

# Enforcing Environmental Policy the Environmental Ombudsman

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## ENFORCING ENVIRONMENTAL POLICY: THE ENVIRONMENTAL OMBUDSMAN

Praised by conservation lawyers as a measure that "will broaden significantly the scope of judicial review in environmental cases,"<sup>1</sup> and even as an "Environmental Bill of Rights,"<sup>2</sup> the National Environmental Policy Act of 1969<sup>3</sup> (NEPA) is merely a preliminary step in developing an effective national program of environmental control.<sup>4</sup> A complementary step was the creation in 1970 of the Environmental Protection Agency<sup>5</sup> (EPA) to provide machinery for coordinating the attack on environmental degradation. There are, however, two critical problems. No provision is made for the resolution of conflicts between the Environmental Protection Agency and other agencies having licensing or permit-granting authority over projects with environmental impact.<sup>6</sup> In addition, citizens wishing to challenge an agency determination on the basis of its adverse environmental impact face traditional limitations on the scope of judicial review of agency decisions.<sup>7</sup>

Creation of an Office of Environmental Ombudsman would, to a substantial extent, eliminate these problems. It would provide the citizen with an effective means of challenging the complex bureaucracy of environmental decision-making, and would assure consideration of environmental quality by those agencies outside the scope of EPA's operational authority.

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<sup>1</sup> Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 649 (1970).

<sup>2</sup> Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

<sup>3</sup> 42 U.S.C. §§ 4321-47 (Supp. V, 1970).

<sup>4</sup> Other steps toward that goal have been taken by the President and Congress. Environmental Education Act, 20 U.S.C.A. §§ 1531-36 (Supp. 1971); Water Quality Improvement Act of 1970, 33 U.S.C.A. §§ 1151-75 (1970); Resource Recovery Act of 1970, *id.* §§ 3251-59; Environmental Quality Improvement Act of 1970, *id.* §§ 4371-74; Clean Air Amendments of 1970, Pub. L. No. 91-604 (Dec. 31, 1970); Exec. Order No. 11574, 35 Fed. Reg. 19627 (1970) (administration of the Refuse Act permit program, 33 U.S.C. §§ 401-15 (1964)); Exec. Order No. 11523, 35 Fed. Reg. 5993 (1970) (establishment of the National Industrial Pollution Control Council); Exec. Order No. 11514, *id.* at 4247 (responsibilities of federal agencies and the Council on Environmental Quality); Exec. Order No. 11507, *id.* at 2573 (prevention, control, and abatement of air and water pollution at federal facilities).

<sup>5</sup> Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

<sup>6</sup> Text accompanying notes 29-30 *infra*.

<sup>7</sup> Text accompanying notes 41-46 *infra*.

## I

## THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

A. *The Creation of a National Environmental Policy*

Concern for the decline in quality of the environment<sup>8</sup> and the inability of the present governmental structure to deal with the growing crisis in environmental control<sup>9</sup> led Congress to extensive investigations of the possibility of a national policy for environmental management.<sup>10</sup> The result was the enactment of the National Environmental Policy Act of 1969.<sup>11</sup>

The stated purpose of the Act is to encourage a balancing between the use and preservation of natural resources.<sup>12</sup> The Act is designed to improve and coordinate existing "plans, functions, programs and resources."<sup>13</sup> Moreover, there is a specific direction by Congress that existing laws be interpreted in accordance with the Act's stated policy,<sup>14</sup> and that agencies file an environmental impact statement on "proposals for legislation and other major Federal actions significantly affecting the quality of the . . . environment."<sup>15</sup> The final sections of the Act

<sup>8</sup> For a discussion of the need for congressional action to save the environment by the author of the National Environmental Policy Act, see Jackson, *Environmental Policy and the Congress*, 28 PUB. AD. REV. 303 (1968). Congress has responded to this need with the Water Quality Improvement Act of 1970, 33 U.S.C.A. §§ 1151-75 (1970), and the Clean Air Amendments of 1970, Pub. L. No. 91-604 (Dec. 31, 1970).

<sup>9</sup> In question is the capacity of an eighteenth century constitutional arrangement of widely diffused and shared powers and a nineteenth century system of political pluralism to deal effectively with twentieth century problems of technological, social, and economic interdependencies . . . .

Bailey, *Managing the Federal Government*, in AGENDA FOR THE NATION 301 (K. Gordon ed. 1968).

<sup>10</sup> See, e.g., SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 90TH CONG., 2d SESS., A NATIONAL POLICY FOR THE ENVIRONMENT (Comm. Print 1968) [hereinafter cited as NATIONAL POLICY REPORT].

<sup>11</sup> The Act was based primarily on S. 1075, 91st Cong., 1st Sess. (1969), introduced by Senator Jackson. The changes made in S. 1075 prior to passage by the Senate are set forth in S. REP. NO. 296, 91st Cong., 1st Sess. (1969). The final bill was reported out of conference in H.R. REP. NO. 765, 91st Cong., 1st Sess. (1969).

<sup>12</sup> The Act's broad declaration of purpose is in keeping with its status as a national policy statement:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

<sup>13</sup> 42 U.S.C. § 4321 (Supp. V, 1970).

<sup>14</sup> *Id.* § 4331.

<sup>15</sup> *Id.* § 4332.

<sup>16</sup> *Id.* § 4332(2)(C). For a comprehensive examination of Title I of NEPA see Peterson,

establish a Council on Environmental Quality to evaluate such impact statements and "to formulate and recommend national policies to promote the improvement of the quality of the environment."<sup>16</sup>

### B. *Implementation of the Act*

With the exception of the creation of the Council on Environmental Quality and the requirement for environmental impact statements from the executive agencies, the Act is little more than a policy statement requiring both strong executive action and favorable interpretation by the judiciary to be effective.<sup>17</sup>

#### 1. *Executive Action*

President Nixon, after appointing the members of the Council on Environmental Quality<sup>18</sup> and outlining a comprehensive program for environmental control,<sup>19</sup> issued an executive order delineating the responsibilities of federal agencies and of the Council.<sup>20</sup> The agencies were directed to review their statutory authority, regulations, policies, and procedures "in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act"<sup>21</sup> and then to report to the Council.<sup>22</sup> The Council was also given the task of assisting the President in his annual report

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*An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ELI ENVIRONMENTAL L. REP. 50035 (1971).

<sup>16</sup> 42 U.S.C. § 4342 (Supp. V, 1970).

The need for a national policy to coordinate environmental management was imperative because control measures at the federal level were virtually nonexistent. See generally NATIONAL POLICY REPORT. Federal agencies often acted at cross purposes in programs with substantial environmental impact. Congressman Reuss gave an example of such mismanagement: "While the Department of Agriculture pays farmers to drain their wetlands, the Department of the Interior pays farmers to reflood their wetlands." *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 66 (1969).

A further factor was litigation indicating that environmental factors were not being given proper consideration in federal agency proceedings. See, e.g., *Udall v. FPC*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

<sup>17</sup> Absence of a strong and comprehensive program to implement legislation such as NEPA may, according to one theorist, result in the same type of ineffectiveness that has thwarted some of the more promising Office of Economic Opportunity programs. Bailey, *supra* note 9, at 303-04.

<sup>18</sup> *Council on Environmental Quality*, 6 WEEKLY COMP. PRES. DOCS. 90 (Jan. 29, 1970).

<sup>19</sup> 116 CONG. REC. S 1605 (daily ed. Feb. 10, 1970).

<sup>20</sup> Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* By September 1, 1970, nearly all agencies had complied with this request. Very little change in statutory authority was proposed. In light of the continuing clash between these agencies and conservation groups over the treatment of environmental factors in agency proceedings, the small number of proposed changes perhaps indicates a cavalier

on the state of the environment.<sup>23</sup>

To facilitate the control of environmental programs and to coordinate standard-setting and enforcement procedures, the President, using the device of the reorganization plan, established the Environmental Protection Agency to assume authority over certain existing environmental programs then administered by various executive departments and independent agencies.<sup>24</sup> Three considerations made the creation of a new independent agency essential: (1) although nearly

attitude by the agencies toward the importance of the request. 1 BNA ENVIRONMENT REP.—CURRENT DEVELOPMENTS 698 (Oct 30, 1970).

<sup>23</sup> The first annual report on the state of the environment was made public in August 1970. It set forth most of the principal environmental issues confronting the nation but failed to propose any definitive programs for solving these problems. ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1970).

An explanation of the Council's failure to be specific in its recommendations has been offered:

This lack of definition may arise from the council's uneasy relationship with the Administration. The report is anchored in specifics only when it is endorsing one of the Administration's legislative recommendations. Then "should" changes to "must," and Congress is sternly told to get on with the job. President Nixon's name is invoked, if not on every page, at least scores of times as if he were the most inspiring leader in this field since Henry David Thoreau. . . .

It is apparent that the council feels itself very much part of this Administration and is loath to go beyond the pace set by the White House. In short, the council is monitoring its own political fallout pretty carefully.

N.Y. Times, Aug. 11, 1970, at 32, col. 1.

<sup>24</sup> The full texts of the President's message and Reorganization Plan No. 3 of 1970 are printed in 116 CONG. REC. S 10877 (daily ed. July 9, 1970). Since this rearrangement of federal functions was made pursuant to a reorganization plan, no changes were made in the existing statutory authority of the units so transferred. 5 U.S.C. § 907(a) (Supp. V, 1970).

The largest organization transferred to the new EPA was the Federal Water Quality Administration (FWQA) which had previously been transferred to the Department of the Interior from the Department of Health, Education and Welfare by Reorganization Plan No. 2 of 1966, 3 C.F.R. 188 (1966 Comp.). The functions of FWQA are delineated by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1964). The FWQA, with a staff of 2,669 and an approximate fiscal year 1971 budget of \$1.23 billion, will comprise nearly half of EPA's personnel and 88% of its funds. *Hearings on Reorganization Plan No. 3 of 1970 (Environmental Protection Agency) Before a Subcomm. of the House Comm. on Government Operations*, 91st Cong., 2d Sess. 26 (1970) [hereinafter cited as *1970 House Hearings*].

Also transferred to EPA were functions administered by the Secretary of the Interior relating to pesticide research and the Gulf Breeze Biological Laboratory; the National Air Pollution Control Administration and the Bureaus of Solid Waste Management, Water Hygiene, and Radiological Health in the Environmental Control Administration of the Department of Health, Education and Welfare; the Atomic Energy Commission responsibilities for establishing generally applicable standards for protection from radioactive material; all duties of the Federal Radiation Council; and the responsibilities of the Secretary of Agriculture pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 135-135k (1964)), under § 408(1) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 346a (Supp. V, 1970)), and those functions administered through the Environmental Quality Branch of the Plant Protection Division of the Agricultural Research Service. 116 CONG. REC. S 10877 (daily ed. July 9, 1970).

every function of government affects the environment, the view of each existing department regarding environmental issues is often affected by its primary mission; (2) centralization of critical standard-setting functions in an existing department would call into question its impartiality; and (3) environmental protection crosses so many jurisdictional boundaries and is of such importance that a strong, independent agency is necessary.<sup>25</sup>

The reasoning behind the creation of the independent Environmental Protection Agency was thus sound;<sup>26</sup> its actual constitution, however, was not. The reorganization plan failed to grant the new agency authority over a number of federal programs concerned with environmental control.<sup>27</sup> Not transferred to EPA's jurisdiction were the United States Geological Survey, the National Institute for Environmental Health, the noise pollution program of the Department of Transportation, and the sewer construction grant and loan programs

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<sup>25</sup> *Id.* at S 10878. Placing these protection activities under an existing department was advocated by a number of cabinet secretaries, most notably those losing personnel and funding under the proposed reorganization. *N.Y. Times*, June 6, 1970, at 1, col. 7. Former Interior Secretary Hickel wanted these functions transferred to the Department of the Interior and its name changed to the Department of the Environment. The President opposed this change because it would require legislation. In addition, an independent agency was less likely to become both the advocate and defender of the industries it was to regulate. *Id.* at 21, cols. 2-3.

Legislation to establish such a department was introduced in October 1970 by Congressman Brock. H.R. 19709, 91st Cong., 2d Sess. (1970). The first environmental bill introduced in the Ninety-Second Congress was a similar proposal sponsored by Congressman Dingell. H.R. 652, 92d Cong., 1st Sess. (1971).

<sup>26</sup> Immediate reaction to the President's plan was positive. Senator Muskie hailed the reorganization as "a good beginning." *N.Y. Times*, July 10, 1970, at 14, col. 2. Russell E. Train, Director of the Council on Environmental Quality, cited the plan as establishing "a base for a bold and very comprehensive attack on the problems of the environment." *Id.*

<sup>27</sup> Congress recognized that there were 84 agencies devoting a portion of their efforts to solving environmental problems and that inclusion of all would create an unmanageable "super-department." There was genuine concern, however, over the failure to include many important programs within EPA. *See, e.g., 1970 House Hearings* 60 (remarks of Congressman Blatnik); *Hearings on Reorganization Plans Nos. 3 and 4 of 1970 Before the Subcomm. on Executive Reorganization and Government Research of the Senate Comm. on Government Operations*, 91st Cong., 2d Sess. 41 (1970) (remarks of Senator Muskie) [hereinafter cited as *1970 Senate Hearings*]; 116 CONG. REC. H 9271-72, H 9276 (daily ed. Sept. 28, 1970). For a complete list of those federal offices, agencies, and committees that devote a substantial share of their time to administration and study of environmentally oriented programs, see NATIONAL POLICY REPORT 32-34. The unmanageability of a "super-department" is discussed in *Joint House-Senate Colloquium To Discuss a National Policy for the Environment, Hearings Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess. 16 (1969) (remarks of former Interior Secretary Udall).

administered by the Departments of Agriculture, Housing and Urban Development, and Health, Education and Welfare.<sup>28</sup>

A second, more serious, defect in the Environmental Protection Agency is its lack of authority to intervene in, or challenge, the proceedings of other federal agencies where an adverse effect on the environment is likely.<sup>29</sup> This constitutes a significant obstacle to the effective implementation of the National Environmental Policy Act since neither EPA nor the Council on Environmental Quality has operational control over, or authority to intervene in, government programs with environmental impact but not covered by the reorganization plan. Outside the scope of the new agency's authority are the Atomic Energy Commission, the Federal Power Commission, the Army Corps of Engineers, and the Departments of Agriculture, Interior, and Transportation, all of which, through their critical licensing and permit-granting functions, have considerable impact on the environment.<sup>30</sup>

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<sup>28</sup> Heeding criticism concerning EPA's lack of comprehensiveness in environmental management, President Nixon, in his message to Congress on the state of the environment, proposed legislation to authorize the agency to set noise standards, restrict the use of hazardous substances (e.g., mercury), require permits for ocean dumping, and stop the sale of unauthorized pesticides. 117 CONG. REC. H 508-09 (daily ed. Feb. 8, 1971).

<sup>29</sup> The Chairman of the Council on Environmental Quality, when asked how much authority EPA had to abate federal pollution, responded: "I do not believe that the new Environmental Protection Agency would have actual crackdown authority over any Federal Agency." 1970 Senate Hearings 58 (remarks of Russell E. Train). See also N.Y. Times, Nov. 19, 1970, at 16, col. 5.

<sup>30</sup> The magnitude of this omission is evident when the following statistics are considered.

For fiscal year 1971, appropriations for the Atomic Energy Commission were in excess of two billion dollars. Pub. L. No. 91-273, § 101 (June 2, 1970). One function of the Atomic Energy Commission continually attacked by conservation groups is the nuclear powerplant licensing program. During 1969 the AEC had under review 36 operating and construction licenses representing more than 31 million kilowatts of generating capacity and had issued seven construction licenses representing a total of 6.27 million kilowatts of capacity. AEC, MAJOR ACTIVITIES IN THE ATOMIC ENERGY PROGRAMS: JAN.—DEC. 1969, at 125-26, 128 (1970).

The Federal Power Commission, on June 30, 1969, had under review 159 applications for major hydroelectric power generating licenses. These applications, representing increased electrical capacity of 11 million kilowatts, would cost an estimated \$1.8 billion. This is more than half the existing number of major licenses for hydroelectric power production. FPC, FORTY-NINTH ANNUAL REPORT: 1969, at 27 (1970). Another activity of the FPC which has generated environmental concern is natural gas pipeline licensing. In fiscal year 1969, the FPC issued licenses for more than 6,000 miles of additional pipeline, an investment by gas transmission companies of \$1.4 billion. *Id.* at 52.

The Department of Transportation's Federal Highway Administration had operating expenses of \$4.22 billion in fiscal year 1969, over three billion dollars of which was allocated to interstate construction. U.S. DEP'T OF TRANSPORTATION, THIRD ANNUAL REPORT: FY 1969, at 126 (1970).

As a final example of the scope of the problem created by the failure to vest EPA with power to intervene in agency determinations, consider the annual development budget

Since a major portion of environmental litigation by citizens' groups has involved challenges to the decisions of these agencies,<sup>31</sup> it appears that private litigation, with its attendant problems of standing,<sup>32</sup> expense,<sup>33</sup> necessity for posting bond,<sup>34</sup> and difficulty of access to evidentiary materials,<sup>35</sup> must be relied upon to police the independent agencies.<sup>36</sup>

of the Army Corps of Engineers of \$1.36 billion, nearly all of which involves projects with environmental impact (dredge and fill, channelization, canals, dams, and the like). ENVIRONMENTAL QUALITY, *supra* note 23, at 193.

<sup>31</sup> *E.g.*, *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom. Sierra Club v. Morton*, 91 S. Ct. 870 (1971) (No. 939) (Department of the Interior); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (Department of Agriculture); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970) (Army Corps of Engineers, Department of Interior, and Department of Transportation); *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

<sup>32</sup> A recent case took judicial notice of environmental resources as a "legally protected interest." That provided a basis for standing to obtain judicial review of agency action allegedly contravening that interest. *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970). A contrary decision was reached by the Ninth Circuit in holding that the Sierra Club did not have a legally protected interest that was threatened by a proposed Disney Enterprises ski resort in the Sequoia National Game Refuge. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom. Sierra Club v. Morton*, 91 S. Ct. 870 (1971) (No. 939). These disparate decisions testify to the unsettled state of the standing question. Among the literature on standing is material that deals specifically with standing in environmental cases. *See, e.g.*, Jaffe, *Standing To Sue in Conservation Suits*, in *LAW AND THE ENVIRONMENT* 123 (M. Baldwin & J. Page eds. 1970); Hanks & Hanks, *supra* note 2, at 231-44; Comment, *Standing To Sue and Conservation Values*, 38 U. COLO. L. REV. 391 (1966); Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories To Control Pollution*, 16 WAYNE L. REV. 1085, 1086-97 (1970).

<sup>33</sup> *See Sive, supra* note 1, at 618.

<sup>34</sup> In *Sierra Club v. Laird*, Civil No. 70-78 (D. Ariz. June 23, 1970), the court, although granting plaintiff's request for a preliminary injunction on the ground that the defendant had failed to comply with NEPA, ordered the Sierra Club to post a \$20,000 bond.

<sup>35</sup> *E.g.*, *Soucie v. David*, Civil No. 24573 (D.C. Cir., filed Aug. 24, 1970) (to compel the Director of the Office of Science and Technology to publish a government report on the supersonic transport).

After much criticism, the Council on Environmental Quality proposed new guidelines for preparation and dissemination of impact statements. Agencies preparing statements on proposed legislation are to make them "available to the public at the same time they are furnished to the Congress." Concerning agency projects and activities, all draft statements are to be furnished to the public unless doing so would significantly increase costs of government procurement. Finally, agencies that plan to hold hearings on proposed actions or legislation should make draft statements available to the public 15 days prior to the date of the hearings. Council on Environmental Quality, *Statements on Proposed Federal Actions Affecting the Environment: Guidelines*, 36 Fed. Reg. 1398, 1400 (1971).

For a discussion of administrative secrecy and its impact on environmental issues, see Forkosch, *Administrative Conduct in Environmental Areas—A Suggested Degree of Public Control*, 12 S. TEXAS L.J. 1, 7-23 (1970).

<sup>36</sup> The enormity of the task may be seen by considering the number of programs, personnel, and funds involved in these agencies. Note 30 *supra*.

## 2. *Judicial Interpretation*

Since its effective date of January 1, 1970, the National Environmental Policy Act has been used by conservation and ad hoc citizens' groups in attempts to obtain judicial review of, or intervention in, agency proceedings in which environmental factors allegedly have not been considered properly.<sup>37</sup> These attempts have been largely unsuccessful for three reasons.

First, the absence of an express congressional indication that the Act should be applied retroactively has been interpreted by the courts as authorizing solely prospective application.<sup>38</sup> This interpretation has resulted in reluctance to grant relief where any administrative determination had been made prior to the effective date of the Act even though work on the project had not yet begun. Only a narrow construction of the Act, however, can limit its applicability to those programs begun after the effective date.<sup>39</sup> Most major federal construction proj-

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<sup>37</sup> *E.g.*, *Environmental Defense Fund v. Corps of Engineers*, 2 BNA ENVIRONMENT REP.—DECISIONS 1260 (E.D. Ark. Feb. 19, 1971); *Environmental Defense Fund v. Corps of Engineers*, 2 BNA ENVIRONMENT REP.—DECISIONS 1173 (D.D.C. Jan. 27, 1971); *Ely v. Velde*, 2 BNA ENVIRONMENT REP.—DECISIONS 1185 (E.D. Va. Jan. 22, 1971); *Bucklein v. Volpe*, 2 BNA ENVIRONMENT REP.—DECISIONS 1082 (N.D. Cal. Oct. 29, 1970); *Brooks v. Volpe*, 319 F. Supp. 90 (W.D. Wash. 1970); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970); *Dorothy Thomas Foundation v. Hardin*, 317 F. Supp. 1072 (W.D.N.C. 1970); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *Wilderness Soc'y v. Hickel*, 1 BNA ENVIRONMENT REP.—DECISIONS 1335 (D.D.C. 1970); *Texas Comm. on Natural Resources v. United States*, 1 BNA ENVIRONMENT REP.—DECISIONS 1303 (W.D. Tex. 1970).

<sup>38</sup> *Brooks v. Volpe*, 319 F. Supp. 90 (W.D. Wash. 1970) (NEPA held not to apply to an administrative determination made in 1967 regarding highway location even though no work had been performed); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970) (NEPA held not to apply to a power transmission project funded prior to the effective date of the Act); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970) (NEPA held not to apply to a road-building contract awarded three days before the effective date of the Act).

The only indications that the Act should have retroactive effect have been indirect. In *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 91 S. Ct. 873 (1971) the Fifth Circuit reversed an injunction compelling the Army Corps of Engineers to issue a permit to fill tidelands. The Army had denied the permit on purely ecological grounds even though its statutory authority is limited to navigation, flood control, and hydroelectric power (43 U.S.C. §§ 1311(a)-(b), (d) (Supp. V, 1970)). The court spoke at length about NEPA and, although acknowledging that "this Congressional command was not in existence at the time the permit in question was denied," held that congressional intent evident in the Act, considered with the Fish and Wildlife Coordination Act (16 U.S.C. § 662 (Supp. V, 1970)), gave the Army grounds to refuse a permit under the Rivers and Harbors Act (33 U.S.C. § 403 (Supp. V, 1970)) for purely ecological reasons. 430 F.2d at 213.

<sup>39</sup> Congress has stated that the Act is to apply to "ongoing activities of the regular Federal agencies." S. REP. No. 296, *supra* note 11, at 14. The guidelines issued by the Council on Environmental Quality in January 1971 (note 35 *supra*) substantiate this congressional mandate. Guideline 11 states:

To the fullest extent possible the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even

ects are planned years in advance, with preliminary studies funded long before actual construction begins.<sup>40</sup> If such interpretations are followed, the Act will have virtually no effect on major federal projects for a substantial period of time.

Second, the burdens imposed on plaintiffs by the courts are substantial. Intervention by citizens' groups in administrative proceedings to compel agency compliance with the action-forcing sections of the Act<sup>41</sup> has been granted only where the petitioners have shown (1) a probability of irreparable harm,<sup>42</sup> (2) a likelihood of prevailing on the merits,<sup>43</sup> (3) substantial noncompliance with the Act,<sup>44</sup> or (4) an absence of monies expended on the project.<sup>45</sup>

Third, although the law of judicial review of agency determina-

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though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

36 Fed. Reg. at 1400.

<sup>40</sup> An example of the long range planning involved is the recent report of the commission to study the feasibility of a sea-level canal through Panama. After six years of study and over \$21 million in expenses, the commission suggested that a canal be constructed parallel to the existing one by using conventional, rather than nuclear, excavating devices, and indicated that it would take 15 years and nearly three billion dollars to complete. N.Y. Times, Dec. 1, 1970, at 92, col. 1. If the Act were held not to apply to this project since the decision was made based on information gathered, and monies expended, prior to its effective date, a major federal undertaking could be launched and completed in 1985 without full consideration of environmental factors.

<sup>41</sup> Section 102 of the Act is the usual basis for injunctive relief. That section requires federal agencies to "utilize a systematic, interdisciplinary approach" to ensure consideration of environmental factors, to file an environmental impact statement, and to "study, develop, and describe appropriate alternatives to recommended courses of action." The failure of an agency to comply with these procedural requirements might give rise to equitable intervention. 42 U.S.C. §§ 4332(2)(A), (C)-(D) (Supp. V, 1970); note 47 *infra*.

<sup>42</sup> *Wilderness Soc'y v. Hickel*, 1 BNA ENVIRONMENT REP.—DECISIONS 1335 (D.D.C. 1970) (preliminary injunction granted to bar permit for haul road to the proposed Trans-Alaska Pipeline System where plaintiffs showed irreparable harm and the Secretary of the Interior failed to submit an impact statement).

<sup>43</sup> *Texas Comm. on Natural Resources v. United States*, 1 BNA ENVIRONMENT REP.—DECISIONS 1303 (W.D. Tex. 1970) (preliminary injunction granted pending appeal in an action to prevent FHA from expending funds on a park project because plaintiff did show a reasonable chance of success in presenting his appeal); *accord*, *Environmental Defense Fund v. Corps of Engineers*, 2 BNA ENVIRONMENT REP.—DECISIONS 1173 (D.D.C. Jan. 27, 1971).

<sup>44</sup> *Sierra Club v. Laird*, Civil No. 70-78 (D. Ariz. June 23, 1970) (preliminary injunction granted where Army Corps of Engineers had not complied with § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)).

<sup>45</sup> *Texas Comm. on Natural Resources v. United States*, 1 BNA ENVIRONMENT REP.—DECISIONS 1303 (W.D. Tex. 1970) (stay pending appeal granted where no monies had been expended).

tions involving environmental issues had broadened somewhat prior to passage of the National Environmental Policy Act,<sup>46</sup> a recent case signals a departure from this trend despite the hope of conservationists that the Act would expand the scope of judicial review.<sup>47</sup> In *San Antonio Conservation Society v. Texas*,<sup>48</sup> the court permitted the

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<sup>46</sup> Expansion of the scope of review of agency determinations was achieved in two landmark decisions. *Udall v. FPC*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

<sup>47</sup> *E.g.*, *Sive*, *supra* note 1, at 649.

The applicability of the National Environmental Policy Act to *all* functions of the federal government would seem to indicate a desire on the part of Congress to encourage a favorable judicial response to the environmental crisis. One court has read the language of NEPA as providing a clear congressional mandate to the courts. *Texas Comm. on Natural Resources v. United States*, 1 BNA ENVIRONMENT REP.—DECISIONS 1303 (W.D. Tex. 1970). The court stated:

Congress has made clear that it intends to "use all practical means and measures . . . to preserve" the "natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." Furthermore, the Congress

authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act. . . .

It is hard to imagine a clearer or stronger mandate to the Courts.

*Id.* at 1304, quoting 42 U.S.C. § 4332 (Supp. V, 1970).

*But see* *Bucklein v. Volpe*, 2 BNA ENVIRONMENT REP.—DECISIONS 1082 (N.D. Cal. Oct. 29, 1970) where the court, in finding that the plaintiff (who had brought a class action on behalf of himself and other citizens and taxpayers of Santa Cruz alleging violation of NEPA) had failed to state a cause of action, held, *inter alia*, that it is doubtful whether NEPA can serve as the basis for a cause of action. The court explained its holding by interpreting the Act in the following manner:

Aside from establishing the Council, the Act is simply a declaration of congressional policy; as such, it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. . . .

It is unlikely that such a generality could serve or was intended to serve as a source of court-enforceable [*sic*] duties.

*Id.* at 1083. The *Bucklein* court, in dismissing the complaint failed to discuss the action-forcing requirements of NEPA (42 U.S.C. §§ 4332(2)(C), 4333-34 (Supp. V, 1970)). These sections place positive duties upon administrative agencies to consider environmental factors in their decision-making processes. Such duties, if ignored, have been held to give rise to a cause of action by anyone who can show standing to seek judicial review. *See, e.g.*, *Wilderness Soc'y v. Hickey*, 1 BNA ENVIRONMENT REP.—DECISIONS 1335 (D.D.C. 1970). The court in *Bucklein* avoided this "troublesome question of plaintiff's standing," by holding that the Act created no cause of action. 2 BNA ENVIRONMENT REP.—DECISIONS at 1083.

In *Ely v. Velde*, 2 BNA ENVIRONMENT REP.—DECISIONS 1185 (E.D. Va. Jan. 22, 1971), the court held that the Law Enforcement Assistance Administration, in approving federal funds for construction of a prison reception and medical center, was not required to consider the environmental impact of the project since the provisions of NEPA are discretionary and not mandatory.

<sup>48</sup> The case is unreported except for the denial of certiorari by the Supreme Court. 400 U.S. 968 (1970). Justices Black, Douglas, and Brennan dissented, indicating their displeasure at the Court's refusal to use this opportunity to "insure that lower courts and certain federal agencies administer . . . environment-saving legislation in the way that Congress intended." *Id.*

Secretary of Transportation to proceed with federal funding and construction of two sections of an expressway despite the contention of the Conservation Society that the project would be environmentally damaging to the parklands of San Antonio.<sup>49</sup> The Department of Transportation had made no findings on the environmental impact as required by the National Environmental Policy Act nor had it made findings as to feasible or alternative routes as required by the Federal-Aid Highway Act.<sup>50</sup>

The inability of EPA to challenge or intervene in proceedings of agencies not under its operational control has thus not been rectified by liberal judicial interpretation of the Act. To maintain a comprehensive program of environmental protection, this defect must be remedied.<sup>51</sup>

## II

### THE ENVIRONMENTAL OMBUDSMAN

An effective program of environmental control must necessarily include the power to police the proceedings of those agencies whose decisions have environmental impact and whose actions are not subject to EPA's authority. An intervener or "Ombudsman" for environmental affairs has been proposed as a solution to this policing problem.<sup>52</sup>

<sup>49</sup> The park in question contains two golf courses, a zoo, an open air theater, and several acres of open space. *Id.*

<sup>50</sup> *Id.* at 969-70. Recently the Supreme Court has directed a district court to determine whether the Secretary of Transportation acted in an arbitrary or capricious manner in approving funding of a highway through parkland despite the congressional mandate in the Federal-Aid Highway Act (23 U.S.C. § 138 (Supp. V, 1970)). *Citizens To Preserve Overton Park, Inc. v. Volpe*, 91 S. Ct. 814 (1971). Concurring Justices Black and Brennan were of the opinion that the case should be remanded to the Secretary of Transportation for full hearings since he had "completely failed to comply" with the congressional command. *Id.* at 826.

<sup>51</sup> The existence of gaps in enforcement emphasizes the need for citizen participation through the courts to provide the necessary relief.

It is just such gaps between concept and capability that prompt Senator Hart of Michigan and Senator Muskie of Maine to push bills that would assure citizens legal standing in suits to protect the environment. If the Council is going to be circumvented—whether or not through acquiescence of the Administration—it will be increasingly necessary for private individuals to look to the courts for relief.

*N.Y. Times*, Nov. 26, 1970, at 30, col. 1.

Without favorable interpretation of environmental legislation by the judiciary, moreover, even citizen suits will not provide the requisite relief.

<sup>52</sup> I think we need to have an intervener or lobbyist on behalf of these environmental considerations, and that there ought to be a commission that can intervene in the proceedings of each one of these departments where it affects the environment and at least get a public focus on it.

*Joint House-Senate Colloquium*, *supra* note 27, at 61 (remarks of Congressman Ottinger).

Interest has recently increased in the Ombudsman as a vehicle through which the citizen could challenge the complexities of administrative proceedings.<sup>53</sup> Traditionally, the Ombudsman's office has been

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The first step in recognition of this need was taken in June 1970 by Congressman Tunney, who introduced H.R. 18242, 91st Cong., 2d Sess. (1970), to amend NEPA and to establish, *inter alia*, the Office of Environmental Ombudsman. The proposed Title 5 as set forth in the bill gives the mechanics of the office. The Ombudsman would be appointed by the Council on Environmental Quality and serve for five years. His general authority would be to review, on his own initiative or at the request of any citizen, any action by a federal official which might adversely affect the environment; actions of state and local officials would also be reviewable under some circumstances. The Ombudsman would be required to make an annual report to Congress, the President, and the Council. He would have the power to issue a 60-day restraining order when he believed an activity of the federal government would have a substantial and adverse effect on the environment. Two members of the Council would have the power to vacate such an order. Following the order there would be an investigation. Public hearings would be held in the locality affected and recommendations then would be forwarded by the Council to the agency involved. The proposed Environmental Ombudsman would also be given authority to intervene in any federal agency or court proceeding which might, in his opinion, affect environmental quality, and to introduce evidence to that effect.

H.R. 18242 was referred to the Committee on Merchant Marine and Fisheries. It was not reported out of Committee. No successor legislation has been introduced to date in the Ninety-Second Congress.

Sive also suggests the Ombudsman as the ultimate solution to environmental control. Sive, *supra* note 1, at 650.

Alternatively, the creation of a new Department of Environmental Quality possessing "veto" power over other agency actions affecting the environment has been presented as a possible solution. Hansen, *Creating New Institutional Arrangements for Environmental Quality Control*, 3 NATURAL RESOURCES L. 739, 746-47 (1970). Hansen's proposal, in addition to possessing all the infirmities of a department acting as both promoter and regulator of natural resources (note 25 and accompanying text *supra*), contains no device to facilitate citizen participation, an essential element of environmental management (see N.Y. Times, Oct. 18, 1970, § IV, at 6, col. 2. (remarks of Russell E. Train)).

<sup>53</sup> AMERICAN ASSEMBLY, OMBUDSMAN FOR AMERICAN GOVERNMENT? (S. Anderson ed. 1968); S. ANDERSON, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS (1969); W. GELLHORN, OMBUDSMAN AND OTHERS (1966); W. GELLHORN, WHEN AMERICANS COMPLAIN (1966); THE OMBUDSMAN (D. Rowat ed. 1968); McClellan, *The Role of the Ombudsman*, 23 U. MIAMI L. REV. 463 (1969); *Report of the Temple University American Assembly on "An Ombudsman for American Government?"* 42 TEMP. L.Q. 156 (1969); Schwartz, *A Congressional Ombudsman is Feasible*, 56 A.B.A.J. 57 (1970); *Symposium—The Ombudsman or Citizen's Defender: A Modern Institution*, 377 ANNALS 1 (1968); Tibbles, *Ombudsman: Who Needs Him?*, 47 J. URBAN L. 1 (1970); Toxey, *The Ombudsman in the Common Law System—Administrative Justice*, 11 WM. & MARY L. REV. 138 (1969). *But see* Dufinecz, *The Ombudsmen Speak*, 53 A.B.A.J. 1049 (1967); MacLeod, *The Ombudsman*, 19 AD. L. REV. 93 (1966); Mitchell, *The Ombudsman Fallacy*, 1962 PUB. L. 24 (Spring 1962).

Hawaii is the only American jurisdiction with an Ombudsman's office at the state level. HAWAII REV. STAT. § 96 (1968). The Hawaiian Ombudsman, assessing his first year in office, noted that environmental pollution was a conspicuous issue, being the source of 15 complaints during his first six months in office. Doi, *The Hawaii Ombudsman Appraises His Office After the First Year*, 43 STATE GOV'T 138, 144 (1970).

A number of bills have been introduced in Congress and in state legislatures to establish Ombudsman-type offices in this country. For a collection of these legislative proposals, see S. ANDERSON, *supra* at 14-57.

created "to meet the problem of an expanded bureaucracy"<sup>54</sup> by providing "an accessible tribune of the small people"<sup>55</sup> who are often denied the opportunity to participate in administrative proceedings.<sup>56</sup> Since all these difficulties exist within the present system of environmental management, the Ombudsman seems a salutary proposal.

To be an effective device in environmental control, the Ombudsman must necessarily rely on his traditional freedom from political influence.<sup>57</sup> In order to guarantee such independence, the Ombudsman should be appointed by the President, with confirmation by the Senate, for an extended term.<sup>58</sup> Removal would only be by joint resolution of Congress.<sup>59</sup> Appointment in such a manner would serve to insulate the Ombudsman from control by the executive branch.

Although the Ombudsman's impact upon the administrative process is customarily limited to "prestige plus publicity,"<sup>60</sup> to grant him the authority to intervene in agency proceedings on his own initiative, or at the request of any citizen, where environmental factors are substantially at issue,<sup>61</sup> would not distort this traditional limitation on his power.<sup>62</sup> If, in the opinion of the Ombudsman, these proceedings did

<sup>54</sup> Rowat, *The Spread of the Ombudsman Idea*, in AMERICAN ASSEMBLY, *supra* note 53, at 7, 8.

<sup>55</sup> Gellhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134, 138 (1968).

<sup>56</sup> Nelson & Price, *Realignment, Readjustment, Reform: The Impact of the Ombudsman on American Constitutional and Political Institutions*, 377 ANNALS 128, 133 (1968).

<sup>57</sup> Bexelius, *The Ombudsman for Civil Affairs*, in THE OMBUDSMAN, *supra* note 53, at 22, 25-26.

<sup>58</sup> This procedure is presently used in appointment of the federal judiciary (life), the Comptroller General (15 years) (notes 66-73 and accompanying text *infra*), and the members of the Federal Reserve Board (14 years) (12 U.S.C. § 241 (1964)), to isolate their decision-making functions from political pressure. One defect in the Tunney proposal (note 52 *supra*) is that appointment of the Ombudsman would be for a period of five years. This attempt to guarantee political independence, given the long range planning involved in many federal projects, (note 40 *supra*), does not establish the necessary freedom of action.

<sup>59</sup> This is the procedure for removal of the Comptroller General. 31 U.S.C. § 43 (1964). A major defect of the Tunney proposal (note 52 *supra*) is that no provision is made for removal of the Ombudsman, the assumption being, therefore, that removal power is vested in the Council on Environmental Quality which has the power to appoint. In effect, this would leave the Ombudsman at the mercy of the executive branch, and limit his ability to act objectively.

<sup>60</sup> Davis, *Ombudsman in America: Officers To Criticize Administrative Action*, 109 U. PA. L. REV. 1057, 1059 (1961).

<sup>61</sup> The determination as to when environmental issues are substantial would be at the discretion of the Ombudsman. In less critical situations the Ombudsman could rely upon his traditional sanction of publicity to achieve some degree of influence over the administrative proceeding. In the event he disagreed with the Ombudsman over the importance of the issue, the individual complainant would still have recourse to judicial review under existing statutory and case law.

<sup>62</sup> The power to intervene where existing laws and statutes are not observed has been

not conform to the standards set by the National Environmental Policy Act, he should have authority to challenge the agency involved,<sup>63</sup> issue a stop order,<sup>64</sup> and prepare reports to the President and Congress.<sup>65</sup>

An independent establishment to investigate and police environmentally significant decisions by federal agencies would not be a radical departure from traditional American institutions. An analogous entity presently exists in the office of the Comptroller General of the United States. Since 1921, the control of financial expenditures of administrative agencies has been the responsibility of the General Accounting Office (GAO) which, under the supervision of the Comptroller General, acts to conduct "examinations into the manner in which Government agencies discharge their financial responsibilities" and to determine "whether public funds [are] economically and effectively applied."<sup>66</sup> Operating with a relatively small staff of investigators and a nominal budget,<sup>67</sup> the GAO has had a significant impact

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the Swedish Ombudsman's for 150 years. Bexelius, *The Origin, Nature and Functions of the Civil and Military Ombudsman in Sweden*, 377 ANNALS 10, 15 (1968).

<sup>63</sup> This challenge would normally take the form of intervention in the proceeding for the purpose of introducing evidence as suggested in H.R. 18242, 91st Cong., 2d Sess. (1970). The Ombudsman could be given the power to petition for review before the court of appeals on behalf of aggrieved citizens if, in his opinion, the agency has not complied with NEPA. Action similar to this was taken by the Secretary of the Interior, at his own initiative, against the Federal Power Commission where he felt that federal, rather than private, development of hydroelectric power at High Mountain Sheep would best serve the public interest. *Udall v. FPC*, 387 U.S. 428 (1967).

<sup>64</sup> The duration of this stop order would, of necessity, be limited to a reasonable time —e.g., 60 days as in the Tunney proposal (note 52 *supra*). However, this stop order should only be removed by the Ombudsman or by judicial order. Were it removable by order of the Council on Environmental Quality as in that proposal, the impact of the stop order on an executive agency would be weakened.

<sup>65</sup> These reports would be similar to the special reports prepared by the General Accounting Office (GAO) to inform Congress of particular instances of illegality, extravagance, or inefficiency in the disbursement of public funds. See Note, *The Control Powers of the Comptroller General*, 56 COLUM. L. REV. 1199, 1213-15 (1956).

<sup>66</sup> Keller, *The Role of the General Accounting Office*, 21 BUS. LAW. 259, 260 (1965).

The GAO was created by the Budgeting and Accounting Act of 1921, 31 U.S.C. §§ 41-57 (1964), as an independent organ of government to act as congressional watchdog over expenditures by all executive agencies. The Comptroller General, although appointed by the President, with confirmation by the Senate, enjoys a high degree of political independence through his 15-year, nonrenewable term, with removal possible only by joint resolution of Congress.

For the leading text on the Comptroller General's Office, see H. MANSFIELD, *THE COMPTROLLER GENERAL* (1939). See also Naylor, *The General Accounting Office*, 4 FED. B.J. 101 (1940); Note, *The Control Powers of the Comptroller General*, 56 COLUM. L. REV. 1199 (1956); Note, *The Comptroller General of the United States*, 70 HARV. L. REV. 350 (1956).

<sup>67</sup> In 1970, the GAO operated with a staff of 4,500 and with a budget appropriation of \$63 million. *Hearings on the Capability of GAO To Analyze and Audit Defense Expendi-*

on the spending habits of the executive branch of the government.<sup>68</sup> The principal power of the GAO is its statutory authority to audit and settle the accounts of executive officers, including the power to make binding legal interpretations as to the propriety of expenditures.<sup>69</sup> Recently the GAO has been asked to expand its scope of legal interpretations and to audit more closely defense expenditures to determine whether they are being made in accordance with the law.<sup>70</sup>

The analogy between the General Accounting Office and the Ombudsman is not misplaced. Both are agents of the legislature<sup>71</sup> and enjoy freedom from political influence. Each has the crucial function of ensuring that administrative activity is carried out within the law.

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*tures Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. 6 (1969) (remarks of Comptroller General Staats).

<sup>68</sup> At least one Senator has given the Comptroller General credit for preventing embezzlement and fraud in the federal government. Ribicoff, *Military Spending and an Expanded Role for the General Accounting Office*, 7 HARV. J. LEGIS. 495, 496 (1970).

This impact has not always been considered in the best interests of the fiscal management of the executive branch. The first Comptroller General, John Raymond McCarl, exercised his powers so vigorously that he threatened the very existence of the GAO as an independent body by delaying New Deal programs with requirements for extensive audits prior to allowing disbursement of funds. Pursuant to the recommendations of the Brownlow Commission, President Roosevelt, in 1937, sought to return the control functions of the Comptroller General to the Treasury Department. Congress, noting the need for independence, struck these proposals down. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 131-33 (1964).

<sup>69</sup> 31 U.S.C. § 60 (1964). In recent years, the number of legal decisions and reports issued by GAO has been in excess of 6,000 annually. J. HARRIS, *supra* note 68, at 145.

<sup>70</sup> Hearings on the capability of GAO to carry out this additional function were held on September 16, 17, and 25, 1969. See *Hearings on the Capability of GAO To Analyze and Audit Defense Expenditures Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. (1969). As a result of these hearings, legislation was introduced by Senator Ribicoff to authorize the Comptroller General to conduct objective studies as to the costs, benefits, and alternatives to pending legislation with special emphasis on major weapons systems, construction projects, and research and development programs. S. 4432, 91st Cong., 2d Sess. (1970). For a discussion of the proposed bill by its author, see Ribicoff, *Military Spending and an Expanded Role for the General Accounting Office*, 7 HARV. J. LEGIS. 495 (1970).

Heretofore GAO's initiative has been questioned and its reports have often been ignored by Congress. Admiral Hyman Rickover has praised the GAO for its potential in examining government policy and chided it for failure to utilize its power:

The General Accounting Office . . . has adequate authority to get into virtually all aspects of Government operations. The office could, in a sense, become the conscience of our government; it could also become a center of excellence, a locus of discontent. However, it has waited for others to take the lead in these fundamental issues.

N.Y. Times, Feb. 7, 1971, § 3, at 2, col. 6.

<sup>71</sup> The Ombudsman has traditionally been associated with the legislature. In Sweden, the post of Justitieombudsman was created to balance the wide powers of the King with those of Parliament. Bexelius, *supra* note 57, at 23-24. Bexelius is the present Justitieombudsman of Sweden.

Finally, each serves to enhance the quality of, and public confidence in, the agencies over which it has jurisdiction.<sup>72</sup>

An Environmental Ombudsman should be completely independent, operating from without, rather than within the present governmental structure.<sup>73</sup> With environmental control programs now coordinated by two separate entities,<sup>74</sup> the addition of a third to police agency functions that have environmental impact and to represent the public in proceedings before these agencies would, at first blush, seem to obfuscate further the boundaries of responsibility in organizations responsible for environmental administration. Looking once again to the control of government expenditures for a model, however, it is evident that the division of authority over fiscal matters among three distinct government entities<sup>75</sup> has not resulted in chaos, but rather in a smoothly-operating, balanced system of fiscal management.<sup>76</sup>

Creation of an Office of Environmental Ombudsman in the legislative branch of government would be a significant step towards an effective program of environmental administration. The Council on Environmental Quality would retain its functions of assisting and advising the President through investigation, review, and appraisal of programs of the federal government. The Environmental Protection Agency would remain in operating control of its standard-setting and enforcement programs. The Environmental Ombudsman would be charged with the responsibility of conducting investigations on his own initiative or upon request of private citizens or members of Congress to ensure agency compliance with the National Environmental Policy

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<sup>72</sup> Perhaps it is not a coincidence that Great Britain selected as its first Ombudsman Sir Edward Compton, the former Comptroller and Auditor General. Schwartz, *supra* note 53, at 59.

<sup>73</sup> Independence is essential, since balancing the competing interests of industrial and citizen groups is an open invitation to coercive pressures. Only through such freedom may truly objective appraisals be made. This is the primary weakness of the Tunney bill; the Environmental Ombudsman would be an offshoot of the Council on Environmental Quality. Note 52 *supra*. See also *Hearings on Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., pt. 1, at 56 (1970) (remarks of Russell E. Train).

<sup>74</sup> The Council on Environmental Quality established by Title II of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4341-47 (Supp. V, 1970), and the Environmental Protection Agency established by Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

<sup>75</sup> The finances of the United States Government are monitored by the Bureau of the Budget (located in the Executive Office of the President), the Treasury Department (a Cabinet Department), and the General Accounting Office (the congressional watchdog). By statute these three must work together in a coordinated manner. 31 U.S.C. § 66 (1964).

<sup>76</sup> J. HARRIS, *supra* note 68, at 138-39.

Act. Using the powers outlined above, the Ombudsman could serve a particularly useful role in representing the citizenry in an area in which the public interest is paramount.

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