

ENVIRONMENTAL CITIZEN ACTION

HEARINGS BEFORE THE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES HOUSE OF REPRESENTATIVES NINETY-SECOND CONGRESS

ON

H.R. 49, H.R. 290, H.R. 4517, H.R. 8050

TO AMEND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
TO PROVIDE FOR CLASS ACTIONS IN THE UNITED STATES DISTRICT
COURTS AGAINST PERSONS RESPONSIBLE FOR CREATING CERTAIN
ENVIRONMENTAL HAZARDS

H.R. 5074, H.R. 5075, H.R. 5076, H.R. 5819

TO AMEND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
TO PROVIDE FOR CITIZENS' SUITS AND CLASS ACTIONS IN THE
UNITED STATES DISTRICT COURTS AGAINST PERSONS RESPONSIBLE
FOR CREATING CERTAIN ENVIRONMENTAL HAZARDS

H.R. 6862, H.R. 9564

TO AMEND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
TO CONFER STANDING ON PRIVATE PERSONS TO SUE FOR RELIEF
FROM POLLUTION

H.R. 8331, HR. 9583

TO AMEND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
TO PROVIDE FOR CITIZENS ACTIONS IN THE UNITED STATES DIS-
TRICT COURTS AGAINST PERSONS RESPONSIBLE FOR CREATING
CERTAIN ENVIRONMENTAL HAZARDS

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6. H.R. 49 limits suits to those plaintiffs personally "endangered or adversely affected."

7. Finally, H.R. 49 provides no guidance on questions of administrative hearings, appropriate defenses, bonds, and awards of legal fees as does H.R. 5076.

I certainly wish to commend this committee for its undertaking of what is clearly the most needed and useful single legislative approach to our environmental problems. I would urge your action on H.R. 5076 in light of the considerations and suggestions advanced for its betterment during these hearings.

We would urge the committee to focus its attention on H.R. 5076. We feel that is the more useful and commendable of the two bills primarily under consideration.

Thank you.

Mr. DINGELL. Mr. Cellarius, the committee is grateful to you for a very helpful statement and we thank you for not only your time and energy but for the very helpful suggestions you have given with regard to legislation pending before this body.

Were there any questions for Mr. Cellarius?

Mr. KARTH. No questions.

Mr. DINGELL. Mr. Cellarius, we are grateful to you and we thank you very much.

Mr. CELLARIUS. Thank you.

Mr. DINGELL. The Chair notes that Mrs. Willard Wolfe has come from rather some distance. Mrs. Wolfe, would you like to be heard at this time?

Mrs. WOLFE. If there is somebody that needs to get ahead of me—

Mr. DINGELL. I don't notice anybody has expressed any great haste.

We are delighted to hear you. Certainly, it is a pleasure to welcome you back. The committee remembers the time before when you were present with us to discuss the National Environmental Policy Act which, in part, through your invaluable support and effort became law and we are certainly privileged to have you back with us again.

STATEMENT OF JOAN WOLFE, WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC.

Mrs. WOLFE. Thank you very much. I am very happy to be here, Mr. Chairman and committee members, counsel.

I am Mrs. Willard Wolfe, former chairman of the West Michigan Environmental Action Council and present legislative chairman of our council.

I am speaking today not only for our council but also for the following organizations which asked us to speak for them:

The Kalamazoo Garden Club, Holland Garden Club, Grand Rapids Audubon Club, Temple Emmanuel Sisterhood, Battle Creek Environmental Action Council, Grand Rapids Council's P-TA's, Kent County Council P-TA's, Grand Valley State College Biology Club, Rockford Garden Club, T.B. Center-Grand Rapids, West Wyoming P-TA, Communications Workers of America, 4034, Michigan Trail Finders, Ada Anti-Pollution League, West Michigan Chapter of Trout Unlimited, the Dwight Lydel Chapter-Izaak Walton League—those are both the largest chapters in the State—Kennowa Hills P-TA, Kent County

League for peace and Freedom, Trinity United Methodist Socials Concern Committee, the Committee to Save the Superior Shoreline.

We strongly support and urge the passage of legislation to give the citizens the right to go to court on behalf of our environment and we commend Representative Dingell and Representative Udall for introducing the legislation which we are primarily discussing today.

The action council has always been a strong advocate of Michigan's Environmental Protection Act of 1970, and act which we asked Dr. Sax to research and write for us, and which embodies the same philosophy as the bills now under consideration.

Since the passage of the Michigan act, the action council has instituted one suit under it. This is the air pollution suit which Roger Conner mentioned, and he also talked about the salutary indirect effects that this type of litigation can cause.

I have with me today for your information, copies of an article from the Grand Rapids Press of April 21, 1971. This article relates to a recent public meeting of the Michigan Air Pollution Control Commission, which Roger Conner also referred to. The headline of the article reads, "State Air Pollution Board Gets Tough." The articles give instances of the commission's tougher stand, and also reports that the meeting, which lasted more than 12 hours "... had about the most lengthy agenda in the commission's history."

Mr. DINGELL. Mrs. Wolfe, the Chair observes that the article to which you allude would probably be helpful to the record, and without objection, the Chair would direct that it be inserted in the record at this point, if you would submit it to us, please.

(The article follows:)

[From the Grand Rapids Press, Wednesday, Apr. 21, 1971]

STATE AIR POLLUTION BOARD GETS TOUGH

(By John O'Connor)

Lansing—Several of the state's smaller foundries told the Michigan Air Pollution Control Commission Tuesday they are trying to get pollution control devices on their furnaces quickly, but the cost is squeezing them hard.

In a day-long session a least a dozen firms appeared before the commission. Most asked for and received more time to either install additional equipment or replace present cupola-type furnaces with electric ones.

Two plants of General Motors Corporation—the Saginaw Malleable Iron Plant Central Foundry Division and the Pontiac Division Foundry—in separate presentations accompanied by slides and charts, impressed commission members with their progress to date in installing air pollution control systems.

The commission approved the Pontiac foundry's program of replacing all cupolas with electric furnaces and fabric filter collectors by March, 1973.

The commission also voted to grant the Saginaw plant its requested variance until January, 1972, at which time the company was ordered to return for a progress review. The Saginaw plant is replacing cupolas with electric furnaces. The whole project will cost \$24.7 million. The project at the Pontiac plant, where the company is building a new facility, will cost \$25 million.

Commission action on the requests of smaller foundries varied considerably:

The Sparta Foundry Company was granted eight more months to continue installing anti-pollution devices on its furnaces. Martin DeHaan, the firm's general manager, reported the second stage of the pollution control work would be completed by the end of 1972.

Tom Anstey, owner of the Anstey Foundry Co. in Stevensville, asked the commission to exempt his firm from meeting the air pollution emission standards of the state because of the firm's small size and infrequent use of its furnace compared to the cost. (About \$75,000) of installing the pollution control devices.

The commission granted the Hillsdale Foundry Company 60 days in which to formulate plans for relocating its foundry in Litchfield with adequate control equipment.

The commission, however, gave Anstey 90 days in which to try to negotiate a loan for equipment purchase and report back.

Ordered to report back October 1 was Casting Service Corporation of Michigan. The Bridgman firm is also in the decision-making stages on new emission control devices.

The commission delayed for 30 days any action on Dow Chemical Company's program for controlling emissions from its coal-fired boilers pending further study by the commission's staff.

Betz Foundry of Grand Rapids was granted a variance until March, 1972. James R. Hale, the firm's attorney said the company is studying electric induction melting, and will place an equipment order by August of this year so that whatever equipment is finally decided upon can be installed and operational by March, 1972.

Betz and the commission are co-defendants in a suit filed recently in the Kent County Circuit Court by the West Michigan Environmental Action Council over the air pollution issue. Assistant Attorney General Curtis G. Beck told the commissioners the hearing in that suit is presently postponed and no new hearing date has been set.

A. E. Higman, general manager of the General Foundry and Manufacturing Co. of Flint, told the commission his company wanted to comply, but—and this theme was repeated by many of the small companies—it was a question of finding the money to buy the equipment.

"We do not have the pocketbook of a General Motors; we have the pocketbook of a general foundry," Higman said. He told the commission the firm has received part delivery on a new electric furnace and expected to have it operating by the end of the year.

The commission granted General Foundry six months more on the condition the firm apply for a permit to install its new electric furnace within 30 days and move along with the other facets of its emission control program already scheduled for completion within the next two years.

TRAVERSE FIRM HIT

The commission warned officers of the Traverse City Iron Works that it could not allow the firm to simply continue operating without any emission control equipment simply because it was planning on constructing a new foundry within five years at a different location. The air pollution staff had reported emissions at the Traverse City foundry were relatively serious and felt the time the firm wanted to complete the new plant (three to five years) was excessive.

Commission chairman John C. Soet asked the company to meet with the commission staff during the next 60 days and report back to the commission.

But the commission voted not to allow the City of Iron Mountain asphalt plan to continue operating this year. Staffers reported the city refused to spend the \$20,000 for the needed air pollution control equipment and wanted to operate for one more year at its present location and then move in 1972 to a more remote area, but still be free of any emission controls.

Dunn Paper Company, of Port Huron appeared to report on its long and generally unsuccessful search for the right kind of equipment to convert a pulverized coal-fire boiler to oil or gas. But the commission gave the firm 60 days in which to try to nail down a company that could do the conversion and report back.

The meeting, which lasted more than 12 hours, had about the most lengthy agenda in the commission's history.

Mrs. WOLFE. We cannot claim with certainty that there is a direct cause and effect relationship here, but it does appear to us to be reasonable to assume that public pressure in the form of a lawsuit is partly responsible for the commission's changing stance. Thus, citizen suits may have effects that extend beyond the results of a given case.

Turning to the specific bills that are being considered here today, H.R. 49 and H.R. 5076, I would like to state on behalf of the action council that we tend to favor 5076 and we do have listed specific

problems which we have with both bills, but I think that since most of them have been referred to already today, I will just skip to a couple of them.

H.R. 49 raises a brand new issue by allowing the recovery of money damages. The action council is not prepared to say that money damages should not be collectable from polluters in class actions, but this is such an extremely complex matter that we are afraid that its inclusion in legislation of this type at this time may prevent the passage of this necessary reform legislation. Any recovery of money damages is going to have to be very carefully worked out, because of the difficulty of determining just what the damages are in pollution cases, and because of the difficulty of deciding what to do with the money once it has been collected.

Another problem that we have is that in 5076, first, in subparagraph (f), it is provided that "Proof of violation by defendant of any Federal or State environmental law or regulation shall conclusively establish plaintiff's right to judgment."

We think that this provision may not be wise. We have learned that, on some rare occasions, Federal and State antipollution standards are not rational. By this, I mean to say that, upon occasions, antipollution standards can be criticized, not on the grounds that they are too tough or too lenient, but on the ground that they simply miss the point. Under these circumstances, we do not think that proof that the defendant is violating the standard should automatically entitle the plaintiff to judgment.

Furthermore, if the provision is inserted in the law, a contrary presumption may arise. Under this contrary presumption, a court might hold that a plaintiff who is unable to show that the defendant is violating any Federal or State environmental law or regulation is not entitled to judgment. We know that this contrary presumption should not necessarily follow from the original presumption. On the other hand, we are afraid that the bill, as presently drafted, may, for all practical purposes, establish this result because of the psychological effect which the provision will have upon the courts.

The second provision which troubles us is section 306 of H.R. 5076, as presently drafted. This provision allows the court to award costs of litigation, including reasonable attorney and expert witness fees to any party, whenever the court determines that such an award is appropriate. The Michigan act allows the court to apportion costs, but under Michigan law and practice this would not include reasonable attorney's fees. We believe that the inability of the plaintiff to obtain his reasonable attorney's fees from the defendant will undoubtedly act as a deterrent to many suits in Michigan. We also know that Congress has used the technique of permitting the courts to award attorney's fees more and more in recent years in order to encourage litigation thought to be socially desirable. The Fair Credit Reporting Act and the Truth and Lending Act are two examples. We believe that the technique works and that it is worth your serious consideration. On the other hand, as presently drafted, the provision in H.R. 5076 would allow the court to award the defendant's attorney's fees against the plaintiff. We believe that this possibility should be eliminated. If it is not, the attorney's fees provision will not work,

and will not encourage this kind of litigation. In fact, it will deter such litigation.

Our experience under the Michigan act has been that few suits are brought and that those which are brought are entirely within the realm of reason. In other words, although not every suit which is brought may be won, none of the suits of which we are aware which have been brought so far can be classified as crackpot suits. So consequently, we do not believe that the threat of an award of attorney's fees against the plaintiff is needed to deter unmeritorious suits.

Now, with your permission, I would like to make some comments on the passage of Michigan's bill, because I think that it is relevant to passage in the Congress.

Mr. DINGELL. I hope you will feel free to do so.

Mrs. WOLFE. Thank you.

The Environmental Action Council went to Dr. Sax originally and asked him to research and draft legislation for us though we did not tell him the kind of legislation we wanted. It was his concept and his work entirely, but we told him that we needed some new tool, an objective means to stop programs and activities which we knew were harming the environment.

We were frustrated by our inability to get legislation passed, the kind of legislation which requires scientific expertise, because conservation organizations are usually volunteer, relatively poor, tax-deductible organizations, which simply cannot combat and contradict the constant public relations and scientific balderdash which some of our industrial lobbyists are able to disseminate day after day.

We were also frustrated by the disregard for the public interest by some single-minded agencies, industries, and individuals.

Dr. Sax brought us his idea for a bill and we immediately saw it as the answer to the frustrations which we had met in the past. But we were also told by our legislators and by older conservation organizations that this was such strong legislation that it couldn't possibly be passed or, if it were passed, it would be passed in such weakened form that it would mean nothing.

However, I think none of them realized that this bill hit a responsive chord in the public. It was a new right; we knew we had to have it. We knew it was a new concept. We could explain it to people and we did. We had a 13-page explanation of this bill which we disseminated widely. People got to know the bill very, very well and it was an answer to the old argument that conservationists are merely emotional. Here would be an opportunity for us to get our facts in court, our scientists under cross-examination under oath, where you could tell fact from fiction. I think that it is interesting to note that conservationists are willing to do this and there are certain industries which do not want the light of truth in court under oath to be heard, evidently.

Eventually, literally hundreds of organizations studied this bill and got behind it and worked very, very hard for it.

I think four examples will illustrate how well the grassroots really knew the bill and how much support they gave it. I am kind of sorry that we didn't turn on the public today because if we had

even whispered that there would be this hearing today, I think you could have had 17 auditoriums filled.

In a snowstorm in Grand Rapids, the worst snowstorm of the year, where you literally couldn't see a few feet ahead of your car, a hearing was held in a fairly rural part of Grand Rapids most people do not know, and yet 450 people showed up for that hearing. Forty-five organizations were represented there at the hearing. All the way from the American Civil Liberties Union to little garden clubs to people coming from Muskegon and Grand Haven testified at that hearing and I think that Representative Anderson will remember what a tremendously unusual type of hearing it was.

Another example is that the Senate held a hearing and gave us a weekend's notice and yet we were able to fill an auditorium. People came from the UAW in Detroit, representing all kinds of backgrounds and interests—a minister's wife, a black housewife who talked about her children not being able to play outside because of the air pollution, the homeowner who talked about the disintegration of his aluminum siding. This type of person spoke very, very eloquently at that hearing.

Another example was the junior league. This is a group which you usually don't think of as getting involved in politics, and yet the junior league asked one of our legislators to come and talk to them about the bill and he did and he brought copies of the bill, but, much to his amazement, the junior league knew more about the bill than he did and they were very disturbed to discover that he had brought the wrong bill. It was the bill before the committee had made some changes. The league girls know the changes. This bill was followed that carefully by many different types of groups.

Finally, the last thing that happened to the bill was that there were two small changes made. One was a collateral estoppel clause and the other was a change from "and" to "or" which has already been referred to. Suddenly the people rose up. We went to our lawyers and we knew exactly, all of a sudden, what "collateral estoppel" meant and we knew we didn't like that phrase. We discovered the "and" to the "or". We had had a little warning on this because this was a change which the Michigan Manufacturers Association had suggested in an earlier hearing; I heard them and thought they will never dare do that, but they did.

That would have killed the bill, completely taken all the teeth out of the bill, but the citizens got on the telephone, and wired and got to Lansing overnight on that little change: needless to say, it was changed back on the floor of the Senate.

Well, if you give us a bill which does do what I know you want to do for us—that is give us a clear right to the courts—by making some of the changes which we have suggested today, if we have a bill that we can get behind as we did in Michigan, I can assure you that people all over the United States will get behind it to the same extent that we got behind the bill in Michigan.

I can assure you that the bill will be watched just as carefully and it will be watched by national organizations.

I can assure you, too, that just as we have made true heroes and feel very, very strongly about the people on the committee and the people in government who helped us get this bill through, Represen-

tative Anderson, Representative Goemaere—all the various people who really worked for us on this bill are very important people to us today—I can assure you that we will feel the same way about all of you. (I already do about Representative Dingell.) This is the kind of bill which the citizens feel they need so badly and it is, as has been stated before, the kind of grassroots bill that tells the citizens that they have a part in their government. I thank you very much for coming to Michigan, and listening to us. I hope very much that we will all be able to work together to see this legislation passed by the Congress.

Thank you very much.

Mr. DINGELL. Mrs. Wolfe, we know that if you are on our side our chances of success are considerably brightened. We will lean very heavily upon you.

Were there any questions of Mrs. Wolfe?

(No response.)

Mr. DINGELL. Mrs. Wolfe, we certainly thank you again. It's been a privilege to have you before this committee. We recall your excellent labors on the National Environmental Policy Act and how helpful they were, and we express to you our thanks for that and for this also.

The Chair notes that we may again have witnesses who find themselves pressed for time. Is there anyone who, for good reason, desires to be heard at this time?

The Chair notes that we have tired our reporter. We should have had a spare.

We will declare a brief recess for 5 minutes.

(Whereupon a short recess was taken.)

Mr. DINGELL. The committee will come to order.

The Chair recognizes Mrs. Elizabeth A. Monahan, speaking on behalf of the Ecology Center of Ann Arbor.

Mrs. Monahan, we are certainly happy to welcome you to the committee for such statement as you choose to give.

STATEMENT OF ELIZABETH A. MONAHAN, THE ECOLOGY CENTER OF ANN ARBOR

Mrs. MONAHAN. Thank you for inviting us to testify. I am Elizabeth Monahan. I am representing the Ecology Center of Ann Arbor, which is a storefront facility which serves as an environmental information center and also promotes activities in the Ann Arbor area to improve the environment of our city. I am also here as the editor of the Enact Ecology Reports, which is a biweekly newsletter with a nationwide readership carrying environmental news, suggestions for citizen action, and encouraging support of worthwhile environmental legislation by providing descriptions of the legislation and names and addresses of the key individuals to be contacted regarding its passage.

The Ecology Center of Ann Arbor wishes to express its support of the concept of "class action" legislation. There have been too many instances not only in the past, but even at present, where citizen groups with a sincere desire to protect the environment of the United States have been denied standing in the courts solely because they were not able to show direct, personal damages to themselves or their own