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The rhetoric of recent years has driven home a new awareness: that the earth's ecology cannot endure endless insult from man's technology and industry. If heedless abuse continues, the habitability of the planet may be jeopardized, and in any event, the quality of life will decline. This realization raises an obvious question: what do we do to forestall these dangers, particularly in the United States?

The dawning of the environmental decade has come with few helpful suggestions being put forward about what can be done in the immediate future, though many fundamental changes have been suggested, ranging from changes in life style, to lowering the standard of living, to abolishing capitalism, to overthrowing the industrial revolution. Those who want to move now to try to cope pragmatically with the problem are left wondering where their energies can be most usefully employed.

Federal Focus for Reorganization

Despite a growing scepticism about the efficacy of federal action, I would like to argue that the federal government should be a prime target in any program of environmental action, though not an exclusive one. The federal government must be a focus for remedial action because so many environmental problems are national in scope, reflecting as they do the integrated nature of the nation's economy. Federal pressure, for instance, on detergent formulas can produce quick results, whereas no state can have a comparable effect, and consumer boycotts may take years to generate sufficient market pressure. Moreover, often only the federal government has the power, as a huge institution, to cope effectively with huge industries. In seeking remedies, it is vital to employ institutions which have the inherent power to prevail. In addition, many environmentally objectionable programs emanate from the federal government, programs such as the SST. Remedial efforts must be directed at the federal government to curb and redirect these programs. Finally, while it is no easy task to move the federal govern-

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ment, effort invested in this task may yield the greatest results in terms of time and energy expended. It is often just as hard, if not harder, to persuade state and local government and private industry to act as it is the federal government. For the effort expended, a success at the federal level can yield far greater results, inasmuch as national patterns, rather than limited, local ones, are affected. Also, the obstacles in the way of success at the federal level are usually fewer: the power of commercial opponents is more diluted at the national level; a nationally organized media tends to be sympathetic; and there are many forces at the federal level that welcome additions to their power.

Complaints about the inefficiency and obstinacy of the federal bureaucracy often overlook certain facts. The federal performance often leaves something to be desired because contradictory instructions are given the bureaucracy. For instance, Congress has asked the Corps of Engineers to dredge wetlands, the Soil Conservation Service to fill them, and the Bureau of Sport Fisheries to preserve them.[1] It is no wonder that progress seems slow. There is no agreement on the goal. Moreover, the bureaucracy often fails to move forcefully because different administrations keep shifting emphasis between moving cautiously and quickly, and Congress often fails to provide the funding to carry out instructions.[2] In short, the public is often not clear in its resolve and expectations when it establishes bureaucracies. Finally, many problems which are given to agencies to solve are inherently intractable. Quite often no consensus exists about what should be done, and much of the knowledge and expertise that is needed simply does not exist. Often an agency is simply directed to gather data, to make grants to have the problem studied, and to develop demonstration projects. This is particularly true in the environmental field, and is also a characteristic pattern in dealing with social problems. On the other hand, when clear goals are assigned, adequate funding is provided, and sufficient expertise is available, bureaucracies can be very efficient. We become acutely aware of this when we oppose the program of an agency, as with much of what the Corps of Engineers does. We

1. *Cf.* 16 U.S.C. §§ 590h, 715a to k-3 (1970); 33 U.S.C. §§ 540-41 (1970).

2. In fiscal year 1969, for instance, appropriations fell $974.2 million short of authorized levels for solid waste disposal ($15.3 million), air pollution control ($96.3 million), for land acquisition through the Land and Water Fund ($95.5 million), highway beautification ($26.1 million), sewage treatment plants ($468 million), and water and sewage grants ($225 million). *See* Citizens Advisory Committee on Environmental Quality, Report to the President and to the President's Council on Environmental Quality, Aug. 1969 (App. B).

tend then to complain about its excessive efficiency and call it "narrow and mission-oriented." The problems, thus, with the federal government often are not inherent, but reflect public confusion, indecision, and at times, impossibly high hopes.

In continuing to look to the federal government for solutions many environmentalists are fully aware of the pitfalls and the disappointments that are inevitable. They are not expecting miracles or instant solutions. They are, however, determined to make progress. They know some efforts will fail, while others will succeed in varying degrees. Just as reformers working on previous problems have been pragmatic in being willing to try various approaches, so also are many environmentalists. They have promoted a multitude of programs and agencies, which are as confusing in their own way as the alphabet of agencies of the 1930's.

Some feel this confusion suggests that environmentalists should be more concerned with questions of reorganization among agencies. The question is often asked: How should the federal government best be reorganized to meet the environmental crisis? What institutions are needed to maintain a tolerable balance between nature and man's works, and how should they be organized? To date, environmentalists have shown little interest in these concerns. For the past decade they have been more interested in developing basic programs and agencies than they have been in ideal arrangements of agencies. In a pragmatic manner, they have been trying to fashion effective new instruments from the materials at hand, which often are older agencies being given broader assignments, such as the Public Health Service, which initially was given the task of abating both air and water pollution.

Until recently, environmentalists have been somewhat sceptical of massive reorganization proposals for a number of reasons. For one thing, these proposals often were suspected of being offered as a panacea that they could not be. In promising to rearrange agencies, they offered the illusion of forceful action but often the benefits were hard to detect. Quite typically the problem has been more lack of authority and funding than the departmental location of an agency. A reshuffling of agencies might disrupt efficiency as much as it would improve it. Moreover, some of the talk about reorganization seemed to come from those who had a vested interest. One of the most outspoken advocates of a Department of Natural Resources made it clear that his motive was to get the Corps of Engineers and the Bureau of Reclamation to-

gether so they could build bigger water projects. He wanted to engraft the budget of the Corps onto that of the Bureau so that it could acquire the financing needed to build the North American Water and Power Alliance acqueduct from Canada.[3] Clearly, too, the Secretary of Interior has a vested interest in seeking to expand his department, but such expansions do not necessarily work in the best interests of the environment. Finally, environmentalists have not been too interested in the proposals of political scientists who have approached reorganization on a mechanistic basis, devoid of commitments to policy goals. Considerations of symmetry in structure and functionally related grouping have not seemed compelling enough to be worth pursuing for their own sake. In short, until recently there has been no real constituency for reorganization.

A number of factors are now causing environmentalists to take a closer look at questions of governmental organization. Foremost among these factors is the heightened sense of urgency with which the environmental movement has been imbued by the basic questions of survival that have surfaced in the last few years (this heightening is evident in the progression of phrases that have been the watchwords for the movement during the past decade: it began with emphasis on outdoor recreation, shifted in the mid-sixties to natural beauty, shifted again a few years later to environmental quality, and now focuses on survival and ecology). Concern with survival demands that all useful reforms should be pursued, including reorganization. Moreover, enough experience has been accumulated with various agencies and programs to suggest that reorganization may be more helpful than previously thought. First, more environmental agencies exist now than before, and problems of interrelationships are becoming more intricate. Second, as some agencies have grown, the problems of inappropriate departmental location have become more acute, as in the case of the Federal Water Quality Administration, which has been moved three times in five years, and is now in the Environmental Protection Agency. Third, as progress has been made in solving problems of authority and funding, environmentalists are now better able to turn their attention to questions of organization. Fourth, new agencies are coming into existence that cannot find logical and hospitable housing within any existing department. The Environmental Protection Agency

3. Senator Frank Moss of Utah has long been advocating reorganization for this purpose. *See* S. 27, 93d Cong., 1st Sess. (1973).

is an example; it was finally established as an independent agency. As more new agencies come along, it will become increasingly critical that problems of organizational structure be solved. The new agencies have to be put somewhere where they can thrive.

Recommendations

While there has been a modicum of interest in environmental restructuring throughout the 1960's, interest began to quicken in 1969. A number of major reorganizational bills were introduced in Congress at that time, the principal ones by Senator Henry Jackson, Senator Edmund Muskie, and Representative John Dingell. One close observor identified three main focal points of attention at that time: "(1) declaration of a national policy for the environment; (2) establishment of a high-level council for surveillance, review, and reporting on the state of the environment; (3) reorganization of the executive departments for more effective coordination and administration of environmental policy."[4] These concerns were supplemented by interest in improving the tools of Congressional action also, and in widening the opportunities for action in the courts.

In just a few years considerable progress has been made on this agenda. With the passage of the National Environmental Policy Act of 1969,[5] a comprehensive statement of environmental policy has been set forth for all federal activity. While this policy is not self-executing, it is important in setting a goal to which all other efforts can in theory relate. The question of campatibility of goals, however, is ducked; it remains to be seen, for instance, whether the Full Employment Act of 1946[6] can be compatible in practice with the National Environmental Policy Act of 1969. Under the National Environmental Policy Act, the goal is stated to be establishing a state of productive harmony between man and nature.[7] Among other things, this state includes achieving a balance between population numbers and resources, preserving diversity in the environment and key elements in our national heritage, and assuring that people's surroundings are safe, healthful, productive, and pleasing.[8] Moreover, the Act declares that it is the policy of the federal

4. L. Caldwell, Environment: A Challenge for Modern Society 217 (1970).
5. 42 U.S.C.A. § 4332 (Supp. 1973).
6. 15 U.S.C. §§ 1021-25 (1970).
7. 42 U.S.C.A. § 4331(a) (Supp. 1973).
8. *Id.* § 4331(b).

government to secure such an environment for our citizens, and that they in turn have a responsibility to contribute to its maintenance.[9] Further national goals are defined as the wide sharing of amenities, the avoidance of actions with undesirable and unintended consequences, recycling of depletable resources, and acceptance of the obligations of trusteeship for future generations.[10] While it is still too early to ascertain ultimately how much effect this policy will have on federal programs, agencies are having to take notice of it because of an action-forcing mechanism jointed to it. This mechanism[11] consists of a requirement that all agencies proposing legislation, or contemplating major action significantly affecting the quality of the human environment, must file an advance statement furnishing information on environmental impact. This statement is to include data on unavoidable adverse effects, alternatives, comparison of local impact, short-term and long-term effects, and irreversible or irretrievable commitments being made. A flood of lawsuits has been brought by citizen groups to force dilatory agencies to file these statements,[12] and many are now being criticized for their self-serving and conclusionary character.[13] Many of these statements attempt to comply with the statute by merely asserting that the adverse effects are minimal, that no reasonable alternatives exist, that no long-term drawbacks will develop, and that similarly no irreversible commitments are being made.

This action-forcing mechanism will fail to achieve its purpose unless federal agencies are required to comply fully and thoughtfully. While federal agencies are not required in their reports to show that adverse impacts will be minimal, they are required to comply with the general policy of the Act, to the extent permitted under their present statutory authorities. To the extent they cannot, they were required to notify the President no later than July 1, 1971.[14]

Oversight of this policy was vested by the National Environment Quality Act in the Council on Environmental Quality, a three-man Council housed in the Executive Office of the President.[15] This Coun-

9. *Id.* § 4331(c).
10. *Id.* §§ 4331(a)-(b).
11. *Id.* § 4332(c).
12. *See, e.g.*, Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972).
13. *See* 1 ENVIRONMENTAL L. DIGEST 52.0 (1970). A discussion of current problems in securing full compliance with § 102(2)(c) of the Act can be found in chapter 1 of the Third Annual Report of the Council on Environmental Quality, Aug. 1972.
14. 42 U.S.C.A. § 433 (Supp. 1973).
15. *Id.* § 4342.

cil was given the surveillance and review functions.[16] It assesses the state of the environment and the adequacy of federal programs.[17] It is also to foster ecological research.[18] Already it is evident that this Council does not have the powers necessary to perform its work. When legislation to establish this Council was being considered, environmentalists proposed that the Council be given authority to veto federal actions inconsistent with the policy of the Act. This was regarded as too large a step to be taken at once. It was said that the Council would have to prove itself first, and that in any event it would have the ear of the President, who instead could be persuaded to veto the action. Nevertheless, the lack of any rejection authority is turning the requirement of environmental impact reports into a hollow gesture. The Council must be given clear authority, at the very least, to reject inadequately prepared reports. It is now relying on persuasion alone to have poor reports redone, and it is not even willing to let the public see many of these.[19] The Council was given a clearer mandate to coordinate federal environmental programs by the Environmental Quality Improvement Act of 1970,[20] but it still does not have authority to keep agencies from violating the National Environmental Policy Act.[21] These violations are not an academic possibility. In the second session of the 91st Congress, the Corps of Engineers forwarded requests for authorization of 45 projects for which no environmental reports were prepared.[22] The Council was not able to stop the Corps.

Not only does the Council lack sufficient authority, it also has been denied the funding and staffing it is authorized. Ultimately, many environmentalists would like to see the Council become the traffic regulator of federal environmental activity. In the environmental field, it should perform functions analogous to those of the Office of Management and Budget. Moreover, some feel it should assume ombudsman functions. It could have a division which hears public complaints and tries to find the source of a problem and develop solutions through a

16. *Id.* § 4344.
17. *Id.*
18. *Id.*
19. In mid-November 1970, the Council took the position that only "final" reports were public documents and announced that it was reserving the right to keep reports that were being revised from being released. Environmentalists protested this action on the grounds that the Act makes no distinction between preliminary and final reports and that the public ought to be able to participate in the process of critiquing reports when they are first submitted.
20. 42 U.S.C.A. §§ 4371-74 (Supp. 1973).
21. *Id.* § 4372.
22. *See, e.g.*, Tupling, *Washington Report*, SIERRA CLUB BULL. 31 (Oct. 1970).

combination of persuasion and statutory power. In an Executive Order implementing the Policy Act,[23] the President gave the Council authority to hold public hearings. This power might be used to begin to develop functions of this sort.

In the summer of 1970, the President, following suggestions of his Advisory Council on Executive Organization (the Ash Council), acted under his reorganization powers to effect a massive reshuffling in the Executive Branch of agencies with environmental responsibilities. Two new super agencies were created: the Environmental Protection Agency,[24] which was made an independent agency, and the National Oceanic and Atmospheric Agency,[25] which was placed within the Department of Commerce. While there was some Congressional opposition to placing the National Ocean and Atmospheric Agency in the Commerce Department, no congressional veto was asserted, and both reorganization plans went into effect.[26]

The National Environmental Protection Agency, a comprehensive pollution control agency, is charged with identifying harmful pollutants, setting allowable exposures and devising programs of prevention and abatement.[27] Thus, its activities include research, monitoring, standard-setting, and enforcement. It drew together pollution control activities from many departments: water pollution control from the Department of the Interior, air pollution control from Health, Education, and Welfare, and radiological control from the Atomic Energy Commission and the Federal Radiation Council.

In contrast to the Council on Environmental Quality, which is an oversight agency, the Environmental Protection Agency is an operating agency. It is to actually perform the work of combatting pollution.

While most environmentalists applauded the creation of the Environmental Protection Agency, it is too early to assess its success. Some of the Environmental Protection Agency's arms have only recently received the operating authority they need. It took action by the 91st and 92d Congresses to complete action on a package of legislation to overhaul basic water and air pollution statutes to give both its air and water pollution control agencies authority to set federal standards on

23. 3 C.F.R. 903 (Comp. 1966-1970).
24. *Id.* at 1072.
25. *Id.* at 1076.
26. *See* Council on Environmental Quality, Environmental Quality: The First Annual Report of the Council on Environmental Quality, Aug. 1970 (App. H, I & J).
27. 3 C.F.R. 1072 (Comp. 1966-1970).

intrastate as well as interstate activities, and to set emission and effluent standards, with stricter enforcement.[28] Also, basic legislation to control noise pollution has just been enacted.[29] Moreover, no real programs yet exist to deal with pollution caused by heavy metals and other toxic substances, though legislation in this subject will undoubtedly be before the 93d Congress.[30] Finally, it remains to be seen whether the Environmental Protection Agency will be successful in coordinating its constituent agencies. For instance, the Environmental Protection Agency must assure that an industrial plant that is prevented from passing its effluents into the air does not instead put them in nearby waters.[31] However, establishment of the Environmental Protection Agency does put the agencies with related purposes in closer proximity to each other, and the top leadership of the agency will have only one purpose—pollution control—and will not be diverted by other programs.

While establishment of the National Oceanic and Atmospheric Agency was regarded as a logical step by environmentalists, many objected to it being placed in the Commerce Department. The ostensible reason for housing it there was that its largest component agency already was in Commerce, the Environmental Services Administration, which includes the Weather Bureau and the Coast and Geodetic Survey among its better known bureaus. Other agencies which have gone into the National Oceanic and Atmospheric Agency include the Bureau of Commercial Fisheries from Interior, parts of Interior's Bureau of Sport Fisheries (marine sport fish program), the marine minerals program of the Bureau of Mines, and various research bodies in the Department of the Navy and Army. For the most part, the National Oceanic and Atmospheric Agency's functions are research and data collection.[32] Environmentalists believe the real purpose of this is to promote commerce, accelerate offshore mineral production, and exploitation of fishery stocks. While the President has directed[33] that the National Oceanic and Atmospheric Agency maintain close liaison with the Environmental Protection Agency and the Council on Environmental Quality, environmentalists fear that ecological constraints will be largely absent from

28. 33 U.S.C. § 1151 (1970); 42 U.S.C. §§ 1857-58 (1970); 49 U.S.C. §§ 1421, 1430 (1970).
29. 49 U.S.C. § 1301 (1970).
30. *See* S. 1487, 92d Cong., 2d Sess. (1972); H.R. 5267, 92d Cong., 2d Sess. (1972); H.R. 5390, 92d Cong., 2d Sess. (1972).
31. 3 C.F.R. 1072 (Comp. 1966-1970).
32. *Id.* at 1076.
33. Address by Richard M. Nixon, Joint Session of Congress, Feb. 15, 1973.

the National Oceanic and Atmospheric Agency's outlook. They feel prime attention should be given to conserving the ocean's productivity and quality, rather than to promoting its development. The present placement of the National Oceanic and Atmospheric Agency, thus, cannot be regarded as a final solution.

Remaining Action

In light of the President's major re-organizational actions in 1970, it is now logical to ask: what remains to be done? Actually, a great deal still remains to be accomplished, though major steps have been taken. In broad outline, the following probably constitutes an agenda for further reform in the executive branch and related areas: (1) environmentally irresponsible agencies need to be controlled; (2) regulatory commissions need to be reconstituted; (3) more new control agencies need to be created; and (4) a new super-department probably should be established.

In bringing new agencies into existence, one does worry about a top-heavy bureaucracy. Less new bureaucracy might be needed if some of the older agencies were disbanded, or had their programs curtailed. This is particularly true with respect to agencies such as the Corps of Engineers, the Bureau of Reclamation, the Bureau of Public Roads, the Federal Aviation Administration, and others whose programs produce the most traumatic impacts on America's ecosystems. Some of these agencies should just have their appropriations trimmed back, while others should have major programs abolished, such as the channelization program of the Corps of Engineers and the Soil Conservation Service.[34] Perhaps the Corps could be usefully redirected to build sewage treatment plants, and the Bureau of Public Roads could be assigned the task of constructing rapid transit systems. In any event, care should be exercised in trying to reassign these agencies to other departments. This should only be done in such a manner that a new mission is given the agency. Otherwise, the reassignment may merely create the illusion of reform without any real change in statutory direction.

One of the saddest results of reform efforts that began almost a century ago is that regulatory commissions have failed largely to protect

34. *See* Report of the National Water Commission, Nov. 1972 (recommends curtailments).

the public interest. Whether by happenstance or design, these commissions have tended, on the whole, to be lethargic at best, and at worst to be instruments of those very interests the commissions are supposed to regulate. The Federal Power Commission, the Federal Trade Commission, and the Atomic Energy Commission all exhibit these symptoms, as Ralph Nader's investigations[35] have revealed. Not only are the commissions afflicted with a fatal sympathy for promoting the business of their charges, but the judicial stance they have adopted has caused them to avoid taking affirmative and aggressive action to protect the public interest. Rather than seeking to be the advocate of the public, they wait for the public to show up to plead its case. If these commissions are to be reformed, some way must be found to make it difficult for commercial interests to capture control of them. One way may be to expand the size of the commissions and to disperse the power to appoint their members among so many elements in society that the commercial interests involved cannot possibly capture all these elments. One of the great innovations of the new approach to conservation embodied in the San Francisco Bay Conservation and Development Commission was the dispersal of the appointing power: some of the seats are appointed by federal agencies, some come from state agencies; some are appointed by the Legislature; some by the Governor; and some by the affected cities and counties. This approach might be tried at the federal level.

The creation of the National Environmental Protection Agency has raised a basic question about environmental responsibility in this country. If we are to achieve the goals set forth in the Act, all elements in society will have to conform to acceptable modes of conduct. Yet, the Act only sets standards of conduct, and weak ones at that, for federal agencies. Why should these same standards not be applicable to the states and to all private parties? The environment can be equally damaged by a facility built by the federal government, state government, or private industry. Ultimately, it will be necessary that all activity having a significant impact on the environment be regulated. Legislation should be enacted to make the National Environmental Policy Act applicable to all industries that send products into interstate commerce or pollutants across state lines. A new regulatory agency should be

35. *See, e.g.*, R. FELLMETH, NADER REPORT ON THE FEDERAL TRADE COMMISSION (1971); J. TURNER, THE CHEMICAL FEAST: THE RALPH NADER STUDY GROUP REPORT ON FOOD PROTECTION AND THE FOOD AND DRUG ADMINISTRATION (1970).

established to license plants, products, and advertising to assure that they are environmentally safe. To get a license, a firm should have to show that the place it wants to put its factory is suitable—that no rare or indigenous species will be destroyed, for example; that its products will not have side effects, nor release ubiquitous substances such as polychlorinated biphenals into the atmosphere. Presently, utility plants are licensed by many states. Why shouldn't chemical plants also be licensed, to cite just one example? Presently, foodstuffs and drugs are tested for safety. Why should other products not also have to pass standards of environmental safety?

If such a new agency is brought into being to regulate industrial operations, one immediately faces the question of where it should be put. Certainly, it should not be put in the Commerce Department, as its purposes are inimical to those of Commerce. Clearly, it is related in general purpose to the Environmental Protection Agency, yet its functions go beyond pollution prevention. It would be concerned with questions of siting, land use, and consumer safety as well. In addition, a number of proposals have been made to establish an agency to prepare and coordinate energy planning in the United States. Inasmuch as energy planning must be keyed to environmental constraints, such as pollution controls, land planning, and conservation of scarce resources, this agency would appear to be linked with the others.[36] This same problem will arise if other new environmental agencies, which are under discussion, also are created. Senator Henry Jackson is advocating a bill to establish a national land use policy.[37] It would set federal standards in this field and require states to prepare statewide land use plans. The plans would have to designate areas to be reserved as open space and hopefully would identify areas of fragile ecology. A new federal agency would be needed to oversee the adequacy of these plans. Senator Jackson has proposed establishment of an office of Land Use Policy Administration in the Department of the Interior as a new agency that would take on this work. Similarly, Senator Philip Hart is proposing legislation[38] to provide greater federal control over the generation of electrical power and the location of plants and transmission lines. Under his bill, a new agency would be created to certify that state plans for siting power plants are in conformance with federal

36. *See* S. 3802, 92d Cong., 2d Sess. (1972). *See also* S. 70, 93d Cong., 1st Sess (1973).
37. *See* S. REP. No. 92-809, 92d Cong., 2d Sess. (1972). *See also* S. 3600, 92d Cong., 2d Sess. (1972).
38. S. 363, 92d Cong., 2d Sess. (1972).

standards. It is not clear where this new agency would be housed, though the Nixon administration has proposed that it be in the Interior Department. A whole division for energy and mineral resources has been proposed there under the Ash Commission's reorganization scheme.[39]

The best answer to the question of where these new agencies should be housed would appear to be establishment of a new Department of Environmental Affairs. In the past, many proposals have been advanced for a Department of Conservation, a Department of Natural Resources, a Department of Environment and Population, and the like.[40] These proposals have all met with an apathetic response because they did not respond to any clear need. Most of these involved relabeling the Department of the Interior and giving it additional agencies. Basically, the Interior Department is designed to house agencies managing federal lands and promoting development of natural resources. No important function is served by changing its name, though some agencies might be logically relocated there, such as the Forest Service and the Soil Conservation Service from the Department of Agriculture, and the Corps of Engineers.[41] However, enough problems arise out of these shifts to make it questionable as to whether there is any net environmental gain. In any event, the Interior Department's scope and traditions are clearly too limited to make it a logical base for broader environmental activity.

A Department of Environmental Affairs could be built around the Environmental Protection Agency. In addition to the Environmental Protection Agency, it could also include the National Oceanic and Atmospheric Agency, and the four new agencies I have just discussed: those dealing with land planning, power plant siting, energy planning, and environmental control of industrial operations. The latter agency might also be put in charge of recycling programs. In addition to these, some of the population control functions of the Department of Health, Education, and Welfare, which Congress extended in the 91st Congress, might be better located in the new Department.[42] While research and

39. *See* Second Annual Report of the Council on Environmental Quality 7, Aug. 1971.

40. For a discussion of the case for such a department see Moss, *Wilderness and the Proposed Federal Department of Natural Resources*, in WILDERNESS AND THE QUALITY OF LIFE, 170 (M. McCloskey & J Gilligan, eds. 1969).

41. It now appears the President may try to establish such a department through executive action under the Executive Reorganization Act. *See* Washington Star and Daily News, Dec. 15, 1972 at A-14, col. 1.

42. Act of March 16, 1970, Pub. L. No. 91-213, §§ 2-9, 84 Stat. 67.

instruction on family planning might stay in the Department of Health, Education, and Welfare, research on population levels and general education on the relationship of population to environment might be better housed with other environmental programs.

In addition to the agencies just mentioned, another new agency might be established to aid all of those in the department. This would be a branch of field legal services, similar to the Rural Legal Assistance effort in the poverty program. This branch could provide lawyers at public expense who would act as public defenders to make sure environmental concerns are not slighted by public and private interest alike.

Creation of a Department of Environmental Affairs would serve a number of real needs. It would encourage the formation of needed new agencies by offering a logical place to house them. It would provide an impetus for moving the National Oceanic and Atmospheric Agency out of the Commerce Department, where it is likely to be given undesirable direction. It would provide an improved mechanism for coordinating environmental programs in an hospitable atmosphere. And it would provide a strengthened and unified influence for sound environmental policy in the federal government.

Congressional Reorganization

If many environmental programs are unified in one department, this would argue strongly for also restructuring the manner in which Congress oversees these programs. Presently, environmental legislation is handled by a plethora of committees: Interior, Commerce, Public Works, Government Operations, and Labor and Welfare in the Senate; Public Works, Interior, Merchant and Marine Fisheries, Interstate and Foreign Commerce, Government Operations, and Science and Astronautics in the House. The Joint Committee on Atomic Energy is also involved, and of course the Appropriations Committees in both houses fund all operating programs. The picture is further complicated by a variety of subcommittees.[43] Legislation[44] has been passed twice but never reported from conferences to establish a Joint Congressional Committee on Environment and Technology to bring key members

43. *See* Muskie, *Environmental Jurisdiction in the Congress and the Executive*, 1 Environment L. Rev. 141, 146 (1970). *See also* Congress and the Environment 229-33 (R. Cooley & G. Wandesforde-Smith, eds. 1970).

44. S.J. Res. 17, 92d Cong., 1st Sess. (1971); H.R.J. Res. 3, 92d Cong., 1st Sess. (1971); H.J.R. Res. 1117, 91st Cong., 2d Sess. (1970).

of both houses together to oversee this burgeoning field of concern. While this committee will afford a better look at the whole picture, it cannot initiate legislation. This will remain the prerogative of the standing subject committees. It seems increasingly doubtful that these subject committees can continue to provide the kind of leadership and support that strong environmental programs will need. In each instance, the committee's main work is in other areas, with the possible exception of the Interior Committees. Environmental legislation should not be the step-child of all of Congress's committees. As environmental programs in the executive branch become increasingly complex and interrelated, Congress will find itself under growing pressure to establish major standing committees on the environment. Such committees would provide a parallel structure to the Department of Environmental Affairs that I have suggested and could oversee all programs connected with it.

Improved Redress in the Courts

Even if all the restructuring I have just described should take place, environmental problems are not likely to be completely solved. Some agencies will fail to perform as directed, and some polluters will escape governmental detection. A strong role remains for private action, and particularly private action in the courts. In the field of public law, the standing of private groups to act as private attorneys general needs to be clearly affirmed. While this novel doctrine—which permits private citizens to seek judicial help in holding agencies to standards of lawful conduct—has been growing in recent years, it is under a cloud of sorts as a result of a recent holding of the Supreme Court in *Sierra Club v. Morton*.[45] While the Supreme Court did make it clear that non-pecuniary interests provide a sufficient basis for standing in litigation, it continued the requirement that litigants in fact suffer a direct injury. Thus, it turned away from adopting a full doctrine of private attorneys general that would have set forth a clear basis for citizen access to the courts.[46] For only with such access can citizens hold agencies to the intent of the statutes that they can persuade Congress to pass. Legislation, moreover, is pending to give citizens a new cause of action against polluters. The Hart-McGovern Bill[47] would allow

45. 405 U.S. 727 (1972).
46. *Id.*
47. S. 1032, 92d Cong., 2d Sess. (1972).

citizens to file actions against polluters without having to show personal injury, and they could obtain injunctive relief. Citizens' right to an environment free of unreasonable impairment would be affirmed, and they would have clear standing to sue in a representative capacity in a new type of class action. Similar legislation has already been enacted in the state of Michigan.[48]

Finally, many believe the kinds of goals embodied in the National Environmental Policy Agency and the Hart-McGovern Bill should be clearly established as basic rights. They are calling for amendment of the Constitution to provide a Bill of Environmental Rights that will give birth to a new body of protective case law. Without such a new Bill of Rights, they point to the following paradox:

> Our old freedoms are being eroded without due process. Without any court order, any finding of fact, or any weighing of values, our health, our security, our freedom, and our privacy are being taken. These unauthorized takings of singleminded technologists are unilateral, arbitrary, and private usurpations. If society should in some instance decide that any taking is warranted, that decision should be made by open, fair, and public processes.
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> And society should also draw lines around the nucleus of environmental rights. Certain rights should be invulnerable—inalienable. Just as nature's law of limits fixes the tolerances needed for life, our laws also should set environmental limits beyond which society cannot intrude, no matter what the excuse. While it may take time for the courts to find and fix those limits, clearly there must come a point where mass institutions are to be restrained from poisoning people any further with effluents, additives, insecticides, and smog.
>
> We may be able to discover the seeds of the new rights we need within the meaning of our old Bill of Rights. But the important thing is that they be set forth and established now: the right to be free from uninvited assault by noxious and annoying substances; the right to be undisturbed by uninvited sounds; the right to be unregimented and uncrowded; the right to have nature's presence accessible and to have its most vivid and vital expressions undefiled; the right to have representative biological communities survive and to have the best soils conserved; the right to live as part of a healthy ecosystem.
>
> In short, we need a Bill of Environmental Rights that will make continued life possible.[49]

48. *See* MICH. STAT. ANN. § 14.528 (202) (1971).

49. McCloskey, *A Bill of Environmental Rights*, in NO DEPOSIT NO RETURN 269 (H. Johnson, ed. 1970).

Such a Bill of Rights could be an inspiration for all our environmental institutions and would assure that the high purpose that brought them into existence could not be neglected with impunity. Our citizens would know their rights and would demand that they be guaranteed.