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FOREWORD: ENVIRONMENTAL QUALITY, THE COURTS, AND THE CONGRESS

*Henry M. Jackson**

IN America, we have traditionally equated progress with gross national product, with the accumulation of personal goods, with economic development, and with miles of roads, numbers of kilowatts, and acres of land. We have been easily impressed by quantitative measures of who we are as a people and where we are going as a nation.

In many respects the ways we measure progress reflect our society's traditional emphasis on the accumulation of material goods and the expansion of commerce and technology. Our success in achieving these goals is apparent from the statistics. We produce more than ten million automobiles annually.¹ Our gross national product, the primary indicator of economic power and growth, is expected to approach 985 billion dollars in 1970;² that figure is more than nineteen times what the gross national product was in 1933.³

We have, however, paid a price for our progress and our prosperity. We have paid in the form of sluggish, rubbish-laden rivers, air which is fouled with smoke and poisoned by chemicals, wasted forests and strip-mined lands, extinct species of wildlife, haphazard growth of urban areas and transportation systems, increased congestion in our cities, and intolerable noise levels. Thus, the growth of our economy and the expansion of our technological power exacts a price; but payment of this price in monetary terms has been deferred as we have allowed our environment to be despoiled.

Now the demand is being made, and properly so, that we improve the quality of the environment and restore the balance of nature which our technological growth and our shortsightedness have impaired. The cost of our progress is being translated into monetary terms, and the price of repairing the damage to our environment will be high. Illustratively, in the last twelve years water pollution has become so serious that experts now estimate that it will cost between 24 and 26 billion dollars over the next five years

* United States Senator from Washington.—Ed.

1. STATISTICAL ABSTRACT OF THE UNITED STATES table no. 818, at 548 (90th ed. 1969).

2. ECONOMIC REPORT OF THE PRESIDENT, H.R. DOC. NO. 253, 91st Cong., 2d Sess. (1970). See especially *Outlook for GNP and Its Components*, *id.* at 60.

3. STATISTICAL ABSTRACT OF THE UNITED STATES table no. 454, at 310 (90th ed. 1969).

to do an acceptable job of cleaning our streams, lakes, rivers, and bays.⁴ Air pollution was first recognized as a critical public health problem just five years ago;⁵ in 1969 governmental expenditures for air pollution control programs amounted to 133 million dollars, and it is estimated that expenditures will grow at an annual rate of thirty per cent.⁶ Solid waste disposal already costs 4.5 billion dollars annually,⁷ and it is widely recognized that we are not doing an adequate job.

Although these figures may indicate the monetary cost of restoring the environment, they do not accurately reflect the cost of remedying ecological disorder. The difference between those two costs can be attributed to environmental-management problems which are on the horizon but are not yet fully perceived. The mere awareness of ecological problems is a hopeful development, however, since some of those problems may be avoided, or at least ameliorated, by careful planning and by prudent choice among available alternatives. One wonders what the savings would have been if measures to prohibit the pollution of the air and water had been imposed at the start of the industrial revolution, if we had established more parks and public recreation areas at a time when the extent of the public domain was far greater than it is now, and if we had planned our great cities for man's benefit rather than for the benefit of machines and commerce.

Another hopeful sign for the quest to save our environment is the change in the values of the public over the past decade. Traditional economic indices are no longer viewed as the sole measures of progress. We are entering an era in which qualitative values and aesthetic factors are considered as important as material wealth. A new concern for values which cannot easily be translated into the language of the market place can be felt and seen in citizen efforts to save open spaces, parks, and natural beauty from the poorly planned construction of freeways, reservoirs, and industrial plants.⁸

4. 1 FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, U.S. DEPT. OF THE INTERIOR, *THE COST OF CLEAN WATER AND ITS ECONOMIC IMPACT*, Jan. 10, 1969.

5. See, e.g., *Controversy: Air Pollution and Health*, SCIENTIST AND CITIZEN, Jan.-Feb. 1968, at 26-28.

6. *THE COST OF CLEAN AIR*, S. DOC. NO. 40, 91st Cong., 1st Sess. (1969).

7. NATIONAL ACADEMY OF ENGINEERING & NATIONAL ACADEMY OF SCIENCES, *POLICIES FOR SOLID WASTE MANAGEMENT* (1969).

8. See, e.g., *Sierra Club v. Hickel*, Civ. No. 51,464 (N.D. Cal., filed July 10, 1969); *Citizens Comm. for the Hudson Valley v. Volpe*, 297 F. Supp. 809 (S.D.N.Y.), *aff'd.*, No. 33,371 (2d Cir. March 19, 1969) (motion for preliminary injunction); *Citizens*

People are no longer complacent about the quality of their surroundings, the use of the environment, or the way in which public resources are administered. The concern of citizen action groups and conservation organizations has moved many of these issues out of the garden clubs and into the arena of public debate and decision making. A major task which we face in the future is ensuring that these newly found public values will be recognized and acted upon. Although the values, the needs, and the problems may be new, the traditional institutions of our society must contribute to the accomplishment of that task.

The growing volume of law in this area indicates that some progress toward preserving and protecting our environment is already being made. However, most of the development of environmental law has taken place outside the courts. The elaboration and refinement of common-law rights to clean, healthy, and aesthetically pleasing surroundings has lagged behind both public aspirations and public needs and has failed to keep pace with the progress that we have made through legislation. The slow development of case law in this area can be attributed to many factors: procedural difficulties such as a failure of the courts to grant private groups either standing to sue or the right to initiate a class action,⁹ problems of evidence,¹⁰ the historic limitations on concepts such as the nuisance doctrine,¹¹

Comm. for the Hudson Valley v. Volpe, 297 F. Supp. 809 (S.D.N.Y. 1969) (motion to dismiss); Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), *affd.*, No. 34,010 (2d Cir. April 16, 1970) (permanent injunction); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 491 (1966); Ways, *How To Think About the Environment*, FORTUNE, Feb. 1970, at 98.

9. See Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Boerner, *Standing To Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070 (1966); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Comment, *Standing To Sue and Conservation Values*, 38 U. COLO. L. REV. 391 (1966); Note, 68 MICH. L. REV. 1294 (1970).

10. See Sive, *Securing, Examining, and Cross-Examining Expert Witnesses in Environmental Cases*, 68 MICH. L. REV. 1175 (1970). See also Proceedings of Airlie House Conference on Law and the Environment, Sept. 11-12, 1969 (to be published by Watkins Publishing Co., New York, N.Y.).

11. See, e.g., Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1130-37; Case Comment, *Air Pollution as a Private Nuisance*, 24 WASH. & LEE L. REV. 314 (1967). But see Berger, *Air Pollution as a Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102 (1969).

and perhaps a feeling by the judiciary that general policy decisions by the legislature must precede specific case decisions.¹² All of these reasons are credible and contain a measure of validity. But a more important factor is that many of the encroachments of modern society on an individual's right to a quality environment are gradual, subtle, and unforeseen. They have not often, at least until recently, generated litigation. Moreover, when an individual does decide to exert a legal claim to environmental quality, he may find that he has taken on the legal and economic resources of an entire industry.

The slow development of case law on the subject of man's right to live in quality surroundings is unfortunate. No matter how good the intentions, the action, and the end products of legislative bodies, those bodies cannot legislate on all matters that are essential to environmental quality. At best they can state the goals of society with respect to the type of environment we want for ourselves and for future generations; and they can enact policies, procedures, and programs which appear to maximize the likelihood that those goals will be attained. But there will always be many specific fact situations which the legislative bodies do not anticipate or deal with; in those situations the public interest should not be ignored merely because the situations were not foreseen.

The need for legislative action should not, however, be ignored. Even though statutes cannot provide solutions for all the environmental problems which we face today, it remains true that only legislatures can provide the comprehensive approach that is needed. Accordingly, the enactment of preventive and control measures is essential; fortunately, the public's desire for a quality environment has already had a significant impact on federal legislation. The landmark measures enacted by the federal government over the past eight years include far-reaching air and water pollution control legislation,¹³ the creation of the Land and Water Conservation

12. It has been argued, however, that although courts may be hesitant to act without prior legislative decisions, they often decide cases in such a manner as to ensure that legislatures will give adequate consideration to matters of environmental concern. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

13. Clean Air Act of 1963, Pub. L. No. 89-675, 80 Stat. 954, codified in 42 U.S.C. §§ 1857-571 (1964); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, codified in 42 U.S.C. §§ 1857-571 (Supp. IV, 1965-1968); Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948), *as amended*, Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498, *as amended*, Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204, *as amended*, Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, *as amended*, Clean Water Restoration Act of 1966,

Fund,¹⁴ the Wilderness Act,¹⁵ the Open Space and Green Span programs,¹⁶ several fish and wildlife conservation measures,¹⁷ and the Highway Beautification Act.¹⁸ In addition to these general programs, Congress has acted to set aside and preserve for future generations a portion of the land, the mountains, the beaches, and the lakes which comprise our nation's natural heritage.¹⁹ These measures are at least

Pub. L. No. 89-753, 80 Stat. 1246, codified in 33 U.S.C. §§ 466-66k (1964), *as amended*, 33 U.S.C. §§ 466-66n (Supp. IV, 1965-1968), *as amended*, National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, *as amended*, Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91. For a general discussion of this legislation, see Edwards, *The Legislative Approach to Air and Water Quality*, 1 NATURAL RESOURCES LAW. 1 (1968).

14. Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897, codified in 16 U.S.C. §§ 460d, 460l-4 to 460l-11 (1964).

15. Pub. L. No. 88-577, 78 Stat. 890, codified in 16 U.S.C. §§ 1131-36 (1964).

16. Housing Act of 1961, Pub. L. No. 87-70, 78 Stat. 890, codified in 42 U.S.C. §§ 1500-00e (Supp. IV, 1965-1968).

17. *E.g.*, Food and Agriculture Act of 1962, §§ 101-03, Pub. L. No. 87-703, 76 Stat. 605, codified in 7 U.S.C. §§ 1010-11, 1379a (1964), 16 U.S.C. §§ 590g-90h, 590p, 1004 (1964); Endangered Species of Fish and Wildlife Act, Pub. L. No. 89-669, 80 Stat. 926, codified in 16 U.S.C. §§ 668aa-68ee (Supp. IV, 1965-1968).

18. Pub. L. No. 89-285, 79 Stat. 1028, codified in 23 U.S.C. §§ 131, 136, 319 (1964).

19. Since 1960, Congress has established six national seashore areas (Cape Cod National Seashore, Act of Aug. 7, 1961, Pub. L. No. 87-126, 75 Stat. 284; Point Reyes National Seashore, Act of Sept. 13, 1962, Pub. L. No. 87-657, 76 Stat. 538; Padre Island National Seashore, Act of Sept. 28, 1962, Pub. L. No. 87-712, 76 Stat. 650; Fire Island National Seashore, Act of Sept. 11, 1961, Pub. L. No. 88-587, 78 Stat. 928; Assateague Island National Seashore, Act of Sept. 21, 1965, Pub. L. No. 89-195, 79 Stat. 824; Cape Lookout National Seashore, Act of March 10, 1966, Pub. L. No. 89-366, 80 Stat. 33), two national lakeshores (Pictured Rocks National Lakeshore, Act of Oct. 15, 1966, Pub. L. No. 89-668, 80 Stat. 922; Indiana Dunes National Lakeshore, Act of Nov. 5, 1966, Pub. L. No. 89-761, 80 Stat. 1309), seven national recreation areas (Lake Meade National Recreation Area, Act of Oct. 8, 1964, Pub. L. No. 88-639, 78 Stat. 1039; Bighorn Canyon National Recreation Area, Act of Oct. 15, 1966, Pub. L. No. 89-664, 80 Stat. 913; Delaware Water Gap National Recreation Area, Act of Sept. 1, 1965, Pub. L. No. 89-158, 79 Stat. 612; Whiskeytown-Shasta-Trinity National Recreation Area, Act of Nov. 8, 1965, Pub. L. No. 89-336, 79 Stat. 1295; Spruce Knob-Seneca Rocks National Recreation Area, Act of Sept. 29, 1965, Pub. L. No. 89-207, 79 Stat. 843; Mount Rogers National Recreation Area, Act of May 31, 1966, Pub. L. No. 89-438, 80 Stat. 190; Flaming Gorge National Recreation Area, Act of Oct. 1, 1968, Pub. L. No. 90-540, 82 Stat. 904); four national parks (Canyonlands National Park, Act of Sept. 12, 1964, Pub. L. No. 88-590, 78 Stat. 934; Guadalupe National Park, Act of Oct. 15, 1966, Pub. L. No. 89-667, 80 Stat. 920; North Cascades National Park, Act of Oct. 2, 1968, Pub. L. No. 90-544, 82 Stat. 926; Redwood National Park, Act of Oct. 2, 1968, Pub. L. No. 90-545, 82 Stat. 931), and eight national monuments (Chesapeake and Ohio Canal National Monument, Proclamation No. 3391, 75 Stat. 1023 (Jan. 18, 1961); Russel Cave National Monument, Proclamation No. 3413, 75 Stat. 1058 (May 11, 1961); Buck Island Reef National Monument, Proclamation No. 3443, 76 Stat. 1441 (Dec. 28, 1961); Pecos National Monument, Act of June 28, 1965, Pub. L. No. 89-54, 79 Stat. 195; Alibates Flint Quarries and Texas Panhandle Pueblo Culture National Monument, Act of Aug. 31, 1965, Pub. L. No. 89-154, 79 Stat. 587; Biscayne National Monument, Act of Oct. 18, 1968, Pub. L. No. 90-606, 82 Stat. 1188; Agate Fossil Beds National Monument, Act of June 5, 1965, Pub. L. No. 89-33, 79 Stat. 123; Florissant Fossil Beds National

partly attributable to new legislative insights: Congress is learning to avoid the temptations of economic expediency. It is learning that the right of future generations to a quality life in a quality environment should not be traded for short-term economic gain.

Nevertheless, as President Nixon made clear in his State of the Union message in January,²⁰ Congress is far from finished in its efforts to preserve the environment. Efforts are constantly being made to determine those areas in which new legislation is needed. As a part of those efforts, I recently introduced legislation designed to make surplus federal property available at reasonable prices to state and local governments for park and recreational purposes.²¹ Today, the Department of Defense alone is the owner in fee of more than 30 million acres of land, a great deal of which is in or near cities. In the years ahead, much of that land will be declared surplus with respect to federal needs. The value of much of that land as a place for recreation for our urban population is far greater than the value of the marginal contribution that the land can make to the national security.

The needs of our cities are critical. The problems of crowding, congestion, and population alone are enormous. In 1940, 30.5 million Americans lived on farms; today only 10.5 million remain.²² At the present time, seventy per cent of our population is crowded onto one per cent of the land,²³ and most of that one per cent is concrete and asphalt. This concentration of our population renders it imperative that we act to save some open spaces in and near our cities.²⁴

Monument, Act of Aug. 20, 1969, Pub. L. No. 91-60, 83 Stat. 101). In addition, Congress has recently passed an act establishing a nationwide system of trails (Act of Oct. 2, 1968, Pub. L. No. 90-543, 82 Stat. 912) and an act establishing a national system of wild and scenic rivers (Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906).

20. H.R. Doc. No. 226, 91st Cong., 2d Sess. (1970), reprinted in *N.Y. Times*, Jan. 23, 1970, at 22.

21. S. 1708, 91st Cong., 1st Sess. (1969). This bill was passed by the Senate on June 26, 1969, and has been referred to the House Interior and Insular Affairs Committee.

22. U.S. DEPT. OF AGRICULTURE, *FACT BOOK OF U.S. AGRICULTURE* (Misc. Publ. No. 1063, 1967).

23. Orville L. Freeman, Remarks at the Symposium on Communities of Tomorrow: National Growth and Its Distribution, Dec. 11, 1967.

24. Large and crowded cities also contribute to the critical importance of zoning and land-use management decisions of local government. Those decisions mold our future and our children's future; they determine the shape of our skylines, the access to our lakes and beaches, and the pattern of land development under our feet, near our homes, and in our communities. Land-use management and planning cannot be left to those who have mastered what one expert terms the "zoning game." R. BABCOCK,

The history of conservation and environmental concern in this country has been a history of specific, isolated confrontations—a history of focusing on the issue or the crisis of the moment, be it forest management, wilderness preservation, an oil spill, or air pollution. A comprehensive management approach to environmental administration has not been achieved. Our institutions and procedures still condition us to fight brush fires.

Fortunately, however, we are now making some progress toward the development of intelligent long-range environmental policies, most recently in connection with the enactment of the National Environmental Policy Act.²⁵ Many of the environmental aspirations and desires of the American people were written into law in that Act, which the President signed as his first official action of 1970. The statute provides a congressional declaration of national goals and policies to guide all federal actions which have an impact on the quality of man's environment.²⁶ The Act makes a concern for environmental values and amenities a part of the charter of every agency of the federal government. It establishes a high-level overview agency—the Council on Environmental Quality²⁷—in the executive office of the President. The Council's mandate is to identify the basic policy issues and alternatives for the administration of environmental matters. Finally, the Act calls for annual reports on the quality of the environment.²⁸ These reports will provide a much needed source of periodic baseline information on the state of the nation's environment.

The most important feature of the Act, however, and probably the least recognized, is that it establishes new decision-making procedures for all agencies of the federal government. Some of these procedures are designed to establish checks and balances in order to ensure that potential environmental problems will be identified and considered early in the decision-making process and not after irrevocable commitments have been made.

THE ZONING GAME (1964). Nor can they be left to the exclusive discretion of public officials, no matter how competent and well intentioned those officials might be. Governmental officials need the participation of an informed and concerned public. Little, *Challenge of the Land*, in OPEN SPACE ACTION INST. (1968).

25. Pub. L. No. 91-190, 83 Stat. 852. The Act was introduced by the author.—Ed.

26. Pub. L. No. 91-190, §§ 101-05, 83 Stat. 852-54.

27. Pub. L. No. 91-190, §§ 202-06, 83 Stat. 854-56.

28. Pub. L. No. 91-190, § 201, 83 Stat. 854.

Full implementation of the goals and policies declared by the Act will require additional legislation by Congress. I believe that a part of that legislative program should be the establishment of a national land-use policy.²⁹ Regulation and control of land use must be more coherently organized in the future if real progress is to be made in achieving a quality environment. Such greater organization is essential because the regulation of land use is the key to ensuring that development is in harmony with sound ecological principles and environmental guidelines. The problems of the present seem relatively insignificant when they are compared with the problems that will result in the coming decades from our future land requirements.

The federal government has done little to plan for, and deal with, the problem of accommodating such future growth in a manner that is compatible with a quality environment. It has instead permitted conditions which encourage haphazard growth and which compound environmental problems. Many of these problems come within the jurisdiction of more than one responsible agency. For example, a recent report of the Puget Sound Governmental Conference indicates that there are 860 public and private agencies providing water and sewer service in King, Snohomish, Pierce, and Kitsap counties in the State of Washington.³⁰ This proliferation of agencies makes long-range planning difficult, complicates coordination, results in inefficient land use, and prevents regional solutions to what are essentially regional problems. A similar situation exists with respect to many other resource and environmental problems. Because of the deficiencies in public administration, there are few alternatives available when crises become immediate.

The pressures upon our finite land resources cannot be accommodated without better planning and more effective control. Our land resources must be inventoried and classified; the nation's goals must be catalogued, and the alternatives evaluated in a systematic manner. These and other needs can be met only if three conditions coexist: governmental institutions must have the power, the resources, and the will to enter into effective land use planning; plans

29. Similar legislation has been suggested by United States Representative Paul N. McCloskey. See *Preservation of America's Open Space: Proposal for a National Land Use Commission*, 68 MICH. L. REV. 1167 (1970).

30. Puget Sound Governmental Conference, *Water and Sewer Facility Planning in the Central Puget Sound Region*, Feb. 1970, at 1.

at all levels of government must be coordinated; and public decisions concerning land use must be supported by effective controls in the form of zoning and taxing policies.

I have introduced legislation in the Senate to establish a "National Land Use Policy." While that measure does not purport to be the final answer to our problems, it does provide a focal point for analysis and consideration of the alternatives. As introduced, the bill has three major provisions. First, it establishes a grant-in-aid program to assist state and local governments in improving their land-use planning and management capability. Second, it encourages states to develop and implement state-wide environmental, recreational, and industrial land-use plans. Third, it enlarges and centralizes the federal government's responsibility for coordinating federal planning activities which affect land use, for improving federal-state relations, and for developing data on land-use trends and projections.

One of the recurring and most complex problems of land-use decision making today is that existing legal and institutional arrangements are, in many respects, archaic. Industry, for example, is often unable to obtain effective decisions concerning plant location without running an interminable gauntlet of zoning hearings, injunctions, and legal appeals. In other cases, land which should be dedicated to nonindustrial uses is given to industry in order to "broaden the tax base." Often, however, the entry of industry into such areas really means higher taxes, fewer amenities, and more problems.

The land-use policy bill which I have proposed would require the establishment of industrial, conservation, and recreational sanctuaries. These sanctuaries would be established before they are actually needed, and their establishment would be based on projected demands. Industrial sites, for example, would be located so that future transportation and environmental problems would be minimized.

Of course, the passage of the National Environmental Quality Act and of a "National Land Use Policy Act" will not ensure that environmental quality will attain the desired priority throughout our society. The operation of these laws can, however, promote the public interest in the environment by impressing that interest upon every activity—governmental, corporate, and individual. The needs and aspirations of future generations make it our duty to build a sound and operable foundation of national objectives for the management of our resources and our environment. We hold those resources

in trust for our children and their children. The future of succeeding generations in this country will be shaped by the choices we make. We must choose well, for they cannot escape the consequences of our choices.