill which finally emerges from the Congress lives up to the high hopes of its sponsors a few short months ago.

Perhaps this is the cruelest of tricks to play on the public—to lead them to believe that they finally are going to have real protective legislation, then to snatch that prize away at the last minute by weakening the standards and enforcement powers of the bill.

The regularity of this phenomenon—perhaps it is a law of politics—means in this case that the fundamental right of the public to a clean environment, and the right of future generations to their very existence, is everywhere endangered or denied. And citizens have very little with which they may fight back. Environmental organizations have done an outstanding job of bringing awareness of these problems to the general public and in asking legislative, executive and judicial bodies for favorable laws and rulings; but, there is not one of these groups that is not hard pressed for resources to keep up their good work. They cannot begin to compete, on a straight financial basis, for the best research teams, managerial assistance, legal talent, and other necessary resources. Immediate steps have to be taken to restore some balance and reason to this situation.

As Common Cause Chairman John W. Gardner has pointed out, all human institutions after a time tend to come under the control of an inside clique. When this happens to government bodies, the insiders are the bureaucrats and the special interests they work with day in and day out. The citizens are shut out, and so is the public interest.

What is needed is to open the doors and let the people in.

That is where citizens' law suits come in.

The establishment of a right in every member of the public to the protection, preservation, and enhancement of the environment and of an adequate remedy to protect that right is long overdue and critically important to the achievement of a healthful environment. Restoration and maintenance of environmental qual-

ity will require basic changes in the operating practices of established governmental and economic institutions, which can only be effected by a reallocation of power over management of our resources. Citizens must be provided at once with an effective means and increased responsibility to oversee and control the use of the environment, particularly the activities of irresponsible corporate and governmental institutions. It is time now to grant citizen organizations the unqualified right to challenge such things as air quality standards, water pollution abatement schedules, mineral leases, radiation standards, waste disposal practices, expansion of electric power facilities, on the merits, before an unbiased forum.

S. 1032 constitutes a charter for the kind of citizen action required to stem the developing environmental crisis. As one example, the proposed legislation would have greatly assisted citizens of New York City in challenging the recent proposal by the Consolidated Edison Company of New York to double its fossil fuel generating capacity in the most heavily polluted corridor in the Nation.

REMOVAL OF MAJOR OBSTACLES TO EFFECTIVE CITIZEN ACTION

In the past, citizens have faced a variety of obstacles (in many cases overwhelming) preventing them from effectively participating in or challenging the merits of decisions by industry and government which significantly affect the environment, e.g., lack of standing, lack of substantive rights, sizeable litigation expenses, restricted review of agency action.

1. *Standing to Sue*

One of the first things that must be done, as the Hart-McGovern bill clearly recognizes, is to make it easier for the individual citizen (or group of citizens) to get his viewpoint on the adequacy and enforcement of environmental standards before the courts. Much of the effort that goes into preparing a legal action in the environmental field must now be devoted to establishing standing. Long before the merits of a case are heard, it is necessary to spend considerable time and effort just getting over the procedural hurdle of whether a particular citizen can raise the important substantive issues.

Some courts have recently granted standing to environmental groups, which have gone on to win on the merits. Victories achieved to date—especially in enforcing the National Environmental Policy Act of 1969 (P.L. 91-190) (NEPA)—affirm the importance of citizen action in the courts to point up and protect against activities detrimental to the environment. The 1971 Annual Report of the Council on Environmental Quality contains the following impressive account of the significance of citizen litigation in the environmental area:

“... citizen litigation has not only challenged specific government and private actions which were environmentally undesirable. It has speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation.

“Citizens in environmental suits have: stopped construction of a road and oil pipeline across the Alaska wilderness, pending thorough environmental studies; prompted cancellation proceedings against the pesticide DDT; halted construction of an expressway on the banks of the Hudson River; shielded wildlife habitats in Texas and Arizona from development; suspended construction of a Corps of Engineers dam in Arkansas until NEPA was complied with; postponed highway encroachment on Overton Park in Memphis, Tenn., pending review of its necessity; and protected parts of the National Forests until it was decided whether they should be saved as wilderness areas. . . .” (1971 Annual Report, pp. 155-56).

The right of citizens concerned about the deteriorating quality of life to bring suits in the environmental area remains, however, unsettled. The United States Supreme Court is scheduled to consider this matter this term in the *Mineral King* case (*Sierra Club v. Rogers C. B. Morton, et al.*), which involves a challenge by environmental interests to a large resort and related highway and electrical transmission line to be built in Sequoia National Park in California. Prompt passage of S. 1032 would relieve the Court of the responsibility for deciding this important question of public policy.

2. *Open-Up Discretionary Action to Public Scrutiny*

A basic obstacle to citizen influence over governmental action is the inability to challenge the merits of “discretionary” acts on the part of regulatory agen-

cies, most notably those responsible for managing our natural resources. The Administrative process has essentially been shielded from the scrutiny of the courts and the public owing to the ill-founded notion that administrative specialists are ideally equipped to effectuate the public interest.

One of the most important objectives of S. 1032 is to open up agency discretion to public challenge and evaluation by an independent arbiter—a role for which the courts are eminently well-suited. The bill authorizes the courts to evaluate the wisdom and soundness of agency decisions in light of the paramount interest in preservation and enhancement of the environment and discards the excessively protective “arbitrary and capricious” standard for judging agency action. S. 1032 would free citizens from “the tyranny of the experts” and frankly recognizes that single-interest agencies, established to promote narrow developmental interests, e.g., Atomic Energy Commission, Federal Power Commission, Department of Transportation, are not designed, and should not be relied on, to exercise ultimate responsibility for resolving policy issues which require an objective balancing of several competing public interests, including the fundamental interest in environmental protection.

3. *Other Aids to Citizen Action*

Other features of S. 1032 which we consider essential to correct the existing imbalance of power among citizens, established economic interests and government bureaucracies regarding environmental management are:

1. Placement of the burden on the polluter to justify the *need* for the challenged activity in terms of promoting the public health, safety and welfare and to demonstrate that no “feasible and prudent alternative” exists which would impose less harm on the environment.

2. Elimination of the requirement for citizen plaintiffs to file a bond, except in unusual circumstances where the defendant can prove upon clear evidence that he would suffer “irreparable damage” and the security requirement would not “unreasonably hinder plaintiff in the maintenance of his action”.

3. Elimination of traditional and outdated defenses frequently interposed to citizen suits such as sovereign immunity.

4. Grant of an unqualified right to citizens to intervene as parties in agency regulatory proceedings, together with the right to challenge the adequacy of agency regulatory procedures.

Common Cause also commends those aspects of S. 1032 which are designed, and appear adequate, to protect against a rash of frivolous suits under the bill, i.e., the requirement that any complaint must “be supported by affidavits of not less than two technically qualified persons” to the effect that the challenged activity is damaging or reasonably may damage the environment; the requirement that each action for relief “constitute a case or controversy”; the absence of any right to recover damages which should serve to ensure that litigation under the bill will be based on and vindicate public, not private pecuniary, interests; and the power of the court to award costs to defendants in frivolous cases. The inherent power of courts to dismiss frivolous or bad-faith actions at the outset—a power which is no more difficult to exercise in the environmental field than any other—would serve as an additional check on such actions.

The Administration, through the Council on Environmental Quality and the Environmental Protection Agency, has indicated its opposition to the prime objectives of S. 1032.¹ Basically, Administration spokesmen argue that only agency experts—not the courts—are competent to decide the kind of questions raised in environmental litigation; that such legislation will result in flooding the courts with environmental cases; that the courts are being asked to perform an essentially legislative function, i.e., to write new environmental laws; that administrative agencies and their work-product will be disregarded.

Also, while paying lip-service to the desirability of increased citizen participation in environmental matters, they contend that citizen action should be confined to agency proceedings and supplemental enforcement of agency orders and mandatory administrative duties. In our view, these objections are all without merit. They have been adequately answered by Senator McGovern, Congress-

¹ See Statements of Timothy Atkeson, General Counsel, Council on Environmental Quality, and John R. Quarles, Jr., Assistant Administrator for Enforcement and General Counsel, Environmental Protection Agency, before the Subcommittee on Fisheries and Wildlife Conservation, Committee on Merchant Marine and Fisheries, House of Representatives, submitted on June 9 and 10, 1971, respectively.

man Morris K. Udall, Stewart Udall, Professor Joseph L. Sax and David Sive in previous testimony on an identical bill (S. 3575) given before this Subcommittee last year.² The common thread running through these objections is the dangerous, and we submit untenable, notion that whatever is good for the "experts" is good for the public-at-large and that any attempt to challenge the experts' conclusions is suspect.

INDIRECT BENEFITS OF S. 1032

The benefits of legislation like S. 1032 should extend beyond providing an independent forum in which to scrutinize environmentally damaging activities of business and the government. First, it is reasonable to assume that a *real* threat of citizen litigation will induce potential defendants to take seriously their responsibility for contributing to the protection and enhancement of the environment.

Second, the citizen power created by the legislation should lead more persons to unite, organize and demand prompt action to abate environmental harm. In other words, S. 1032 would provide badly needed bargaining power to concerned citizens, which is likely to be vastly more effective than any increased access to Executive Branch agencies. The Administration prefers access to the executive rather than the courts for a simple reason: absent the possibility of a direct challenge to the merits of their decisions in an unbiased forum, agencies can disregard citizen advice and recommendations with impunity, as they frequently have done.

Passage of an environmental rights and protection law at the Federal level is also likely to stimulate state legislators to enact similar laws, in states where such laws have not already been enacted. This pattern has been followed to some extent with respect to NEPA, e.g., the California Environmental Quality Act of 1970.

Environmental litigation of the kind authorized under S. 1032 would also serve a useful educational function both for the public and its elected representatives.

RECOMMENDATIONS FOR STRENGTHENING S. 1032

In expressing support for S. 1032, Common Cause would also like to suggest certain ways which in its judgment the bill could be strengthened.

1. Recovery of Litigation Costs

A right to environmental protection and a remedy to secure it are not themselves sufficient to generate the citizen action necessary to vindicate legislative policy: existing economic constraints on environmental litigation must be removed. As the United States Supreme Court has recently noted in holding that plaintiffs who successfully enforce the Public Accommodations Title of the Civil Rights Act of 1964 "should ordinarily recover an attorney's fee . . .":

"If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

(The Court was construing 42 U.S.C. § 2000a-3(b) which provides that "the prevailing party" is entitled to "a reasonable attorney's fee" in the court's "discretion".)

Economic constraints can be overcome in large part by providing for the payment of reasonable fees for attorneys and expert witnesses incurred by citizens in prosecuting meritorious cases. Specifically, the courts should be required to direct a defendant (public or private) to pay such fees to citizen plaintiffs where the court upholds the plaintiff's contentions, or where the plaintiff's action results in abatement of environmental harm without a final court determination, e.g., through settlement or consent decree.

There is precedent for requiring an award of attorney's fees to successful plaintiffs in the Truth-In-Lending Act passed in 1968, (see 15 U.S.C. § 1640(a)

² See *Environmental Protection Act of 1970*, Hearings before Subcommittee on Energy, Natural Resources, and the Environment of the Committee on Commerce, United States Senate, 91st Cong., 2d Sess., on S. 3575 (May, July 1970). See also "Environment and the Bureaucracy", article by Professor Joseph L. Sax reprinted in the Congressional Record of June 15, 1971 at S. 9062-63.

(2)), as well as for authorizing the courts to award "costs of litigation, including reasonable attorney and expert witness fees," when the interests of justice require, to encourage litigation by "private attorneys general" in the public interest. E.g., Section 113 of the Clean Air Act of 1970; Equal Employment Opportunity Title, Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)).

The only mention of litigation costs in S. 1032 appears in Section 4(d) which provides that "costs may be apportioned to the parties if the interests of justice require". This provision could easily be construed only to include direct court costs, not the more significant litigation costs represented by fees for counsel and expert witnesses, which we feel must be included to insure enthusiastic and effective citizen action.³

2. Protection for All Components of the Human and Natural Environment

Common Cause has no doubt that you and Senator McGovern intend the proposed Environmental Protection Act of 1971 to provide protection against unreasonable harm to all components of the human and natural environment. We also feel strongly that the concept of "environment" embodied in the legislation should be as broad as possible. For example, such matters as noise pollution and problems associated with urban environment should not be excluded.

The rights and remedies granted by the bill are not stated in terms of "the environment" generally; but, rather are related to protection against hazards to "the air, water, land and the public trust of the United States," (i.e., the obligation of government to maintain free and open use of natural resources). To avoid a possible narrow construction of the above phrase, we recommend that the right and remedy provided for in S. 1032 be stated in terms of "the protection, preservation and enhancement of *all components of the human and natural environment*, including without limitation the air, water, land and public trust of the United States." This approach is consistent with the expansive concept of the environment underlying the national environmental policy enunciated in NEPA, in which Congress, *inter alia*,: (a) recognized "the critical importance of restoring and maintaining *environmental quality* to the overall welfare and development of man. . . ." and "that each person should enjoy a *healthful environment*. . . ." (emphasis added); (b) declared the need to ". . . assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; [and] . . . attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences . . .;" and (c) directed the Council on Environmental Quality to report annually on the condition of ". . . the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic . . . and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment. . . ."

We would also recommend that the title of the bill—the Environmental Protection Act of 1971—be expanded to "The Environmental *Rights and Protection* Act of 1971" to emphasize its *two* basic features: a public right to environmental quality and an adequate remedy to protect it.

3. Compliance with Agency Standards No Defense

One very important purpose of S. 1032 is to enable the public to obtain an independent evaluation of the adequacy of agency standards and criteria developed to carry out statutory duties. The bill should make clear that satisfaction or compliance by a private party with such agency standards or criteria does not in itself constitute a defense to an action to enforce the right to environmental protection granted by the bill. A defendant should not be permitted to argue that, since a challenged activity complies with existing pollution standards, it is therefore "consistent with . . . the public health, safety and welfare . . ." as required by Section 4(a). Pollution standards, like any other agency action, represent compromises and reflect value judgments which technicians have no special expertise in making.

³ The insufficiency of Section 4(d) in terms of covering major litigation costs was also pointed out by Frank M. Potter, Jr., when serving as Executive Director, Environmental Clearing House, Inc. See *Environmental Protection Act of 1970*, Hearings on S. 3575 before the Subcommittee on Energy, Natural Resources and the Environment, U.S. Senate Committee on Commerce, 91st Cong., 2d Sess., p. 70 (May, July 1970).

4. Additional Evidence Available to Court

The legislation provides that a court, in reviewing the merits of agency action, "may order that additional evidence be taken with respect to the *environmental issues* involved," (emphasis added). To avoid a narrow construction of the phrase "environmental issues", we recommend its elimination and substitution of an authorization to take any additional evidence "which the judge deems necessary to carry out the purposes of the Act." Clearly, the court should be able to consider any additional evidence which it deems relevant, e.g., information relating to the alleged justification for, and the availability of less harmful alternatives to, an electric power plant.

In summary, environmental protection legislation is only as valuable as its enforcement, and no governmental institution can be as alert, as flexible, or as sensitive as the affected citizen. There may be times when some individuals or groups act irresponsibly by bringing a case without sufficient cause. But the courts can quickly dispose of these. It would be a far greater injustice to continue to hamper the efforts of responsible citizens to challenge environmental irresponsibility which directly affects their lives.

Mr. Chairman, we thank you for inviting Common Cause to present its views on your excellent bill. We will be pleased to answer any questions you or the Committee may have.

SUMMARY OF STATEMENT SUBMITTED BY ROBERT M. HALLMAN AND CHARLES R. HALPERN ON BEHALF OF COMMON CAUSE

Common Cause fully supports the prime objectives of the proposed Environmental Protection Act of 1971 and recommends prompt enactment into law of this extremely important piece of legislation.

The establishment of a right in every member of the public to the protection, preservation and enhancement of the environment and a remedy adequate to protect that right is long overdue and vital to stemming the developing environmental crisis. Immediate steps are required to correct the present imbalance of power among citizens, established economic interests and government bureaucracies regarding management of the environment. This legislation would remove major obstacles to citizen litigation and, thereby, provide the public with the power effectively to challenge environmentally irresponsible activity by business, as well as government. It would:

- 1) Eliminate traditional defenses to citizen suits such as lack of standing to sue and sovereign immunity;
- 2) Open up discretionary acts by government agencies to scrutiny in an independent forum—the courts;
- 3) Eliminate the requirement for citizen plaintiffs to put up bonds in order to sue; and finally
- 4) Place the burden on polluters to justify the need for their challenged activity and to show that there are no alternatives which would be less harmful to the environment.

The proposed legislation also adequately protects against frivolous or bad-faith suits and ensures that actions to enforce it will vindicate public, rather than private economic, interests.

While supporting the proposed legislation, Common Cause urges that the following recommendations would considerably strengthen it:

In order to generate the citizen action necessary to secure a healthful environment, existing economic constraints, i.e., substantial costs of litigation, must be removed. As the United States Supreme Court has recently stated with regard to the Civil Rights Act of 1964:

"If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."

Common Cause recommends that the proposed legislation provide specifically for the payment of reasonable fees for attorneys and expert witnesses incurred by citizens in prosecuting meritorious cases, including cases where environmental harm is abated without final court action, e.g., through settlement.

Compliance with standards established by government agencies must not constitute a defense to an action under the bill.

Courts, in examining the merits of agency action, must be authorized to consider any additional evidence they deem relevant to the resolution of issues presented.

The concept of the "environment" embodied in the legislation must be as broad as possible, including all components of the human and natural environment.

The title of the legislation should be expanded to "The Environmental Rights and Protection Act of 1971" to emphasize its two basic features.

Senator HART. As we indicated earlier, we will inquire of certain of the men who in an academic role have concerned themselves both with the environment and administrative procedures, and if some are in a position to give us counsel, we will schedule a day in which we will receive their testimony.

We will adjourn at this time.

(Whereupon, at 2:04 p.m., the hearing was adjourned.)

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

FEDERATION OF AMERICA SCIENTISTS,
Washington, D.C., September 13, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: We write to endorse S. 1032, the Environmental Protection Act of 1971, providing citizens with the right to file suit to protect the environment from unreasonable pollution, impairment or destruction.

Today no one doubts that Government agencies, states, and private parties often undertake environment-affecting actions that are flatly opposed to the public interest. In the case of Government agencies, these improper activities often arise organically from conflicting agency pressures, high level directives, political influence, bureaucratic momentum, or just bad judgment. It is an anomaly in our law that there should be no legal remedy to these common distortions of public policy.

Our environment obviously requires an all-pervasive watchdog to sound the alarm when the possibility of damage is significant. And this watchdog must have the ear of a dispassionate, respected organ of society capable of resolving the resultant disputes. Only the public can satisfy the first criterion. Only the courts can satisfy the second.

Only the public can be depended upon to be promptly indignant about environmental deprivations. Ultimately, only the public can be the guardian of its environmental interest. Therefore, the right of the public to apply for timely injunctions must be legislated.

By the same token, if the court system did not exist for other purposes, we might seek to invent it to arbitrate disputes over the environment. In a court, men of judicial mind and public respect hear both sides. They apply the law and, more important in environmental issues, they apply the rule of reason to decisions that inevitably involve much discretion and conflicting values.

The Hart-McGovern bill thus brings into fruitful harmony the desire—and the ability—of the public to police its surroundings, and the existence of the courts to hear the cases the public brings.

We do not question, furthermore, the ability of the courts to decide these issues. Courts resolve equally complicated questions in other fields of law. And if the issues are complicated—as they are—better to resolve them in a court than to permit unchallenged administrative procedures to have the last word.

At the present time, citizen suits involving the environment actually bring the law into disrepute. Under present procedures, *pro bono publico* law firms are forced to charge violation of obscure statutes—or to find in agency actions procedural omissions of doubtful significance—simply because citizens are denied the standing to challenge the substance of decisions that all agree are questionable. This is not a healthy situation.

We also believe the courts should spend the necessary time on environmental matters. Much that the courts do is of patently lower priority, since environmental issues typically involve damage that is irreversible. And if there is need for relieving pressure on the courts—which we do not doubt—the solution is court reform and expansion, not the omission of important kinds of justified cases.

We do not share the view that frivolous citizen suits will be a serious problem. The proposed law does not provide for any damages to tempt such suits. And the courts are well experienced in detecting and denying unnecessary legal action. The bill also requires two technical experts in support of each suit. Most important, the costs and difficulties involved in pursuing suits are so substantial that unreal suits are always well deterred. In any case, the answer to frivolous suits is not to keep real suits impossible.

The Hart-McGovern bill fills a missing link. More and more information is becoming publicly available about the environment. More and more citizens want to be involved in protecting their surroundings. More and more often it is recognized that agency judgments are questionable. S. 1032 brings all these factors together by permitting serious citizen suits. For this reason, there is no proposed law in Congress today that is more important in its ability to protect the environment.

Respectfully,

JEREMY J. STONE, *Director.*

ANN ARBOR, MICH., *September 28, 1971.*

U.S. SENATE COMMITTEE ON COMMERCE,
Washington, D.C.

GENTLEMEN: These comments are intended for inclusion in the record of hearings on the proposed Federal Environmental protection act which would permit citizen suits to prevent environmental pollution.

I am a practicing lawyer in Ann Arbor, Michigan. For years my practice has been concentrated in the field of zoning and other land use regulations. Because of the close relationship between land use and many other environmental problems, I have increasingly been called upon to counsel regarding litigation to protect the environment. For the past year, we have had Act 127, P.A. 1970, which has opened up broad new remedies for groups and individuals who seek to protect the environment but cannot show monetary damage to themselves or their property as a result of the action complained of. The language of our act is quite broad and comprehensive, but there remain a number of environmental problems which it cannot reach. These include, quite prominently, the activities of federal agencies, and may include activities of private corporations engaged in federally-related activities.

For many years, the smokiest chimney in Ann Arbor was the U.S. Post Office. Local mailmen also had a habit of leaving their truck engines turned on for minutes at a time while they made deliveries, polluting the atmosphere in a particularly needless and wasteful manner. Fortunately, both of these problems have been greatly reduced in recent years through the increasing awareness of the Post Office of environmental dangers.

Some of us are wondering what will happen when an industrial polluter poses a defense of interstate commerce, defense contracting, or even federally assisted housing, to a suit under Act 127. Is federal authority supreme or do state courts have a right to abate pollution in such situations? No one knows.

Act 127 has another feature which is very valuable, in that it requires all governmental agencies in the state to consider the environmental aspects of matters which come before them. This is very important because many state agencies operate under statutes which make no mention of environmental matters. For example, the Michigan Public Service Commission, which regulates utilities, is required by statute to consider a great many things when making decisions, but before Act 127, it was not required, or even authorized, to consider the environmental consequences of its decisions.

Michigan has many other agencies, among them the Michigan Waterways Commission, which are charged with carrying out various programs in accordance with standards set by the legislature which do not include consideration of environmental impact. Act 127 has taken care of all of these at once. On the Federal scene NEPA is supposed to do the same thing. But there is a lot of uncertainty. Suppose a federal agency files an impact statement showing that great environmental harm will result from a proposed action, but for reasons which it considers compelling, proposes to go ahead anyway. There seems to be some doubt as to what can be done about it. There is also doubt as to whether or not anyone has authority to reject a NEPA impact statement. A Federal act similar to our Act 127 could straighten this out.

Let me describe, by way of illustration, a presently existing controversy and the way in which a federal environmental protection act would be of help.

In the area soon to be known as the Sleeping Bear Dunes National Lakeshore, lies the mouth of the Platte River. It is a beautiful spot, because as the river approaches Lake Michigan it forms a long slender sand bar, and the view over the bar includes the Empire and Sleeping Bear Dunes and the Manitou Islands, the principal assets of the National Lakeshore. It is also uniquely desirable for

swimming and beach play during the summer months because the river, which is only two to three feet deep near the mouth, contains warm, running water, which is much more comfortable than Lake Michigan and affords children a great opportunity to use air mattresses, inner tubes and the like. It is a popular place and becomes more so with each passing year. It is used, actually, for a great variety of different recreational activities. It is truly one of Michigan's finest natural resources. Among other things, the action of wind and water keeps the area clean despite its use by thousands of people every year and, frequently, several hundred in a day.

In 1966 the State of Michigan planted coho salmon in the Platte River and in the fall of 1967 the adult fish returned to the river to spawn. The mouth of the river, normally little used after Labor Day, became a wild mob scene as hundreds of fisherman, each morning, sought to launch their boats to fish in Platte Bay, and to retrieve them in the evening. Launching, parking and toilet facilities were grossly inadequate and the sand bar at the river mouth, which was such an attraction to children in the summertime, became an annoying obstacle to the free passage of boats. As a result, the Michigan Waterways Commission, which is charged with building and maintaining harbors and channels through the state, and the U.S. Army Corps of Engineers determined to "improve" the mouth of the Platte River with a 950 foot breakwall, dredged out harbor over 2000 feet long, launch ramps, and a parking lot for a thousand cars.

Michigan has many rivers, but there are harbors, such as is proposed here, at the mouths of most of them. The closest is Frankfort, only 11½ miles away. Naturally, conservationists throughout the state objected to this despoilation of one of our last remaining natural river mouths, pointing out that we were losing entirely too many of our natural scenic areas for things like power plants and other necessities and that it would be criminal to destroy this one for such a frivolous purpose as a motor boat harbor. Public hearings were held but no decision has been made.

The problem is complicated by a couple of factors. In the first place, both of these government agencies proposed to use discretionary funds for this project. The Waterways Commission would devote a share of the money it gets from gasoline taxes, and the Corps would apply section 107 money. The other complicating factor is the National Lakeshore. Although, in its development plan, the National Park Service characterizes this project as an ecological and aesthetic disaster, it is without power to prevent it, since the act establishing the National Lakeshore, in its final form, permitted the State of Michigan to withhold 300 acres in the Platte Bay area to construct a harbor for fishermen.

Should the public protest be ignored, and the state and federal agencies involved decide to proceed with the harbor, the Sierra Club and, perhaps, other organizations and individuals, have plans to bring suit to prevent it. Suing the Michigan Waterways Commission is simple enough, now that we have Act 127, but the most damaging parts of the project, the channelization of the river and the construction of the breakwall, which will destroy the natural river mouth and prevent the free flow of the waters, are the part of the project that is assigned to the Corps of Engineers. Were the Corps to proceed, it could largely frustrate any efforts to stop the Waterways Commission. At the present time, it appears that we can get an injunction from a federal court to halt work by the Corps of Engineers until they file an honest environmental statement under NEPA. But strangely enough, once they comply with this requirement, and publicly admit that they propose to destroy this natural area, our right to a permanent injunction or other equally effective relief is not entirely clear. It could be made so by a federal version of Act 127. We cannot bring a nuisance abatement suit since the state and federal governments are in the process of acquiring all of the nearby land. We need a specific environmental protection remedy and a definite waiver of immunity from suit in environmental cases.

The mouth of the Platte has required some 11,000 years, since the last glacier, to develop, by the processes of nature, into its present unique form. In two or three months the Corps of Engineers could destroy all of this and we may need the assistance of the Federal courts to protect it. Congress can help us by adopting environmental protection legislation based on the Michigan model.

When our Act 127 was proposed, there were widespread fears of large numbers of suits and interference with the legitimate functions of administrative agencies. Neither has occurred here and there is no reason to suspect that the situation would be different on the Federal scene.

In summary, a Federal statute similar to Michigan's Act 127 could assure an effective remedy to prevent environmental degradation by Federal agencies, including a specific waiver of immunity from suit, make sure that no other polluter can escape restraint by virtue of Federal connection, and require Federal administrative decisions to be based upon a real consideration of environmental impact by putting teeth into the impact statement requirements. Surely such a law would be a good idea.

Very truly yours,

CLAN CRAWFORD, JR.

MULTI-MEDIA CONFRONTATION—THE ENVIRONMENTALISTS' STRATEGY FOR A "NO-WIN" AGENCY PROCEEDING

(By Irving Like*)

Frequently legislation creating government agencies is narrow in purpose and may exclude environmental considerations. Moreover, many government agencies have become sympathetic with the goals of the industries that they regulate. Using the AEC as his example, the author shows how hearings tend to exclude considerations of public interest unless they are vigorously asserted by citizens as intervenors: the agency's restrictive rules may make a traditional victory for the intervenor nearly impossible. Inaction, however, is not the answer. Even though an excellent environmental claim can be shattered in the agency proceedings because of the heavy agency bias for industry, the environmentalist intervenor can use the agency procedure for the benefits he can reap from it, namely, education of the public and consequent public support.

The battle to save our environment very often involves government agencies, either as the initiators and builders of projects which ravage natural resources, or as the allegedly impartial mediators between those who would spoil the environment and those who would save it. Groups and individuals who would fight projects that waste, pollute, and threaten our very survival will often find themselves locked in combat within the framework of administrative agency rules. The agency may be at the federal, state, or even local level of government, but its remedial potential must be utilized. A successful remedy at the agency level, however, does not demand a total victory over the project that threatens the environment. This Article will indicate a means of achieving a victory for environmental values even if the agency determination proves unfavorable. A "no-win" strategy can maximize the environmental benefits arising from lengthy administrative hearings even when the chances of administrative victory are almost non-existent.

The question naturally arises—why should the concerned conservationist litigate a "no-win" contest where the agency is challenged on the substantiality of the evidence supporting its determination and where defeat is probable? What is to be gained in such a contest? The answer is that the environmentalist must not view such a struggle in the traditional terms of "win" or "lose," but rather must see it as a means of realizing an ultimate environmental objective. In a traditional, non-environmental agency proceeding the contenders are ordinarily confined to the privilege seeker and its rivals, seeking or opposing the issuance of a license or franchise. In such a case, the usual result is that there will be a winner and a loser. In the environmental case, however, a different situation results from the necessary involvement of a public interest.

In the non-environmental litigation, if emotional issues of interest to the public are not involved, only the tribunal, the litigants, and their witnesses are present. Counsel usually presents his cross-examination and affirmative case in a conventional and sequential manner designed primarily to win for his client a favorable decision from the tribunal. In an environmental case, such as one concern-

*Practicing attorney, member of the New York Bar, B.S.S., 1946, University of Wisconsin; L.L.B., 1949, Columbia University. Mr. Like has been active in conservation law and has drafted the Conservation Bill of Rights for the New York State Constitution. In this article Mr. Like draws on his experience as counsel to environmentalist intervenors in an AEC hearing to permit construction of a nuclear-energy power plant. This Article has been adapted from an address by Mr. Like to the ALI-ABA Course of Study on Environmental Law, held at Washington, D.C., January 28-30, 1971.

ing the hazard of nuclear pollution, the public interest is involved and litigation as usual, with the standard scenario of an agency hearing, will not suffice. The administrative arena must be used as an educational forum to alert the public to the project's adverse effect on environmental quality. The environmental stakes must be vividly dramatized as a prelude to organizing political action to block the project or correct its deficiencies. Issues to be raised would include the danger of accident which may discharge large quantities of radiation,¹ the cumulative long-term effect of low levels of radiation routinely discharged,² the problems of transportation and storage of high level wastes,³ thermal pollution⁴ and

¹ U.S. Atomic Energy Comm'n, *Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Power Plants*, Wash-740, Mar. 1957. "For the three types of assumed accidents, the theoretical estimates indicated that personal damage might range from a lower limit of none injured or killed to an upper limit, in the worst case, of about 3,400 killed and about 43,000 injured. Theoretical property damages range from a lower limit of about one half million dollars to an upper limit in the worst case of about seven billion dollars." Letter of transmittal from AEC to Joint Committee on Atomic Energy, Mar. 22, 1957, at viii.

See S. NOVICK, *THE CARELESS ATOM* (1969), for accounts of the accident in 1957 at Windscale Pile No. 1 which released large amounts of radioactivity into the air and the accident at the Enrico Fermi atomic power plant in 1966 which came close to releasing large quantities of radioactivity into the atmosphere near Detroit, Michigan. *Id.* at 5-10, 156-62.

² The cumulative effects of radiation discharges are discussed in Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation.

1958 Supplement No. 17 (A/3838)

1962 Supplement No. 16 (A/5216)

1964 Supplement No. 14 (A/5814)

1966 Supplement No. 14 (A/6314)

1969 Supplement No. 13 (A/7613)

The consensus of scientific opinion is that even the smallest amounts of radiation are liable to cause deleterious, genetic and perhaps somatic effects. 1958 Supplement, *supra*, at 41, ¶ 55(a).

It is recognized that even a slow rise in the world's environmental radioactivity might eventually cause appreciable damage to large populations before it could be definitely identified as due to irradiation. *Id.* at 42, ¶ 56.

The subject of the biological effects of low levels of radiation is exhaustively discussed in *Hearings on the Nature of Radioactive Fallout and Its Effects on Man Before the Joint Comm. on Atomic Energy*, 85th Cong., 1st Sess., vols. 1 & 2 (1957); JOINT COMM. ON ATOMIC ENERGY, 86TH CONG., 2D SESS., SELECTED MATERIALS ON RADIATION PROTECTION CRITERIA AND STANDARDS: THEIR BASIS AND USE (Comm. Print 1960); *Hearings on Radiation Protection Criteria and Standards: Their Basis and Use Before the Joint Comm. on Atomic Energy*, 86th Cong., 2d Sess. (1960); *Hearings on Fallout, Radiation Standards, and Countermeasures Before the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess., parts 1 & 2 (1963); JOINT COMM. ON ATOMIC ENERGY, 91ST CONG., 1ST SESS., SELECTED MATERIALS ON ENVIRONMENTAL EFFECTS OF PRODUCING ELECTRIC POWER (Comm. Print 1969) [hereinafter cited as JCAE SELECTED MATERIALS]; *Hearings on Environmental Effects of Producing Electric Power Before the Joint Comm. on Atomic Energy*, 91st Cong., 1st Sess., part 1 (1969) [hereinafter cited as *Environmental Effects Hearings*, part 1]; *Hearings on Environmental Effects of Producing Electric Power Before the Joint Comm. on Atomic Energy*, 91st Cong., 2d Sess., part 2, vols. 1 & 2 (1970) [hereinafter cited as *Environmental Effects Hearings*, part 2]; *Hearings on Underground Uses of Nuclear Energy* (S. 3042) *Before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st Sess., part 1 (1969) [hereinafter cited as *Senate Hearings on Underground Uses of Nuclear Energy*, part 1]; *Hearings on Underground Uses of Nuclear Energy* (S. 3402) *Before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., part 2 (1970) [hereinafter cited as *Senate Hearings on Underground Uses of Nuclear Energy*, part 2].

³ See S. NOVICK, *supra* note 1, at 143-46, 186-87; *Senate Hearings on Underground Uses of Nuclear Energy*, part 2, *supra* note 2, at 1672-77.

Testimony on the problems of transporting radioactive wastes was given during the AEC Atomic Safety & Licensing Board Hearings on the application of Long Island Lighting Company to build a nuclear power plant at Shoreham, New York. AEC Docket No. 50-322, Transcript at 3129-99. Applicant testified that 1,268,000 lbs. of solid radioactive wastes plus 40 to 75 spent fuel assemblies of 600 lbs. each would be generated yearly at the proposed Shoreham plant [*Id.* at 3129-30-A] necessitating three truck shipments every two weeks [*Id.* at 3132] or between 100 to 125 trailer truck shipments per year from Long Island to the burial storage area at West Valley, New York. Since transportation of radioactive wastes is prohibited over the Triborough Bridge & Tunnel Authority bridges and tunnels connecting Long Island with the mainland of New York State [Triborough Bridge & Tunnel Authority Regulations, §§ 254.3B & 255.15, cited in AEC Docket No. 50-322, Transcript at 3138-39], all radioactive wastes would be required to be shipped through the City of New York in order to reach West Valley, New York. *Id.* at 3145-46.

The problems of transportation of radioactive materials are discussed at length in *Hearings on Indemnity and Reactor Safety Before the Joint Comm. on Atomic Energy*, 87th Cong., 2d Sess. (1962); *Hearings on Proposed Extension of AEC Indemnity Legislation Before the Joint Comm. on Atomic Energy*, 89th Cong., 1st Sess. (1965); JOINT COMM. ON ATOMIC ENERGY, 89TH CONG., 1ST SESS., SELECTED MATERIALS ON ATOMIC ENERGY INDEMNITY LEGISLATION (Comm. Print 1965); *Hearings on Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses Before the Joint Comm. on Atomic Energy*, 89th Cong., 2d Sess. (1966); Knapp, *Cost and Safety Considerations*

(Footnote continued on following page)

other radiological and non-radiological effects.⁵ Thus, the public interest in a nuclear power plant case may transcend its interest in a higher standard of living when it becomes apparent to the public that in the long run nuclear pollution, if unchecked, will threaten survival.⁶

Viewed in this perspective, a losing environmental cause is worth fighting for because it adds to the ecological enlightenment of the public.⁷ It is even possible that a prospective polluter may be induced to abandon its plans or at least improve upon them if it knows that its project will provoke environmental challenge.⁸

I

AN AEC CASE STUDY

An excellent example of agency proceedings where the "no-win" strategy can be utilized is the Atomic Energy Commission's method of granting construction permits for nuclear power plants. If a citizen environmental group decides to intervene in such AEC proceedings to challenge the issuance of a permit to a utility to build a giant nuclear power plant, it is faced with formidable resource, legal, and procedural problems.⁹

in the Transport of Radioactive Materials, in PROCEEDINGS OF THE 1958 AEC AND CONTRACTORS SAFETY AND FIRE PROTECTION CONFERENCE, T.I.D. 7569 (1958).

The problems of storage of high level wastes are described in the Wall Street Journal, Jan. 25, 1971, at 1, col. 6.

⁴ *Problems in Disposal of Waste Heat from Steam Electric Plants*, JCAE SELECTED MATERIALS, *supra* note 2, at 285-335; *Economic Aspects of Thermal Pollution Control in the Electric Power Industry, Environmental Effects Hearings*, part 1, *supra* note 2, at 1044-1957 (app. 17); Statement of Dr. Donald Mount, *id.* at 356-73; *Hearings on Thermal Pollution Before Subcomm. on Air and Water Pollution, Senate Comm. on Public Works*, 90th Cong., 2d Sess. pt. 3, app. 1 & pt. 4, app. 2 (1968).

⁵ Abrahamson, *Environmental Cost of Electric Power, 1970* (Scientists' Institute for Public Information Workbook); Environmental Policy Division, Legislative Reference Service, Library of Cong., *The Economy, Energy and the Environment: A Background Study*, Sept. 1, 1970 (prepared for the Joint Economic Comm., 91st Cong., 2d Sess.).

⁶ *Hearings on Underground Uses of Nuclear Energy Before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st & 2d Sess., parts 1 & 2, at 58-101; 259-74; 319-444; 449-53; 1617-25 (1969-70). Testimony and materials presented by Drs. Gofman and Tamplin; Affidavit by Linus Pauling, *id.* at 1362; Affidavit of Joshua Lederburg, *id.* at 1366.

⁷ The controversy over pollution from a proposed power plant on Cayuga Lake, N.Y., illustrates this point. According to Dr. Alfred W. Eipper:

"A particularly encouraging by-product of this controversy [concerning a proposal to construct an 830 megawatt nuclear power station on Cayuga Lake] was a great deal of imaginative thinking on the problem by a wide variety of scientists, engineers, economists, and others. It is this kind of thinking that will ultimately provide significant solutions to pollution problems." (Eipper, *Pollution Problems, Resource Policy, and the Scientist*, SCIENCE, July 3, 1970, at 12. See also the Scientists' Institute for Public Information (SIPI), Fall 1970 vol. 1, no. 1, at 12, which reports that two years of activity by the Minnesota Committee for Environmental Information (MCEI) and the Minnesota Pollution Control Agency have been instrumental in focusing national attention on the U.S. nuclear energy problem, including questions concerning what is "permissible exposure" to ionizing radiation and the adequacy of federal radiation standards.)

⁸ It has been claimed that construction of a nuclear power station at Cayuga Lake has been indefinitely postponed as a result of the local citizens' effort to ensure that the plant would inflict minimal environmental damage and create no public health hazard. Scientists' Institute for Public Information (SIPI) Report, *supra* note 7, at 12.

⁹ Atomic Energy Act, 42 U.S.C. § 2239 (1964), requires the Commission to hold a hearing on the application for a construction permit for a nuclear power plant facility at the request of any person whose interest may be affected by the proceeding, and to admit any such person as a party to such proceeding. The AEC Rules of Practice, 10 C.F.R. § 2.714 (pt. 2), authorizes intervention by any person whose interest may be affected by a proceeding and who desires to participate as a party.

Hearings on applications for construction permits to build nuclear power plants are not held unless the AEC technical staff first recommends that the permit be issued. At a contested hearing, the staff participates as the ally and not the adversary of the applicant. 10 C.F.R. pt. 2, app. A. A two step licensing procedure is provided for, consisting of a construction permit stage and a safety finding stage. Under its regulations, the AEC is permitted to defer a definitive safety finding until operation is actually licensed. Rules of Practice, 10 C.F.R. § 2.104, pt. 2; 10 C.F.R. § 50.35; Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO, 367 U.S. 396 (1961).

The illogic of holding that safety findings can be made after construction is finished was pointed out by Justice Douglas in his dissent in the *Power Reactor* case.

"But when that point is reached (after construction is finished), when millions have been invested, the momentum is on the side of the applicant, not on the side of the public. The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a "white elephant. . ." 367 U.S. at 417.

During the Shoreham hearings, it was disclosed that the utility had spent several million dollars installing concrete in preparation of the foundation for the facility, and that the reactor pressure vessel itself had been purchased pursuant to a contract between the utility and General Electric Co. entered into prior to the commencement of the hear-

The AEC is a classic example of the military-industrial research and development complex, and the litigant with limited resources enters a David-and-Goliath confrontation, pitting himself against the utility, the AEC technical staff, and the titans of American industry.¹⁰ Arrayed on their side as well are the huge complex of dependent trade associations,¹¹ economic interest groups,¹² public relations media,¹³ the scientific, engineering, and technical resources of the AEC, the AEC national laboratories and sponsored research, and the AEC's Congressional protectors. The Joint Congressional Committee on Atomic Energy,¹⁴ a powerful standing committee, has helped the AEC gain billions of dollars in Congressional appropriations which the AEC has used to promote the development of military and civilian uses of atomic energy. In the process the AEC has gained powerful allies among the major corporations, the military services, utilities, universities and research institutes in the United States and abroad.¹⁵

ings. The vessel was more than 60 percent fabricated at the shops of Combustion Engineering in Chattanooga, Tennessee. Certainly this investment momentum must weigh upon the Atomic Safety & Licensing Board in its decision on the construction permit application.

¹⁰ Examples are the electric utilities, companies like General Electric Co., Westinghouse Electric Corp., Babcock & Wilcox Co., Allis-Chalmers Manufacturing Co., E. I. duPont de Nemours & Co., Union Carbide Corp., and United Nuclear Corp. For a roster of economic interests concerned with the development of the atomic energy industry, see *Hearings on Development, Growth and State of the Atomic Energy Industry Before the Joint Comm. on Atomic Energy*, 87th Cong., 2d Sess. (1962).

¹¹ Examples are Atomic Industrial Forum (representing the utility industry, the reactor manufacturers, the architect-engineering firms, and the uranium fuel industry), Edison Electric Institute (representing operating companies serving most of the customers of the investor owned segment of the electric utility industry in the United States), and American Public Power Association (a national trade organization representing most of the publicly owned electric utility systems in the United States). A listing of organizations interested in the general and administrative standards for nuclear energy appears in *Hearings on Employee Radiation Hazards and Workmen's Compensation Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 139-45 (1959).

¹² The economic interest groups depending upon the nuclear energy industry constitute a *Who's Who* of American industry covering all aspects of the total cycle including the mining of the raw materials, the milling of the mined materials, the transportation sequence of the raw and processed materials to the fuel fabrication plants and then to the power plants, the manufacture of the nuclear steam supply system and all equipments and components, the operation of the power plants, and the transportation and disposal of the waste products. The dominant position of American industry in reactor technology is evidenced by the fact that American type reactors enjoy an almost complete monopoly in foreign markets. *Hearings on AEC Authorizing Legislation, Fiscal Year 1971, Before the Joint Comm. on Atomic Energy*, 91st Cong., 2d Sess. 1607-09, app. V (1970) (statement by Philip Sporn, Consultant, on Developments in Nuclear Power Economics, Jan. 1968 to Dec. 1969).

The range of problems associated with the development of civilian nuclear power is described in *Hearings on Fundamental Agreements for Cooperation Before the Joint Comm. on Atomic Energy*, 90th Cong., 1st & 2d Sess. 211, app. 8 (1967-68). (Civilian Nuclear Power, the 1967 Supplement to the 1962 Report to the President).

¹³ The Atomic Energy Commission publishes a weekly news release giving the views of AEC Commissioners in promotion of the nuclear power technology. *NUCLEONICS WEEK*, a McGraw-Hill publication, covers developments of interest to the nuclear energy industry from a pro-atomic power technology bias. The publications of the Atomic Industry Forum, the Edison Electric Institute, the utilities and other major corporations with a stake in the development of the technology also serve as public relations media to further the pro-technology bias.

¹⁴ The Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1964), created the Joint Committee on Atomic Energy. *Id.* §§ 2251-57. This Joint Committee is authorized to conduct hearings for the purpose of receiving information concerning the development, growth and state of the atomic energy industry. All bills, resolutions and other matters in the Senate or the House of Representatives relating primarily to the Atomic Energy Commission or to the development, use or control of atomic energy must be referred to the Joint Committee, and any government agency shall furnish any information requested by the Joint Committee with respect to the activities or responsibilities of that agency in the field of atomic energy. *Id.* § 2252.

¹⁵ The AEC's influence within the scientific and academic community is aided in great part by the substantial moneys which the AEC spends in support of research and development. The AEC funds the Argonne National Laboratory, Oak Ridge National Laboratory, Brookhaven National Laboratory, Lawrence Radiation Laboratory, Los Alamos Scientific Laboratory. The AEC also pays for research conducted by many of the major colleges, universities and research institutes in the United States. Its estimated operating costs for fiscal year 1971 biology and medicine program was \$88,300,000. *Hearings on AEC Authorizing Legislation, Fiscal Year 1971, Before the Joint Comm. on Atomic Energy*, *supra* note 12, at 898, app. V.

The omnipresence of the AEC in supporting scientific research in the United States led Senator Gravel to ask whether it was possible to find anybody who knows anything about radiation who does not work for the Atomic Energy Commission and whether the AEC had cornered the market. *Senate Hearings on Underground Uses of Nuclear Energy*, part 2, *supra* note 2, at 535-36. A study of the history of hearings held before the Joint Committee on Atomic Energy demonstrates the ability of the AEC to line up scientific witnesses in support of its policies and viewpoints. See for example *Environmental Effects Hearings*, parts 1 & 2, *supra* note 2, and in particular *id.* part 2, vol. 2, at 2414, setting forth a letter signed by 29 scientists supporting the radiation guides for the general population.

Thus, the citizen who challenges an AEC license project is met not only by the applicant and the technical staff of the Commission which has recommended the issuance of the license, but also the well-orchestrated chorus of the nuclear power technologists.¹⁸

The legal rules also operate against the intervenor seeking to protect the environment. The AEC, which promotes that which it is also supposed to regulate,¹⁷ drafts the regulations governing the issuance of the construction permit or operating license, appoints from within its establishment the licensing board which will judge the proceeding, and reserves to itself the ultimate review of its delegates' decision.¹⁸ The agency proceeding is conducted according to rules of practice designed by the AEC. These rules favor the issuance of the requested license¹⁹ and provide an obstacle course for any intervenor opposing the project.²⁰

The problems of lack of funds, inability to obtain expert witnesses and the other difficulties which plague citizen intervenors in environmental litigation pounded by the fear or reluctance of qualified scientists and technicians to testify

¹⁸ The usual lineup against the citizen consists of the utility and the AEC technical staff. *But see* NUCLEONICS, Nov. 18, 1970, at 3, which reports that Suffolk Scientists for Cleaner Power & Safer Environment, a group of largely Brookhaven National Laboratory scientists, who intervened on behalf of the planned Long Island Lighting Co. Shoreham nuclear plant on Long Island Sound [AEC Docket No. 50-322] would like to go national and rally scientists and other citizens to their cause. This group intervened in the Shoreham proceeding primarily to offset the intervention of the Lloyd Harbor Study Group, a coalition of conservation and environmental organizations which opposes the Shoreham project.

¹⁷ Atomic Energy Act, 42 U.S.C. §§ 2011, 2012, 2232, 2235 (1964); 42 U.S.C. §§ 2201, 2230 (Supp. V, 1970).

¹⁹ The Atomic Energy Act authorizes the establishment of atomic safety and licensing boards, 42 U.S.C. § 2241 (1964). AEC licensing hearings are held before three-man Atomic Safety and Licensing Boards (two technical members and one lawyer). Atomic Energy Comm'n, 10 C.F.R. § 2.721 (1970). Certain review functions are assigned to an Atomic Safety and Licensing Appeal Board. *Id.* § 2.785. Final review is vested in the Commission. *Id.* § 2.770.

The Licensing Board, Appeal Board and Commission are composed of members drawn from the nuclear technology establishment with minimal, if any, representation from the fields of biology, genetics, medicine, and the so-called "soft sciences."

¹⁹ The Shoreham case (AEC Docket No. 50-322) is a good example of the built-in pro-nuclear technology bias of the Licensing Board. One technical member is an employee of the Los Alamos National Laboratory, which is funded, controlled and operated by the AEC. The second technical member is employed by Union Carbide Corporation, which operates the Oak Ridge National Laboratory for the AEC and is active in the development and marketing of uranium concentrates. The Board denied a motion that it be disqualified and its decision was upheld by the Appeal Board and the Commission. See note 9 *supra*.

²⁰ The Rules of Practice, 10 C.F.R. §§ 2.1-2.91 (1970), handicap the limited resource intervenor in a number of ways.

(a) Notice of hearings is not published in a manner, and sufficiently in advance of the hearing, to facilitate timely intervention by interested citizens and an adequate opportunity to prepare for the hearings. Notice need only be published in the Federal Register. *Id.* § 2.106.

(b) The rules governing intervention do not spell out any standards or guidelines on which intervention will be allowed, giving the Commission very broad discretionary power to deny petitions to intervene. *Id.* § 2.714.

(c) An original and 20 conformed copies of such pleading or document must be filed unless the Board dispenses with such requirement. *Id.* § 2.708(d).

(d) Subpoenas are not issuable as of right but only on application to the Chairman of the Atomic Safety and Licensing Board Panel, to the Chief Hearing Examiner, or to another designated officer. *Id.* § 2.720.

(e) Interlocutory appeals to the Commission from rulings of the presiding officer are not available as a matter of right. An interlocutory appeal may only be had when the presiding officer, in his own judgment, determines that prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. *Id.* § 2.730(f).

(f) The presiding officer is empowered to direct the service of written testimony—a provision which imposes an undue burden on the intervenor with meager funds and limited opportunity to prepare for trial. *Id.* § 2.718.

(g) The rules do not provide for furnishing free copies of lengthy transcripts to indigent intervenors. *Id.* § 2.750.

(h) In licensing proceedings, the AEC can make up the rules of the game as it goes along, through its power (1) to issue regulations, (2) to control the actions of its appointee licensing boards, and (3) to resolve major or novel questions of policy, law, or procedure which are certified to it. *Id.* app. A, III (g) (2). In an AEC proceeding, these problems are commented upon.

²¹ See Sive, *Securing, Examining, and Cross-Examining Expert Witnesses in Environmental Cases*, 68 MICH. L. REV. 1175 (1970).

See also address by Howard P. Green, "The Role of Government in Environmental Conflict," before the Conference on Law and the Environment, Warrenton, Va., Sept. 11-12, 1969, sponsored by the Conservation Foundation.

against a project recommended by the AEC.²² Various factors have dissuaded scientists and engineers—even those with strong concerns about the environmental effects of nuclear power projects—from testifying in behalf of citizens in such litigation. These include loss of employment or consultant contracts with the AEC, the utilities and the nuclear power industry, curtailment of research grants to universities with whom the prospective expert witness is affiliated, and other forms of economic and professional harassment.²³

The legal rules of judicial review of administrative agency proceedings do not provide much comfort to the intervenor who wishes to appeal a losing administrative effort.²⁴ The doctrine of exhaustion of administrative remedies,²⁵ the final order rule,²⁶ and the substantial evidence rule²⁷ represent formidable barriers to an attempt to persuade a court to grant judicial relief against environmental abuse by a polluter seeking an agency license. It is not suggested, however, that the environmentalist can never succeed in getting a court to overturn a determination of an administrative agency upon a question committed to the agency's judgment where the agency's findings were contrary to law, arbitrary or capricious, or were unsupported by substantial evidence.²⁸ Judicial relief has been granted in environmental cases where agencies have proceeded without lawful authority,²⁹ have failed to observe required procedures,³⁰ or have violated the mandate of a particular statute; and successful challenges on similar grounds may increase in future cases because of procedural aid given to environmentalists by recent state constitutional amendments,³¹ the National Environmental Policy Act (NEPA),³² the Federal Water Quality Improvement Act,³³ and other environmental legislation.

The environmentalist faces his most awesome task when he challenges an agency decision on the ground that it is not supported by substantial evidence. Where the substantive policy decision of an agency like the AEC is challenged, the drain upon an intervenor's resources is greatest. Even a great amount of technical research can fail to build the strong substantive case required to obtain judicial review of a decision in which an agency has abused its discretion.³⁴ The research need not be wasted, however, since it is essential to the public

²² See CHEMICAL & ENGINEERING NEWS, July 13, 1970, at 13, reporting on charges by Ralph Nader that the AEC is trying to silence or pressure Dr. John Gofman and Dr. Arthur Tamplin, who are employed at the Lawrence Radiation Laboratory at Livermore, Calif., for having criticized the AEC and governmentally-established radiation dose limits.

²³ See, e.g., address by Stewart L. Udall at the annual meeting of the American Association for the Advancement of Science, in Chicago, Ill., Dec. 30, 1970, reported in New York Times, Dec. 31, 1970, at 6, col. 3.

²⁴ "To me, the most encouraging development of the last two years has been not only that some scientists have begun to speak out with power and vigor on environmental issues and the errors of misguided technology, but that they have won a growing national audience for their views.

²⁵ "Yet I have looked on with dismay, as a few elders of the scientific establishment have made studied efforts to put down some of these new leaders as 'unscientific upstarts' . . ."

²⁶ See 5 U.S.C. § 706 (Supp. V, 1970). See Sive, *Some Thoughts of An Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970) for a discussion of the difficulties of securing court reversal of administrative determinations in review proceedings subject to the substantial evidence—rational basis rule.

²⁷ 5 U.S.C. § 704 (Supp. V, 1970).
²⁸ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Lam Man Chi v. Bouchard*, 314 F.2d 664, 670 (3d Cir. 1963).

²⁹ *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 65-66 (1966); *Deutsch v. AEC*, 401 F.2d 404, 407 (D.C. Cir. 1968).

³⁰ 5 U.S.C. § 706 (Supp. V, 1970); *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57 (1966); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966); *NLRB v. Brown*, 380 U.S. 278 (1965); See also *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

³¹ *Citizens' Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970).
³² *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

³³ E.g., N.Y. CONST., art. 14, § 4, granting any citizen standing to sue in conservation cases with the permission of the appellate division of the state supreme court.

³⁴ National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (Supp. V, 1970).
³⁵ Federal Water Quality Improvement Act of 1970, 33 U.S.C. § 466 (Supp. V, 1970).

³⁶ *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967) (environmental impact of Interstate highway project); *Yannacone v. Dennison*, 55 Misc. 2d 468, 285 N.Y.S.2d 476 (1967) (dangers of DDT); *In re Citizens' Nat'l Resources Ass'n Petition Before the State of Wisconsin Dep't of Natural Resources*, 3-DR-1 (filed May 21, 1970).

education purpose of the "no-win" strategy. This type of case, in which the citizen is forced to appeal to the public, illustrates most clearly the mismatch of the citizen versus the agency-industry constituency.

II

THE MULTI-MEDIA CONFRONTATION

As a basic strategy an agency proceeding should be treated as a multimedia confrontation in which the agency proceeding itself is both the medium and the message, transmitting to the public the truth about an abuse of the environment. When an agency proceeding may decide the ecological fate of a major natural resource like Long Island Sound,³⁵ and impose additional radiation pollution, when its long-term biological effects on the present and future population of an area like Long Island are unknown,³⁶ citizen intervenors should transform the agency hearings into a dramatic medium. The hearing, by its content and total effect, can educate the public and its opinion- and policy-makers to the environmental hazards and create public commitment to, and participation in, political activity aimed at ultimately winning the victory not attainable in the narrow confines of the agency proceeding.³⁷

The public, however, does not attend long, drawn-out agency hearings devoted to technical details, no matter how relevant they are to important environmental questions. Most laymen cannot long endure a cross-examination or presentation of evidence on matters such as the species of aquatic organisms inhabiting a particular waterway, their radio-sensitivity and the tendency to reconcentrate radioactive effluent, and their fractional mortality due to thermal shock caused by their travels through a plant condenser or by the discharge of large volumes of heated water. But intelligent reporters, assigned by newspapers, magazines, radio or television networks to cover controversial hearings, can make a serious attempt to grasp the essence of scientific and technical points brought out by testimony on the radiological and thermal effects of an atomic power plant.³⁸ Thus the important points raised in the proceedings can be passed on to the public.³⁹ The intervenor must therefore strive to make the hearings as

³⁵ The Shoreham proceeding (AEC Docket No. 50-322) involves a proposal by Long Island Lighting Company to build an 849 mw atomic power plant on the shoreline of Long Island Sound at Shoreham, N.Y. If licensed by the AEC, the plant would discharge low levels of liquid radioactive effluent and 600,000 gallons per minute of heated water into Long Island Sound.

The Federal Environmental Protection Agency's "Report on the Water Quality of Long Island Sound," March 1971 (CWT 10-29) concluded that pollution of Long Island Sound has adverse effects on fish, shellfish and other aquatic life, causes interference with recreational use of the waters, spoils beaches and shore-front property, and significantly affects the ecology of the Sound. The report identified as sources of this pollution, wastes from municipalities and industries (including oil and heated effluents). It recommended that federally approved water quality standards be implemented and that enforcement action be initiated immediately against those sources of pollution not in compliance with federally approved water quality standards.

A federal-state enforcement conference on Long Island Sound was held on April 14 and 15, 1971 under the sponsorship of the EPA for the purpose of setting requirements and deadlines for ending industrial and municipal pollution in the Sound. The conference recommended that a joint water quality program be established for all Long Island Sound and that compatible requirements be developed to govern thermal discharges from power plants. See N.Y. Times, Apr. 18, 1971, at 52, col. 1, Long Island Press, Apr. 14, 1971, at 3. See note 2 *supra*.

³⁶ At the Shoreham hearings, Dr. Arthur R. Tamplin of the AEC's Lawrence Radiation Laboratory testified that "present radiation exposure guidelines are simply based upon the hope that the genetic effects won't be intolerable." Dr. Ernest J. Sternglass, Professor of Radiation Health Physics in the Graduate School of Public Health, University of Pittsburgh, testified that low level radiation "cannot only lead to significant rises in diseases previously known to be produced . . . such as congenital defects and cancer, but it also appears to act indirectly so as to produce small decreases in maturity at birth that in turn can increase the chance of early death from various causes such as respiratory and infectious diseases." N.Y. Times, Apr. 18, 1971, at 60.

³⁷ Increasing public awareness, leading to citizen and court action, has forced the federal government to act to lessen the hazard from pesticides. Some environmental functions of the Departments of Interior, Agriculture, and Health, Education & Welfare have been combined with the Environmental Protection Agency to increase the effectiveness of control. The federal government has examined its policy of large-scale use of defoliants in Vietnam, a result of which the use of 2,4,5-T has been curtailed not only there but for domestic uses. SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 91ST CONG. 1ST SESS., CONGRESS & THE NATION'S ENVIRONMENT, ENVIRONMENTAL AFFAIRS OF THE 91ST CONGRESS 120 (Comm. Print 1970). See also F. GRAHAM, SINCE SILENT SPRING (1970) which describes the gradual public awakening to the dangers of pesticides since Rachel Carson's *Silent Spring*.

³⁸ See, e.g., Shepard, *The Nuclear Threat Inside America*, LOOK, Dec. 15, 1970, at 21.

³⁹ See note 48 *infra*.

interesting and informative as possible in order to sustain the interest of the media in covering them as a source of daily news items. Since the hearing is part of a larger script staged to win ultimate public support, each day of the agency hearing must contain, whenever possible, a dramatic and suspenseful event.⁴⁰ The media must become interested in reporting not only the evidence, but the words and doings of the personalities participating in the hearing, at and away from the witness stand and counsel table.

In this way it is more likely that the intervenor's best points will be reported in depth and the public interest in the case kept alive. This is critical because, if the dramatic impact of the proceeding wanes, the media and ultimately the public may lose interest, and the educational objective will be lost. The intervenor must plan and time the disclosure of its strong points so that each day's coverage has the making of an important news story. The public's interest and attention must be sustained and the community exposed to a continuous learning process. This may produce a somewhat disjointed hearing record but the formal orderliness of the proceeding must be subordinated to the preferred objective of transforming the hearing into what it is really supposed to be—a full and open forum which educates the public while it provides the licensing board with a record on which to base its decision.

The intervenor must also try to counter the well-organized public relations efforts of the utility, and its allies, whose house organs generate widespread publicity portraying the hearings in a light most favorable to the project under consideration.⁴¹ The intervenor should prepare a newsletter and press release each day summarizing the important points developed by the evidence. Interviews must be granted whenever requested to explain the meaning of the day's happenings, or to give previews of matters which will come up at future hearings.

Comprehensive press coverage also insures that the agency's transgressions will not go unnoticed. Questions or evidence which may be ruled out by the tribunal because of its constricted view of its own responsibilities under NEPA,⁴² will be reported by the media.

For example, the AEC had until recently taken the position that NEPA does not require it to consider the non-radiological environmental effects of nuclear power plants, or their impact on water quality criteria.⁴³ AEC boards have sustained objections to cross-examination questions and have issued rulings declaring that the evidence as to these environmental matters would not be accorded probative value.⁴⁴ The press has reported the AEC's views on these matters, and has published editorials criticizing the AEC for its tunnel-vision conception of its duties under NEPA.⁴⁵

⁴⁰ For example, reporters often write their stories or edit their tapes late at night for the next morning's newspaper edition or radio news broadcast. They may sleep late and not appear in the hearing room until the late morning or early afternoon of the hearing. This presents counsel with the problem of timing and spacing his cross-examination and presentation of evidence to coincide with the presence of the media representations. The appearance of Nobel Laureate Dr. James D. Watson on March 15, 1971 to testify in opposition to the planned Shoreham nuclear power plant is an example of such an event. It was not known until then, whether the Licensing Board would permit him to testify. This uncertainty created dramatic suspense. The views of Dr. Watson and his testimony on the increase in the danger of cancer and genetic defects from nuclear power plants were reported in *N.Y. Times*, Mar. 16, 1971, at 24, col. 3.

⁴¹ See, e.g., *Lilco News*, a company newspaper published by the Long Island Lighting Company, vol. 13, no. 10, Nov. 10, 1970 and vol. 13, no. 11, Dec. 1970, slanting its coverage of the hearings on Lilco's Shoreham A-Plant and editorializing in favor of the company and against the citizen intervenors.

⁴² National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (Supp. V, 1970).
⁴³ 10 C.F.R., pt. 50, app. D (1970) (Statement of General Policy—Implementation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (Supp. V, 1970)).

⁴⁴ During the Shoreham hearings (AEC Docket No. 50-322) the Atomic Safety and Licensing Board took the position that it would not hear evidence in connection with any non-radiological environmental effects of the proposed power plant. See second Pre-Hearing Order dated May 19, 1970.

In other rulings, the Board:

a) denied intervenor's motions for orders directing the issuance of subpoenas to various scientific and technical witnesses who would have testified on thermal and other non-radiological effects of the plant;

b) refused to assign probative value to the comments of federal and state agencies filed pursuant to NEPA;

c) refused to admit evidence on the issue of the alleged need for the project and its alternatives.

⁴⁵ See, e.g., the following *Newsday* editorials: *Atoms on the Sound*, Mar. 17, 1970; *A More Careful AEC*, Apr. 10, 1970; *The Shoreham Hearings*, May 21, 1970; *Movement in the AEC*, June 11, 1970; *The Shoreham A-Plant*, Oct. 2, 1970; *What's the Hurry?*, Dec. 11, 1970.

See also the critical column by former Interior Secretary Stewart L. Udall entitled *Days of Testing for the AEC*, *Newsday*, Sept. 15, 1970.

There are indications that public opinion is growing in favor of Congressional amendment of NEPA to force agencies like the AEC to consider the broader environmental impact of their licensing actions.⁴⁶ The AEC itself, in a new regulation published December 4, 1970, declared that the issue of non-radiological effects may be raised in future licensing cases.⁴⁷ Whether this is merely lip-service to NEPA remains to be seen, and public pressure or the fear of political reprisal may account for this policy statement. Public pressure and ultimate political action are the goals which can inject victory into a "no-win" agency proceeding.

In summary, the environmental issues must be simultaneously tried on multiple levels—the agency, the media, and the arena of public opinion. The hearing serves as a catalyst to create conditions in which a citizen coalition might defeat the environmental threat through political means. The intervenor, aware of the fact that the proceeding is unfolding in a fishbowl, must phrase its statements on or off the record in a manner mindful of the next day's press or radio account of the hearings. In a major "no-win" environmental case, the intervenor must combine its trial tactics with mastery of the theories and practices of the communications art and media⁴⁸ if it is to inform the public of the nature of the environmental degradation and the deficiencies of the applicable regulatory process.⁴⁹ The intervenor must manage its case as a newsworthy event, and remain constantly alert to the pulse of media coverage.

III

SCOPE OF THE CHALLENGE

The environmental intervenor should not limit its concern to that of the environmental effects of the particular project but should challenge the technology itself. Too often the environmentalist takes for granted the efficiency of the technology which is incorporated in the questioned project and accepts uncritically the project's numerical or quantitative values as represented by the project's sponsors.

For example, in a licensing proceeding involving a nuclear power plant, it is customary for the utility and the agency staff to testify that the amount of radioactivity which will be routinely discharged into the environment will not result in more than a negligible radiation dose exposure to the public.⁵⁰ In fact, the public is often assured that the dosage will be less than one per cent of the maximum levels of radiation legally allowed by the AEC.⁵¹ The public may

⁴⁶ Hearings have been held in the Congress on the extent of compliance by federal agencies with the National Environmental Policy Act and the need for clarification of the statute. (1 BNA ENVIRONMENT REP.—CURRENT 837 (1970)); *id.* at 869.

⁴⁷ Federal agencies have reviewed legislation needed to comply with NEPA. *Id.* at 698.

⁴⁸ Revision to 10 C.F.R. pt. 50, app. D, dealing with implementation of NEPA, 35 Fed. Reg. 18470 (1970).

⁴⁹ M. McLuhan, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (Signet ed. 1964). In his chapter on the press, McLuhan discusses the power of the press as a means of communication and a direct cause of events.

⁵⁰ "In fact, the press is now not only a telephoto mosaic of the human community hour by hour, but its technology is also a mosaic of all the technologies of the community . . . the mosaic of the press manages to effect a complex many-leveled function of group-awareness and participation such as the book has never been able to perform . . . The owners of media always endeavor to give the public what it wants because they sense that their power is in the medium and not in the message or the program." *Id.* at 192-93.

⁴⁹ The question of who watches the regulatory agencies entrusted with the administrations of the commons (public resources) is discussed in Crowe, *The Tragedy of the Commons Revisited*, SCIENCE, Nov. 28, 1969, at 1103.

⁵⁰ "Yet the actual day to day decisions and operation of these administrative agencies contribute, foster, aid and indeed legitimate the special claims of small but highly organized groups to differential access to tangible resources which are extracted from the commons. This has been so well documented in the social sciences that the best answer to the question of who watches over the custodians of the commons is the regulated interests that make incursions on the commons." *Id.* at 1106.

⁵⁰ In the Shoreham proceeding [AEC Docket No. 50-322] the staff's "statement on the Environmental Considerations," concludes that "the radioactivity levels in liquid or gaseous releases from the Shoreham plant will be well below 10 CFR Part 20 limits." Transcript at 6.

⁵¹ In the Shoreham proceeding, a so-called one percent "commitment" was made by the applicant, AEC Docket No. 50-322, Transcript, Sept. 21, 1970, at 264. Administrative authority for such a pledge is found in the AEC regulations [10 C.F.R. pt. 20 (1970)] which require that power reactor licensees keep releases of radioactivity in nuclear power reactor effluents as low as practicable.

not realize, however, that the computation of radiation dosage involves many unverifiable assumptions and meteorological variables.⁵² The computation also includes a process of negotiation between the AEC technical staff and the utility as to what assumptions are to be used and what "credits" will be allowed the utility for what are described as "engineered safeguards," which consist of equipment or systems installed by the utility as part of its design.⁵³ These "credits" are factored into the computation of off-site radiation dose so as to reduce the estimate of radiation dose to the public. Unfortunately the calculation of offsite doses takes place behind closed doors and sometimes involves what have been called "knock-down, drag-out" battles.

Evidence of this type can be obtained if one carefully analyzes the nuclear power technology, its assumptions, bases, parameters, its methods of quantification, and the data it relies upon. Cross-examination can bring this information to the attention of the public in a most vivid and understandable way. NEPA⁵⁴ provides a juridical basis for inquiring into the need for, the quality of, and alternatives to, a particular technology, and for evaluating its environmental effects.⁵⁵ The intervenor should point up, wherever possible, the technology's deficiencies, the degree of its unreliability, the level of its quality-assurance programs, the extent of its verifiable empirical data, its experimental nature, and its risk-benefit calculus.⁵⁶ The intervenor should determine for itself whether there

⁵² Examples of assumptions used by the AEC:

- a) Assumptions used for evaluating the potential radiological consequences of a steam line break accident for boiling water reactor;
- b) Assumptions used for evaluating the potential radiological consequences of a fuel handling accident for boiling & pressurized water reactors;
- c) Assumptions as to behavior of effluent after release;
- d) Assumptions and calculations as to meteorologic behavior and conditions utilizing equations drawn from "Meteorology & Atomic Energy—1968";
- e) Assumptions for atmospheric diffusion and dose conversion;
- f) Assumptions used for evaluating the potential radiological consequences of a loss of coolant accident for boiling water reactors.

In its Safety Guide No. 3 (Nov. 2, 1970) the staff states that it has developed a number of appropriately conservative assumptions based on engineering judgment and on applicable experimental results from safety research programs conducted by the AEC and the atomic energy industry.

The assumptions used by the AEC for a loss-of-coolant accident have never been tested under accident conditions in a real life situation. The AEC has never actually assessed the reliability of emergency core cooling systems under actual accident conditions in a power reactor and does not plan to carry out such an experiment (the Loft program—(Loss of Fluid Test)) until 1975 at the earliest. *Hearings on AEC Authorizing Legislation, Fiscal Year 1971, Before the Joint Comm. on Atomic Energy, 91st Cong., 2d Sess., 1671, pt. 3 (1970).*

⁵³ There is no authority for these credits either in the statute or regulations governing the AEC. The word "credit" appeared in the AEC's computation of accident doses in the Shoreham case but was not quantified. Safety Guide No. 3 also refers to credits to be given for special design features but no numerical values are assigned. The claims of the utility and the staff as to the quantity of radiation dose and the risk of radiation are determined by the quantity of "credits" agreed to by the staff after negotiation with the utility, out of public view.

⁵⁴ Section 102(A) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(A) (Supp. V, 1970) requires the agency to use a systematic interdisciplinary approach to insure integrated use of the natural and social sciences and the environmental design arts in decision making. This suggests a line of cross-examination inquiring whether the staff used modern systems computer models and techniques to predict and assess the environmental impact of the project. For example, did the staff study the concentration mechanisms and pathways to man of each radionuclide to be discharged from the atomic plant? 42 U.S.C. § 4332(B)-(C) (Supp. V, 1970). Sections 102(C) and (D) generate cross-examination into the question whether the staff made an independent evaluation of the alleged need for the atomic power project, the fossil fuel alternatives, and their comparative costs and environmental effects. NEPA also lays the basis for rebuttal testimony on the above subjects.

⁵⁵ Dr. Alfred W. Elpper, a biologist at Cornell University, has suggested that these questions be asked:

"Who participated in formulating the assumptions and conclusions about this program's desirability? What lasting social benefits—and costs—will this program produce? Who will derive these benefits? What environmental problems will, or may be, created? What alternatives exist? Has the relative desirability of not enacting the program been evaluated?" Elpper, *Pollution Problems, Resource Policy and the Scientist*, SCIENCE, July 3, 1970, at 13.

⁵⁶ A quality assurance program is required to be established and implemented in order to provide adequate assurance that the nuclear power plant structures, systems and components will satisfactorily perform their safety functions. 10 C.F.R., pt. 50, app. A (1970) (General Design Criteria for Nuclear Power Plants). Where generally recognized codes and standards are used, the utility is required to identify and evaluate them to determine their applicability, adequacy and sufficiency and to supplement or modify them as necessary to assure a quality product in keeping with the required safety function.

(Footnote continued on following page)

is a need for the project, whether the particular design is the best available under the proven state of the art for the subject technology, how the project can be improved and at what cost, and whether there are preferred alternatives.

The intervenor should examine the technology from the standpoint of the disciplines and rationale of other technologies employing superior techniques, practices or procedures in dealing with similar problems of fabrication, testing, maintenance, inspection, and materials and systems analysis. For example, the nuclear power industry is constantly being exhorted to develop standards for its components and systems and to emulate the aerospace industry in developing superior quality-assurance programs.⁵⁷ Although the respective technologies develop unevenly and at different paces, and thus are in different states of advancement and rationalization, knowledge of these deficiencies arising from the comparison opens up productive lines of cross-examination designed to show the ways in which nuclear power plant facilities and equipment can be improved upon and made more safe and reliable. Widening the scope of the agency inquiry to include basic technology can provide useful ammunition in challenging an environmentally hazardous project.

IV

ORGANIZATION AND TECHNIQUE USEFUL IN MULTI-MEDIA CONTESTS

It is well known that contested agency hearings involving the licensing of large, complex projects can last many months and wear out the poorly staffed, insufficiently funded intervenor through the process of attrition.⁵⁸ One must assume that in most environmental cases, the intervenor will not have adequate resources to match the legal and technical forces of the applicant and the agency.⁵⁹ The environmental intervenor must therefore innovate. A new lawyer-client relationship must be developed which reflects the nature of the struggle as a part legal, part political campaign. [The lawyer and his client, the environmental organization, must create a team composed of the lawyer, technical consultants, layman interrogators, evidence gatherers and political activists. The team must carefully utilize its expert resources and non-legal members to achieve a "no win" success.

A. Procedural Tactics That Educate

The right to cross-examine is a particularly potent tool in an agency proceeding. The lawyer-citizen team should immediately set about gathering material

Verifiable empirical data on problems related to safety and protection of the environment are needed to reduce reliance on untested assumptions. For example, the assumption that an emergency core coolant system or other vital component will function when needed during operation under accident conditions must be replaced by proof of their reliability based on data drawn from actual testing of such equipment under accident conditions, as is proposed in the Loft program. See note 52 *supra*. Similarly, the assumption that radioactive or thermal discharge from the plant will not harm the aquatic environment must be replaced with evidence gained from comprehensive preoperational systems analysis, ecological studies utilizing predictive models and computer techniques, and verification through post-operational ecological surveys determining the impact of such wastes on the environment.

A balance of the risks and benefits of nuclear power requires that the social costs attributable to nuclear power generation and distribution be quantified. Among the many factors that should be considered on the cost side are:

- (a) dollar cost of pollution-related illnesses in terms of medical costs and loss of work;
- (b) property damage associated with air pollution;
- (c) loss of commercial fishing resources owing to thermal or radioactive pollution;
- (d) loss of recreational land and water;
- (e) calculating the cost of somatic and genetic harm resulting from radiation exposure.

Toward a Rational Power Policy: Reconciling Needs for Energy & Environmental Protection, Apr. 1971 (submitted to the Mayor's Interdepartmental Committee on Public Utilities by the Environmental Protection Administration of the City of New York).

⁵⁷ Shaw, *et al.*, *Nuclear Power: Suddenly Here*, SCIENCE & TECHNOLOGY, Mar. 1968, at 32-34.

See also Rickover, *Who Protects the Public?*, MATERIALS EVALUATION, Dec. 1968, at 15(a)-24(a) (a publication of an address by Admiral Rickover on industry safety codes).

⁵⁸ The Shoreham case began in March 1970 (AEC Docket No. 50-322). Hearings commenced in September 1970 and were scheduled to end on May 19, 1971.

⁵⁹ A small sampling of intervenors in AEC licensing proceedings includes the Lloyd Harbor Study Group, Inc. [AEC Docket No. 50-322], Sierra Club, Michigan Steelhead & Salmon Fishermen's Association, T.E.M.P. (Thermal Ecology Must be Preserved), Concerned Petitioning Citizens, and Michigan Lake & Stream Associations, Inc. [AEC Docket No. 50-255], Saginaw Valley Nuclear Study Group, Citizens Committee for the Environmental Protection of Michigan, United Auto Workers of America, Trout Unlimited, West Michigan Environmental Action Council, Inc., and University of Michigan Environmental Law Society [AEC Docket Nos. 50-329 and 50-330].

for a comprehensive cross-examination.⁶⁰ Many scientists and technical experts, who may be reluctant to testify, will nevertheless cooperate at minimal or no charge in furnishing excellent questions to be posed on cross-examination of the applicant and the agency's technical staff. The scientific and academic community in those disciplines related to the issues in the proceeding should be canvassed for cross-examination questions and references which can provide additional sources of questions. The friends of conservation are quite numerous in all professional and technical fields and their cooperation is essential if a broad challenge is to be undertaken. NEPA also provides a fertile source of questions for the intervenor. It gives him the opportunity to probe into the studies and reports that have been made by the applicant or agency staff concerning the environmental effects of the proposed project,⁶¹ and to cross-examine regarding the data substantiating the assumptions and conclusions of such studies or reports.

The use of cross-examination to discredit or expose bias may not be as important as its use to educate the public regarding the realities of the particular project and its impact on the environment. The cross-examination must expand into a general inquiry into the bases of the challenged technology and must focus on what is known and unknown about the project's environmental effects.⁶² Extensive use must be made of the scientific literature on these subjects during the cross-examination of the experts who testify. In this way, the cross-examination can reveal the issues which are in dispute within the scientific community and the gaps in scientific knowledge. The agency proceeding becomes a sort of free public university in which the counsel and his lay interrogators function as the faculty. Their stance is that of skeptic and their role is to insure that all the important questions are asked. The adversariness of the "no-win" agency proceeding is more than a process of discrediting or rebuttal of the proofs of the applicant and the agency. The adversary posture is essential to achieve a dialogue among the citizen, the applicant and the regulatory authority. The outcome of this process is a body of knowledge tested in the crucible of cross-examination.

The use of cross-examination to generate a broad scientific investigation of the claims of the applicant and agency means a long hearing and precludes any early decision to issue a permit to applicant. This may provoke an effort by the applicant or agency to curtail the cross-examination. The intervenor must vigorously resist any suppression of its right to cross-examine as a violation of the Administrative Procedure Act⁶³ and of the due process requirements of a public hearing.⁶⁴ While the AEC has given its official sanction to the concept of the agency hearing as an educational forum,⁶⁵ its own objective is to persuade the public that its staff's position is valid.⁶⁶ The counter-objective of the intervenor environmentalist must be to test the validity of the agency's position by giving the proceeding the depth and dimensions of a truly critical scientific inquiry.

The intervenor should also use motions for examination, discovery and inspection, physical view of the project site and facilities and other motions or objections on procedural and evidentiary points as devices to educate the public

⁶⁰ Examples of kinds of material useful for cross-examination include legislative hearing transcripts, prints and reports, government publications, scientific and technical papers published in scholarly journals, or issued by the AEC, its contractors and the national laboratories. The Nuclear Safety Information Center at Oak Ridge, Tennessee distributes a computer printout bibliography on all scientific subjects relevant to nuclear energy. The Oak Ridge National Laboratory State of the Art technical discussion papers are particularly useful.

⁶¹ NEPA, 42 U.S.C. § 4332 (Supp. V, 1970).

⁶² See note 54 *supra*.

⁶³ 5 U.S.C. § 556(d) (Supp. V, 1970) provides that a party is entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts."

⁶⁴ See, *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 300 (1936); *Hannah v. Larche*, 363 U.S. 420, 440 (1960), *rehearing denied*, 364 U.S. 855 (1960).

⁶⁵ *Hearings on Licensing & Regulation of Nuclear Reactors Before the Joint Comm. on Atomic Energy*, 90th Cong., 1st Sess. pt. 1, at 43 (1968) (Statement by Harold L. Price, AEC Director of Regulation).

See also AEC News Release, Nov. 25, 1970, in which AEC Commissioner James T. Ramey says:

"As to hearings, I remain of the view that a public hearing is desirable, even a necessary part of such a system [the reactor licensing system]. A hearing of course means some delay in the total licensing process. Delay however is the social cost we pay for the social benefit we derive from public participation in agency decisionmaking."

⁶⁶ *Hearings on Licensing & Regulation of Nuclear Reactors Before the Joint Comm. on Atomic Energy*, *supra* note 65, at 151 (Testimony of Dr. David B. Hall).

while serving their customary objectives.⁶⁷ For example, a motion requiring that the utility disclose the quantity of radiation which will be discharged by the plant and requesting that the utility and AEC disclose their calculations of off-site radiation levels can be made meaningful to the public when it is explained that such information is a prerequisite to determining whether such radiation will have an adverse effect on humans or fish and wildlife. The intervenor must develop a strategy of motions and objections which, when allowed, achieve their intended purpose or, when disallowed, cast the agency or applicant in the role of obstructing the quest for truth. These alternative results can only be achieved if the intervenor's motions and objections are credible efforts to guarantee a flow of relevant information of interest to the public.

The technique of requesting the licensing board to take official notice of scientific facts and governmental agency reports is another indispensable means of developing the agency hearing into an educational forum. It is likely that voluminous information relevant to the issues in an agency hearing has been gathered by the government and is reported in its publications or in transcripts of Congressional hearings.⁶⁸ This material may provide valuable cross-examination questions or damning evidence against the proposed project. Counsel should also be alert to the potential treasure trove of evidence obtainable only through application for subpoenas to compel the testimony of government scientists and officials and the production of data generated through government-financed research.⁶⁹ The outer limits of relevant evidence obtainable through the Freedom of Information Act⁷⁰ should also be explored in the agency proceeding. In short, all of the evidence-gathering devices available to counsel should be exploited to aid his main objective of transforming the agency proceeding into an educational happening.

B. Lay Interrogators

Invariably, the intervenor will encounter technical aspects of the project or its environmental effects which are too complicated or esoteric for the layman or his attorney to grasp and develop into effective cross-examination. Under the Rules of Practice of the AEC,⁷¹ this problem may be solved by the use of technically qualified lay interrogators who are permitted, after establishing their qualifications, to cross-examine in their area of specialty.

The use of non-lawyer technical expert cross-examiners has other advantages. The expert may be someone unwilling or unable to testify directly on the intervenor's side.⁷² By cross-examining in behalf of the intervenor, the expert, sometimes a scientist of wide repute, associates himself with the intervenor's cause and is so identified by the media. The appearance of such lay cross-examiners can enliven the proceeding and stimulate news coverage and public interest. The lawyer must, of course, teach his technical experts how to ask a proper question on cross-examination and must be prepared to rescue his lay cross-examiner if he falters into questions subject to objection.

The Administrative Procedure Act⁷³ neither grants nor denies to an individual who is unqualified (*i.e.*, who is not a lawyer) the right to appear for or to represent a person before an agency or in an agency proceeding. Nevertheless, if the Administrative Procedure Act is liberally interpreted, the intervenor's counsel might request and be granted permission to use a qualified consultant interro-

⁶⁷ 10 C.F.R. pt. 2 (1970) authorizes discovery rights and evidence gathering procedures in AEC licensing proceedings, see *id.* § 2.720 (subpoenas); *id.* § 2.740 (depositions and written interrogatories); *id.* § 2.742 (admissions); *id.* § 2.743(e) (offer of proof); *id.* § 2.743(f) (official notice).

⁶⁸ *Hearings on Licensing & Regulation of Nuclear Reactors Before the Joint Comm. on Atomic Energy*, *supra* note 65, parts 1 & 2.

⁶⁹ 10 C.F.R. pt. 2, § 2.720 (1970) authorizes the issuance of subpoenas on a showing of general relevance of the testimony or evidence sought, subject to a motion to quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue.

⁷⁰ 5 U.S.C. § 552 (Supp. V, 1970).

⁷¹ At the request of a party, a presiding officer may permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. Rules of Practice, 10 C.F.R. pt. 2, § 2.733 (1970).

This Article is based primarily on the experience of the author in an AEC proceeding. If the rules of practice of other administrative agencies do not expressly authorize the use of technically qualified lay interrogators, it is conceivable that an application for an order permitting lay cross-examination might be granted, if good cause is shown.

⁷² See note 22 *supra*.

⁷³ 5 U.S.C. §§ 500(d) (1), 555(b) (Supp. V, 1970).

gator to cross-examine in technical subjects too difficult for counsel to prepare for and pursue within the time allotted for the hearings.

Suppose, however, that the intervenor is unable to afford counsel to represent it in the agency proceeding. It has not yet been firmly decided whether an indigent intervenor has the right to represent himself in an agency proceeding and whether an organization which cannot afford counsel can send a lay member to ask questions and present evidence on its behalf.⁷⁴ Arguably, the denial of this right would negate the "public hearing" requirement and could even constitute a denial of due process. If the issue is decided in favor of the indigent intervenor, giving him full right to confrontation and cross-examination of witnesses at the hearing, then it would seem logical that the intervenor who has a lawyer should be allowed to use lay interrogators as well.⁷⁵

These issues may well be raised in future agency proceedings. An agency proceeding might involve, for example, a project detrimental to the environment of an impoverished rural or ghetto area whose residents are entitled to intervene but are without the financial means to retain counsel to represent them before the agency. In such a case, the only meaningful right of the citizen is his right to cross-examine the applicant and agency staff and call upon them to account at a public hearing. Our jurisprudence acknowledges the right of the indigent defendant charged with a crime to have the benefit of counsel.⁷⁶ The term "indigent" should also be expanded to include the citizen group with meager funds which intervenes in an environmental case to contest a project sponsored by a powerful corporation and its patron agency. The courts have ruled that there is no right to counsel in an agency proceeding.⁷⁷ However, if one accepts the premise of an indigent intervenor whose environmental rights may be injured, the concept of due process should be extended to recognize the right of such indigent intervenor to be provided with counsel or, at the very least, to be represented by a lawman of its choice.

The right of citizens to organize themselves and to litigate environmental cases with professional or lay representation, or a combination of both, is essential if they are to have a fighting chance to resist the corporate-agency alliance. If such right is not guaranteed, citizens in many parts of the country will be helpless to defend their environmental rights and will have inflicted upon them by default projects which degrade the quality of their environment.

CONCLUSION

This Article attempts to focus interest on the agency proceeding as a means of achieving a future political remedy when a present administrative or judicial remedy is unattainable. Success in winning the ultimate environmental objective requires maximum use of the media and arts of communication in dramatizing the confrontation between the citizen and his corporate and agency adversaries. All of the skills of counsel and his dedicated lay and scientific allies must be exerted to educate the public in understanding the nature of the particular technology and its environmental effects and to induce the public to demand the ecological ideal.⁷⁸

⁷⁴ *Id.* Local Union No. 742, United Broth. of Carpenters & Joiners of America v. N.L.R.B., 377 F.2d 929 (D.C. Cir. 1967), cert. denied, 389 U.S. 843 (1967), noted that a union had the right to be represented by its business agent rather than by counsel.

⁷⁵ See note 71 *supra*. Query whether the Administrative Procedure Act, 5 U.S.C. §§ 500(d)(1) and 555(b) (Supp. V, 1970) should be interpreted as authorizing the use of lay interrogators by an intervenor who is also represented by counsel.

⁷⁶ U.S. CONST. amend. VI. See *Glasser v. United States*, 315 U.S. 60 (1942); *People v. Wilson*, 13 N.Y.2d 277, 196 N.E.2d 251, 246 N.Y.S.2d 608 (1963), appeal dismissed 377 U.S. 925 (1964); *People v. Koch*, 299 N.Y. 378, 87 N.E.2d 417, 87 N.Y.S.2d 231 (1949).

⁷⁷ There is no constitutional right of counsel in a civil matter pending before an administrative agency. *Suess v. Pugh*, 245 F. Supp. 661 (D.C. W. Va. 1965).

⁷⁸ The current environmental interest and the role of the media, has been described in these words:

"Toward the end of the 1960's there was a sudden upsurge of public interest in the subject. The devastation of the environment and the threat of overpopulation became too obvious to be ignored. A sense of anxiety close to panic seized many people, including politicians and leaders of the communications industry. Television gave prime coverage to a series of relatively minor yet visually sensational ecological disasters. Once again, as in the coverage of the Vietnam war, the close-up power of the medium was demonstrated. The sight of lovely beaches covered with crude oil, hundreds of dead and dying birds trapped in the viscous stuff, had an incalculable effect upon a mass audience. After years of indifference, the press suddenly decided that the jeremiads of naturalists might be important news, and a whole new vocabulary (environment, ecology, balance of nature, population explo-

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The question has been asked, "What are the prospects given the character of America's dominant institutions, for the fulfillment of this ecological ideal?"⁷⁹ The answer will depend on the outcome of the current environmental crusade, but administrative strategy which conceives of the effect of the agency proceeding as a dramatic event perceived by the media and the public can preserve resources until institutions evolve to serve society's environmental needs. Thus the strategy suggested here for the "no-win" agency proceeding is an essential part of the environmental crusade, and a step in the direction of the fulfillment of the ecological ideal as an American institution.

STATEMENT OF EDWARD F. MANNINO,¹ CHAIRMAN, COMMITTEE ON ENVIRONMENTAL QUALITY, PHILADELPHIA BAR ASSOCIATION

Mr. Chairman and members of the Committee: Last year, I submitted a Statement to this Committee on the Environmental Protection Act of 1970, which was then numbered as S. 3575. At that time, I indicated my general support for the bill, and included a number of suggestions for amendments, which recommended (1) providing a cause of action for damages (2) providing for reimbursement of counsel and expert witness fees for a successful plaintiff, and (3) establishing docket preference for cases initiated under the Environmental Protection Act. For the convenience of the Committee, I am attaching a slightly revised copy of my original Statement on S. 3575 as an exhibit to this Statement.

As you know, the proposed Act would create a federal common law of environmental protection, permitting the federal courts to evolve standards for the protection of our air, water, and land resources from "unreasonable pollution, impairment, or destruction." As such, it would provide the only general federal substantive law available to private litigants to enjoin all forms of pollution. This is the Act's major contribution, although it also soundly provides for the elimination of several commonly advanced procedural obstacles to private suits to protect the environment, including lack of standing, sovereign immunity, and jurisdictional amount. Since the affirmative case in favor of the Act has been well demonstrated by several witnesses before your Committee, and has been particularly well presented in Professor Sax's recent book, *Defending the Environment* (Knopf: 1971), my comments today will be directed toward the criticisms of the Act voiced by various spokesmen for the administration. In my previous Statement, I attempted to analyze the objections advanced to the Act last year by Shiro Kashiwa, Assistant Attorney General, Land and Natural Resources Division, Department of Justice. That analysis is appended to this Statement.

My focus in the present Statement is upon the objections raised this year before your Committee and the House Committee on Merchant Marine and

sion, and so on) entered common speech. . . . By the summer of 1969, it had become evident that the media were preparing to give the ecological crisis the kind of saturation treatment accorded the civil rights movement in the early 1960's and the anti-Vietnam War protest after that."

Marx, *American Institutions and Ecological Ideals*, SCIENCE, Nov. 27, 1970, at 945. Examples of popular magazine coverage of the AEC controversy include *The Controversial Atomic Energy Commission*, NEWSWEEK, Jan. 4, 1971, at 37; Boyle *The Nukes are in Hot Water*, SPORTS ILLUSTRATED, Jan. 20, 1969, at 24; and *The Nuclear Threat Inside America*, *supra*, note 38.

⁷⁹ Marx, *supra* note 78, at 945.

¹ This statement is presented solely in my individual capacity as an attorney in private practice in Philadelphia who is active in environmental law problems. In January of 1970, I was appointed by the Chancellor of the Philadelphia Bar Association to establish a Special Committee on Environmental Quality to suggest legislative approaches which would arrest the deterioration of our total urban environment. In that capacity, I have appeared before several federal, state, and local bodies to testify on proposed environmental legislation, including the Clean Air Amendments of 1970, and the pending amendments to the Federal Water Pollution Control Act. I also presently serve as Pennsylvania Co-Chairman of the American Bar Association's Environmental Quality Committee (Young Lawyers' Section), and as a Director of the Environmental Planning and Information Center of Pennsylvania, Inc., ("EPIC") and the Pennsylvania Roadside Council. In addition, I teach Natural Resources Law at Temple University School of Law, and am active in several other environmental and consumer organizations.

In my private practice, I am presently counsel for a number of cities, including Philadelphia, Pittsburgh, Erie, and Lancaster, Pennsylvania; Baltimore, Maryland; and Providence, Rhode Island, in the litigation known collectively as the *Multidistrict Vehicle Air Pollution Cases* (M.D.L. Docket No. 31), 52 F.R.D. 398 C.D. Cal. 1970, *appeal pending*, 9th Cir., No. 71-1241, in which antitrust and constitutional claims are asserted against members of the automotive industry for an alleged conspiracy to retard the development of automotive air pollution control devices.

Fisheries (which is considering similar legislation) by the Council on Environmental Quality, through its General Counsel, Timothy Atkeson, and by the Environmental Protection Agency, through its Assistant Administrator for Enforcement and General Counsel, John R. Quarles, Jr. As I read these Statements, I understand the objections voiced to be essentially threefold:

(1) The Act, in failing to establish specific standards, is overly vague, and may force upon courts tasks which "they are not institutionally equipped to handle." (Atkeson Statement, *BNA Environment Reporter, Current Developments*, Vol. 1, pg. 1460);

(2) The Act errs in forcing federal courts to elaborate standards in areas where the federal legislature has failed to act, presumably in deference to state legislatures and courts, who are felt to have prime responsibility in those areas (*Id.*, at pg. 1461);

(3) The Act creates administrative problems in areas in which federal legislature has provided for specific standards—air quality control, for example—by permitting federal courts to disregard such standards where they are found inadequate. (*Id.*, at 1461; Quarles Statement, *BNA Environment Reporter, Current Developments*, Vol. 2, pg. 189).

In many respects, these criticisms are subtler refinements of the points made by Mr. Kashiwa last year. On review, however, I feel that the following additional observations are appropriate:

1. The asserted difficulty of forcing the courts into areas which they may not be "institutionally equipped to handle" seems exaggerated in the area of environmental law. Any practicing lawyer who has had experience in litigation involving patent validity or infringement, an area Congress has expressly entrusted to the federal courts, can provide eloquent testimony to the competence of the federal courts to perceive and to adjudicate the supposedly esoteric problems engendered by such litigation. Suits brought under the federal antitrust laws also provide evidence of the federal courts' competence to render informed adjudications where complex factual data and economic sophistication are required, and where the underlying legislation speaks generally in terms of "conspirac[ies] in restraint of trade," 15 U.S.C. § 1, or of acquisitions whose effects "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. There is no reason to believe that federal courts, in light of this experience, would be incompetent to render informed decisions in the pollution area, whether problems of air, water, or land quality are in issue.

Mr. Atkeson's reliance on the recent Supreme Court decision in *State of Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), to support the view that courts may not be equipped to establish pollution standards in the absence of administrative or legislative action seems misplaced. In *Wyandotte*, the Supreme Court refused to exercise its original jurisdiction (under which the Court sits, in effect, as a trial court, rather than in its usual role as an appellate court) essentially because of two considerations—first, that the Court, as an appellate court, was not the appropriate tribunal for adjudicating the "formidable" factual claims which formed the basis for the nuisance suit brought by Ohio to enjoin mercury dumping in Lake Erie, and, second, that Ohio's claim was one arising under state rather than federal law. Thus, Mr. Justice Harlan emphasized in his opinion that "it is vitally important to stress that we are not called upon by this lawsuit to resolve difficult or important problems of federal law . . ." 401 U.S. at 504. Moreover, the Court's decision, in denying Ohio's attempt to invoke the Court's original jurisdiction, did not state that the underlying controversy was beyond a court's competence, but instead specifically noted that its ruling was "without prejudice to [Ohio's] right to commence other appropriate judicial proceedings." 401 U.S. at 505 (emphasis added).

Finally, and most significantly, the Court did not dismiss three other original jurisdiction suits pending before it at the time *Wyandotte* was decided, but set them instead for oral argument this Term. *Washington v. General Motors Corp.*, No. 45, Orig.; *Illinois v. City of Milwaukee*, No. 49, Orig.; *Vermont v. New York*, No. 50, Orig.; 402 U.S. 940 (1971). See also "Top Court to Mull Deciding Pollution Cases that Involve Intricate, Multistate Suits," *Wall Street Journal*, May 4, 1971, pg. 7. Had the presumed obstacle of technical difficulty been compelling, as Mr. Atkeson suggests, the Court could simply have dismissed these suits on the basis of *Wyandotte*. Instead, the Court recognized that issues of federal law might compel it to assume original jurisdiction in appropriate cases despite technical difficulties and the relative absence of Court experience in sitting as a trial court.

2. The second major objection—that federal courts should not enter areas in which the federal legislature has not acted—seems particularly ill-founded. The premise of this approach, that such areas “are traditionally regarded as the responsibility of the State courts and legislatures,” and that federal court regulation in such areas might entail “a major shift in Federal-State relationships,” (Atkeson Statement, *supra*, at pg. 1461) ignores the fact that state regulation has in fact been highly unsatisfactory to date, as I indicated in my Statement of last year. Indeed, many states, such as my home state of Pennsylvania, have such restrictive laws of standing for private suits as to render such suits virtually impossible, or at least impracticable. Where adequate state legislation exists or is subsequently adopted, moreover, federal courts could remit would be federal litigants to adequate state remedies under the abstention doctrine. An example of the types of considerations which would appropriately induce a Federal court in an action under S. 1032 to stay its hand in deference to adequate state pollution laws is contained in proposed legislation suggested by the American Law Institute, currently pending in the Senate as S. 1876, The Federal Court Jurisdiction Act of 1971. That legislation would add a revised Section 1371(c) to the Judicial Code which would provide that:

“A district court may stay an action, otherwise properly commenced in or removed to a district court under this title, on the ground that the action presents issues of state law that ought to be determined in a State proceeding, if the court finds: (1) that the issues of State law cannot be satisfactorily determined in the light of the State authorities; and (2) that abstention from the exercise of federal jurisdiction is warranted either by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view that may be ultimately taken by the State court, or by other circumstances of like character; and (3) that a plain, speedy, and efficient remedy may be had in the courts of such state; and (4) that the parties’ claims of federal right, if any, including any issues of fact material thereto, can be adequately protected by review of the State court decision by the Supreme Court of the United States.” (Emphasis added.)

In light of the concern expressed regarding the effect of S. 1032 on federal-state relationships, it is significant to note that the American Law Institute, a recognized expert in this field, has concluded that its suggestions “cover the cases in which federal deference to state courts is most clearly indicated . . .” *American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts* 49, 287 (1969).

In addition, the concept of deference to state legislatures and courts expressed in Mr. Atkeson’s Statement is somewhat undercut by the Council’s own position that the proper course of action is to await adoption of specific federal legislation in each of the environmental areas which are encompassed by S. 1032. Clearly, if federal legislation is appropriate, enactment now of S. 1032 will at least fill a gap until the more specific legislation contemplated by the Administration is introduced and enacted. Indeed, the experience garnered by courts under S. 1032 may be of significant value in drawing up specific legislation in discrete problem areas. As will be discussed below, there is no inconsistency in having specific legislation and S. 1032 both on the books.

3. The final objection voiced by both the Council and the Environmental Protection Agency, relating to the interplay between standards established by federal and state legislatures or administrative agencies with those to be generated by the federal courts under S. 1032, poses a more difficult problem. On reflection, however, I do not feel that S. 1032’s reservation of power to the federal courts to supercede “inadequate” administrative remedies, or to formulate a federal common law of pollution, poses any serious practical problem. To begin with, as specific standards are adopted, implemented, and enforced, federal courts are most unlikely to substitute their judgments for those of an effectively-functioning administrative agency, such as we all hope EPA will become. Second, the immense costs of private litigation to protect the environment, together with the fact that most such suits have been, and most probably will continue to be, prosecuted by responsible conservation organizations with limited budgets, such as the Environmental Defense Fund and the Sierra Club, further act as institutional barriers to any anticipated flood of environmental litigation under the Act. Third, under these circumstances, private litigation under S. 1032 will, in practice, most probably be limited either to virgin areas, where no adequate state or federal remedy is extant, or, for that rare case, where the specific facts

developed at trial will show that an administrative regulation, drafted to meet a general situation, should not equitably be utilized to foreclose a private suit to protect the environment.

4. Finally, I should like to make a brief reference to how the National Environmental Policy Act affects the advisability of enacting legislation such as S. 1032. (See Atkeson Statement, *supra*, at 1462). That Act, although a great leap forward, is essentially *procedural* in its major impact, since it primarily required the filing of so-called "Environmental Impact" or "§ 102(c)" Statements. Its substantive content is much less definite, and would not appear to overlap S. 1032 to any significant degree. Thus, in the leading case of *Calvert Cliffs' Coordinating Committee, Inc. v AEC*, 2 E.R.C. 1779 (D.C. Cir. 1971), which is generally regarded as embodying the most expansive reading of NEPA to date, the Court of Appeals for the District of Columbia Circuit carefully distinguished between the "substantive" and "procedural" aspects of NEPA:

"We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.* But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—considered fully and in good faith—it is the responsibility of the courts to reverse" (*Id.* at 1783; see also 1780; 1782, n. 10; 1783, n.13)

Similarly, in the *Fire Ant* case, a district court refused to enjoin under NEPA an Agriculture Department program of aerial spraying of mirex insecticide since, "in reviewing the Department of Agriculture program under consideration here, the Court will not substitute its judgment for that of the Secretary on the merits of the proposed program but will (only) require that the Secretary comply with the procedural requirements of (NEPA)" *Environmental Defense Fund v. Hardin*, 2 E.R.C. 1425, 1426-27 (D.D.C. 1971). Thus, significant as NEPA is, it does not fill the gap for which S. 1032 is designed.

[EXHIBIT A]

AUGUST 25, 1970.

Re Environmental Protection Act of 1970 (S. 3575).

Hon. GEORGE MCGOVERN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCGOVERN: As Chairman of the Committee on Environmental Quality of the Philadelphia Bar Association, I am taking this opportunity to submit my individual views on S. 3575, the Environmental Protection Act of 1970, which you introduced into the Senate on March 10, 1970.

Our Committee has as its primary objective the goal of assuring a share of decision-making power to the people in activities which may have an adverse environmental impact upon them. As such, we have previously submitted testimony before the Subcommittee on Air and Water Pollution of the Public Work Committee on certain air and water pollution legislation now under consideration,¹ emphasizing the importance for expressly recognizing in such legislation the right of each citizen to initiate suits to abate sources of pollution and to recover any damages inflicted upon him. In our testimony, we indicated the legal basis for our belief that such a right should be recognized and also expanded to further permit the recovery of reasonable counsel fees by successful plaintiffs. Since the Environmental Protection Act of 1970 would expressly permit private suits for protection of the environment from unreasonable pollution, I enthusiastically support it.

Concerning the specific provisions of the bill, I have read, and am in agreement with the positions expressed in the Statement of William T. Coleman, Jr. on the bill, before the Subcommittee on Energy, Natural Resources and the

*This would appear to be the general standard for review of administrative decisions presently in force.

¹ Statement of Edward F. Mannino on S. 3229, S. 3546, and S. 3466, April 17, 1970. *Air Pollution—1970*, Part 4. Hearings before the Subcommittee on Air and Water Pollution, Committee on Public Works, United States Senate, pp. 1479-85; Statement of Edward F. Mannino and Kenneth R. Myers on S. 3468, S. 3470, S. 3471, and S. 3687, August 13, 1970. *Water Pollution—1970*, Part 5. Hearings before the Subcommittee on Air and Water Pollution, Committee on Public Works, United States Senate, pp. 1843-45.

Environment of the Commerce Committee, on July 10, 1970.² As you recall, that testimony indicated that the bill should be broadened, first, to recognize a cause of action for damages;³ second, to permit a successful private plaintiff to recover a reasonable attorney's fee from the defendant; third, to expressly provide for jury trials, to assist public decision-making in the field of pollution, and; fourth, to establish docket precedence⁴ for cases initiated under the bill. In addition, Mr. Coleman's Statement calls for the deletion of the two sworn affidavits requirement of Section 3(a) of the bill, and suggests the evolution of an abstention mechanism, to minimize federal-state conflict, where state legislatures have adopted similar, strong pollution legislation.

Although I concur in the specific recommendations made in Mr. Coleman's Statement, I submit this additional statement in light of, and as a response to, the testimony presented by Assistant Attorney General Shiro Kashiwa of the Land and Natural Resources Division of the Department of Justice on July 10, 1970. As reported in the *Environment Reporter* of July 17, 1970, and the *New York Times*, of July 11, 1970, Mr. Kashiwa indicated opposition to the bill on essentially three grounds: (1) it is inconsistent with federal laws vesting in state and local governments the primary responsibility for air and water pollution control; (2) it authorizes courts to intervene in matters left by legislation to the "expertise" of administrative agencies; and (3) it is overly vague, in referring to "unreasonable pollution."

The first point—that state and local governments have the primary responsibility in combating air and water pollution—is irrelevant in the present context. Wherever the *primary* legal responsibility may lie, it is apparent today that state and local action against all sources of pollution has been minimal and extremely ineffective. Indeed, in the recent Report released by the Council on Environmental Quality, the inadequacy of state air pollution programs was summarized in the following findings:

"A March 1970 Department of Health, Education, and Welfare report to the Congress, 'Progress in the Prevention and Control of Air Pollution,' traces the considerable increase in State and local budgets for air pollution control, stimulated in large part by the Federal matching grants program initiated in 1963. However, of the 55 State and territorial programs being financed by the grants program in 1970, only six have reached an annual per capita expenditure of 25 cents, which is generally considered the minimum expenditure needed for State programs. Only 23, including the six, are spending as much as 10 cents per person per year. At the local level, the situation is better: 64 of 144 grantee agencies are spending at least 40 cents per capita per year, which is generally considered the minimum needed for local programs."

* * * * *

"Perhaps the most significant indicator of the adequacy of State and local air pollution control programs is manpower. The 1970 HEW report to the Congress, 'Manpower and Training Needs for Air Pollution Control,' indicates that in general control agencies are inadequately staffed. Fifty percent of State agencies have fewer than ten positions budgeted, and 50 percent of the local agencies have fewer than seven positions budgeted. Further, during 1969 the vacancy rate for all agencies was 20 percent. Recruitment of competent personnel is difficult. The report estimates that by 1974 State and local agencies will need 8,000 personnel if they are to implement the Clean Air Act properly—a jump of 300 percent over the number of persons currently employed in these programs."

* * * * *

"NAPCA considers inadequate some 28 to 34 State programs for areas not under the jurisdiction of a local agency. Some 14 to 20 are considered adequate or progressing rapidly, and only two to four are considered good. Local and regional programs are doing better, with 44 percent of the agencies spending what NAPCA considers adequate for a minimal program."

² Hearings before the Subcommittee on Energy, Natural Resources, and the Environment, Committee on Commerce, United States Senate, on S. 3575, Serial 91-80, pp. 153-64.

³ I note that S. 4023, The Environmental Class Action Act of 1970, introduced into the Senate on June 24, 1970, by Senator Cannon, expressly provides in Section 3 for a cause of action for damages.

⁴ [Since this Statement was prepared, Massachusetts has enacted a bill somewhat similar to the present S. 1032 (Chapter 732, Acts of 1971, effective September 7, 1971) which provides, in part, that "Any suit or action brought pursuant to . . . this section shall be advanced for speedy trial . . ."]

Environmental Quality, The First Annual Report of the Council on Environmental Quality (August 7, 1970), pp. 83, 85, 87-88.⁵ These findings of the Council on Environmental Quality on the inadequacy of state and local programs were confirmed and augmented in the recent Ralph Nader Study Report on Air Pollution. See generally, John C. Esposito, *Vanishing Air*, (1970) particularly Chs. 7 and 9.

In light of these findings, it is apparent that state and local governments have not adequately or completely fulfilled whatever responsibilities they may have for the abatement of air and water pollution. Federal intervention is therefore appropriate at this point to preserve the citizen's right to protect himself against unreasonable pollution. Indeed, there is a striking similarity between the whole area of pollution control and civil rights, so far as state versus federal power is concerned. Thus, in the early 1960's, the federal government's attempts to guarantee black citizen's the right to vote, particularly in the southern states, were repeatedly attacked on the grounds that voting laws and the protection of the citizen's right to vote, were peculiarly the responsibility of the individual states. The response there, as it must be here, is that the *ultimate* responsibility to remedy infringement of important rights of citizens must reside in the federal government, where the Constitution authorizes it to act, as it does here under the Commerce Clause.

A similar objection, resting upon assumed primary responsibility in the states has been suggested by Chief Justice Burger, who indicated, in his recent remarks before the American Bar Association, that "People speak glibly of putting all the problems of pollution . . . in the Federal courts. We should look more to state courts familiar with local conditions and local problems." See *Congressional Record*, daily ed., August 11, 1970, pg. H 8099 (remarks of Rep. Eckhardt). Again, deference to state courts is appropriate where effective state action has been taken to guarantee protection to the individual citizen victimized by pollution. However, as of the present time, only Michigan has enacted a law which would recognize a right of citizen suit such as is incorporated in the present bill, and only seven other states—California, Colorado, Massachusetts, New York, Pennsylvania, Tennessee, and Texas—are even considering such legislation. See 2 *Clean Air and Water News*, No. 32 (August 6, 1970), pg. 1-2: A. Salpukas, "Ecology Law Suits Approved in Michigan." *New York Times*, July 5, 1970, pg. 21.⁶ Of course, where effective state laws are available, a federal court, sitting in such a state, could remand the federal litigant to his adequate state remedy. Compare 28 U.S.C. §§ 1341, 1342.

A second objection raised to S. 3575 by Mr. Kashiwa—that private litigation under the bill would require judicial intervention in areas best left to administrative "expertise"—also is erroneous. To begin with, a great number of recent studies have revealed a uniform failure by administrative agencies to effectively regulate the industry over which they have been granted the duty of supervision. Too often these agencies have become nothing more than the docile captives of the very industry which they are mandated to regulate. See, e.g. Louis Kohlmeier, Jr., *The Regulators: Watchdog Agencies and the Public Interest* (1969); Robert Fellmeth, *The Interstate Commerce Omission: The Public Interest and the ICC* (1970); James Turner, *The Chemical Feast* (1970) (FDA); Report of the American Bar Association Commission to Study the Federal Trade Commission (September 15, 1969); E. Cox, R. Fellmeth & J. Schulz, *The Consumer and the Federal Trade Commission* (1969); "The Regulators Cannot Go On This Way." *Business Week*, reprinted in *Congressional Record*, daily ed., March 12, 1970, pg. E 1907 (extension of remarks of Rep. Hamilton). Indeed, one respected administrator has himself indicated agreement with these criticisms of regulatory agencies. Thus, Commissioner Philip Elman of the Federal Trade Commission has said:

⁵ [Although state efforts have increased in quality and intensity in air pollution and other environmental control areas since this Statement was prepared, the Second Annual Report of the Council, *Environmental Quality—1971*, after reviewing these state efforts, concluded that "The many successful or promising examples of State and local environmental action belie persistent and fundamental problems: severe fund shortages in many States and in many types of environmental protection activities; glaring manpower deficiencies, often largely attributable to unattractive pay scales; and reluctance or inability of many officials to stand up to polluters and irresponsible land developers." *Id.* at pg. 71.]

⁶ [Since this Statement was prepared, Connecticut, Indiana, Minnesota, Massachusetts and Florida have also enacted legislation similar to the present S. 1032. See *Environmental Quality—1971*, at pp. 172, 179, nn. 99-100; BNA *Environment Reporter*, *State Air Laws* 346:0121 (Florida Act)]

"Today, when all institutions of government are being found wanting, none has been more criticized—and less responsive to such criticism—than the independent regulatory commission. With monotonous regularity, studies and reports appear in an unending procession, all saying essentially the same things. While the criticisms cover a very broad ground, the most fundamental deficiency has been found to be the agencies' chronic failure to fulfill their unique quasi-legislative function of developing and implementing regulatory policies responsive to public needs and the public interest. With each new study and report, there is the same ritual call for better appointments and improved administration. Yet the agencies go on essentially unchanged and seemingly undisturbed, with little evidence of basic improvement in performance."

"A Modest Proposal for Radical Reform," 56 *A.B.A. Journal*, November 1970, pg. 1045. In a similar vein, Judge Wright of the Court of Appeals recently began an opinion invalidating rate increases granted by the Civil Aeronautics Board with this statement of the issue: "This appeal presents the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." *Moss v. CAB*, 430 F. 2d 891, 893 (D.C. Cir. 1970). Significantly, the question thus posed was answered in the affirmative by a unanimous court.

Moreover, passing to the particular areas covered by S. 3575, the recent Ralph Nader Study Group Report on Air Pollution, (John C. Esposito, Vanishing air, (1970) surveyed the performance of the National Air Pollution Control Administration, the federal agency entrusted with the task of controlling air pollution, and found it woefully ineffective. Against this background, a general call for deference to the alleged "expertise" of administrative agencies suffers from the same defect that a call for deference to state and local authorities does—that these bodies have not been effective in the field of pollution control.

Finally, Commissioner Elman has expressly noted that one of the significant failings of the administrative process in the extent to which it forecloses effective private litigation to redress what are primarily private wrongs. S. 3575 would remedy this defect and, as such, is extremely valuable as an administrative reform bill. As Commissioner Elman noted:

"Another basic point which seems to have been disregarded is that the regulatory agencies were created in order to redress those injuries to the public which can best be remedied by administrative action.

"Where only private interests are aggrieved, the proper remedy is private action in the courts. A tort, whether the victim is a competitor or a consumer, is a private, not a public, wrong—and the place to seek relief is a court, not a regulatory agency. To be sure, there may be disadvantaged individuals or groups who will need—at least for a time—some kind of government help in securing effective access to the courts. But this does not justify the transformation of regulatory agencies into courts. Just as the administrative process should not be used to insulate businessmen from the rigors of a free-enterprise economy, it should not be used to relieve the courts of their duty to redress violations of private rights." Elman, *supra*, at pg. 1046.

Mr. Kashiwa's final objection—that the bill provides no concrete standards—is also misplaced. Federal courts have long been called upon to evolve rules of law to deal with problems in many technical areas, and have proved their competence to do so. There is no reason to doubt that they will be able to do so in the many areas of environmental concern as well. Indeed, several federal courts have already done so. See, e.g., *Biechle v The Norfolk & Western Ry. Co.*, 309 F. Supp. 354 (N.D. Ohio 1969). Moreover, when effective federal, state and local standards are finally promulgated in an area of pollution control, it can realistically be anticipated that federal courts, in their interpretation of S. 3575, will draw upon and utilize the results of that administrative expertise, as they should. In the interim, there should be no bar to creative judicial efforts to resolve the very clear and present dangers of pollution.

In conclusion, I believe that S. 3575 represents a significant attempt to guarantee to each citizen a right to protect himself against pollution, and should be enacted.

[From the Hospital Tribune, Sept. 20, 1971]

HOSPITALS FOUND STILL USING TOXINS IN INFANTS' WASH

EVANSTON, ILL.—Substances that may be hazardous to newborn infants are still being used in the laundering of clothing, diapers, and bedding for hospital nurseries, the American Academy of Pediatrics warned.

In a statement issued by its committee on drugs, the academy pointed out that cases have occurred in which premature and full-term newborn infants have contracted methemoglobinemia after their diapers were rinsed with the bacteriostatic agent 3,4,4'-trichlorocarbaniide (TCC).

Reports in the pediatric literature have indicated that aniline—a well-known cause of methemoglobinemia—has resulted from the breakdown of TCC during sterilization of infant diapers, the statement pointed out.

PHYSICIANS OFTEN NOT TOLD

Nursery physicians are frequently not appraised of the procedures used in laundering infants' clothing and bedding, and often they are not consulted before a change in the laundry procedure is implemented, the statement said.

The academy also expressed concern over newer laundering agents, such as enzyme-detergent combinations and optical brighteners.

"Will these cause poisoning epidemics in the newborn nursery?" it asked. "Do these pose hazards as residues in laundered clothing and crib linen for premature and full-term infants?"

"The biology of the premature and full-term neonate demands that even the most innocent-appearing substance in their environment be scrutinized for the possibility of adverse effects," the statement concluded: "Until data on toxicity are available for various substances which are proposed for introduction into the nursery, clinical judgment would dictate avoiding them."

THE UNIVERSITY OF WISCONSIN LAW SCHOOL,
Madison, Wis., November 23, 1971.

Senator PHILIP A. HART,
Committee on Commerce, U.S. Senate,
Old Senate Office Building, Washington, D.C.

DEAR SENATOR: I enclose a copy of my statement regarding S. 1032. In accordance with your request, it is very brief. If you decide that you want a longer statement, write me and I will be glad to oblige.

For your possible use, together with this statement, I include the following concerning my background in this area. I have taught courses in environmental law for several years. I am co-author of a text on environmental litigation which will be published within the next few months. I am author of a bill with goals similar to S. 1032 which has passed the State Assembly in Wisconsin and is presently before the State Senate.

Sincerely,

JAMES B. MACDONALD,
Professor of Law.

Enclosure.

STATEMENT OF JAMES B. MACDONALD, PROFESSOR OF LAW, UNIVERSITY OF
WISCONSIN LAW SCHOOL

The proposed legislation increases the accessibility of the federal district courts to citizens who seek to defend the environment. It permits them to bring actions to secure equitable court orders to halt or to impose conditions on any activity which affects interstate commerce and which unreasonably pollutes, impairs, or destroys the air, land or water. Such legislation is sorely needed.

At present the initial stages of many environmental law suits are confined to questions of standing of the plaintiffs and the validity of the alleged cause of action. Yet in cases which survive motions to dismiss and are tried on the merits, the evidence presented often discloses a careless or uninformed disregard for the

environment by the defendant. The proposed legislation would eliminate much of the preliminary skirmishing and enable the parties to devote their full energies to the environmental issues.

Governmental agencies cannot hope to carry the full load of environmental protection without assistance. When citizens are willing to help shoulder part of the burden, their desire to seek the aid of the courts should be encouraged, not frustrated.

DECEMBER 7, 1971.

To: Senator Philip A. Hart, Chairman, Subcommittee on Energy, Natural Resources and the Environment of the Committee on Commerce, United States Senate.

From: Eva H. Hanks, Associate Dean and Professor of Law, Rutgers, The State University School of Law, Newark, N.J.

Re: *Environmental Protection Act of 1971 (S. 1032)*.

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.

Chief Justice BURGER¹

DEAR SENATOR HART: I am pleased to submit my comments for consideration by your distinguished Committee. I wish to go on record as wholeheartedly endorsing the proposed Environmental Protection Act and as urging its prompt approval by your Committee and the Congress.

The hearings on S. 1032 and its predecessor, S. 3575² explore in substantial detail the potential problems and issues raised by this legislation. For purposes of these comments, the major objections to the bill are grouped under four headings and remarked upon separately. Because of the fullness of the record already before you the commentary is brief.

1. *The competency of the judiciary*

The argument here is twofold. One, judges are said not to have the ability to deal, on the merits, with complicated technical issues, and allegedly cannot make the informed scientific judgments required in environmental cases. Two, environmental cases involve "political questions" and courts are either "not institutionally equipped" to handle such questions³ or will in any event be reluctant to do so because "they will perceive a proper sense of institutional restraint."⁴

It is difficult to be patient with either one of these objections. Environmental cases are neither more nor less complicated technically than antitrust, rate regulation, patent or nuisance suits, as well as a host of others in many of which courts are "guided" by no more than standards of reasonableness. It is instructive that the commentators who oppose S. 1032 on this ground have neither attempted to document the supposed incompetence of courts nor have they tried to distinguish the judicial administration of the Sherman Act, the case most analogous to what is proposed by S. 1032. Mere reiteration that courts are incompetent won't make them so. The comment that environmental cases raise "political" and "value" judgments and ought therefore to be kept out of the judicial forum rings strange in a society which since *Marbury v. Madison* has submitted fundamental questions going to the very essence of the quality of life of all of its members to its highest judicial tribunal as the ultimate arbiter.

Most tellingly, both arguments fail to perceive what citizen environmental litigation is all about:

¹ In *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (D.C. Cir. 1966). *Church of Christ* and problems of "Standing to Sue" are discussed in Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 230 (1970) at 231-244.

² *Environmental Protection Act of 1971*. Hearings Before the Subcommittee of the Committee on Commerce, U.S. Senate on S. 1032, 92d Cong., 1st Sess. (1971); *Environmental Protection Act of 1970*. Hearings Before the Subcommittee of the Committee on Commerce, U.S. Senate on S. 3575, 91st Cong., 2d Sess. (1970) (hereinafter referred to as 1971 and 1970 Hearings, respectively).

³ Testimony of Mr. Atkeson, General Counsel, Council on Environmental Quality, 1971 Hearings, at 25 and 21, respectively.

⁴ Memorandum to the Subcommittee by Professor A. Dan Tarlock, dated November 24, 1971, p. 6.

(a) rightly or wrongly (it matters not which for our purposes) the New Deal optimism at having found, in the administrative agency, the panacea for our ills has been replaced by almost total disillusionment, distrust and cynicism on the part of the citizens of this country;

(b) almost daily, a large, invisible, Kafkaesque middle- and lower-level bureaucracy makes decisions affecting hundreds and thousands of lives (including unborn lives)—yet remains itself largely impervious to the electoral process or, for that matter, to the broad policy mandates laid down by its own superiors;⁵

(c) many of these decisions are—and this is a most important point which makes so many environmental issues unique—*irrevocable* and *irreversible*: when human callousness and official indifference if not complicity have exterminated the last timber wolf or the last American eagle; when private greed and official myopia if not corruption have turned life-giving wetlands into acres of dead concrete, the issues are moot—forever;

(d) ours is a time of great tension between legitimate needs for central decision-making⁶ and the desire of the people to reassert some control over their lives. No one can forecast the shape of the final resolution of this conflict. All we can say with certainty is that citizens want a forum, a place where they can vent their concern and attract public attention, where they can focus issues, where because of the rules of the adversary process they must be listened to in a way they have no assurance of being listened to even if they were admitted more freely into administrative proceedings, both rule-making and adjudicatory.

The function of the citizen environmental suit is to accomplish just this; to raise important substantive policy questions and, if the court agrees such questions do indeed exist, to gain the time needed for an eventual appropriate legislative or administrative response.⁷

Thus, even if *in the long run* courts cannot or should not be the arbiter of our environment only a stubborn refusal to face the extent of our environmental crisis or a misguided belief that judicially imposed moratoria will lower the GNP and therefore also our welfare⁸ can make one deny that *in the short run* the environmental citizen suit is a desperately needed tool to restore to a largely disenfranchised citizenry its right to be heard.

In sum, neither the relatively broad sweep of S. 1032, or its adherence to such traditional common law concepts as “reasonableness” or the failure to define “public trust”⁹ or the inevitable intrusion of “political” or value factors argues against the prompt adoption of this most important legislation.

Finally, no objection can be raised because the class of potential defendants under S. 1032 includes private parties. They are subject to suit now—but for reasons explored with the Committee by a number of witnesses, private nuisance suits are unsatisfactory.¹⁰ Furthermore, a federal environmental common law will allow for the imposition of uniform standards where that is desirable—for instance, to maintain roughly equal cost levels among competitors if that is appropriate.¹¹ On the other hand, even a federal environmental common law can, under the rubric of “reasonableness,” accommodate regional variations in resource use patterns.¹²

2. The expertise of administrative agencies

This is to a large degree the converse of the first argument, viz., that courts are incompetent to deal with environmental problems.

⁵ See Hanks & Hanks, *The Right to a Habitable Environment*, in *The Rights of Americans* (ed. Dorsen 1970), especially pp. 156-158.

⁶ See e.g., Galbraith, *The New Industrial State* (1st Signet ed. 1967), ch. XXXI, *The Planning Lacunae*.

⁷ See also testimony of Mr. Butler, Washington Counsel, Environmental Defense Fund, 1971 Hearings, at 106-107, citing the trans-Alaska pipeline system, the Cross-Florida Barge Canal and the DDT controversy as three specific examples of cases in which the judicial “nudge” prompted quick administrative and executive response.

⁸ See Berle, Jr., *What GNP Doesn't Tell Us*, *Saturday Review*, August 31, 1968 at 10.

⁹ Discussed at length in Professor Sax's important article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹⁰ See e.g., 1970 Hearings at 40.

¹¹ And see former Secretary of the Interior Udall, 1970 Hearings at 17:

If industry has to perform—all industries that are in competition with each other—if they have to perform at the same level and are told to install the very best equipment that is available to abate pollution, then . . . it becomes a clean or cleaner way of doing business. . . .

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

¹² Professor Tarlock's concerns in this respect do not seem well taken. See his memorandum to the Subcommittee, p. 7.

Three points seem to be crucial. One, as said earlier, the distrust of and disillusionment with administrative agencies is a political reality. As Professor Jaffe has observed:

It has now become a commonplace that the individual citizen in our vast, multitudinous complexes feels excluded from government. Thus, while governmental power expands, individual participation in the exercise of power contracts. This is unfortunate because the feeling of helplessness and exclusion is itself an evil, and because the individuals and organized groups are a source of information, experience, and wisdom. . . .

. . . From the very beginning, both our Constitution and our practice has sought to protect the individual *qua* individual and *qua* member of a minority from the abuse of power by the majority, despite the fact that majority rule through representation is the central institution of our democracy. Furthermore, democracy in our tradition emphasizes citizen participation as much as it does majority rule. Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking.¹³

Confidence in the administrative process has been undermined to a degree not immediately reparable. Even if agencies had environmental expertise, therefore, their pervading rejection would force us to offer citizens other avenues to be heard—until we restore some confidence in the administrative decisionmaking process if that is possible or develop new or additional institutions.¹⁴

Two, the destruction of our environment is not so much the result of a villainous conspiracy between the regulators and the regulated but the consequence of human ignorance, greed and complacency. It is only now that we are beginning to grasp the interdependencies of "spaceship Earth." In other words, most administrative agencies have no special environmental expertise—they have, after all, never been expected to develop any.¹⁵ Many of them are therefore in no better position to make environmental value judgments than are judges and many of them are in a worse position because their very expertise, in whatever technical area it may be, may well prevent them from viewing the system as a whole.

Finally, the *Brave New World* is casting its shadow ever more closely. We ought to do all we can to strengthen the countervailing force of what may be our last generalists, our judges, before we finally succumb to a word run by experts and presided over by psychotechnologically engineered leaders.¹⁶ Here again, then, S. 1032 is a step in the right direction.¹⁷

3. "Delay" of the decisionmaking process

So far, at least, it appears that major delays have been caused by administrative agencies trying to prevent public interest groups from participating and by the Justice Department arguing that the King Can Do No Wrong (otherwise known as the sovereign immunity defense) and that organizations representing thousands of citizens dedicated to the protection and conservation of the environment have no business "interfering" with arrangements made between the Secretaries of Interior and Agriculture and Walt Disney Production, for example, about the fate of the Mineral King Valley (known as "no standing").¹⁸ The principle seems clear: to exhaust the meager resources of those undertaking the onerous job of "private attorneys general" by harassing them with technical motions.¹⁹ It is only in this context that "delay" is an undesirable cost which ought to be eliminated.

¹³ Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968), 1044-45.

¹⁴ Such as public ombudsmen, as suggested by Professor Tarlock, Note 4 *supra* at 9-10. It is a longer range solution, though, and thus an inadequate substitute for S. 1032.

¹⁵ See also testimony of the former Attorney General of the United States, Ramsey Clark, 1970 Hearings at 25.

¹⁶ See "Op-Ed" by Dr. Kenneth B. Clark, *Leadership and Psychotechnology*, New York Times, Nov. 9, 1971, p. 47.

¹⁷ It is a step only because if citizen participation is desirable, the expense of public interest group intervention ought not to be borne by those who by definition have no economic interest of their own to pursue. For a discussion of this problem and a variety of models to deal with it, see *The Why, Where and How of Broadened Public Participation in the Administrative Process*, remarks delivered at the Administrative Process Symposium on September 17, 1971 by Professor Cramton, Chairman, Administrative Conference of the United States.

¹⁸ *Sierra Club v. Hickel*, 1 ERC 1669 (9th Cir. 1970). The case is pending—on the standing issue—before the Supreme Court on writ of certiorari.

¹⁹ The latest of these is to move for a change of venue. See Comment, *Change of Venue in environmental litigation: The Jicarilla Apache Tribe of Indians v. Pratt*, 1 ELR 10130.

Delay resulting from a fuller consideration of the merits, whether in a trial or by way of a remand to the administrative agency, surely is a cost we ought to be more than glad to pay: even if the ultimate decision were to remain the same, the fact that the "aspirations of the democratic process"²⁰ have been fulfilled makes it a better decision.

In the longer run, of course, there need be no delay at all. Once adjustments have been made to the new lead times required, the flow of decisions which is, in terms of efficient administration, what we are most interested in, will be the same as it was before environmental factors had to be taken into account. For example, no utility would consider three years lead time to study the economic feasibility of a nuclear power plant a "delay"; likewise, there is no reason to view (say) an additional year to research environmental compatibility as a "delay." It just means that utilities will have to allow a somewhat longer lead time for their projects. But once the short run adjustments are made to accommodate the new procedures, the flow of decisions should return to previous levels. Of course, there may be some short run delays to projects already in the administrative pipeline; but that is always true when there is change.

4. *The issue of de novo review*

To a large extent this objection is a canard. In almost all cases, some administrative agency will be involved and quite obviously, the court will pay heed to its decision, frequently more so than may be desirable or appropriate. Equally obviously, the court will typically remand to the agency for further study and fact finding if the record before it is inadequate. And finally, in a small number of cases it may indeed review all or part of the case de novo. But if we once concede the breakdown of the integrity of many administrative processes, then we cannot avoid the conclusion that some—few—cases will be reviewed de novo. Our knowledge of "normal" judicial behavior and especially of judicial "conditioning" vis-a-vis administrative proceedings should let us face that possibility with equanimity. It will not happen very often and the chances are it will not happen undeservedly. In any case, however, since business *cannot* go on as usual we ought to be prepared to accept an occasional deviant from the norm of judicial behavior.

The above responds to the major questions raised under the proposed legislation. Our environmental problems threaten to overwhelm us. We ought to have the courage to give our citizens the tools contained in this Act—not because it will solve our crises but because we need all the help we can get and because the traditions of our system teach us to have more faith in the ability of courts to respond to the felt necessities of the times than the opponents of the Environmental Protection Act are willing to acknowledge.

STATEMENT OF A. DAN TARLOCK, INDIANA UNIVERSITY SCHOOL OF LAW, BLOOMINGTON, INDIANA

My name is Dan Tarlock. I am an associate professor of law at Indiana University, Bloomington and I teach in the areas of natural resources, land use planning, land finance, and administrative law. It is a privilege to appear before a committee which has been so concerned with the response of the law to pressing social problems. I have written a more detailed statement of my position for the record and will confine my oral testimony to my primary objections to S. 1032 in its present form.

My major objections to S. 1032 are first that it does not sufficiently discriminate in the classes of environmental conflicts which should be subject to judicial review by citizens asserting what in essence would be common law environmental rights and second that it therefore overestimates the utility and desirability of individual or citizen association law suits as an enforcement strategy.

S. 1032 is built on a growing body of precedents which have expanded the duty of federal agencies such as the Federal Power Commission and the Department of Transportation to develop a comprehensive record before deciding to license or approve major projects. The bill attempts to apply these precedents to all environmental problems and in so doing ignores important countervailing policies. I would urge the Committee to distinguish between giving individual

²⁰ Testimony of Mr. Butler, note 7 *supra* at 94.

citizens and citizen associations standing to challenge the activities of agencies which do not have an express mandate to protect environmental values and whose efforts to interject environmental considerations into their decision-making inherently conflict with their developmental mandates and creating a common law of pollution which can be enforced by roving private attorneys general against private and governmental entities whose residual discharges are heavily regulated by an increasingly incomprehensible and often conflicting maze of regulations.

In the first instance there is enough evidence to support the assertion that environmental values are systematically underrepresented in decision-making by all federal agencies which substantially effect the environment. But, courts are limited in their ability to influence major licensing and public works decisions. They cannot decide the merits of a controversy and thus should not and cannot undertake a *de novo* review of administrative action. As Professor Jaffe has reminded us in a review of Professor Sax's book, *Defending the Environment: A Strategy For Citizen Enforcement*, "Where the legislature has faced up to contemporary problems and has made its policy clear, there is simply no basis for a court's disallowance for an administrative determination which satisfied rules of law and has fairly and substantially met the burdens imposed by the rules for the protection of the environment." (84 Harv. L. Rev. 1562, 1568). However, the courts do have a creative role to play in promoting more rational decisionmaking than they have historically played; they can—as they now are—move away from rubber stamping important decisions. They can decide whether Congress has in fact made its policy clear in the statute under which the decision is allegedly authorized and they can decide to, in Second Circuit Judge Kaufman's words, "skirt the question of whether an administrative agency was right or wrong or its decision supportable or unsupportable" and hold that the record compiled by an agency was deficient because certain relevant considerations were given inadequate attention. (Kaufman, *Power for the People—And By the People: Utilities, The Environment and The Public Interest*, 46 N.Y.L.Rev. 867, 870 (1971).

In short, the court's primary function is to put teeth into the concept that those wishing to undertake an activity that will significantly effect the ability of others to use resources such as a scenic corridor, wetlands or a forest have the burden of proof to demonstrate that the activity is consistent with legislative definitions of the public interest. The use of the courts to create and enforce environmental quality standards has been justified on the grounds that because they are accessible they can promote the democratic process by remanding important but low visibility decisions to the legislature. This may be a useful tactic for a litigator but I do not think it should be the basis of Congressional environmental policy for two basic reasons. First, reliance on the courts diverts attention from the harder, but I believe, ultimately more useful approach—reform of the legislative and administrative process. Second, if courts are thrust into a policy making role, their integrity will be undercut and they will command less respect from society to perform their basic functions.

In the past courts have been hampered in their ability to impose this burden on agencies and licenses because they have had no standards to guide them. It is, as others such as Professor Sax have testified, a lack of standards not any lack of technical competence to hear a complex law suit which constrains the courts from promoting more rational decision making. S. 1032 attempts to provide standards by creating a right to freedom from unreasonable pollution, impairment or destruction of the air, water, land or public trust of the United States. I have serious reservations about the utility of these standards. I will shortly discuss my objections to citizen suits against residual dischargers for unreasonable pollution but for the present would like to concentrate on impairment of the public trust as a standard for enjoining federal activities.

I have spent a fair amount of time in the past two years reading cases dealing with tideland ownership and use and I have concluded that the public trust expresses one simple idea. It was well put by the American tideland treatise writer, Joseph K. Angell, in 1847:

"The claim of the citizens and inhabitants of a state or country to the free use of the waters of the sea and their shores, for private advantage, is so obviously dictated by the law of nature, that in the first of all countries, they have been left open to public use."

The public trust expresses one simple concept. It is not a general theory of resource allocation which can be adapted to a wide range or resource use conflicts.

In order for a doctrine to function as an effective judicial standard it must contain a set of priorities which will control the outcome of a wide range of conflicting claims. I do not think it is possible to rank in advance the competing claims that are present in environmental cases and certainly the courts have done this only with a limited class of interests in the public trust doctrine. As I have previously emphasized the role of the courts should not be primarily to establish substantive environmental standards but to promote more rational decision-making procedures.

I would recommend that the citizens be granted standing to sue all federal agencies whose activities effect the environment but that instead of being tied to common law standards to be enforced by the courts S. 1032 should be limited to granting citizens standing to enforce the duty to compile an adequate record the courts have held N.E.P.A. creates. Even if the Supreme Court reverses the Ninth Circuit in *Sierra Club v. Morton* now pending, the Court may impose qualifications the Congress would find too restrictive.

The defense of sovereign immunity should, of course, be eliminated. The courts have ample powers to deny equitable relief in cases where it would be inappropriate and the doctrine especially as delineated in *Larson v. U.S.*, only serves to shield the government from desirable citizen scrutiny.

With regard to the creation of a federal common law of pollution, I have serious reservations about allowing suits for injunctive relief against residual dischargers on the grounds that a discharge constitutes unreasonable pollution. The intent of S. 1032 seems to allow a court to decide that a discharge that complies with applicable air, water or other quality standards still constitutes unreasonable pollution. Before I continue I would like to make it clear that I recognize that standards are often crude and may not allow for a sufficient margin of ecological safety. However, I think this problem is partially handled under the existing law of private nuisance which provides that compliance with applicable standards does not preclude a court from concluding that a discharge is unreasonable if it damages an appropriate plaintiff. Why, then, do I favor this principle but not S. 1032. I offer the following reasons:

1. I think it necessary to realize that in many instances the decision to upgrade the quality of a resource is analagous to the decision to produce a luxury good such as symphony halls or wilderness areas. The Federal Water Pollution Control Administration's 1966 study of the Delaware estuary concluded that the primary benefits from cleaning up the river would be recreational.

I think that decisions to use a stream system for high quality uses than say for waste assimilation is a highly political one because it involves trade-offs between a wide-range of resource claimants. It is the type of decision that a court is not equipped to make—again not because they could not do a credible job—but because other institutions have superior capacities to make the decision. Specifically the administrative process is better calculated to insure that all interested parties will have an opportunity to present their claims so that an agency will have access to better information about the magnitude of the costs and benefits involved in alternative quality levels. Moreover, a decision which is reached through the administrative process—assuming that this process becomes more open to diverse citizen groups than it is now—will be more readily accepted by those with the primary responsibility to take abatement action.

2. The seeming lack of speed in pollution control enforcement is often due to a lack of firm scientific evidence about the long term effects of a residual on a resource. I believe that because of persistent long term pollutants exists we must increase the ability of standard setters to err on the side of ecological safety and that consistent with this principle the burden to produce information about the effect of a discharge should be shifted to the polluter. But, my recent (and very superficial) research on power plant siting and thermal pollution problems convinces me we have overestimated that existing state of ecological knowledge that is useful in formulating regulations. Unless we abandon the notion that liability ought to be imposed only if it is probable that an activity will produce demonstrable harm—either from a present or future perspective—the courts will be reluctant to classify a discharge as unreasonable if the proof of damage is only speculative. I do not suggest that regulators sit passively by until the necessary knowledge is forthcoming. I do, however, suggest the growing evidence that we do not know enough about the effects of various discharges suggests that lawsuits may not be the answer to pollution abatement, as lawyers tend to assume. Lawsuits are a useful method of expanding the duty of agencies

to consider intangibles such as aesthetics, which have been historically ignored in project planning, but this reasoning does not lead me to the conclusion that we need an increased number of citizen lawsuits against residual dischargers.

3. Finally, the time is approaching when we must decide whether existing regulatory agencies will be supported or undercut by allowing the courts to substitute their standards for the agency's. I think the current state of pollution regulation has reached the point where we may be discouraging compliance with pollution abatement standards because it is difficult to know what is required for compliance. The current Corps of Engineers waste discharge permit program is a legal Rube Goldberg creation—especially after the recent district court opinion holding that a N.E.P.A. impact statement is required for each permit.

I think it would be better for the federal government to set rigid standards as they are doing, which are, of course, subject to revision in light of new information rather than to create a federal common law of pollution. Citizens enforcement of the standards is still useful for the risk is substantial that regulatory agencies will not follow a consistent enforcement program but I think the concept of Section 304 of the Clean Air Act of 1970 is preferable to S. 1032. It strikes a better balance between the integrity of regulatory programs and citizen participation.

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DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION. By Joseph L. Sax.¹ New York: Alfred A. Knopf. 1971. Pp. xiii, 252. \$6.95.

(Reviewed by Louis L. Jaffe)²

Professor Sax has written a valuable and provocative book on a "strategy" for defending the environment. I would take some exception to the furthest reaches of his thesis; it is based, I think, on a too hasty and too easily assumed prognosis of the potential usefulness of administrative action. But even if it overestimates this and places too much relative reliance on the judiciary, its analysis of the latter's potential for effective control of administrative action is nevertheless both excellent and imaginative.

There is some ambiguity in Professor Sax's position on the role of courts. At one point he asserts:

"The principal function of courts in environmental matters is to restrain projects that have not been adequately planned and to insist that they not go forward unless and until those who wish to promote them can demonstrate that they have considered and adequately resolved reasonable doubts about their consequences." (P. 113.)

But in dealing with certain cases, he complains that "[t]he court refused to consider the highway-routing question on its merits" (p. 139). And he says:

"The significant potential strength of the judiciary in correcting environmental misconduct is sapped because courts hesitate to inquire into the merits, rather than the peripheral legalities, of environmental issues." (P. 135.)

Public rights to environmental quality must begin to be viewed in a fashion similar to private rights—to be seen as capable of direct evaluation on their merits within the framework of the common-law system and freed from excessive deference to the decisions, and the records made by administrative officials. (P. 148.)

Carrying his thesis forward more boldly, he says:

"[I]f the court finds the proposal at odds with an environmentally sound policy, though it may not now be expressed in any legislation, and it finds no urgency for immediate construction, it withholds approval until and unless the policy question is returned to the legislative forum for open and decisive action." (P. 152.)

It is, of course, always open to the plaintiff to argue that an administrative action is not "supported by evidence" or is "arbitrary and capricious," but Professor Sax points out that it is almost impossible to disturb an administrative action on the basis of this vague and indeterminate standard. He argues that a court which disposes of an environment case on that basis is failing to make the contribution which we are entitled to expect.

¹ Professor of Law, University of Michigan.

² Byrne Professor of Administrative Law, Harvard University.

I agree with him in the implied criticism, though I do not necessarily accompany him all the way. Rarely does a good judge dispose of an environmental case on quite so abstract a level. At the very least, he structures his judgment in terms of the competing considerations, and he demands that here be a reasoned conclusion that does no violence to the prime factors of judgment. But more than this can and should be expected. In the present climate of public opinion, which is being more and more reflected in statutes such as NEPA,³ the courts in the exercise of their lawmaking function should give environmental considerations a very high priority.⁴ Statutes old and new are to be read in light of the needs of the times. These needs will be expressed explicitly or implicitly in the ongoing current of legislative enactment as projected against the more general background of public opinion. A prime function of the courts is to give these values an operative form. Thus, courts should conclude that a serious environmental impact must be justified by relevant and weighty considerations. This is, in a sense, a burden-of-proof rule, and we know that a skillful manipulation of such burdens can be decisive.

It is, of course, implicit in such a rule that proponents of the administrative action may justify it by considerations having substantial weight. Merely verbal, trivial, or marginal factors should be disregarded as frivolous. Needs must be verified; alternatives must be explored; and costs of alternatives must be quantified. But if the considerations in favor of the action are weighty, the burden will have been satisfied. These considerations may be derived from the statutes, but they can also be derived from the more generally accepted considerations regarded as relevant to the kind of decision in question. For example, in the *Overton Park* case,⁵ one alternative to the proposed action would have increased expenditure from an estimated three million dollars to one hundred million dollars. Another alternative would have dislocated great numbers of people. Clearly, considerations of this sort can justify a decision to accept certain adverse environmental impacts.

An example of a more precise type of lawmaking is the so-called "public trust" doctrine. According to this doctrine, public lands dedicated to certain uses (for example, use as a park, a recreation ground, or a forest preserve) cannot be diverted by a public authority (such as a highway commission) to other uses less environmentally worthy, unless the diversion is relatively inconsequential and does not seriously disturb the dedicated use.⁶ In Massachusetts, the doctrine is stricter and appears to allow no diversion without specific authorization by the legislature.⁷

Professor Sax espouses a theory of judicial intervention which goes beyond any of the theories already expounded, and which has the effect of dividing up the major responsibility for environmental control between the courts and the legislature and of assigning to the executive-administrative branch a rather routine role. Motivating this suggestion is the now fashionable theory that administrative agencies cannot be trusted to take important initiatives altering the status quo, whereas the courts are far more dependably "with it." It is asserted that administrative agencies are either the "captives" of those whom they regulate or—as is the case with the Atomic Energy Commission and a number of bureaus of the Department of the Interior—have a developmental mission which causes them to ignore the adverse effects of development.

This is not the place to explore these hypotheses in detail. Both of them have important elements of truth. But there are significant qualifications which are relevant to our environmental problems. Administrative bodies do indeed tend to develop a symbiosis with those whom they regulate. This characteristically comes about over a period of time in which the initial impulses behind the enabling legislation have worked themselves out and have lost their urgency. Where contemporaneous and powerful pressures are translated into statutes, and where there is thus a fresh and urgent mandate, there is evidence, as with

³ National Environmental Policy Act of 1969, 42 U.S.C. § 4231 (Supp. V, 1970).

⁴ This point of view is expressed in the recent DDT case, *Environmental Defense Fund, Inc. v. Ruckelshaus*, No. 281,813 (D.C. Cir., Jan. 7, 1971).

⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1367 (5th Cir. 1970), *rev'd*, 91 S. Ct. 814 (1971).

⁶ *State v. Public Serv. Comm'n*, 275 Wis. 112, 81 N.W.2d 71 (1957); *Paepcke v. Public Bldg. Comm'n*, 46 Ill. 2d 330, 263 N.E.2d 11 (1970). In the *Overton* case, where a statute gave special protection to a park, the Supreme Court remanded for a more intensive review by the district court of the agency determination to invade the park area. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 91 S. Ct. 814 (1971).

⁷ *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966).

the NLRB and SEC, that agencies are capable of effective action. It is too early to say that this will not be the case with environmental problems. Indeed, unless this comes about, I am afraid that the possibilities of effective and broadscale environmental protection action are not very good. Without powerful and continuous administrative initiatives, the courts cannot, in my opinion, accomplish a great deal. Even assuming an important increase in the number of citizens prepared to undertake law suits, the systematic design and administration of air and water pollution standards cannot be accomplished effectively by courts. It is worth pointing out that in the recent case of *Zabel v. Tabb*⁸ it was the Corps of Engineers which undertook the extension of the statute, and a district court which invalidated its action. It has also recently been pointed out that the powerful congressional committee which has reported on the use of public lands has come out with a report predominately slanted in the direction of private development, whereas the Forest Service, as is true of the Corps of Engineers, is beginning to show a sensitivity to environmental factors.

What, then, is Professor Sax's proposal? He proposes, if I understand him correctly, that in a case involving a potentially significant environmental impact, the judge make an independent determination of that environmental impact. Where the impact is deemed significant, the disputed action will be disallowed if the judge is of the opinion that the legislature has not established a more or less specific rule for the situation at hand. I may be giving an overprecise version of his proposal, since it is not clear to me. He may be saying that the judge should himself perform the balancing which normally would be the function of the agency, or he may be saying that where there is a serious environmental impact the balancing is to be done by the legislature. Probably he would think of both approaches as relevant, the specific applicability of either depending on the nature of the case. I cannot believe that he means to require a reference to the legislature if the judge believes that the balancing is sound, though of this I am not sure. The reference to the legislature would be most appropriate where, because the situation is relatively novel, it would be necessary to extrapolate from existing policy declarations to uphold the administrative action.

What should be our response to these proposals? I would concur with his proposal in the type of situation last mentioned. Where serious environmental impact is involved, where the action proposed has major dimensions, and where the legislative guidelines are obscure, there is a strong argument for securing further legislative guidance. The device is one that is used by the Massachusetts court in its application of the public trust doctrine. The Massachusetts court will not allow a change in the use of property dedicated to a public trust, thus requiring further legislation if the proposed action is to be taken. The device is, as a matter of fact, already in more general use. It is not at all unusual for a court faced with a questionable action—with one requiring the making of a novel and important policy decision—to reject the action, thus compelling reference to the legislature.⁹ The device is peculiarly applicable where powers are exercised under an old statute and where new problems have arisen which have not been reviewed by the legislature. In such situations courts often *do* give very liberal readings to further broad powers enabling administrative bodies to undertake new tasks without further legislative authorization. That attitude, it would seem, is inappropriate in cases of this type.

But I understand Professor Sax to be arguing for an extension of judicial power to more questionable uses. He reviews critically, for example, cases dealing with highway location in which courts have refused to make independent judgments. In all cases of this sort which I have seen, the considerations pro and con are arguably in close balance. There are usually adverse environmental impacts whatever alternative is chosen, and there are budgetary considerations which are a function not only of the case at hand but of the total cost of the overall program. One way of classifying cases of this sort is to identify them as specific applications of an ongoing general program. If the basic policy considerations of the general program have not been considered by the legislature in the light of current problems, then there would be a reason for disallowing particular projects until a legislative review has taken place. But once the legislature has made its general decision and delegated its power to administrators, the case for in-

⁸ 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3356 (U.S. Feb. 23, 1971).

⁹ *Kent v. Dulles*, 357 U.S. 116 (1958).

dependent judicial appraisal becomes questionable on both theoretical and practical grounds. Obviously, legislative bodies, whether state or federal, are not in a position to deal with each highway extension or each siting of an atomic energy plant. And even if they were, each legislature should be the judge of how it proposes to use its time, which tasks it will itself perform, and which tasks it will delegate.

In current discussions of this problem, and particularly in the recent decision of the court of Appeals of the District of Columbia in the DDT case,¹⁰ it is being said that the courts should not be too much impressed or "taken in" by the supposed "expertise" of agencies. In most cases, it is argued, the question goes beyond expertise and involves policy judgments; and even where expertise is relevant, the agency may use it in the service of special interests. With these observations I agree. But the power of an administrative or executive officer to make decisions does not rest on expertise alone, or, in many cases, on expertise at all. It rests on the basic fact that the legislature has conferred the power on the executive or administrative officer and has thought it proper to confer discretion in the exercise of that power. It may, of course, directly or by implication confer the power on a court, as with the antitrust law. But it is even questionable whether courts will regard themselves as authorized under the Constitution to exercise broad discretionary powers where these are ill-defined or not governed by rules of law. It has long been the doctrine of the Supreme Court and of most state courts, for example, that a court cannot constitutionally be granted a rate-making power. A similar doctrine has been expounded with respect to licensing powers, at least where the discretion is very broad. These powers, says the Court, are not judicial.

But quite apart from this constitutional question, if a legislature chooses to confer a power—be it a power to build roads or to license the use of the public domain—on an administrative officer, there is simply no basis for the exercise of the power by a court. The doctrine of limited judicial review expresses this fundamental premise of our Constitution. It is on this premise that a court is limited to questions of law, abuse of discretion, or lack of adequate evidence. We have shown that under these rubrics it is possible for the courts to impose highly important effects on the decision of environmental questions. But where the legislature *has* delegated power to an executive officer, there comes a point at which courts are constitutionally without power to intervene. Where the legislature has faced up to contemporary problems and has made its policy clear, there is simply no basis for a court's disallowance of an administrative determination which satisfies the rules of law and has fairly and substantially met the burdens imposed by the rules for the protection of the environment. A court cannot, merely because of its dissatisfaction with the result, require that the consent of the legislature be secured for the particular act in question. Of course, it may be that Professor Sax would not disagree with this conclusion, and that he would be satisfied with as much power as I suggest can and should be exercised by the courts. My conclusions, I think, do allow for a very large judicial role—a role much beyond a perfunctory application of the hallowed formulas. It is my belief, in any case, that the courts are neither technically nor politically in a position to do much more, and that a philosophy or action based on the notion that the administration can be expected to perform only a role subsidiary to the courts and the legislature will in the long run be self-defeating.

I should not conclude without a passing reference to the book's Postscript. "Everything," says Professor Sax, "that has been said here is adaptable to the problems of housing and welfare, to the proliferation of shoddy merchandise, and the miserable charade that too frequently passes for public regulation of business and the professions" (p. 245). I will let pass the merits of this rather wholesale indictment, but is it meant to say that in all these fields the courts are to take over the reform of administration? The very suggestion, I think, that judicial intervention in the control of the environment implies a similar intervention in all other affairs—at least in those affairs with whose present administration the proponent is dissatisfied—raises a question as to the book's thesis. It would mean that more and more burdens are to be heaped upon the courts, courts already so overtaxed that many of them are unable to keep up with the ordinary administration of justice. Does it make good sense to propagate the thesis that judges alone are fit to govern?

¹⁰ *Environmental Defense Fund, Inc. v. Ruckelshaus*, No. 281,813 (D.C. Cir., Jan. 7, 1971).

THE UNIVERSITY OF TEXAS AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., October 26, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: Someone on your staff called me last week and asked me if I would look at and comment on S. 1032, the environmental protection legislation that you have introduced. I have now studied the bill and have read the hearings that were held in May and July, 1970, and in April, 1971.

I come to the bill with something of a bias since I have been for years an interested member of the Sierra Club and on other groups concerned with protection of the environment. I should say, in the interest of fair disclosure, that I currently represent State of Texas in litigation in the Fifth Circuit in which may state is opposed by conservation groups that do not wish to have a freeway built through Brackenridge Park in San Antonio. The issues there, however, are quite different from those that your bill poses and I do not regard this professional connection as affecting in any way my reaction to your bill. With the exception of that case, I have no professional relationships that even colorably might influence my attitude toward the bill. The principal commitment of my entire career has been to improvement of the administration of justice, particularly in the federal courts, and it is from that perspective that I view the bill.

Several friends of mine—Joe Sax, Ramsey Clark, and Bill Coleman—have testified in support of this proposed legislation. It suggests no disrespect for them or for you when I say that I cannot recall ever having read a proposed piece of legislation that shocked and horrified me as much as this did. I would regard the adoption of this bill as a disaster.

Courts play an important role in our governmental scheme but they cannot cure every ill of our society. We do them a disservice when we ask them to perform tasks for which they are not equipped. Under this bill the courts, at the instance of any citizen who could afford a lawyer, would be required to invest and to apply a body of "federal common law" on permissible interferences with the environment.

Protection of "the air, water, land, and public trust" of the United States—whatever those terms may mean—raises issues of public policy of the greatest difficulty and importance. In every case a nice balance must be struck to determine whether pollution, impairment, or destruction is "unreasonable" or whether the harm is outweighed by promotion of the public health, safety, and welfare. Except for a cryptic reference to the fact that environmental protection is "the paramount concern of the United States," your bill would give the courts no guidance whatever in resolving these issues. This would be, with a vengeance, justice by the length of the Chancellor's foot.

Justice Harlan has written only recently of "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 * * *," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 502 (1971). This sense of futility is inevitable when judges, with no guidance from the statutes or from precedent, are asked to make what are essentially legislative choices in areas in which conflicting public policies of high importance are veiled in scientific complexity. Your bill would inundate the courts with such cases, in which necessarily they would flounder and accomplish little, at a time when they are overwhelmed with ordinary judicial business in which they can make a real contribution.

In my judgment it is for state legislatures and Congress to decide how much interference with the environment is permissible in the light of the other needs of our society. It is primarily for the executive to enforce these standards. Administrative agencies are better equipped to resolve specific conflicts than are courts. The role of "private attorneys general" ought to be discouraged as much as possible.

There are many details of the bill that I regard as ill-conceived or poorly drafted or both but my objection to the basic concept of the bill is so strong that it does not seem profitable to go into details.

Very truly yours,

CHARLES ALAN WRIGHT,
McCormick Professor of Law.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., October 27, 1971.

Mr. LEONARD BICKWIT, Jr.,
Old Senate Office Building,
Washington, D.C.

DEAR MR. BICKWIT: You have asked me to comment on S. 1032, and you have especially requested that I scrutinize the bill from the standpoint of one who specializes in administrative law. I am glad to respond for two reasons: I am sympathetic to the purposes of the bill, and I think some further work on the bill is quite essential before it can be ready for enactment.

Nothing in the bill transgresses any basic principles of administrative law that I know about. Clearly, Congress may confer a "right" upon "each person" and then may confer standing upon "any person" to maintain an action under section 3. And clearly (Mr. Atkeson to the contrary notwithstanding), Congress may, if it chooses, confer upon the courts, without statutory standards, the power to decide. No more by way of standards is either necessary or desirable than such words as "unreasonable pollution, impairment, or destruction." And clearly, in my opinion, the courts are quite capable of administering such a standard in individual cases.

I find myself completely on the side of Senator Hart in dealing with Mr. Atkeson's arguments. And I find myself in agreement with Professor Sax—as far as he goes.

Even so, I think a great deal more work must be done on S. 1032 before it can be ready for enactment. The bill might be pretty good for a state that has little or no legislation about pollution. But the federal government has a great deal of relevant legislation, and, so far as I can see, the bill has been drafted without regard for the extensive legislation that has already been enacted. It coasts over many difficult problems without being aware of them.

Most serious, in my opinion, is the failure of S. 1032 to deal with the problem of fitting together federal administrative action and federal court action. The draftsman seems unconcerned about that huge problem. Indeed, the problem is so huge and so difficult that I am not at all sure that it can be satisfactorily solved, or even that it should be solved.

Our tradition (both federal and state) is a strong one that we do not confer upon both courts and administrative agencies the concurrent power to take care of the same problems at the same time. The basic idea of S. 1032 that, even though various federal agencies have power to make rules and to adjudicate, the courts may also adjudicate the very same problems is a basic idea that Congress and the state legislatures have generally rejected. (An exception was the original Interstate Commerce Act, but the Supreme Court took care of that in *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426.) When the legislators have not been alert enough to take care of the problem, the courts have generally done so, as in the Abilene case. Indeed, if S. 1032 were enacted in its present form, federal courts would probably apply the doctrine of primary jurisdiction in such a way as to hold that when a plaintiff raises a question that an agency has power to decide, the court will refuse to entertain the complaint: the bill would probably be interpreted to mean that a federal court may act only on a problem that is beyond the jurisdiction of any agency.

Even in a case in which the federal court would take jurisdiction, the problems of what law to apply are complex enough that Congress should deal with them in the statute. I assume that a court would not violate either a regulation or an order authorized by Congress, unless it holds the regulation or order invalid. But what would a court do with findings and policies not embodied in a regulation or an order: for instance, what would a court do about "final findings and recommendations" made by a board pursuant to 18 CFR § 606.13?

What if a federal agency issues an order against Polluter X that he may not continue to pollute more than six units—would the court have authority to entertain a suit for a declaration that Polluter X may not pollute more than five units? I frankly don't know what the answer (a) would be, or (b) should be. Therefore I think a good bill would answer it.

The reasons for legislating, as Congress usually does either directly or indirectly, that two tribunals may not duplicate each other's action are exceedingly strong. The established tradition surely has much merit. The reasons on the other side also have some merit: Administrative machinery established

to get a job done often becomes a protection of those who are supposed to be regulated; the biggest administrative power of all is often the power to do nothing or the power to do less than ought to be done. A citizen suit like that authorized by S. 1032 can provide a means for curing this weakness of the administrative process.

The bill, in my opinion, should deal with this problem. If the draftsmen will think through the problem, I think they are likely to come out with the conclusion that courts should never be authorized to duplicate the work of the agencies Congress has established; and if they come to that conclusion, all that will be left of S. 1032 will be an authorization to the courts to deal with problems that agencies have not been authorized to deal with. Would such a bill be worth while?

Section 6 of S. 1032 is badly drafted, in my opinion, in four respects:

(1) It provides that "any person entitled to maintain an action under this Act may intervene as a party in . . . existing administrative and regulatory procedures." This apparently means that "any person" may cross-examine every witness in every administrative proceeding on this subject matter, whether he has competence or not. Much experience is that even the best of lawyers get in the way when an intervenor's interests are only incidental, when the lawyers think they have to cross-examine to earn their fees. Does this provision require a little more home work?

(2) The clause in section 6 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," raises the question whether section 3(a) means what it says. May "any person" under section 3(a) maintain an action only if the regulatory procedures are found by the court to be inadequate? If so, section 3(a) should specify the limitation. If that is not the intent, what *is* the meaning of what I have just quoted from section 6?

(3) Section 6 also provides that at the initiation of "any person entitled to maintain an action under the [this] Act, such [administrative and regulatory] procedures shall be reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized herein." But under the Administrative Procedure Act, one is normally entitled to a limited review not only of "such procedures" but also of the substantive action the agency takes. Is it the intent of this provision of section 6 to restrict the right to judicial review that would normally be available? Why limit the review to "such procedures"? Why deal with judicial review at all unless it is dealt with comprehensively? And why not leave alone the comprehensive congressional treatment of it in 5 U.S.C. §§ 701-706, which experience has shown to be quite satisfactory?

(4) Section 6 says that "in any such judicial review the court shall be bound by the provisions, standards, and procedures of sections 3, 4, and 5 of this Act." But sections 3, 4, and 5 are not designed for a review proceeding; they are designed for initial action by the court. Those sections are a misfit for a review proceeding.

I shall stop there, even though I could point to what I deem many more flaws in the drafting.

The big question I raise is: Can the authorization to federal courts be coordinated with the existing powers of federal agencies on the same subject matter? The bill does not do the coordinating. If the coordinating can be satisfactorily worked out—which I doubt—I would support S. 1032.

I hope these remarks will be helpful to you and to Senator Hart, whom I have long admired.

Sincerely yours,

KENNETH CULP DAVIS.

STATEMENT OF THE COUNCIL OF HOUSING PROCEDURES

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 of 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 a 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.

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 associations 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 proper 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 "ill-equipped 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.

Cordially,

HILTON DAVIS,
Manager, Legislative Action.

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 unreasonably 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.*

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

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

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 definitions 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.*

U.S. ATOMIC ENERGY COMMISSION,
Washington, D.C., September 9, 1971.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate*

DEAR SENATOR MAGNUSON: The Atomic Energy Commission is pleased to respond to your request for comments on S. 1032, a bill which, if enacted, would be known as the "Environmental Protection Act of 1971".

S. 1032 would find and declare, among other things, 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 . . . has the responsibility to contribute to the protection and enhancement thereof." The bill would authorize private or class actions seeking 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 affects interstate commerce, wherever such activity and such action for relief constitute a case or controversy." A complaint in any such action would need to be supported by affidavits of at least two "technically qualified persons", stating that "to the best of their knowledge the activity . . . damages or reasonably may damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction." Upon a prima facie showing by the plaintiff that the activity affects interstate commerce and "has resulted in or may reasonably result in unreasonable pollution, impairment, or destruction of the air, water, land, or public trust of the United States", the defendant would have a 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 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 United States district courts would have jurisdiction over actions brought under S. 1032 without regard to the amount in controversy. This bill would permit an action to be brought against a department, agency, or instrumentality of the United States.

The bill would also provide that its provisions would be "supplementary to existing administrative and regulatory procedures provided by law" and that in an action under the bill, if enacted, the court might "remand the parties to such procedures". However, this provision is subject to certain limitations. The court could, in any event, grant interim relief "where required and so long as necessary to protect the rights recognized herein." Also, the availability of administrative or regulatory procedures would be no bar to the maintenance of an action under S. 1032 where the procedures are found by the court to be "inadequate for the protection of . . . rights [recognized in S. 1032]." Furthermore, the bill would make such procedures "reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized herein," and provide that the reviewing court is to be bound by the provisions, standards, and procedures applicable to actions under S. 1032 and may order the taking of additional evidence on the environmental issues involved.

The Atomic Energy Commission is in sympathy with the broad objective of encouraging public participation in the consideration of environmental problems and of providing an appropriate forum in which public concerns may be expressed. In our proceedings for the licensing of nuclear power plants, we have exerted every effort to keep the public informed of pending proceedings and to afford interested members of the public an opportunity to appear, voice their concerns and have them considered in public hearings.

As to the merits of providing for class action suits in general, we defer to the views of the Council on Environmental Quality and the Department of Justice.

We question, however, the need for and the propriety of such suits where an adequate administrative forum for public participation in the governmental decisionmaking process exists and adequate provision for judicial review of such governmental action is available under Federal law. For example, the licensing proceedings of the Atomic Energy Commission offer a forum for plenary consideration, with full public participation, of the environmental effects of a proposed nuclear power plant. Licensing decisions of the Commission, moreover, are, under the provisions of the Atomic Energy Act, subject to judicial review in an appropriate United States Court of Appeals.

It should also be noted that AEC administers a program of inspection of its licenses, including nuclear power plants, and has full authority to enforce its

regulations and license conditions. Thus, any member of the public may notify the AEC of an alleged violation of an AEC regulation or license condition dealing with, among other things, environmental standards; and, under our compliance program, the matter will be investigated promptly. Should there be a threat to the public health and safety, AEC has authority to shut down the facility. In other cases, the AEC can impose other restrictions or sanctions on the licensee, including civil monetary penalties. All AEC enforcement actions are subject to judicial review.

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,

R. E. HOLLINGSWORTH,
General Manager.

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