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The Federal Government and Environmental Litigation

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United States Department of Justice

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The Federal Government and Environmental Litigation

By Kent Frizzell

I. Introduction

This article presents an overview of the federal litigation directly affecting the environment. Essentially it describes the role of the Department of Justice in the federal program of improving the environment. It was written from the standpoint of the Assistant Attorney General for the Land and Natural Resources Division whose function primarily is litigation and not administration. The Department of Justice is not engaged in the administration of environmental programs. The Environmental Protection Agency and other federal agencies have the administrative and regulatory functions. The Department’s function is to litigate for these agencies. The Department also takes the defensive role in many lawsuits in which it defends governmental programs and projects which have been attacked in the courts. To perform the legal services necessary, there are about 120 lawyers in the Land and Natural Resources Division plus 93 United States Attorneys and their assistants to aid the Department throughout the country.

II. The Government as Landowner

By way of background, the United States itself is the principal landowner in the country; it owns a total of about 750 million acres. Because of such large landownership, many problems peculiar to the United States have arisen relating to the manage-

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*Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice; Attorney General, State of Kansas, 1969-71; J.D. 1955, Washburn University. This article is based upon speeches delivered by Mr. Frizzell at the Ohio State Bar Association’s annual meeting on May 19, 1972, and at the Eighth Circuit Federal Bar Association Conference on April 21, 1972.

1 Public Land Law Review Commission, One Third of the Nation’s Land (1970) [hereinafter cited as One Third].
ment and use of its lands. Much of the Department's litigation on environmental quality is based on the use of these public lands. In some states the land owned by the United States is considerable. For example, the percentages of public lands owned in some of the states are:

<table>
<thead>
<tr>
<th>State</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>96 percent</td>
</tr>
<tr>
<td>Nevada</td>
<td>86 percent</td>
</tr>
<tr>
<td>Utah</td>
<td>66 percent</td>
</tr>
<tr>
<td>Idaho</td>
<td>63 percent</td>
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<tr>
<td>California</td>
<td>44 percent</td>
</tr>
<tr>
<td>North Dakota</td>
<td>5 percent</td>
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<tr>
<td>South Dakota</td>
<td>7 percent</td>
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<tr>
<td>Minnesota</td>
<td>6 percent</td>
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<tr>
<td>Missouri</td>
<td>4 percent</td>
</tr>
<tr>
<td>Nebraska</td>
<td>1 percent</td>
</tr>
<tr>
<td>Iowa</td>
<td>0.5 percent</td>
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</tbody>
</table>

Because of dispositions under various laws, the total acreage held by the federal government is gradually diminishing, notwithstanding federal acquisitions of privately owned land. Each agency is required to report its holdings to the General Services Administration as of June 30 of each year. In 1965 their total land holdings were 765 million acres; six years later, in 1971, the most recent year for which this massive inventory has been completed, the figure was 760 million acres. In recent times it has been only in the period between the 1968 and 1969 inventories that there was some increase, rather than a decrease, in total federal land holdings.

In the immediate future federal holdings will decrease sub-

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2. General Services Administration, Inventory Report on Real Property Owned by the United States Throughout the World as of June 30, 1970 (1971) [hereinafter cited as Inventory].
4. The Government-wide inventory was initiated in 1953, and is being continued pursuant to the desire of the Senate Committee on Appropriations. A comprehensive history of the inventory program is contained in the Hearings on H.R. 9161 Before the Senate Committee on Appropriations, 85th Cong., 1st Sess. (1958).
5. Inventory, supra note 2.
st substantially, particularly because of claims on land in Alaska. In the Alaska Statehood Act, the Congress pledged 103 million acres to the new State to form a tax base for it. Of this, 77 million acres remain to be selected. Another 40 million acres have been provided for selection by natives by the Alaskan Native Claims Act, enacted last December. Much of this land will be claimed this year because of the expiration of a freeze on land disposal in Alaska which ended on March 18, 1972, in accordance with a provision of the Alaskan Native Claims Settlement Act. With the end of the freeze, which has been in effect since 1968, public lands in Alaska will also be opened up to claimants under the mining, homesteading and other laws.

It may be of interest to note that in 1867 the federal government owned nearly 2 billion acres of public lands, or about 80 percent of the total area of our country. The need to populate these lands and to develop their resources led to the enactment by the Congress over the years of numerous statutes offering government owned lands free or with attractive terms to those who would settle or exploit them. Increasing demands upon

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8 85 Stat. 688 (1971). The 40 million acres are to be divided among some 220 villages and 12 Regional Corporations. If the entire 40 million acres cannot be selected from the 25 township areas surrounding the villages, lieu selection areas are to be withdrawn by the Secretary of the Interior as close to the 25 township areas as possible. Additionally, the natives will be paid $462,500,000 over an eleven-year period from funds in the Treasury, and $500,000,000 from mineral resources received from lands in Alaska to be conveyed to the State under the Statehood Act and from remaining Federal lands in Alaska, other than a certain Naval Petroleum Reserve. The State has agreed to this arrangement. Native claims which are based on aboriginal use and occupancy are declared extinguished by the Act, in return for the benefits thereunder.
10 See P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).
11 The Homestead Act of 1862, 43 U.S.C. § 161 (1970), marked the beginning of this policy; individuals could acquire up to 160 acres for no charge other than a filing fee of $10 and a $4 commission, plus an additional $4 commission when proof of required occupancy and improvement was submitted; areas in excess of 2 million acres were filed upon in every year from 1868 through 1934, when most remaining public lands were withdrawn from entry. The Desert Land Entry Act of 1877, 43 U.S.C. §§ 321 et seq. (1970); the Enlarged Homestead Act of 1909, 43 U.S.C. § 218 (1970); and the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291 et seq. (1970) all provided for larger acquisitions. See P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).
these lands led to more and more laws, which affected fewer and fewer lands. More than a billion acres have been disposed of under these laws. Most of these laws, many now obsolete or obsolescent, are still on the statute books. The Isolated Tract Sales Act of 1846, the Homestead Act of 1862 and the Desert Land Entry Act of 1877 are striking examples of such statutes.

The Public Land Law Review Commission, created by the Congress in 1964, made a study of unprecedented depth, over a period of several years, of the hodgepodge system of federal land laws, culminating with the issuance of its report in June 1970. Altogether, the Commission found some 3700 items of federal enactment. The Commission made numerous recommendations for the modernization of these laws. The Commission's report commences with 18 broad recommendations relating to future policy respecting public lands. Two of the more important recommendations are for revision of the policy of large-scale disposal reflected in the majority of existing statutes, and for receipt by the Government of full value for the use of public lands except where there is no consumptive use of the land or its resources. To implement its policy recommendations, the Commission offered 137 major recommendations and 250 supplementary recommendations covering every aspect of public land use, administration, and disposition. One of the strongest threads running throughout the report involves concern for the environment in the utilization of the public lands and resources located thereon. The Commission's recommendations are now receiving study in the Congress and in the Executive branch. We can hope that this will lead to a code of federal land laws suited to the needs of the future.

Sound conservation, development and utilization of remaining federal lands and their natural resources are essential to the well-being of the country. The Government must carefully conserve and wisely manage this precious heritage for the benefit of all the people. Because the United States is such a large landowner, it has become a target of a number of environmental suits. These

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16 One Third, supra note 1.
cases are the newest cases in environmental law, a distinct new field of litigation. The public has become conscious of the environment; as a consequence, environmental law is developing at a fast pace.

III. The Government's Role in Environmental Litigation

As illustrative of environmental problems in the United States, the following are the types of legal activities in which the Department of Justice is engaged in the environmental field:

A. The Government as Defendant

On January 1, 1970, President Nixon signed into law the National Environmental Policy Act (NEPA) which declared that it is the policy of the United States Government to create and maintain conditions under which man and nature can exist in productive harmony. Title I of NEPA recognizes that "each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." It requires all federal agencies to take into account the environmental impact of all actions they propose. Specific directives to prevent adverse environmental effects of federal agency activities are indicated. Title II created in the Office of the President a permanent Council on Environmental Quality (CEQ) of three members, modeled on the Council of Economic Advisers. The principal functions of the Council are to recommend environmental policies to the President and to assist him in the preparation of an annual environmental report to be submitted to the Congress beginning in July 1970.

Perhaps the most complex and extensive litigation with which the Land and Natural Resources Division is concerned involves Section 102(2)(C) of NEPA which provides in pertinent part that all agencies of the Federal Government shall:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions sig-

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18 § 101(c), 88 Stat. 852.
significantly affecting the quality of the human environment, a
detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be
avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of
man's environment and the maintenance and enhancement of
long-term productivity, and
(v) any irreversible and irretrievable commitments of
resources which would be involved in the proposed action
should it be implemented.

Section 102(2)(C) also requires that the preparing agency,
prior to drafting its detailed statement, solicit the comments of
other federal agencies with expertise and/or jurisdiction over any
of the anticipated environmental impacts. To implement Section
102(2)(C), under authority of Executive Order No. 11514,\(^{21}\) CEQ
issued interim\(^{22}\) and final guidelines\(^{23}\) to assist the various federal
agencies in preparing their own regulations.

To date there are over 20 court of appeals decisions and 60
district court decisions applying NEPA, many of which are cited
and discussed later in this article. As of June 23, 1972, there were
about 218 NEPA cases in the following categories: approximately
60 involving the Department of Transportation, 43 involving the
Corps of Engineers, 10 involving the Department of Defense,
18 involving the Department of the Interior, 17 involving the
Department of Agriculture, 14 involving the Atomic Energy
Commission, 15 involving the Department of Housing and Urban
Development, 10 involving the Environmental Protection Agency,
6 involving the Federal Power Commission, 6 involving the
General Services Administration, with the remainder divided
among a scattering of agencies. The bulk of these cases are
handled by the Land and Natural Resources Division of the
Department of Justice.

A variety of complex and often interrelated issues, such as
the following, are presented in NEPA litigation:

1. Obviously, NEPA does not require an environmental statement for every federal action. Section 102(2)(C) speaks in terms of "major federal actions significantly affecting the quality of the human environment." The answer to the basic question of how large a project must be before it is considered a "major action" with "significant impact" would vary from department to department as each applies NEPA to its own activities and problems. An agency determination in this regard should be entitled to "great deference" and not be subject to judicial reversal unless arbitrary or capricious.

In Citizens for Reid State Park, the plaintiffs sought to enjoin the Defense Department from carrying out a mock amphibious landing on the beaches of Reid State Park in Georgetown, Maine, as a part of a combined sea, air and amphibious training maneuver. A negative determination was made by the agency as to the applicability of Section 102(2)(C) and the court held that the scope of review was limited, that the decision was not arbitrary or reached without adequate consideration of environmental factors, and that the record clearly warranted the Navy's determination that any potential environmental damage to the park from the maneuver was insignificant.

2. The applicability of NEPA to ongoing projects or programs at the time of enactment is also an issue. At the time NEPA was enacted many governmental programs and projects were at various stages of operation or completion. For many of these projects, a question arose as to the applicability of NEPA. In essence, the case law appears to restate provision 11 of the CEQ guidelines:

Application of section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the

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24 E.g., Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972); Save Our Ten Acres v. Kreger 2 EER 20305 (S.D. Ala. decided April 7, 1972), appeal filed 5th Cir., No. 72-2165.
section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act of 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 .... not fully evaluated at the outset of the project or program.\(^{28}\)

3. Whether or not specific agency activity is exempt from the application of NEPA has also been litigated. There are a number of instances where federal agencies have claimed that certain activities or programs are exempt from NEPA.\(^{29}\)

4. The content of environmental statements has been questioned. An impact statement is a guarantee that the significant environmental impacts of any particular project and alternatives have been thought about and weighed in the decisionmaking process. As one court put it:

At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then existing decisionmaking responsibilities or to take away any then existing freedom of decisionmaking, but it certainly intended to make such decisionmaking more responsible. ... \(^{30}\)

The statement should not be an exhaustive collection of various and sundry minute scientific descriptive details which, though satisfying to a scientist’s inquisitiveness and extensive fact-gathering processes, would likely be confusing to the decision-makers and apt to miss the focus NEPA sought to achieve. The role of the impact statement is to reasonably identify relevant


environmental concerns in project evaluation. The nature of the impact statement was discussed recently in *Committee for Nuclear Responsibility v. Seaborg (Amchitka)*, where the court noted that it is not its duty to rule on the relative merit of competing scientific opinion. The statement was intended to provide for the deciding officials reference to the existence of responsible scientific opinions concerning possible adverse environmental effects. Only responsible opposing views, the court noted, need be included, and hence there is room for discretion on the part of the officials preparing the statement. The agency need not set forth at full length views with which it disagrees, all that is required is a meaningful reference that identifies the problem at hand for the responsible official. The agency, the court concluded, is not foreclosed from noting in the statement that it accepts certain contentions or rejects others.

In *Natural Resources Defense Council, Inc. v. Morton*, the court noted that the requirement that NEPA be complied with "to the fullest extent possible" is neither "rubber" nor "iron":

The statute must be construed in light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.

The court concluded:

So long as the officials and agencies have taken the "hard look" at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.

In *Natural Resources Defense Council* the Government had taken an appeal from a decision of the district court granting plaintiffs' motion for a preliminary injunction, which held up the proposed sale by the Department of the Interior of leases to approximately 80 tracts of submerged lands on the outer continental shelf for

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31 3 ERC 1126, 1128-29 (D.C. Cir. 1971).
32 458 F.2d 827 (D.C. Cir. 1972).
33 *Id.* at 837.
34 *Id.* at 838.
oil and gas production. The district court found that the environmental impact statement filed pursuant to NEPA was defective in that it did not discuss some alternatives listed in it, and failed to discuss in detail the environmental impacts of the alternatives listed.\textsuperscript{35}

The court of appeals denied the Government’s motion for summary reversal of the injunction. In so holding, the court found that:

The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.\textsuperscript{36}

Therefore, it held that the discussion of the environmental impacts of alternative actions, as well as of the proposed action, is necessary to satisfy NEPA. Further, the court noted that the discussion of alternatives in regard to this particular proposal must encompass practically all aspects of the national energy posture.\textsuperscript{37} Since the Energy Subcommittee of the Domestic Council (designated by the President as the body with the power to make overall policy in this field) had not issued an impact statement on the decision to proceed with offshore leasing rather than to change import quotas, it fell to Interior when implementing that policy to evaluate the environmental impact of reasonable alternatives, even though their implementation lies beyond the scope of Interior. The court reasoned that, in addition to disclosing the thinking of the agency in making its proposal, the impact statement serves as a guide for the ultimate decisionmakers who must decide between various alternatives within the purview of different agencies.\textsuperscript{38}

The court established a rule of reasonableness as to the extent to which various types of alternatives must be evaluated, pointing out that, in regard to alternatives beyond the authority of the responsible official, reference can be made to other studies, including other impact statements.\textsuperscript{39} In addition, the court held

\textsuperscript{36} 458 F.2d 827, 833 (D.C. Cir. 1972).
\textsuperscript{37} Id. at 834-38.
\textsuperscript{38} Id. at 833.
\textsuperscript{39} Id. at 836.
that past determinations by Congress and the President involved here (the 1953 Outer Continental Shelf Lands Act\textsuperscript{40} and the mandatory oil import program instituted by the President pursuant to congressional authority),\textsuperscript{41} regardless of the urgency embodied therein, do not override the need for review of the environmental impact of alternatives under NEPA. Rather, NEPA merely infused another element in the continuous review of these programs contemplated by Congress.\textsuperscript{42}

5. Another problem area has been citizen participation in NEPA. Agency regulations on the preparation of environmental statements, in accordance with CEQ guidelines, generally require the filing of, first, a draft environmental statement and, subsequently, a final environmental statement. The draft statement is available to citizens and citizen groups who are free to examine it. Where members of the public have had an opportunity to comment on a draft environmental statement and have not done so, they should be precluded from initiating any judicial attack on the activity involved. To allow plaintiffs under such circumstances to initiate judicial proceedings would thwart the administrative process and be in violation of the doctrines of exhaustion of administrative remedies and laches.\textsuperscript{43} As to public hearings on federal activities, NEPA does not establish such a right. As stated in \textit{National Helium Corp. v. Morton},\textsuperscript{44} neither NEPA nor the Administrative Procedure Act compels extensive administrative proceedings or hearings. “There is no indication that Congress in enacting the NEPA intended to impose extensive procedural impediments to Department action.”\textsuperscript{45}

6. Finally, the preparation of environmental statements may come under attack. The CEQ guidelines provide that where several federal agencies are involved in a federal action for which an environmental statement is required, the lead agency should prepare the statement. The leading case on this issue of who

\textsuperscript{40} 43 U.S.C. §§ 1331 et seq. (1970).
\textsuperscript{41} See the President's June 4, 1971, Message on Supply of Energy and Clean Air, 112 Cong. Rec. 8313, 8313-17 (1971).
\textsuperscript{42} 458 F.2d 827, 836 (D.C. Cir. 1972).
\textsuperscript{44} 455 F.2d 650 (10th Cir. 1971); see also Jicarilla Apache Tribe v. Morton, 3 ERC 1919 (D. Ariz. 1972), appeal filed, No. 72-1634 (9th Cir. 1972).
\textsuperscript{45} 455 F.2d 650, 657 (10th Cir. 1971).
is the lead agency is *Upper Pecos Association v. Stans*, in which the Upper Pecos Association sought a declaratory judgment and injunctive relief against the Department of Commerce and its Economic Development Administration (EDA) on the ground that EDA's funding of 80 percent of the cost of a road through part of a national forest was a violation of NEPA. The association contended that the granting of this money for the road was a "major federal action," requiring the preparation of an environmental impact statement by EDA. The Tenth Circuit affirmed the finding of the trial court that the Forest Service, as the agency charged with the construction of the road, was the "lead agency" and, therefore, was the agency with the responsibility to prepare the environmental impact statement. The court stated that the Forest Service has a continuing commitment to the course of action to build the road, and also has the expertise to prepare the statement which sets forth the various alternatives to the project.

Furthermore, the court rejected the Association's contention that preparation of the statement after the grant had been made was a meaningless gesture. It stated that "the project must be of sufficient definiteness before an evaluation of its environmental impact can be made and alternatives proposed." Since the Forest Service must still approve the location of the road and grant the necessary right-of-way easements for its construction, the impact statement prepared by the Forest Service will provide the basis on which that agency will make the final determinations. Therefore, the court found no violations of NEPA and denied the Association's motions for declaratory and injunctive relief against the project.

As to the preparation of the draft environmental statements by the applicant, the Second Circuit, in *Greene County Planning Board v. Federal Power Commission*, held that the Federal Power Commission may not delegate the responsibility of preparation of draft environmental statements to applicants for a license.

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47 Id. at 1235.
48 Id. at 1236.
49 Id. at 1236-37.
50 Id. at 1237.
The decision acknowledges that basic data can come from the applicant, but the preparation of the statement itself should be done by the agency:

NEPA places the onus of formulating the statement solely on the Commission, and, unless there is any indication that the Commission's procedures will not allow it to comply with its statutory duty this Court should defer to the Commission's discretion as to the proper information gathering techniques.\(^5\)

The Land and Natural Resources Division does more than just litigate suits involving NEPA. Other statutes are invoked by environmental groups. In *Sierra Club v. Morton*,\(^5\) the Disneyland Company of California was granted a lease (after competitive bids) on a large acreage in the mountains west of Fresno, California, to build a $32,000,000 ski resort. An environmental group, the Sierra Club, filed suit against the Secretary of the Interior and the Secretary of Agriculture to stop the issuance of a permit for the project. The Sierra Club alleged that the manner in which the leases were granted Disneyland by the Government violated federal statutes governing the management of national forests and parks. Plaintiff's main purpose in filing suit was to preserve the area as a wilderness, instead of permitting its conversion into a ski area. The district court stopped the project by an injunction. The Government appealed and the Ninth Circuit sustained the legality of the actions of the Departments of the Interior and Agriculture and held that the Sierra Club did not have the requisite standing to bring the action.\(^5\) The Sierra Club's petition for certiorari was granted by the Supreme Court,\(^5\) oral arguments were heard, and on April 19, 1972, the Court came down with its decision affirming the ruling of the Ninth Circuit that the Sierra Club had not alleged a sufficient stake in the area affected to have standing to bring the action. As the

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\(^5\) 405 U.S. 727 (1972).

\(^5\) Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

The Court stated: "The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development." The Court observed that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the Administrative Procedure Act."

Although the decision defeated the standing of the Sierra Club in that case, it made clear that individuals and groups may have standing to litigate matters where they have noneconomic interests. As the Court said:

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

The Court also observed that an individual or group which establishes its standing is not limited to asserting only its own interests in the matter; it can argue the public interest in support of its claim that the agency has failed to comply with its statutory mandate. The Court further noted that the test to establish standing would not insulate executive action from judicial review nor would it prevent any public interests from being protected through the judicial process. The significance of the standing test, the Court said, is to "serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

Even though the Government's posture in a lawsuit is that of defendant, its role is to protect the public interest and balance social and economic factors along with environmental considerations. Frequently the suit is brought because some private party or group is attempting to overturn an administrative decision which was based upon careful and thoughtful planning and

57 Id. at 739.
58 Id. at 734.
59 Id. at 740.
balancing and good ecomanagement and simply does not meet plaintiff's special interests. In addition to many of the cases cited above, an excellent example of this is the case of Zabel v. Tabb,\textsuperscript{60} in which the Corps of Army Engineers denied a permit to dredge and fill navigable waters. In Zabel the Fifth Circuit reversed the district court, holding that the Corps was not limited to consideration of navigation, flood control and hydroelectric potential when issuing such permits. The Fifth Circuit held that the Corps may deny such permits on environmental grounds alone.

B. The Government as Plaintiff

The three basic statutes under which the Government acts as plaintiff in protection of the environment are (1) Section 13 of the Rivers and Harbors Act of 1899,\textsuperscript{61} commonly referred to as the Refuse Act, (2) the Federal Water Pollution Control Act,\textsuperscript{62} and (3) the Clean Air Act.\textsuperscript{63}

The Refuse Act makes it unlawful to discharge "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States," except as authorized by the Secretary of the Army.\textsuperscript{64} For violations of the Act, the federal government may, by the express terms of another section of the Rivers and Harbors Act of 1899, seek criminal penalties in terms of fines and imprisonment.\textsuperscript{65} In 1970, however, the Department of Justice commenced using the Refuse Act as a basis for filing civil actions to enjoin pollution. The first such action was filed on March 13, 1970, against the Florida Power and Light Company in Miami, Florida, to enjoin massive discharges of heated water into Biscayne Bay.\textsuperscript{66} The case was settled on September 10, 1971, by entry of a consent decree requiring the company to construct, under court supervision, at

\textsuperscript{60} 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).
a cost in excess of $25,000,000, a system to cool and recycle the heated water.

As of July 26, 1972, approximately 125 other civil injunctive suits under the Refuse Act had been filed, including, in February, an injunctive suit to abate the discharge by the Reserve Mining Company of 67,000 tons per day of taconite tailings into Lake Superior. Of the civil injunctive cases filed, about 80 have been concluded by the entry of decrees, all of which require either the immediate cessation of the discharges, or the installation of pollution abatement equipment—often at great cost.

In addition, criminal litigation under the Refuse Act has been accelerated. Whereas as few as 15 and no more than 56 criminal actions under the Refuse Act had been filed during any one year in the fiscal years 1961 through 1969, 129 such actions were filed in fiscal year 1970, and 191 such actions were filed in fiscal year 1971. There were 59 convictions under this statute in fiscal 1970, and 127 convictions in fiscal 1971. Only a few months ago a large company (Anaconda Wire & Cable) was convicted of 100 violations of the Refuse Act, and a fine of $200,000 was imposed by the court; this was by far the largest fine ever imposed under the Refuse Act at one time against one defendant.

The Federal Water Pollution Control Act provides two enforcement mechanisms for pollution abatement by the federal government. The first is a three-step procedure consisting of a conference of federal, state, and interstate water quality agency representatives, a public hearing, and finally, court action. The second enforcement procedure calls for notification both to the violator of water quality standards and to interested parties, followed by court action if necessary. To date only two cases have been referred to the Attorney General for adjudication under the Act: one in 1960, against the City of St. Joseph, Missouri, and one more recently, against Reserve Mining Company, in Minnesota.

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68 1961-1971 ATT'Y GEN. ANN. REP.
69 1970-1971 ATT'Y GEN. ANN. REP.

(Continued on next page)
The Clean Air Act was changed dramatically when the Clean Air Act Amendments of 1970 became law. In the past, air pollution was regulated primarily by state and local authorities. The Act authorizes national standards and calls for national air quality standards on certain pollutants designated by the Environmental Protection Agency (EPA). It sets a deadline for primary standards—those designed to protect health. Significant new sources of air pollution, such as new power plants and smelters, and both new and old sources of hazardous air pollutants will fall under national emission standards. The Clean Air Act Amendments of 1970 are an example of a recent shift in burden of proof in pollution control. Once the EPA administrator tags an air pollutant as hazardous, he may, after giving notice, publish emission standards. Then any objector must establish "that such pollutant clearly is not a hazardous air pollutant."

To date, only one request for action following a conference or standard-setting procedure has ever been referred to the Attorney General: United States v. Bishop Processing. In that case, the Fourth Circuit affirmed the judgment of the district court, which provided that the company cease all manufacturing and processing in its chicken rendering plant.

IV. FEDERAL LAND ACQUISITION

The acquisition of lands for federal public purposes and the uses made thereof for the public benefit usually have material effects upon the human environment. The Land and Natural Resources Division of the Department of Justice is presently involved in the prosecution of condemnation proceedings to acquire approximately 15,000 individual tracts of land for such purposes. One of the primary purposes in acquiring privately owned lands by the United States Government is flood control.

(Footnote continued from preceding page)

78 Id.
Dam and reservoir projects, however, not only control floods, but also create beautiful recreation areas, thereby improving and enhancing the environment.

One of the largest of multi-purpose projects now underway is designated the Tocks Island Dam and Reservoir Project-Delaware Water Gap National Recreation Project, located on the boundary between Pennsylvania and New Jersey. The total estimated cost of this project is $500 million. When this project is completed, it will create one of the largest recreational areas for the millions of people in the metropolitan areas of northern New Jersey, southeastern New York and northeastern Pennsylvania. The Land Acquisition Section of the Land and Natural Resources Division is now handling the condemnation proceedings for the Corps of Engineers of the Department of the Army on approximately 100 dam projects throughout the United States. These projects will involve the acquisition of many thousands of acres of land. If voluntary conveyance of these acres cannot be achieved by the agency primarily responsible for land acquisition, the Land and Natural Resources Division is authorized to acquire the land by eminent domain proceedings.

The value of these dam projects has been questioned by many environmental groups. Prior to the institution of condemnation proceedings to acquire properties, the acquiring agency is requested to furnish information as to the actions taken to comply with the provisions of NEPA. In *United States v. 247.37 Acres of Land*, the court vacated an earlier decision allowing United States condemnation of land for a flood control project, on grounds that NEPA had not been complied with. In *Zlotnick v. District of Columbia Redevelopment Land Agency*, it was held that land speculators who brought an action to enjoin condemnation proceedings did not have standing to raise the issue of compliance with NEPA because they were merely seeking enhanced payment for their land from the agency.

To demonstrate some of the environmental benefits from the Corps of Engineers projects, the Corps has cited the following:

The Federal Government's top recreation host, the Army Corps of Engineers, recorded 276 million visits at 319 lakes

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80 3 ERC 1098 (S.D. Ohio 1971).
during 1970—up more than 7.5 percent over the record-year 1969. Camper days at 185 Corps project areas, where camping is permitted, were recorded at 43 million in 1970.

Lake Sidney Lanier, formed by Buford Dam on the Cattahooche River in Georgia, again headed the list with 11,737,000 visits recorded, an increase of nearly 800,000 over the previous year.

Lake Texoma on the Red River in Texas recorded the highest number of camper days, 7,637,500 during the year.

In addition to Lake Sidney Lanier's high visitation, 16 projects recorded more than 3 million visits and 30 recorded over 2 million. An additional 35 projects recorded visits in excess of 1 million.

Although the primary purposes of the man-made lakes built by the Corps are for other than recreation, the projects have become the Nation's most popular and heaviest visited recreation areas.

The Corps' lakes have been acclaimed among the best fishing areas in the Nation by the country's leading outdoors sports magazines, and by leading sport fishermen. Nearly 54 million pounds of sport fish were caught in the man-made lakes last year.\textsuperscript{82}

The federal government is in the process of acquiring by eminent domain ocean or lake front areas for recreational purposes in the following areas:\textsuperscript{83}

<table>
<thead>
<tr>
<th>State</th>
<th>Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Point Reyes National Seashore Area</td>
</tr>
<tr>
<td>California</td>
<td>Whiskeytown National Recreation Area</td>
</tr>
<tr>
<td>Florida</td>
<td>Biscayne Bay National Park</td>
</tr>
<tr>
<td>Florida &amp; Mississippi</td>
<td>Gulf Islands National Seashore</td>
</tr>
<tr>
<td>Indiana</td>
<td>Indiana Dunes National Lakeshore</td>
</tr>
<tr>
<td>Maryland</td>
<td>Assateague Island National Seashore (1970)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Cape Cod National Seashore Area</td>
</tr>
<tr>
<td>Michigan</td>
<td>Pictured Rocks National Lakeshore</td>
</tr>
<tr>
<td>New York</td>
<td>Fire Island National Seashore</td>
</tr>
</tbody>
</table>

The federal government is considering sites for rapid transit systems in an effort to reduce pollution caused by automobiles in


\textsuperscript{83} Records, Department of Justice.
congested city areas. Several cities have studied the total or partial ban of the use of automobiles in certain areas. Great strides are being made in the metropolitan area of the District of Columbia which will materially aid in reducing the pollution problem. Under a compact composed of the District of Columbia and the States of Maryland and Virginia, each participating entity is paying a part of the cost of constructing a rapid rail transit system in these jurisdictions; however, the United States is paying the greatest portion of such costs. It is estimated that 1,302 parcels of land will be acquired for the location of the transit system and related facilities at a cost of approximately $200,170,000. The Land and Natural Resources Division is charged with the responsibility of prosecuting condemnation proceedings to acquire these properties, which involve many parcels of great value. In addition, the Division is often requested to acquire more land for new and improved post offices, federal court buildings, harbor sites, and irrigation projects. These are planned and programmed with the interest and purpose of creating a better environment. The total spent for these land acquisition projects is as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td>$171,826,973.43</td>
</tr>
<tr>
<td>1968</td>
<td>183,440,371.26</td>
</tr>
<tr>
<td>1969</td>
<td>175,392,775.19</td>
</tr>
<tr>
<td>1970</td>
<td>161,216,596.38</td>
</tr>
<tr>
<td>1971</td>
<td>170,792,833.20</td>
</tr>
<tr>
<td>Total</td>
<td>$862,669,549.46</td>
</tr>
</tbody>
</table>

Many of the lands being acquired for federal public purposes are very valuable, and frequently excessive claims are made by property owners. Presently, claims are being asserted in amounts approximating $45 million. Claims involving many millions of dollars have been asserted in actions against the United States for lands included in a legislative taking for the Redwoods National Park in the State of California.

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84 The Washington-Metropolitan Area Transit Authority was created effective February 20, 1967, by interstate compact between Maryland, Virginia, and the District of Columbia pursuant to Pub. L. No. 89-774 (approved Nov. 6, 1966).

85 Records, Department of Justice.

V. Conclusion

As noted, this is only a brief outline of what is being done in the area of environmental litigation and public land law by the federal government. One thing, however, is clear: man has created the environmental problems we have today and man can solve them. The essayist E.B. White has observed, "Our approach to nature is to beat it into submission." Perhaps that is changing now. As Rachel Carson noted in Silent Spring (1962):

We stand now where two roads diverge. But unlike the roads in Robert Frost's familiar poem, they are not equally fair. The road we have long been traveling is deceptively easy, a smooth superhighway on which we progress with great speed, but at its end lies disaster. The other fork of the road—the one 'less traveled by'—offers our last, our only chance to reach a destination that assures the preservation of our earth.