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STANDING ON THE SIDE OF THE ENVIRONMENT: A STATUTORY PRESCRIPTION FOR CITIZEN PARTICIPATION

Private citizen control over the quality of his own and his children's lives is a truly democratic goal—one not yet achieved with respect to the citizen's opportunities to protect and preserve the environment. Paradoxically, private citizen litigation to promote environmental quality is virtually unavailable at a time when environmental protection is critical and citizen interest is at its peak. This Comment argues that the traditional barriers to private citizen standing should no longer prevent citizens from suing on behalf of the public interest in the environment. It offers a complete analysis of the need and precedent for, and objections to Congressional adoption of Senate Bill No. 1032, a proposal designed to expand the role of citizens, courts, and legislatures in solving the country's environmental problems.

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.¹

The unchecked growth of the environmental crisis, despite the many governmental institutions responsible for environmental quality, has raised serious questions concerning the ability of the democratic system to meet the environmental challenge. The very mechanisms which government creates to assist it in serving the citizenry often frustrate the private citizens' legitimate efforts to serve the public interest.² Indeed, the disinclination or inability of bureaucratic institutions to attend promptly to pressing national problems occasions sentiment that the individual needs protection from his government.³ Dissenting voices


2. In the second decision in Office of Communication of the United Church of Christ v. FCC, Judge (now Chief Justice) Burger observed, "[t]he Public Intervenors, who were performing a public service under a mandate of this court, were entitled to a more hospitable reception in the performance of that function. As we view the record the Examiner tended to impede the exploration of the very issues which we would reasonably expect the Commission itself would have initiated; an ally was regarded as an opponent." 425 F.2d 543, 548-49 (D.C. Cir. 1969).

3. The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized ac-
of civil rights, peace, and environmental groups unite in the refrain that while government is created to respond to society's needs, it increasingly operates as a paternalistic proxy-holder whose sensitivities are dulled to all but the economically powerful.  

Because the frustration that is symptomatic of the individual's ext


Government has grown at a phenomenal rate:
From 1860 to 1960 the U.S. population and its work force increased approximately 6 times as against over 60 times for federal civilian employees. The Washington government work force increased 100 times during that period.


Some believe, however, that governmental expansion is not undesirable, and that it does not necessarily portend restriction of individual freedom.

Without increased bureaucratic regulation, such forces as technological change, urbanization, and more intensive division of labor would either be impossible, or would lead to greater social disorganization and a narrower range of choice for the individual.

Thus, greater bureaucratization is one of the inherent costs of greater freedom of choice, and could not be abolished without reducing that freedom.

A. DOWNS, INSIDE BUREAUCRACY (1967), quoted in W. GELLMANN, supra, at 8.

That administrative bodies are necessary to protect the citizen from the private sector by compensating for individual impotence in the marketplace has been illustrated as follows:

On the private side, organizations—corporations, unions, associations—are now the dominant factor in the economy. Man must live within them if he is to be sustained by his own employment, and he must buy from them and borrow from them if he is to enjoy even the minimum essentials of life. Their policies and managerial decisions—on production, wages, prices, advertising, etc.—allocate advantages and disadvantages to men. Man is, in other words, inescapably a subject of private administration.

....

[1] In spite of all the imperfections in attainment of the democratic ideal, the President and Congress operating together in the solar system of politics can be more representative of the total complex of conflicting and concurrent interest than General Motors, AFL-CIO, or any other private structure in the administered society—that, in other words, public policy and the administrative state can be more democratic than private policy and administration.


4. The truth is that a vast bureaucracy now runs the country, irrespective of what party is in power. The decision to spray sagebrush or mesquite trees in order to increase the production of grass and make a cattle baron richer is that of a faceless person in some federal agency. Those who prefer horned owls or coyotes do not even have a chance to be heard.


5. The twentieth century has exacerbated one universal phenomenon respecting the impact of government on the affairs of those it seeks to govern. It is the mounting frustration with which the American citizen views his inability to obtain redress against governmental maladministration. Existing institutional devices to control bureaucratic authority have proved unsatisfactory. .... One such method of control that has demonstrated its inadequacy to resolve citizen complaints is judicial review.

Sherry, The Myth that the King can do no Wrong: A Comparative Study of the
clusion from government\textsuperscript{6} may engender action which is inimical to—or at least external to—normal democratic processes,\textsuperscript{7} governmental channels must be opened through which the private citizen may seek to

\textit{Sovereign Immunity Doctrine in the United States and New York Court of Claims, 22 Ad. L. Rev. 39 (1969).}

6. 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. . . .


This ground swell has prompted the President of the United States to observe, 

7. "'[U]ntil political leadership addresses itself to the major problems of our society . . . the concern and energy of those who know the need for change will seek outlets for their frustration.'" Dr. C.H. Plimpton, \textit{quoted in} W. Douglas, \textit{supra} note 4, at 56. "It is that sense of futility which permeates the present series of protests and dissents. Where there is a persistent sense of futility, there is violence; and that is where we are today." W. Douglas, \textit{supra} note 4, at 56. In the environmental sphere, this futility may be manifested in more constructive ways.

Last April six young Miami residents scaled a six-foot fence, ducked past a sleepy night watchman and sneaked into a dimly lit sewage treatment plant. Their foray launched one of the most unorthodox campaigns yet in the battle to save the environment.

Quickly and silently the black-clad intruders approached six huge waste vats scattered through the building. In each they deposited a bomb filled with dye. Minutes later they regrouped and started making their way out.

By day break, after similar raids on two more sewage plants, half the inland canals in the Miami area turned bright yellow. Back at their headquarters, their mission accomplished, Eco-Commando Force 70 issued Communiqué No. 1.

The tiny organization . . . declared that they had dyed the waste 'to show what happens to sewage dumped in our waterways.'

' . . . [A]lthough we have committed a couple of misdemeanors—mostly trespass—we consider the risks to be worthwhile. Our crimes are miniscule compared to the hundreds of crimes that are being committed daily on our environment. We honestly believe we are fighting for our lives.'

On Independence Day, they struck again—this time with such embarrassing impact that Dade County Sheriff E. Wilson Purdy was ordered to find the raiders and arrest them. The charges were not specified.

Thousands of July 4th vacationers and tourists who flocked to this area's beaches were startled by red signs that warned: 'Danger polluted. No swimming. No fishing. Potentially dangerous concentrations of pathogenic bacteria have been found at or near this location.'

. . . Their attorneys advised them to disband. They refused. They said if they were captured, 'we'll plead self-defense.'

On November 10 the commandoes wrote President Nixon and warned him
redress grievances which have been unnoticed, ignored, or created by governmental institutions. In response to this need, various state and national lawmakers, believing that access to the courts might significantly ameliorate the crisis, have proposed legislation which would grant the individual the right to sue to protect the environment.

The power legally to protect the environment resides in legislative, executive, and judicial bodies. To the extent that legislative

that the beach in front of his Key Biscayne vacation retreat is 'washed by the raw sewage pouring from the ocean outfalls which stud our coastline.' They asked the President to join in a fight against area polluters.

The White House did not respond.


8. Rather than inviting anarchy, such citizen participation would augment the efforts of administrative bodies, (see part III B infra) which are in fact necessary to coordinate and regulate private enterprise. See note 3 supra.

9. The citizen who today sees his Nation being ravaged also sees a labyrinth of agencies, procedures, and rules which make individual action impossible. We hope to clear this thicket to assure that individuals can receive a hearing for their grievances in a forum which can provide relief. The courts of this Nation offer that forum. We also hope to extend participatory democracy and the meaningfulness of the political process. This bill [S. 3575] will help to accomplish that.


10. The full text of the United States Senate Bill is set forth in the Appendix. That bill was introduced in 1970 by Senators Hart and McGovern as the Environmental Protection Act of 1970, S. 3575. It was reintroduced by the same senators in 1971 as S. 1032. Hearings on the 1971 bill in the Senate Committee on Commerce, Subcomm. on Energy, Natural Resources, and the Environment, were originally scheduled for March 18 and 19, but were rescheduled for April 1 and 2, 1971. Senate Comm. on Commerce, Press Release, Mar. 12 & 17, 1971, on file with Ecology Law Quarterly.

The companion bill was introduced in the House of Representatives in 1970 by Congressman M. Udall as H.R. 18429, and in 1971 as H.R. 5074. H.R. 18429 was entitled the Environmental Protection Act of 1970, but H.R. 5074, substantially the same bill, was introduced as an amendment to the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-47 (Supp. V, 1970) ). The House Judiciary Committee held hearings on the 1970 bill but the 1971 bill was sent to the Merchant Marine and Fisheries Committee. 117 Cong. Rec. H 925 (daily ed. Feb. 25, 1971); Letter from Fred Palmer, Staff Assistant to Congressman Udall to authors, on file with Ecology Law Quarterly.

11. A general statement of governmental responsibility in this area was offered in the Senate Hearings on the Environmental Protection Act of 1970:

Government—Federal, State, and local—has the primary responsibility to take all steps necessary to see to it that its activities and the activities of persons and corporations do not cause unreasonable damage to the physical and human environment. Ideally the citizens of a society should be able to rely, in most instances, upon its officials to enforce the laws by way of criminal and civil suits against all who would pollute the environment. As Charles A. Lindbergh said the other day, the New York Times, Tuesday, July 7, 1970, page 25:

... Much as I believe in the utmost practical freedom for man, I do not
and executive bodies are not responsive and courts not accessible, the private citizen seeking to prevent environmental destruction is without recourse. Regular elections and short terms encourage legislative and executive responsiveness, but no similar safeguards force administrators—on whom elected representatives depend to make routine but important decisions—to account to the public for their actions. Thus, administrative bodies can be the Achilles' heel of a democratic government. With respect to courts, responsiveness is theoretically not a factor, since the judiciary is not a legitimate object of political pressure. Rather, the judiciary is meant to serve democracy by insuring equal footing to all who come before the bar. In its role as an equalizer, the court affords the poorest and weakest the opportunity to challenge on common ground the richest and most powerful. Hence, while the value of the executive and legislative branches to democracy is a function of their responsiveness, that of the judicial branch is a function of its accessibility.

The principal determinant of courts' accessibility is whether the individual seeking to bring an action has "standing" to sue. The concept of standing is the offspring of the "case or controversy" requirement of the Constitution. Although something of an enigma, the

see how his essential environment can be maintained in this technological era through commercial organizations acting independently. Contemporary pressure lobbies, together with the often ruthless exploitation and spoliation of our country, stand witness to the need for quick and firm governmental action.

1970 Hearings, supra note 9, at 154 (statement of William T. Coleman, Jr., of Dilworth Paxson, Kalish, Levy & Coleman, Philadelphia, Pa.).

12. For a review of the accessibility of the courts to the private citizen under current law, see part I B infra.

13. [B]oth because of conflicts and the cumbersomeness of any bureaucracy, governmental agencies and people who are trying to do their best cannot police all the situations. They cannot be completely effective. All over this country today we see citizens' groups who are in effect trying to alert government that action is needed. But the wheels of government turn very slowly, and sometimes the wheels of industry turn very fast.

It therefore becomes vital that citizens . . . who are alerted to some peril, some danger to their communities [sic], or region, or environment have a forum that they can go to rather than simply writing their Congressman or protesting to some law enforcement official.

1970 Hearings, supra note 9, at 14-15 (statement of Stewart Udall, former Secretary of the Interior).

For a former Secretary of the Interior's summarization of the reasons for administrative inability to keep pace with environmental degradation, see note 57 infra.


15. In the . . . field of standing, Mr. Justice Frankfurter found himself reduced to a nearly unprecedented degree of inarticulateness in announcing the Court's decision in United States ex rel. Chapman v. Federal Power Commission.

Differences of view . . . preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any
constitutional limitation basically operates to assist courts in achieving their purpose—peaceful resolution of disputes through consideration of all relevant facts and arguments—by assuring that the plaintiff is a proper party to bring a legal action. In selecting proper parties, courts seek to obviate collusive suits and nominal presentations by requiring that potential plaintiffs demonstrate a "personal stake," or "injury in fact," in order to establish the existence of an "adversary context."

With respect to challenges of administrative action, it is necessary at the outset to distinguish between standing and reviewability, concepts which have intertwined to form a Gordian knot which even the Supreme Court has apparently been unable to cut through. Standing may usefully be classified as a threshold determination, "related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." The court must then determine whether the administrative action in question is reviewable by inquiring "whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs."

While these traditional requirements serve courts' legitimate purposes of full adjudication and judicial economy, they may present an insurmountable barrier to one seeking to vindicate the public interest in environmental quality. Congress, recognizing the need for citizen

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20. The well-reasoned dissent of Justices Brennan and White in *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 167 (1970), was based on the theory that the majority had confused the concepts of standing and reviewability.
22. *Id.* at 152. Under the Administrative Procedure Act . . . , 'statutes [may] preclude judicial review' or 'agency action [may be] committed to agency discretion by law.' 5 U.S.C. § 701(a). In either case, the plaintiff is out of court, not because he had no standing to enter, but because Congress has stripped the judiciary of authority to review agency action.

*Id.*
participation in this area, has declared in the National Environmental Policy Act of 1969 (NEPA) that "each person has a responsibility to contribute to the preservation and enhancement of the environment;" but standing rules have restricted the accessibility and thus the utility of the judiciary as a channel for such participation. The authorization of individual suits to buttress governmental regulatory efforts would provide the public with a valuable tool in exercising the responsibility imposed by the NEPA. This Comment will inquire into the need for and appropriateness of legislating standing to sue to protect the environment. The inquiry will focus first upon the inadequacy of the administrative structure and the insufficiency of present case law to meet the environmental challenge, and next upon the precedent for and adequacy of the proposed legislation.

I

THE NEED TO LEGISLATE STANDING TO SUE

A. Administrative Inadequacy

Congress and the state legislatures are charged with the responsibility of protecting citizens' interests in the public domain. To assist them in discharging this obligation they delegate to administrative agencies the authority to manage, allocate, and protect natural resources in a manner consistent with, and guided by, the public interest. Practical considerations may necessitate this delegation; but vesting con-

23. § 101(c) of the National Environmental Policy Act of 1969 states in full, The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.


[t]he Act has created an Environmental interest which citizen groups, functioning as private attorneys general, have standing to protect in the public interest. . . .

In sum, it does not seem farfetched to suggest that the National Environmental Policy Act could well become our Environmental Bill of Rights. Id. at 269.

24. The fertile allocation of governmental housekeeping responsibilities by the legislatures [see note 3 supra] has spawned a plethora of agencies whose accession to power is observed by Justice Douglas as follows:

As the problems of the nation and the states multiplied, the laws became more prolix and the discretion granted the administrators became greater and greater. . . . Management of national forests and national parks is left to federal agencies which in turn promulgate regulations governing the use of these properties but seldom allow a public voice to be heard against any plan of the agency.

W. DOUGLAS, supra note 4, at 78-79.

25. In some instances, decision to transfer subordinate legislative authority to
control over environmental quality in bodies which are not directly responsible to the electorate creates broad power which is not balanced by the safeguards of the political process. Electoral control over legislative policy has no counterpart in the administrative area.26

Furthermore, the influence of interest groups on governmental agencies—through political pressure27 and through the inherent interdependence of the public and private sectors28—undermines impartial balancing of competing factors in administrative decision-making. Hence, determinations are often the product of proceedings in which commercial interests monopolize agency attention; an administrative myopia results, obscuring the necessity and value of publicly visible action.29

The extent of citizen knowledge of, and participation in, administrative proceedings is often determined by the subject of the agency action. Thus, concern over popular and highly-publicized issues, such as the location of new highways, often leads to increased public participation. The need for public hearings and public input is thus not limited to specific issues, but is a general one. Hence, the need for meaningful public participation extends beyond the specific issues at hand.

Administrative agencies were influenced by the need of relieving Congress from details so that its essential policy-making work might go forward. In yet other cases, the choice of the administrative agency was essential to the effectuation of a preventive program necessitating constant supervision and inspection for which neither judicial nor legislative organization is adapted. W. GELLMAN, supra note 3, at 3.

26. Although administrators may be deemed indirectly responsible to the electorate—through the attenuated political check on those administrators appointed by elected officials—since administrative officials are not directly accountable, they are more vulnerable to disproportionate influence by minority and private interests than are legislators. Thus the administrative vehicle, created to implement laws and to do vicariously what the legislature was not equipped to do itself, may become its own driver, guided more by magnates of the marketplace than by its legislative mandate to serve the public interest.

27. See note 29 infra for a glimpse of the political tentacles of the highway lobby, a melange of, inter alia, contractors, engineers, gas producers, auto manufacturers, truckers and billboard firms.

28. See notes 46-48 infra and accompanying text.

29. Justice Douglas recounts an incident which reveals an interesting interplay between political and economic forces:

The Highway Lobby makes the Bureau of Public Roads almost king. In 1968, when Alan Boyd proposed hearing procedures before federally supported highways were either located or designed, public hearings on the proposed regulations were held. Every one of our fifty governors appeared or sent word opposing the regulations. Why? Because the national highway lobby and the state highway departments have such a close working partnership that nothing should be done to disrupt it. That means that they think that individuals should have no voice in planning. Yet the location of a highway may: (a) ruin a park...; (b) ruin the scenic values of a river; (c) needlessly divide a unitary suburban area into separate entities; [or] (d) ruin a trout stream (as some fifty highways have done in the Pacific Northwest)


Professor Joseph L. Sax underscores the necessity of judicial review of such agency actions as follows: The often inadequate review given proposals which would modify public trust land [as would a decision to locate a highway] serves to emphasize...
as preserving Walden Pond\textsuperscript{30} or saving San Francisco Bay,\textsuperscript{31} focuses public attention on agency action with respect to those specific problems. Public scrutiny encourages scrupulous administrative consideration of factors which militate against narrow industrial interests and for broadly-based public interests.\textsuperscript{32} Administrative proceedings conducted in the public arena and watched attentively by an aroused citizenry are therefore likely to include proper consideration of the potential impact of a given decision on the public as a whole. Conversely, the potential for influence by self-interested and powerful minorities at the stage of the administrative hearing—if one is held\textsuperscript{33}—increases when the subject is

the importance of judicial action on issues which, while critical, tend to be handled at low-visibility levels, though they may be endorsed by highly-placed officials. Sax, \textit{The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention}, 68 Mich. L. Rev. 471, 559 n.268 (1970).

\textit{[M]inimal procedural safeguards . . . are characteristically required of most governmental decision-making institutions of our society, but . . . are often currently denied to those who would represent a point of view to which a decision-maker is unreceptive or of which the decision-maker is unaware. Those safeguards—notice, access to information, and right of participation in the exploration of relevant issues—may typically be denied to all but those private and special interests whose opinions the decision-making body, usually an administrative agency, is accustomed to hearing. Thus, for example, a state agency entrusted with responsibility for planning forest use traditionally may entertain only the opinions of private lumber companies while denying participation to members of the public whose forest land the agency is administering. Since such agencies of decision-making ultimately derive their authority from the public and since their decisions affect the use of public resources, responsible and representative members of the public are entitled to no less voice in the decision-making process than are any more acutely affected private interests.}


32. \textit{See note 35 infra.}

33. Agencies, failing to recognize that people—to say nothing of plants and animals—may be intimately affected by their action, often unthinkingly sacrifice environmental considerations on the altar of the profit motive. A bleak picture painted by Justice Douglas portrays graphically the result of individual helplessness in the face of ecology-blind avarice:

\textit{I remember an alpine meadow in Wyoming where willows lined a clear, cold brook. Moose browsed the willow. Beaver came and made a dam which in time created a lovely pond which produced eastern brook trout up to five pounds. A cattle baron said that sagebrush was killing the grass. So the Forest Service sprayed the entire area. It killed the sagebrush and the willow too. The moose disappeared and so did the beaver. In time the dam washed out and the pond was drained. Ten years later some of the willow was still killed out; the beaver never returned; nor did the moose.}

\textit{Why should a thing of beauty that hundreds of people enjoy be destroyed to line the pockets of one cattle baron?}

\textit{W. DOUGLAS, supra note 4, at 83.}
of less apparent significance. Without a celebrated cause to galvanize public sentiment, and in the absence of strong political support, the general populace typically lacks the organization, financial backing and effective spokesmen necessary to influence administrative decisions. Private interests, however, are capable of launching intensive lobbying campaigns in support of desired official concessions which are of limited visibility to the public; thus the well-organized minority often ex-

34. It is not difficult to perceive the reason for the legislative and administrative actions which give rise to [cases in which the whole of the public interest has not been adequately considered], for public officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises. The concessions desired by those interests are often of limited visibility to the general public so that public sentiment is not aroused; but the importance of the grants to those who seek them may lead to extraordinarily vigorous and persistent efforts.

Sax, supra note 29, at 495.

35. Political clout is often necessary to awaken an agency to its responsibility, though such is seldom wielded by or on behalf of private citizens. The happy ending of the following story is unfortunately the exceptional rather than the usual outcome of agency-citizen confrontations.

In 1961-1962 the Forest Service made plans to build a road up the beautiful Minam River in Oregon—one of the few roadless valleys in the State. It is choice wilderness—delicate in structure, sparse in timber, and filled with game. We who knew the Minam pleaded against the road. The excuse was cutting timber—a poor excuse because of the thin stand. The real reason was road building on which the lumber company would make a million dollars. The road would be permanent, bring automobiles in by the thousands and making a shambles of the Minam.

We spoke to Senator Wayne Morse about the problem and he called over Orville Freeman, Secretary of Agriculture, the agency that supervises the Forest Service. Morse pounded the table and demanded a public hearing. One was reluctantly given. Dozens of people appeared on the designated day in La Grande, Oregon, not a blessed one speaking in favor of the plan. Public opposition was so great that the plan was suffocated.

W. DOUGLAS, supra note 4, at 84.

An odd result of the fear-of-citizen-participation syndrome—demonstrating the assiduousness with which some agencies perform only that which they must—is that if a hearing is held, its purpose may be defeated by allowing not the "public," but only a minority, whose bleatings are easily drowned out, to be heard:

Once in a blue moon a hearing is held. Early in 1969 the Forest Service's proposal to spray the Dry Fork in the Big Horn National Forest in Wyoming was put down for a hearing so that Norma Ketchum—but no other member of the public—could be heard. Why only that one lady? Senator Gale McGee at her request spoke to the Forest Service about the project. Because of his political pressure, this one lady was heard.

But spraying regularly takes place with no one being heard.

Id. at 82.

36. Those who are concerned about cleaning up tend to be citizens who are weekend warriors. They cannot compete with the persuasive pressure of the paid lobbyist. Environmental protection is their avocation, not their vocation. They cannot afford to send well paid representatives or very many, that is, to either Washington or... State capitals. However, in their own districts, they can collect evidence, obtain the aid of a sympathetic lawyer and go to court. This bill [S. 3575] will help correct an imbalance of advocacy.

exercises disproportionate influence on public resource decisions while obscuring broadly-based public interests.37

In fact, it often seems that agencies deliberately minimize public awareness of, and participation in, the decision-making process.38 One instance of such public exclusion was occasioned by the Santa Barbara oil spill fiasco: The Department of Interior, having responsibility for approving proposed offshore oil drilling,39 "preferred not to stir the natives up"40 and accordingly decided against holding public hearings there. Also responsible were the oil company's cries that the delay was costing it "millions of dollars."41 The problem is not confined to

Private interests deal with governmental instrumentalities not only through lobbying efforts but also through a network of commercial relations which operate further to preoccupy agencies with business interests. See note 48 infra and accompanying text.

The inequity of lobbying power is highlighted in the consumer area. "Consumer advocates both in and out of Congress maintain that industry representatives and special interest groups have too strong a voice in Washington in setting and enforcing policy."

Consumer Agency is Sought to Offset Industry Lobby, San Francisco Sunday Examiner & Chronicle, Sept. 13, 1970, § A, at 13. The House Government Operations Committee recently approved the Consumer Protection Act of 1970 which would establish a Consumer Protection Agency; the latter would be empowered to intervene on behalf of consumers in federal agency proceedings and certain lawsuits. Id.

37. It is often questionable whether particular governmental dispositions of public lands to business interests were accomplished within the ambit of authority vested in an administrative body by the legislature. When an historical use of public land is modified in such a way that its availability for public use is reduced, "there is a strong, if not demonstrable, implication that [such a modification] represent[s] a response to limited and self-interested proponents of public action." Sax, supra note 29, at 495.

A typical example involved allocation of San Francisco Bay tideland in 1968:

[T]he Alameda Conservation Association is challenging in court [Alameda Conserv. Ass'n, Inc. v. California, 2 BNA ENVIRONMENT REP.—CASES 1175 (Jan. 19, 1971)] the recent land 'swap' made by the State Lands Commission with Leslie Salt Company, involving some 2,000 acres of San Francisco Bay tideland. . . . Conservationists . . . have called the settlement a giveaway of public property.

CRY CALIFORNIA, Spring, 1968, at 39.

For a narrative of how the Maryland State Board of Public Works deeded to a private real estate developer about 176 acres of state-owned submerged land in the vicinity of Ocean City, a popular resort, for $100 per acre, which the developer then sold, after filling it, for about $5,000 to $7,000 per acre, see Sax, supra note 29, at 502-03.

38. There are a variety of . . . ways in which agencies minimize public participation in their deliberations. For example, the duty to hold a public hearing may technically be satisfied by holding a hearing which is 'announced' to the public by posting a notice on an obscure bulletin board in a post office. . . . Alternatively, a statutory hearing requirement may simply be ignored, and the argument later made that despite the omission no citizen has legal standing to challenge the agency's action.

Sax, supra note 29, at 497-98 n.76. See also note 35 supra.


the West Coast: a bizarre but possibly all too common drama, involving the Cross-Florida Barge Canal recently blocked by President Nixon, unfolded in Florida in 1966. According to one national magazine:

After stalling off any public hearings for seven years, the Corps of Engineers finally agreed to hold one in January 1966. Lt. Gov. Tom Adams, then Florida's secretary of state, was chairman; he and other officials argued with the canal's opponents and joked and wisecracked during conservationist presentations. What they didn't know was that the meeting was being filmed—and the film, later shown around the state as a classic example of government indifference to public outcry, whipped up a storm strong enough to sustain the battle.

Administrative aversion to citizen participation stems in a large part from the symbiotic relationship enjoyed by agencies and industry. This interdependence is rooted both in the fact that the United States government is America's largest consumer and in the reliance of the government on private services. Admittedly, a degree of affiliation is necessary to the execution of governmental responsibilities and to the country's economic welfare; but when interdependence becomes tantamount to complicity between government and industry, causing government to serve industry first and the public second, the affiliation

43. Id. at col. 3. For a discussion of the political ties of the "nation's most conspicuous consumer of political pork," see The Pork Barrel Brigade: Big Boon or Boondoggle?, San Francisco Sunday Examiner & Chronicle, Nov. 8, 1970, This World, at 23.
44. W. GELLHORN, supra note 3, at 12.
45. See note 48 infra.

Not only is there close communication and contact among [businessmen and FTC members], but there is actual interchange of jobs. Indeed, many of the young attorneys in the Commission staff view their experience as training for later corporate work. Their acquaintances among the staff and Commission serve them well in this capacity and multiply their contacts and communications with business interests.

Recently two other agencies saw their top political officials leave to take high positions in the industries they previously regulated. This is a common phenomenon in Washington . . . .

Id. at 122.
47. U.S. Congressman Morris K. Udall, speaking for himself and 66 additional sponsors of the 1971 House bill on citizen's environmental suits, expressed concern at the unexplained governmental failure to arrest the environmentally irresponsible activity of a leading industry:

It is hard to say why the Justice Department is reluctant to use the leverage it has [under the 1899 Rivers and Harbors Act] in halting water pollution. Perhaps in some cases fact finding is proving more difficult than originally expected.

What is more likely . . . is that politics is once again entering into administrative agency decisionmaking concerning the environment. Among those who continue to pollute with impunity is the Minnesota Mining & Man-
erodes the foundation of participatory democracy.\textsuperscript{48}

If able to meet standing requirements, the citizen may bring judicial scrutiny to bear on administrative actions to insure that they are

\footnotesize{manufacturing Co.—commonly known as 3M. Congressman Reuss has revealed that one of 3M's Wisconsin plants has been pouring acid wastes into a Mississippi River tributary that are strong enough to corrode manhole covers. The Justice Department has given no indication why it is reluctant to bring suit against 3M. It may be just a coincidence, but the record shows that top management of the company contributed $50,000 to the Republican Party in 1968. 117 Cong. Rec. H 893-94 (daily ed. Feb. 25, 1971). 48. Although a purpose of government contracts is to regulate private industry by setting terms on which the government is willing to do business, [g]overnmental reliance on private contractors creates a condition of public dependency as well as a public pressure. Something of this kind must have been in President Eisenhower's mind when, in his farewell message on January 17, 1961, he warned: 'In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. . . .'

And as Professor Miller has remarked . . . "By placing the influence over, and sometimes even control of, important decisions one step further away from the public and their elected representatives, the [contractual] system further exacerbates the problem of discretion."

W. Gellhorn, supra note 3, at 13 (footnotes omitted).

Justice Douglas shares this sentiment but adds a twist: Agencies also function as the prep schools of industry.
[\textsuperscript{T}]he voices of the mass of people are not heard; and the administrative agencies largely have their own way.

Moreover, the Establishment controls those agencies. That control does not come from corrupt practices or from venality. It results from close alliances made out of working relations, from memberships in the same or similar clubs, from the warp and woof of social relations, and from the prospects offered the administrator for work in the ranks of the Establishment, if he is the right and proper man. The administrative office is indeed the staging ground where men are trained and culled and finally chosen to the high salaried posts in the Establishment that carry many desirable fringe benefits. The New Dealers mostly ended up there. Under Lyndon Johnson there was lively competition for administrative men who would in two years have made a million working for the Establishment. That is a powerful influence among many agencies; and it results in those who have agency discretion exercising it for the benefit of those who run the corporation state . . .

Anyone who opposes one of those federal agencies whose decision may destroy a lake or river or mountain knows something about the feeling of futility that is abroad in the land.
W. Douglas, supra note 4, at 80-81. In sum, "the agencies chronically seem more concerned with serving the industries they are supposed to regulate than with protecting the public." Regulating the Regulators, Newsweek, Aug. 24, 1970, at 45.

Although examples of the nexus between industry and administrative bodies are legion, two agencies strikingly exhibit industry control of the governmental function. One is the Atomic Energy Commission:
Pursuant to the statutory direction 'to produce or to provide for the production of fissionable material in its own facilities,' the [Atomic Energy] Commission entered into management contracts with several large industrial concerns to operate government-owned plants for the production of fissionable material. 'More than 90 percent of the Commission's budget goes to contractors;' the result is that 'a small but powerful segment of American Industry is today the
within the scope of legislative and popular mandates, and may thereby encourage such action to proceed from consideration of public, rather than industrial interests. In his extensive study of the development of public trust law, Professor Joseph Sax carefully demonstrates how certain enlightened state courts such as those in Massachusetts and Wisconsin have fashioned judicial devices for insuring responsible exercise of the power to modify historical uses of public trust property. These

manager of the great bulk of the atomic energy program.' On June 30, 1968, the AEC itself had only 7,700 employees, while 122,000 contractor employees did 'most of the work involved in achieving the AEC goals.' W. Gellhorn, supra note 3, at 13 (footnotes omitted).

Furthermore, "the AEC, under its charter, finds itself charged with promoting precisely the same industrial operations it is also charged with regulating." The Controversial Atomic Energy Commission, Newsweek, Jan. 4, 1971, at 37. See also Atomic Doubletalk, A Review of Matters Withheld from the Public by the Atomic Energy Commission, The Center Magazine, Jan./Feb., 1971, at 29.

The second is the Department of Defense:

The Pentagon is ready to start constructing the ABM system and is helping scientists prepare their articles praising it. The electronics industry is firmly entrenched in the Pentagon and that industry will reap huge profits from ABM which started as a five billion dollar item, quickly jumped to ten billion and 200 billion and even 400 billion. . . . The voices and pressures of the military-industrial complex seem always to suffocate the pleas of the poor as well as the pleas of those who want to be done with wars and create a cooperative world pattern for the solution of international problems.

W. Douglas, supra note 4, at 64-65.

The Atomic Energy Commission and the Department of Defense are complex and immensely powerful entities but are afflicted with a tunnel vision which limits their perspectives to those of the industries which provide their logistical support. The pervading influence of those industries engenders an administrative monomania symptomatic of a malaise which grips many bureaucracies. This infirmity bodes the demise of majority rule through citizen participation since self-perpetuating singlemindedness allows little room for response to the popular mandate.

One might inquire whether the citizen suit is not a rather circuitous route by which to insure administrative responsibility, since administrative public hearings themselves ideally afford ample opportunity for citizen participation and watchdogging. In response to this query, three points should be made: (1) Such hearings are not always held [see note 38 supra]. (2) In a suit maintainable under the legislation considered by this Comment [see note 10 supra, and part III, A infra], the plaintiff would represent the public interest in the subject matter of the litigation, thus obviating the necessity—as in administrative hearings—for participation by all interested or affected parties. Furthermore, a class of individuals similarly situated would be allowed to bring such an action [see section 3(a) of the U.S. Senate Bill in the Appendix] if they deemed it advisable to do so. (3) Even if an individual's suit does not engender sufficient publicity to catch the public eye [see text accompanying notes 30-32 supra], the decision will at least be made by an impartial forum which is theoretically insulated from courtship by special interest groups.

These courts have developed a healthy skepticism for the ability of administrative bodies to deal objectively with resource allocation matters, since agencies are frequently mesmerized by the overtures of private industry.

The very fact that sensitive courts perceive a need to reorient administrative conduct . . . suggests how insulated such agencies may be from the relevant constituencies. A highway agency, for example, which has a professional bureaucracy, which performs its function within a large geographic area rather than within a particular community, and which is rarely the sub-
courts, recognizing the potential for abuse of authority delegated to administrative agencies, have not hesitated to brush aside the camouflage of administrative discretion when circumstances reveal a strong likelihood of undue influence by private interests.\(^5\)

Although these state courts have reduced administrative arbitrariness and insensitivity to public needs, the basic problem remains: The court system, which provides the only governmental avenue for citizen review of administrative action, is inaccessible in the vast majority of cases to the private citizen.\(^5\) Unless the Attorney General, a governmental commission or an individual with standing to intervene or review the particular action happens to bring the matter to the court's attention, agency action will remain insulated from citizen participation and criticism.\(^5\) The result is a lack of adverseness in the administrative decision-making process, due to vigorous efforts by private interests to gain desired concessions.\(^5\) This situation could be effectively remedied by granting standing to individual citizens to challenge agency action and further to complement administrative enforcement efforts which fall short of supplying full environmental protection. The present law of standing, confused and outdated,\(^5\) does not meet the needs of the public to vindicate its interests by challenging administrative actions.\(^5\)

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51. See note 9 supra.
52. While it will seldom be true that a particular governmental act can be termed corrupt, it will often be the case that the whole of the public interest has not been adequately considered by the legislative or administrative officials whose conduct has been brought into question. In those cases, which are at the center of concern with the public trust, there is a strong, if not demonstrable implication that the acts in question represent a response to limited and self-interested proponents of the public action. It is not difficult to perceive the reason for the legislative and administrative actions which give rise to such cases, for public officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises.
53. SAX, supra note 29, at 495.
54. This need was recognized as early as 1943 by Judge Jerome Frank in Associated Industries, Inc. v. Ickes where he enunciated the "private Attorney Generals" concept. 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943). For his language, see text accompanying note 234 infra.
55. Chief Justice Burger, while a Circuit Judge, also recognized this possibility. He stated in a recent case that the aid and participation of legitimate representatives fulfilling the role of private attorneys general is necessary when it becomes apparent that governmental commissions can no longer effectively represent the public interest.
Moreover, broadening standing to allow the private citizen to complement agency action is necessary because administrative bodies cannot carry the entire burden of restoring and maintaining the public domain. Due to inadequate financial and manpower resources, agencies created specifically to promote environmental quality simply cannot police every industrial polluter.

To further evaluate the ramifications of statutes authorizing standing and the efficacy of proposed legislation, an appraisal of the present law is necessary.


Arming the private citizen with this right does not transform each citizen into an "agency policeman;" rather, it is intended to provide support to agencies under pressure from interested parties and to prompt agency action on neglected problems.

Far from risking an undue or inhibiting interference with Government enforcement, [S. 3575] will provide powerful supplementary enforcement, a major way of illuminating the full range of the law's reach which is established so slowly by Government litigation, and an effective and desirable prod to officials to do their duty.

1970 Hearings, supra note 9, at 23 (statement of Ramsey Clark).

The citizen acting in concert with administrative bodies will also free the latter to act where they are presently too overburdened to do so.

57. Former Secretary of the Interior Stewart Udall summarizes forces which foul administrative machinery, and thus diminish bureaucratic efficiency, as follows:

As Secretary of the Interior, I had major responsibility for the protection of the nation's lands and waters. . . . Neither the Department of the Interior, nor any other administrative agency can do the job alone. I would like to tell you why, based on my experience.

First of all, there are just too many things to watch. . . . S. 3575 will provide a system in which citizens can call their neighbors to account for their environmental misdeeds without the need to petition a bureaucracy. God help us if every accident claim in the country had to await the turning of the machinery in Washington. . . .

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

Third, every agency develops a program, . . . and a point of view. [B]lind spots also develop. The administrator may conclude that one type of pollution is the important thing and . . . [leave] other problems to another day. . . . In addition, the administrator often hears about problems over and over again, and he becomes jaded. A problem may be so pervasive that he does not get upset with each new example and begins to lose any sense of urgency. When an aroused citizen or conservation group goes to a judge, he will not face the bureaucrat who has heard it all before.

Fourth . . . is politics. When an agency takes vigorous action against pollution, there is likely to be a vigorous counterattack by large economic interests. Things slow down, drag out, and, in many cases, become interminable. The citizens' remedies included in this bill will actually permit the administrative agency to resist these pressures.
B. Present Status of the Law

1. Common Law Standing

The distinction between public and private causes of action is central to the issue of private citizen standing to sue. Generally, a private suit is the assertion of "a distinctive or discriminating impact which specially entitles [a litigant] to challenge an allegedly illegal . . . action." The plaintiff has standing if he is advancing a personal, legally protected interest, and if the injury is peculiar, not equally shared by the other members of the community. Thus, in an environmental context a private citizen will probably have no trouble establishing that he has standing to sue where he is able to show that pollution will cause actual or threatened economic loss to himself, or damage to his health.

On the other hand, the right to bring an action primarily to vindicate the public interest in the enforcement of public obligations, where no distinctive, individual injury has been suffered, is vested in the community. Generally, to avoid multiplicity of suits, the courts have made the community interest enforceable only by a representative, usually a public official such as the attorney general or district attorney.

Thus, for example, if a private citizen tries to sue to abate industrial pollution on the grounds that it is a public nuisance, his case will be dismissed for lack of standing since the contamination is equally harmful to everyone in the community, and therefore only the appro-

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

1970 Hearings, supra note 9, at 21.


60. See W. PROSSER, supra note 58, at 611-23; Juergensmeyer, supra note 17; Porter, The Role of Private Nuisance Law in the Control of Air Pollution, 10 ARIZ. L. REV. 110 (1968); PROSSER, Private Action for Public Nuisance, 52 VA. L. REV. 997, 1023-27 (1966); Note, Air Pollution as a Private Nuisance, 24 WASH. & LEE L. REV. 314 (1967).

61. See Jaffe, Public Actions, supra note 58; Jaffe, Private Actions, supra note 58.

62. See also W. PROSSER, supra note 58, at 605-11; Jaffe, Public Actions, supra note 58, at 1267.

63. W. PROSSER, supra note 58, at 608.


65. However, in some instances the court will recognize plaintiff's standing where the nuisance is a private one as well as a public one. Where the plaintiff suffers personal injury, or harm to his chattels, there is no difficulty in finding a different kind of damage. The same is true where
priate public official has the right to sue. Although the community representative may occasionally be judicially ordered to enforce that right by a private citizen's mandamus action,66 the opportunities to obtain the writ are narrowly limited since acts within the generally broad area of the official's discretion67 are not subject to challenge.68 As a result, a large quantity of industrial pollution is safe from private citizen scrutiny since a citizen can rarely show a distinctive or special injury.69

there is any substantial interference with the plaintiff's use and enjoyment of his own land, as where a bawdy house, which disturbs the public morals, also makes life disagreeable in the house next door. This makes the nuisance a private as well as a public one; and since the plaintiff does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree, there is general agreement that he may proceed upon either theory, or upon both. . . .

W. PROSSER, supra note 58, at 609-10 (footnotes omitted). "[W]hen [the] infringement causes him substantial harm, there is no very good reason for denying him relief." Id. at 609.

No clear line can really be drawn between the private and public action. However, much of the private citizen environmental litigation of this common law variety is primarily of the public action type—a private citizen asserting that he and others of the community have been injured by defendant's action and deserve redress. See Jaffe, Standing to Sue in Conservation Suits, in LAW AND THE ENVIRONMENT 123 (M. Baldwin & J. Page Jr., eds. 1970); J. BRECHER & M. NESTLE, ENVIRONMENTAL LAW HANDBOOK 102 (CEB 1970).


68. The United States Code provides that the federal district courts shall have jurisdiction in a mandamus action to compel an officer or employee of the United States or an agency thereof to perform his duties. 28 U.S.C. § 1361 (1964). A court can only issue a mandamus to compel government officials to perform their duties and cannot directly influence the official or agency in the decision-making process. 1962 U.S. CODE CONG. & AD. NEWS 2785. That is, the court can only compel the official or agency to act where there is an obligation to act. Where the official or agency has failed to make any decision, the court can order that a decision be made, but can have no control over the substance of the decision. Id. at 2787. For example, under the National Air Pollution Control Act, hearings are required in certain instances. 42 U.S.C. § 1857c(a) (Supp. V, 1970). If an officer refused to hold a hearing, the court could compel him to hold the hearing, but could not tell the official what to decide at the hearing. 1962 U.S. CODE CONG. & ADMIN. NEWS 2787. See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 HARV. L. REV. 308 (1967). But see 3 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.11 (1958); L. JAFFE, supra note 15, at 181. See also text of Part I, B, 2 infra. For a discussion of state mandamus, see generally W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS (CEB 1966).

69. With reference to the problem of air pollution, it has been said that America's population would suffocate before air pollution could be alleviated by private citizen control. See Juergensmeyer, supra note 17, at 1155. See text accompanying note 62 supra. See generally Hearings on H. B. 3055 Before the Comm. on Conservation and Recreation of the Michigan House of Representatives (1970), on file with Ecology
Thus, the common law provisions for private citizen response to environmental problems are limited by technical legal requirements and hobbled by the complex nature of environmental problems which are not easily characterized as causing personal injury. With this conceptual inability of the common law to deal with twentieth century environmental problems, the private citizen must ordinarily look to a statutory provision of standing, and where it does not exist, he is left without a remedy.

2. Present Statutory Standing to Challenge Administrative Determinations

Due to the expansion of both state and federal authority to preserve and protect the environment, and to increasing governmental activity threatening it, private litigation has focused on the action or inaction of the responsible administrative agencies. The distinction between public and private actions does not disappear when the cause of action is based on a statute or administrative regulation, but it becomes more difficult to discern. In an action against an administrative agency, the plaintiff asserts a private interest, a private interest which is also public, or just a public interest.70 The right to challenge an allegedly illegal administrative action usually entails a requirement that plaintiff be “aggrieved” or “affected”71 before he can bring suit. Thus, when a plaintiff’s injury is the type of harm the statute or regulation was designed to prevent, the plaintiff has standing.72

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Some states, however, allow citizens to sue in the public interest in certain kinds of public nuisances. For example, “Michigan has long permitted citizens to sue in the name of the State of Michigan on behalf of the public to enjoin certain kinds of public nuisances like houses of prostitution and gambling dens.” Id. at 5.

Professor Sax of the University of Michigan Law School claims that at least a dozen other states have statutes like Michigan’s. Id. Two such examples are Wisconsin [Wis. Stat. Ann. § 280.02 (1958)] and Florida [Fla. Stat. Ann. § 60.05 (1969)]. The recent draft of the Restatement of Torts (Second) indicates that there may be a trend developing toward enlargement of the Wisconsin and Florida exception. See Restatement of Torts (Second), § 821C(2)(c) (Tent. Draft No. 17, 1971) which states:

(2) In order to maintain a proceeding to enjoin or abate a public nuisance, one must

(c) Have standing to sue as a representative of the general public, or as a citizen in a citizen’s action, or as a member of a class in a class action.

This may afford a significant opportunity for development in the area of environmental protection.

70. See Jaffe, Public Actions, supra note 58; Jaffe, Private Actions, supra note 58.
72. See text accompanying notes 84-157 infra.
There are several types of statutory provisions concerning standing of private citizens to sue an administrative agency. First, Congress may provide for review of agency conduct in specific instances. Generally, such provisions simplify the standing issue since review is specifically limited to certain individuals or groups. Second, the agency's enabling act may contain a general review provision. It is more difficult for the private citizen to obtain standing under this type of provision than where standing is specifically granted. Statutes in this category allow challenges by "parties aggrieved" or "affected", or "parties in interest." Third, some statutes make no allowance for private citizen standing. These statutes take one of two forms: an expressed exclusion; or a selective or incomplete review provision. In all but a few instances, the expressed exclusion will prevail. But, in the

73. An example of such a provision is the National Labor Relations Act [29 U.S.C. §§ 151-58 (1964)] which allows any union or employer affected by labor board orders to petition for review of board decisions. Id. § 160. For a good short discussion of federal statutory review provisions, see Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 901-11 (1957). See also 2 F. Cooper, State Administrative Law 603-04 (1965) for a discussion of state approaches.


77. See note 73 supra. See also Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 305-06 (1943); AFL v. NLRB, 308 U.S. 401, 404 (1940).

78. A statutory review provision would be incomplete when no mention, either of exclusion or inclusion, is made.

79. See L. Jaffe, supra note 15, at 353-54. Exceptions also occur when a court may entertain a claim that a statutory procedural right has been denied. E.g., Robertson v. Chambers, 341 U.S. 37 (1951); Hornsby v. Dobard, 291 F.2d 483 (5th Cir. 1961), on remand, 232 F. Supp. 25 (E.D. La. 1964); Ellerd v. Southern Pac. R.R., 241 F.2d 541 (7th Cir. 1957).

A provision merely making the action of an officer final is often held not to exclude review. It is sometimes said that such a provision emphasizes its administrative finality. This interpretation can be expected when important personal interests are at stake such as those of an alien about to be excluded or deported.


However, a contrary view has been taken in actions of school authorities, where
case of the selective or incomplete provision, the plaintiff may resort to the Administrative Procedure Act which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'

Unless a statute clearly excludes or supersedes the APA, the expanded mode of review provided therein cannot be modified.

While specific provisions for standing have proved workable, private citizens and groups have found great difficulty in obtaining standing under general enabling statutes and the APA. Although some courts have progressively broadened the concept of standing under these statutes, generally conservative construction, conflicting opinions, and confusing precedent have, in effect, deprived the private—especially the individual—litigant of any meaningful remedy.

a. The trend toward public interest standing under general provisions

Although the traditional law of standing under general provisions


80. The Administrative Procedure Act provides that the provisions of the Act authorizing judicial review apply “except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a) (Supp. V, 1970) (emphasis supplied). See also Switchmen’s Union v. Mediation Bd., 320 U.S. 297 (1943) in which preclusion of judicial review was inferred from the purpose of the statute involved.


Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. In Abbott Laboratories v. Gardiner, 387 U.S. 136, 140, we held that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. . . . It is, however, only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent that the courts should restrict access to judicial review. [Id. at 141.] The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. See the Chicago Junction Case, 264 U.S. 258 [1924]; Hardin v. Kentucky Utilities, [390 U.S. 1 (1968)].


82. Abbott Laboratories v. Gardiner, 387 U.S. 136, 140 (1967). Prior to the enactment of the APA, it was generally assumed that lack of a specific provision for review indicated a Congressional intent to foreclose challenge. See Brownell v. Tom We Shung, 352 U.S. 180 (1956). See also H.R. Rep. 1203, 79th Cong., 2d Sess., 229-30 (1946); K. C. Davis, Administrative Law Text 421 (1959). Since then, however, the Supreme Court has recognized a general presumption that agency actions are reviewable. See text accompanying notes 174-200 infra. See also Brownell v. Tom We Shung, 352 U.S. 180 (1956); Marcello v. Bonds, 349 U.S. 302, 310 (1955).

83. 5 U.S.C. § 701(a) (Supp. V, 1970); see note 80 supra.
has given way to more liberal notions, the modern approach is still too confining to give an individual citizen or organization a significant role in the environmental field. Because courts have neglected to draw clear distinctions or criteria, the grounds for granting individual citizen standing to sue shades imperceptively into organizational standing. Often in cases involving group efforts to obtain standing, the court's language may also be applied to individuals.

Before 1940, general provisions usually authorized standing to those who could demonstrate harm to a "legal right" or "legal interest." No private citizen, citizen group, or organization had standing unless

84. See Davis, supra note 17.
85. For example, in Associated Industries, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943), the court said:

[T]here is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person . . . to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest.

(emphasis added). But in National Coal Ass'n v. FPC, 191 F.2d 462, 465 (D.C. Cir. 1951), the court cut back on Associated Industries' language:

The 'person aggrieved' review provision is a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest. . . .

(emphasis added). For additional discussion of these cases, see generally notes 100-05 infra and accompanying text.

86. See note 126 infra.
87. Tennessee Power Co. v. TVA, 306 U.S. 118 (1939). Earlier cases denying standing were the companion cases of Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447 (1923) in which the Court said that the Commonwealth could not sue because its own rights were not involved, [id. at 484-85] and that the individual taxpayer could not sue because the interests of the taxpayer are so "comparatively minute and indeterminable" and that the taxpayer's contentions, even if proved, would have too "remote, fluctuating and uncertain" an effect on payments out of the Treasury. Id. at 487. Thus the initial criterion for establishing standing to sue was a showing that a legal right of the plaintiff was violated. The plaintiffs "must show . . . that the order alleged to be void subjects them to legal injury, actual or threatened." Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 148 (1923).

The Chicago Junction Case, 264 U.S. 258 (1924), a decision written by Justice Brandeis clarifying the criterion for standing, upheld standing for six competitors to challenge the validity of an Interstate Commerce Commission decision allowing the New York Central Railroad to acquire an independent terminal railroad in Chicago. The decision was attacked on the ground that there was no evidence to support a finding that the acquisition would be in the public interest as required by the statute. Id. at 266. The Court distinguished its prior decision by stating that:

This loss is not the incident of more effective competition. Compare Edward Hines Trustees v. United States . . . . It is injury inflicted by denying to the plaintiffs equality of treatment. . . . By reason of (the Interstate Commerce Act), the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

Id. at 267.
the right invaded [was] a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.\textsuperscript{88}

The scope of federal standing expanded, however, largely because judicial interpretation of the “aggrieved party” provisions of many federal agencies’ enabling legislation\textsuperscript{89} expanded to occasionally encompass assertions of the public interest by plaintiffs and organizations challenging administrative actions.\textsuperscript{90}

In \textit{FCC v. Sanders Bros.},\textsuperscript{91} the plaintiff, a radio station owner, sought to set aside an FCC order granting a license to another radio station in plaintiff’s broadcast area on the ground that the grant would not serve the “public interest, convenience, and necessity.”\textsuperscript{92} The Supreme Court granted standing even though under the Communications Act\textsuperscript{93} plaintiff could not demonstrate infringement of a legally protected right. The Court considered that the plaintiff was “a person aggrieved or . . . adversely affected . . .”\textsuperscript{94} because, since he was “likely to be financially injured, [he would have] sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.”\textsuperscript{95} Thus, although the Court did not explicitly allow the plaintiff standing as a representative of the public interest, it did allow plaintiff standing to make the assertion that to grant the license would not serve “the public interest . . . ,” despite the fact that no personal legal interest of such person under the statute had been or would be invaded.

Jaffe explains how this provides a proper transition to the beginning trend to grant public interest standing:

Standing . . . [was] made to rest on a determination that an interest intended by statute to be protected has been denied that protection . . . It . . . mean[t] that the agency was required by the statute to have regard to competition as one factor in its decision . . . .

L. JAFFE, \textit{supra} note 15, at 507.

91. \textit{Id.}
92. \textit{Id.} at 472.
94. 309 U.S. at 476.
95. \textit{Id.} at 477.
After Sanders, in Scripps-Howard Radio, Inc. v. FCC, under the same statute and a similar set of facts, the Court explicitly promulgated a standard which would provide redress for legitimate grievances in cases in which the plaintiff sought to protect the public rather than a specific private interest. Accordingly, the Supreme Court held that a competitor who would probably suffer economic injury if the FCC granted a rival license, was a person aggrieved under the statute and had “standing only as [a representative] of the public interest.”

Lower courts have drawn upon the rationale developed in this line of cases to expand standing to the point where a private citizen, within the narrow limits expressed by the policy of the statute involved, could represent the public interest. Judge Frank, in Associated Industries v. Ickes, in which consumers of coal asserted that they were aggrieved under the statute by an agency's price-fixing order, articulated the doctrine of “private Attorney Generals.” This concept allows “any non-official person, or . . . a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . .” Later, Judge Ba-
zelon clarified the limits of this development in *National Coal Association v. FPC*:104

We agree . . . "[that] one threatened with financial loss through increased competition resulting from a Commission's order is 'aggrieved.' . . . [The] 'person aggrieved' review provision [is] a constitutionally valid statute authorizing a class of "persons aggrieved" to bring suit . . . to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded."105

Most recently Appellate Judge Burger106 in *Office of Communications of the United Church of Christ v. FCC*107 signaled what is arguably the final conceptual erosion of the direct and personal injury requirement. In that case, where a Mississippi television station was allegedly guilty of practices inconsistent with the public interest, viewers were allowed to intervene in a license renewal proceeding in order to enforce policies embodied in the Communications Act of 1934.108 The court, in granting the protestors standing eliminated the requirement that reliance be placed on specific review provisions or on the public nature of the enabling statute.109 Setting the traditional approach to the standing issue aside, Judge Burger said:

When it becomes clear . . . that [the traditional approach] is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the [Federal Communications] Commission . . . can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.110

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104. 191 F.2d 462 (D.C. Cir. 1951).
105. Id. at 464-65, quoting Associated Industries Inc. v. Ickes, 134 F.2d 694, 705 (2d Cir.), vacated as moot, 320 U.S. 707 (1943).
106. At the time of this opinion Judge Burger was an Appellate Judge for the District of Columbia Circuit Court. In addition to *Church of Christ*, Judge Burger wrote two other opinions worth noting for their inconsistency in respect to the standing issue: Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); and National Ass'n of Securities Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969). Professor Davis has commented that the Judge's decision in the latter case did not measure up to his two former decisions. Davis, supra note 17, at 461 n.51.
108. 47 U.S.C. §§ 151-609 (1964). The relevant policies are that television be in the public interest [Id. § 309(a)] and that conflicting views be heard on important issues [Id. § 315(a)].
109. See 359 F.2d at 1003.
110. Id. at 1003-04.
Shifting from the prior approach of assessing plaintiff's standing solely or specifically in terms of the rights of particular plaintiffs, *Church of Christ* emphasizes the value to the public in having effective representation: 111 "The court is thus adopting the concept . . . of 'public action . . .' " 112 and the idea that "particular plaintiffs may be refused participation as non-representative or redundant." 113 Extrapolating from this case, it is arguable that in the future courts will require only "that there [be] a legitimate controversy of general public interest and that the plaintiffs are responsible parties, able effectively to present the case." 114 Such controversies exist when there can be found general implications that particular legislation is closely related to the public interest. 115

These cases demonstrate the strength of the *trend* toward public interest standing for private citizens; but the fact that some courts still revert to the traditional approach 116 diminishes, to some extent, the significance of this development. A private citizen affected by pollution or anti-conservationist policies frequently finds himself barred from

112. *Id.*
113. *Id.* (emphasis added). The language used in this case leaves ample room for expanding the concept of the public interest. For example, *Church of Christ* reasons from a line of consumer suits ([Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953); Associated Industries, Inc. v. Ickes, 134 F.2d 694 (2d Cir.), vacated as moot, 320 U.S. 707 (1943); United States v. Public Utilities Comm’n, 151 F.2d 609 (1945)] that "[t]here is nothing unusual or novel in granting the consuming public standing to challenge administrative actions." 359 F.2d at 1002.

This line of cases suggests two possible extensions of the analogy. One, the class of consumers can be very broad, arguably the entire human population, whose interests might encompass practically every process in the society. Jaffe, *Public Actions, supra* note 58, at 1314. Second, and more narrowly conceived, is the idea that everyone is a consumer of air, water, etc. In a particular area subjected to particular pollution, anyone residing in that area is affected by the pollution, and thus could arguably be qualified to assert a public action on behalf of the public interest. For a case suggesting this interpretation, see the District Court opinion in *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970).

115. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) which says:

When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest. These are the people who will really have the incentive to bring suit against illegal government action, and they are precisely the plaintiffs to insure a genuine adversary case or controversy.

*See also* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Powelton Civic Home Owners Ass’n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968).

challenging the administrative action even if a provision for citizen
challenge exists in the statue, because it may permit suit by a narrow
category of "aggrieved persons" only.\footnote{117} Since the private citizen af-
fected by pollution often finds himself outside that sometimes narrow de-
finiteion of "aggrieved persons," he will find it necessary to make attenu-
ated arguments in order to be included within the statute's standing
provision, since the statute may bear but peripherally on his issue.\footnote{118} Such obstacles and judicial inconsistency neither encourage citizen ac-
tion, nor guarantee adequate protection of the environment. More-
over, the private litigant may find a particular environmental problem
completely outside the structure of the statutory response,\footnote{119} leaving
him without remedy, as he has virtually no cause of action at common
law.

\paragraph{b. Standing of environmentalists to assert the public interest}

Although the court in Church of Christ found little difficulty in
accepting the listeners' group as representative of the public interest,
in many instances, environmental plaintiffs who assert non-economic
interests have encountered difficulty in satisfying standing require-
ments.\footnote{120} In this regard, courts have more readily accorded standing
to organizations, as distinguished from individuals, because they see
organizations as inherently representative of a collective interest, which
potentially encompasses a broader interest than that personified by an
individual. A further reason for the apparent preference for the or-
ganization as a plaintiff is the organization's typical financial and ideo-
logical commitment\footnote{121} to the subject matter of the litigation. But even
the question of whether citizens' organizations have standing in their
own right is not clearly settled.\footnote{122} A survey of lower court opinions

\footnote{117} Most agency statutes provide for challenge in this manner. See note 71
and accompanying text supra.

\footnote{118} E.g., Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d

\footnote{119} E.g., "the problems of noise, of odor, of airport and road construction, of
pesticide use, and a dozen others at least, leave the citizen essentially without redress
beyond the opportunity to plead with some public agency." \textit{Hearings on H.B.
3055 Before the Comm. on Conservation and Recreation of the Michigan House of
Representatives} (1970), on file with \textit{Ecology Law Quarterly}.

\footnote{120} Although an individual private citizen has received some help from cases sug-
jecting he be allowed to sue in behalf of the public interest; organizations, perhaps
because of the collective interest they share more demonstrably with the public, have
found it easier to establish their standing to sue. See also notes 125 & 126 infra.

\footnote{121} \textit{Committee for the Hudson Valley} [302 F. Supp. 1083 (S.D.N.Y. 1969),
\textit{aff'd}, 425 F.2d 97 (2d Cir. 1970)] and \textit{Church of Christ} expressly so held.

\footnote{122} One reading of \textit{Scenic Hudson} is that it gave standing to a conference
(association) of conservation organizations; but that holding is undermined
because the court found that one of the member organizations suffered eco-
indicates a trend toward granting groups standing to sue, but the rule is still not uniform.

On the other hand, the history of cases has shown that little sympathy is felt for the individual private citizen endeavoring to challenge administrative action as a representative of the public interest. Some cases have come close to deciding that individual citizens do have standing, but in general it does not appear that the courts feel a single citizen is capable of representing the public interest.

nomic injury and because it sloughed over the fact that the conference itself had not been injured. The Supreme Court in Data Processing Service had an opportunity to settle the issue. Of the two plaintiffs, one was an association. The Court, however, never discussed the problem, except to hold that the petitioners had standing.

Hanks & Hanks, supra note 23, at 243.
125. Both on their facts and their rationale [Scenic Hudson and Church of Christ], neither suggests that the individual citizen, absent a threat to his personal interests, either as defined by common law or by statute, has standing to assert that agency action endangers broad social interests. Both would seem to confer such standing only upon responsible and representative groups. This may be a difficult line to draw.


126. Of the four plaintiffs in the Church of Christ case, only two were organizational; the other two were individuals. The court did not discuss which of the four must be given standing, but it did emphasize the representative nature of organizations.

The responsible and representative groups . . . cannot . . . be enumerated . . . specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful. . . . These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests.

359 F.2d at 1005.

In Parker v. United States, the plaintiffs included an individual wilderness guide as well as several organizations. The court held that these statutes confer on groups and individuals such as the plaintiffs the status of 'aggrieved persons' . . . .” Civil No. C-1368 (D. Colo., filed Dec. 24, 1969) (memorandum and order) (emphasis added), on file with Ecology Law Quarterly; subsequently decided on the merits, 309 F. Supp. 593 (D. Colo. 1970). For further discussion on this case, see note 153 infra.

Even the now ancient (in terms of the significant developments of the last few years) Associated Industries, Inc. v. Ickes, 134 F.2d 694 (2d Cir.), vacated as moot, 320 U.S. 707 (1943), suggests that an individual can represent the public interest: Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then . . . there is an actual controversy. . . . [They] are so to speak, private Attorney Generals. Id. at 704 (emphasis added).

Although the citizen group approach is favored by the courts, an individual who would convince the court he is representing the public interest should not be prohibited from suing. And the possibility that an individual could make such an allegation is not far-fetched. See Comment, supra note 19 at 317-18.

127. The reluctance of courts in allowing individual citizens to sue in the public
The issues, discussed above in discerning the trend toward public interest standing, are applicable to the following discussion about environmentalists' standing to assert the public interest. However, confusion has resulted since the courts frequently have not separated the general issue of reviewability by a plaintiff asserting the public interest from the issue of whether the particular plaintiff involved is the proper party to bring the public interest action.

Scenic Hudson Preservation Conference v. FPC is the first of many "environmental" cases to break some of the barriers preventing interest seems to be related to the fear of agencies that they would be inundated with frivolous suits. But to reason that standing should be denied to all public interest plaintiffs in order to cut down on frivolous suits is like "amputating the arm to cure the hang-nail." An exercise of agency discretion to make rules which will limit public participation while assuring adequate representation of divergent views of those who wish to represent the public interest is a more acceptable approach. Since other methods are available to the judiciary and administrative agencies, disallowing an individual to sue is not necessary. See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005-06 (D.C. Cir. 1966).  

128. See part I, B, 2, a supra.  
129. This distinction is sometimes difficult to make because of the intimate intertwinement of the two issues. The frequent problem is that the courts seem to look at the plaintiff first—if he is the type of plaintiff it wants asserting the public interest, then public interest standing is acquiesced; otherwise it is not and subsequent courts are inclined to find in this determination precedent which denies public interest standing altogether, without cognizance that the prior determination was closely related to the issue of the characteristics of the plaintiff. See generally the Brennan-White concurrence and dissent in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 167 (1970).  

The courts have also manipulated the standing concept to express ideas indirectly related to the law of standing. These ideas have broadened and confused the essential purpose for the standing to sue requirement. The confusion with the concept's definition resulted from ideas that the law of standing can keep judges from assuming too much governmental power, that it can limit courts to appropriate subject matter, that it can help assure competent presentation of cases, and that it can protect against a flood of litigation . . . overburden[ing] the courts (and) . . . produc[ing] a disastrous deterioration in the quality of all that courts do. Davis, supra note 17, at 469. The law of standing is not the law of ripeness, of case or controversy, of scope of review, of unreviewability, or of inadequate presentation, as many cases have indicated. "The law of standing is the wrong tool to accomplish judicial objectives unrelated to the task of deciding whether a particular interest asserted is deserving of judicial protection." K.C. Davis, Administrative Law Treatise, 1970 Supplement § 22.00-4 (1971). A court should avoid hypothetical or remote questions, decline to enter political areas, limit themselves to issues "appropriate for judicial determination," avoid taking over functions of government that are committed to executives or administrators, stay away from governmental acts as foreign affairs and military operations, and insist upon competent presentation of cases. But to do these things and justify them with the standing to sue concept is unnecessary and only tends to make the concept more complex and unpredictable. Id.  

130. 354 F.2d 608 (2d Cir. 1965) cert. denied, 384 U.S. 941 (1966). For discussions of this case appearing elsewhere, see Davis, Standing: Taxpayers and Others, 35 U. CHI. L. REV. 601 (1968); Jaffe, supra note 6; Note, Of Birds, Bees and the FPC, 77 YALE L.J. 117 (1967).
groups from suing in the public interest. The plaintiff, "an unincorporated association consisting of a number of non-profit conservation groups," sought to set aside the development of a hydroelectric project on the Hudson River authorized by the Federal Power Commission. The court held that "the Supreme Court has not made economic injury a prerequisite..." to standing where a person or party claims he was "adversely affected" or an "aggrieved party" under the Federal Power Act. The Court conferred standing on the Conference on the basis that those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved parties" under 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

Scenic Hudson is significant in at least two ways. First, it decided that economic interest in the outcome of the action was not necessary for a plaintiff to be "aggrieved" by agency action under the Constitutional requirement of case or controversy. Second, since the statute involved seeks to protect the "public interest in the aesthetic, conservational, and recreational aspects of power development," "those who by their activities and conduct have exhibited a special interest in such areas [have] a legal right to protect their special interests."

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131. 354 F.2d at 611.
132. Id. at 615.
133. 16 U.S.C. § 825l(b) (1964). The Court stated the FPC's function to be: "[To] adequately protect the public interest in the aesthetic, conservational and recreational aspects of power development ..." 354 F.2d at 616.
134. 354 F.2d at 616.
135. Id. at 615. The Constitutional requirement of case or controversy is stated in Article III, Section 2 of the U.S. Constitution. See generally Berger, supra note 99. It is used to guarantee that the plaintiff is the proper party to most adequately litigate the issues involved in this case. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 151-52 (1970).

While Scenic Hudson broadened the scope of public interest standing for organizations to include citizen groups which do not suffer special economic injury, it is not clear that standing in a public action, in order to satisfy the case or controversy requirement, is restricted to representative citizen group plaintiffs. Scenic Hudson, however, does refer to the "representation of common interests by an organization, ... serving to limit the number of those who might otherwise apply for intervention, [as] expediting the administrative process." 354 F.2d at 617.

136. 354 F.2d at 616. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), albeit in dicta, demonstrates a recognition that an organization's concern for the environment may satisfy the standing requirements for suits in the public interest. The Supreme Court has not yet ruled decisively, as a case holding, in this regard. However, certiorari was recently granted in Sierra Club v. Hickel, which will provide the Court an opportunity to do so. 433 F.2d 24 (9th Cir. 1970), cert. granted, 39 U.S.L.W. 3353 (U.S. Feb. 23, 1971).
137. 354 F.2d at 616.
Road Review League v. Boyd[^138] built upon Scenic Hudson. The Court was asked to review the legality of a decision locating an interstate highway. The controversy had lasted six years and involved the Federal Bureau of Roads and supporters of alternative routes for a highway. The Federal Bureau of Roads had made a final decision which was opposed by the plaintiffs who argued for two alternative routes with alleged economic and conservation advantages. Plaintiffs included a town, a civic association of the same town, two wildlife sanctuaries whose property was adversely affected, and a so-called road review league, a non-profit association concerned with the location of highways. Since the Highway Act declared that it was a national policy, in carrying out the provisions of the Act, to preserve park lands and historic sites,[^139] the court held that any or all of these plaintiffs had a sufficient interest to make the claim that the Bureau's consideration of these criteria had been legally insufficient.

Professor Jaffe feels that Road Review is significant because it goes a step beyond Scenic Hudson:

In that case the statutes specifically provided that an "aggrieved person" is entitled to bring an action for judicial review. There is no comparable provision in the statutes establishing the powers of the Bureau to locate roads, that is, no provision for judicial review. The decision thus opens up to judicial review at the instance of representative persons any official action alleged to have ignored or violated statutory standards governing the action.[^140]

Citizens Committee v. Volpe[^141] in affirming the approach taken in Scenic Hudson and Road Review League, held that plaintiffs were "'aggrieved' by the alleged destruction of the natural resources of the river."[^142] The district court found that one of the main purposes of the Department of Transportation Act,[^143] under which the dispute arose, was conservation of the country's natural resources. The court could therefore recognize a congressional intent to grant standing:

[^140]: Jaffe, supra note 65, at 128. Road Review also differed from Scenic Hudson in that the plaintiffs, who challenged the authorization of a proposed federal highway route, had not been parties to the original administrative proceeding. The court nevertheless allowed an independent action against the administrative order, finding the requisite interest in the fact that the plaintiffs "participated actively in attempting to secure an administrative determination favorable to their interest."

[^142]: Id. at 1092.
The rule... is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.\textsuperscript{144}

From both the district and circuit courts' discussion of the standing issue, some notion of the criteria for group standing is gleaned. Significantly, the court talks in terms of a congressional intent to give standing to interested groups.\textsuperscript{145} Environmental groups meeting the following two requirements set by the court are accorded standing. First, the plaintiff group must show some genuine interest in conservation. The circuit court found requisite sufficiency of interest where a plaintiff demonstrated it is "willing to shoulder the burdensome and costly processes of intervention."\textsuperscript{146} Second, the district court found the statute under which the administrative decision is made must concern "the protection of natural... and scenic resources."\textsuperscript{147}

Unfortunately, the progression of decisions favorable to public interest standing for organizations is interrupted by \textit{Sierra Club v. Hickel}.\textsuperscript{148} Asserting that it had a national membership of 78,000, of

\begin{itemize}
  \item \textsuperscript{144} 302 F. Supp. at 1092. While holding that the statute involved was sufficient to grant standing because of the related congressional intent, the district court, like the circuit court that affirmed its decision, 425 F.2d 97, 101 (1970), also held that the Administrative Procedure Act granted standing to plaintiffs. 302 F. Supp. 1083, 1090 (1969).
  \item \textsuperscript{145} It is significant because the Administrative Procedure Act (APA), under which the Court granted standing in this case, provides judicial review for any "person... aggrieved by agency action..." 5 U.S.C. § 702 (Supp. V, 1970) (emphasis added). The APA does not restrict the definition of "person" to groups. Rather, "person includes an individual, partnership, corporation, association, or public or private organization other than an agency." \textit{Id.} § 552(2). Even the definition of party "includes a person or agency named or admitted as a party, ... in an agency proceeding..." \textit{Id.} § 551(3).
  \item \textsuperscript{146} 425 F.2d 97, 103 (2d Cir. 1970), \textit{quoting}, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).
  \item \textsuperscript{147} 302 F. Supp. at 1092. \textit{See Note, supra} note 140, at 458 in which the author indicates the trend to move away from the standing requirement to allow environmentalists to challenge agency action in the public interest.

The facility with which federal courts have read public environmental rights into... statutes, despite the absence of supporting statutory language or legislative history, cannot be dismissed as mere 'charitable' statutory construction. The only explanation for these strained interpretations is a tacit acknowledgement by the courts of a fundamental public right of environment underlying the statutes.

\textit{Id.} at 472.
which approximately 27,000 resided in the San Francisco Bay Area,¹⁴⁹ and "that it has for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains,"¹⁵⁰ the Sierra Club alleged "its interest would be vitally affected . . . and would be aggrieved by . . . acts of the defendants . . . "¹⁵¹ The Ninth Circuit held that the plaintiff did not have standing when it sought to enjoin the Forestry Service from issuing permits which would allow a large commercial and recreational development to be built in the Mineral King valley near Sequoia National Park.¹⁵² Practically reverting to pre-Sanders doctrine,¹⁵³ the decision rigidly construed the injury-in-fact test¹⁵⁴ to require a direct injury,¹⁵⁵ which it claimed the


150. Id.
151. Id.
152. Id. at 33.

153. That is to say the case brings us almost back to the requirement of plaintiff's showing a "legal right" or "legal interest." See text accompanying notes 87-88 supra. See Comment, supra note 19 at 313. The Mineral King case especially points up the inconsistency in the courts' response to private citizen and public interest group challenges of administrative action. It is contrary to the trend of cases discussed supra (notes 120-44), as well as specifically opposed to the precedent of the Second (Scenic Hudson line of cases) and Fifth Circuits (Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

Further demonstrating this contradiction of courts' attitudes to granting standing is the District Court's opinion in the Colorado case of Parker v. United States. In Parker, the diverse group of plaintiffs included a magazine, the Sierra Club, the Eagles Nest Wilderness Committee, the Colorado Open Space Coordinating Council, a guide who conducted wilderness trips, and other conservation organizations and named individuals. The suit concerned a decision of the Forestry Service to sell timber on lands immediately adjacent to a so-called 'primitive area'. These lands are potentially subject to presidential recommendation to Congress for inclusion in a 'wilderness area,' and it is claimed that the status quo cannot be changed until the Secretary of Agriculture has first considered whether or not to recommend the inclusion of these lands in a proposed wilderness area and noticed his recommendation for hearing.

Jaffe, supra note 65, at 128-29.


154. See note 194 infra.
Sierra Club’s members did not possess without alleging injury to local users.\(^{156}\) While in environmental litigation there may often be injury to local users, the class of those aggrieved is not confined to local users. Particularly in the instance of a national park, those aggrieved may very well be a national organization which historically has been concerned with preserving environmental values for its members and the general public.\(^{157}\)

3. The New Tests for Standing

Although in the recent cases of *Association of Data Processing Service Organizations, Inc. v. Camp*\(^{158}\) and *Barlow v. Collins*,\(^{159}\) new tests for standing were decided, the situation is not significantly improved for the environmental plaintiff asserting the public interest. The Supreme Court adopted two new standards for standing. The first, based on the constitutional case or controversy requirement,\(^{160}\) requires that there be an “injury in fact, economic or otherwise,”\(^{161}\) to assure that the “dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”\(^{162}\) Second, “the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”\(^{163}\)

Although one commentator contends that these new criteria liberalize standing requirements,\(^{164}\) the tests will not necessarily improve the opportunities for environmental litigants to find their way into the

\(^{156}\) Id. at 31, 33.

\(^{157}\) For further discussion of the possible importance of local users, see Comment, *supra* note 19 at 314-18.


\(^{160}\) U.S. Const. art. III, § 2. See also note 194 *infra*.

\(^{161}\) 397 U.S. at 152.

\(^{162}\) Id. at 151-52.

\(^{163}\) Id. at 153. See Comment, *supra* note 19, at 306, which suggests there may be a third test based on the language in *Barlow v. Collins*, 397 U.S. 159 (1970), that “the statute whose guarantees are being invoked must not clearly and positively deny standing.” Id. at 165. However, it may be that this third provision is already embodied in the second requirement that the interest be within the “zone of interest.” Arguably, if the statute clearly and positively denies standing to assert an interest, that interest is not within the zone of interests protected by the statute.

\(^{164}\) See Davis, *supra* note 17.

This article is also useful for an analysis of the “criteria the Court has tried to formulate” as well as his advocacy of a “simpler approach that may be more satisfactory.” Id. at 450.

Justice Douglas also observed “the trend is toward enlargement of the class of
courts as representatives of the public interest. The injury-in-fact test requires injury to some personal interest, and thus, whether the class of environmental litigants will be enlarged will be determined by the extent of personal interest required by different courts. On the one hand, a court could construe injury in fact as a liberal requirement

people who may protest administrative action. The whole drive for enlarging the category of aggrieved ‘persons’ is symptomatic of that trend.” 397 U.S. at 154. Although this prophecy does not necessarily apply to the environmental litigant, he may still get assistance from some recent cases which indicate an emerging judicial willingness to grant standing for plaintiffs of the public interest. For discussion of the issues raised in this area see Comment, Judicial Review in Urban Renewal Cases: Concepts and Consequences, 57 GEO. L.J. 615 (1969); Comment, Standing to Challenge Administrative Agency Conduct: Recent Developments in the Federal Common Law, 44 TUL. L. REV. 95 (1969); Note, Judicial Review of Displacee Relocation in Urban Renewal, 77 YALE L.J. 966 (1968); Note, Protecting the Standing of Renewal Site Families, 73 YALE L.J. 1080 (1964).

Some recent urban renewal cases also illustrate the judicial willingness to find statutory language (in the National Housing Act) which creates protectable interests in relatively large classes of persons who allege aggrievement. See Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Powellton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968); Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968). Reviewability of agency action appears to have become the rule rather than the exception, irrelevant of the particular character of the federal program.

Cf. Justice Brennan’s dislike for the new tests because they introduce unnecessary complexity into the process. His and Justice White’s concurring and dissenting opinion in Data Processing and Barlow, 397 U.S. at 167-70 explains and defends the “injury in fact” process:

The Court’s approach to standing, set out in Data Processing, has two steps: (1) since the framework of Article III . . . restricts judicial power to “cases” and “controversies,” the first step is to determine whether the plaintiff alleges that the challenged action has caused him injury in fact (2) if injury in fact is alleged, the relevant statute or constitutional provision is then examined to determine whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

My view is that the inquiry in the Court’s first step is the only one which need be made to determine standing . . . . By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests . . . . I submit that in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. (footnotes omitted).


165. See note 194 infra.

166. K.C. DAVIS, supra note 129, at § 22.09-5. Davis also says:

The concept of ‘injury in fact’ need not be pushed to its outer limits. The guide in marking out its limits should be whatever legislative intent is
which would comprehend an environmental injury to society.\textsuperscript{167} On the other hand, a strict showing of personal harm may be required,\textsuperscript{168} which would result in denial of standing to assert the public interest.

Similarly, the zone of interest requirement may exclude many potential environmental litigants who would previously have had standing.\textsuperscript{169} However, it could be considered to facilitate actions by environmentalists in view of the court's language that the interest need only be "arguably within the zone of interests."\textsuperscript{170} Restricting standing to those whom Congress specifically intended to be covered by the statute may also cause unnecessary complexity.\textsuperscript{171} Not only does it require the court to examine carefully the legislative history of the relevant statute, but it also forces plaintiffs to make attenuated arguments regarding statutory coverage and breadth.\textsuperscript{172}

While these tests may hold some potential for environmental litigants, they can easily be construed to allow only a narrowly defined class of personally injured environmentalists to sue. Hence, the new

discernible, and in absence of such intent the guide should be a judicial judgment as to whether the interest asserted is in the circumstances deserving of judicial protection . . . . The concept of 'injury in fact' need not be rigid either as to what it includes or what it excludes. It can be kept both flexible and simple.\textsuperscript{Id. at § 22.00-5.}

\textsuperscript{169.} K.C. \textsc{Davis}, \textit{supra} note 129, at § 22.00-5. The "zone of interests" test, which is so disliked by Justices Brennan and White (see note 164 \textit{supra}) may be ignored because it is arguably dicta. At the outset of the opinion the Court stated that the petitioner had shown an injury in fact. At the end of the case the Court reiterated and concluded that: "It is clear that the petitioners, as competitors . . . ., are within the class of 'aggrieved persons' . . . [who have standing.]" 397 U.S. at 157. Because standing was really based on the petitioner's injury in fact, the court did not have to discuss the "zone of interests" test at all.
\textsuperscript{170.} See \textit{Id. at § 22.00-5.}
\textsuperscript{172.} Because this is essentially the present status of the law, parties to environmental litigation find themselves twisting and turning in order to put meritorious cases into a posture where they can obtain some judicial attention. The result is a most undesirable distortion of good legal practice. Perhaps the most notable example of this problem arose in a pending case challenging the proposed Hudson River Expressway in New York [Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), \textit{cert. denied}, 400 U.S. 949 (1970)]. The plaintiffs wished to challenge alleged adverse environmental impacts from the proposed highway. But no existing law permitted this challenge to be made directly. As a result, the court and the lawyers involved became entangled in the question whether the structure on which the highway was to be built should be called a dike. This question was raised because an old—and virtually forgotten—law expressed congressional approval for the building of dikes in navigable waters. The parties argued at length in both the district court and the court of appeals whether this structure was a dike, each citing technical dictionaries and the like.
tests may not accord the plaintiff access to the courts sufficient to plead the public interest in the preservation of the environment. Professor Davis' comments are apt: "Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice." A person who objects to agency action inimical to the public interest should have an opportunity to show that the action is illegal.

4. The Effect of the Administrative Procedure Act

The Administrative Procedure Act provides an independent means by which a litigant can obtain standing to secure review of administrative action. The Act governs judicial review of all administrative bodies and applies to all federal agencies unless other statutes specifically preclude judicial review, or unless "agency action is committed to agency discretion by law." Section 10(a) gives a right of judicial review to any person "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ." The reviewing court must "compel agency action unlawfully withheld or unreasonably delayed," and must reverse agency actions, findings, and conclusions that are an abuse of discretion, unconstitutional, beyond statutory authority, or unsupported by substantial evidence.

Prior to the APA, when seeking review of agency actions under

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

1970 Hearings, supra note 9, at 44 (statement of Joseph L. Sax, Professor of Law, University of Michigan).

173. K.C. Davis, supra note 129, at § 22.00-5. For Professor Jaffe's succinctly stated evaluation and opinions regarding the requirements of standing for a private citizen suing in behalf of the public interest, see Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971).


175. See notes 73 & 76 supra.

176. 5 U.S.C. § 701(a) (Supp. V, 1970). See United States v. George S. Bush & Co., 310 U.S. 371 (1940). For example, many statutory provisions merely authorize agencies to make loans; in these instances, an agency's discretion may be so complete that refusal to make a loan is not reviewable under section 10.


178. Id. § 706.

179. Id.
“aggrieved persons” provisions, the litigant was required to show detriment to obtain standing. While “detriment” is unfortunately vague it was at least clear that it was not necessarily confined to a “legal injury” or harm related to the substantive issues which would be raised. Where litigants did not have a personal interest in the outcome of the litigation, however, a problem arose since the courts feared there would not be the adverseness necessary to meet the constitutional case or controversy test. Additional reluctance to grant standing was due to the fear that such liberalization would encourage a flood of suits and appeals which would thereby interfere with effective administrative action or clog the administrative and judicial processes. For these reasons, before the APA was passed, the courts granted standing only

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181. If no statutory provision for aggrieved persons was made, judicial review was presumed excluded. See note 82 supra.

182. For example, the Federal Communications Act, 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151-609 (1964), does not protect radio stations from loss of revenue due to the licensing of competing stations. This financial detriment is significant only in that it may qualify the radio stations to appeal the action; the substantive case against the administrator must be based on other grounds. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475-77 (1940). In Sanders, the factor of competition between the applicant and existing licensees was relevant to whether the license should issue only where destructive competition between them may deprive the public of any effective service. See also Pittsburgh v. FPC, 237 F.2d 741, 746-48 (D.C. Cir. 1956).

183. U.S. CONST. art. III, § 2. Since the “legal injury” requirement of standing is derived from conceptions of the proper relation of the federal courts to the executive and legislative branches, no constitutional problem is presented when Congress provides that less deference is to be accorded to administrative acts. However, the Supreme Court had not yet retreated from its position in Frothingham v. Mellon, [262 U.S. 447 (1923), overruled in Flast v. Cohen, 392 U.S. 83 (1968)], that the litigant must have a personal interest in the outcome of the dispute. See also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 151 (1951) (concurring opinion); FCC v. National Broadcasting Co., 319 U.S. 239, 265 (1943) (dissenting opinion).

184. Thus, judicial interpretation of the “aggrieved person provision became entangled with fundamental judicial policy assumptions about administrative agencies. Extending statutory standing depended on either of two assumptions: (1) that only litigants who meet stricter standards of adverseness are likely to undertake the most effective and full presentation of the issues thereby providing the best protection of the public interest in rectifying administrative error; or (2) that the delay in the effectiveness of the resulting decision will greatly impede the public need for expeditious and final administrative disposal of public business. See Note, Competitors' Standing to Challenge Administrative Action Under the APA, 104 U. Pa. L. Rev. 843, 861-62 (1956). See, e.g., United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116, 120 (2d Cir. 1943). But see Associated Industries, Inc. v. Ickes, 134 F.2d 694, 707 (2d Cir.), vacated as moot, 320 U.S. 707 (1943).

to those who alleged direct injury.\footnote{186}

There has been considerable debate as to the scope of the APA since its enactment in 1946. To be sure, the language of the Act excludes from review those agency actions made unreviewable by the agency's enabling statute.\footnote{187} Except when there is a "basic presumption of judicial review"\footnote{188} and no showing of "'clear and convincing' evidence of a contrary legislative intent,"\footnote{189} the correct interpretation of provision 10(a)'s scope of "adversely affected or aggrieved . . . within the meaning of any relevant statute" has not been settled.

Indicative of the judicial confusion over the correct interpretation of section 10(a) is the battle of scholarly opinion between the two foremost scholars of administrative law, Professors Davis\footnote{190} and Jaffe.\footnote{191} Professor Jaffe seems to think that the APA was "no more than declaratory of existing law."\footnote{192} He argues in favor of the public interest action through a broadened interpretation of "persons adversely affected or aggrieved."\footnote{193} In taking this position, he maintains that the APA was not meant to allow standing only to persons "adversely affected in fact."\footnote{194} Claiming that grievance in fact should not be the test, Professor Jaffe says: "If the APA had meant to make the test

\footnotesize{186. L. Singer & Sons v. Union Pac. R.R., 311 U.S. 295, 304 (1940); United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116, 120-21 (2d Cir. 1943); cf. Ex-Cell-O Corp. v. Chicago, 115 F.2d 627, 631 (7th Cir. 1940).

187. Section 10(a) of the APA [5 U.S.C. § 701(a) (Supp. V, 1970)] states in part that any person who has suffered legal wrong, is aggrieved, or adversely affected by administrative action is entitled to judicial review, "[e]xcept to the extent that (1) statutes preclude judicial review." See also Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1966), wherein the Court said that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Cf. note 79 supra.


189. \textit{id.} at 141.


192. \textit{id.} at 528. See also \textit{id.} at n.97.

193. See Jaffe, \textit{Public Actions}, supra note 58, at 1282. There is no articulated distinction between the "adversely affected" and "aggrieved" language. Congress' choice of these different terms seems to have been fortuitous and the courts have not interpreted them to have intrinsically different meanings. See Davis, \textit{Standing to Challenge Governmental Action}, 39 \textit{MINN. L. REV.} 353, 359 & n.30 (1955).

194. L. \textit{Jaffe}, supra note 15, at 530. When aperson is injured in fact, he is said to be injured in a way such that he will represent some degree of \textit{personal} interest in his litigation. In this way, the courts consider the litigant will satisfy the case or controversy requirement. K.C. \textit{Davis}, supra note 129, § 22.21, at 786. Thus, when a suit is brought exclusively representing the public interest, the courts usually conclude that no standing is allowed because of the plaintiff's deficiency in satisfying the case or controversy requirement based on a degree of personal interest.}
grievance in fact, most of the provision becomes unnecessary." Professor Davis, on the other hand, believing his view is supported by legislative history, takes the position that the "subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

The courts, like the academicians, are not all of the same mind. Two cases of recent vintage, Parker v. United States and Izaak Walton League of America v. St. Clair, show that some courts are in-

195. Jaffe, Private Actions, supra note 58, at 288. Jaffe reminds us that the words "in fact" are not, however, in the statute. The statute as enacted conforms to the draft which came out of conferences between the Government and the American Bar Association and of which the Attorney General stated to Congress: "This reflects existing law."

L. JAFFE, supra note 15, at 529.

196. 3 K.C. Davis, supra note 68, § 22.02, at 211-12, Davis further indicates that

[The reasons in favor of permitting a challenge of governmental action by one who is in fact adversely affected by that action are very powerful. The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy. The second reason is that the artificiality and complexity of the law of standing would disappear if the courts would follow the simple idea that one who is in fact hurt may challenge; the large amount of litigation over the unnecessary complexities of the law of standing is wasteful. The third reason, applicable in the federal system, lies in the intent behind the Administrative Procedure Act . . .

Although the legislative history is not entirely free from conflicting views, the part of the legislative history that is both clear and authoritative is the statement made by the committees of both the Senate and the House. . . . When both committee reports are so clear in translating the statutory words "adversely affected" to mean "adversely affected in fact," the reasons in favor of following that interpretation are rather powerful, except to the extent that other legislative history is inconsistent. . . . The conclusion . . . seems to be abundantly supported that one who is in fact adversely affected may obtain judicial review, in absence of adequate affirmative reasons for denying standing.

Id. at 211-13.


199. 313 F. Supp. 1312 (D. Minn. 1970). For further discussion, see Comment, supra note 19, at 315 n.49.
Increasingly accommodating plaintiffs of a public nature under the APA, while other cases are indicating more narrowly that "the APA [should] appl[y] to all situations in which a party who is in fact aggrieved seeks review." 201

Thus, it is evident that until a right to a clean environment exists which enables individual citizens to sue to protect it, standing for the environmental litigant will be dependent upon capricious judicial interpretation of section 10(a) when suing under the APA. Even with the recent advances of some courts in recognizing the public need to protect the environment through public interest litigation, the lack of consistency of this result signals the need for a more direct and expedient way of guaranteeing this right.

The public interest environmental litigant can find essentially no consistent and effective basis for standing by way of the common law, the construction of administrative agencies' provisions, or the ambiguous APA. Thus, as the irreversible deterioration of our environment continues and concerned citizens crusade to protect it, the doctrines of our legal system fail to adapt and respond to the needs of this crisis. The environmental litigant is therefore forced to look to the legislatures to provide him with the means for protecting the public interest.

The legislatures are faced with balancing the need for agency autonomy and discretion against the need for agency responsiveness to statutory mandate and public interest. 202 Considering the gravity and

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202. "The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1004 (D.C. Cir. 1966).
urgency of the environmental crisis and the inadequate operation of many administrative agencies, the legislatures should find that the public interest tips the scales. As expressed by Edmond Cahn, and approved by the court in the Church of Christ case:

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

Thus, since legislation has proved historically to be the most effective method of changing judicial priorities, and private citizen enforcement has been the legislative response to enforcing changed priorities, there is precedent to support the approach of legislating standing to sue which is taken in S. 1032.

II  
PRECEDENT FOR LEGISLATING STANDING TO SUE

Enabling the individual to complement the efforts of government in enforcing the public interest is a time-honored concept which is represented by a number of legislative and court implied forms. While the subject matter and operation of these laws is diverse, they share a common purpose to buttress governmental enforcement of the law. Such support arguably is needed today in the environmental field since legislative policies set for administrative agencies are not always effectuated in the routine activities of government agencies. Adequate enforcement of legislative policies is not guaranteed by passing bills in Congress; and since it is impossible for Congress to supervise every act affecting our precious resources—timber sales, oil leases, and highway contracts are among the most noteworthy—a better approach is needed.

205. See generally text accompanying notes 207-25 infra.
206. Id.
207. The qui tam suit [see text accompanying notes 216 & 217 infra] is just such an action encouraging citizen enforcement.

Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence . . . in this country ever since the foundation of our Government.

208. See text accompanying notes 211-46 infra.
209. See Part I, A supra.
One of the best devices for providing needed scrutiny is the watchfulness of the citizen, for it is he, in his own community, who will be victimized if adequate precautions are not taken. As Chief Justice Burger noted in a very important decision issued shortly before he came to the Supreme Court, "Consumers are generally among the best vindicators of the public interest." If consumers are to be allowed to vindicate the public interest, they must have a forum for so doing, and no institution presently available in our system provides a better opportunity for looking hard and carefully at dubious enterprises than the courts.  

A. Statutory Precedent

There are several ways in which legislators have provided for private vindication of the public interest: the qui tam action, private antitrust actions, the Clean Air Act of 1970, and the Civil Rights Act. Passed to secure proper enforcement of the law where police and prosecutorial forces of the government were inadequate, the qui tam or informer statute allowed the private citizen to sue as a private attorney general and authorized him to collect a share of the fine, penalty, or forfeiture which the statute prescribed.

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201. 1970 Hearings, supra note 9, at 43 (testimony of Joseph L. Sax, Professor of Law, University of Michigan). See id. at 154 (statement of William T. Coleman, Jr., of Dilworth, Poxson, Kalish, Levy & Coleman, Philadelphia, Pa.).

211. For an analysis of the qui tam action under the Refuse Act of 1899, see Comment, The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution, 1 Ecology L.Q. 173, 189-90 (1971). See also note 217 infra.


216. Id. at 13.

217. See id. at 11. Not a novel concept, the qui tam action functioned in common law as a means for citizen participation fortifying an inadequate professional police force and prosecutorial administration. "Much reliance was placed upon common informers to secure the enforcement of laws affecting public order and safety . . . ." L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION, FROM 1750, Vol. 2, at 143 (1948).

[T]he common informer, stimulated by his share in the penalty, was expected to play a considerable part in setting the machinery of justice in motion with regard to lesser infringements of the law. Thousands of these were committed every day, and although most of them were nonindictable offences or misdemeanors, they had nevertheless considerable social significance . . . .

Id. at 146-47.

Viscount Simon, in presenting the common informers bill to the House of Lords for second reading, stated:

If we go back to the old days when there was no efficient police force,
interest in this type of action since the recent revival of the Refuse Act of 1899.\textsuperscript{218}

The Clayton Act\textsuperscript{219} authorizes a private cause of action in cases of injury to the business or property of an individual, or corporation, resulting in the violation of the antitrust laws. Injunctive relief\textsuperscript{220} and treble damages\textsuperscript{221} are the available remedies. It was Congress’ intention to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney’s fee.\textsuperscript{222}

Although treble damage antitrust suits may be distinguished from the proposed legislation for standing in the environmental field since the antitrust action relies, in a sense, on the private party’s “self-interest” while suits by private citizens to protect the environment are presumably “public interest” suits, the distinction fails when the antitrust private action is properly characterized. The real purpose of private citizen standing under the Clayton Act is to insure the existence of a competitive economy by challenging monopolistic practices or motives. Recognizing that government could not adequately control the problem itself, Congress made private citizen challenges to antitrust practices an attractive cause of action.\textsuperscript{223}

Environmental problems present at least as massive a control problem as antitrust. Yet, until the recent amendments to the Clean Air Act,\textsuperscript{224} legislated standing for private citizens to protect the public in-

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\textsuperscript{171} \textit{Parl. Deb., H.L.} (5th ser.) 1052 (1951).
\textsuperscript{218} Refuse Act of 1899, 33 U.S.C. §§ 407, 411, 413 (1964). See also Comment, \textit{supra} note 211.
\textsuperscript{221} Id. § 15.
\textsuperscript{222} Bruce’s Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947.) In \textit{Perma Life Mufflers, Inc. v. International Parts Co.}, the court observed, in referring to private antitrust suits as “a bulwark of antitrust enforcement,” that “the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to anyone contemplating business behavior in violation of the antitrust laws.” 392 U.S. 134, 139 (1968).
\textsuperscript{223} See text accompanying note 222 \textit{supra}.
terest in the environment was never provided. The Clean Air Act provides fixed deadlines for a 90 per cent reduction in auto emissions, and also imposes several new controls on industry and other stationary sources of air pollution. Section 304 states:

[A]ny person may commence a civil action on his own behalf—
(1) against any person (including (i) the United States, and
(ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. . . .

Citizens are now able to go to court to compel abatement of air pollution from corporate, federal, or municipal facilities. They also may sue the administrator to compel enforcement of the law in areas where definite actions and timetables are fixed by law.

However, unlike the legislated right to citizen suit proposed by S. 1032, §304 restricts citizen action to the Clean Air Act of 1970. The new bill, on the other hand, is unhindered by other statutes as it grants standing to sue to any citizen who seeks to protect the environment; even the standards set by the administrator of the Clean Air Act would be vulnerable to challenge under the proposed legislation.

Legislated private citizen action is available in yet another area of litigation—civil rights. Without private enforcement in this area, many feel government would “never have the manpower, the tech-

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225. The report of the Senate Committee on Public Works on the bill [S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970)] indicates that a primary reason for the inclusion of the citizen suit provisions is to motivate governmental agencies to bring enforcement and abatement proceedings themselves. By noting especially that federal agencies have been “notoriously laggard” in abating pollution, the Committee report virtually invites citizen suits against such agencies. The report denies that the citizen suit section provides for “class actions,” since injury is not required for standing and since there is no provision for monetary damages. “Instead, it would authorize a private action by any citizen or citizens acting on their own behalf.” Id. at 38. The jurisdictional monetary limit is waived. Rights and remedies under any other provisions of law would remain available, and compliance with the standards required by the Act would not preclude a common law action for damages. The assumption which surfaces in the Committee report seems to be that the federal agencies simply will not do their jobs as desired, and that citizen suits are appropriate to provide the necessary incentives.

226. S. 1032, 92d Cong., 1st Sess. is set forth in full in the Appendix.


niques, or the awareness necessary to enforce the law for all.\textsuperscript{229} The area of environmental problems is equally if not more complex and diverse, conceivably requiring a huge staff of enforcement personnel. With the limited regulatory resources of government available, private citizen action is the only possible way by which Congress could hope environmental laws would be comprehensively enforced.

\textbf{B. Standing by Judicial Implication}

Further support for legislating standing for environmental plaintiffs can be found in areas where courts, by recognizing the need and implying a private citizen right to sue, have enlarged standing in order to accomplish adequate enforcement of laws. This judicial recognition of the value of private enforcement emphasizes the need for such enforcement to protect the environment. However, such protection cannot wait for full judicial implication; it is necessary because of the seriousness and urgency of the environmental crisis that it be legislated now.

Citizen action to enforce laws in the area of securities regulation is not legislatively but rather judicially derived. Congress enacted statutes\textsuperscript{230} providing for civil and criminal sanctions, and established the Securities and Exchange Commission to enforce compliance. The courts, however, decided that Commission enforcement was not enough,\textsuperscript{231} and accordingly developed a body of law granting the individual investor the right to bring a private suit, for equitable relief or for damages, based on a violation of the securities laws. No provision in the statute provides that the private person affected can seek an injunction; the courts, simply implying a private cause of action based on congressional intention, believed that the possibility of civil damages or injunctive relief "serves as a most effective weapon in the enforcement of . . . requirements."\textsuperscript{232}

Another area of precedential support for legislation granting citizen


\textsuperscript{232} J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964). The courts have also implied causes of action for damages under the Civil Aeronautics Act and the antiwiretapping legislation in the same fashion as they did under the Securities Acts of 1933 and 1934. 1970 \textit{Hearings}, supra note 9, at 155 (statement of William T. Coleman, Jr., Philadelphia environmental lawyer). Other laws which attempt to regulate or abolish deleterious effects on interstate commerce have also been recognized to raise implied causes of action. \textit{See generally} Note, \textit{Implying Civil Remedies from Federal Regulatory Statutes}, 77 \textit{Harv. L. Rev.} 285 (1963).
standing to sue is found in a number of significant judicial decisions of
the past three decades. With the stroke of Judge Frank’s pen the term
and the concept of private attorneys general received its contemporary
initiation in 1943.233

Congress can constitutionally enact a statute conferring on any non-
one official person, or on a designated group of non-official persons, au-
thority to bring a suit to prevent action by an officer in violation of
his statutory powers; for then, in like manner, there is an actual con-
troversy, and there is nothing constitutionally prohibiting Congress
from empowering any person, official or not, to institute a proceed-
ing involving such a controversy, even if the sole purpose is to vindic-
ate the public interest. Such persons, so authorized, are, so to
speak, private Attorney Generals [sic]. . . .234

Since 1943 courts have periodically considered the extension of
the concept.235 The present Chief Justice Burger in Office of Com-
mutation of the United Church of Christ v. FCC236 allowed indi-
vidual citizens to become “private attorneys general.” In that decision
he wrote:

The theory that the Commission can always effectively represent
the listener interests . . . without the aid and participation of legit-
imate . . . representatives fulfilling the role of private attorneys
general is one of those assumptions we collectively try to work with
so long as they are reasonably adequate. When it becomes clear
. . . that it is no longer a valid assumption . . . neither we nor the
Commission can continue to rely on it.237

Furthermore, the private attorney general concept does not place
courts on unfamiliar ground with respect to the notion of a representa-
tive action. Several such rights of representative action exist today.
For example, derivative actions are accorded stockholders claiming rep-
resentation of their corporations.238 [Federal] Rule 23 of the Federal
Rules of Civil Procedure provides another example of how courts
have routinely set requirements which deal with the adequacy of the

233. Earlier manifestations of the basic idea of a private attorney general can be
found in the informer statutes. United States ex rel. Marcus v. Hess, 317 U.S. 537
(1943); see text accompanying notes 102, 215-218.
234. Associated Industries, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as
moot, 320 U.S. 707 (1943). For discussion of this case, see text accompanying notes
100-03 supra.
235. See text accompanying notes 99-119 supra.
236. 359 F.2d 994 (D.C. Cir. 1966).
237. Id. at 1003-04.
238. Fed. R. Civ. P. 23.1:
The derivative action may not be maintained if it appears that the plaintiff
does not fairly and adequately represent the interests of the shareholders or
members similarly situated in enforcing the right of the corporation or associa-
tion . . . .
239. Id. 23.
representation of a class of persons by a person who comes into court. Extending the analogy further, it is arguable that as one person represents a class, a similar representative relationship exists between the citizen and society in certain environmental circumstances. These examples are useful in showing that representation is allowed, and that the court possesses inherent power through developed criteria to determine "representativeness" of the litigants in order to weed-out many of the frivolous and "strike" suits. Thus, there is ample precedent for statutory standing to sue. Legislated standing to sue is not a novel, untried method; nor is it ineffectual. Judicially implied standing similarly shows the courts' recognition of the merits of private citizen standing and their willingness and ability to handle such cases. Eventually, judicially implied standing may provide the citizen an adequate environmental remedy. But it is possible that the nation does not have the time to await the incremental process of judicial implication in the area of environmental protection, and it is this possibility that makes the strongest argument for legislat ing citizen standing today. Our nation's environmental condition is too serious to depend on the gradual enlargement of the citizen right to sue to protect the environment.

If a right of this nature is presented to concerned citizens, they are not likely to be "meddlesome," as some opponents have contended. Instead, responsible citizen participation can probably be

240. H.R. 15578, 91st Cong. 2d Sess. (1970) is a bill to amend the National Environmental Policy Act of 1969 (NEPA) to confer standing on private persons to sue as a class for relief from pollution. This bill demonstrates the growing applicability and acceptance of the class action approach to environmental litigation. Although this bill would assist the environmental litigant, it only allows him to sue under the NEPA of 1969. On the other hand, the bill being proposed herein, S. 1032 (see Appendix, infra) provides for a right to sue to protect the environment, without conditioning that right on any statute.

241. David Sive argues that Citizens Committee v. Volpe, 425 F.2d 97 (1970) settled the standing that the "legally protected interest" will be the public interest. If this is so, argues Sive, the only remaining issue is whether the self-appointed representative of the public interest asserted is "a responsible representative of the public." Address by David Sive, National Conference on Environmental Law, San Francisco, Nov. 6, 1970, on file with the Ecology Law Quarterly.

242. [It is the opinion of a majority of the members of the Subcommittee that federal courts have adequate tools to deal with unmeritorious suits in the environmental field, if and when such suits do multiply. Report of the Presidential Council on Environmental Quality's Legal Advisory Subcomm. on Private Litigation, quoted in Address by David Sive, supra note 241. The Council subsequently voted to support the Bill (Letter from Nicholas Robinson, member of the Legal Advisory Subcommittee, on file at the Ecology Law Quarterly.)] However, it should be noted that upon the reintroduction of S. 1032 Timothy Atkeson, general counsel for the Council on Environmental Quality, told the Senate Commerce Subcommittee on the Environment, on April 15, 1971, that the Council opposed the citizen suit bill. See 1 BNA ENVIRONMENT REP.—CURRENT 1435 (1971).

243. 1970 Hearings, supra note 9, at 149 (statement of James Moorman, Center
expected. Laws will be ignored unless enforced—and anti-pollution laws are no exception. "[N]either [the] bureaucrat nor businessman will pay much attention to these laws unless the potential exists for the citizen to take them to court." Congressman Udall, in presenting the proposed legislation to the House of Representatives, said:

Outraged and concerned citizens willing to take their grievances to court have had a healthy impact on the fabric of law that governs our lives. The fight to save the environment is too important to leave citizens out.

III

ADEQUACY OF PROPOSED LEGISLATION

At the time of this writing, legislation granting private citizens standing to protect the environment has been passed in one state, and proposed in other state legislatures and in Congress. In addition to creating the right in each citizen to protect the environment, these measures embody provisions designed to guard against frivolous suits and to relax certain requirements which could operate to preclude suits by plaintiffs who would otherwise have a good cause of action. Congressman Morris Udall describes the four ways in which the bill would change existing law as follows:

It grants all citizens a federally guaranteed right to a pollution-free environment . . . .

It gives all citizens an effective means of enforcing that right by opening up the Federal courts to citizen suits to protect the environment.

It gives citizens standing before administrative agencies and regulatory bodies to present the environment's side of the coin during the decisionmaking process.

It gives citizens standing in Federal court to challenge administrative decisionmaking where it is lax in the enforcement of existing antipollution standards and in the implementation of environmental policy in general.

Since the United States bill has received the most publicity and since its provisions are substantially similar to those of its local counterparts,

244. See note 329 and accompanying text infra.
248. The U.S. Senate bill (S. 1032) is set forth in the Appendix.
an examination of the salient features and possible associated difficulties of S. 1032 will satisfy the general interest while serving as an aid to evaluating similar state statutes.

A. Salient Points

1. Entitlement by Right to Environmental Quality

The bill embodies in section 2(a) a Congressional finding and declaration that "each person is entitled by right to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States and that each person has the responsibility to contribute to the protection and enhancement thereof." This section, the heart of the bill, creates the right necessary to fulfill the responsibility imposed upon each citizen in the National Environmental Policy Act of 1969 (NEPA). Some commentators contend that such a right already exists implicitly, either under the Constitution or under the NEPA. If so, it has not yet been generally recognized and

251. 42 U.S.C. § 4331(c) (Supp. V, 1970). See note 23 supra. For a discussion of the ramifications of granting such a broad right, see part III, B infra. It might be argued that the right is not broad enough. Compare a similar bill recently introduced in California (AB 838), the California Conservation Act, which provides in section 536.20 that

[a]ny person may maintain an action for equitable relief against any other person for the conservation and protection of the environment from destruction or pollution, and defines "environment" as "the land, water, air, or silence. . . ." A.B. 838, Cal. Reg. Sess. § 536.12 (1971). Thus an action for abatement of noise pollution would be explicitly allowed under the California legislation, whereas the right to maintain such an action under S. 1032 would presumably have to be implied from the right to protect the "air".

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

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

1970 Hearings, supra note 9, at 14 (statement of Stewart Udall). See note 253 infra. Put more bluntly,

. . . all ecological sins come home to roost, and bitterly indeed have the once richly endowed civilizations of the past paid for their rape of nature. In America the long overdue account of our disregard for ecological laws is only now beginning to be presented. The payments must be made, if not in cash, then in blood.


253. In their study of the NEPA, Hanks & Hanks conclude the following with respect to § 101(c):

Life is the primary value. Without it, all other rights are meaningless. It would seem appropriate and entirely in keeping with the spirit of the Act, therefore, to read subsection 101(c) exactly as had been intended in the Senate
a legislative articulation of its scope would serve to dispel any doubt. If such a right does not exist, the major question concerns the suitability of the instant legislation as a vehicle for its implementation.

2. Any “Person” May Sue or be Sued

Basically, this legislation would allow any person to sue any other person on his own behalf or on behalf of a class of persons similarly situated for declaratory or equitable relief to protect the environment. With certain variations, “person” is defined to include any individual, organization, governmental agency, department or instrumentality.

The history of citizen suits as significant instruments of law enforcement and presidential recognition of the importance of citizen participation in the task of cleaning up the environment support the

version. That is to say, aside from the interests created by the remainder of title I, and enforceable in public actions, subsection 101(c) recognizes a ‘legal right’ in every individual to a healthful environment. What does such a right mean? First, anyone suing to enforce it, is entitled to his remedy if his right is found to have been abridged. His suit, in other words, is a private, not a public action. Second, a legal right to a healthful environment could, in certain circumstances, preclude any balancing or weighing of interests during the governmental decisionmaking process; that is, in some situations no amount of dollars will outweigh the threat to life. Undoubtedly, as Senator Jackson noted, we already have such a right. The Supreme Court, however, has not yet been called upon to expound it. When it is, as surely it will be, prudence may dictate to give the ’right to life’ a statutory rather than a constitutional basis, at least while its contours are in a stage of development.

Hanks & Hanks, supra note 23, at 251. See also the contention of Assistant Attorney General Shiro Kashiwa that existing jurisdictional requirements allow ample opportunity for citizen-initiated pollution-abatement suits:

Lack of this legislation will not prevent suits by private individuals or groups of individuals against polluters or threatened pollution. Such suits, for damages as well as for equitable relief, presently may be brought in state courts, and in Federal courts where the normal requirements for Federal court jurisdiction are present. 1970 Hearings, supra note 9, at 126.

254. See part I, B supra.

255. S. 1032, 92d Cong., 1st Sess. § 3(a) (1971). The consequences for courts and governmental agencies of granting “any person” the right to sue will be dealt with in part III, B infra.

256. Section 3(b) also includes in its definition of “person,” “a State or local government, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States.” Id. § 3(b).

257. Id. § 3.

258. See part II supra. Note also that the Congress has recently demonstrated its support of the citizen suit concept in the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676. See text accompanying notes 224-27 supra.

259. 1970 Hearings, supra note 9, at 8. The President stated the following in a recent environmental message:

The task of cleaning up our environment calls for a total mobilization by all of us. It involves governments at every level, it requires the help of every citizen. . . . It presents us with one of those rare situations in which each individual everywhere has an opportunity to make a special contribution to his country as well as his community.

Id.
authorization of standing to any "person." However, the objection is raised with respect to this provision that it demolishes the judicially-erected shelter of sovereign immunity, which exempts the United States government from legal responsibility. Although Congress may waive the defense, it is asserted that such a waiver in this instance would be undesirable.

In preserving this much-criticized common law vestige, the United States is a maverick among nations. This obduracy has no contemporary justification. The doctrine, developed to protect the king of England "who could do no wrong," was, by some remarkable quirk of history, applied to the United States government as the institutional descendant of the king. Its mysterious appearance in America was noted in 1882 by the Supreme Court: "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."

Notwithstanding recent forceful argument that "sovereign immunity must go," and current sponsorship by the American Bar Association and Administrative Conference of a Congressional initiative to eradicate all traces of the doctrine in federal courts, governmental defendants continue dutifully to assert the defense and will apparently persist as long as any life remains in its withered form. Despite

260. K.C. DAVIS, supra note 82, at 482.
261. See note 281 infra.
262. See text accompanying note 274 infra.
263. See note 267 infra.
264. See Borchard, Governmental Liability in Tort, 34 YALE L.J. 1 (1924).
268. Davis, supra note 267, at 383.
269. "The definition of 'person'... is, moreover, very helpful since sovereign immunity seems to be an involuntary response built into every Governmental lawyer." 1970 Hearings, supra note 9, at 158 (testimony of William T. Coleman, Jr.). Senator George McGovern put it this way:

Among the 'manacles of law' that have become the favored shibboleths of those who defend the actions of governmental agencies against challenge by individual citizens, perhaps the most anachronistic and pernicious is the doc-
inconsistencies in application,\textsuperscript{270} there is a well-recognized exception to the doctrine: it may not be asserted by an officer acting \textit{ultra vires} his statutory or constitutional authority,\textsuperscript{271} since such an officer would be acting in his individual, rather than his official capacity. Thus, it is at least arguable that, by dint of the NEPA’s declaration of “the continuing responsibility of the Federal Government to use all practical means . . . to improve . . . Federal plans, functions, programs and resources to the end that the Nation may— . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . ,”\textsuperscript{272} any inconsistent official action would be \textit{per se} illegal and beyond the scope of the sovereign immunity defense. Hence, this bill’s authorization of suit against federal officers arguably does not exceed the bounds of a currently maintainable cause of action.

Nevertheless, Shiro Kashiwa,\textsuperscript{273} speaking for the Department of Justice, has objected to the elimination of the sovereign immunity defense, maintaining that to subject officials to suit because

\begin{quote}
the laws in compliance with which they must perform their functions are “inadequate for the protection of” the rights of individuals would be to substitute the judgment of the judicial branch for that of the legislative and executive branches, and would not, in our view, be either efficient or desirable in the conduct of the public business.\textsuperscript{274}
\end{quote}

The phrase quoted by Mr. Kashiwa was extracted from the third proviso of section 6 which reads,

\begin{quote}
trine of sovereign immunity, whose rationale—obviously erroneous—is that ‘the king can do no wrong.’ Though the United States Supreme Court still holds to this doctrine, a most cogent statement about its implications was made by the Court in 1882:

\begin{quote}
It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime.
\end{quote}
\end{quote}


270. The Supreme Court has observed with respect to its decisions on sovereign immunity that “as a matter of logic it is not easy to reconcile all of them.” Land v. Dollar, 330 U.S. 731, 738 (1947).


273. Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice.

274. \textit{1970 Hearings, supra} note 9, at 125 (emphasis added).
nothing herein shall be deemed to prevent the maintenance of an action, as provided in this Act, to protect the rights recognized herein, where existing *administrative and regulatory procedures* are found by the court to be inadequate for the protection of such rights.\textsuperscript{275}

Without reaching the usurpation-of-legislative/executive-function argument,\textsuperscript{276} it is apparent that Mr. Kashiwa and the bill refer to two different things. Under the bill, an action may be maintained if "administrative and regulatory procedures," not "laws in compliance with which [administrators] must perform their functions," are inadequate. Furthermore, it may be dangerous to cloak administrative regulations and decisions in the armor of a conclusive presumption when such regulations have proved inadequate so often in the past,\textsuperscript{277} and since officials lack incentive to provide procedural safeguards when their actions are not reviewable.\textsuperscript{278}

Moreover, the mere incantation of the sovereign immunity litany should not cause courts to recoil from subjecting administrative acts to judicial scrutiny; the Administrative Procedure Act allows review of a wide range of administrative action including that which is found to be unconstitutional, in excess of statutory authority, an abuse of discretion, without procedure required by law, or based on findings unsupported by substantial evidence.\textsuperscript{279}

An interesting conflict of interest problem arises when sovereign

\begin{itemize}
  \item \textsuperscript{275} S. 1032, 92d Cong., 1st Sess. § 6 (1971) (emphasis added).
  \item \textsuperscript{276} This argument is dealt with in part III, B infra.
  \item \textsuperscript{277} See note 336 infra; see generally part I, A supra.
  \item \textsuperscript{278} For instance, when issues of fact and of law arise between government officers and a private party as to who owns a piece of land, due process—apart from sovereign immunity—would require submission of the issues to an impartial tribunal for taking evidence, making findings on the record, and receiving written or oral argument on the law. But officers of the Department of the Interior acknowledge that when they are protected by sovereign immunity, the customary system is for the very officers who are engaged in the controversy with the private party to make the decision, without taking evidence, without allowing cross-examination or rebuttal, without receiving briefs or hearing oral argument, and without even pretending to use an impartial tribunal.
\end{itemize}
immunity is asserted by the Department of Justice on behalf of a governmental client: since Justice is not in the position of a private attorney, but is rather a representative of the public interest, it should be obligated not to throw up the sovereign immunity barrier in defense of an official whose actions could have been outside the scope of his statutory authority, and thus not in the public interest.\textsuperscript{280}

Because of the injustices which result from the doctrine's application, and because of its erosion in other areas which are no more critical than environmental quality to the welfare of the nation,\textsuperscript{281} creation of governmental responsibility for pollution which is produced by governmental activity or by private activity under governmental authority is justified. Thus S. 1032, in abolishing sovereign immunity in environmental cases, would eliminate resultant miscarriages of justice, would increase governmental conscientiousness, and would clear an ominous hurdle in the path toward environmental quality.

3. \textit{Only Declaratory and Equitable Relief are Allowed}

The remedies available to a plaintiff under S. 1032 consist of declaratory and equitable relief, thus preventing an action for damages.\textsuperscript{282} While the absence of a damage provision may cause the bill to lack the incentive value supplied by such provisions in other standing measures,\textsuperscript{283} allowance of only declaratory and equitable relief will discourage frivolous suits by plaintiffs willing to gamble on recovering a monetary award. Furthermore, since damages are seldom requested in environmental suits—because the relief sought is usually a cessation of the defendant's activity and because assessment of actual damage is difficult\textsuperscript{284}—the lack of monetary compensation will not dampen the enthusiasm of potential plaintiffs.

It has been urged, however, that a damage provision be included—at least when the defendant is a private person or corporation—not only to supply incentive to the environmental plaintiff, but also to en-

\textsuperscript{280} See parts III, \textit{A}, 4 and III, \textit{B}, infra.
\textsuperscript{281} Congress abolished an enormous chunk of sovereign immunity in 1855 when it created the Court of Claims and another big chunk in 1946 when it enacted the Federal Tort Claims Act. Governmental responsibility in contract for more than a hundred years and in tort for more than twenty years has been wholly successful; the main unsatisfactory result has been uncertainty—stemming from incompleteness of governmental responsibility—a result that is mostly remediable through further legislation.
\textsuperscript{282} S. 1032, 92d Cong., 1st Sess. § 3(a) (1971).
\textsuperscript{283} See part II supra.
courage self-policing by industries through its threat value.\textsuperscript{285} But such a provision could prove to be counter-productive to the ultimate environmental goal of pollution abatement: if a court deems a defendant industry crucial to the economy of a particular community, the court may tend to grant damages in lieu of injunctive relief; if the amount of damages is not sufficient to force abatement, the result is to allow the offending industry to buy a right to pollute.\textsuperscript{286} Other drawbacks of a damage provision include the following: first, it is difficult to distinguish and determine the harm caused by a corporation; second, it is often impossible to compensate for environmental damage; and third, such a recovery would be a windfall to a plaintiff who did not apply it toward reparation of the alleged harm.

Since the advantages of allowing only declaratory and equitable relief apparently outweigh possible disadvantages, and because of the inappropriateness of damages in environmental actions, this provision is a desirous inclusion in S. 1032.

4. "Unreasonable" Pollution may be Abated

The bill provides in section 3(a) for actions to protect "the air, water, land, or public trust of the United States from unreasonable pollution, impairment, or destruction . . . ."\textsuperscript{287} Thus, a plaintiff under this authorization could seek reversal of administrative determinations or cessation of industrial activity solely on the ground that such allowed unreasonable impairment of environmental quality. This provision has consequently been the subject of much concern on the part of agencies—which protest such an expansion of the scope of judicial review of their actions—and industry—which contends that the "unreasonable" standard is too vague either to allow compliance, which would insure safety from suit, or to permit uniform application. These objections will be considered in turn.

The allowance of review of administrative action which is allegedly unreasonable might at first blush seem to expand radically the permissible bounds of judicial inquiry into the validity of agency determinations. But on closer examination, it appears that such a standard would

\textsuperscript{285} 1970 Hearings, supra note 9, at 156, 160 (testimony of William T. Coleman, Jr.).

\textsuperscript{286} See Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (1970). In that case, a group of homeowners sued a cement company for the depreciation in value of their homes due to particulate pollution by defendant. The principal difficulty with that decision, however, was not the award of damages rather than an injunction, but was the grant of permanent damages instead of the usual continuing damages granted in most nuisance cases. This amounted to a condemnation of a pollution easement and gave the polluter no incentive to attempt to abate the environmental insult in the future.

\textsuperscript{287} S. 1032, 92d Cong., 1st Sess. § 3(a) (1971).
only allow courts to accomplish openly what they have been forced to do behind a veil of recitals: while the scope of judicial review of administrative determinations is generally governed by § 706 of the Administrative Procedure Act, most courts purport to condition the nature of their examination upon whether a "question of fact" or a "question of law" is at issue. Whereas administrative findings of fact command great judicial deference and are conclusive if supported by substantial evidence, questions of law are subject to full judicial review. But even in the case of review of questions of fact there is considerable latitude, since substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Courts also apply a reasonableness test in reviewing questions of law, but there the formula is denominated the "rational basis test."

However, due to the difficulty of distinguishing one type of question from the other, many courts, including the United States Supreme Court, have either omitted discussion of the law-fact distinction or characterized the question according to whether it is one on which judicial judgment ought to be substituted. Thus, the extent of judicial dissection of a particular determination will depend less upon applicable formulae than upon whether the court feels that review is necessary because of other factors. Among these factors are the court's opinion of the agency, whether overturning the particular finding would destroy the entire regulatory scheme, and whether the agency generally conducts fair hearings and writes careful opinions. That these inquiries constitute far greater scrutiny than is technically allowed by current rules is manifest. It is submitted that inquiry as to whether an agency decision accords reasonable protection to the environment would authorize nothing not currently practiced in the review of agency action, whether the court uses a reasonableness standard or decides to substitute its judgment for that of the agency.

The Department of Justice has persistently argued in its briefs in defense of administrative conduct that "[o]nly a blatant illegal act by

290. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (emphasis added).
291. K.C. Davis, supra note 82, at § 30.05, L. Jaffe, supra note 15, at 556.
292. The multiplicity and complexity of rules is such that often it is easier to review the whole case on the merits than to decide what part of it is reviewable and under what rule.
293. K.C. Davis, supra note 82, at 213-14.
294. Id. § 30.08.
295. Id. § 29.02, L. Jaffe, supra note 15, at 576.
296. K.C. Davis, supra note 82, at §§ 30.07, 30.09.
a Federal official may be enjoined by the courts,' and "where as here agency discretion is brought into challenge, only the most egregious abuse will warrant judicial intervention.' As with sovereign immunity, the interposition of this defense causes expenditure of precious time and money resources in litigation of defenses which bear no relation to, and prevent the court from reaching, the real problem at issue. Availability of judicial review is a necessary ingredient of this legislation since administrative sympathy for industries' difficulties in complying with strict regulations has often resulted in environmentally inadequate regulatory standards.

In defense of the breadth of the unreasonableness standard, the bill's author observes, "we are not prepared to define in a precise way exactly what we want achieved in every environmental area." Further,

[i]f you simply let [the administrative agencies] articulate standards and treat those standards as the be-all and end-all, you are locked into their perspective about how much muscle they ought

297. 1970 Hearings, supra note 9, at 32 (testimony of Joseph L. Sax). Professor Sax notes a case which illustrates the operation of the arbitrary and capricious standard to deny review of administrative action in note 350, infra.

[i]f you want to appoint a commission to review or to control railroads, you usually find a man with vast experience in railroading so that he will be knowledgeable on the subject of control . . . .

It is conceivable that the regulatory commission having to do with water pollution or air pollution or land pollution, [or] whatever . . . . could be staffed largely from the industry being regulated and thus have an excessive sympathy. . . .

1970 Hearings, supra note 9, at 54. Not only is it conceivable that such could occur, California Public Resources Code virtually allows timber owners a veto over rules proposed by the district forest practice committee. The committee, incidentally, is composed of five members, four of whom are selected from private timber owners in the regulated district. CAL. PUB. RES. CODE § 4937 (West 1956):

ADOPTION AND APPROVAL OF RULES. The committee shall adopt the rules for the district after due notice and hearings. The committee shall submit the rules to the private timber owners within the district for approval. If the rules are approved by two-thirds of the private timber ownership voting in the district . . . they shall be submitted to the board for approval.

Id. § 4942. See also note 48 supra and accompanying text.

298. See note 57 supra.

299. 1970 Hearings, supra note 9, at 31 (testimony of Joseph L. Sax).

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

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

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

Id. at 69.
to employ. That is just the perspective we are trying to get out of. 

... [W]e ought to use standards to set the minimum below which no one ought to go. 300

Industries and chambers of commerce, on the other hand, have urged inclusion of a provision specifying that compliance with established regulatory standards would constitute a defense to an action under the bill. 301 They contend that the vagueness of the unreasonableness standard would make it impossible for industries to insure safety from suit, 302 and that such a right of action could have discriminatory effects, due to differential application of the standard to competing industries, and to the probability that only some offending industries would be sued. One way to avoid these potential difficulties would be to provide that compliance with existing statutes, standards or regulations is a de-

300. Id. at 39.
301. Id. at 54. See the Statement of the National Association of Manufacturers, id. at 166:
To enact this legislation would be a tacit admission on the part of Congress that the regulatory schemes envisioned by the Clean Air Act ... and the Federal Water Pollution Control Act ... are unworkable and, in order for private citizens, individually or as a class, to gain relief, intercession of the Judiciary is necessary. We do not think such is the case . . . .
Id. at 167. One advocate of this legislation has responded to the industry position in answering a question by Senator Hart:

Senator HART. [I]n the situation where the location of [a] plant would comply with the standards that have been issued, . . . [t]he mere fact that it met the standards would not of itself be a defense; it would have to anticipate an additional standard being voiced by the individuals through the courts, is that right?

Mr. ANDERSON. [Hon. Thomas J. Anderson, State Representative, Michigan State Legislature.] [T]hat could be overstated, I believe, and is being overstated by some industries at the present time. . . . I think that too long we have used as one of the prime determinants for making decisions of where to locate a plant, . . . or how to get rid of our waste, the amount of cost to the stockholders.

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

Id. at 56. For another response to the industry position that the “unreasonable” standard is too vague, see the excerpt from the testimony of James T. Moorman in note 302 infra.
302. Others differ:
As for the standard of reasonableness, it is a standard which the court has dealt with in many areas, but in a new area, we must await the definitions which arise out of litigation. I believe, however, we can make a few predictions of some things the courts will find unreasonable.

Polluters will find that it is unreasonable not to use the latest and best methods of pollution control available for their particular enterprise. Polluters will find it is unreasonable to continue to use antique manufacturing plants that have long since returned their investment many times over but which cannot be adapted to pollution control.

I think polluters will find it is unreasonable to preempt the air and water of any area for a use that is inimical to the integrity of life.

1970 Hearings, supra note 9, at 150 (testimony of James T. Moorman).
fense and to allow suit only against the body which promulgated the standard at issue. This could be coupled with a provision allowing interlocutory relief in the form of a temporary restraining order against entities affected by the standard in question, upon a prima facie showing by the plaintiff, pending determination of the adequacy of the standard. 803 Such a provision would assuage the fears of industry spokesmen who argue that "the results of the suits [under this legislation] could very well be discriminatory as between competing manufacturers, only some of whom might be sued." 304

A different problem would arise if a court were called upon to set standards in a situation where no administrative regulations were applicable, as in the case of most types of noise pollution. Distinguishing relief requiring only an individually tailored remedy from that necessitating a broad policy pronouncement will facilitate analysis of this situation. A case of the former type might be a private nuisance suit, where the plaintiff seeks abatement of pollution which causes him to suffer injury which is separate and distinct from that suffered by the community at large: here, of course, judicial competence to regulate defendant's activity is established. In cases of the latter classification, judicial deference to a legislative expression of policy is appropriate, 305 although the court could properly grant interlocutory relief pending congressional articulation of applicable guidelines.

303. A bill recently introduced in California takes this tack:

No action may be maintained under this chapter where any conduct or product is expressly authorized by state statute. . . . No action may be maintained under the provisions of this chapter against any person for any conduct or product expressly authorized by any rule, regulation, order, permit, or variance of any state [body] except against the public entity which issued [it].


304. 1970 Hearings, supra note 9, at 169 (statement of David Swan, Vice President—Technology, Kennecott Copper Corp., on behalf of the American Mining Congress).

305. The New York Court of Appeals reasoned as follows in declining to indulge in air-pollution regulation:

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

Boomer v. Atlantic Cement, 309 N.Y.S.2d 312, 314-15 (1970). For a statement of Professor Joseph L. Sax's view that courts should act as laboratories within which problem areas can be delineated sufficiently to allow legislative resolution, see note 388 infra. Compare the theory that it is better to have judicially-promulgated standards than none at all, enunciated in the excerpt from Wright, The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?, 54 COLUM. L. REV. 1 (1968), in note 389 infra.
Finally, it should be stressed that statutory regulation of business activity characteristically incorporates flexible standards which may be interpreted to expand with the understanding of the regulated subject matter. The instant legislation, by setting a flexible standard would be in the respectable company of, *inter alia*, the Sherman Antitrust Act ("restraint of trade"),306 the Interstate Commerce Act ("[unreasonable] or discriminatory rate"),307 and the United States Constitution ("unreasonable searches and seizures").308

5. Appointment of a Master is Expressly Allowed

Section 4 of S. 1032 devotes two subsections309 to allowing the use of masters, although the procedure for their utilization is set forth in detail in the Federal Rules of Civil Procedure.310 The explicit authorization was perhaps intended both to inform the parties of the availability of court appointed experts, and to assure that state courts could also make use of this means of aiding judges in deciding esoteric technical issues. The latter assurance was perhaps deemed necessary because a 1916 Supreme Court decision311 obligated a plaintiff asserting a federal substantive claim in state court to accept that state's procedure. The inclusion of this provision as an integral part of the legislation may reflect a conviction of its drafters that the availability of masters is so important to the effectuation of the right of action created that these provisions are substantive, and not merely procedural. In any event, subsequent cases have so distinguished the 1916 rule that it probably has no continuing validity save within the facts under which it was enunciated.312

The availability of masters will undoubtedly prove valuable when judges are called upon to make decisions based upon scientific and technical evidence. And since challenges of administrative standards could well entail contradictory assertions by scientists on opposite sides, a just and environmentally sound disposition of such challenges would often be facilitated by the findings and recommendations of a master. Effective use by the court of a master would thus appear to settle doubts

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306. 15 U.S.C. § 1 (1964). Although the word "unreasonable" is not contained in the language of the statute, courts have construed § 1 as precluding only those contracts or combinations which "unreasonably" restrain competition. Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).
308. U.S. CONST. amend. IV.
309. S. 1032, 92d Cong., 1st Sess. § 4(b) & (c) (1971).
310. FED. R. CIV. P. 53.
as to the ability of the judiciary to handle complex environmental issues.

6. Each Person is Provided with a Remedy to Protect the "Public Trust"

Section 3(a) of the bill would authorize any person to bring an action for the protection of the "public trust" of the United States. This provision would permit citizens to maintain suits for preservation and protection of certain properties for public use.

The public trust doctrine is rooted in Roman and English law under which certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. . . . [It] has never been clear, however, whether the public had an enforceable right to prevent infringement of those interests.

Within the protection of the public trust are the sea and great lakes below the low-water mark, waters within rivers and streams of any consequence, and public parklands, especially if they have been donated to the public for specific purposes. As Professor Joseph L. Sax has demonstrated, the public trust concept is well suited to a strategy for involving citizens in the protection of public natural resources: it embodies a concept of a legal right in the general public to protect the public domain; it is enforceable against the government; and it is capable of interpretation consistent with existing governmental efforts to protect the environment.

The value of this doctrine lies in its potential as a citizen's tool for ensuring responsiveness on the part of administrative and regula-

313. S. 1032, 92d Cong., 1st Sess. § 3(a) (1971).
314. Sax, supra note 29, at 475.
315. Id. at 556.
316. The definitive work on public trust law is the lengthy study by Professor Joseph L. Sax in the Michigan Law Review. In his article, Professor Sax delineates a broad legal approach to environmental protection designed to facilitate judicial scrutiny of governmental management of public resources. Id.
317. Id. at 474.
318. Id. at 485:

Certainly the phrase 'public trust' does not contain any magic such that special obligations can be said to arise merely from its incantation; and only the most manipulative of historical readers could extract much binding precedent from what happened a few centuries ago in England. But that the doctrine contains the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine might usefully promote needed legal development, can hardly be doubted.

For an explication of the types of governmental conduct which might be subjected to judicial scrutiny through the public trust doctrine, see note 323 infra.
tory bodies charged with guarding trust property. These bodies have a responsibility to the public to manage and allocate natural resources in the public interest. Granting the citizen the right to protect the public trust would clothe him with authority to supervise and if necessary to supplement agency action, thus encouraging administrative responsiveness and facilitating citizen participation in the decision-making process.

Various state courts, notably those in Massachusetts and Wisconsin, have recognized that the public interest may not be fully represented in decisions by a body which is not directly responsible to the electorate. The Massachusetts Supreme Court requires an explicit legislative mandate for administrative decisions which would diminish public use or enjoyment of public property. This technique minimizes the possibility for undue influence by private interests and requires that important decisions which affect the public domain be made in the public view, by the legislature.

The Wisconsin Supreme Court has held that if agencies do not adhere to certain guidelines in allocating public lands, they must sup-

319. See note 50 supra.
320. Sax, supra note 29, at 492.

The Massachusetts court articulated this policy in Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966). The facts of that case illuminate the operation of the Massachusetts doctrine:

In 1888 the Massachusetts legislature created the Greylock Reservation Commission to preserve a 9,000 acre area of Mount Greylock as an unspoiled natural forest. By 1953 development was minimal, but in that year a second statute created an Authority to construct and operate on Mt. Greylock a tramway and other facilities, and authorized the original Commission to grant leases of the Reservation to the Authority. The latter obtained financing for the desired ski development through a private management corporation which was to underwrite revenue bonds. The corporation leased 4,000 acres from the Commission for an elaborate ski development, from which it was to receive forty per cent of the net revenue of the enterprise.

Before the project began, five local citizens brought an action against the Reservation Commission and the Tramway Authority, as beneficiaries of the public trust under which the reservation was allegedly held. They asked the court to invalidate the 4,000 acre lease and the agreement between the Authority and the management corporation, in order to prevent the imminent development and particularly to rescind the transfer of supervisory power to the profit-making corporation.

The court invalidated both the lease and the management agreement, holding them to be in excess of the statutory grant of authority, in spite of an extremely general statute and the usual broad construction given legislative grants of power to administrative agencies. The court in Greylock "devised a legal rule which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses." Sax, supra note 29, at 494.

321. Sax, supra note 29, at 517.

Although the policy of requiring explicit justification for the transfer of public trust lands to private uses had been roughly formed in earlier cases, the Wisconsin court refined its approach in 1957 in State v. Public Service Comm'n, 275 Wis. 112, 81 N.W.2d 71 (1957). That case involved a plan by the City of Madison to construct additional recreational facilities in a park it owned which fronted on a recreational lake. The Attorney General challenged the proposal, claiming it would destroy navigation
ply more justification for nonadherence than a recitation that their action was an appropriate exercise of administrative discretion. Through these rules, the court has encouraged more diligent balancing of relevant interests, thereby supplying incentive to reach decisions which give due consideration to the public interest.

The historical scope of public trust law is quite narrow and courts must develop the doctrine considerably if it is to be an effective instrument in the hands of the citizen. Nonetheless, the concept is of great possible use to the citizen in prompting governmental agencies to protect the public interest. Because of the embryonic nature of, and judicial unfamiliarity with this concept, its use in actions authorized by S. 1032 should be guided by the expressed legislative purpose for its inclusion: to revitalize an existing legal approach which allows the public to obtain judicial review of governmental distribution of public resources.

and would thus be invalid under the court’s prior holdings. In rejecting the Attorney General’s contention, the court said that “even for a public purpose, the state could not change an entire lake into dry land nor alter it so as to destroy its character as a lake,” but that “the trust doctrine does not prevent minor alterations of the natural boundaries between water and land.” Id. at 118, 81 N.W.2d at 74.

The five factors relied upon by the Wisconsin court in reaching this decision come as close as judicial statement has to a specific enumeration of a set of rules for implementation of the public trust doctrine:

1. Public bodies will control the use of the area.
2. The area will be devoted to public purposes and open to the public.
3. The diminution of lake area will be very small when compared with the whole of Lake Wingra.
4. No one of the public uses of the lake as a lake will be destroyed or greatly impaired.
5. The disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.

It is important to note that the comparison which the court made in the third factor is not with the whole of the state’s lake resources, but with the particular resource at issue. Thus, the court implicitly recognized the problem which would be raised by a test that required demonstrable infringement of recreational water uses in the state as a whole, and it was unwilling to adopt an approach which would require it to examine the effects of a particular change on the entire resources of the state.

Sax, supra note 29, at 517-18 (footnotes omitted).

322. Sax, supra note 29, at 518.

323. The general outlines of the doctrine at present are articulated by Professor Sax as follows:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

Id. at 490.

324. Professor Sax explained the inclusion of the provision this way:

[T]here is another side to the environmental problem that might be called the distributive side. . . . If those lands which have historically been available
7. Affidavits of Two "Technically Qualified Persons" are Required to Support Plaintiff's Complaint

Without specifying the nature of the requisite qualifications, S. 1032 states that complaints must be supported by the affidavits of at least two "technically qualified persons." Although this requirement is clearly helpful in demonstrating to the court that a claim is not patently frivolous, the requirement must be fully defined if it is to be useful to the plaintiff. Since affiants should be technically qualified to testify to the particular harm alleged, a workable definition of "technically qualified person" might be "one whose training and experience makes him competent to determine the amount of pollution or the effects thereof complained of." Hence, the affidavit of a doctor would be necessary in order to support a claim of physical harm to an individual, while a pollution control engineer would be qualified as to an unlawful amount of exhaust emissions. Even if the suggested definition were added, the plaintiff may well encounter difficulty in determining what sort of technician would be appropriate to support an action against a highway commission for its failure to choose a route which circumvents a stand of redwoods or for needlessly ignoring aesthetic values to economize on concrete.

Moreover, since not every cause of action requires support by expert testimony, the bill should allow plaintiff discretion in utilizing technical expertise. If the plaintiff can accomplish his prima facie showing without technicians, he should not be compelled by a blanket requirement to incur the additional expense involved in retaining experts. And since technicians are common bedfellows of industry, one who would afford effective support to an environmental plaintiff may prove to be a rare commodity. There is more than a grain of truth in the

for the free and general use of the whole public . . . are given over . . . to very limited kinds of private development, there is a diminution in environmental quality, a restriction in the use of these public resources that can have a serious, adverse effect on the public. . . .

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

1970 Hearings, supra note 9, at 35 (testimony of Joseph L. Sax).

325. S. 1032, 92d Cong., 1st Sess. § 3(a) (1971).

326. In theory, export [sic] testimony ought to be available to both sides to support their cases; in practice, this simply does not work. Even if environmentalists can afford to hire experts (and they often cannot), experts cannot always be found. It is a rare electrical engineer who will agree to take the witness stand on behalf of opponents to a power plant or transmission line: he knows well that other utilities may thereafter hesitate to contract
statement that "all of the experts, even those who are in academic life, are either in the hire or expecting to be in the hire, of industry."\(^{327}\)

While this provision was included to eliminate crank and harassment suits and to aid courts in determining whether the plaintiff has stated a claim which merits relief,\(^{328}\) its necessity is questionable. There is no comparable provision in the Michigan law, and the much-feared deluge of frivolous filings has not ensued;\(^{329}\) it is at least possible that such a provision was deemed necessary to secure the bill's passage by the Congress. But there is little reason to retain the requirement, which would significantly hinder the prosecution of actions, since ample protection from frivolous suits is provided by Rule 11 of the Federal Rules of Civil Procedure (FRCP): "The signature of an attorney constitutes a certification by him that he has read the pleading; that to the best of his knowledge, information and belief there is a good ground to support it; and that it is not interposed for delay."\(^{330}\) FRCP Rule 23.1 requires an additional affidavit by the plaintiff as to the truth of his allegations.\(^{331}\) Accordingly, reliance upon these provisions coupled with the traditional means for disposing of suits lacking merit,\(^{332}\) suffices to curb such suits, and the interposition of another hurdle between the individual and the court is not necessary.

8. ** Provision is Made for Intervention into and Review of Administrative Procedures

Section 6 of the bill\(^{333}\) would increase citizen access to the administrative decision-making process by allowing intervention into and review of existing administrative and regulatory procedures by any person entitled to maintain an action under the bill. It also allows the court to entertain an action and to grant interim equitable relief where it finds ongoing procedures to be inadequate for the protection of rights recognized under section 2(a). These are, however, provisos to the

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with him for services in circumstances that may be wholly unrelated to the present controversy. Conscientious men do exist and someone may be found to testify, but it is not easy; cases have been lost and will continue to be lost for this reason. Without that interplay of expert testimony, the court is at a major disadvantage, and the decision is likely to suffer.

1970 Hearings, supra note 9, at 80 (statement of Frank M. Potter, Jr.).

327. *Id.* at 157 (statement of William T. Coleman, Jr.).

328. *Id.* at 20.


332. See part III, B, 1 infra.

first clause of section 6, which states that S. 1032 "shall be supple-
mentary to existing administrative and regulatory procedures . . . and
. . . the court may remand the parties to such procedures . . . ."\textsuperscript{334} This provision buttresses governmental regulatory efforts by allowing
the court to remand the parties to existing administrative proceedings,
where appropriate. Alternatively, the court could retain jurisdiction
over the case, deferring adjudication pending the outcome of the ad-
ministrative proceedings. Thus the court may utilize these devices to as-
sure that lawsuits authorized by the present legislation will not hinder
administrative efforts to protect the environment.

The first proviso of section 6 allowing interim equitable relief
pending the outcome of administrative hearings was inserted to "pro-
vide an individual protection from inadequate, unwise or unresponsive
administrative and regulatory procedures while they are developing
rather than requiring him to await [their] final outcome."\textsuperscript{335} Because
the ponderous administrative machine often remains lodged in the quag-
mire of bureaucratic red tape while pollution proceeds unchecked,\textsuperscript{336}

\textsuperscript{334} Id. (emphasis added).
\textsuperscript{335} 1970 Hearings, supra note 9, at 132:
For example, we had in mind . . . the Everglades air training strip. In that
case construction of the strip was begun before approval of the airport by
the FAA. The FAA was pondering the problem and in that sense there
was an ongoing administrative procedure.

We intend by this feature of the bill to permit a citizen to move not-
withstanding the fact that there is this ongoing regulatory procedure . . .
See id. at 133 for some spectacular broken-field running by the elusive Assistant
Attorney General Kashiwa as he evades Senator Hart's attack on the Everglades
Jetport case.

\textsuperscript{336} See Air Pollution Control Hits Red Tape, 4 ENVIRONMENTAL SCIENCE &
TECHNOLOGY 802 (1970).
It's air pollution crunch time! The three years of statutory authority em-
bodied in the 1967 Air Quality Act . . . are drawing to a close. . . . To
date, no implementation plan from a state has been either approved or dis-
approved by NAPCA [National Air Pollution Control Administration] . . .
[T]ortuous procedures in the '67 act have impeded state officials with ad-
vanced programs.

\textit{Id.} at 802.

Pennsylvania's official in charge of air pollution:] "Based on our experi-
cences, the regional approach is ineffective, inefficient, and should be drasti-
cally modified. The chaotic system produced a legislative nightmare of paper
shuffling, arbitrary self-serving bureaucratic requirements, and the use of un-
approved evaluation techniques . . . .

. . . What is . . . troublesome is that the confusion and delays are now
becoming apparent to the general public."

\textit{Id.} at 803.

Senator Philip A. Hart cites an article by Saul Friedman which appeared in the
Detroit Free Press as a striking portrayal of the agonizing sluggishness of governmental
efforts to protect the environment:

Mr. Friedman's concern is the daily dumping of 67,000 tons of taconite tail-
ings by Reserve Mining Company into Lake Superior—a lake the Audubon
Society has suggested may soon be more deserving of the name 'Lake Inferior.'
According to the article, the stuff has been discharged in increasing amounts
this temporary cessation of the allegedly harmful activity constitutes
an expedient supplement to regulatory procedures. Despite the conten-
tion of the Department of Justice that this relief is available presently,
one of the bill's authors insists that a court would ordinarily remand
the individual to the ongoing administrative procedure, without more.837

Administrative and regulatory bodies are often pedestrian, seldom
responsive to the public interest, and uniformly vulnerable to distrac-
tion by the sirens of industry.838 As Professor Sax has painstakingly
pointed out,839 the administrative decision-making process tends to be
of low visibility to the public, resulting in sparse public knowledge of,
and participation in, administrative proceedings. While recent Supreme
Court decisions such as Association of Data Processing Services Origi-
izations, Inc. v. Camp840 and Barlow v. Collins841 have broken new
ground in this area, they do not clearly allow intervention and review by
any citizen to protect his interest as a member of the public.842

It has been said that section 6 would redress the "curious reversal
of history"843 by which "the protectors [of the people] have become
the unwitting agents of the [vested interests in property, and large cor-
porate enterprises],"844 by allowing the individual to challenge govern-
mental agencies on equal footing.

since 1956, clouding the lake, increasing algae, killing fish food and new-
born salmon and trout.

Mr. Friedman cites numerous scientists who have criticized this activity
as unreasonable. In April, 1969, . . . the Interior Department released a
study by its regional coordinator for the area concluding that the taconite
was damaging the ecological balance of the lake . . . Several in EPA's
(Environmental Protection Agency's) Water Quality Office have since asserted
that the discharge is inexcusable in light of the permanent environmental dam-
age which may result. Finally, Mr. Friedman writes, the company's own
study recently confirmed that it is spoiling the lake.

Despite all this, the only Federal 'enforcement' action taken against Re-
serve has been an interminable, unproductive Enforcement Conference au-
thorized by the Federal Water Pollution Control Act. The Conference,
which convened in May of 1969, allowed Reserve a full 15 months to de-
velop a proposal to deal with the problem. When the proposal was finally
submitted in January of this year, a committee was created to advise the
Conference on its suitability. The committee has now rejected the report, and
the Conference is busily determining what should be its next move. Not
surprisingly, Murray Stein, the Chairman of the Conference, says in retrospect
it has been a cumbersome and ineffective device in ending the pollution of
the lake.

Statement of Sen. Philip A. Hart before the Subcomm. on Air and Water Pollution,
U.S. Senate Comm. on Public Works on S. 523 & S. 1014, Mar. 24, 1971, at 1-2, on
file with Ecology Law Quarterly.

337. 1970 Hearings, supra note 9, at 133.
338. See part I, A supra.
339. Sax, supra note 29, at 495.
342. See generally text accompanying notes 158-73 supra.
343. 1970 Hearings, supra note 9, at 112.
344. Id.
9. **On a Prima Facie Showing by the Plaintiff, the Burden of Establishing No Feasible and Prudent Alternative Shifts to the Defendant**

Section 4(a) of the bill provides that "when the plaintiff has made a prima facie showing" that defendant's activity has resulted in or reasonably may result in unreasonable pollution, "the defendant shall have the burden of establishing that there is no feasible and prudent alternative . . ." This requirement is not excessively harsh, since the defendant presumably considered carefully all possible alternatives prior to embarking on his course of action. This provision asks only that the defendant reveal to the court the process by which he arrived at the decision to undertake the activity in question.

Traditional common law burden of proof rules were formed in the crucible of a social policy which sought to nurture economic and industrial development regardless of the consequent despoilation of natural resources. Today's environmental consciousness is inconsistent with procedural rules which operate only to safeguard resource-consuming activity.

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346. 1970 Hearings, supra note 9, at 34.
347. Id.
348. [The] common-law preference reflected a broad policy favoring industrial expansion and economic growth at the expense of natural resource conservation.

Today, however, conditions are radically different. Yet the burden rule, the justifications for its existence largely dead and gone, lives on to govern the allocation of the obligation of persuasion in a large number of suits.

Krier, supra note 203, at 107-08. Exemplary of the pro-industrialization mentality prevalent prior to the advent of the current environmental consciousness are these words from Judge Musmanno:

> While smoke _per se_ is objectionable and adds nothing to the outer aesthetics of any community, it is not without its connotational beauty as it rises in clouds from smoke stacks of furnaces and ovens (and even gob fires) telling the world that the fires of prosperity are burning,—the fires that assure economic security to the workingman, as well as establish profitable returns on capital legitimately invested.


350. Krier, supra note 203, at 107-08. Professor Sax illustrates the effect of according administrative agencies a nearly conclusive presumption:

> Just recently a case in our own State of Michigan in the Federal district court was dismissed because the judge said that under the present law in an environmental matter he could only give relief if the plaintiff showed by clear and convincing evidence that the action of the Federal agency (which was the defendant there) was malicious, arbitrary, or capricious. We simply are not going to be able to make those kinds of showings. The purpose of environmental litigation is not to demonstrate to a judge that the administrator should be assigned to a lunatic asylum, but rather that he has made a mistake about an important environmental issue.
To compound this procedural advantage, Professor James E. Krier observes that the nature of resource-consumers’ activity is such that they “can continue their conduct until sued. In short, they will almost inevitably be defendants, and those whose uses preserve rather than deteriorate will ineluctably be plaintiffs.” This adds up to the rather astounding result that, despite clear national policy against needless resource consumption, the very objects of that policy are protected by judicial resolution of any doubt in their favor.

Professor Krier further demonstrates that burden of proof rules are inevitably biased against protection of the environment, since a consumptive use of resources will preempt non-consumptive uses, while the reverse is never true. “In short, the polluter’s use can stop the swimmer from using and enjoying a lake, but the swimmer’s use cannot stop the polluter from polluting the lake.” The logical contortion which accords the intruder a presumption of legality is but another haunting spirit of antiquity which this legislation would exercise.

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Plainly if the demand for environmental protection is to be made meaningful there must be some opportunity to inquire into agency action beyond the question whether the agency has acted ‘maliciously.’ . . . Yet in the absence of legislation the judge felt himself powerless to inquire into the reasonableness of the plan or to investigate the consistency of the plan with congressional concern for the maintenance of environmental quality.

1970 Hearings, supra note 9, at 44 (prepared statement of Joseph L. Sax).


352. Id.

And it is one of the simple facts of our present system that (for a host of reasons) plaintiffs most generally carry the major burden of providing most of the basic issues in a lawsuit. The result is striking: Even with a system of substantive rules against resource consumption, our present rules ensure that in cases of doubt about any facet of those rules, resource consumption will prevail.

Id.

353. This is the case for the following reasons. Essentially two classes of demands can be made on such resources as air, land, water, wildlife and so on: (1) demands which consume or deteriorate those resources (water pollution, the slaughter of wildlife, the harvesting of forests) (2) demands which do not consume or deteriorate them (swimming, birdwatching, hiking and camping). In a world without laws, those who wish to use resources for consumptive or deteriorating ends will always prevail over those who wish to use them for nonconsumptive or nondeteriorating ends. This is simply because consuming users, by exercising their demands, can foreclose non-consuming users from exercising theirs, while the contrary cannot hold true.

Id.

354. Id.
In addition to inequitable treatment in the courts, environmental plaintiffs suffer at the hands of the agencies. The House Committee on Government Operations has recently chastised the Corps of Engineers' standard practice of compelling the opponent of a permit to shoulder the ponderous burden of showing that substantial damage to the public interest would result from the permit's issuance:

The Corps has often routinely approved such applications unless the opponents of the permit clearly showed that substantial damage to the public interest will result. The committee believes that the Corps should place on the applicant the burden of proving that the filling, dredging, or other work is indisputably in accord with the public interest. Private endeavor to review agency decisions must be Herculean if it is to succeed.355

The sheer weight of the administrative record, the obscurity of those responsible for the decision, coupled with the citizen's limited means and administrative obstinacy present a frightening spectre. This would be dispelled by section 4(a).

Finally, compelling the environmentalist to shoulder the burden of

355. H. Rep. No. 917, 91st Cong., 2d Sess. 6 (1970). The Committee continued,

The Corps should be sure that the environment will not be substantially harmed; or that there is no feasible or prudent alternative to such work and that all possible measures will be taken to minimize the resulting harm.

Id.

[The Act] would ... effect a basic change in the rule that a ruling of administrative agencies must be upheld by courts if it has any rational basis unless there is some error of law.

This rule places a hard enough burden on the litigant in the ordinary case where there is a limited record of clearly identifiable papers and proceedings upon which the administrative decision was based, and only one or a small number of agency personnel investigated and determined the matter.

Without some error of law, it is an almost impossible burden upon the citizens' group litigating the factual issues when the project is vast. The record of administrative action literally fills rooms with papers of every kind and description. The number and identity of persons who worked on the matter are unclear, and the agency vigorously defends its own determination. To this should be added such problems as the limited means of the citizens' committee; the remarkable talent of most administrators and their biologists, engineers, and other professionals and artisans to mask the answer to the simplest of questions in gobbledygook and erase from the dictionaries the words 'yes' and 'no'.

1970 Hearings, supra note 9, at 121 (prepared statement of David Sive).

[The problem] is [that of] the control of most of our resources by administrative agencies, and the tremendous advantage in court which ... the agency itself [has] or [which] a company or developer or user of resources [which] an agency licensed or permitted [has].

The tremendous advantage which they have in the courts under the standard rule of administrative law is that if there is any basis for the administrative decision, unless there is an error of law, the administrative decisions must be upheld. Here we have I think a very curious reversal of history ... .

Id. at 111-12 (testimony of David Sive).
proof strikes a mortal blow to decisional validity: the adversary system operates on the theory that each side will achieve the fullest possible illumination of issues, but this is no longer a realistic assumption due to the unequal availability of financial and technical resources to the plaintiff (opponent) and defendant (applicant). To ask the defendant to justify his actions would achieve a fuller presentation and restore the parties to a more equitable balance.

10. Actions May be Brought Without Regard to the Amount in Controversy

After a recitation that defendant's activity must affect interstate commerce, section 3(a) provides that an action may be brought "without regard to the amount in controversy." Although 28 U.S.C. §1331 vests jurisdiction in federal courts only if the amount in controversy exceeds $10,000, "suits arising under the commerce laws may, by 28 U.S.C.A. §1337, be brought without regard to jurisdictional amount." Thus, while the amount in controversy requirement purportedly applies to all federal cases, a variety of statutes exempt nearly all areas of federal question jurisdiction, so that section 1331 essentially pertains only to diversity cases. These statutes generally do not exempt suits to challenge the validity of governmental action, however, leaving "an unfortunate gap in the statutory jurisdiction of our federal courts." Since S. 1032, in allowing review of administrative procedures regardless of the amount involved, is not in harmony with this pattern, the propriety of waiving the monetary requirement must be examined.

Although it is difficult to justify requirement of a jurisdictional

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356. The courts . . . lack an adequate information base upon which to make their decisions. The common law system is grounded upon the adversary system, the theory being that each side will present the most favorable case, and that the court will then resolve the dispute on the basis of the evidence before it. The environmental problems arising today are highly complicated—so different from the land disputes and tort actions of centuries ago that they hardly bear comparison. In theory, export [sic] testimony ought to be available to both sides to support their cases; in practice, this simply does not work. 1970 Hearings, supra note 9, at 80 (prepared statement of Frank M. Potter, Jr.).

357. S. 1032, 92d Cong., 1st Sess. § 3(a) (1971).

358. C. WRIGHT, supra note 312, at 109.

The courts have found in § 1337 of the code, and its predecessors, support for jurisdiction without an amount requirement in so many different kinds of suits that it seems fair to say that that section of the code grants jurisdiction whenever suit is under an act whose constitutional basis is the commerce clause.

Id.

359. Id. at 107-08.

amount in any federal question case, such a requirement would be particularly inappropriate in this instance for two reasons: First, environmental damage, no matter how slight, often combines with other factors to upset irreversibly delicate ecological balances. A simple ecosystem, such as an isolated body of water, should not be left unprotected simply because the result of an injunction against a polluter's activity would not cost him the equivalent of the requisite amount in controversy. Second, it may be difficult to ascribe monetary value to the harm done aesthetic values or the health or welfare of an individual or class which the defendant's activity has caused or threatens to cause. Although the judiciary is experienced in weighing evidence concerning valuation, the requirement of a minimum amount, by prohibiting actions critical to environmental quality which involve speculative or minor amounts, would defeat the purpose of this legislation. Therefore, the provision dispensing with such a requirement is necessary.

11. No Bond May be Required of the Plaintiff Except Under Certain Conditions

Section 4(e) forbids the court to order the plaintiff to post an indemnity bond for interlocutory relief wrongfully granted unless the defendant shows that the relief requested will cause him irreparable damage. Even in the latter circumstance, no security may be required if compliance would unreasonably hinder the plaintiff or prevent a full hearing on the issue.

By effectively limiting standing to those who can afford to post bond, a security-for-expenses requirement would undermine the purpose of the legislation. Statutes granting citizen standing to protect the

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361. C. Wright, supra note 312, at 110.

It is difficult to understand why there should ever be a monetary requirement in federal question cases. The requirement is of extremely limited application, and when it does apply the effect is to deny a federal forum in cases in which the amount involved is small but for which the federal courts have a special expertise and special interest. (... This is the position taken in ALI Study, § 1311(a). See the discussion of this point in the Commentary at pp. 172-176.)


363. See note 284 supra and accompanying text.


365. 1970 Hearings, supra note 9, at 36 (testimony of Joseph L. Sax):

[1] In cases ... where challenges are put to large projects, often involving enormous sums of money, to impose upon the plaintiffs as a regular matter the requirement of bond is in effect to deny them the right to sue, because the ordinary plaintiff is simply not going to be able to put up the money.

For that reason the bill says that bond ought not to be required as an
environment are an integral part of the broad strategy to encourage citizen involvement in the preservation of our natural resources. Since defendants in actions under this legislation will often be large corporations and public utilities with vast amounts of capital committed to the activity challenged, in many cases the requisite bond would be far beyond the means of most citizens, thereby precluding most citizen-initiated suits.

Moreover, since the relief usually sought in environmental cases is injunctive, and since the requisite bond for a temporary or preliminary injunction is likely to be prohibitively high, even if plaintiffs prevail the defendant's activity will have continued for the duration of the litigation, thus in many cases, largely defeating the purpose of the suit.

Furthermore, the rationale of security-for-expenses provisions—prevention of insubstantial suits—is served by requiring the plaintiff to make a prima facie showing and to produce affidavits of two qualified experts. The very costs of bringing a lawsuit—including retention of counsel and experts, and meeting filing fees and discovery costs—provide a barrier which necessitates careful threshold evaluation by the plaintiff of the suit's merit. Moreover, even at this prelim-

ordinary matter but leaves it open to the court where it feels it necessary and evidence has been adduced to support the necessity to obtain a bond.


367. Citizens opposed to a particular proposal or project are usually forced to seek injunctive relief from the courts; they may and often do find that this relief cannot be obtained without their posting a substantial bond, which is quite beyond their means. The results [sic] is that while they work their way through the courts, the opposition is busily 'doing its thing'—building or digging or chopping down—and by the time that the court is ready to decide, the essential question has become moot.

1970 Hearings, supra note 9, at 80 (prepared statement of Frank M. Potter, Jr.).

368. Judges could compensate for the lack of a bond by examining more closely plaintiff's motion:

[W]hen you move for a preliminary injunction, you must prove to the court several things . . . . First, you have to show irreparable harm. Furthermore, you have to show a probability of victory on the merits when you have your full trial; and you have to show that the balance of the equities is in your favor.

What this will mean, . . . is that the judges will make these findings a bit more seriously perhaps than they would if they knew they could fall back on bonds in case they made a mistake.

So, . . . the result will be that the judges, under this bill, will recognize that the citizen is not the type who can post meaningful bonds, will examine the questions of irreparable harm, probability of victory on the merits and balance of equities carefully, and make careful decisions.

Id. at 152 (testimony of James Moorman).


370. See part III, B, 2, (b) infra.

Perhaps even more effective than . . . the inherent powers of courts to deal
inary stage, the court is competent to assess whether plaintiff's case is meritorious and whether requirement of a bond would "unreasonably hinder plaintiff in the maintenance of his action . . . ." The court, upon a showing that a temporary or preliminary injunction will cause defendant irreparable harm, may deny plaintiff's request.

Section 4(e) would also mitigate the effect of Rule 65(c) of the Federal Rules of Civil Procedure which governs the issuance of temporary restraining orders and preliminary injunctions:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred . . . by any party who is found to have been wrongfully enjoined. . . .

This provision encourages requiring a bond of the plaintiff in every case instead of balancing the possible harm to the defendant with the desirability of allowing plaintiff a hearing on the merits. While the relief sought may inconvenience the defendant, he should not be allowed to avoid proving the reasonableness of his behavior, as required after a prima facie showing by plaintiff, simply because plaintiff happens to be impecunious. To the extent that citizen watchfulness is necessary, it is in the public interest to compensate for plaintiff's handicap: To fail to do so is to procedurally abet defendant's behavior, since a bond requirement protects him not only from wrongfully granted relief, but also from suit by any but the most well-financed plaintiffs.

12. Other Provisions

Section 3(a) includes a broad venue provision which allows the plaintiff to bring an action "in the district court of the United States for any judicial district in which the defendant resides, transacts busi-

with floods of environmental suits is the pure matter of expense. [Organizations supplying legal services to environmental causes], no matter how generous may be their funding by foundations or members, cannot possibly employ, across the entire country, more than two or three dozen lawyers on a full-time basis. Moreover, in the handling of causes which involve issues of fact of any consequence, they, as well as the privately employed attorneys who give large portions of their time to such public causes, are severely limited.

Address by David Sive, supra note 241. Even Assistant Attorney General Kashiwa recognizes the expense factor:

[I]n our experience it is very expens[ive] to litigate about pollution. Although they do have experts in the department, we have gone outside to get expert testimony and these experts are very, very expensive. For a private individual to foot this bill, it is going to be very, very expensive . . . .

1970 Hearings, supra note 9, at 137.

373. 1970 Hearings, supra note 9, at 36.
ness, or may be found . . . .” While in some cases this might reduce the burden of seeking out defendants, the propensity of various types of pollutants to produce harmful effects in areas which may be prohibitively distant from the district in which venue may be laid suggests the need for further liberalization. To allow suit where the harmful effect occurs, wording similar to the venue provision of the Securities Act might be utilized to allow suit in “the district in which any act constituting a source of pollution has occurred or may occur.”

A critical aspect of facilitating suits by individuals is reducing to a minimum the cost of bringing an action. In addition to easing the bond requirement, the bill addresses itself to this problem in section 4(d) by allowing the court to apportion “[c]osts . . . to the parties if the interests of justice require.” But since the major expense in actions under this legislation is likely to consist of experts’ and attorneys’ fees, which are generally not comprehended by “costs,” section 4(d) should be revised to read, “Costs of the litigation and reasonable attorney and expert fees may be apportioned to the parties if the interests of justice require.”

Finally, in view of the irreparable nature of most environmental damage, a provision should be added to allow actions under the bill to take precedence over other civil actions of lesser urgency, in order that the damage may be arrested as quickly as possible. Thus the bill might provide that “Any action brought pursuant to this Act shall take special precedence over all civil matters on the calendar of the court, except those matters to which equal precedence on the calendar is granted by law.”

B. Effect of Proposed Legislation upon Administrative and Judicial Institutions

Perhaps the most striking characteristic of the bill, and certainly a factor which merits careful consideration, is the breadth of the right of action which it authorizes. This right may be so expansive that its exercise will substantially interfere with the workings of administrative and judicial machinery in both the federal and state realms. Such a possibility necessitates the following specific considerations as to the effect of this legislation upon governmental institutions: (1) whether this legisl-
tion would allow inordinate judicial intrusion into the administrative bailiwick, (2) whether courts are competent to handle technical environmental issues, (3) whether the bill will generate a deluge of frivolous litigation, and (4) whether the right created would be utilized to circumvent existing state remedies.

First, with respect to possible judicial interference with the administrative function, the sponsors of S. 1032 have indicated that its basic theme is to allow an expanded opportunity for examination of the exercise of administrative discretion. The authorization to seek determination of the reasonableness of agency action raises the possibility that such review will not only interfere with the administrative function, but will lead to judicial exercise of non-judicial powers such as licensing and ratemaking. These powers properly reside within the administrative domain since the legislature has chosen to delegate them to agencies and has further deemed it necessary to allow agencies certain discretion in their exercise. The need for closer scrutiny of administrative implementation of legislative policy—to determine whether discretion is being exercised consistently with delegated authority—is said to arise from the interrelated factors which combine to prevent administrative agencies from according due consideration to the environmental impact of their decisions. In this regard, judicial review would be proper where the legislative authorization of the administrative action in question did not proceed from a policy which was formulated by the legislature in light of current conditions. In such cases, courts would ensure that the present legislative policy with respect to the environment was accorded due consideration and reflected in the agency decision. While judicial reversal of administrative action which is inconsistent with legislative policy is a proper objective,

[w]here the legislature has faced up to contemporary problems and

378. See 1970 Hearings, supra note 9, at 134 (statement of Senator Hart). [T]he principal purpose of this legislation is to make available a forum in which to assure that settled congressional policies are implemented and not obscured or quietly ignored by the actions of public or private enterprises. For example, the Federal Aid Highway Act declares a national policy that “special effort should be made to preserve . . . public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” It prohibits the use of such lands for highways programs unless, among other things, “there is no feasible and prudent alternative to the use of such land.” S. [1032] simply makes it possible to raise and examine the question whether such congressional mandates are being effectuated. Indeed it makes it possible to ask whether the highway building agencies are usurping or ignoring congressional policy.

Id. at 44-45 (prepared statement of Joseph L. Sax). See note 389 infra. 379. For a discussion of the extent to which S. 1032 broadens the scope of review of administrative actions, see text accompanying notes 288-96 supra.

380. These factors are discussed in part I, A supra.

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.\textsuperscript{382}

For the legislature has chosen to bestow certain powers upon the agency and has further clothed administrative officials with the discretion necessary to exercise those powers; and when a determination satisfies the above criteria, it is questionable whether judicial exercise of similar discretionary power is constitutionally permissible.\textsuperscript{383}

The Environmental Protection Act of 1971 would vest certain rights in individuals and would require that administrative determinations safeguard those rights in addition to reflecting consideration of environmental impact as prescribed by the National Environmental Policy Act.\textsuperscript{384}  S. 1032 states that “administrative and regulatory procedures” must be adequate for the protection of the right of “each person . . . to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States . . . .”\textsuperscript{385} and that each person is entitled to a remedy for any administrative and regulatory procedures which are inadequate “to protect the air, water, land, and public trust of the United States for unreasonable pollution, impairment, or destruction.”\textsuperscript{386} Therefore, if an existing regulatory procedure for pollution abatement, or an administrative determination, allows any of the above unreasonable infringements of the environment, and thus does not adequately safeguard the above rights of each person, the administrative action would not be reflective of current legislative policy and hence would be open to challenge by an action under this legislation. That is, the action would not have “fairly and substantially met the burdens imposed by the rules for the protection of the environment.”\textsuperscript{387} Thus the bill would not appear to allow improper judicial intrusion into matters of exclusive administrative competence, but would simply provide the opportunity to inquire whether administrative bodies have acted pursuant to their legislative mandates.

Apart from deviating from their prescribed duty, administrative or regulatory bodies simply may not be aware of certain environmental problems. Citizen suits would serve in these cases to illuminate problem areas in need of legislative or administrative regulation.\textsuperscript{388} They

\textsuperscript{382} Jaffe, Book Review, 84 \textsc{Harv. L. Rev.} 1562, 1568 (1971).

\textsuperscript{383} \textit{Id.} at 1567.


\textsuperscript{385} S. 1032, 92d Cong., 1st Sess. § 2(a) (1971).

\textsuperscript{386} \textit{Id.} §§ 2(b) & 6.

\textsuperscript{387} See Jaffe, supra note 382.

\textsuperscript{388} We are very far from knowing what all the problems are that will arise, let alone knowing in detailed fashion how to cope with them in terms of setting precise legislative standards. To open the door to some elucidating
would further serve to create administrative vigilance and diligence often missing due to lack of incentive which might be provided by more liberal reviewability.  

The fact that the Massachusetts and Wisconsin courts have developed a policy of judicial surveillance of administrative natural resource decisions indicates their recognition that administrative bodies are often not responsive to the public interest. That this judicial scrutiny has caused agency decisions to serve the public interest demonstrates that courts have a vital role to play in ensuring responsible management of natural resources.

Under present law, industries guilty of shirking "the responsibilities of each generation as trustee of the environment for succeeding generations"—especially oil companies and politically powerful chemical and automobile manufacturers—are immune from suit by litigation is itself to aid the legislative process as it attempts to grapple with these issues. It permits us to get some detailed case studies of problems, upon which to begin working out more general standards which can be imported into legislation. Thus the judicial and legislative processes, rather than being viewed as inconsistent or varying approaches, should be understood as fully compatible and mutually beneficial.

1970 Hearings, supra note 9, at 45 (prepared statement of Joseph L. Sax).

389. For a development of the thesis that "the role of the judiciary in confronting problems of environmental quality must be to assure that other decision-making bodies of government make the best possible decisions about environmental quality," see Comment, The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality, 17 U.C.L.A. L. REV. 1070 (1970).

Precisely at the point where responsibility for environmental decision-making is not adequately being assumed or fulfilled by other institutions of government, the courts can and must play their most vital role.

... The most prominent example of judicial resuscitation of coordinate decision-making institutions is the Reapportionment Cases. [See Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).] The fundamental impact of those cases has been to assure that institutions of government in a democratic society which are vested with responsibility for making decisions between competing values and demands of large groups of people be truly representative of those values and demands.

Id. at 1097. See also, Wright, The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?, 54 CORNELL L. REV. 1 (1968):

But whatever one may think of the Court's attempts to mitigate the effects of its institutional incapacities, what is clear about these incapacities is that, where relevant, they counsel deference to the legislature but do not require it. Where the choice is between the Court struggling alone with a social issue and the legislature dealing with it expertly, legislative action is to be preferred. All too often, however, the practical choice has been between the Court doing the job as best it can and no one doing it at all. Faced with these alternatives, the Court must assume the legislature's responsibility.

Id. at 5-6 (footnotes omitted).

390. See notes 319-22 supra and accompanying text.


392. As demonstrated in notes 44-48 supra and accompanying text, the interdependence of public administration and private industry often substantially impairs the effectiveness of administrative agencies as regulators of the private sector. The citizen suit would provide "an independent mechanism to check and balance agency ac-
the private citizen whose only interest is in a livable environment. Current judicial and administrative standing requirements also preclude the private citizen from subjecting utility companies, with their extensive right of eminent domain, to judicial scrutiny.\textsuperscript{393}

The very fact that environmental debauchery has proceeded apace under the noses of governmental regulatory bodies emphasizes the need for private enforcement of unenforced laws by members of the public, who are the real victims of pollution.\textsuperscript{394} Citizen watchfulness provides the most practical and thorough means of policing governmental actions.\textsuperscript{395}

Second, the bill’s allowance of judicial inquiry into the reasonableness and adequacy of administrative standards and procedures neces-
sitates consideration of whether courts are competent to evaluate the scientific and technical evidence which may be offered in such cases. Since agencies possess special knowledge and skills in the areas of their administrative responsibility, it is appropriate to inquire if courts are equipped to judge whether determinations by such agencies are environmentally sound.

In this regard, notwithstanding judicial familiarity with such intricate matters as malpractice, fraud and patent cases, opponents of the present legislation contend that the technicality of environmental decisions is beyond the expertise of the average judge. This argument not only ignores proven judicial competence but forgets that the court is not meant to possess sophistication in all areas of knowledge; rather, it is meant to serve as a tabula rasa upon which the parties inscribe their evidence, technical and otherwise. If technical expertise is necessary to the decision, the court is free to appoint a master to evaluate the evidence and contentions of the parties. The court may then balance the competing claims, not only on the basis of scientific fact, but also in light of legislative mandate and public policy.

Had bette rstand ready to prove it; if you have exaggerated, you will pay for it on cross-examination; if your perspective is limited, the court will be apprised of the fact through the adversary process. 

 ld.  at 108.

396. In fact, governmental defendants have used claims of judicial incompetence as smoke screens to prevent scrutiny of actions which do not comply with a particular legislative mandate. In Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970), Colorado citizens sued the U.S. Forest Service (Department of Agriculture), claiming that the Service was not adequately enforcing the Wilderness Act and the Multiple Use-Sustained Yield Act. The government lawyers informed Judge William E. Doyle, "'Judge Doyle, you can't decide matters of silvicultural judgment, you don't know anything about when trees ought to be harvested and about black beetle disease.'" The Judge responded, 'You are right, . . . I don't purport to substitute my judgment for yours. What I want to know is why you people are giving a contract to cut down trees in an area that is said to have wilderness qualities before you have . . . made a recommendation to the President and the Congress under the Wilderness Act. Why are you preempting the opportunity of the Congress and the President to decide whether or not they want to enlarge the wilderness system? That is what I want to know, and that is not a question of how many beetles are in a tree. That is a question of whether you people are enforcing the Wilderness Act that Congress passed and told you to enforce.'

1970 Hearings, supra note 9, at 33 (testimony of Joseph L. Sax).

397. [T]he real issue is not some esoteric matter of engineering or biology. It is, rather, the reasonableness of a determination to subordinate one interest to another. For example, [in Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970)] a central issue . . . was why the Forest Service seemed so insistent that the particular tract under dispute there be subjected to timber harvesting immediately, before the studies and recommendations on wilderness additions in that area were completed. Judge [William E.] Doyle said during the trial, 'Where is the compelling public interest in selling the timber? That's what I'd like to know.' A perfectly sensible question for a judge to ask, and one that was determinative in the case. Careful study of environmental litigation reveals how often it is precisely such questions which
Third, the creation of the right in every individual to sue to protect the environment raises the question of whether ensuing actions will inundate the already crowded courts. Each time citizens are empowered to assist governmental regulation, the cry is raised that this will open the floodgates to a deluge of frivolous litigation, harassment of defendants and overcrowding of the courts. While it is probable that more suits would result from enactment of this measure, the judiciary must remain free to accommodate new developments and to adapt to needed changes. Indeed, the time presently spent on threshold issues such as standing could more profitably be devoted to the merits of the case.

The courts themselves have recognized that relaxation of standing requirements does not automatically result in a multiplicity of suits

the courts are truly called upon to ask; and how competent they are to obtain comprehensible answers upon which decisions may be based.

1970 Hearings, supra note 9, at 46 (prepared statement of Joseph L. Sax).

Professor Sax summed up his view this way:

'The job of the court is to hear and evaluate the testimony of those who are technical experts, not to do their job for them. A judge is perfectly competent to hear evidence on damage, on alternative solutions, and on the asserted need for various kinds of facilities which are brought into challenge. A plaintiff in an environmental case, as in any other, who fails to define and to clarify the issues he wants decided within the ability of a judge to decide, or who fails to carry his burden of proof, will simply not prevail on his claim.'

Id. at 30.

398. See part II supra.
399. Chief Justice Warren E. Burger, speaking at the American Bar Association convention, August 10, 1970, observed as follows:

Meanwhile, not a week passes without speeches in Congress and elsewhere and editorials demanding new laws—to control pollution, for example, and new laws allowing class actions by consumers to protect the public from greedy and unscrupulous producers and sellers. No one can quarrel with the needs, nor can we forget that large numbers of people have been without the protection which only the lawyers and courts can give.

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


400. Professor Kenneth C. Davis, in criticizing the "zone of interests" test laid down by Data Processing and Barlow v. Collins [see note 159 supra and accompanying text] as an unwarranted restriction on judicial policy making, recognized that, '[t]he freedom of judges to go on determining that new interests emerging from new conditions or new understanding must be preserved. The whole development of the common law through the centuries has involved the creation of new 'common-law rights.' Obviously, that process should not be terminated. And if judges' power to create new 'rights' must be continued, their smaller power to do something less than that—to recognize that some new interests suffice for standing—must likewise be continued.

Davis, supra note 17, at 458.
401. 1970 Hearings, supra note 9, at 24.
402. "[T]he dockets ... have not increased appreciably as a result of the new cases in which standing would previously have been denied." Scanwell Laboratories v. Thomas, 424 F.2d 859, 872 (D.C. Cir. 1970). The Second Circuit took the same
and indeed, the Michigan law authorizing citizen's suits to protect the environment has not precipitated the inundation forecast by opponents.\textsuperscript{403}

Moreover, the bill embodies provisions designed to filter out crank and insubstantial suits. For instance, the allowance of only declaratory and injunctive relief, without a provision for damages, will minimize the incentive to take a long shot for a lucrative reward. Further, since plaintiffs will typically seek preliminary injunctive relief, the issues in cases brought by means of the standing legislation will be determined at an early stage, avoiding prolonged litigation constituting great expense to defendants. The sheer cost to the plaintiff of instituting a lawsuit will deter a substantial number of plaintiffs who have no economic interest in a contemplated action.\textsuperscript{404} Most environmental plaintiffs assert conservational interests which are noneconomic, so the task of the court will usually be to determine whether a particular plaintiff adequately represents the public or a particular class of individuals.\textsuperscript{405} Since courts currently do this in areas such as stockholders derivative suits and actions under Rule 23 of the Federal Rules of Civil Procedure, governing class actions, the courts should encounter no difficulty determining the issue in the environmental area.

In addition, an arm of the Executive Branch has concluded that legislating private citizen standing would not engender a multiplicity of suits. The Legal Advisory Committee to the Presidential Council on Environmental Quality recently resolved to support various important

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We see no justification for the Commission's fear that our determination [granting standing] will encourage 'literally thousands' to intervene and seek review in future proceedings. We rejected a similar contention in \textit{Associated Industries} . . . noting that 'no such horrendous possibilities' exist.


Professor Kenneth C. Davis likewise points out that experience of the federal courts themselves shows that floods of litigation do not result when the judicial doors are opened to all. A 1953 case [\textit{Reade v. Ewing}, 205 F.2d 630 (2d Cir. 1953).] held that a 'consumer'—anyone who eats—has standing to challenge action of the Food and Drug Administration; if consumers have brought many cases, they must all be unreported.

Davis, \textit{supra} note 17, at 471.

403. When Michigan adopted a sweeping environmental law last October that gave citizens as well as the state the right to file suits against corporate polluters and public officials allied with them, critics predicted chaos. They said courts would be flooded with an avalanche of citizen suits, and government agencies would become hopelessly paralyzed.

Now, six months later, the record shows only 10 suits have been filed. \textit{Michigan Ecology Law Brings No Flood of Pollution Suits}, San Francisco Sunday Examiner \& Chronicle, Apr. 25, 1971, § A, at 19, col. 1.

404. See note 370 \textit{supra}.

405. See text accompanying notes 120-29 & 238-42 \textit{supra}. 
features of S. 1032, on the recommendation of its Subcommittee on Private Litigation:

A fundamental consideration with respect to the basic purposes and features of the Bills is that of the concern or lack of concern over a possible multiplicity of suits. A majority of the members of the Committee do not believe that either of the Bills will bring about any undue multiplicity.\textsuperscript{406}

Fourth, the relatively easy access to courts afforded anyone seeking "protection . . . of the air, water, land, and public trust of the United States . . . from unreasonable pollution, impairment, or destruction,"\textsuperscript{407} necessitates consideration of whether this broad dispensation would encourage abuse of the right of action to avoid more restrictive actions and procedures available under specialized state law. It should be noted at the outset that the bill explicitly allows concurrent state court jurisdiction: " . . . nothing herein shall be construed to prevent or preempt State courts from exercising jurisdiction in [the action provided for under section 3(a)]."\textsuperscript{408} Hence, a state court could properly entertain such an action even though it was based entirely on the federal claim.\textsuperscript{409} Considerations as to how courts should dispose of actions under this legislation fall into two categories: 1) with respect to suits before a federal or state court, whether the action is properly brought under this legislation, and 2) with respect to suits before a federal court, decision by that forum as to whether it should abstain from exercising jurisdiction. These considerations will be examined in turn.

In determining whether the action is properly brought under this legislation, the court may obtain initial guidance from the purposes of

\textsuperscript{406} Address by David Sive, supra note 241. The statement continues, 'The principal factors underlying the view of the majority of the members of the Subcommittee are: 1) the continuous lack of means of most citizens and citizens' groups to bring environmental suits, with no reason to believe that conditions will be substantially different in the future from those in the past; and 2) the powers of the federal courts to deal with and summarily dispose of suits which have no merit or which are brought in bad faith or for ulterior purposes. In this connection, the Subcommittee respectfully suggests that careful study be made of the question of the applicability of Rule 23 of the Federal Rules of Civil Procedure to environmental suits of the type of most of those brought to date. If they are class actions, Rule 23 provides a ready vehicle for disposition of such suits brought in bad faith or by persons who are inadequate representatives of the class, a class which may be as large as the general public of a whole region.'

\textsuperscript{407} S. 1032, 92d Cong., 1st Sess. § 2(a) & (b) (1971).

\textsuperscript{408} Id. § 3(a).

\textsuperscript{409} Claflin v. Houseman, 93 U.S. 130 (1876). See C. Wright, supra note 312, at 171.
creating this right of action, which are twofold: First, the bill is intended to "fill the gap" between legislative statement of policy and administrative implementation of that policy by insuring that administrative discretion is exercised pursuant to the legislative mandate; and second, it is meant to facilitate the efforts of private individuals and groups to sue to vindicate the public interest in environmental quality. Thus in the first instance, if the case at bar involves review of an administrative determination in light of allegedly countervailing legislative policy, allowance of the suit would be proper, unless the plaintiff had a plain, speedy and efficient administrative remedy; in that case, the court should remand the parties to that remedy pursuant to section 6 of the bill. However, if the plaintiff sought to assert interests which were purely private and personal, and not primarily those of the public, such that the action would not further the second purpose of the federal law, the court should remand the plaintiff to the particular federal or state remedy suited to that cause of action. An example of this type of action is the private nuisance suit, where the plaintiff's personal and distinct injury would entitle him to relief under state law; in such an action, recourse to the broad federal right of action would be neither necessary—since the plaintiff's interests and the environment would receive adequate protection under existing state law—nor appropriate—since S. 1032 was not meant to engender a proliferation of private ac-

410. 1970 Hearings, supra note 9, at 45.

411. Senator George McGovern, a co-sponsor of S. 1032, emphasizes that the bill "is in the tradition of the 'private attorneys general' . . . ." concept which allows individuals to represent the public interest. Id. at 9.

412. With respect to the relations between federal and state courts, [a] litigant must normally exhaust state . . . 'administrative' remedies before challenging the state action in federal court. He need not normally exhaust state 'judicial' remedies. The rationale for this distinction is that until the administrative process is complete, it cannot be certain that the party will need judicial relief, but when the case becomes appropriate for judicial determination, he may choose whether he wishes to resort to a state or federal court for such relief. . . . A state administrative remedy need not be exhausted if the remedy is inadequate.


(b) A district court shall stay any action to enjoin, suspend, or restrain the operation of, or compliance with, any order of any administrative agency of a State, or a political subdivision thereof, or for a declaratory judgment with regard thereto, if: (1) the order affects rates chargeable by a public utility, or the conservation, production, or use of minerals, water, or other like natural resource of the State; and (2) the order has been made after reasonable notice and hearing and (3) a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) the power of the State to make such order has not been superseded by any Act of Congress or administrative regulation thereunder.

Id. § 1371.

413. See text accompanying notes 61-69 supra.
tions, but rather to facilitate assertion of the public interest. Finally, in an action brought in state court, if the environmental interests asserted under the federal law conflict with or challenge state policy favoring such factors as development, highway building or crop spraying, the state court would be obliged to allow the plaintiff to proceed under the federal law, "in light of the paramount concern of the United States for the protection of [environmental quality]."

Turning to the second category, concerning suits brought in federal court, one of the well established abstention doctrines allows the federal forum to "decline to consider a case which involves a specialized aspect of a complicated system of local law outside the normal competence of a federal court." In considering when dismissal would thus be appropriate "to avoid needless conflict with the administration by a state of its [domestic] affairs," the federal court will immediately note the apparent possibilities for discord between the traditionally recognized strong state interest in natural resources and the complex local regulatory systems governing their use and allocation, on the one hand, and the recently articulated national policy recognizing the "critical importance of restoring and maintaining environmental quality . . . ," on the other. However, this ostensible conflict would not appear sufficiently substantial to withstand close analysis. The applicable abstention doctrine received a definitive explication in Burford v. Sun Oil Co., in which Sun Oil requested a federal district court to

414. See note 378 supra.
415. The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confessed to it by the Constitution, adopted that [Federal Employer's Liability] act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.


417. For a general discussion of the various abstention doctrines, see C. Wright, supra note 312, at 196-208.
419. C. Wright, supra note 312, at 199.
421. 319 U.S. 315 (1943). Although in this case an oil company sought to challenge a state administrative order, the facts are apposite to the present analysis since under S. 1032 a plaintiff could, inter alia, seek to enjoin the orders of a state administrative agency.
enjoin the enforcement of a Texas Railroad Commission order granting Burford permission to drill four oil wells. The Texas legislature had established a complete system of judicial review under which "the Texas courts [were] working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry."422 The legislature had even concentrated all direct review of the Commissions' orders in the state district courts of one county to achieve uniformity. This permitted

the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which [was] useful in shaping the policy of regulation of the ever-changing demands in this field . . . .

. . . . As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide.423

Since this case "raised a number of problems of no general significance on which a federal court can only try to ascertain state law,"424 abstention was appropriate.425

Burford affords excellent guidance in ascertaining the circumstances under which a federal court should, in the exercise of its equitable discretion, defer to a state court's competence to interpret and apply domestic law and policy by dismissing the action. The federal court was asked to perform a function which state courts were especially well equipped and practiced at performing. Furthermore, the state legislature had carefully formulated a system of review by the state courts as an integral part of the regulatory framework of the state's oil industry. There was involved neither federal law nor federal policy; indeed, the subject matter was of intimate concern to the state as the life blood of its economy. Applying these principles to the problem at hand, the federal court must determine whether the alleged environmental infringements involved are the subject of intimate state concern, and if so, whether the national interest in environmental quality will be adequately protected under the state system. In making the latter determination, the court may examine the ends to be served by the state policy in question and retain jurisdiction if they are found to be antagonistic to

422. Id. at 326.
423. Id. at 327.
424. Id. at 331 (emphasis added).

The Burford rationale has been so broadened by subsequent cases, that now abstention is likely to be applied in any attempt to enjoin a state regulatory body in a federal court.

the preservation of environmental quality. To fulfill the objectives of S. 1032, state governments should be allowed “independence ... in carrying out their domestic policy” only insofar as effectuation of that policy is not contradictory to the national policy of “restoring and maintaining environmental quality. ...” Of course, if the question presented involved environmental infringements which were not peculiarly within the competence of a particular state, but were rather typical or common, requiring uniform national treatment, disposition at the federal level would be fitting.

CONCLUSION

This Comment has posed a simple argument: Private citizens must have standing to sue to vindicate the public interest in protection of the environment. The inadequacy of administrative response to citizen participation and the reigning confusion in the courts concerning the right to sue administrative agencies compels the conclusion that only the legislature can assure the right of an environmental litigant to have his day in court.

Today’s situation portends environmental crisis, and the public interest in the environment is largely represented by persons too isolated from citizen action and too close to the parties they are supposed to regulate. Government has attempted environmental protection through legislation, but its successes are hindered by political compromises, inadequate appropriations, and insufficient enforcement personnel.

The citizen wants to protect the environment, but the legal resources are lacking. The President and Congress say “that each person

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426. This process may be generally characterized as an evaluation by the federal court of the policy’s environmental impact, perhaps guided by criteria such as those enumerated in § 4332(2)(C) of the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (Supp. V, 1970).
428. See note 420 supra.
429. An advantage of this legislation is that it alleviates the problem of industry moving away from states which impose strict pollution control standards. Since the federal cause of action would be available in any state, the incentive for relocating would be diminished. See 1970 Hearings, supra note 9, at 17.
430. Senator McGovern describes past government efforts as follows: “At worst, we have created a flying machine of false hopes which casts the shadows of motion without the substance of movement.” 1970 Hearings, supra note 9, at 8.
431. E.g., in 1965 there were approximately 1,200 trained persons working in the field of air pollution, but 7,000 persons were needed. Existing training programs are thoroughly inadequate to the task of supplying the number of professionals required to meet demand. U.S. DEP’T OF HEW, PUBLIC HEALTH SERV., TODAY AND TOMORROW IN AIR POLLUTION 25 (1966).
has a responsibility to contribute to the preservation and enhancement of the environment,*432 but neither has yet provided a legal means for accomplishing this. Citizens, harmed yet unremedied, watch a deteriorating environment with teeming resentment.

The avenue of citizen participation is one rich with possibility. Allowing citizen standing will place the responsibility for our environment where it should be— with the people. S. 1032 accomplishes this. The importance of this legislation was forcefully expressed by Ramsey Clark:

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

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

These old ideas of standing to sue which came from the 18th and 19th centuries are inadequate to mass population.*433

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Stephen E. McCaffrey

433. 1970 Hearings, supra note 9, at 26 (testimony of Ramsey Clark).
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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Environmental Protection Act of 1971".

SEC. 2. (a) The Congress finds and declares that each person is entitled by right to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States and that each person has the responsibility to contribute to the protection and enhancement thereof.

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

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

SEC. 3. (a) Any person may maintain an action for declaratory or equitable relief in his own behalf or in behalf of a class of persons similarly situated, for the protection of the air, water, land, or public trust of the United States from unreasonable pollution, impairment, or destruction which results from or reasonably may result from any activity which affects interstate commerce, wherever such activity and such action for relief constitute a case or controversy. Such action may be maintained against any person engaged in such activity and may be brought, without regard to the amount in controversy, in the district court of the United States for any judicial district in which the defendant resides, transacts business or may be found: Provided, That nothing herein shall be construed to prevent or preempt State courts from exercising jurisdiction in such action. Any complaint in any such action
shall be supported by affidavits of not less than two technically qualified persons stating that to the best of their knowledge the activity which is the subject of the action damages or reasonably may damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction.

(b) For the purpose of this section, the term "person" means any individual or organization; or any department, agency, or instrumentality of the United States, a State or local government, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States.

SEC. 4. (a) When the plaintiff has made a prima facie showing that the activity of the defendant affecting interstate commerce has resulted in or reasonably may result in unreasonable pollution, impairment, or destruction of the air, water, land, or public trust of the United States the defendant shall have the burden of establishing that there is no feasible and prudent alternative and that the activity at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of its air, water, land, and public trust from unreasonable pollution, impairment, or destruction.

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

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

(d) Costs may be apportioned to the parties if the interests of justice require.

(e) No bond shall be required by the court of the plaintiff: Provided, That the court may, upon clear and convincing evidence offered by the defendant that the relief required will result in irreparable damage to the defendant, impose a requirement for security to cover the costs and damages as may be incurred by defendant when relief is wrongfully granted: Provided further, That such security shall not be required of plaintiff if the requirement thereof would unreasonably hinder plaintiff in the maintenance of his action or would tend unreasonably to prevent a full and fair hearing on the activities complained of.

SEC. 5. The court may grant declaratory relief, temporary and permanent equitable relief, or may impose conditions on the defendant which are required to protect the air, water, land, or public trust of the United States from pollution, impairment, or destruction.

SEC. 6. This Act shall be supplementary to existing administrative
and regulatory procedures provided by law and in any action main-
tained under the Act the court may remand the parties to such pro-
cedures: Provided, That nothing in this section shall be deemed to
prevent the granting of interim equitable relief where required and
so long as is necessary to protect the rights recognized herein: Prov-
vided further, That any person entitled to maintain an action under
this Act may intervene as a party in all such procedures: Provided
further, That nothing herein shall be deemed to prevent the mainten-
ance of an action, as provided in this Act, to protect the rights recognized
herein, where existing administrative and regulatory procedures are
found by the court to be inadequate for the protection of such rights:
Provided further, That at the initiation of any person entitled to maintain
an action under the Act, such procedures shall be reviewable in a court
of competent jurisdiction to the extent necessary to protect the rights
recognized herein: And provided further, That in any such judicial re-
view the court shall be bound by the provisions, standards, and pro-
cedures of sections 3, 4, and 5 of this Act, and may order that addi-
tional evidence be taken with respect to the environmental issues in-
volved.