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An Investigation into Proposed Citizen Suit Legislation
in New York State During the 1972-1973 Legislative Session

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[REDACTED] Senior 1973

Environmental Forum
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May 2, 1973

Mr. Louis Ismay
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SUNYAlbany, NY 12222

Dear Mr. Ismay:

This paper is a concentrated study on citizen rights involving the environment. It covers the more important citizen suit bills in this 1973 Legislative Session of New York State, the summaries and points of interest with the bills, and the hopeful changes in the law.

I would like to thank the cooperation of the State Capitol Building for their resources and their competent staff and also, the University library for the additional material to complete this paper.

In summary, I offer this paper for credit in your class. If you have any other questions, please contact me at your convenience.

Sincerely,

Annette B. Mis
Annette B. Mis

THE LAW AS IT STANDS TODAY . . .

ENVIRONMENTAL CONSERVATION
LAW

Article 19

Section 190705

"The basis for proceedings on other actions that shall result from violations of any code, rule, or regulation which shall be promulgated by the department pursuant to this article shall inure solely to and shall be for the benefit of the people of the state generally and it is not intended to create in any way new or enlarged rights or to enlarge existing rights. A determination by the commissioner that air pollution or air contamination exists or that any code, rule or regulation has been disregarded or violated, whether or not a proceeding or action may be brought by the state, shall not create by reason thereof any presumption of law a finding of fact which shall inure to or be for the benefit of any person other than the state."

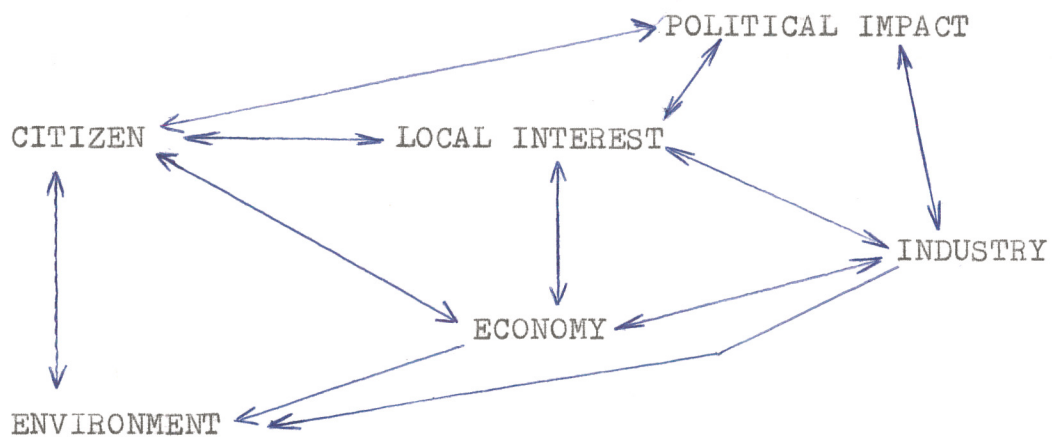
In layman terms, that translates that as of today, a citizen does not have the right to bring suit against polluters if it does not affect them personally. The following pages of this study will discuss what changes are in the making with the legislation as a guide.

INDEX OF BILLS

S-1815 A-no sponsor	Sens. B. C. Smith, Halperin
S-no sponsor A-3338	Mr. Carroll
S-2520 A-3509	Sen. Lewis Mr. Barbaro
S-2024 A-1258	Sen. Dunne Mr. Jonas
S-879 A-758	Sens. B. C. Smith, Barclay, W. T. Smith Mr. Harris
S-236 A-354	Sen. Dunne Mr. Harris and Mr. Lane
S-no sponsor A-266	Mr. Landes
S-no sponsor A-2577	Mr. Berle
S-1561 A-131	Sen. Pisani Mr. Burrows
S-647 A-806	Sen. Meyerson Mr. Fink
S-no sponsor A-3102	Mr. Stein

Key: S--Senate bill/no.
A--Assembly bill/no.

The Environment as Related to the Community:



Note: Arrows represent focus of interest.

The Environment as Related to the Community:

Gifford Pinchot, the father of modern conservation and scientific forestry in the United States, made this plain. "The earth," Pinchot related, "belongs by right to all its people and not to a minority, insignificant in number but tremendous in wealth and power." He continued, "The rightful use and purpose of our natural resources is to make all the people strong and well, able and wise, well taught, well fed, well clothed and well housed, with equal opportunity and special privilege for none."

In advocating Pinchot's statement, I believe that the environment is overly subject, as the supporting diagrams shows to both economic and industrial concerns. With local interest more concerned with the economy, and political impact hampered by lobbie of industry, only the citizen remains to protect the environment. Hence, citizen suits in proper usage will incur the courts to prevent pollution by industry and other polluters for the benefit of a "few" over the citizens of the state.

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Let me ask, why does our technology take so many ecologically destructive directions? There are many theories behind this question involving our social system, its complications, and the ravaging of our natural environment since the Industrial Revolution. My purpose, is not to examine the causes nor the remedies of our ecological crisis. It is, however, to seek organizational changes in the law and to a much greater degree, seek the spontaneous help of knowledgeable individuals of our society to stop the destroyers of our natural ecosystems. From this point of view, I will examine the current attitude of our legislatures. This is too large a subject to be handled in one brief paper, but fortunately even to a modest degree, our political system and our educational system will overcome their negative aspects to allow its citizens to sustain a check on the ecological crisis.

On January 1, 1970, Mr. Nixon signed into law the National Environmental Policy Act known as Public Law 91-190, 83 Stat. 853 for the purpose of creating the Council on Environmental Quality. Among its principal provisions was one which directed all agencies of the federal government to do the following:

Include in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

1. the environmental impact on the proposed action,

2. any adverse environmental effects which cannot be avoided should the proposal be implemented,
3. alternatives to the proposed action,
4. the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The purpose of section 102 of the National Environmental Policy Act of 1970 was to require that environmental values be considered with respect to all programs and projects likely to have environmental impact carried on by or with the permission of any government agency, whether state or local. In the 1973 legislative session of New York State, A-354 of Mr. Lane and S-1815 of Sen. B. C. Smith have been introduced to promote a consistent statewide environmental policy as well as focus attention on public interests rather than private or bureaucratic concerns.

Hence, environmental impact statements in their proposed form apply section 50 of New York State law, application of environmental law, to all state agencies. To insure that environmental values be given appropriate consideration along with the economic and technological factors, environmental impact statements shall be submitted to the Commissioner of the Department of Environmental

Conservation for each proposed project or program. Such statements shall include, although not be limited to, provisions on ecological impact, alternatives to the proposal, adverse environmental effects, estimated duration of adverse effects, and any other information which the Commissioner deems pertinent. Furthermore, additional advice and information useful in enhancing environmental quality shall be made available to the public as well as the state environmental board and their council of advisors.

At present, or perhaps in desperation, the citizen is turning to the courts as the only source of relief-- from the pollution, whether it be solid wastes into the Mohawk River or air pollution from the concrete mills. With the bureaucracy in disarray, environmental lawyers who had told their clients that litigation should only be a last resort are constantly finding themselves in the courtroom, the case in point being Amchitka and now the Alaskan pipeline. The principal function of the courts in environmental matters is to restrain projects by issuing a temporary injunction, halting an environmentally dangerous activity until a fullfledged trial can be had.

The role of the courts is not to make public policy, but to help assure that public policy is made by the appropriate entity, rationally and in accord with the aspirations of the democratic process. Rather than being at odds with legislative policy-making, the courts are promoting that process. In this manner, lawsuits initiated by private-citizens are now being undertaken since the bureaucracy has lacked the ability to

cope with all the issues that deserve attention in stopping pollution.

Georgetown University Professor Carroll Quigley has defined "environmental pollution" as vague in meaning, but essentially in the category that movement of objects by human action from places or conditions where they are natural and unobjectionable to places or conditions where they are unnatural, objectionable, and injurious. Unto this definition, add the legislation as set forth in national standards. Since it is difficult to enact legislation on an industry-to-industry base, Congress has passed complicated laws that has placed the burden on the states. In brief, the 1970 Water Quality Act and the 1972 Air Quality Act have placed not only the pressure of cleaning the environment upon the state, but also the staggering cost.

The purpose of citizen suits is to provide an alternative from waiting for the state to bring suit and secondly to bring into the courts a greater range and load of meaningful cases than there are at the present time. Joseph L. Sax, a law professor at the University of Michigan, drafted a bill giving citizens of a state the right to file suit against any public agency, or private industry to protect the air, water, or other natural resources from pollution. As a milestone in environmental law, Governor William G. Milliken of Michigan signed the Environmental Protection Act of 1970 to alleviate the growing resource contamination within the state.

Prior to the Sax law, in Michigan, and currently in New York State, the courts have often dismissed environmental suits

sought be private state citizens on the grounds that they do not have proper legal standing. Why? The court has stated that these actions should be brought by local, state, or federal agencies already charged by law with protecting the environment. Also, the court has ruled that a citizen bringing suit must show that he is directly affected by the actions of the offended. However, as in the case of the Sax law, and similar to bills introduced in New York State, there would be no question that a citizen has the right to bring suit when there is a threat to the overall environment.

On Monday, August 3, 1970, the New York Times stated in editorial comment:

The state of Michigan is pointing the way toward a society in which men, either personally or disguised as corporations, will foul the environment only at their legal perils. It will be enough to persuade a Michigan court that a river is being polluted or the air contaminated in spite of the law or even that the law itself, is inadequate to the need. The court then could grant injunctions, impose conditions, or even direct the upgrading of standards.

The hypothesis behind citizen suit legislation is that legitimate grievances should command action of an immediate and unbiased nature. Thus, each citizen of the state must be specifically empowered by statute to bring suit in any appropriate state court in order to protect our natural resources. Under existing New York State law, a person cannot maintain action to abate pollution or to protect the environment unless he can show that he has been affected or specifically aggrieved. The provisions of the citizen suit bills grant to private citizens the additional and cumulative remedies to abate pollution.

The prime difficulty in environmental lawsuits is the expense incurred. This will include hundreds of hours of lawyers' time, secretarial and clerical assistance, court fees, bond premiums, and compensation for experts. Another difficulty with the courts is that they cannot perscribe industry wide changes of practice, or order public utilities to spend money or even decide what levels of pollution are tolerable. Nor do the courts have the power to compel vigorous enforcement of anti-pollutiion statutes. A final reason stems from the economic issue. The courts will usually not close down a polluter's plant, which would cause serious economic loss for the polluter and considerable local unemployment. The case that would cite this example is Bomer versus Atlantic Cement Co. The court conceded that clouds of dust produced by a cement company was causing severe damage to neighboring property owners and that the plant was a nuisance. Although they conceded that it was causing serious harm, the court refused to enjoin the plant.

Litigation by private citizens strengthens and hastens government anti-pollution efforts. Litigation also provides another advantage, it cuts down the polluters inherent superiority in terms of money, power, and influence. The courts may also issue relief in terms of cleaning the environment when ecological disaster occurs, such as the shooting of eagles by helicopter in the West.

Further advantages of citizen legislation include the removal of industrial lobbying with appropriate litigation since

judges are not subject to the same type of pressures as legislators. And, unlike most bureaucrats, judges are sometimes willing to listen to new arguments and act flexibly.

S-1815 Sens. B. C. Smith, Halperin
A-no sponsor

Status: referred to the Committee on Conservation
and Recreation

AN ACT

To amend the environmental conservation law, in relation
to penalizing industries for contravening environmental
standards

This bill adds a new section to the environmental law
providing that any person, firm or corporation that has been
sited for being in violation of either a state health depart-
ment order or environmental conservation board order for more
than one year shall not be eligible to bid on any contract for
public work, materials or for either the State of New York
or any municipality within the state.

In our efforts to clean up the environment, it is important
that we recognize and distinguish between the companies that
are operating in compliance with health and environmental
standards. Conversely with those who have not heeded orders
and abatement notices for more than a year should be given
incentive for eliminating sources of pollution.

The company that has made the necessary investment to
abate pollution should have an economic advantage over the
competitor who has not yet seen fit to abate the source of
pollution. This bill is also a step forward in this recognition.

It is fitting and proper that the Legislature of the
State of New York distinguish between those companies who are
operating in a manner that will not harm or ravage the
environment. This bill simply takes cognizance of those who

S-1815

A-no sponsor

are and those who are not operating according to health and environmental conservation standards. Both a recognition and an incentive to abate pollution, which is the purpose of this legislation is long overdue in the State of New York.

S-no sponsor
A-3338 Mr. Carroll, Assemblyman

Status: referred to the Committee on Environmental Conservation

This ACT is identical to bills: S-236/A354 in wording. However, this unusual case has a reason. On January 3, 1973, Senator Dunne of S-236 and Assemblyman Harris of A-354 presented their bill to the session. Dunne and Harris wanted their bills added to the Environmental Conservation Law as Article 73. Article 73 would be found at the end of the ECL if passed. The end of ECL deals with enforcement and would be considered a subsidiary enforcement to the law. It would cause no real power as only an added article in ECL in that position.

Therefore, Mr. Carroll, decided to present the identical bill to the session again on February 5, 1973 but this time as Article 6. Article 6 would hold a stronger position among the other articles in the heart of ECL. It would hold a more paramount place as an active policy because all the other articles following Article 6 would have to answer and strengthen Article 6 as one of the more leading laws in ECL.

S-2520 Sen. Lewis

A-3509 Mr. Barbaro, Assemblyman

Status: In Senate and Assembly referred to Committee
on Environmental Conservation

AN ACT

to amend the environmental conservation law, in relation to actions and proceedings involving pollution of the waters, air or environment of the state

This bill would amend the environmental conservation law by granting to any person, association or group the right to commence an action demanding the prohibition of an act, or challenging the Government which allows acts of pollution, or which Government itself pollutes the air, water or natural resources of the State.

This bill is necessary to force Governmental Agencies to act for the protection of our ecology when such agency is reluctant to do so or is itself the perpetrator. All too often the courts find either that the petitioner lacks standing to sue, or that the duty sought to be enforced upon an agency is within its "discretionary authority" and not subject to judicial review: (and getting a court to find an abuse of discretion is very tough.)

This bill is designed to leave no doubts as to the right of an individual or group to sue and enforce administrative duties in an area which is literally the life-blood of our state--our environment.

S-2024 Sen. Dunne

A-1258 Mr. Jonas, Assemblyman

Status: In Senate referred to the Committee on
Judiciary and in Assembly referred to
the Committee on Codes

AN ACT

To amend the civil practice law and rules, in relation to class actions, and repealing a section thereof pertaining thereto

This bill, which has been drafted and sponsored by the Judicial Conference, expands greatly the public's right to bring class actions, that is law suits brought by a few on behalf of many in the same circumstances (the class). Presently, New York only permits such suits if the members of the class are related to each other by "privity", a formal and narrow legal concept which includes people who own stock in the same company or tenants in common of the same land but excludes consumers of the same brand of merchandise or users of the same ecological system. The bill would correct this exclusionary rule and permit class actions when common questions of fact or law predominate. The bill also provides extensive guidelines to help the courts manage these suits.

S-879 Sens. B. C. Smith, Barclay,
W. T. Smith

A-758 Mr. Harris

Status: in Senate referred to Committee on Finance
in Assembly referred to Committee on
Governmental Operations

AN ACT

to amend the executive law, in relation to notice to
and appearance by the attorney general in actions and
proceedings involving pollution of the waters, air or
environment of the state

This bill, recommended by the Attorney General, amends
Article 5 of the Executive Law by adding a new section,
S71-a, with relation to notice to and appearance by the
Attorney General in all actions or proceedings, private
or otherwise, which involve the pollution of the waters,
air or environment of the State. This bill is to take
effect immediately when and if passed.

As stated earlier in this paper with the case of
Boomer v. Atlantic Cement Co., 25 N. Y. 2d 219 (1970).
is one of the unfortunate results which a bill of this
type (S-879 & A-758) could remedy. The result of the
court case insofar as private litigants are concerned
is that it sanctions a virtual license to pollute upon
the payment of damages. It is difficult, it not impossible,
to separate the public interest in pollution abatement
from the private interest of the particular individual
whose property is damaged. However, disposition of the
individual's interest does not require abatement so long
as damages are paid. On the other hand, a judicial

S-879
A-758

disposition in the public interest would be keyed to abatement under a judicially fixed schedule, rather than continuance, of the pollution.

This bill provides that in private litigation, such as Atlantic Cement, where environmental pollution is involved, the Attorney General shall be notified of the initiation of such litigation so that he may participate therein if he determines that the public interest requires his intervention and so that he may ask for affirmative relief on behalf of the People of the State.

This bill is part of the legislative program of the Attorney General.

S-236 Sen. Dunne
A-354 Mr. Harris and Mr. Lane

Status: referred to the Committee on
Conservation

AN ACT

To amend the environmental conservation law, in relation to establishment of a procedure authorizing any person to institute an action for conservation and protection of air, water and other natural resources of the state

The bill would provide each person, including the Attorney General on behalf of the people of the State, an individual, a department or agency of State government, a political subdivision of the State, a public or private corporation, an association or firm and others with a new legal remedy enabling them to maintain legal actions for equitable or declaratory relief to protect the air, water, or other natural resources of this State from pollution, destruction, or substantial or unreasonable impairment, or to halt or prevent violations of the State's pollution control and environmental protection laws and standards.

Under existing law, a person cannot maintain a legal action to abate pollution or to protect our natural resources unless he can show that he has been affected or specially aggrieved by the polluter's activities. Under the provisions of this bill, any person would have legal standing to maintain an environmental protection action against a polluter without having to show an adverse effect on him as an individual or on his property. Furthermore, the Attorney General would have the right to bring a direct action for equitable or declaratory relief without the need for prior administrative proceedings, referral from a State department or

S-236
A-354

agency, or the need to establish a common law public nuisance.

The general procedural principles to be followed in the action are set forth and provision is made for the court to require a plaintiff to give an undertaking as security for costs and disbursements in an amount not to exceed \$2,500.00 except where the plaintiff is a political subdivision, department or agency of the State or the Attorney General.

The purpose of this bill is to provide additional and cumulative remedies to abate pollution, destruction or substantial or unreasonable impairment of the air, water or other natural resources of the State in order to enable every citizen to participate with the State in our common struggle to attain a healthy environment and protect and preserve the natural resources of the State for use and enjoyment by all citizens.

S-no sponsor
A-266 Mr. Landes, Assemblyman

Status: referred to the Committee on Judiciary

AN ACT

To provide for declaratory and equitable relief for protection of the air, water and other natural resources and the public trust therein; to prescribe the rights, duties and functions of the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity; and to provide for judicial proceedings relative thereto

The protection of the air, water and other natural resources and the public trust therein, and would give each citizen increased access to the courts to sue and to protect the environment.

The granting of the right to the courts to grant injunctions or impose other conditions on the alleged polluter, in order to protect the environment.

If standards have been previously set up by an administrative agency the courts has the right to determine whether the standard is deficient, and, if so, to direct the adoption of a standard approved by the court.

If the court has a reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed five hundred dollars.

When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water, or other natural

resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show by way of an affirmative defense that there is no feasible alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the supreme courts shall apply to actions brought under this act.

In conclusion, it can be said that this particular bill resembles other citizen suit bills in that it is concerned with the rights and duties of the individual. However, the more citizen suit bills in the hopper may generate more interest and action. Citizen suit bills have been relatively stable in committees, etc. this year but legislators agree that there will be more action and concern in the next session.

S-no sponsor

A-2577

Assemblyman Peter A. A. Berle

Status: referred to the Committee on Codes

AN ACT

To amend the civil practice law and rules, in relation to providing for actions for declaratory and equitable relief for protection of the air, water and other natural resources of the state; to prescribe the duties of the attorney general, political subdivisions and the citizens of the state; and to provide for judicial proceedings relative thereto

This bill permits the Attorney General, a city, village, township or citizen to maintain a legal action for the protection of the air, water and natural resources of the state from impairment or destruction, and the rights of the people guaranteed by section four of article XIV of the constitution of the state.

The plaintiff must make a prima facie showing after which the burden is on the defendant to show

- a) There is no prudent alternative
- b) The program or product is consistent with health, welfare and safety in light of the state for protection of natural resources

The bill also provides for intervention in administrative proceedings and review of administrative determinations in light of the interest of the state in protecting air, water, etc. The bill provides for safeguards against "strike" suits by prohibiting settlements for compensation. In addition the court may require the plaintiff for post a bond. The bill does not authorize class action for money damages.

The purpose of this bill is to provide for the development of a common law of environment in the courts of New York

S-no sponsor
A-2577

to establish the interest of the state in protecting air, water and natural resources and to provide an effective method of enforcing the public interest in environmental matters expressed in article XIV of the constitution.

S-1561 Sen. Pisani

A-131 Mr. Burrows, Assemblyman

Status: In Senate referred to the Committee on Conservation and Recreation and in Assembly referred to the Committee on Conservation

AN ACT

To amend the environmental conservation law, in relation to providing standing to maintain civil actions or to intervene in an administrative proceeding by the attorney general, a city, village, or township or a citizen of the state or any domestic corporation, association or other organization or any foreign corporation, association or other organization having members within the state whose charter lists a purpose of protecting natural resources or the environment against any person, including a governmental instrumentality or agency, to see protection of the environment from pollution and of the rights of the people as guaranteed by section four of article fourteen of the constitution of the state of New York

This bill would amend the Environmental Conservation Law by adding a new action providing groups, corporations, and individual plaintiffs with the standing order to halt environmental pollution.

The following are important portions of the bill:

Section 135

Provides that the court may appoint a master or referee to take testimony and make a report to the court in an action

Section 136

Provides that the court may order the plaintiff to post a surety bond or cash, not to exceed one hundred dollars if the court has reason to doubt the plaintiff's ability to pay any costs rendered against him in an action.

Provisions in this bill will not force a business to operate at a loss, but will attempt to insure cleanup where

S-1561

A-131

the polluter is not subject to prohibitive expense. Where a polluter cannot stay in business unless allowed to pollute, the plaintiff must resort to other remedies such as nuisance law as grounds for suit.

Polluters claim that suits are merely a means of harrassment or even if in good faith, that they become another agent of court congestion. Therefore, polluters invariably insist on a costly bond and characterize the action as a strike suit.

To make possible the greater use of litigation, this bill limits the surety bond usually required if the court has reasonable grounds to doubt the plaintiff's ability to pay any costs which might be rendered against him in a suit to an obtainable and realistic amount.

S-647 Sen. Meyerson
A-806 Mr. Fink, Assemblyman

Status: referred to Judiciary Committee

AN ACT

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing
an amendment to article one of the constitution, in
relation to the inalienable right to a decent environment

Every person has the unfettered right to breath clean
air and drink fresh water. By providing the people with
such an inalienable right, the state would in effect become
responsible for the breach of any such right by one party
or another. It shall therefore become the duty of the
state to see that such a right is not violated.

S-no sponsor

A-3102

Assemblyman Stein

Status: referred to the Committee on Judiciary

AN ACT

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing an amendment to article one of the constitution, in relation to the inalienable right to a decent environment to provide for a healthful life and pursuit of happiness

This constitutional amendment would declare that every person has an inalienable right to a decent environment and that no person has a right to deplete or despoil the resources which make a decent environment possible. The amendment also declares it to be the policy of the State to protect our resources for future generations and mandates a legal duly enacted economic plan for resource utilization.

It is presently extremely difficult for a private individual to bring suit against polluters because the American business philosophy is such that a "right to pollute" is assured unless a clear danger to the individual is shown. Furthermore, while the Conservation Amendment enacted last year was a step forward in preserving our resources, it did not allow the State to control resource utilization, which is necessary to assure for future generations undepleted resources.

Summary of the Bills based on Citizen Suit Legislation:

Including reference to:

- I. definition,
- II. appointment of a referee,
- III. legal fees,
- IV. bond requirement,
- V. frivolous suits, and
- VI. monetary reward

The purpose of the bills on citizen suit legislation all maintain the same purpose, to enable the victims of environmental pollution to maintain suits against the polluter and, if successful, to recover damages or obtain an injunction. Moreover, such suits may be maintained by plaintiffs suing either as individuals or as representatives of a class of victims who cannot be practicably joined.

Again, the summary of provisions clearly revises the policy of the state of New York to vindicate the citizen under section 4 of Article XIV of the state constitution. The Supreme Court is given jurisdiction to hear such cases; the Civil Practice Laws and Rules are amended so as to allow for class suits in environmental cases; and, differing provisions are made for attorney's fees and monetary reward.

However, between the major bills many differences occur:

I. Definitions.

Most of the bills are very specific on definition of various terminology to prevent loopholes within the law. As in the Burrows' bill assembly # 131/Pisani bill senate # 1561 specifically defines "abatement," "damage to the environment," "person," and "prohibitive" with a purpose to greatly reduce further destruction to the environment. It clearly states protection of the natural resources whereas in the Harris-Dunne bill S-236/A-354 briefly defines only "person" as an individual who has the power to legal remedy. The Carroll

bill #3338 also defines only "person" with the same wording; it is obvious the Burrows-Pisani bill is the strongest in clarity for the people to understand.

II. Appointment of a Referee.

A referee will be appointed who will be a disinterested person and one who is technically qualified in providing the court with expert testimony is allocated in the Burrows-Pisani bills only. My other listed bills neglect to make any provisions for establishing a referee in their statements. The appointment of a referee does not call for an "environmental ombudsmen" but does represent a prehearing to discourage frivolous suits.

III. Legal fees.

Mr. Berle's A-2577 relates that if the plaintiff is unsuccessful that no cost in excess of the \$2,500 nominal bond requirement shall be levied by the court against. This \$2,500 is the maximum amount of the bond. However, this amount is based upon the discretion of the court in assessing "good faith" of the suit and thus may not be necessarily required. This provision, as Mr. Berle believes, is a further discouragement to frivolous suits.

The Burrows-Pisani bills state that if the court has reasonable grounds to doubt the plaintiff's ability to pay any cost which might be rendered against him in an action brought under section 8-0102, the court may order the plaintiff to post a surety bond or cash not to exceed \$100. I feel that although this provision would encourage numerous suits, due to the \$100

nominal bond, many frivolous suits may result. Also, the low bond requirement may "flood" the court docket with suits not impairing the "good health" of the citizens of the state.

The Dunne S236 and Harris A354 bills has the following provision, "at any stage of the action, upon motion by the defendant with notice, or upon its own initiative, the court may order the plaintiff to give an undertaking for costs and taxable disbursements in an amount not to exceed the sum of \$2,500." Specifically, this bond requirement at the discretion of the court provides that the plaintiff must give proof within thirty days that the defendant is doing damage to the environment. If the plaintiff shall not complete this undertaking within the thirty day requirement, the court may dismiss the complaint and award the costs in favor of the defendant.

In conclusion, the legal fees in Mr. Berle's bill provide the strongest measure. This measure is important since the limit of \$2,500 discourages the frivolous suit but can be readily obtained if the environment is threatened and possibly waived on the court's discretion.

IV. Bond requirements.

In brief reiteration, I find Burrows-Pisani bond fee of \$100 inadequate. More realistically, the \$2,500 bond fee should be imposed and the court shall rule, based upon the referee's report, on whether this bond shall be posted.

V. Frivolous suits.

Mr. Harris, Sen. Dunne, and Mr. Berle, in their own bills, provide the best measures against suits brought out of "good faith" into poor actions. In addition to the \$2,500 nominal bond, the allegations as to the conditions or actual complaint must be supported by affidavits of at least two technically qualified environmentalists. Also, an action in these bills cannot be compromised, discontinued, or dismissed without the approval of the court to dissuade "collusion" between plaintiff and defendant during the case.

VI. Monetary Reward.

In the Burrows-Pisani bills, the court shall award to the plaintiff damages of not less than TWO or not more than THREE TIMES the amount it would reward if the defendant did damage to the environment. Also, a reasonable amount shall be rewarded to the plaintiff in costs incurred with the actual case presentation in court. Burrows-Pisani in their bills believe that the monetary reward system should be implicated. This, they felt, would encourage the average citizen to bring suit since he would in turn gain monetarily. Although this may encourage the frivolous suit, the implication of concern is the distribution of settlement. To divide up the proceeds in this manner makes the provision absurd with close examination of settlement.

The Landes bill #A-266, the Carroll A-3338, and the Dunne S236/Harris A354 bills state that the courts may grant declaratory or equitable relief or both. The court may: direct the immediate

cessation or correction of the condition or activity complained of, impose such terms and conditions, with respect to the condition or activity complained of, as may be required to conserve and protect the air, water or other natural resources of the state from pollution.

I conclude that the compromise bill must authorize the court not to divide any "lumps" monetary settlement to an individual plaintiff, but direct the defendant to return the environment to its natural state unscathed by the pollution.

VII. Conclusion.

Of the bills summarized, each has individual flaws. With this in mind, the passage of any single bill could endanger the environment instead of following its intended purpose. To this extent, the passage of any single bill might be detrimental in any one of the categories discussed.

Conclusion on Citizen Suit Legislation and the Need For
Immediate Passage of a Sound Compromise Bill

Ultimately, the usefulness of litigation like citizen suits must be tested for its impact on policy rather than merely its ingenuity in the use of legal doctrine. The question is whether the courts do in fact serve to pry open the democratic process and provoke consequences that are responsive to the merits of the conflict and more reflective of the variety of public constituencies to have an interest in the situation.

There is no single answer to this situation. The governmental process is too complex to produce enough solutions and the scope of judicial intervention is too limited to provide wholly satisfactory solutions.

The prospects for passage in environmental legislation on citizen suits seem slim at this time. We must do better. Though much of the solution can be found in citizen suits legislation. The issues on solution will be raised before administrative branches of government and in the mass media. However, the most effective tool will be court subpoena.

We will do better, but not nearly so well as the public likes to think. We have many battles ahead that will have to be fought one by one. The battlefield, of course, will not be limited to the courtroom--many disputes will be aired in the legislative forum, before administrative tribunals, and in the mass media. But one fundamental source of power to make those battles productive will be the hovering presence of a court order.

This is not because courts are--in some theoretical sense --particularly desirable institutions for the resolution of

conflicts; but because within the foreseeable future there will be conflicts and because courts are especially suitable for assuring access to the decision-making process to ordinary citizens who have no status beyond that as the victims of environmental disruption.

Few environmental problems are amenable to a set of fixed laws in promoting a greater concern for environmental protection. What I suggest is the need of legislation to incorporate citizen participation as an essential factor for the future. The recognition of citizens enlarge judicial roles by promoting a greater concern for environmental quality.

Mr. Joseph L. Sax defines the purpose of litigation as, "litigation is thus a means of access for the ordinary citizen to the process of governmental decision-making." Further, Mr. Sax states:

The elaborate structure of administrative middlemen we have interposed between the citizen and his interest in environmental quality has had another pernicious effect. It has dulled our sensitivity to the claim that citizens, as members of the public have rights. The citizen who comes to an administrative agency comes essentially as a supplicant, requesting that somehow the public interest be interpreted to protect the environmental values from which he benefits. The citizen who comes to court has quite a different status-- he stands as a claimant to which he is entitled.¹

The need for citizen suit legislation does not have to be further elaborated upon, however, the passage of a law does. In the State of New York, numerous bills have been introduced. Though no single bill seems likely to achieve passage at this time.

¹ Sax, Joseph, Defending the Environment. New York: Alfred A. Knopf, Inc., 1970. 58pp.

Notwithstanding the provisions of compromise, I believe that the issue of damage to the environment and the elimination or reduction required thereof is essential for the welfare of the people of this state. There is a prevailing weakness of enforcement procedures within this state. Citizen suits will fulfill section 4 of article XIV of the constitution of the state of New York in providing the people with a "healthy environment."

Thusly, citizen suit law will indicate that environmental values must be protected as an invaluable complement to any administrative agency effort. Once this legal standing takes effect, this state will take the step forward for the "pollution free environment," a step desperately needed now. ✓

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