

**OFFICE OF THE OMBUDSMAN AT THE
ENVIRONMENTAL PROTECTION AGENCY**

HEARING
BEFORE THE
**COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE**
ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

S. 606

A BILL TO PROVIDE ADDITIONAL AUTHORITY TO THE OFFICE OF
OMBUDSMAN OF THE ENVIRONMENTAL PROTECTION AGENCY

JUNE 25, 2002

Printed for the use of the Committee on Environment and Public Works



U.S. GOVERNMENT PRINTING OFFICE

83-699 PDF

WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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ONE HUNDRED SEVENTH CONGRESS
SECOND SESSION

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**OFFICE OF THE OMBUDSMAN AT THE
ENVIRONMENTAL PROTECTION AGENCY**

TUESDAY, JUNE 25, 2002

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:38 a.m. in room 406, Senate Dirksen Building, Hon. James Jeffords (chairman of the committee) presiding.

Present: Senators Jeffords, Carper, Clinton, Crapo and Specter.

**OPENING STATEMENT OF HON. JAMES M. JEFFORDS,
U.S. SENATOR FROM THE STATE OF VERMONT**

Senator JEFFORDS. The hearing will come to order.

The purpose of today's hearing is to examine the functioning of the EPA's Office of the Ombudsman. While this may be a little-known office within the EPA, historically it has played an important role looking into the Agency's handling of hazardous waste sites under the Superfund program. It is clear to me that the Agency needs an independent and credible and impartial ombudsman that will respond to the needs of communities coping with complicated and somewhat life-threatening environmental problems.

I, for one, do not want another GAO study in 9 months that again finds that the ombudsman does not have sufficient independence. Last April, the EPA transferred the ombudsman to the Office of Inspector General. In reviewing the testimony of today's witnesses, it is clear that this action has generated considerable concern. I hope that the Inspector General will detail the operating plans for the ombudsman office and will let the committee know when the office will be publicly posted and fully staffed.

Most of you know the authorizing statute governing the activities of the ombudsman expired some time ago. Senator Crapo has introduced a bill that Senators Specter and Allard and others have, that would require the ombudsman to report directly to the Administrator of the EPA. I hope all the witnesses will give us their comments on this piece of legislation.

As a reminder, I would request that the witnesses keep their oral remarks to 5 minutes so that we can have time for questions and answers from each panel. Each of the witness' written testimony will be placed in the record and the record will be left open for following questions and additional testimony.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE
STATE OF VERMONT

Good morning. The purpose of today's hearing is to examine the functioning of the EPA's Office of the Ombudsman. While this may be a little known office within the EPA, historically it has played an important role looking into the Agency's handling of hazardous waste sites under the Superfund program.

It is clear to me that the Agency needs an independent, credible, and impartial Ombudsman that will respond to the needs of communities coping with complicated and sometimes life-threatening environmental problems. I for one do not want another GAO study in 9 months that again finds that the Ombudsman does not have sufficient independence.

Last April, the EPA transferred the Ombudsman to the Office of the Inspector General. In reviewing the testimony of today's witnesses, it is clear that this action has generated considerable concern. I hope that the Inspector General will detail the operating plans for the Ombudsman's office and will let the Committee know when the office will be publicly posted and fully staffed.

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Senator JEFFORDS. Senator Clinton.

**OPENING STATEMENT OF HON. HILLARY RODHAM CLINTON,
U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator CLINTON. Thank you very much, Mr. Chairman. I especially thank you for holding today's hearing on this very important topic. I am grateful that we are going to focus on it because it has been a subject of great concern to me and to my colleague, Congressman Nadler, who I am delighted is here to testify on behalf of the tens of thousands of residents of Lower Manhattan. Congressman Nadler has been a staunch and unrelenting advocate on behalf of our constituents at and around Ground Zero who experienced the unthinkable on September 11 and who to this day continue to be faced with issues and concerns regarding the quality of the air they breathe and the health and safety of the environment that they and their families live in.

In the case of the World Trade Center, like so many other sites around the country, people are faced with very complicated environmental questions. They are trying to understand technical and scientific issues that really only experts can explain to us and get to the bottom of. What we all want is simply to understand what is going on; to learn what we need to do to protect our health and to protect our environment.

It should not be complicated, and I do not think it should be that difficult. It should be the Federal Government's job not only to carry out the laws, but also to help the public understand what is going on, and to provide us with the information we need to make the right decisions about the health and safety of our children and ourselves. It seems more often than not that communities are left confused, even empty-handed, without the information and without the actions that they need and deserve from their government.

Senator Lieberman and I, with the great support of Chairman Jeffords, went to New York to hold a hearing on air quality at

Ground Zero back in February, to try to clear the air, so to speak—to get some real information that we then could act on and legislate about. Again, Congressman Nadler, who has been a leader on these issues, was there to lend his expertise and support.

Now, I know that we have a number of people from New York City who have traveled here today. I wish we could hear from every single one of you on this important issue, but the record will receive written testimony and it will remain open until July 7. I know that a number of you visited some of my colleagues' offices and I really applaud you for doing that—to get the word out. We just recently had a public opinion survey in Manhattan, Mr. Chairman, where a majority of residents were more concerned about the air quality issues than they were about another terrorist attack.

People just know there is—and it may not be that there are answers we are not being told, although we think that there were answers we were not told in a timely way, but that we have to do further research to get to the bottom of some of these issues. We need to have an independent voice like an ombudsman to be able to give us that guarantee that somebody is asking the hard questions inside the Agency.

I just want to end with reading one of the many e-mails that I have received from my constituents in Lower Manhattan with regards to this question about the EPA ombudsman. This woman lives in a building right next to the World Trade Center. Here is what she wrote, "Dear Senator, I have been diagnosed with new asthma and spent several months gasping for air. I have been unable to return to my home because it is still full of World Trade Center dust, although it has been cleaned by conventional methods many times. Dozens of my neighbors are also ill. The EPA ombudsman hearing here were the first time the truth was told about what has happened to us. Please do everything in your power to reinstate Robert Martin."

Another woman who lives just five blocks away says, "I speak for many who are very worried about downtown's condition. The ombudsman was our hope that something would be done to correct all of our problems. We are so worried down here. As taxpaying citizens, we feel abandoned and need more advocates. It is a nightmare and we are overwhelmed with the amount of work us regular people have to do to try and overcome what we know is a bad situation. Please help."

These people need an advocate who is an expert, who is inside the Agency, who does have access to information that is often sometimes difficult even for those of us in the Senate to obtain in a timely manner. So I hope that we are going to resolve some of the disputes that have occurred around this important position. We are conducting this hearing to determine a way to ensure that the role of an independent ombudsman is maintained at EPA. That to me is the most important issue—not someone who has to toe the party line, not someone who has to repeat publicly what he or she is told to repeat, but someone who can be a thorn in the side and can take a contrary position. This is not new to this Administration. This has happened in other Administrations where the ombudsman had some things to say that were not always welcome to hear. We have to have that kind of public airing, especially when

it comes to our air in Lower Manhattan in the wake of the terrible disaster of September 11.

So I am also pleased that our colleague, Senator Allard, is here as well, and I look forward to the testimony.

Senator JEFFORDS. Thank you very much.

I welcome both Senator Allard and Representative Nadler. This is an incredibly important hearing and I deeply appreciate your interest and your willingness to be here.

Senator Allard.

**STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM
THE STATE OF COLORADO**

Senator ALLARD. Thank you, Mr. Chairman and Senator Clinton. I am pleased to be able to testify before you today, and I want to thank you for holding this hearing and giving me an opportunity to testify on Senate bill 606.

As you know, this legislation reauthorizes the Office of the Ombudsman of the Environmental Protection Agency. I speak to you from personal experience, having worked with a neighborhood in Denver who came to our office. We worked with them to try and get the bureaucracy within the Environmental Protection Agency to respond to the concerns of the citizens in that neighborhood. Frankly, as an office, we were not able to get through the echelon that had established itself in the regional office of the Environmental Protection Agency, so we had to turn to the Ombudsman. The Ombudsman was the one who helped us break down those barriers because their purpose was to serve as an independent voice for citizens impacted by decisions happening within the Environmental Protection Agency.

I am going to keep my remarks brief, but I do want to share with the committee my reasoning on and interest in this issue. I introduced similar legislation in the 105th Congress because of the ongoing battle between the citizens of a Denver neighborhood and the EPA concerning the Shattuck Superfund site. The Ombudsman's office was instrumental in bringing the truth of what was happening in this case to light. The legislation was introduced by Senator Crapo at the beginning of the current Congress because the issue of authorization and independence in the office of the EPA Ombudsman is still an important one.

I would like to share with you quickly the stories surrounding the Shattuck site in the Overland Park neighborhood in southwest Denver and what the EPA did there. These events have had a lasting impact not only on the residents of the Overland Park neighborhood, but on each of us who look to the EPA to be the guardian of our Nation's environmental health and safety. In 1997, after several years of EPA stonewalling, the residents of Overland Park in Denver brought their concerns about a Superfund site in their neighborhood and their frustrations with EPA to my attention. I learned that the neighborhood had run into a wall of bureaucracy that was unresponsive to the very public it is charged with protecting. As a result of learning this information, I requested the Ombudsman's intervention. In early 1999, the Ombudsman's office began an investigation and quickly determined that the claims made by the residents were not only meritorious, but that EPA offi-

cials had engaged in an effort to keep documents hidden from the public, thereby placing their health in further danger.

Without the Ombudsman's investigation on Shattuck, the residents of Overland Park would never have learned the truth. The Ombudsman's investigation brought integrity back into the process. Without the Ombudsman's work, a trusted Federal agency would have been able to successfully hide the truth from the very people it is charged to protect. The Shattuck issue is a decade-long example of why citizens' trust in their government has waned.

This bill will preserve an important mechanism within the EPA that the public can trust to protect their health and safety. The Shattuck story was a frustrating and often disheartening experience for all involved. It is an example of what can happen when a government entity goes unchecked. For the residents of Denver, the Office of Ombudsman offered the opportunity to get to the truth and made the health and safety of the public the top priority. Let me make it clear that the main priority of my continued support of this bill is to keep the Office of the EPA Ombudsman open for business and capable of conducting that business.

In the future, others may find themselves in a situation similar to the one that residents of Denver experienced. I want to know that we will have every assurance that the public safety will be protected, that its voice will be heard, that its questions will be answered and its concerns addressed. This office should not have its investigative ability restricted and its independence should not be compromised. The EPA's actions and decisions in future cases like Shattuck should not go unchecked and citizens in other States should have a public avenue to address concerns and get answers from the Environmental Protection Agency.

I know that I am not alone in my concerns, and unfortunately that the Shattuck site is not unique. Many of my fellow Senators and Representatives have experienced similar concerns with sites in their States. That is why this legislation remains so very important. I appreciate the efforts that have been made by the current Administration in an attempt to solve some of the problems that the Office of the Ombudsman experienced. I know that Administrator Whitman shares my desire to see this issue to a conclusion that will be beneficial to all, and I appreciate her willingness to work with my office.

Again, Mr. Chairman, thank you for holding this hearing and your willingness to look further into the matter.

Senator JEFFORDS. Thank you for your excellent statement. You are right, and we appreciate the work you have put into it.

Representative Nadler.

Senator ALLARD. Mr. Chairman, I am sorry, but I have to move on.

Senator JEFFORDS. Oh, you are going to leave us.

Senator ALLARD. Very good, thank you.

Senator JEFFORDS. Thank you, Wayne—very helpful.

Now, Mr. Nadler.

**STATEMENT OF HON. JERROLD NADLER, U.S.
REPRESENTATIVE FROM THE STATE OF NEW YORK**

Mr. NADLER. Thank you, Mr. Chairman. I would like to thank you and the rest of the committee for holding this hearing today and for inviting me to testify regarding the EPA Hazardous Waste Ombudsman, in particular the role of the Ombudsman in investigating the response of the EPA to the September 11 terrorist attack in New York.

My colleague from New York, Senator Clinton, has been an outspoken advocate, and knows all too well the problems citizens in New York have been encountering over the last 9 months. Thank you, Senator Clinton, for arranging the field hearing in New York back in February, and thank you, Chairman Jeffords, for the committee's continued oversight of the EPA by examining this issue today.

Those of us who have had to deal with the EPA have had an interesting experience. We experienced on the one hand an agency that seems to ignore the community's concerns, and on the other, an Ombudsman willing to listen and investigate complaints about agency neglect. Ultimately in the vast majority of the EPA Ombudsman cases, the transparent Ombudsman process has helped the Administrator or regional officials to take proper action to resolve the disputes, resulting in greater protection from radioactive and other hazardous waste threats. Both Democrats and Republicans alike have utilized the EPA ombudsman to help restore trust in government where it had previously been shaken.

Immediately following September 11, I formed the Ground Zero Elected Officials Task Force, of which Senator Clinton is a member, to coordinate the efforts of all the government representatives from the area. The main goal of the Task Force is to assess the needs of the community in Lower Manhattan and to ensure that those needs are addressed by the appropriate government agencies. One area that clearly was not addressed was the presence of hazardous waste in people's homes, schools and businesses. In the days following the attack, the Task Force heard countless complaints from citizens who suffered from adverse health effects and lacked the necessary resources to test and clean their apartments and buildings properly.

When EPA was presented with such information, the Agency either maintained that everything was safe initially on the basis of zero test data, or claimed that the city of New York was in charge of indoor environments and that the EPA only had authority only outdoor environments and had no authority for regulating indoor environments. This distinction between indoor and outdoor environments has no basis in statute.

The Agency maintained its position even after being presented with independent test results conducted by long-time EPA contractors at the request of the Ground Zero Task Force which showed elevated levels of hazardous materials inside downtown apartments. Citizens were left to fend for themselves. They often ended up in court proceedings against their landlords and building owners, and expended vast resources on the cleanup downtown that was not conducted adequately or systematically, but rather on an ad hoc basis.

After 4 months of this untenable situation, I asked the EPA National Hazardous Waste Ombudsman, Robert Martin and his Chief Investigator, Hugh Kaufman to investigate. Their involvement produced a sea-change in the relationship of my office as well as of local residents with EPA. My position has always been that EPA should use its existing authority to take any and all actions necessary to find out where hazardous materials went following the collapse of the World Trade Center and to remediate all contaminated spaces, and that New York should not be treated differently from other parts of the country where the EPA has engaged in response activities including remediating indoor spaces.

Ombudsman Martin and Mr. Kaufman were able to tell us what the EPA should have done, could have done under law, and has done at other hazardous waste sites around the country. Most importantly, the ombudsman process provided a forum to communicate with my constituents, to listen to their complaints and concerns, issue requests for the production of documents and interrogatories, hold public hearings, bring in experts from around the country to help the citizens understand the magnitude of the issues, make recommendations for corrective action, and truly get to the bottom of what EPA did and did not do.

The key to all of this is that it was a transparent and public process. We held two 11-hour public hearings that were open to the public, documented with a court reporter, the transcripts of which are available to anyone.

I am joined today by Lieutenant Manuel Gomez and Sergeant David Abro who responded to the World Trade Center site with the New York Police Department and the New York Fire Department respectively. Both of these men participated in the ombudsman process by testifying at one of the hearings held in New York. Lieutenant Gomez testified that he and hundreds of other police officers worked at the World Trade Center for 24 days without a respirator. He was issued only this paper mask, which actually has a label on it that reads, "warning, this mask will not protect your lungs." This is the same mask worn by Mayor Giuliani, and as you can see on the cover of this book, by Senator Clinton, Senator Schumer, President Bush and myself when we visited the site.

When Lieutenant Gomez brought his own respirator to wear at the site, his superiors told him to take it off and ordered him to wear this paper mask even though his superiors and EPA personnel were wearing proper respirators themselves. Worse yet, hundreds and thousands of responders wore these, which are worse than useless, did not wear proper respirators, and there were over 20,000 respirators sitting unused in National Guard armories all around New York that could have been made available immediately to emergency responders and workers at the site. We will pay for decades in health costs for this negligence.

This is just an example of the kind of testimony received at the ombudsman hearings. We heard from residents, workers, business owners, city and State elected officials, firefighters, police officers, parents and the New York City Board of Education. We would have liked to hear from the government agencies, in particular EPA, but they declined the Ombudsman's and my invitation to participate.

Except for the Ombudsman, the EPA has yet to engage in a public and transparent process regarding the cleanup of the World Trade Center. If anything, it has done just the opposite. Questions have gone unanswered. Information has been obtained only through the Freedom of Information Act, if at all, and trying to get the Agency to act has been a lengthy, arduous and often unsuccessful process. The ombudsman process was essential to address citizens' complaints and focus public pressure on the Agency to address those complaints.

In the 4 months from September 11 to January, the EPA maintained, contrary to a wealth of evidence, that everything was safe; directed people to the city government for relief—a city government which offered no relief to people other than to tell them to clean up asbestos-laden dust with a wet mop and a web rag; and ultimately remained unresponsive to citizens. In the 4 months from January to May, the time of the EPA ombudsman process, the EPA finally reversed its policy, at least in part, and agreed to initiate remediation inside people's homes.

Of course, there were many factors that contributed to this policy shift, but I do not believe it would have happened or happened so quickly without the ombudsman process and the expertise and hard work of Mr. Martin, his Chief Investigator Huge Kaufman, and the people who worked with them to use the ombudsman process so effectively.

The EPA is finally beginning a cleanup plan now, this month, largely because of pressure generated by the Ombudsman. Unfortunately, there is now no real Ombudsman to keep a watchful eye on the Agency. This is disconcerting because the EPA plan is woefully inadequate. For example, the EPA plans to clean apartments only on request. This ignores the threat of cross-contamination and recontamination from uncleaned apartments and from building HVAC systems. The EPA plan provides for testing only for asbestos in the air. It does not plan to assess dust on hard surfaces that are also pathways for exposure. Nor will the Agency test for any of the other contaminants that were present in the World Trade Center debris other than asbestos, such as lead, mercury, dioxin, fiberglass, benzene, chromium, bromine and fine particulate matter.

The cleanup plan is available only south of an arbitrary boundary at Canal Street, cutting off other areas covered by the debris cloud, including parts of Brooklyn, Chinatown and the Lower East Side. Besides not dealing with many potentially contaminated sites, this presents a severe environmental justice problem. The workers will not be wearing protective gear, which would seem to be a clear violation of OSHA regulations. The EPA has developed this plan without public comment and has not established a Citizens Advisory Group or help public meetings. It has not even established an administrative record accessible to the public.

Quite frankly, the EPA has provided no evidence that the cleanup plan for World Trade Center debris complies with applicable laws and regulations, such as the National Contingency Plan and OSHA regulations, and there is no guarantee that EPA will act in accordance with existing laws, policies and procedures.

The Agency must be forced into a public and transparent process. The people of New York deserve and need an experienced, strong

and independent hazardous waste Ombudsman at EPA now more than ever. Unfortunately, what has happened to the Ombudsman is just the opposite. By placing the Ombudsman in the Office of Inspector General, the position has been stripped of its independence, transparency and effectiveness. The necessary procedures that legally must be followed in operating an inspector general's office are not consistent with the procedures necessary for an independent, transparent ombudsman function.

For example, employee protection provisions and openness of operation must be very different in an IG's office because it is part of a law enforcement function. Whereas, an ombudsman must be more open to the public and at times must be a public advocate. The EPA Ombudsman is crippled as long as it remains under the control of the Inspector General. Without independence to control his casework or his resources, an Ombudsman is one in name only. With no permission to talk to Members of Congress or to the public without permission of the IG, an ombudsman is a toothless tiger indeed.

Recent events require that we institute or reinstitute an independent fully funded EPA Ombudsman Office to receive, investigate and resolve complaints. Perhaps the best way is to make the Ombudsman an arm of Congress, but wherever an ombudsman is placed, the office must have control of its resources, staff and cases. The Ombudsman must be able to communicate with the public, must be free to act free from interference by outside parties or from within the Agency itself.

This is nothing new to the United States or to democracies in general. In fact, establishing independent ombudsmen is good government. The Federal Government has decades of experience in establishing strong and independent ombudsmen. The IRS and the Department of Health and Human Services have ombudsmen to address citizen complaints regarding taxes and long-term care respectively. Victims of a terrorist attack and those living with the threat of hazardous waste deserve at least the same protection. An independent ombudsman is intolerable only to an agency that does not plan to comply with the law.

Thank you, Mr. Chairman.

Senator JEFFORDS. Thank you for that—

[Applause]

Senator JEFFORDS. I understand your concern, but please, no applause.

I just want to thank you for the effort and time you have put into this. This is the most disturbing evidence that I have ever received in the way of handling the Office of Ombudsman, so I want to commend you for the work that you have done.

Mr. NADLER. Thank you, sir.

Senator JEFFORDS. I know that Senator Clinton, knowing her as I do, will take very seriously what you have said. I assure you that I will support her in any way possible to make sure we get to how this could happen and make sure it never does happen again.

Senator Clinton, I have to go to another serious problem, too, on another committee, so I will turn it over to you now, and thank you.

Senator CLINTON [assuming the chair]. Thank you so much, Chairman Jeffords, for your concern about this issue and for taking so seriously the testimony of our colleague.

Congressman Nadler, what is your current understanding of the status of the EPA Ombudsman's investigation into the handling of the situation at the World Trade Center?

Mr. NADLER. As far as I know, it is at a total standstill. I am not aware of anything that has happened since the court decision came down that effectively allowed the EPA to strip the Ombudsman's Office of its function and power. Since the Ombudsman's Office went to the IG, we have had no communication with them. They have asked us nothing, communicated nothing. As far as I know, they have communicated with nobody in Lower Manhattan or in Brooklyn with respect to any of this. As far as I know, it simply stopped.

Senator CLINTON. Do you agree with the GAO recommendations about what the EPA should do to provide the Ombudsman with a separate budget, subject to Civil Service requirements, the authority to hire, fire and supervise staff, and be given more structural independence?

Mr. NADLER. I certainly do. I think there is a danger, however, in that the EPA has willfully misinterpreted and misrepresented that report and has used it as justification—I think a very strained justification—for putting the Ombudsman's Office under the Inspector General. So with the caveat that I certainly do not agree with that strained interpretation, and that the Ombudsman must be independent, and that strengthening his independence does not mean putting him in an office where he cannot speak to the public or to Members of Congress without permission from somebody else, but means having an independent agency with independent budgetary authority and the ability to talk to anybody without permission from anybody else—yes.

Senator CLINTON. Do the models from IRS and HHS work in your opinion, and we should look to those?

Mr. NADLER. They work there. I think they work there very well. Whether they are fit to transfer here, I do not really know. I do not know about the bureaucratic structures within those agencies and how they differ from EPA. Again the key is that it has got to be set up in such a way that the Ombudsman has independence in terms of budget; that he has got a set budget for the year; that he does not have to justify every expenditure to anybody else in the Agency; and that he can communicate publicly and hold public hearings without anybody's permission.

I would add one other thing that he has never had. I think the Ombudsman ought to have subpoena power. One thing that was made very clear was that the EPA, when the Ombudsman's Office agreed to hold public hearings in New York on this situation at my request, the EPA made very clear that it would not testify. It would not send any witnesses, and in fact it advised other government agencies not to send witnesses to the hearing. The morning of the hearing, before the hearing convened, without any knowledge on the EPA's part on what was going to occur at the hearing, they released a press release saying it was a publicity stunt, a po-

litically motivated publicity stunt and therefore they were not cooperating with it.

This was designed, obviously, to undermine the hearings because they did not want all the information to come out. I think that an ombudsman, to really be able to function in these kinds of situations, that we to seriously consider, in fact, I would say we ought to, give him or her subpoena power so they could make the EPA testify. It is only when EPA officials testify and have to answer pointed questions that you get the best results.

Senator CLINTON. I thank you so much, Congressman Nadler, for your leadership on this issue and I hope that we will be able to get it resolved and get an independent voice back in the EPA. Obviously, we are most concerned about it because of New York, but as Senator Allard and many of my colleagues have pointed out, this is not a Republican or Democrat issue. It is not one that is geographic. It is really rooted in the difficulties that we have. You had in your testimony, and I know you were hurrying along so that you fit into the time, but before you left would you mind just reading this quote from your testimony from Justice Douglas?

Mr. NADLER. I did skip. Thank your observations. I did skip a considerable part of the testimony, which I will submit for the record, to get it into the 5 minutes. Justice Douglas in 1972 identified the problem that so often plagues much of the Federal Government. In the case of *Sierra Club v. Morton*, so it was an environmental case I assume, given that fact that Sierra Club was involved, "The Federal agencies of which I speak are not venal or corrupt, but they are notoriously under the control of powerful interests who manipulate them through advisory committees or friendly working relations, or who have that natural affinity with the Agency which in time develops between the regulator and the regulated." This quote by Justice Douglas is as relevant today as it was 30 years ago. Indeed, this is why the EPA Ombudsman was created by Congress in 1984 when then-Congresswoman Barbara Mikulski faced an unresponsive EPA. As the numerous cases that were in progress by Ombudsman Martin when his office was destroyed, in effect, indicate, the need for an independent EPA Ombudsman is just as critical today as when the office was first created.

Senator CLINTON. I thank you for that, and I will be sure that a copy of your testimony is provided to Senator Mikulski. I am sure she will be very interested in the fact that what she helped to create in 1984 has been eviscerated in recent months. I think that is a matter of grave concern to all of us.

Mr. NADLER. Thank you. I would also make one observation if I may. One of the most valuable services the Ombudsman did, I must say when this crisis occurred, a lot of us did not have tremendous experience dealing with EPA. We did not have a lot of hazardous waste sites in my district. As far as I know, we did not have any. I had never dealt with them. We were pretty much at sea in how to try to force action by EPA and how to get them off the dime and how to get them to say, wait a minute, we have to start dealing with indoor air as well.

One of the most valuable services provided by the Ombudsman was simply that having been there at all the other places, he was able to say, well you know, in Shattuck they did this; in Libby, MT,

the Administrator made a speech 4 days before September 11 saying it would be immoral for the Federal Government to expect residents and homeowners to pay the cost of remediating their own homes. We could see the contrast of what the EPA was not doing in New York. That reservoir of experience and openness about that experience is extremely valuable.

Senator CLINTON. Thank you very much.

Mr. NADLER. Thank you.

Senator CLINTON. We continue to look forward to working with you, Congressman. It is always a pleasure.

We are going to be calling the second panel now—Ms. Nikki Tinsley, Inspector General, U.S. Environmental Protection Agency; and Mr. David Wood, Director, Natural Resources and Environment, U.S. General Accounting Office.

Thank you both for being here.

Ms. Tinsley.

**STATEMENT OF NIKKI TINSLEY, INSPECTOR GENERAL, U.S.
ENVIRONMENTAL PROTECTION AGENCY**

Ms. TINSLEY. Good morning, Senator Clinton. I am happy to be here.

With me today I brought Peggy Boyer, who is our Acting Ombudsman. I would like to start by saying I am just going to give summary remarks and I would appreciate it if my whole statement was put in the record.

Senator CLINTON. Absolutely.

Ms. TINSLEY. Congress established the ombudsman function at EPA in 1984 to provide information and to investigate complaints from the public related to certain hazardous and solid waste programs. The Agency maintained that function for 16 years, long after the statutory authority expired. Last July, GAO issued a report about EPA's national and regional ombudsman. That report identified weaknesses in the Ombudsman's independence, impartiality and freedom from conflict of interest, and its accountability and reporting.

When I read the GAO report, I realized that our office had many of the attributes that the Ombudsman's office was missing. Congress established the Inspectors General to serve as independent, impartial and accountable sources for audits and investigations of the activities of Federal departments and agencies. We are sometimes known as watchdogs for our role in alerting the public and Congress to problems within the executive branch. The Act gives Inspectors General numerous authorities, including access to all agency records and subpoena authority. The Act also grants us authority to ensure our independence. We select, prioritize and carry out all our work assignments independent of agency oversight. We have separate budget authority, separate hiring and contracting authority and independent reporting responsibilities. We have broad authority to receive complaints and conduct investigations.

Since the early 1980's, our office has operated a hotline to receive complaints and allegations from the public regarding EPA's programs and operations. We receive hotline complaints through our toll-free number, through correspondence, through in-person visits and over the Internet. Given that the EPA Ombudsman's role of re-

viewing agency actions was similar to the work that Offices of Inspector General were created to perform, and because we report both to the Congress and to the Agency, I believed that our office is well suited to assume the investigatory functions of the Ombudsman's office when I read the GAO report.

In April of this year, the Ombudsman's office was transferred to the Office of Inspector General. Since the transfer, we have expanded the services of the Ombudsman to include all EPA-administered programs, rather than limiting it only to Superfund and hazardous waste issues. We have been busy during the 10 weeks since we began doing the work of the Ombudsman. The Acting Ombudsman is assessing the transferred caseload which is a rather challenging task due to the lack of any organized system of records or case file index. Our primary focus at this point is to work to resolve the already existing cases.

We have met with individual Members of Congress and congressional committee staff. We have made contact with citizens groups in several of the communities where there are open cases, and we have scheduled site visits and public meetings for Coeur d'Alene, ID and Tarpon Springs, FL.

Senator Clinton, I want to assure the public, EPA stakeholders and Congress that we will conduct the ombudsman work with independence and professionalism. I welcome your suggestions as we move forward with our new responsibilities. I appreciate the opportunity to participate today and would be happy to respond to your questions.

Senator CLINTON. Thank you very much, Ms. Tinsley.

Mr. Wood.

STATEMENT OF DAVID WOOD, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GENERAL ACCOUNTING OFFICE

Mr. WOOD. Thank you, Senator Clinton.

My statement today discusses two topics—first, a brief description of the standards for ombudsmen that have been published by professional organizations; and second, preliminary observations on issues raised by EPA's recent reorganization of its ombudsman function.

While there are no Federal standards specific to the operation of ombudsman offices, several professional organizations provide standards of practice relevant to ombudsmen who deal with inquiries from the public. These standards incorporate the core principles of independence, impartiality and confidentiality. For example, an effective ombudsman must have both actual and apparent independence from any person who may be the subject of a complaint or inquiry. According to guidelines published by the American Bar Association, key indicators of independence include a budget funded at a level sufficient to carry out the ombudsman's responsibilities, and the power to appoint, supervise and remove staff.

Standards of practice published by another professional group, the Ombudsman Association, advocate that for independence, an ombudsman report to the highest authority in the organization. These standards also stress the importance of impartiality and confidentiality in the ombudsman's operations.

While Federal agencies face some legal and practical constraints in meeting these standards, we found that ombudsmen at the Federal agencies we reviewed for our 2001 report did reflect aspects of the standards. For example, at the Federal Deposit Insurance Corporation and the Food and Drug Administration, the Ombudsman's Office had its own budget and reported directly to the highest level of the Agency. In that report, we found that key aspects of EPA's national hazardous waste Ombudsman, then located within the Agency's Office of Solid Waste and Emergency Response, were not consistent with the standards. Our report recommended that EPA take actions intended to increase its Ombudsman's consistency with the standards, including modifying its organizational structure to locate the Ombudsman outside of the Waste Office.

Partly in response to our report, EPA announced a reorganization relocating the National Ombudsman to the Office of Inspector General. This brings me to the second topic of my testimony—observations on issues raised by EPA's reorganization. Our observations are based on limited work we had done in response to a recent request from Representative Diana DeGette. For that reason and because EPA has not yet developed detailed operating policies or an official description of the position within the Inspector General's Office, our observations should be viewed as preliminary.

While EPA's reorganization raises several issues, GAO believes that the most fundamental is intent. If EPA intends to have an ombudsman function that is consistent with the way the position is typically defined in the ombudsman community, placing the function within the OIG will not achieve the objective. This is because the role of an ombudsman typically includes program operating responsibilities such as helping to informally resolve program-related issues and mediating disagreements between the Agency and the public.

Including these responsibilities in the position within the OIG would conflict with the Inspector General Act, which prohibits the transfer of program operating responsibilities to an Inspector General. Yet, omitting these responsibilities would result in establishing a position labeled ombudsman that is not fully consistent with the function as it is typically defined.

Further, while EPA's reorganization removes the national Ombudsman from the Office of Solid Waste and Emergency Response, it may not result in a degree of structural or functional independence that is consistent with the professional standards. For example, according to EPA, authority for budget and staffing for its national Ombudsman will rest the newly created Assistant Inspector General for congressional and Public Liaison, not the Ombudsman. Also, according to EPA the Inspector General has the overall responsibility for the work performed by the office, and no single staff member, including the national Ombudsman, will have the authority to select and prioritize his or her own caseload independent of other needs.

In addition, the reorganization does not appear to address concerns we raised in our report about the independence of the regional Ombudsman, whose position is generally seen as a collateral duty within EPA.

Finally, placing the Ombudsman in the OIG could affect the activities of the Inspector General. For example, the OIG could no longer independently audit or investigate the Ombudsman as the Inspector General can at other Federal agencies where the functions are separate.

Senator Clinton, Mr. Chairman, that concludes my oral statement. I will be glad to respond to any questions that you all have.

Senator CLINTON. Thank you very much, Mr. Wood. I thank you as the representative of GAO for another very helpful analysis, which I think clearly lays out the issues that we are concerned about today.

Ms. Tinsley, as I review Mr. Wood's testimony based on the 2001 report on EPA's Ombudsman, it makes a very convincing case that the functions that an ombudsman must properly perform would be quite constrained and difficult to administer within the Office of the Inspector General, and certainly would be at odds with any description of an ombudsman's role from the relevant professional standards.

I think that the real crux of our issue today is the EPA reorganization that essentially subsumed the office within the functioning of the Inspector General, and whether that gives either the real or apparent perception of independence that is essential to such a position.

Can you comment on S. 606 and the concept of having the Ombudsman report directly to the EPA Administrator, as opposed to the Inspector General?

Ms. TINSLEY. We have not prepared official comments on S. 606, but when GAO was doing its initial review it asked us to review the draft legislation and comment. Our concern when we read it was that it sounded like the IG Act, and in fact gave the Ombudsman similar authorities to IGs. For example, it suggested that the Ombudsman would have subpoena authority, which we already have. It also required us to assist the Ombudsman as the Ombudsman did its work. So it appeared to me that it would create another Office of Inspector General, to look just at some limited aspects of EPA's programs. I do not think that is necessary.

Senator CLINTON. My view of Inspectors General within the Federal Government has been that they function usually and primarily as watchdogs over the internal operations of the Agency in which they are housed; that complaints and concerns that affect the performance of duties of an individual or a department within the Agency are clearly within the purview of the responsibility of the Inspector General.

What we are talking about here is largely concerns driven by different constituencies—people who are outside, who are living near a hazardous waste site, who are breathing the air from the World Trade Center. I do not see any history of either expertise or administrative responsibility that equips the Inspector General to perform that function. I very much respect the role of an Inspector General. I think it is an essential ingredient within the checks and balances that Federal agencies have to maintain. But here, we are looking at the legitimate complaints about the Agency that come from outside. I think Mr. Wood's description of what is required for independence is much more convincing than the concerns about du-

plication of responsibilities within the EPA when I do not think that they are the same functions at all.

I am also wondering—in your written testimony, you referred to various investigations that have been accepted into the IG's office after the dissolution of the Ombudsman's, and you indicate that the World Trade Center investigation has been incorporated into an already ongoing OIG assignment. What does that mean?

Ms. TINSLEY. We had already begun some work to look at EPA's actions connected with the tragedy at the World Trade Center. As we looked at the Ombudsman's files, we added some questions to our ongoing assignment, so that we could address what was in there. In addition, we did contact Congressman Nadler's staff, although they did not choose to meet to discuss our work with us. Of course, your staff was involved in our briefings when we took over the Ombudsman function, and when that decision was actually announced by the Administrator.

Senator CLINTON. Of course, those briefings led to our concerns. We are very concerned about the decision to eliminate the independent Ombudsman and to basically incorporate these very specialized constituency-driven concerns into the ongoing work that you do.

Now, I wanted to ask Mr. Wood, you indicated in your testimony that according to ABA guidelines, key indicators of independence include sufficient funding, ability to spend funds independent of any approving authority, and the power to appoint, supervise and remove staff. Now, based on these indicators, and based on what you know about the EPA's testimony concerning their reorganization, do you believe that the Ombudsman will be able to establish that kind of independence within the Office of Inspector General?

Mr. WOOD. I think the short answer would be no. Our reading of the standards is that those characteristics are to adhere to the Ombudsman in its own right, and not by dint of being included in or placed in an office that also may happen to have similar characteristics of independence.

Senator CLINTON. Also in your testimony you talked about how placing the Ombudsman within the OIG alters the relationship between the function of the Ombudsman and the individuals who make inquiries or complaints. Can you elaborate on that?

Mr. WOOD. I think it harkens back to the distinction that you just made about an ombudsman being more oriented to hearing complaints from the public. It is frankly that element of informal provision of information and dispute resolution that, actually if included in the IG, we think would violate the Inspector General Act.

Senator CLINTON. So in other words, if the best intentions of this reorganization were taken at face value and the Ombudsman were incorporated within the Inspector General Act, that might in itself violate the legislative act establishing the Inspector General.

Mr. WOOD. They can define a position—and I believe this is what EPA is intending to do—in a way that does not violate the Act. However, our point is, if you do that, you have removed an essential element of what an ombudsman is.

Senator CLINTON. Right. Well, I think that our concerns, Ms. Tinsley, do not reflect in any way upon you or your office, but really go to the heart of the matter, which is that the EPA, as we

heard very eloquently and forcefully presented by Congressman Nadler, has not responded adequately to the concerns and complaints and the realities that are present in Lower Manhattan. I speak specifically about that, but as Senator Allard said, there are many other cases in Colorado and elsewhere where that has been also a problem; and that not until the independent Ombudsman got involved was there any answer forthcoming about a lot of the deep anxieties that people rightfully had. Then all of a sudden, these hearings that are held for 11 hours where people are putting forth very disturbing evidence about how their efforts to clean their homes, how their efforts to use respirators were basically either short-circuited or denied, raised serious questions about the EPA's functioning. All of a sudden, the Ombudsman is gone.

That certainly raises some serious questions about what the EPA's real goals are. I think that many of us believe that we are going to have to take legislative action to clarify what was the original idea behind the Ombudsman when first created back in the 1980's, that this would be an independent voice with independent authority, independent budget. I think we have seen a perfect example here as to why we need that.

Senator I am going to have to excuse myself, like our Chairman, and I appreciate your being here to carry on with this very important hearing.

**OPENING STATEMENT OF HON. MICHAEL D. CRAPO,
U.S. SENATOR FROM THE STATE OF IDAHO**

Senator CRAPO [assuming the chair]. Thank you very much. I apologize for being late.

Let me make my apologies to the committee and to the audience as well. We had a very important Republican Conference this morning that started early and we thought was going to get done before this hearing began. It ran on and on and I was unable to leave there on time. So I apologize for being late to the hearing today.

[The prepared statement of Senator Crapo follows:]

STATEMENT OF HON. MIKE CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Thank you, Mr. Chairman.

I appreciate your convening this legislative hearing on S. 606, the Ombudsman Reauthorization Act. As you well know, this measure is of critical importance to Idahoans and many communities throughout the country.

Before I make my opening statement, I would like to extend a welcome to all of our guests today who have been invited to comment on the legislation. I would also like to express my appreciation to Kathy Zanetti of the Shoshone Natural Resources Coalition, who has traveled all the way from Wallace, Idaho, to be with us today.

The position of ombudsman has a long and distinguished history. Several Federal agencies, State governments, and other organizations in the U.S. have established ombudsmen to fill a unique role of resolving grievances. An ombudsman is more than just a fact-checker or a bean-counter. An ombudsman is link to our communities and a last recourse for many who cannot find assistance with their grievances.

Establishing an ombudsman is a delicate task. It requires just the right amount of initiative, investigative experience, and confidence of and advocacy for the public. To maintain the trust of the public, however, an ombudsman needs to operate without even the appearance of interference from others within the agency. For their part, operations officials whose work may be investigated need to feel that an ombudsman is fair and professional.

For another analysis on the proper functions of a Federal ombudsman, I'd like to take a few moments to read some excerpts from the Administrative Conference of the United States' report entitled, "The Ombudsman: A Primer for Federal Agencies."

- Creating an ombudsman provides both the public and the government a way to resolve a dispute that persists in spite of efforts to deal with it at the operational level.

- Executive ombudsmen . . . should report to the head of the agency . . .
- The ombudsman should, in general, have the power to conduct a formal interview of all agency personnel on any matter under investigation. The ombudsman's jurisdiction should encompass all the grievances arising from the agency's dealings with the public. Among the potential advantages of the office are its accessibility for citizens, its speed, its flexibility, and its informality. The ombudsman should be encouraged to look into a complaint even where no 'case or controversy' exists, other remedies have not been 'exhausted,' or the complaint is not 'ripe' in the legal sense.

[The report is from 1990. No longer in existence, the Administrative Conference of the United States was established as an independent Federal agency to "promote improvement in the efficiency, adequacy, and fairness of procedures by which Federal agencies . . . [perform] governmental functions."]

Turning to another source, we should look to comments of the United States Ombudsman Association, the organization of public ombudsmen, which will also be submitting testimony today. While the USOA generally supports the establishment of independent ombudsman agencies, a model many States have followed for public ombudsmen, for the investigation and resolution of complaints, the association believes that S. 606 would do much to improve the functionality of the ombudsman's office within the EPA. What's more, the USOA recommends that "everything reasonably possible should be done to maximize the ombudsman's independence within the agency where the office is situated."

The GAO wrote a report in 2000 on the problems with which the EPA has established the Office of the National Ombudsman and will be testifying here today. The report closely follows the American Bar Association's guidelines for ombudsmen— independence, budget and staffing authority, and the power to select cases. It is my expectation that the GAO's statements today will point out that the EPA's transition of the Office of the Ombudsman at best leaves many questions unanswered and at worst, fails to heed the recommendations of the report. The GAO's recommendations for the EPA Ombudsman are generally consistent with the language of S. 606.

Despite all the support for the approach outlined in S. 606, perhaps what is most troubling is the reaction of the EPA to the communities throughout the country that have expressed concern with what they believe to be a "muzzling" of the important ombudsman function. When asked about how the ombudsman will function, agency personnel have indicated that there is no current operating model, nor is one expected for the foreseeable future. For communities that depend on the last recourse provided by the ombudsman, this is not a comforting development. It is my hope that the EPA will be able to announce today its guidelines for the operations and future of the Office of the Ombudsman and lay aside many of our troubling concerns.

Mr. Chairman, I understand that you have other commitments that do not allow you to remain with us for all the panelists. Before you leave, I want to share with my thanks for calling this important hearing.

I look forward to a productive, informative, and vigorous discussion on S. 606 and the many issues involving the Office of the EPA National Ombudsman.

Thank you, Mr. Chairman.

Senator CRAPO. I would like to ask a couple of my own questions, and then we will turn to Senator Carper. Again, I apologize for not having been here for most of your presentation of your testimony. However, I have read your written testimony and am familiar with the issue.

Ms. Tinsley, I also realize that you have probably been through this, answering this question already a lot, but it seems to me that what we are learning as we get reports from the U.S. Ombudsman Association and we review the American Bar Association's standards, we get the GAO reports and other things, is that probably the most significant factor in establishing an effective ombudsman's office is independence. As you know, at the outset when the proposal was made by EPA to transfer the Ombudsman's Office to the OIG,

I raised the questions about who was going to make the decisions about what cases are going to be taken. Who is going to make the decisions about what staff will be hired and what staff will be allocated to a particular investigation? Who is going to make decisions about travel? Who will actually review and approve the report of the Ombudsman? Will it be the Ombudsman him-or herself or will the Ombudsman submit that report to the Inspector General for the Inspector General's final approval? Would the Inspector General have the authority to change an Ombudsman's report under the set-up that you now have?

It is my understanding that the answer to all of those questions is that it is the Inspector General who will be making the final determination in each of those areas. The Inspector General will decide which cases the Ombudsman can take. The Inspector General will decide what funding resources will be allocated to the Ombudsman, will decide what staff the Ombudsman will have, will decide what travel will be authorized, and will actually decide whether the report of the Ombudsman is sufficient and make the final decision as to whether the report will be issued in its proposed form. Is that correct?

Ms. TINSLEY. Ultimately, I am responsible for everything that happens in the Office of Inspector General. Quite frankly, the way things work is I do not need to get engaged normally unless I get called in for a tiebreaker, if you will. All our reports are done under the government audit standards and are Ombudsman's work will be as well, which has rigorous quality control included. I cannot change a report because our reports are based on the information that is gathered in the analysis that we have done. We work very hard to make sure that everything we say is accurate and supportable. So I do not go around changing reports.

The work we do and how we budget for it is based on those cases that are most important and those that we think will address our stakeholders, the Congress and the Agency's needs. The Ombudsman's work appears at this point to be primarily very high-risk from the standpoint of environmental protection and public health protection. Those are the kinds of cases that we give the highest priority to. At this point based on what we have seen, I am not concerned that we will not be able to address the existing and future Ombudsman workload within our normal work processes. Once we have done this for a while, if we find out that we cannot, we will adjust our work processes. To date, it appears that the way we go about doing and prioritizing all of our assignments will work for the Ombudsman work as well because it is floating to the top.

Senator CRAPO. Well, let's just take the case of the Idaho work that is being done by the Ombudsman. My understanding when the shift was made to move the Ombudsman's Office into the IG's Office that—well, I actually asked the question at that point, who is going to issue the report, because we still want and wanted then to have the report issued promptly. The answer that I got was that the Ombudsman would be encouraged to issue his report soon. That report would have to go to the IG for final review and then it would be promulgated. There was no assurance that the report that the Ombudsman issued would be the report that the IG authorized.

Now, I hear you telling me that you are not likely to change that, but are you telling me you cannot change that report?

Ms. TINSLEY. I cannot change it unless there is evidence to show that there is something inaccurate in the report.

Senator CRAPO. What you are telling me, then, is that you are a final overview over the Ombudsman. If you do not agree with the Ombudsman's report because you see different evidence or read the evidence a different way, that you can disagree with it and change it.

Ms. TINSLEY. I could do that as long as it was in accordance with our standards. That has never happened in a report since I have been the IG, but it would have to be supported by the evidence.

Senator CRAPO. The point that I am making is that that makes you the Ombudsman.

Ms. TINSLEY. I think that makes me ultimately accountable for the work of the Ombudsman.

Senator CRAPO. I think we may be saying the same thing.

Ms. TINSLEY. Semantics, yes.

Senator CRAPO. I also wanted to go back and make sure that I understand correctly that with regard to the question about how much staff is allocated, what travel is authorized, and so forth—those are also decisions that the Ombudsman has to obtain permission from basically you for.

Ms. TINSLEY. We have a process where we allocate budget funds to different pieces of the organization. If someone runs short, usually there is not a problem with moving money from one piece to another, which we have the authority to do with our budget. So again, I do not see any issues with travel, with assignments, with anything because thus far we have not had issues in our organization with that kind of thing.

Senator CRAPO. I can tell you from my perspective, I do not know about during your tenure, but I have seen issues at the EPA over those issues relating to the Ombudsman.

Let me just ask one last question. When we in Idaho first decided that it would be helpful, we hoped helpful, to get the Ombudsman to be involved in what is happening in the Coeur d'Alene Basin, we made our pitch. Our congressional delegation asked the Ombudsman to take the case. We were very fortunate that he agreed to do so, in my opinion. Once again, if we were starting that process all over again under your current structure, wouldn't it be you that we have to make the real pitch to, in addition to the Ombudsman? We would have to go to the Ombudsman first, but we would also have to go to you to make sure that you would also approve and agree to allow him to take that case?

Ms. TINSLEY. The way the process works in our organization normally is that if we get a congressional request, I do not usually go out and talk to the congressional staff. In this case, it would be our Office of congressional and Public Liaison, where the Ombudsman is sitting. They would prioritize the work and I would just find out through our normal management information system that you had a high priority request and the staff had decided that it was important for us to do.

So it is more an information function for me. I do not manage every assignment, every trip. I try to stay aware.

Senator CRAPO. I realize that you do not do that, and that is a sign of a good manager, but the point I am making is that you could if you chose. If something came up and somebody said, we really do not want the Ombudsman investigating Idaho. You could say no.

Ms. TINSLEY. I could say no.

Senator CRAPO. That is the point I am trying to make. That is the independence issue that I am trying to get at.

Mr. Wood, I have a lot of questions for you, too, but I know I have used up my time, so we will see if we get a second round here.

Senator Carper, I believe you are next.

Senator CARPER. Well, you are our Chairman. I guess you can decide.

[Laughter.]

Senator CARPER. Seize the day—carpe diem, carpe diem.

Senator CRAPO. That is right.

Senator CARPER. To our witnesses, thanks for joining us today.

Do I understand that the statutory authority for the Ombudsman was created in 1984? Does that sound about right? The statutory authority for the Ombudsman expired in 1989?

Mr. WOOD. I believe it was 1988.

Senator CARPER. Since that time, there has been no statutory authority for this position. So it has been about 13 or 14 years since the statutory authority for the position expired. Do I understand that this hearing is designed to find out whether it is appropriate for the Ombudsman to be located or housed, supervised by the IG, the Inspector General, as opposed to being a more independent party within EPA? Is that pretty much—

Senator CRAPO. Perhaps I could answer that. That is generally the point. As you may be aware, there is legislation that has been introduced that Senator Specter and I and several others are co-sponsors of, which is also a subject of this hearing. That legislation would create an independent Office of the Ombudsman. After that legislation was introduced, there were also the actions by the EPA to address the issue itself by moving the Office into the IG's Office.

So this hearing, as I understand it, is sort of to cover all of the issues.

Senator CARPER. All right. It seems to me, just as a casual observer here today more than anything else, that if we wanted to resolve this issue, we could simply take up your legislation and pass it and send it on to the President and we would resolve just where this position ought to lie.

Senator CRAPO. So stipulated.

[Laughter.]

Senator CARPER. I am ready to move right to markup at this point in time.

Mr. Wood, let me just ask of you, what do you make of the legislation that Senator Crapo here has introduced, along with a couple of our colleagues? Is there any merit in it at all?

Mr. WOOD. I am sorry?

Senator CARPER. Any merit in it at all?

Mr. WOOD. Yes.

Senator CRAPO. Be very careful with your answer.

[Laughter.]

Mr. WOOD. I will be.

Senator CRAPO. Just kidding.

Mr. WOOD. Like the IG, we have not submitted any formal comments, but I have read the bill and I think by doing a few of the key things that are consistent with the standards promulgated by the professional ombudsman associations, it would go further toward—

Senator CARPER. Do they have their own association?

Mr. WOOD. Oh, there are actually a couple, yes.

Senator CARPER. Rival associations?

Mr. WOOD. There is the Ombudsman Association and the U.S. Ombudsman Association.

Senator CARPER. All right.

Mr. WOOD. There is also a coalition of Federal Ombudsmen. The bill does have certain provisions that would promote structural independence, for example, things like reporting directly to the Administrator, a separate budget over which the Ombudsman would have control, and within Civil Service guidelines, the ability to hire and fire its own staff—things like that.

Senator CARPER. When you look at the legislation, do you see anything that you think we ought to change before we go to markup on it?

Mr. WOOD. I guess we would like the opportunity to go over it in a little bit more detail, but we will be glad to supply comments.

Senator CARPER. All right. Good.

Ms. Tinsley, any comments on the legislation? I do not want to put you in the hot seat here. If you rather just pass, you can do that, but anything you find with the legislation that is especially appealing or not appealing?

Ms. TINSLEY. As we read through the proposed legislation—we did this about a year ago—our only concern was that it seemed to duplicate a lot of the IG's role from the standpoint of investigations of agency activities, which I see as an IG role and which is what the IG Act created the IGs to do.

Senator CARPER. So you are not quite ready for us to go straight to a markup on that legislation?

Ms. TINSLEY. I think we would like to provide some comments where we see conflicts if you were to do that.

Senator CARPER. Fair enough. Does it seem peculiar to you that the Congress, which has not authorized or provided statutory authority for this position for 13 or 14 years, is now concerned with where this position is housed within EPA? Do you see any irony in that? That is not a fair question.

Ms. TINSLEY. No.

Senator CARPER. All right. You do not have to answer that. I see a little irony in that myself.

All right. Thank you both very much. Mr. Chairman, thanks. It is a pleasure to call you Mr. Chairman.

[Laughter.]

Senator CRAPO. Thank you very much. Maybe we will talk to you about cosponsoring the bill.

Senator CARPER. All right.

Senator CRAPO. Senator Specter.

**OPENING STATEMENT OF HON. ARLEN SPECTER, U.S.
SENATOR FROM THE COMMONWEALTH OF PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, I am pleased we are finally having this hearing. I have been very much concerned about what has been going on at Marjol, and the conflict which has been reported to me and to others about what has happened with Mr. Robert Martin, and a disagreement with the Inspector General, as I understand it—that is what I want to hear about—with Mr. Martin resigning, contending that he had not been given notice and his files had been seized. I am glad, Ms. Tinsley, that you are here and Mr. Martin is here so that we can try to make a determination as to what has actually happened.

Mr. Chairman, I have a great many questions for this panel, but I think it would be most expeditious, at least speaking from my point of view, if we heard from Mr. Martin, with Ms. Tinsley remaining, so we can see what the differing positions are and the appropriate inquiries can be made by this committee.

Mr. CRAPO. That is not the structure that we had set up for the hearing. I don't know, Ms. Tinsley, can you remain here at the hearing during Mr. Martin's testimony?

Ms. TINSLEY. Well, I had another appointment scheduled. We can call and try and change that.

Senator SPECTER. Excuse me?

Ms. TINSLEY. We could call and try and change that. I had another meeting after this, but we could call and try and change that.

Senator SPECTER. We could appreciate it if you would. What I would like to do, Mr. Chairman, going right to heart, we have waited for this hearing for a long time, and it is not to the point to ask Ms. Tinsley questions, then to hear from Mr. Martin without hearing Ms. Tinsley and giving her a chance to give her position. So I would like to move right to that.

Senator CARPER. Mr. Chairman, I do not have any objections, if it is agreeable to you, I think it is a perfectly good idea.

Senator CRAPO. Well, one of the issues here is we have in the next panel, if I remember correctly, a number of other witnesses which could take some time. Are you suggesting that we bring Mr. Martin forward at this time?

Senator SPECTER. If Ms. Tinsley can wait until the others have testified, that would be most orderly. If she cannot, then I would request to hear from Mr. Martin at this time.

Senator CRAPO. I think that maybe the easiest thing to do would be to hear from Mr. Martin at this time, and then you could ask questions of both of them on the panel at this point.

Senator SPECTER. I would very much appreciate that, Mr. Chairman.

Senator CRAPO. Mr. Martin, would you please come forward? We will deviate from our procedure briefly. Mr. Martin, what we would do is allow you to make your presentation and then following that, we will return to Senator Specter for questions. Does that work, Senator Specter?

Senator SPECTER. Thank you very much, Mr. Chairman, that would be fine.

Senator CRAPO. Thank you.

This is Mr. Robert Martin, the immediately preceding Ombudsman.

Mr. Martin.

STATEMENT OF ROBERT MARTIN, FORMER EPA NATIONAL OMBUDSMAN

Mr. MARTIN. Thank you, Senator Crapo, members of the committee. It is very good to be here, very good to see you again, Senator, and Senator Specter as well.

With your permission as Chairman, I would like to incorporate for the record my written statement.

Senator CRAPO. Without objection.

Mr. MARTIN. Thank you.

I also have present with me Mr. Devine, who is my legal counsel. He may be able to answer questions as well for the benefit of the committee.

Senator CRAPO. Thank you.

Mr. MARTIN. Thank you.

That being said, I really just have a few points and would be available to answer any and all questions that Senator Specter and others have on the committee.

The National Ombudsman function as I served in it for approximately 9.5 years as a career employee of the U.S. Environmental Protection Agency is gone. It has been destroyed. That happened when I was summarily transferred to the Office of Inspector General. My position description, which specified my duties as Ombudsman, was eliminated. I was being sent to an unclassified position within the Office of Inspector General where frankly I would no longer be Ombudsman. To go there under those terms, in my view, would have been a betrayal of my charge as Ombudsman, and also a betrayal of the communities which I had served in many cases for many years, including in Idaho and Pennsylvania. So I would not go. I resigned.

So I appear before you today as an ordinary citizen, like many of the folks I worked with over the years. I am pleased to do that.

Second, I would like to make the point that I feel, as both a legal and a practical matter, the National Ombudsman function cannot exist within the Office of Inspector General. I do not believe the organic statute of the Inspector General allows for that, and I do not feel, as a practical matter, that it can work. The National Ombudsman function, as I performed it over the years, was open, totally open and transparent. I do not feel it can work in the IG. So I do not feel that, good intentions notwithstanding, we have an Ombudsman today. I hope that this committee and this Congress does the right things and makes one, for all the people who have been helped by this important institution, and will continue to need that help.

Because you do not have an Ombudsman today, I feel that there are many communities, New York City included, that are not protected from an unchecked bureaucracy. I guess I harken back to the quote which Senator Clinton asked Congressman Nadler to read into the record by former Justice William Douglas. It is not that we are dealing with bad, venal people, it is just that bureaucracies tend to get out of control if they are not checked. I think it

is a fundamental tenet going back to the beginning of the country—the separation of powers, checks and balances. I think the Ombudsman function is such a check and balance and must exist independently to protect American communities.

By transferring the function to the Office of Inspector General, that is gone. That is gone, in my opinion. In so doing, I feel communities lost, and I do say lost, a means of acquiring truth. As Senator Allard said earlier, truth is what came from the Shattuck case in Colorado. Truth is what was evolving in Idaho and in Throop, PA and in a number of other cases which were ongoing during my tenure. Openness is gone, too.

I tried to bring to the job three things over the year. One was to really listen to people. That is hard work, and not justify the position of the EPA—sanction what had happened before. I thought it was always important to truly listen, go back to square one, understand why it is we were even there, especially in Idaho, Mr. Crapo.

Second, to bring compassion. I do not feel that EPA brought a lot of that to different communities. That is needed because we work for the people. We work for the people, not the other way around.

Third, to ensure thoroughness. In each and every case, I had undertaken over 9½ years, I had heard from the Agency that there was not a problem, except in Idaho. You've got all kinds of problems in Idaho. I found in the end analysis in many of these cases that we had not been thorough enough in understanding the problems we were facing. Instead of listening to the people who always offered real good information—real common sense facts—we often talked to each other in EPA or talked to other government entities. People were not treated right. Things did not happen, as they should have happened, and some things happened that should not have happened. I did the best I could over 9½ years to make sure that has changed.

In so doing, I had the help of a number of people. I would like to commend them at this time—my former investigator, Mr. Kaufman; my secretary, Louise Hall; my chief scientist, Doug Bell; and also a group of young men who never quit as interns, Mr. Spencer Haines, Mr. Ken Remelt, and Mr. Justin Blum.

Much was done, much was done through the National Ombudsman function for many years, to bring truth and openness, and I say a measure of justice, too, in the end, in many of these cases. It was not done by me alone. It was done in collaboration with Members of Congress, with people like Senator Allard, Congressman Nadler, Senator Crapo, Senator Specter. A free press also was important, and direct one-on-one ground-level communications with people in their homes who provided all kinds of evidence that was very useful in the end in determining what recommendations were proper to make to EPA management to address the situation.

That needs to continue. You know what? I feel it will. We can discuss the law. We can discuss the facts. I have and continue to have I think an abiding faith in the strength of the American people and their communities. That will abide.

Last, in the way of a vision for where all this goes, I feel this committee should proceed to markup as soon as possible on the Ombudsman Reauthorization Act of 2002. I think that the function

should once again have the sanction of the Congress. I think it needs to be a true and independent National Ombudsman for the environment. I think it should report to the Congress and be able to make recommendations to the executive branch, including the EPA. I think it should report to where the people have placed their trust, which is this body.

During the interim period, I guess I want it known that I did resign. I did not just completely walk away. There was a complaint pending with the Office of Special Counsel. They asked me to mediate with EPA to see if maybe I could finish the work I had started for a very limited period of time and then go. I guess I want you to know that would be my desire. The deadline for mediation has passed with no response from EPA. I guess that is where things are.

Senator CRAPO. Thank you very much, Mr. Martin. We appreciate your being willing to come out of order and make your remarks.

Mr. MARTIN. One final request—because of what happened to me, frankly, I also think that whistleblower rights should be protected. I understand that there is legislation pending in the Senate to allow for that—the Whistleblower Amendments Protection Act of 2002. I would also recommend that, and suggest that the salient provisions be incorporated in the Ombudsman Reauthorization Act. That is all.

Senator CRAPO. Thank you very much. As I was saying, those of us who have worked with you recognize and appreciate the influence you have been able to have in the communities where we serve. In fact, it was in Idaho where you first became involved in the Triumph site, where we finally were able to get some resolution. That was one of the main reasons we tried to successfully invite you back to Idaho to look at the Coeur d'Alene basin issues. I realize the matter is now in negotiation with regard to the litigation that is ongoing, but I certainly would hope that some way would be worked out that you could finish the investigation in Idaho, and truly conclude that work as well as maybe other work that you had been working on.

I want to tell you my personal thanks for the work that you have done for Idaho and for the Nation.

Mr. MARTIN. Thank you.

Senator CRAPO. Senator Specter, did you want to continue with your line of questioning now?

Senator SPECTER. Yes. Thank you very much, Mr. Chairman.

Mr. Martin, I agree with what the Chairman has said, Senator Crapo has said, and I thank you for what you have done on a Pennsylvania matter. My focus of attention is on Marjol, an area where my staff and I have been working since 1988. It goes back to Senator Heinz' tenure in the Senate and a great deal of activity in the ensuing 14 years. Based upon what has been reported to me from your activities and Mr. Kaufman's activities, you took very strong positions for protection of the community seeking broad relief under Superfund and strong activities from EPA, and essentially have been thwarted in those efforts.

Would you state exactly what did happen, first with respect to your recommendations, and second with respect to what the EPA did—the higher levels of the bureaucracy?

Mr. MARTIN. Yes. Prior to the completion of my preliminary report on the Marjol site, which was filed on October 10 of last year with the Agency and also with the Pennsylvania congressional delegation, I had investigated the Marjol case for seemingly about a year. At the beginning of that case, as you may know, Senator, I held a public, on-the-record hearing in the community itself, at which residents testified and virtually every member of every surrounding local government was present, as was Congressman Sherwood.

Senator SPECTER. What were your recommendations, Mr. Martin?

Mr. MARTIN. My recommendations, filed in October of last year, were to bring in the Superfund Program. The Superfund had not been invoked at Marjol, except in the very early days of the site to perform a removal action.

Senator SPECTER. Why hadn't Superfund been invoked?

Mr. MARTIN. Why had it not been invoked?

Senator SPECTER. Correct.

Mr. MARTIN. The rationale of the Agency from the Region 3 office was that because there was a responsible party, one, and because the responsible party was viable, two—meaning financially—that the it would be valid to proceed under the Resource Conservation and Recovery Act for corrective action, as opposed to bringing in the Superfund program.

Senator SPECTER. When you terminated, it has been brought to my attention that you considered your files to have been seized. Is that correct?

Mr. MARTIN. That is correct.

Senator SPECTER. Would you say exactly what happened?

Mr. MARTIN. To the best of my recollection, yes, I shall. I was aware of the planned transfer of me and the National Ombudsman function to the Office of Inspector General. As a pretext, I had in September of last year following the release of the General Accounting Office report, written to the Administrator. That is the only time I have ever written to an Administrator, but I felt it was important to do so. Of course, recommended that the GAO recommendations be adopted, so that I would have full powers as Ombudsman—meaning to hire and fire my own people, supervise my own people, have my own budget, so that these cases could be moved and finished.

I said in that writing that in any event, in no event, should the function be transferred to the Office of Inspector General because that would only provide the false appearance of independence and not true independence. I offered to meet with the Administrator to discuss my own recommendations in conjunction with the GAO's. I heard nothing until November, when I received a direct communication from the Administrator that she was deliberating and would make a decision shortly. I then heard on November 27 that a decision had been made, that the National Ombudsman function would be folded into the Office of Inspector General.

Senator SPECTER. In your opinion, why was that done?

Mr. MARTIN. In my opinion, that was done—well, I can tell you what the effect of it was. It was to silence effectively the National Ombudsman function and eradicate its independence.

Senator SPECTER. Well, was it done in common parlance, Mr. Martin, because you had become a hair shirt? You had given them too much trouble and they wanted you out of the position where you could exercise independent judgment on what ought to be done on these sites?

Mr. MARTIN. It became clear to me that as I was summoned in and told of the transfer that I was not going to be sent there as Ombudsman. I would not have my position description which specifies that I am Ombudsman and lays out my duties. I would no longer be able to communicate directly and independently with the Congress and with the media, and I feared even the people who had asked me to do the cases.

Senator SPECTER. Was the Administrator unhappy with what you were doing? Did the Administrator in effect disagree with your policies and wanted to eliminate your authority by making the transfer to the Office of Inspector General?

Mr. MARTIN. As I noted earlier, we had never spoken directly, so I had no first-hand knowledge of what her motives were. I can tell you that is the subject of an FBI inquiry right now. I have been asked to interview with the FBI and have done so.

Senator SPECTER. What is the nature of the FBI inquiry?

Mr. MARTIN. There have been allegations made relating to potential conflicts of interest of a financial nature on the Administrator's part, with respect to my cases.

Senator SPECTER. Aside from that, was there a general displeasure by the head officials in EPA with the kinds of strong recommendations you were making and the insistence that you were pushing forward to get corrective action as you saw it?

Mr. MARTIN. Yes.

Senator SPECTER. Did this exist beyond Marjol, in other places?

Mr. MARTIN. Yes, it did.

Senator SPECTER. Where else?

Mr. MARTIN. It existed in Idaho. It existed in New York City. It existed in many of the other cases.

Senator SPECTER. Back to the issue of seizure, precisely what happened?

Mr. MARTIN. On April 12 of this year, U.S. District Judge Roberts of the District Court in Washington vacated a temporary restraining order which had served to protect me from being transferred and my files from being transferred to the Office of Inspector General. Within hours of the vacating of the TRO, I understand orders were issued to come for the files in my office as soon as possible, which included the Marjol and Coeur d'Alene basin files.

Senator SPECTER. You say orders were given?

Mr. MARTIN. Yes. You cannot move—

Senator SPECTER. Who gave the orders?

Mr. MARTIN. That I am not sure about, sir, but I know you cannot move—

Senator SPECTER. When did you first learn of it?

Mr. MARTIN. I learned of it after—well, I want to note that while the TRO was being vacated and personnel were being sent to re-

move the files, I was on official travel. I was not in Washington at the time.

Senator SPECTER. Were you told that your files were going to be taken before they were taken?

Mr. MARTIN. On that occasion, no.

Senator SPECTER. On any occasion?

Mr. MARTIN. I understood in January from Assistant Inspector General Johnson that the Office of Inspector General intended to take the files, but that was before Federal Judge Roberts issued a temporary restraining order.

Senator SPECTER. When you have used the word "seized,"—it is not my word, it is the word I understand to have used—why did you characterize it as "seized"? That is a very forceful term, signifying taken against your will. Why do you use that term?

Mr. MARTIN. Well, in the first instance, I did not agree to the transfer. I felt it was an invalid transfer. As I noted a moment ago, I was on official travel at the time this occurred, testifying before the legislature in New York City, and then working on the Shattuck case in Denver, Colorado. I understand there is an e-mail from the Office of the Administrator providing instructions that the files were to be taken as quickly as possible.

Senator SPECTER. E-mail from the Administrator, Governor Whitman?

Mr. MARTIN. From the Office of the Administrator. I do not know that it was from her personally, sir.

Now, the only personnel remaining was my senior scientist, Mr. Bell. Because I was away, he was asked to transfer all of the files. He did so under protest and duress.

Senator SPECTER. Mr. Martin, without those files can you carry on your work at Marjol or the other locations you identified?

Mr. MARTIN. It would be very hard.

Senator SPECTER. Would it be possible—hard or impossible?

Mr. MARTIN. It is possible. I could begin the cases de novo, and ask for cooperation among all the parties to start again.

Senator SPECTER. To start again.

Mr. MARTIN. Yes, to start again. I must note that in between the issuance of the restraining order and the final seizure of the files, there was an attempted seizure of the files while the restraining order was in effect.

Senator SPECTER. An attempt to take the files?

Mr. MARTIN. Yes. My senior scientist, Mr. Bell turned them away at the door, showing the restraining order.

Senator SPECTER. Ms. Tinsley, were Mr. Martin's files taken without any notice to him?

Ms. TINSLEY. No. We notified his office and he was aware of the transfer, I believe, because we tried to notify him by phone and through the supervisor that he had prior to the transfer. So actually, we—

Senator SPECTER. Who tried to notify him?

Ms. TINSLEY. Our Assistant Inspector General, who would be his direct supervisor did that.

Senator SPECTER. What is the name of that person?

Ms. TINSLEY. Gary Johnson.

Senator SPECTER. Is that person here?

Ms. TINSLEY. No, he is not. I believe that Mike Shapiro, who was his supervisor with the Office of Solid Waste tried to contact him as well. Since I did not do this piece directly, if I tell you anything that is not completely accurate, we are going to have to correct it for the record because I was not personally involved in moving the files. When the files were moved to us, Mr. Martin was part of our office. It was after the restraining order had been lifted and the move of the files that we had planned since early January then was actually taking place in April.

Senator SPECTER. Were you aware that the files were to be removed?

Ms. TINSLEY. Yes.

Senator SPECTER. Mr. Martin, did you hear from either Mr. Johnson or Mr. Shapiro that the files were to be removed?

Mr. MARTIN. No, not at the time the restraining order was removed, no.

Senator SPECTER. Did you hear about it at any time prior to the time the files were removed?

Mr. MARTIN. I heard about it as I was returning to Washington. By that time, it had nearly been finished.

Senator SPECTER. Ms. Tinsley, why has EPA moved to take Mr. Martin out of the position of Ombudsman and put him in another spot where he can no longer carry out the functions that he was exercising as Ombudsman on Marjol and these other locations?

Ms. TINSLEY. From my perspective, that is not what happened. He was just going to be part of our office and be part of the team that would resolve these cases I would hope more quickly than he was able to do by himself.

Senator SPECTER. Are you testifying before this committee that it was your intention to make him part of your team and to leave him with the authority to continue to do what he had been doing?

Ms. TINSLEY. He was going to be part of our team. He would not have the authority to do everything, but we could apply more resources than he had in his office, and so we were hopeful that we could work with him as one of our lead people and respond to a lot of these cases at the same time, which I think was difficult for him to do with a staff of only three or four people.

Senator SPECTER. So your testimony is that you were doing it to help him by giving him more resources, contrasted with setting up an arrangement which took him away from the authority he had as Ombudsman, to work on the files and to do what he wanted to do with Marjol, to have a Superfund site declared?

Ms. TINSLEY. Our intention as to do this to help the public, the people who had inquiries that were not being responded to as timely as they might be if there were more resources applied.

Senator SPECTER. Has the public been responded to in a more timely manner since Mr. Martin has been replaced?

Ms. TINSLEY. Not as quickly as I had hoped. Since he resigned, he was not here to help us go through the files and determine what work was left to be done.

Senator SPECTER. Ms. Tinsley, what did you expect him to do when you took away his authority as Ombudsman and when you went in a took the files out from under his control, with every objective observer understanding that you were moving him and cut-

ting his authority out? Do you expect this committee to accept your explanation that you wanted to leave him in a position of power, but to help him carry out what he had intended and was trying to do?

Ms. TINSLEY. I do expect you to believe that. That was our intention and we thought we could set up a system where he could be successful and part of responding to the folks that he was working with on these investigations in a more timely manner.

Senator SPECTER. Did you ask Mr. Martin to stay on?

Ms. TINSLEY. Mr. Martin would not talk with us. We tried to arrange meetings with him, but he refused to attend. Once he was on our staff, as soon as he was back in town, he resigned, so we did not ever have an opportunity to talk with him. Our intention was never to remove him from his files, it was to move the files to our office where he was going to be working.

Senator SPECTER. Without notice to him. Mr. Martin, did Ms. Tinsley ever ask you to come in to talk?

Mr. MARTIN. No, she did not.

Senator SPECTER. Did anybody ask you to come in and talk, to stay on the job?

Mr. MARTIN. Mr. Johnson communicated that he wanted to talk, by voice mail. I indicated in a reply that before doing so I wanted official paperwork showing that there had been a transfer and the nature of the transfer. That was not provided until weeks or a month after my resignation.

Senator SPECTER. Ms. Tinsley, at this point you have a very heavy obligation to move to help the people of the Marjol community. The inference that I draw is that Mr. Martin was ousted because people did not like what they—the higher bureaucracy at EPA did not like what he was doing and that it was retribution. This is a long involved history. It is not just the taking of these papers, and not just failure to have a conversation with him when he was being removed. Ms. Tinsley, do you disagree with the conclusion of the GAO, “The National Ombudsman will not be able to exercise independent control over the budget and staff resources needed to implement the function”? Do you think that is true or false?

Ms. TINSLEY. As an individual, the person does not control all the budget within the Office of Inspector General. We do that as an organization. The Ombudsman will be part of a team that has access to all the budget resources.

Senator SPECTER. So you agree that it is true that it is the National Ombudsman, but you are saying the whole team can do it.

Ms. TINSLEY. Correct.

Senator SPECTER. Would you agree or disagree with the General Accounting Office conclusion that the National Ombudsman, and these are my words, does not have, “the authority to select and prioritize his or her own caseload, independent of all other needs”?

Ms. TINSLEY. The caseload prioritization is done as a part of the team as well, based on risk. I am not sure you were here earlier when we talked about this, but the highest ranking risk factors in the way we assign work have to do with threats to human health and the environment. The Ombudsman work that is open at this

time meets that high criteria, and it is the kind of work that we all address immediately.

Senator SPECTER. Since Mr. Martin has left, Ms. Tinsley, what has your team done specifically to solve the Marjol problem?

Ms. TINSLEY. OK. We have 16 boxes of files on Marjol and we have one of our senior auditors assigned to that. He is going through the information so that we can finish what work needs to be done. Without Mr. Martin, it was difficult for us because of the way the files were put together to even know the status on cases. So we have been working through that on our own.

Senator SPECTER. You have one person assigned to review files in 16 boxes?

Ms. TINSLEY. We have eight people right now working on 130 boxes. One person is working specifically on Marjol, as I understand it. Let me just see if I know how far along we are on that. We are about halfway through with the records that Mr. Martin had on Marjol.

Senator SPECTER. When will you finish?

Ms. TINSLEY. We hope by the end of July.

Senator SPECTER. When will you start to act to correct the Marjol problem?

Ms. TINSLEY. We would be able to get started immediately.

Senator SPECTER. Now?

Ms. TINSLEY. As soon as that analysis is done. In my mind, we have started now because first we have to assess where we are before we can move forward. We would be happy to meet with your staff on this if they would like to provide us input, or anyone else you could direct us to. We are very anxious to respond to these open cases.

Senator SPECTER. Well, what are you doing specifically besides a laborious task of reviewing files, which has been going on for a long, long time, to act to solve the problem at Marjol? Reviewing files is not very helpful unless you finish it, know what you are doing, and do something. When are you going to do something about the Marjol problem? When are you going to act to correct that gaping sore by treating Marjol as a Superfund site and correcting it?

Ms. TINSLEY. We will not be able to anything until we finish the file review and then we will get started. I am sorry I cannot tell you more, but without knowing the specifics of what went on at Marjol, it would be difficult for me to respond about what we need to do in the future.

Senator SPECTER. Well, would you please make a determination of those specifics and let this committee know?

Ms. TINSLEY. Yes. We would be happy to do that.

Senator SPECTER. My staff is not exactly in a position to direct the activities at Marjol, although it may be that my Executive Director in the area, Andy Wallace, could take over and do it. Perhaps we can find some constitutional way to do it, but we have been at it for 14 years, and I have not seen any matter in the many, many I have handled that leaves me with such dissatisfaction as this one does. I would be less than candid with you, Ms. Tinsley, if I said that I am totally unconvinced that you removed Mr. Martin or rearranged him to bring him in to give him more re-

sources as part of your team. The inference is unmistakable by what Mr. Martin has done at Marjol and other places that he was in effect a hair shirt, that he was doing things the upper management in EPA, and for a long time—not just since Governor Whitman has been Administrator, through Democratic and Republican Administrations. Speaking for this Senator, I am going to try very hard to try some way to correct it, either through the confirmation process or the appropriation process. We are not going to let this matter stand.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you very much, Senator Specter.

Let me go back to a series of questions. I would like to talk, to the extent we can get into it, just about where we go from here. In Senator Specter's questions and Ms. Tinsley's answers, it became very obvious that regardless of where one stands on what should have been done, how it should have been handled, we are at a point with regard to the Ombudsman's functions where we are trying to pick up speed, get back to where we can become effective again. We are not in an effective stage because we have so much file review to take care of, yet we have sitting right here in the room a person who has the institutional knowledge who created those files, who did all of the research and the work that generated the files that would give us the ability to move forward, and do so promptly in areas like Pennsylvania and Idaho and elsewhere.

Mr. Martin, you indicated that—well, tell me first of all, if I understand correctly, in the litigation that was undertaken after the judge lifted the temporary restraining order and entered his order, the matter was referred to the Office of Special Counsel. Is that correct?

Mr. MARTIN. That is correct.

Senator CRAPO. Can you tell me what happened at that point in the litigation? Maybe we could ask your attorney to advise us. Would you please state your name and association for the record?

Mr. DEVINE. Thank you, Senator.

My name is Tom Devine. I am the Legal Director of the Government Accountability Project.

After Mr. Martin filed a Whistleblower Protection Act complaint of constructive discharge, the Office of Special Counsel asked if he would like to try to achieve a constructive resolution of the dispute through mediation. He thought hard about this, and decided that he would prefer that approach and proposed a resolution which would allow him to go back for a limited period to complete his work on the pending cases. Yesterday was the deadline for the Environmental Protection Agency to respond and inform the Office of Special Counsel if they wanted to participate. We have not heard from them.

Senator CRAPO. Ms. Tinsley, is that your understanding as well? Or are you involved in this?

Ms. TINSLEY. I am not familiar with that matter, nor am I involved in that. I do not know what was going on on that matter.

Senator CRAPO. OK, thank you.

I am sorry, state your name again for me please? Your name again?

Mr. DEVINE. Tom Devine.

Senator CRAPO. Devine. Mr. Devine, is it still Mr. Martin's position as you represent him that he would like to engage in the mediation?

Mr. DEVINE. Do I still represent him?

Senator CRAPO. No. As his representative, is it your understanding that it is still his position that he would like to engage in mediation if possible?

Mr. DEVINE. Oh, yes sir. Mr. Martin feels we can accomplish a lot more by letting him get back to work, rather than having a retaliation fight.

Senator CRAPO. I realize that we in the legislative branch are not in a position to try to dictate outcomes of litigation or of these types of Office of Special Counsel activities. It seems to me that one thing we are allowed to do is to encourage all parties to fully and fairly follow the law. Right now, we have a process in place under the law which at least opens the opportunity for mediation.

It just seems to me that perhaps we could, within the boundaries within which we are supposed to stay in the legislative branch, at least encourage the parties to view the mediation opportunity as one here which would allow us to, at least with regard to a part of this issue, find some resolution—a part of this issue that is very important to Senators like myself in Idaho and I assume Senator Specter in Pennsylvania and others, who do not want to see all of the work that has gone on so far with regard to the generation of these files and the work that has been done in the areas where we have hoped to see some progress, go back to the starting point and have to start de novo or with new people reviewing files and so forth.

So I guess I would just on my own behalf, and I would let Senator Specter say whether he agrees, encourage all of the parties to consider some way under the law to deal with each other fully and fairly to mediate this issue if possible.

Senator SPECTER. Mr. Chairman, may I say that that is an excellent idea.

Mr. Martin, would you be prepared to sit down with Ms. Tinsley and take her up on her representation that she wanted to give you additional resources and would like to have your expertise in solving the problem?

Mr. MARTIN. Yes, so long as—

Senator SPECTER. Ms. Tinsley, would you prepared to do that?

Ms. TINSLEY. We are not part of that negotiation, is what my counsel tells me. This is actually an action that the Agency is—

Senator SPECTER. Well, I am not concerned about whether you are part of that process. What I am concerned about is how we solve the problem. I have heard you say that you really welcome—you wanted Mr. Martin to stay on and help you solve the problem and that you wanted to give him additional resources. I just asked him a question if he would be willing to sit down with you and try to work out an arrangement where he could stay and EPA could have the benefit of all the work he has done, and you would make a good-faith effort to let him carry forward duties as a part of a team. Would you be willing to sit down and talk to him about that?

Ms. TINSLEY. If that is within my authority to do, and the thing I do not know as I sit here is whether or not that is, because I do

not know what went on between Mr. Martin and the Office of Special Counsel. So I apologize. I just do not know what I can—

Senator SPECTER. Well, aside from what went on between Mr. Martin and the Special Counsel, you have a situation here where you have responsibility as Inspector General to do this job. You have taken over the Ombudsman's work. You have taken it over, as you have testified here, in a context of trying to give him additional resources and help. You have been stymied in your efforts because you do not have his expertise on those voluminous files.

Now, I would like to see you work out an arrangement, if you are really serious and in good faith, where you would sit down and carry that out and try to work out with him an arrangement. I would assign Tom Dower who has worked on this matter for 7 years. Your way, you would like inputs from the staff, to sit and talk with you about it. Would you be willing to do that?

Ms. TINSLEY. I think we would be willing to meet with your staff member, and as I said, short of that, I just have to find out what I can do, what I really have the authority to do, because I do not want to promise you I can do something that I cannot do, but I will certainly look into it.

Senator SPECTER. I do not want you to meet with the staff member. I want you to meet with Mr. Martin. You said you would like to have him back and to have his expertise help you. Well, he is prepared to do that. We are a couple of lawyers here. You are an attorney, right?

Ms. TINSLEY. No, I am not.

Senator SPECTER. Well, you have that advantage then.

[Laughter.]

Senator SPECTER. Well, I know of no reason why you cannot sit down and talk to the man. You have said that you would like to have his help and he is willing to sit down and talk to you. I would like you to do that. OK?

Ms. TINSLEY. OK.

Senator CRAPO. Thank you.

I would just like to get clarification on one matter. Ms. Tinsley, you indicated that you were not a part of the OSC mediation effort. Did you mean the Office of Inspector General was not, or that the EPA was not?

Ms. TINSLEY. I think that EPA is handling that. EPA, the Agency, not EPA the Office of Inspector General, and there is a cut between us on these kinds of things. My understanding is that the Agency's Office of General Counsel—

Senator CRAPO. Is the one that would be responding to the OSC?

Ms. TINSLEY. Yes.

Senator CRAPO. All right. Thank you.

Well, I appreciate what I hope will be an opportunity to see if we cannot, at least with regard to these issues that are outstanding and where so much work has been done, figure out a way to move forward without a loss of Mr. Martin's expertise.

Getting back to the legislation, let me just ask Mr. Wood. I told you I had a few questions for you. I am going to go to you now. I think I will get to each of the others of you on this question.

One of the sets of input that was submitted to the committee in writing by an entity that is not going to be a witness today was

written testimony by the U.S. Ombudsman Association. In their testimony, the Ombudsman Association suggested that there was a problem—that they are generally supportive of the legislation that we have proposed, but have made recommendations to improve it. Their single most significant recommendation was that they do not believe that the Ombudsman’s Office, in order to obtain the independence that we want to achieve for the Ombudsman, they do not believe that the Ombudsman’s Office should be in the EPA period, but instead that it should be, sort of as Mr. Martin said in his testimony, located outside the EPA, and in their testimony they say preferably in the legislative branch. Then they go on to say, perhaps by situating it in the GAO.

Now, I am not necessarily asking you whether the GAO would be willing to undertake the Ombudsman’s Office, in which case they would then directly report to Congress on these activities, but I want to ask you the broader question. Do you believe that the legislation would be improved or that, in an effort to obtain independence for the Ombudsman’s Office, do you believe that it would be better for the Ombudsman in this situation to report directly to Congress rather than to the Administrator, as the legislation sets it up now?

Mr. WOOD. I think what is behind the comments that they made is, there is a model out there for Ombudsman that is largely derived from the State level, where there are some who report directly to legislatures.

At the Federal level, what we found from our work in the report last year was there can be effective ombudsmen in the executive branch who report to the top of their agency. So I guess at first blush, I would have to say that I do not think that it would be necessary to put it in the legislative branch because there are models at the Federal level that seem to be working.

Senator CRAPO. What would happen if the Ombudsman were to undertake a care or reach findings and so forth which were problematic for the Administrator to whom he or she reports? Wouldn’t that in a sense cast a cloud on their independence again?

Mr. WOOD. It could, although one of the things that I think your bill does not have right now that maybe it could have is specific provisions for the removal. In other words, the conditions that would have to be met before the Ombudsman could be removed. There might be legitimate reasons, but by specifying what those are, that might be one way to help promote independence.

Senator CRAPO. Thank you.

Ms. Tinsley, I know you do not necessarily support transferring the Ombudsman’s Office period to anything different than its current situation, but do you have an opinion you would like to register with regard to whether the legislation should be changed to move the Ombudsman’s Office outside of the EPA entirely?

Ms. TINSLEY. Gee, I think GAO would be a great place for the Ombudsman.

[Laughter.]

Ms. TINSLEY. My only concern is on the investigatory role which I think duplicates what IG’s were created to do. GAO also has the authority to do the kinds of investigations, which are really review of agency programs similar to program evaluations. GAO has that

authority now. So I think that right now there are two responsibilities for that. There is the IG who can do that work, and there is GAO, who reports directly to the Congress. The IGs report to both the Congress and the Agency head. So I could see that investigatory function sitting either place, and I think already both of us have that authority. So I do not know if you need to establish the authority a third time.

Senator CRAPO. All right, thank you.

Mr. Martin, any thoughts on the issue?

Mr. MARTIN. Congress.

[Laughter.]

Senator CRAPO. We are running a little bit late. I have a lot of other questions, but I think at this point I am going to excuse this panel, and again I would like to thank you, Mr. Martin, for coming up out of order, but we appreciate all of you. This panel is excused. Thank you very much.

We would like to call up panel No. 3 now—Ms. Danielle Brian, the executive director of the Project on Government Oversight; Ms. Katherine Zanetti, the facilitator for the Shoshone Natural Resources Coalition; Ms. Susan Shortz, the president of Halt Environmental Lead Pollution, or HELP.

While the panel is coming up, let me personally welcome Ms. Zanetti who is from Idaho. We appreciate your coming here, and again I apologize for my being late and not being able to be here for the first part of the hearing. Kathy is very, very involved in the issues in Idaho, and we appreciate not only the attention over the years that you have given to it, but your ability to make the effort to get here today, Kathy. Thank you.

I would like to ask each of you—I do not know exactly what was announced at the beginning, so I will re-give the instructions. We have these little lights here that try to help you keep your testimony to 5 minutes. We have all read or will all read your written testimony, which is submitted as a part of the record. We like to keep the verbal presentation to 5 minutes each so that we can have as much give and take on questions and answers as possible. So I would just encourage you to try to keep your eye on that light system as you proceed.

Ms. Brian.

**STATEMENT OF DANIELLE BRIAN, EXECUTIVE DIRECTOR,
PROJECT ON GOVERNMENT OVERSIGHT**

Ms. BRIAN. Thank you, Senator.

I am the executive director of the Project on Government Oversight, POGO, a politically independent, nonprofit watchdog that investigates, exposes and seeks to remedy systemic abuses of power, mismanagement and subservience by the Federal Government to powerful special interests. We strive to promote a government that is accountable to the citizenry.

Thank you for asking me to testify on this issue and the brazen attempts spanning two Administrations of EPA management to weaken and ultimately destroy the EPA Ombudsman's Office. POGO first became aware of a problem when citizens from Lake Township, Ohio brought the Industrial Excess Landfill Superfund site to our attention more than 5 years ago. Because of various con-

cerns regarding the EPA's decisions regarding their cleanup, citizens from the community attempted to gain an Ombudsman review. Their request was denied, not by the Ombudsman, but by the EPA itself. We got involved then, as their Congressman did, and it took almost an entire year to get the top EPA management to overturn their decision.

The fact that the Ombudsman was not allowed to decide for himself whether or not the case was worthy was our first taste of EPA management's efforts to silence the Ombudsman. We decided to look at other EPA regions around the country to see if the problems at IEL were unique. Unfortunately, we found they were not. We learned about the Shattuck site in Denver, CO and the Brio site in Harris County, TX, among others. I would like to point out that, and Senator Allard talked about the Shattuck site, but in that case, there was approximately 8 years of conflict prior to Ombudsman involvement, meaning the government, the community and the potentially responsible parties were at loggerheads and could make no progress.

After the Ombudsman became involved, there became a more transparent process. His recommendations were so weighty that the EPA agreed to change their remedy, recognizing that they had implemented an improper remedy. In the Brio case in Texas, there had been conflict, again, for 4 or 5 years before the Ombudsman's involvement. After his investigation and report, again the EPA totally changed their remedy, now resolving really what the community considers the best remedy, the EPA has put it in place, and very hearteningly, the community, the PRPs and the government are working closely together now.

My written testimony outlines a long history of efforts, despite this success, by EPA to squelch this Office. Despite these obstacles, the National Ombudsman Office has been remarkably effective at getting the EPA to review its decisions and correct its mistakes. Not only did the Ombudsman offer the communities successful resolutions to their particular troubles, he gave them reason to believe that sometimes the government can do the right thing. I find it remarkable that so much effort has gone into silencing the Ombudsman's Office, when this Office can only make recommendations. He never forced these changes. They were just so obviously right that the EPA acknowledged them and changed their position.

We are here today because Senate 606 has been introduced to provide the Ombudsman's Office statutory authority. This step is absolutely essential, given EPA's history. The agencies reviewed by the GAO all have Inspectors General as well as Ombudsmen, although none of their Ombudsman's programs are in any way affiliated with the respective Inspector General's offices. The legislative history of the IG Act makes this clear, stating, "Broad as it is, the IG mandate is not unlimited. Issues requiring substantive or technical expertise will often fall outside his proper sphere."

It is particularly important that the EPA have an independent Ombudsman's Office because of a regulation in the Superfund Act that prevents a remedy decision from being challenged until after the remedy has been implemented. In other words, the community has no recourse if they are concerned, other than the Ombudsman. The Ombudsman is the only recourse the communities have when

they feel that their health and environment is not being adequately protected.

Thirteen years ago, a Senate subcommittee of this full committee issued a bipartisan report which found that statistically the involvement of the PRPs led to cheaper remedies which did not necessarily protect health and safety. We are releasing today the results of our investigation into the EPA's handling of Superfund sites, and I ask that it be included into the record.

Senator CRAPO. Without objection.

Ms. BRIAN. We concluded that because the EPA has come to rely so heavily on the PRPs to help develop the cleanup plan for sites, the system is skewed to favor the cheapest, but not necessarily the best remedy. Again, I think it is worth emphasizing, the Ombudsman's Office is the only place for communities to ensure that a thorough and adequate investigation of the site has taken place, and the best interests of the community have been considered.

Senate 606 is essential for the independence of this critical function. However, we also believe that the provision to move the Ombudsman to the Administrator's Office will not work. POGO has determined that genuine independent oversight over policy cannot proceed from within the bureaucracy it evaluates. We would encourage the committee to consider placing a National Ombudsman Office in either a White House office, or as has been discussed, perhaps attached to the GAO in the legislative branch. We also believe the legislation should include whistleblower protections for those who come to the Ombudsman with information.

I think it is worth mentioning that were the Whistleblower Protection Act Amendments, Senate 995, in effect today, Robert Martin would have had legal protection from the EPA's efforts to dismantle—well, success in dismantling his office simply because he did his job. I urge all the members of this committee who have not yet to become cosponsors of that important legislation.

In the end, Bob Martin must be reinstated to finish his cases, both because his work is terribly important and because the government must not be party to such an injustice as squelching the sole voice working to get the truth out for the protection of communities in need.

Thank you.

Senator CRAPO. Thank you very much, Ms. Brian.

Ms. Zanetti.

**STATEMENT OF KATHERINE ZANETTI, FACILITATOR,
SHOSHONE NATURAL RESOURCES COALITION**

Ms. ZANETTI. Mr. Chairman, my name is Kathy Zanetti and I am a 49-year-old grandmother of four and a proud member of a fifth generation family from the historic Silver Valley of North Idaho. I would like to thank you for the opportunity to speak before this committee today on a topic that has dominated the attention of my community for over the last 2 years. I am honored to represent the citizens of the Silver Valley and to testify in support of Senate bill 606.

I am the chairman for Shoshone Natural Resources Coalition, a nonprofit group of volunteer citizens who work and live in the Coeur d'Alene basin and are concerned about human health, envi-

ronmental and economic issues. We are a grassroots organization made up of a very diverse group of individuals. SNRC represents business owners, school district officials, community leaders, local elected officials, and generations of Silver Valley families. Many of our members have been involved in EPA issues in the upper basin for 20-plus years.

We are a community filled with an intense pride for our heritage, our families and most of all, our way of life—a way of life now held precariously in peril by the decisions of various Federal agencies. Although our approach and our opinions about cleanup in the Silver Valley may be different, we are united in the common need for a truly independent Ombudsman.

The Environmental Protection Agency came to the Silver Valley in the early 1980's shortly after CERCLA or Superfund became law, to address specific cleanup at the Bunker Hill Smelter, and they have been there ever since. In almost the last 20-some years, the EPA has spent over \$400 million in the Silver Valley and has not even completed the original scope of cleanup. EPA Region 10 deceived the public by first promising that the Superfund site in Kellogg would not extend beyond its initial 21-square-mile box. Yet they have unilaterally expanded the range of remediation to 1,500 square miles, crossing State lines, adding to the cost another \$360 million, possibly as much as \$1.3 billion, and creating the Nation's largest Superfund site, with little or no regard to the citizens or communities that have been involved and must endure these ever-changing boundaries.

Although there may have been a human health risk that warranted their presence at the time in the early 1980's, there is no medical or undisputed scientific evidence that one exists today. Yet today, after all the money and the billion-dollar expansion plans, EPA's own central impound area at the Bunker Hill Superfund site remains the largest point source contributor of metal into our watershed. It is our sincere wish to take care of any necessary cleanup that remains to be done in the upper basin, to get out from under the stigma of Superfund and on to rebuilding our lives, as well as the economic stability of our community.

The Superfund actions around the Nation have taken on a life of their own, which holds communities such as mine in a never-ending state of limbo. It appears that Region 10 EPA in its dealings with the Coeur d'Alene basin of North Idaho has become a bureaucratic machine driven by personal agendas. After years of attending meetings, drafting comments and writing hundreds of letters, we realized that our voices had fallen on deaf ears. In reality, we were merely being counted as part of the Agency's number games. They hold meetings and workshops, but they did not seem to listen to the concerns of the communities involved.

We have truly had no where else to turn until the Ombudsman stepped forward. The Office of the Ombudsman has answered the call of the Silver Valley, first under the Office of Solid Waste and Resource Management, where its authority was maintained by the very entity that it was investigating. Budgets and personnel were used to control Ombudsman activities and whose mail was often intercepted by EPA congressional affairs, all of which resulted in a total lack of independence. The United States Department of Jus-

tice even attempted to kill the investigation to protect its natural resource damage lawsuit.

Second, at present under the Office of Inspector General, the Ombudsman is to assume duties other than those designated under Superfund, to take on an increased workload and basically cease to exist as an Office. It is now part of another bureaucracy within a larger bureaucracy.

While we welcome the attempt to work with the IG's Office and will welcome them with open, but cautious arms to the Silver Valley, we feel that in the long term this situation cannot work. There must be a dedicated, independent Ombudsman. He serves as the only intermediary between EPA and citizens when things have gone terribly awry. This Office is the last resort and sometimes the only resort for the common citizens and common sense. The Office of the Ombudsman above all else requires independence so that it may work effectively with both sides to find reasonable and successful solutions that are environmentally sound and meeting the needs of communities everywhere.

The Ombudsman's position is the people's court of last resort. Communities like the Silver Valley need an Ombudsman who not only can, but who must intervene on environmental health and safety issues on our behalf without having their hands tied, their actions influenced or censored by the controls of other agencies. Only the Ombudsman can answer our call to do the right thing. To be effective and of true service to the public, an ombudsman must be independent, accountable and unbiased. I believe Senate bill 606 achieves these objectives. Without S. 606, communities like mine have nowhere to turn when they have exhausted all hope of working constructively with the EPA. I, for one, refuse to continue to allow the Environmental Protection Agency to use my own tax dollars unchecked against either me or my family.

Finally, in this great Nation our structure of government is set up with many forms of checks and balances, as we have heard today, so that citizens have a channel to express their concerns against abuse or capricious acts of public officials. The National Ombudsman Office is that channel and therefore should be able to work unimpeded to help achieve fair and reasonable checks and balances of the EPA.

Thank you for the opportunity to testify this morning in front of this committee, and I urge you to please support Senate bill 606. I would ask that in conclusion, I could submit an additional written testimony from another group within our basin.

Senator CRAPO. Without objection, so ordered.

Senator CRAPO. Thank you, Ms. Zanetti.

Ms. Shortz.

STATEMENT OF SUSAN SHORTZ, PRESIDENT, HALT ENVIRONMENTAL LEAD POLLUTION (HELP)

Ms. SHORTZ. Thank you, Mr. Chairman, and members of the committee for this opportunity to be able to speak to you today.

I am from the small Borough of Throop. It is a small residential community with a population of slightly over 4,000. Our Marjol site which Senator Specter spoke about earlier is a former lead acid battery recycling facility located in this Borough. The 43.9-acre site

is owned by Gould Electronics. There are approximately 65 residential homes within 500 feet and 25 of those homes are actually within 50 feet of the site. The Lackawanna River borders on the west.

There are over 500,000 cubic yards of battery casings, along with other carcinogens, on this site. It would be enough, if was dug up, to fill 12 football fields 50 feet deep, to just give you an idea. There are also PCBs, PAHs, antimony and arsenic. There is also soil contamination that has taken place outside that site. In reality, this is an illegal, toxic, hazardous waste dump in the middle of a small town, without any permits, without any regulatory controls.

Since 1987, there have been ongoing negotiations between EPA, Gould and our own Pennsylvania Department of Environmental Protection. Assistance teams came in from the EPA back in 1987 and did testing on our properties. At that time, they told us that we would be made aware. It was not until 1988 and after we had made written request of the EPA to get the results of our own personal private properties that we were finally given that information and found out that we were the potential for a Superfund site.

In April 1988, a CERCLA order was signed between EPA, DEP and Gould and the site remediation began. At that time, under the CERCLA, the emphasis was made on the residential properties because we were living in immediate harm. Our cleanup level is 500 parts per million for lead, and yet a lot of States actually are now down to 200. We had in our homes levels in the thousands, and in our backyards in areas where our children played, levels well over 15,000.

Through the Ombudsman's investigation, we found out that EPA and DEP were aware of this well into the early 1980's, and were negotiating back and forth with EPA all this time without making any of us aware of the conditions in which we were living.

The citizens of our community have been fighting since that time to get our properties fully cleaned up in a manner that we feel is safe to protect our health and welfare. Gould, the owner of this site, has repeatedly said from the very beginning that they will only cap the site, and their only concern is the cost-effective clean-up. Although the Borough of Throop has actually spent over \$1.5 million in order to prove that this EPA cap is not appropriate, no one has been willing to listen to us, not EPA or Gould, until now the Ombudsman and Chief Investigator Kaufman and the geologist Doug Bell came into our area.

The first Ombudsman hearing took place in August of 2000 and the results were amazing. We found out that there are over 240 potentially responsible parties in this site, including the Federal Government, not just Gould. We also found out that Gould received millions of dollars, not only from lawsuits against these potentially responsible parties, but also in liability claims against insurance that they had and other sources. We further learned that specifics of a secret amendment to the consent order which changed the requirement from a temporary storage of soil on the property that had been removed from our residential properties and stored on-site, to permanent entombment.

The geologist, Doug Bell, his discussions with our engineering consultants finally put some credence to the concerns we had that this site is in fact undermined from deep anthracite mining, has

the potential for mine fires, and it also has ongoing subsidence occurring there.

When the Ombudsman came in, our decision was placed on hold. After that hearing, a couple months later we were called to Philadelphia to speak with the EPA Region 3 Administrator, who at that time was Bradley Campbell. He listened to our concerns and he assured us that he would wait for the recommendations of the Ombudsman before they came up with their final decision. However, within a very short couple of months, suddenly the final decision came out. Not only were we dissatisfied with the final decision, but it was greatly different from the initial proposal. In the initial proposal, they were at least going to remove approximately one-third of the contaminants, and they were going to some site stabilization, and then a cap. Under the final decision that came out, there was no guarantee of any removal, only what as they put it would not fit under the cap. They would no longer solidify anything on the site. They would simply put a cap on top, and that was the end.

The Ombudsman through his investigations has continued to find problems with that decision, and has repeatedly brought to our attention the fact that we could still even be on an NPL listing, which EPA over the years has denied us that ability to do. They have constantly told us that we cannot fit there. They are hiding always behind sound science. Several years ago as we started this process, the term used to be the state-of-the-art cleanups and state-of-the-art landfills et cetera. Now we are "sound science." Yet, sound science allows 250,000 parts per million of lead, PCBs, PAHs to be abandoned in the middle of a residential community adjacent to a river, on top of mine subsidence, on top of a potential mine fire, with nothing more than a cap. They have told us that operation and maintenance will maintain the safety of our community.

Senator Clinton is right when she said about the complexities of being involved in a site such as ours, after almost 20 years of involvement, if you are concerned, you learn an awful lot about these types of issues. This expertise has come from listening, from reviewing et cetera. Even then, they would not listen to our concerns. We came back with our own people that gave us expert advice on this. Then we had the Ombudsman come in and again the doors have been closed.

Since this investigation began, the Ombudsman's Office has now been effectively eliminated, as far as we are concerned. We have heard nothing more on our sites. Tinsley earlier today in the testimony said that they are willing to work and sit down and go over this information and start again from scratch. We have been through several Administration changes. We have been through five project managers alone on our site. We have been through numerous congressional changes. We have started from scratch over and over and over again, and hit a wall every single time that we have come along.

I ask that the Senate bill 606 be strongly considered. I ask that the discussions earlier about bringing Mr. Martin back on the job, so that he could at least continue with these that are in progress, so that we could finally get closure. Unfortunately, a lot of the people that have been involved in 1987 are no longer with our site. They have all been deceased. There are very few of us that are still

here that are fighting, but those of us that are and the town that I live in want closure, and we want closure that our families and our future generations can live with.

I thank you for this opportunity.

Senator CRAPO. Thank you very much, Ms. Shortz.

I would like to thank each member of the panel for your preparation and for the effort that you went through to be here. I know that it is not an easy thing to prepare for, and then make the personal and financial commitments to get to a congressional hearing and to share the information that you share. So I do want to thank you all for that.

I do have a number of questions for you, and I would like to go through these questions with each of you in the sense that I will ask the question and then each of you can take an opportunity to respond if you would like to.

I assume from the nature of your testimony the answers to some of these questions, but I want to be very explicit about it. One of the issues, in fact one of the central issues around Senate bill 606 is whether the Ombudsman's Office should be reauthorized and we should move forward with it. I assume that each of you would support the reauthorization of the Ombudsman's Office. Am I correct?

Ms. BRIAN. Absolutely.

Ms. ZANETTI. Absolutely.

Senator CRAPO. Some of you, or one or more of you have answered this question already, but I would like you each to elaborate on it a little bit. As you know from the previous questions we have had, one of the issues relating to the bill that has been raised is whether the Ombudsman's office, when we reauthorize it, should be located within the EPA itself, which would then, as the bill has it, have the Ombudsman reporting to the Administrator of the EPA, or whether the Ombudsman's Office should be located in some other place, like the legislative branch of Government under the GAO or somewhere like that, or reporting directly to the President in the executive branch, or something like that.

I would just like to hear what each of you think about that in a little more detail, both in terms of whether it is adequate for the Ombudsman to be reporting directly to the Administrator, and if not, whether it should be somewhere else, and then if you do have an opinion on where that somewhere else should be.

Ms. Brian?

Ms. BRIAN. Yes, Senator, I do strongly believe that this Office needs to move outside the Agency. That comes in part because of being students of Federal agencies generally—we are finding that genuine oversight on policy matters, rather than the kinds of work that Inspectors General are intended to do, is very difficult to do from within an agency. Specifically with regard to the EPA Ombudsman's Office, as I mentioned, we have been battling efforts since the late, well for 6 or 7 years over two Administrations of EPA Administrators, trying to whittle away the efforts of this Office to maintain its independence.

So I am absolutely certain that it would be a mistake for us to have that Office report to the Administrator because by the nature of the kind of work he does, it is raising questions about the wis-

dom of the decisions that have been made in the name of the Administrator.

Senator CRAPO. Thank you.

Ms. Zanetti?

Ms. ZANETTI. In our area, Senator, we were unaware that there were even any regional ombudsmen. In the years that SNRC has been involved in the activities up there, we have never yet seen a Regional Ombudsman. So I believe that the bill should in fact, if anything, remove him from underneath any Administration office and become a stand-alone office on his own. Therefore, he could direct his own Regional Ombudsman without them being under any undue influence from the respective Region Administration.

I believe that to gain true independence for his office, he would need to answer directly to Congress.

Thank you.

Senator CRAPO. Thank you.

Ms. Shortz?

Ms. SHORTZ. I also agree that it needs to be removed from the EPA agency. Just to cite two examples that occurred recently in our process, last year through Senator Specter, Senator Santorum and Congressman Sherwood, we had arranged a meeting for some of our citizens to come down and speak with them about our concerns on this ongoing investigation. Administrator Whitman was supposed to be present at that particular meeting. In the process of setting up the meeting, we had specified that we would like Mr. Martin and Mr. Kaufman present at the meeting so that we could discuss specifically our investigation. As late as the afternoon before our trip down with all of our plans made and with all of our information gathered and together, the meeting was canceled. I feel strongly the meeting was canceled because of our insistence of wanting the Ombudsman there. That was not her plan for that meeting.

Then later on through a lot of letters from the Congressman and the Senators on the ongoing investigation and what we felt was hindrance and interference, we were given assurances by EPA that they were going to be fully supportive, and were going to give him an office there, and then they brought that to Mr. Martin's attention. They kind of kept pushing that issue, and then ultimately they pulled back and said that, well, they were offering help to Mr. Martin and he was refusing the help. They did not acknowledge the reason for that refusal.

So I feel as long as the Ombudsman is under the EPA, it is going to be difficult because you are in fact investigating the very people that write your approvals and give you your money and do your performance appraisals et cetera. I think it is an absolute conflict of interest. So I would like to see it outside.

Senator CRAPO. Thank you. You have raised an issue, Ms. Shortz, that each of the others have also testified to to some extent, but I want to go back through it briefly. That is, if I can re-state what I understood you to be saying, and ask that you concur with it. In your opinion, as you have observed the operations of the EPA and the operations of the Ombudsman in your particular case in Pennsylvania, am I correct in assuming that it is your opinion that

there have been efforts by the EPA to interfere with the Ombudsman's operations.

Ms. SHORTZ. I feel absolutely in our case there has been, and from what I have read and communicated with other sites, I have no doubt that that is occurring. I find on our site, EPA has definitely been more pro the polluter than it has been the citizens and the environment that they are actually supposed to be protecting. We find it very disappointing, right from hiding information from you, making it difficult to retrieve information. They consistently, well even as late as now in April, we had a second Ombudsman hearing. EPA did not even attend the hearing. They refused to come because their mind was made up.

When our decision was put on hold after the Ombudsman got involved, they continued to try and set up meetings with the polluter to continue working on the work plan for the cleanup. So this interference goes on and on and on. As I said, even the Inspector General's Office in our particular site was involved, which is where he now is supposed to be housed. They also were interfering. They were also working against us in getting a complete investigation, and to get information out that we are entitled to. We are the ones that are living there, not the people in the EPA.

Senator CRAPO. Thank you.

Ms. Zanetti, do you have a similar observation or any observation on the issue of from what you have seen in Idaho with regard to whether you perceive that there is a conflict or an effort by the EPA to interfere with the Ombudsman's operations?

Ms. ZANETTI. Yes, Mr. Chairman, I believe there has definitely been a conflict of interest with the EPA trying to interfere with the Ombudsman investigation. We have tried many times over in Region 10 to work with the EPA. Time and time again, they have just simply not listened to us. It was not until the Ombudsman came to our community that he saw through the pages of documentation that I believe I am on the opposite end of the spectrum here. These people are crying for EPA intervention, and we are crying for them to wrap up the 21-square-mile box and remove themselves from our area. That is something that the Ombudsman actually saw through. He looked through the reams and reams and rooms full of documentation to the people in the community. He got to know us, our concerns and our overall genuine good health, of not only generations past, but the generations that were coming up. He saw through that. He saw to us, and he in fact was beginning those reports to EPA and he has been fraught with nothing but backlashes ever since.

Senator CRAPO. Thank you.

I think that is an indication of a good Ombudsman, namely one who you cannot predict whether they are going to come down on this philosophical point of view or that philosophical point of view, but instead someone who is going to look at the facts and find out whether there is a basis there.

Ms. BRIAN?

Ms. BRIAN. Yes, Senator, and I wanted to agree with what Ms. Zanetti was saying. I think one of the centrally important parts of the credibility of his Office has been that the Office is not an environmental office. Their goal is not to be an environmentalist, to

have a particular agenda. They come, they get all the facts out in the public and they come to the appropriate resolution. That is how, I think, you end up having communities and PRPs and the government all sort of coming together for the first time.

A specific example, as you are asking after our initial involvement, which I thought was fairly direct intervention where the EPA just said no, he cannot take the case—

Senator CRAPO. That would be intervention, I would say.

Ms. BRIAN [continuing]. Was later in November 1998. I wrote to the EPA Administrator at the time asking for a public process and working group to be initiated to develop recommendations for improving the independence of the Office. My suggestion was that that effort include representatives of the U.S. Ombudsman Association, the environmental community, labor, industry, good government, public interest groups, the EPA, the Ombudsman's Office, members of affected communities—anyone who was a stakeholder in the issue. The response from the Administrator's Office was they believed, well, she said, "I do not find that such a review as depicted in your letter is necessary."

Shortly after that, however, while they believed that a public review was not necessary, they created a covert review internal to the EPA which was promptly convened. They actually said that the purpose was to review the Ombudsman problem. Who was it a problem for, other than EPA management?

Senator CRAPO. Good point.

I think we have covered the question of whether the members of the panel agree that we should have independence and what your opinions are with regard to moving the Office of the Ombudsman outside the EPA entirely. Ms. Zanetti in one of her answers raised the question of Regional Ombudsmen, and I believe what she indicated was they had not heard from the Regional Ombudsman until the National Ombudsman got involved. I would like to know from Ms. Brian and Ms. Shortz what your experience with Regional Ombudsmen has been, and if you want to toss in anything else, Ms. Zanetti, you are welcome.

Ms. Brian?

Ms. BRIAN. I think that is a tremendous misnomer because the Regional Ombudsman, although because of certain circumstances I understand they are trying to change that, for the most part they have been part-time ombudsmen. So part of the time they are supposed to be independent and reviewing all the evidence and coming to independent conclusions. The rest of the time, they go back to their jobs working for the people whose decisions they are evaluating. That is so clearly not in keeping with what an ombudsman can be. Why would a community in any way, or a PRP for that matter, trust this person's being independent?

Senator CRAPO. Good point. Did you have any involvement of the Regional Ombudsman in your region?

Ms. BRIAN. In the Region, no. I am actually not from a community. We are from a public interest group in Washington.

Senator CRAPO. That is true.

Ms. BRIAN. In the communities that we have reviewed, the Regional Ombudsmen have never had any significant involvement at all.

Senator CRAPO. Ms. Shortz?

Ms. SHORTZ. That is a similar experience to ours. Actually, how we found out about the National Ombudsman was a former councilmember of my community had retired in Florida, and he still gets the local papers and follows what our process has been all these years. He had sent me a newspaper article about Mr. Martin's involvement in the Tarpon Springs site in Florida. He said, "Gee, this guy looks like maybe he can help you."

So through our Senators and our Congressmen, we found out how to contact him. Senator Specter sent a letter requesting him to review our case, and he came on board. Up until that time, I did not even know there was this function. When Mr. Martin came into our community for the first hearing, EPA brought with them our Regional Ombudsman, and that was the first time I ever knew he existed or met him. He simply sat at the table between the EPA officials, never opened his mouth, never said a word, and I have never seen or heard from him since.

So I really do not even know what his function is in our Region. He has not given any input for or against. He has not communicated with us at all. It is only Mr. Martin that has tirelessly continued to try and help us through this.

Senator CRAPO. Thank you.

Any more that you want to say on that, Ms. Zanetti?

Ms. ZANETTI. I think it is obvious, Senator, that because they sit within the Regional Office, there are undue influences put on their position and their abilities, and how can they be of help to communities, again, if they do not get involved, as we all agree?

In truth, I was unaware that there was a Regional Ombudsman. In all the times that we have had the interactions with the Agency, most of them controversial to say the least, their own public survey will let you know that in our area they are not very well approved, let's say. Until the National Ombudsman came, we had no recourse. There was no one that truly listened to our side of the story, so to speak.

Senator CRAPO. Thank you.

One proposal that has been made, and in fact our legislation does make a stab at this by trying to bring the Regional Ombudsman under the National Ombudsman, and we did that in the context of it all being still within the Agency, although we are now evaluating this question of whether the Ombudsman should be moved entirely outside the Agency. I am interested if any of you have any opinion as to whether we should have a National Ombudsman system, rather than just one Ombudsman, but one under which we have the 10 Regional Ombudsmen functioning and responsible solely to the National Ombudsman.

Ms. BRIAN. That would be a dramatic change in the current system, and I think that would be a very wise one. As we know, there are too many issues for the tiny Ombudsman Office to handle by itself. I think if they had people in the region who were reporting to them and assisting them, that would be a great improvement.

Senator CRAPO. Ms. Zanetti?

Ms. ZANETTI. I agree that if the Regional Ombudsman were under the authority of the National Ombudsman and only his au-

thority and would have no prejudice from any other agencies, that they could probably be of great assistance to him as well.

Senator CRAPO. Ms. Shortz?

Ms. SHORTZ. I agree with Ms. Zanetti and Ms. Brian. In our current site, the people that we are primarily involved with are Mr. Martin, Mr. Kaufman and Mr. Bell. We were only one of numerous sites all over the United States that they are involved in. It certainly is a mind-boggling task to try and bring in this information, filter through it, and act on it, and have hearings et cetera. So I definitely think they need more help, and the Regional Ombudsman is I think a good method in which to do that. Again, they need to be totally answerable to the Ombudsman. I would think the current system of being part-time EPA workers and part-time Ombudsmen would have to be negated.

Senator CRAPO. I definitely agree.

All right. I was just checking to be sure there were not any more issues that we wanted to cover thoroughly at this time. Again, I apologize to everybody for the lateness of the hearing. We have had a lot of interruptions today. It has been a long hearing, but it has been also a very interesting and I think productive hearing.

I want to again thank this panel, as well as the other panelists for the time and effort that they have put into making themselves available to us. We are going to leave the record open for additional testimony and followup questions until July 15. Not only may panelists, but others who would like to submit information for the record are welcome to do so. We appreciate your prompt response.

If the members of the committee have any additional questions, we are going to send them to you as well, so you are not totally off the hook until July 15. If you do receive additional questions from us, we would appreciate your prompt attention to and response to those questions.

Again, this is a very critical issue and I think the testimony today has shown that it is not necessarily a philosophical issue. You see Senators here from all sides of the political aisle, the political spectrum. You see witnesses here from all sides of the issue spectrum. The issue here as I see it is truly one that is not partisan and not issue-oriented in terms of environmental policy one way or the other. It is a question of how we should manage our Ombudsman's functions in this Nation.

We appreciate the strong interest that has been shown in this, and I am very hopeful that this strong interest and the testimony that has been provided today is going to give us the momentum to move forward to a markup. I think we have some good ideas to improve the legislation, and hopefully we will be able to see some prompt action here in Congress.

I also hope that we are going to see some prompt action between the parties at the EPA and with Mr. Martin and the Ombudsman's Office so that we can hopefully resolve some of the other issues beyond just the global policy of how we should structure the Ombudsman's Office, but deal with the question of how we are going to resolve investigations that were already underway when this took place.

So again with that, let me thank everybody for your attendance, and this committee is adjourned.

[Whereupon at 12:08 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM THE STATE OF COLORADO

Mr. Chairman, thank you for holding this hearing and for offering me the opportunity to testify on behalf of S. 606. As you know, this legislation would reauthorize the Office of the Ombudsman of the Environmental Protection Agency.

I'd like to keep my remarks brief, but I want to share with the Committee my reasoning on, and interest in, this issue. I introduced this legislation in the 105th Congress because of an ongoing battle between the citizens of a Denver neighborhood and the EPA concerning the Shattuck Superfund site. The Ombudsman's office was instrumental in bringing the truth of what was happening in this case to light. The legislation was reintroduced, by Senator Crapo, at the beginning of the current Congress because the issue of the Office of the EPA Ombudsman is still an important one.

I would like to share with you, quickly, the story surrounding the Shattuck site in the Overland Park neighborhood in southwest Denver and what the EPA did there. These events have had a lasting impact, not only on the residents of the Overland Park neighborhood, but on each of us who looks to the EPA to be the guardian of our nation's environmental health and safety. In 1997, after several years of EPA stonewalling, the residents of Overland Park in Denver brought their concerns about a Superfund site in their neighborhood and their frustrations with the EPA to my attention. I learned that the neighborhood had run into a wall of bureaucracy that was unresponsive to the very public it is charged with protecting and I requested the Ombudsman's intervention. In early 1999, the Ombudsman's office began an investigation and quickly determined that the claims made by residents were not only meritorious, but that EPA officials had engaged in an effort to keep documents hidden from the public, thereby placing their health in danger.

Without the Ombudsman's investigation on Shattuck, the residents of Overland Park would have never learned the truth. The Ombudsman's investigation brought integrity back into the process. Without the Ombudsman's work, a trusted Federal agency would have been able to successfully hide the truth from the very people it is charged to protect. The Shattuck issue is a decade long example of why citizens' trust in their government has waned. This bill will preserve an important mechanism within the EPA that the public can trust to protect their health and safety.

The Shattuck story was a frustrating and often disheartening experience for all involved. It is an example of what can happen when a government entity goes unchecked. For the residents of Denver, the Office of Ombudsman offered the opportunity to get to the truth and made the health and safety of the public top priority.

Let me make it clear that the main priority in my continued support of this bill, is to keep the Office of the EPA Ombudsman open for business and capable of conducting it. In the future, they may find themselves in a situation similar to the one that residents of Denver experienced. I want to know that they will have every assurance that the public's safety will be protected, that its voice will be heard, that its questions will be answered and that its concerns addressed.

This office should not have its investigative ability restricted, and its independence should not be compromised. The EPA's actions and decisions in future cases like Shattuck, should not go unchecked and citizens in other States should have a public avenue to address concerns and get answers from the EPA. I know that I am not alone in my concerns and, unfortunately, that the Shattuck case is not unique. Many of my fellow Senators and Representatives have experienced similar concerns over sites in their States. That is why this legislation remains so important.

I appreciate the efforts that have been made by the current administration in an attempt to solve some of the problems that the Office of the Ombudsman has experienced. I know that Administrator Whitman shares my desire to see this issue to a conclusion that will be beneficial to all and I appreciate her willingness to work with my office. Again, Mr. Chairman, thank you for holding this hearing and your willingness to look further into this matter.

Thank you, Mr. Chairman.

STATEMENT OF HON. JERROLD NADLER, U.S. REPRESENTATIVE FROM THE
STATE OF NEW YORK

Thank you, Chairman Jeffords. I would like to thank you and the rest of the committee for holding this hearing today, and for inviting me to testify, regarding the EPA Hazardous Waste Ombudsman, and in particular, the role of the Ombudsman in investigating the response of the EPA to the September 11th terrorist attack in New York. My colleague, Senator Clinton, has been an outspoken advocate and knows all too well the problems citizens in New York have been encountering over the past 9 months. Thank you, Senator Clinton for arranging for the Field Hearing in New York back in February, and thank you Chairman Jeffords, for the committee's continued oversight of EPA by examining this issue today.

As the Congressman representing Ground Zero, I thank you for the opportunity to share the very positive experience of my constituents with the EPA Hazardous Waste Ombudsman during the cleanup of the World Trade Center. Fortunately, for the majority of us in Congress, we have not needed to know about the EPA Ombudsman. Those of us who have had the need have similar stories to share; on the one hand, an agency that seems to ignore the community's concerns and on the other an Ombudsman willing to listen and investigate complaints about agency neglect. Ultimately, in a vast majority of the EPA Ombudsman cases, the transparent Ombudsman process has helped the Administrator, or regional officials, take proper action to resolve the disputes, resulting in greater protection from radioactive and other hazardous waste threats. Both Democrats and Republicans alike have utilized the EPA Ombudsman to help restore trust in government where it had previously been shaken.

In 1972, Justice Douglas identified the problem that so often plagues much of the Federal Government:

"The Federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated."

(*Sierra Club v. Morton*, 92 U.S. 1361, 1371 (1972)).

This quote by Justice Douglas is as relevant today as it was thirty years ago. Indeed, this is why the EPA Ombudsman was created by Congress in 1984 when then-Congresswoman Barbara Mikulski faced an unresponsive Environmental Protection Agency. As the numerous cases that were in progress by Ombudsman Martin indicate, the need for an independent EPA Ombudsman is just as critical today as when the office was first created.

Today, I am here to share first-hand knowledge of events that transpired in New York following September 11th. The World Trade Center case highlights how imperative it is that there be an independent and effective Ombudsman at EPA.

Immediately following September 11th, I formed the Ground Zero Elected Officials Task Force, of which Senator Clinton is a member, to coordinate the efforts of all the government representatives from the area. The main goal of the Task Force is to assess the needs of the community in Lower Manhattan, and to ensure that those needs are addressed by the appropriate government agencies. One area that clearly was not addressed was the presence of hazardous waste in people's homes, schools and businesses. In the days following the attack, the Task Force heard countless complaints from citizens who suffered from adverse health effects, and/or lacked the resources necessary to test and clean their apartments and buildings properly. When EPA was presented with such information, the agency either maintained that everything was safe, or claimed that the city of New York was in charge of indoor environments and that EPA had no authority for indoor environments. The agency maintained this position even after being presented with independent test results, conducted by long-time EPA contractors, which showed elevated levels of hazardous materials inside downtown apartments.

This situation made it very difficult to quickly and effectively address the mounting casework from constituents who literally had nowhere to go to get hazardous waste out of their homes. Citizens were left to fend for themselves, often ended up in court proceedings against their landlords and building owners, and expended vast resources on a cleanup downtown that was not conducted adequately or systematically, but rather on an ad-hoc basis.

After 4 months of this untenable situation, I asked the EPA National Hazardous Waste Ombudsman, Robert Martin, and his Chief Investigator, Hugh Kaufman, to investigate. Their involvement produced a sea change in the relationship of my office, as well as of local residents, with EPA. My position has always been that EPA

should use its existing authority to take any and all actions necessary to find out where hazardous materials went following the collapse of the World Trade Center, and to remediate contaminated spaces, and that New York should not be treated differently than other parts of the country where the EPA has engaged in response activities. Ombudsman Martin and Mr. Kaufman were able to tell us what the EPA should have done, could have done, and has done at other hazardous waste sites around the country. But most importantly, the Ombudsman process provided a forum to communicate with my constituents, listen to their complaints and concerns, issue requests for the production of documents and interrogatories, hold public hearings, bring in experts from around the country to help the citizens understand the full magnitude of the issues, make recommendations for corrective action, and truly get to the bottom of what EPA did and did not do.

The key to all of this is that it was a public and transparent process. We held two eleven-hour hearings that were open to the public, documented with a court reporter, the transcripts of which are available to anyone. We heard from residents, workers, business owners, city and State elected officials, firefighters, police officers, parents, and the NYC Board of Education. We would have liked to hear from the government agencies, in particular EPA, but they declined our invitation to participate.

Except for the Ombudsman, the EPA has yet to engage in a public and transparent process regarding the cleanup of the World Trade Center. If anything, it has done just the opposite. Questions have gone unanswered, information was obtained only through FOIA, if at all, and trying to get the agency to act has been a lengthy, arduous, and often unsuccessful process. The Ombudsman process was essential to address citizen complaints, and focus public pressure on the agency to resolve those complaints.

In the 4 months from September 11th to January, the EPA maintained that everything was safe, directed people to the city government for relief (a government which offered no relief to people other than to tell them to clean up asbestos-laden dust with a wet mop and wet rag), and ultimately remained unresponsive to citizens. In the 4-months from January to May, the time of the Ombudsman process, EPA reversed its policy and agreed to initiate remediation inside people's homes. Of course, there were many factors that contributed to this policy shift, but I do not believe it would have happened, or happened so quickly, without the Ombudsman process, and the expertise and hard work of Mr. Martin, his Chief Investigator Hugh Kaufman, and the people who worked with them to use the Ombudsman process so effectively.

The EPA is finally beginning a cleanup plan, largely because of pressure generated by the Ombudsman. Unfortunately, there is now no real Ombudsman to keep a watchful eye on the agency. This is disconcerting because the EPA cleanup plan is woefully inadequate. For example, the EPA plans to clean apartments only on request. This ignores the threat of cross-and recontamination from uncleaned apartments and from building HVAC systems. The EPA plan provides for testing only for asbestos in the air and does not plan to assess dust or hard surfaces that are also pathways of exposure. Nor will the agency test for any of the other contaminants that were present in World Trade Center debris such as lead, mercury, dioxin and fine particulate matter. The cleanup plan is available only south of an arbitrary boundary at Canal Street, cutting off other areas covered by the debris cloud, including parts of Brooklyn, Chinatown and the Lower East Side. Besides not dealing with many potentially contaminated areas, this presents an environmental justice problem. The workers will not be wearing protective gear, which would seem to be a clear violation of OSHA regulations. The EPA has developed this plan without public comment, and has not established a Citizens Advisory Group or held public meetings. It has not even established an Administrative Record accessible to the public.

Quite frankly, the EPA has provided no evidence that the cleanup plan for World Trade Center debris complies with applicable laws and regulations, such as the National Contingency Plan and OSHA regulations, and there is no guarantee that EPA will act in accordance with existing laws, policies and procedures. The agency must be forced into a public and transparent process. The people of New York deserve and need an experienced, strong and independent Hazardous Waste Ombudsman at EPA now more than ever.

Unfortunately, what has happened to the Ombudsman is just the opposite. By placing the Ombudsman in the Office of Inspector General, the position has been stripped of its independence, transparency and effectiveness. In July 2001, the House Commerce Committee requested that the GAO investigate EPA management's efforts to interfere with the EPA Ombudsman's ability to perform his job. Two critical recommendations were made by the GAO. First, the GAO recommended

that EPA should provide the Ombudsman with a separate budget and, subject to applicable Civil Service Requirements, the authority to hire, fire and supervise his own staff. Second, the GAO recommended that the EPA Ombudsman be given more structural independence. By moving the Ombudsman to the Office of Inspector General, and stripping away his position description, the EPA has done exactly the opposite. The necessary procedures that legally must be followed in operating an Inspector General's office are inconsistent with the procedures necessary for an independent, transparent Ombudsman function. For example, employee protection provisions and openness of operation must be very different in an Inspector General's office because it is part of a law enforcement function, whereas an Ombudsman must be more open to the public and, at times, must be a public advocate.

The EPA Ombudsman is crippled as long as it remains under the control of the Inspector General. Without independence to control his casework or his resources, an Ombudsman is one in name only. The situation became so untenable for Robert Martin that he resigned in protest when the Agency opted to house the Ombudsman under the Inspector General's office, change the locks on his doors and remove all his files without his approval while he was away on EPA-related travel.

Recent events require that we institute an independent, fully funded EPA Ombudsman Office to receive, investigate and resolve complaints. Perhaps the best way is to make the Ombudsman an arm of Congress, but wherever an Ombudsman is placed, the office must have control of its resources, staff and cases. The Ombudsman must be able to communicate with the public and must be able to act free from interference by outside parties or from within the agency itself. Wherever an Ombudsman is ultimately placed, it is clear that the Office of Inspector General is not appropriate.

I sit here next to my Republican colleague from Colorado, having experienced many of the same problems with the EPA: unresponsiveness, neglect and lack of substantive public involvement. The WTC is a unique case in the order of its magnitude and precedent, but not with respect to the growing need for a mechanism to hold agencies accountable and ultimately resolve citizens' complaints. And dare I say, the World Trade Center may not be the only case of its kind should future terrorist attacks occur.

An independent EPA Ombudsman with the necessary resources and staff can provide an antidote to the malaise that we all know sometimes befalls Administrative Agencies. This is nothing new to the United States or to democracies in general. In fact, establishing independent ombudsmen is good government. The Federal Government has decades of experience in establishing strong and independent Ombudsmen. The IRS and HHS have Ombudsmen to address citizen complaints regarding taxes and long-term care respectively. Victims of a terrorist attack, and those living with the threat of hazardous waste, deserve at least the same protection.

STATEMENT OF NIKKI L. TINSLEY, INSPECTOR GENERAL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Good Morning Chairman Jeffords and Members of the Committee. My name is Nikki Tinsley and I am the Inspector General of the Environmental Protection Agency (EPA). I am pleased to speak to the Committee today about the Office of the Inspector General's implementation and operation of the Ombudsman function.

I'd like to begin my remarks with a brief history of the EPA Ombudsman. The Ombudsman function was established by Congress in the Resource Conservation and Recovery Act amendments of 1984. Although the statutory authority for the office expired in 1989, and Congress has not reauthorized it, EPA has continuously maintained the Ombudsman function in some form for more than 16 years. As originally authorized, the Ombudsman's mission was to provide information, and investigate complaints and grievances from the public related to EPA's administration of certain hazardous and solid waste programs.

In July 2001, the General Accounting Office (GAO) issued a report, *EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence*, GAO-01-813. This report identified areas of weakness in the operation of the Ombudsman function regarding its independence from the program office that is subject to review, its impartiality and freedom from conflict of interest, and its accountability and reporting. Given that the Ombudsman's role of reviewing Agency actions is similar to the work we were created to perform, and because we report to both Congress and the Agency, I believe our office was well suited to assume the investigatory functions of the Ombudsman's office. In April of this year, the Ombudsman's Office was transferred to the OIG.

Congress established the Inspectors General through the Inspector General Act of 1978 (Act), to serve as an independent, impartial and accountable source for audits, evaluations and, investigations of the activities of Federal Departments and Agencies in an effort to prevent and detect fraud, waste, and abuse, and enhance the economy, efficiency, and effectiveness of government programs and operations. We are sometimes known as “watchdogs” for our role in alerting the public and Congress to areas of concern within the Executive branch. Under the Act, Inspectors General have the authority to demand access to any Agency record; request information or assistance from Federal, State or local government agencies; and issue subpoenas. The IG Act also granted certain authorities unique to OIG’s in order to insure our independence. We select, prioritize and carry out all of our work assignments independent of EPA oversight. We have separate budget authority, separate hiring and contracting authority, and independent reporting responsibilities to Congress. These are some of the key characteristics that enable us to effectively review Agency programs and ensures our structural independence.

We perform our work in accordance with established standards and procedures, including Generally Accepted Government Accounting Standards, otherwise known as the GAO “Yellow Book,” and report our findings independently and separately to the EPA Administrator and Congress. The IG Act also provides the OIG broad authorities to receive complaints and conduct investigations. Whatever capacity our staff may be serving in, the basic operating principles of the EPA OIG, and all Federal OIG’s for that matter, are to act with independence, impartiality and accountability. Congress and the public can be assured that all work done by the OIG, including that of the Ombudsman, will continue to meet those standards. For the record, I am submitting a copy of a brief prepared by the U.S. Department of Justice which outlines the legal authority for the OIG to perform the Ombudsman function.

Since the early 1980’s, we have operated a Hotline to receive complaints and allegations from the public regarding EPA’s programs, operations, employees and contractors. We receive Hotline complaints through our toll-free number, correspondence and, beginning recently, the Internet. We have the sole discretion either to accept a request for assistance, or decline to act. Such decisions are made based on the information received, supporting evidence, and an internal evaluation process. This function is very similar to the function of an Ombudsman, and over time has provided us with audit, evaluation and investigative leads.

All complaints received by the OIG may not result in an investigation. In those instances where our preliminary work produces sufficient information to warrant a full review, we open a case. Oftentimes a complaint does not warrant an investigation but rather, resolution of an issue. If the first responsibility for handling the issue rests elsewhere in the Agency, we will make a referral. In many cases, elevation of an issue by the OIG is sufficient to get Agency action. This is our current operating procedure for all complaints. In some cases, the OIG will already have ongoing work in an area when a complaint is received by the Ombudsman; when this occurs the Ombudsman will consult with the lead staff member on the assignment to expand the scope of work to include new issues or information. As is the case with all our work, the highest priority assignments are provided the necessary financial and human resources to fulfill their objectives.

We operate as one OIG. This means that our work prioritization involves multiple OIG offices and no single staff member has the authority to select and prioritize their own caseload independent of all other needs. If an issue or investigation warrants further work, the necessary human and financial resources are devoted to the project until the matter has been brought to its appropriate conclusion.

As part of the transfer, we have expanded the services of the Ombudsman to include all EPA administered programs, rather than limiting it to only Superfund and hazardous waste issues. Within the OIG, the Ombudsman now has the opportunity to utilize the expert assistance of all OIG staff, which includes scientists, auditors, attorneys, engineers, and investigators. Ours is a matrix organization. We assign staff and other resources to projects on a priority basis, drawing from a large pool of OIG resources.

I’d like to now give you an update on what we have accomplished in the 10 weeks since we began doing the work of the Ombudsman. Our first order of business was to get an Acting Ombudsman in place, and to assess the transferred caseload. This involved the inventory and organizing of 130 boxes of documents that were transferred from the National Ombudsman’s office in OSWER. This was a rather challenging undertaking due to the lack of any organized system of records or case file index. It took us until early June to organize and review the files and to assess the information and the work that had been done. To date, we have had eight OIG staff members assigned to the Ombudsman’s caseload, which is more than double the staff that had been assigned in OSWER.

According to GAO's 2001 report, the prior National Ombudsman opened 34 cases between October 1992 and December 2002, closing 14 of those cases within five to 25 months, 13 months being average. We are assessing the remaining 20 cases. Ten of the 20 cases initially appear to be completed or closed, and we are working to confirm this. The remaining 10 cases range in age from more than 20 months to 5 years and appear to be unresolved. These cases include Marjol Battery, Shattuck Chemical, Bunker Hill/Coeur d'Alene. Further, we are determining the status of seven additional cases where we have found documents or read media accounts of the existence of cases. This includes the World Trade Center, which we have incorporated into an already ongoing OIG assignment.

We have developed a priority list of cases, and will be working to conclude these as quickly as possible. We have also begun outreach efforts in order to both explain how we plan to perform the Ombudsman function and to collect additional information. We have met with individual Members of Congress and congressional Committee staff. We have made contact with citizen groups in several of the communities where there are open cases, and we have scheduled site visits and public meetings for Couer d'Alene, Idaho and Tarpon Springs, Florida in July.

Our primary focus at this point is to work to resolve the already existing cases. To do this, we are conducting our work using our audit, evaluation and investigative standards and procedures. At the same time we are working on developing policies and procedures for handling future incoming cases. This includes case selection criteria. We have also met with the Regional Ombudsmen and are working with them to develop a coordinated approach for addressing the incoming issues at all levels in a timely and appropriate manner.

I believe the public reporting of the caseload, activities, and accomplishments of the Ombudsman is a vital and important responsibility. As an Inspector General I firmly believe that professional standards of conduct, a transparent review process, and public accountability strengthens the credibility of the reviewer's findings. In order to provide accountability and communication with the public, and Congress, the work of our Ombudsman will meet the same high standards we have for all our other products. We will publish at least annually a report summarizing the work of the Ombudsman, including a status report on the cases opened by the National Ombudsman and recommendations or findings made to the Agency. We already provide similar reports semiannually for all our work, and annually for Superfund program work.

Members of the Committee, I am proud of the track record of the EPA OIG. I want to assure the public, EPA stakeholders, and Congress that we will conduct the Ombudsman work with independence and professionalism. I give you my commitment to be responsive to any questions or comments you may have as we move forward with this important work. I welcome your assistance in providing any information or suggestions as we move forward with our new responsibilities. That said, I hope that you withhold judgment on our performance until such time as we have had an opportunity to produce results.

Thank you for the opportunity to participate today. I will respond to any questions the Committee may have at this time.

U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

CIVIL No. 8:01CV-2407-T-17MAP

APRIL 8, 2002

Mary Mosley, Plaintiff, v. *Christine Todd Whitman*, in her official capacity as
Administrator of the U.S. Environmental Protection Agency, Defendant

DEFENDANT'S REPLY BRIEF

Defendant hereby files this reply in support of her motions to dismiss and for summary judgment in order to respond to issues raised by plaintiff for the first time in her response brief.

I. The Decision to Relocate the Ombudsman Functions Does not Violate the Inspector General Act.

In opposing defendant's motions to dismiss and for summary judgment, plaintiff contends the proposed relocation of the ombudsman functions within EPA is a violation of the Inspector General Act of 1978, 5 U.S.C. app.3 §9 (hereinafter, the "IG Act.") Plaintiff's Memorandum in Opposition to Defendant's Motions to Dismiss and for Summary Judgment, (hereinafter, "Pl. Opp. Br.") at 14. Plaintiff's complaint fails

to raise this as a count, however, and plaintiff's attempt to expand her case beyond the counts in her complaint and add a new claim in her response brief should not be allowed.

Moreover, the proposed transfer is not a violation of the IG Act.¹ The Office of Inspector General (OIG) at the Environmental Protection Agency was established in accordance with the IG Act, for the express purpose of, *inter alia*, conducting and supervising audits and investigations relating to EPA's programs and operations, 5 U.S.C. app. 3, § 2(a)(1), and to provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency, and effectiveness in the administration of such programs. *Id.* at § 2(2). Pursuant to the act, the Inspector General can "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. app. 3, § 4(a)(1). To carry out these broad responsibilities, the Inspector General has extensive authority, including authority "to make such investigations . . . relating to the administration of the programs and operations of the . . . [EPA] as are, in the judgment of the Inspector General, necessary or desirable." *Id.* at § 6(a)(2).

The Inspector General may also demand access to agency records and reports; request information or assistance from Federal, state, or local government agencies or units; issue subpoenas to entities other than Federal agencies; administer or take oaths; and "select, appoint and employ such officers and employees as may be necessary" to carry out its responsibilities. *Id.* at § 6(a). Finally, the Act allows defendant to transfer offices or agencies, or functions, powers, or duties thereof, as she may determine are properly related to the functions of the OIG, and would, if so transferred, further the purposes of the IG Act, except that she cannot transfer program operating responsibilities under this provision. *Id.* at § 9(a)(2).

Plaintiff contends the IG Act has been violated because the act does not specifically name the same ombudsman responsibilities listed in the long-expired statutory provision establishing the EPA's Office of the Ombudsman, and because, according to plaintiff, the ombudsman's functions are program operating responsibilities. Pl. Opp. Br. at 13-14. Both of these arguments fail.

The IG Act clearly states that the Inspector General can "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. app. 3, § 4(a)(1). One of the three basic areas of inquiry for such audits is to review program results to determine whether programs or activities meet the objectives established by Congress or the agency. S. Rep. No. 95-1071 at *29, *reprinted in* 1978 U.S.C.C.A.N. 2676, 2703-2704 (1978). As such, the terms of the statute authorize the Inspector General to conduct the same function of receiving and investigating complaints that the long-expired statute creating the Ombudsman office set forth. *Id.* § 6917(a)(d).² The November 27, 2001 memorandum transferring the ombudsman functions notes that defendant and the Inspector General expect the newly relocated ombudsman function will address public concerns across the spectrum of EPA programs. Exh. B to TRO Opp. at 2. Likewise, EPA's OIG maintains a hotline for the public to use. *See* Exhs. 1 & 2 attached hereto.

Moreover, the very elements of the ombudsman's functions that plaintiff contends must be protected are the elements that the IG Act provides the OIG. Plaintiff avers that the relocation of the ombudsman's functions will impair the ability of the Ombudsman to independently investigate and oversee EPA's handling of the Stauffer Chemical Superfund site. Complaint at ¶¶7, 14, 18, 30, 41. As explained above, OIG has extensive authority to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of EPA, 5 U.S.C. app. 3, § 4(a)(1), and OIG has access to agency records and reports, and to a wide-range of investigatory tools, such as subpoenas, to conduct its investigations and audits. OIG's audit, investigatory, and subpoena powers are "very broad." *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 330 (5th Cir. 1997).

Furthermore, OIG has the independence that plaintiff contends is imperative. Congress created OIG in order to ensure that the body investigating an agency have the requisite level of independence to effectively conduct its investigation. S. Rep. 95-1071 at *7, *reprinted in* 1978 U.S.C.C.A.N. 2676, 2682 (1978). *See also Winters Ranch Partnership*, 123 F.3d at 333 (noting that purpose of the IG Act was to establish an OIG in each agency "to effect independent and objective audits and inves-

¹While issues raised for the first time in a reply brief are not typically considered, *see e.g., United States v. Kimmons*, 1 F.3d 1144, 1145 (11th Cir. 1993), defendant provides this argument solely because plaintiff has raised the issue for the first time in her response brief. This argument is in addition to the arguments defendant raised in her motions to dismiss and for summary judgment.

²The ombudsman functions have been retained at EPA as a matter of policy. Exh. B to Defs. TRO Opp. at 1-2.

tigations of the programs and operations of each agency.”). Moreover, defendant’s November 27, 2001 memorandum transferring the ombudsman’s functions noted that the relocation to the OIG would give the function the independence and impartiality recommended by a number of Members of Congress. Exh. B to Defs. TRO Opp. at 1–2. Thus, plaintiff has failed to demonstrate that the OIG cannot assume the ombudsman’s functions under the IG Act.

Plaintiff also contends that the ombudsman’s functions are “central to the operations of the agency” and therefore, are a program operating responsibility that cannot be transferred to the OIG. Pl. Opp. Br. at 14. Plaintiff fails to provide any evidence or explanation to support her conclusion, and, in any event, her argument fails because the ombudsman’s functions are not a “program operating responsibility.” While the IG Act does not define the term, “program operating responsibility,” courts have equated the term to “congressionally delegated” responsibilities, *Winters Ranch Partnership*, 123 F.3d at 334; to “long-term” regulatory responsibilities, *id.* at 334–36; to “those activities which are central to an agency’s statutory mission,” *United States v. Hunton & Williams*, 952 F. Supp. 843, 850 (D.D.C. 1997); and to “day-to-day,” “hands on” responsibilities for the overall administration of an agency’s programs. *Greene v. Sullivan*, 731 F.Supp. 835, 836 (E.D. Tenn. 1990). The United States Court of Appeals for the Eleventh Circuit found an investigation was not a program operating responsibility because it was initiated by the Inspector General in response to an allegation of fraud and abuse, and not as part of a regulatory compliance audit that would be within the authority of another office to conduct. *Inspector General of the United States Department of Agriculture v. Glenn*, 122 F.3d 1007, 1010 (11th, Cir. 1997).

The ombudsman’s functions at EPA are no longer governed by statute, 42 U.S.C. § 6917(d), and have been retained by EPA as a matter of policy. Exh. B to Defs. TRO Opp. at 1–2. Plaintiff has provided no evidence suggesting that the ombudsman’s functions are routine, long-term responsibilities statutorily provided to a particular office within EPA, and central to EPA’s mission. Moreover, the rationale behind prohibiting the transfer of program operating responsibilities is to preserve the function of the OIG as an independent and objective inspector of the agency’s operations. *Winters Ranch Partnership*, 123 F.3d at 334. As explained above, defendant has decided to move the ombudsman’s functions to allow for, among other things, the necessary independence of the ombudsman functions. Nov. 27, 2001 Memo, Defs. Exh. B to TRO Opp. at 1–2.³

Finally, the fact that the ombudsman’s function was previously located within a program office, the Office of Solid Waste and Emergency Response, does not mean that it is a “program operating responsibility.” The IG Act allows defendant to transfer “offices or agencies, or functions, powers, or duties thereof, “as she may determine are properly related to the functions of the OIG, and, if so transferred, would further the purposes of the OIG Act. 5 U.S.C. app., § 9(a)(2). To conclude that a function is a “program operating responsibility” simply because it is found within a program office within an agency would nullify the provision allowing defendant to, in her discretion, transfer offices or agencies, or functions thereof, to the OIG. 5 U.S.C. App. 3, § 9(a)(2).

Plaintiff cites *Truckers United For Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001), which is distinguishable here. In *Mead*, the court found that the OIG had improperly “lent” its search and seizure powers to a routine agency investigation that, by statute, was charged to another office to conduct. 251 F.3d at 186–87, 189. The *Mead* court noted that OIG’s investigation was not an audit of agency enforcement procedures or policies, or an investigation relating to abuse or mismanagement at the agency. *Id.* at 189. Here, in contrast, the Inspector General is not lending her authority to an investigation which is under the statutory authority of another office, or which is being conducted by another office within EPA, such as by OSWER. Moreover, EPA has maintained an ombudsman function not pursuant to statute or as required by Congress, but only as a matter of agency policy. Ex. B to Defs. TRO Opp. at 1–2. Defendant has decided to move the ombudsman’s functions

³The legislative history to the IG Act provides an example of an EPA investigation that would clearly fall within the IG’s authority. Senate Report No. 95–1071 notes that while the OIG would not likely review an allegation that a specific sewage treatment plant was not operating according to technical specifications, the OIG would properly review an allegation that EPA had approved plans for a faulty sewage treatment system because an agency official was improperly influenced in his decision. S. Rep. No. 95–1071 at *28, reprinted in 1978 U.S.C.C.A.N. 2676, 2703 (1978).

to OIG, pursuant to her authority under 5 U.S.C. app. 3, § 9(a)(2). The proposed relocation is not a violation of § 9(a)(2) of the IG Act.⁴

Plaintiffs in Two Other Cases Raising Identical Causes of Action Have Not Filed Motions to Consolidate

Plaintiff also raises, for the first time, the issue of “a transfer and consolidation pursuant to 28 U.S.C. § 1407.” Pl. Opp. Br. at 3. Defendant will respond to any motions to transfer, consolidate, or any other motion, when plaintiff files and serves said motion. Defendant notes, however, that she has verbally advised plaintiff that she is opposed to a voluntary dismissal, without prejudice, by plaintiff of the action in this Court.

Moreover, plaintiff offers no evidence in support of her assertion that plaintiffs in several other districts in which the Ombudsman is involved on behalf of the community are intervening in [*Martin v. Whitman*, No. 1:02CV00055 (RWR) (D.D.C.)] rather than continuing with their suits where they were originally filed suit.” Pl. Opp. Br. at 3. On the contrary, there are currently two other cases pending in Federal district court which raise counts virtually identical to this action. *Throop Borough v. Whitman*, No. 3:CV01–2461 (James M. Munley) (M.D. Pa.); *city of Smelterville v. Whitman*, Cv. No. 020005–N–EJL (D. Idaho). Defendant has moved to dismiss the *Throop Borough* case. Exh. 2 hereto. Defendant’s response to the amended complaint in *city of Smelterville* is due April 16, 2002. Order attached hereto as Exh. 3.⁵

III. Plaintiff Has Not Asserted A Claim For Retaliatory Discharge

Finally, plaintiff raises for the first time a contention that there is a material issue of fact as to whether the proposed relocation of the Ombudsman functions is a “retaliatory discharge of the National Ombudsman.” Pl. Opp. Br. at 2. While defendant disagrees that there are any material issues of fact here, this particular statement is objectionable because, as with the claim that the IG Act has been violated, plaintiff has not brought a claim here that the proposed relocation is a “retaliatory discharge.” Again, plaintiff is using her opposition brief to add new claims to her case, without moving for leave to amend her complaint.⁶

CONCLUSION

For the reasons expressed above, as well as in defendant’s memorandum supporting her motions to dismiss and for summary judgment, defendant’s motions to dismiss and for summary judgment should be granted.

Respectfully submitted,

MAC CAULEY,
U.S. Attorney.

RESPONSES BY NIKKI TINSLEY TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Ms. Tinsley, please address the concerns voiced by Mr. Wood about the ombudsman’s ability to function in a manner consistent with relevant professional standards for ombudsmen.

Response. As Mr. Wood noted in his testimony, there are no Federal standards specific to the operation of the ombudsmen offices, however several professional organizations provide standards relevant to ombudsmen. He stated that the standards incorporate core principles of: independence, impartiality and confidentiality. We believe those standards are met with the Ombudsman operating within the Office of the Inspector General (OIG).

⁴ Plaintiff states that the proposed relocation will eliminate the Office of the Ombudsman. Pl. Opp. Br. at 14, n.6. While the office itself will not be in existence, the November 27, 2001 Memorandum makes clear that the ombudsman’s functions are being transferred to OIG. Defs. Exh. B to Defs. TRO Opp. Thus, as this Court recognized in denying plaintiff’s motions for a TRO and preliminary injunction, Dec. 28, 2001 Order at 7, the ombudsman’s functions will continue at EPA.

⁵ Plaintiff makes several references to allegations allegedly raised in connection with the *Martin* case. Pl. Opp. Br. at 3, n. 1. As noted in defendant’s brief in support of her motions to dismiss and for summary judgment, the *Martin* case involves a claim that the relocation violates the Ombudsman’s First Amendment rights. Defs. Memo. at 5–6 and Exh. 3 thereto. Except for the allegation regarding the removal of Hugh Kaufman from Ombudsman functions, plaintiff has not raised the allegations in footnote 1 of her response brief in her complaint, and she does not appear to rely on them in support of her case.

⁶ It is doubtful that plaintiff would have standing to bring a claim for retaliatory discharge, as she is not an EPA employee affected by the proposed transfer of the Ombudsman functions.

The OIG, through the Inspector General Act (IG Act), has specific authorities designed to insure our independence. We select, prioritize and carry out all of our work assignments independent of EPA oversight. We have separate budget authority, separate hiring and contracting authority, and independent reporting responsibilities to Congress. We do not have program responsibilities, therefore our review of EPA's program management and delivery can be conducted with impartiality. Finally, we adhere to appropriate professional standards when we conduct our audits, investigations and evaluations. This includes standards of conduct, freedom from personal impairments, and internal controls, all of which support the principles of independence, impartiality and confidentiality.

Question 2. When do you anticipate publicly posting the position of the ombudsman?

Response. We have not established a specific timeframe for hiring a permanent ombudsman. Our immediate focus has been, and will continue to be, moving forward on the existing caseload. We expect Ms. Boyer to continue in her capacity as Acting Ombudsman until a permanent ombudsman is hired.

Question 3. How will the reorganization of the ombudsman function and the location of the ombudsman within the OIG-change what the OIG does?

Response. The transfer of the ombudsman function to the OIG does not fundamentally change what we do. We will continue to conduct audits, investigations and evaluations of EPA's programs, and performance, and EPA contractors. We will still operate under the authorities provided under the IG Act. The only change within our organization has been the consolidation of our congressional and public affairs activities into a new Office of Congressional and Public Liaison which includes the ombudsman.

Question 4. Ms. Tinsley, as the Inspector General, do you review all written reports prepared by the Office of Inspector General? Do you plan to review written reports prepared by the ombudsman? If so, does that not present a possible conflict if the ombudsman's report could be construed to reflect unfavorably on prior work performed by the OIG?

Response. Yes, I review written reports issued by our office. This is typically done after a report has been issued. I plan on engaging in a similar process with the reports of the ombudsman. By law, the OIG does not have any program management or program delivery responsibilities, so there is no possibility of a conflict of interest with a report of the ombudsman. The function of the EPA Ombudsman is to investigate citizen complaints about EPA's performance, not the work of the OIG.

Question 5. Ms. Tinsley, how would you handle a situation in which the ombudsman is asked to investigate a matter on which the OIG had previously reported? Would you recuse yourself from reviewing the ombudsman's report on this matter?

Response. Any decisions on recusal would be made on a case by case basis.

Question 6. According to the GAO testimony, having the ombudsman located within the Office of Inspector General could augment the level of resources devoted to the ombudsman function, since the ombudsman would be able to draw on staff from other areas of the OIG. However, couldn't this also work in reverse? What guarantee do we have that the ombudsman staff will not be diverted to work on regular OIG audits and investigations, particularly during periods when workload levels are high?

Response. The OIG work planning process is designed to ensure that we staff the highest priority assignments, whether they are audits, investigations, or evaluations. As a practical matter, our auditors, evaluators, investigators, engineers, attorneys, and scientists are assigned to projects and cases, not offices. This provides the added flexibility to devote the necessary resources to the priority assignments. With more than 350 OIG employees, we fully expect to be able to staff high priority ombudsman cases.

Question 7. In its July 2001 report, GAO concluded that the other duties assigned to the regional ombudsmen hampered their independence. Has OIG defined the role of the regional ombudsmen to avoid potential conflicts of interest?

Response. The Regional Superfund Ombudsmen function was not transferred to the OIG. At this time, they will continue to operate under the Regional offices. However, we have met with the regional ombudsmen, established lines of communication for appropriate coordination with them. With the Agency, we have jointly issued preliminary guidance on the process for handling information requests, and complaints that are made directly to the regional ombudsmen offices. Complaints of inappropriate action by Agency officials or other related parties (e.g. state and PRP

leads) will be elevated to the OIG ombudsman for an independent and impartial review.

Overall, we have found that the regional ombudsmen provide a valuable service by facilitating critical exchanges concerning process and site specific information which diffuses confrontational situations and precludes more serious and elevated problems. The OIG ombudsman will participate with the regional ombudsmen in monthly meetings and continue coordination efforts to ensure appropriate level of review and information exchange.

Question 8. OIG has announced plans to expand the scope of the ombudsman's function to cover all agency programs. Will this expand the budgetary needs of the office?

Response. We expect ombudsman function will necessitate an increase in the overall budget for the Office of the Inspector General.

Question 9. Please update the Committee on the progress you have made on the cases that Mr. Martin's office was working on prior to its transfer to the IG's office.

Response. We have inventoried and organized of 130 boxes of documents that were transferred from the National Ombudsman's office. This was a rather challenging undertaking due to the lack of any organized system of records or case file index. We have been assessing approximately 20 open cases. Ten of the 20 cases initially appear to be completed or closed, and we are working to confirm this. The remaining 10 cases range in age from more than 20 months to 5 years and appear to be unresolved. Further, we are determining the status of seven additional cases where we have found documents or read media accounts of the existence of cases.

We have developed a priority list of cases and assigned team leads for the cases. We have also begun outreach efforts in order to both explain how we plan to perform the ombudsman function and to collect additional information. We have made contact with citizen groups in several of the communities where there are open cases, and we have conducted site visits and participated in public meetings in Spokane, Washington, and Northern Idaho, and Tarpon Springs, Florida.

RESPONSES BY NIKKI TINSLEY TO ADDITIONAL QUESTIONS FROM SENATOR CRAPO

Question 1. Could you specify the time line or date at which the Office of the Inspector General intends to officially publish or announce the final management and operational responsibilities for the National Ombudsman function?

Response. We are in the process of finalizing the function statement, position description and case selection criteria for the ombudsman. We expect to have the publicly available in September.

Question 2a. For what reason does Ms. Boyer remain only in an "Acting" capacity as the National Ombudsman?

Response. Until a permanent ombudsman is competitively selected under the Office of Personnel Management procedures for filling a vacancy under civil service procedures, an individual serving as the OIG ombudsman must do so in an acting capacity.

Question 2b. When and how do you intend to establish a permanent National Ombudsman?

Response. We have not established a timeframe for permanently hiring an ombudsman. When we fill the vacancy on a permanent basis, we do so in accordance with established requirements for hiring in the Federal Government.

STATEMENT OF DAVID G. WOOD, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT

Mr. Chairman and members of the committee, I am pleased to be here today to discuss our work relating to the national hazardous waste ombudsman function at the Environmental Protection Agency (EPA). EPA's hazardous waste ombudsman was first established within the Office of Solid Waste and Emergency Response as a result of the 1984 amendments to the Resource Conservation and Recovery Act.¹ Recognizing that the ombudsman provides a valuable service to the public, EPA retained the ombudsman function as a matter of policy after its legislative authorization expired in 1988. Over time, EPA expanded the national ombudsman's jurisdiction

¹The Resource Conservation and Recovery Act governs the management of solid and hazardous waste.

tion to include Superfund² and other hazardous waste programs managed by the Office of Solid Waste and Emergency Response and, by March 1996, EPA had designated ombudsmen in each of its 10 regional offices. While the national ombudsman's activities ranged from providing information to investigating the merits of complaints, in recent years, the ombudsman played an increasingly prominent role through his investigations of citizen complaints referred by Members of Congress. Legislation now pending before the Congress would reauthorize an office of the ombudsman within EPA.³

In November 2001, the EPA Administrator announced that the ombudsman function would be reorganized, effective in January 2002.⁴ Specifically, the agency announced that the national ombudsman would be relocated from the Office of Solid Waste and Emergency Response to the Office of Inspector General (OIG) and would address concerns across the spectrum of EPA programs, not just hazardous waste programs. The agency also retained the ombudsmen located in its regional offices. In response to a request letter from Representative Diana DeGette raising concerns about placing the national ombudsman within EPA's OIG, we have recently initiated work to examine various issues related to the reorganization.

- My testimony today, which is based on our 2001 report on EPA's ombudsman⁵ and on the work now under way,
- describes the professional standards for independence and other key factors relevant to ombudsmen, including those located within Federal agencies; and
- provides our preliminary observations on issues raised by the reorganization of EPA's ombudsman function.

For our 2001 report, we examined relevant standards of practice, including those published by the American Bar Association (ABA), The Ombudsman Association, and the U.S. Ombudsman Association. We also looked at four Federal agencies whose ombudsmen deal with inquiries from the public: the Agency for Toxic Substances and Disease Registry (an agency of the Department of Health and Human Services), the Federal Deposit Insurance Corporation, the Food and Drug Administration, and the Internal Revenue Service. In preparing this testimony, we met with, and obtained information from, key EPA officials involved in the reorganization of the agency's ombudsman function. However, because the agency has not yet developed detailed operating policies and procedures or an official description of the national ombudsman position within the OIG, and because we have only recently initiated work related to the reorganization, our observations are preliminary.

In summary:

- Although there are no Federal requirements or standards specific to the operation of ombudsman offices, several professional organizations have published standards of practice relevant to ombudsmen who deal with inquiries from the public. These standards incorporate the core principles of independence, impartiality, and confidentiality. For example, an effective ombudsman must have both actual and apparent independence from any person who may be the subject of a complaint or inquiry. According to ABA guidelines, key indicators of independence include a budget funded at a level sufficient to carry out the ombudsman's responsibilities; the ability to spend funds independent of any approving authority; and the power to appoint, supervise, and remove staff. The Ombudsman Association's standards of practice define independence as functioning independent of line management, and advocate that the ombudsman report to the highest authority in the organization. Impartiality requires ombudsmen to conduct inquiries and investigations in a manner free from initial bias and conflicts of interest. Confidentiality requires, with some exceptions, that ombudsmen not disclose, and not be required to disclose, any information provided in confidence. While Federal agencies face some legal and practical constraints in implementing some aspects of these standards, ombudsmen at the Federal agencies we reviewed for our 2001 report reflected aspects of the standards. For example, at the Federal Deposit Insurance Corporation, the Food and Drug Administration, and the Internal Revenue Service, the ombudsman's office had its own budget and reported directly to the head of the agency.

- If EPA intends to have an ombudsman function that is consistent with the way the position is typically defined in the ombudsman community, placing the national

²The Superfund program was established under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to clean up highly contaminated hazardous waste sites.

³See S. 606 and H.R. 1431, The Ombudsman Reauthorization Act of 2001.

⁴The transfer of the ombudsman function to EPA's Office of Inspector General actually took place on April 13, 2002, following the dismissal by a Federal district court of a legal challenge to the reorganization.

⁵U.S. General Accounting Office, Hazardous Waste: EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence, GAO-01-813 (Washington, D.C.; July 27, 2001).

ombudsman within the OIG does not achieve that objective. Specifically, the role of an ombudsman typically includes program operating responsibilities, such as helping to informally resolve program-related issues and mediating disagreements between the agency and the public. Including these responsibilities in the national ombudsman's role within the OIG would likely conflict with the Inspector General Act, as amended, which prohibits the transfer of program operating responsibilities to the Inspector General; yet, omitting these responsibilities would result in establishing an "ombudsman" that is not fully consistent with the function as defined within the ombudsman community. Further, while EPA's reorganization removes the national ombudsman from the Office of Solid Waste and Emergency Response whose programs the ombudsman is charged with investigating—it may not result in a degree of structural or functional independence that is consistent with professional standards for ombudsmen for several reasons.

- The national ombudsman, as the position is currently envisioned, still will not be able to exercise independent control over the budget and staff resources needed to implement the function. According to EPA, authority for budget and staffing for the national ombudsman function will rest with the Assistant Inspector General for Congressional and Public Liaison.

- Prior to the reorganization, the national ombudsman could independently determine which cases to pursue; however, according to EPA, the Inspector General has the overall responsibility for the work performed by the Office, and no single staff member—including the national ombudsman—has the authority to select and prioritize his or her own caseload independent of all other needs.

- In addition, the reorganization does not appear to address concerns we raised in our 2001 report about the independence of the regional ombudsmen, whose position is generally seen as a collateral duty within EPA. They will continue to have a dual role in fulfilling some ombudsman responsibilities while also serving in line management positions, primarily within the Superfund program.

Finally, placing the ombudsman in the OIG could affect the activities of the Inspector General; for example, the OIG could no longer independently audit or investigate the ombudsman, as the OIG can at other Federal agencies where the ombudsman function and the OIG are separate entities.

RELEVANT PROFESSIONAL STANDARDS FOR OMBUDSMEN

Through the impartial and independent investigation of citizens' complaints, Federal ombudsmen help agencies be more responsive to the public, including people who believe that their concerns have not been dealt with fully or fairly through normal channels. Ombudsmen may recommend ways to resolve individual complaints or more systemic problems, and may help to informally resolve disagreements between the agency and the public.

While there are no Federal requirements or standards specific to the operation of Federal ombudsman offices,⁶ the Administrative Conference of the United States recommended in 1990 that the President and the Congress support Federal agency initiatives to create and fund an external ombudsman in agencies with significant interaction with the public.⁷ In addition, several professional organizations have published relevant standards of practice for ombudsmen. Both the recommendations of the Administrative Conference of the United States and the standards of practice adopted by various ombudsman associations incorporate the core principles of independence, impartiality (neutrality), and confidentiality. For example, the ABA's standards⁸ define these characteristics as follows:

- Independence—An ombudsman must be and appear to be free from interference in the legitimate performance of duties and independent from control, limitation, or penalty by an officer of the appointing entity or a person who may be the subject of a complaint or inquiry.

⁶The Federal Interagency Alternative Dispute Resolution Working Group will be developing guidance on standards of practice for Federal ombudsmen, as recommended in a GAO report entitled, *Human Capital: The Role of Ombudsmen in Dispute Resolution*, GAO-01-466 (Washington, D.C.; Apr. 13, 2001).

⁷The Administrative Conference of the United States was an independent advisory agency in the executive branch that issued recommendations and statements on the improvement of the Federal administrative process. The agency was terminated by the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1996.

⁸To help develop the standards, ABA's Sections of Administrative Law and Regulatory Practice and Dispute Resolution appointed a steering committee, which included representatives from several ombudsman associations: the Coalition of Federal Ombudsmen, The Ombudsman Association, the U.S. Ombudsman Association, and the University and College Ombuds Association.

- Impartiality—An ombudsman must conduct inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest.
- Confidentiality—An ombudsman must not disclose and must not be required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation must be confidential and not subject to disclosure outside the ombudsman's office.

Relevant professional standards contain a variety of criteria for assessing an ombudsman's independence, but in most instances, the underlying theme is that an ombudsman should have both actual and apparent independence from persons who may be the subject of a complaint or inquiry. According to ABA guidelines, for example, a key indicator of independence is whether anyone subject to the ombudsman's jurisdiction can (1) control or limit the ombudsman's performance of assigned duties, (2) eliminate the office, (3) remove the ombudsman for other than cause, or (4) reduce the office's budget or resources for retaliatory purposes. Other factors identified in the ABA guidelines on independence include a budget funded at a level sufficient to carry out the ombudsman's responsibilities; the ability to spend funds independent of any approving authority; and the power to appoint, supervise, and remove staff. The Ombudsman Association's standards of practice define independence as functioning independent of line management; they advocate that the ombudsman report to the highest authority in the organization.

According to the ABA's recommended standards, "the ombudsman's structural independence is the foundation upon which the ombudsman's impartiality is built." One aspect of the core principle of impartiality is fairness. According to an article published by the U.S. Ombudsman Association on the essential characteristics of an ombudsman, an ombudsman should provide any agency or person being criticized an opportunity to (1) know the nature of the criticism before it is made public and (2) provide a written response that will be published in whole or in summary in the ombudsman's final report.⁹

In addition to the core principles, some associations also stress the need for accountability and a credible review process. Accountability is generally defined in terms of the publication of periodic reports that summarize the ombudsman's findings and activities. Having a credible review process generally entails having the authority and the means, such as access to agency officials and records, to conduct an effective investigation. The ABA recommends that an ombudsman issue and publish periodic reports summarizing the findings and activities of the office to ensure its accountability to the public. Similarly, recommendations by the Administrative Conference of the United States regarding Federal ombudsmen state that they should be required to submit periodic reports summarizing their activities, recommendations, and the relevant agency's responses.

Federal agencies face legal and practical constraints in implementing some aspects of these standards because the standards were not designed primarily with Federal agency ombudsmen in mind. However, ombudsmen at the Federal agencies we reviewed for our 2001 report reflected aspects of the standards. We examined the ombudsman function at four Federal agencies in addition to EPA and found that three of them—the Federal Deposit Insurance Corporation, the Food and Drug Administration, and the Internal Revenue Service—had an independent office of the ombudsman that reported to the highest level in the agency, thus giving the ombudsmen structural independence.¹⁰ In addition, the ombudsmen at these three agencies had functional independence, including the authority to hire, supervise, discipline, and terminate their staff, consistent with the authority granted to other offices within their agencies. They also had control over their budget resources. The exception was the ombudsman at the Agency for Toxic Substances and Disease Registry, who did not have a separate office with staff or a separate budget. This ombudsman reported to the Assistant Administrator of the agency instead of the agency head.

ISSUES RAISED BY EPA'S REORGANIZATION OF THE OMBUDSMAN FUNCTION

In our July 2001 report, we recommended, among other things, that EPA modify its organizational structure so that the function would be located outside of the Office of Solid Waste and Emergency Response, whose activities the national ombudsman was charged with reviewing. EPA addresses this recommendation through its placement of the national ombudsman within the OIG, where the national ombuds-

⁹Gottelher, Dean M. and Hostina, Michael, "Essential Characteristics of a Classical Ombudsman" (U.S. Ombudsman Association, 1998), <http://www.usombudsman.org/References/Essential.pdf>, (downloaded June 19, 2001).

¹⁰For example, the ombudsmen from the Food and Drug Administration and the Internal Revenue Service each reported to the Office of the Commissioner in their respective agencies.

man will report to a newly created position of Assistant Inspector General for Congressional and Public Liaison. OIG officials also told us that locating the national ombudsman function within the OIG offers the prospect of additional resources and enhanced investigative capability. According to the officials, the national ombudsman will likely have a small permanent staff but will also be able to access OIG staff members with expertise in specific subject matters, such as hazardous waste or water pollution, on an as-needed basis. Further, OIG officials anticipate that the ombudsman will adopt many of the office's existing recordkeeping and reporting practices, which could help address the concerns we noted in our report about accountability and fairness to the parties subject to an ombudsman investigation.

Despite these aspects of EPA's reorganization, several issues merit further consideration. First and foremost is the question of intent in establishing an ombudsman function. The term "ombudsman," as defined within the ombudsman community, carries with it certain expectations. The role of an ombudsman typically includes program operating responsibilities, such as helping to informally resolve program-related issues and mediating disagreements between the agency and the public. Assigning these responsibilities to an office within the OIG would conflict with statutory restrictions on the Inspector General's activities. Specifically, the Inspector General Act, as amended, prohibits an agency from transferring any function, power, or duty involving program responsibilities to its OIG.¹¹ However, if EPA omits these responsibilities from the position within the OIG, then it will not have established an "ombudsman" as the function is defined within the ombudsman community. In our April 2001 report, we noted that some Federal experts in dispute resolution were concerned that among the growing number of Federal ombudsman offices there are some individuals or activities described as "ombuds" or "ombuds offices" that do not generally conform to the standards of practice for ombudsmen.

A related issue is that ombudsmen generally serve as a key focal point for interaction between the government, or a particular government agency, and the general public. By placing the national ombudsman function within its OIG, EPA appears to be altering the relationship between the function and the individuals that make inquiries or complaints. Ombudsmen typically see their role as being responsive to the public, without being an advocate. However, EPA's reorganization signals a subtle change in emphasis: OIG officials see the ombudsman function as a source of information regarding the types of issues that the OIG should be investigating. Similarly, rather than issue reports to complainants, OIG officials expect that the national ombudsman's reports will be addressed to the EPA Administrator, consistent with the reporting procedures for other OIG offices. The officials told us that their procedures for the national ombudsman function, which are still being developed, could provide for sending a copy of the final report or a summary of the investigation to the original complainant along with a separate cover letter when the report is issued to the Administrator.

Based on the preliminary information available from EPA, the reorganization raises other issues regarding the consistency of the agency's ombudsman function with relevant professional standards. For example, under EPA's reorganization, the national ombudsman will not be able to exercise independent control over budget and staff resources, even within the general constraints that are faced by Federal agencies. According to OIG officials, the national ombudsman will have input into the hiring, assignment, and supervision of staff, but overall authority for staff resources and the budget allocation rests with the Assistant Inspector General for Congressional and Public Liaison. OIG officials pointed out that the issue our July 2001 report raised about control over budget and staff resources was closely linked to the ombudsman's placement within the Office of Solid Waste and Emergency Response. The officials believe that once the national ombudsman function was relocated to the OIG, the inability to control resources became much less significant as an obstacle to operational independence. They maintain that although the ombudsman is not an independent entity within the OIG, the position is independent by virtue of the OIG's independence.

Despite the OIG's argument, we note that the national ombudsman will also lack authority to independently select and prioritize cases that warrant investigation. According to EPA, the Inspector General has the overall responsibility for the work performed by the OIG, and no single staff member—including the ombudsman—has the authority to select and prioritize his or her own caseload independent of all other needs. Decisions on whether complaints warrant a more detailed review will be made by the Assistant Inspector General for Congressional and Public Liaison in consultation with the national ombudsman and staff. EPA officials are currently reviewing the case files obtained from the former ombudsman, in part to determine

¹¹ See 5 U.S.C. Appx. 3 § 9(a)(2).

the anticipated workload and an appropriate allocation of resources. According to OIG officials, the national ombudsman will have access to other OIG resources as needed, but EPA has not yet defined how decisions will be made regarding the assignment of these resources. Under the ABA guidelines, one measure of independence is a budget funded at a level sufficient to carry out the ombudsman's responsibilities. However, if both the ombudsman's budget and workload are outside his or her control, then the ombudsman would be unable to assure that the resources for implementing the function are adequate. Ombudsmen at other Federal agencies must live within a budget and are subject to the same spending constraints as other offices within their agencies, but they can set their own priorities and decide how their funds will be spent.

EPA has also not yet fully defined the role of its regional ombudsmen or the nature of their relationship with the national ombudsman in the OIG. EPA officials told us that the relationship between the national and regional ombudsmen is a "work in progress" and that the OIG will be developing procedures for when and how interactions will occur. Depending on how EPA ultimately defines the role of its regional ombudsmen, their continued lack of independence could remain an issue. In our July 2001 report, we concluded that the other duties assigned to the regional ombudsmen—primarily line management positions within the Superfund program—hamper their independence. Among other things, we cited guidance from The Ombudsman Association, which states that an ombudsman should serve "no additional role within an organization" because holding another position would compromise the ombudsman's neutrality. According to our discussions with officials from the Office of Solid Waste and Emergency Response and the OIG, the investigative aspects of the ombudsman function will be assigned to the OIG, but it appears that the regional ombudsmen will respond to inquiries and have a role in informally resolving issues between the agency and the public before they escalate into complaints about how EPA operates. For the time being, EPA officials expect the regional ombudsmen to retain their line management positions.¹²

Finally, including the national ombudsman function within the Office of the Inspector General raises concerns about the effect on the OIG, even if EPA defines the ombudsman's role in a way that avoids conflict with the Inspector General Act. By having the ombudsman function as a part of the OIG, the Inspector General could no longer independently audit and investigate that function, as is the case at other Federal agencies where the ombudsman function and the OIG are separate entities. As we noted in a June 2001 report on certain activities of the OIG at the Department of Housing and Urban Development, under applicable government auditing standards the OIG cannot independently and impartially audit and investigate activities it is directly involved in.¹³

A related issue concerns situations in which the national ombudsman receives an inquiry or complaint about a matter that has already been investigated by the OIG. For example, OIG reports are typically transmitted to the Administrator after a review by the Inspector General. A process that requires the Inspector General to review an ombudsman prepared report that is critical of, or could be construed as reflecting negatively on, previous OIG work could pose a conflict for the Inspector General. OIG officials are currently working on detailed procedures for the national ombudsman function, including criteria for opening, prioritizing, and closing cases, and will have to address this issue as part of their effort.

In conclusion, Mr. Chairman, we believe that several issues need to be considered in EPA's reorganization of its ombudsman function. The first is perhaps the most fundamental—that is, the need to clarify the intent. We look forward to working with members of the Committee as you consider the best way of resolving these issues.

This concludes my prepared statement. I would be happy to respond to any questions that you or other Members of the Committee may have at this time.

STATEMENT OF ROBERT J. MARTIN, FORMER EPA NATIONAL OMBUDSMAN

Thank you Mr. Chairman and distinguished members of the committee for the opportunity to appear and testify before you in connection with S. 606, the pending Ombudsman reauthorization Act of 2002. I understand the focus of the hearing is

¹² EPA officials told us that they are piloting a new approach in three regional offices in which the ombudsmen will be increasing their level of involvement in the ombudsman role, although the individuals will continue to have other responsibilities.

¹³ U.S. General Accounting Office, HUD Inspector General. Actions Needed to Strengthen Management and Oversight of Operation Safe Home, GAO-01-794 (Washington, D.C.: June 29, 2001)

to make inquiry regarding the actions of the Environmental Protection Agency and the EPA Office of the Inspector General impacting the Ombudsman and to offer suggestions relating to the establishment of a permanent Ombudsman institution for the environment. As the former National Ombudsman for Hazardous and Solid Waste at the EPA for nearly 10 years, I trust my remarks on the foregoing matters will prove useful to the Committee as you deliberate on the nature of this vital institution.

Moreover, it is my hope that this testimony and the statements from communities will serve to tell a story. It is a compelling story that begins and ends with the American people in many communities who continue to face the most difficult of circumstances involving harm to their health and financial well being from hazardous waste and the actions or inactions of the EPA regarding the management of that waste. The presence of an independent National Ombudsman function at the EPA has been a significant chapter in that story, empowering American communities from New York City to Coeur D'Alene, Idaho in the struggle to keep hope and truth alive while seeking to make changes necessary to protect human health and the environment or to provide help with resulting financial harm.

A new and disturbing chapter emerged in the story, however, when EPA Administrator Whitman dissolved the independent National Ombudsman function. Over and against my objections and the protests of many American communities as well as the pleas of the Congress, Administrator Whitman implemented her decision on April 12, 2002 to end the independent EPA Ombudsman by having the EPA Office of Inspector General take control of the Ombudsman function. Within days, my position description as Ombudsman was eliminated, the locks were changed on the doors and files were removed affecting dozens of cases while I was on official travel. American communities who had come to rely upon an independent EPA Ombudsman function have suffered a great loss.

They have lost a place to be listened to when no one else at the EPA would listen to their cares and needs. They have lost a place of refuge when they were insulted in their own neighborhoods by their own government. They have lost a meaningful voice of advocacy within the EPA bureaucracy for the truth of their own experiences. They have lost a mediating influence to secure desperately needed changes within the EPA when the government made a decision that harmed their neighborhoods or would not make a decision that would save their neighborhoods. They sustained all these losses when the independent EPA Ombudsman function was eliminated by Administrator Whitman.

I resigned on April 22, 2002 under circumstances tantamount to a constructive dismissal as it became clear that the independent Ombudsman function would be absorbed and eliminated by the EPA Office of Inspector General. An independent EPA Ombudsman cannot exist within the EPA Office of Inspector General both as a practical and legal matter. To remain in EPA under such circumstances would have been to cooperate in a lie and would have compromised the relationship of trust I had developed with many American communities. I offer the following today: (1) a chronology to help explain how the independent National Ombudsman function evolved; (2) a discussion of why an independent National Ombudsman function cannot exist with the EPA Office of Inspector General and (3) a vision of a congressionally established National Ombudsman for the Environment.

CHRONOLOGY

- On November 24, 1986, the United States Environmental Protection Agency formally established the Office of Ombudsman under the Hazardous and Solid Waste Amendments of 1984 (HSWA) through publication in the Federal Register. 51 FR 42297 (11/24/86). "It is the function of the Office of Ombudsman to receive individual complaints, grievances and problems submitted by any person with respect to any program or requirement under the Resource Conservation and Recovery Act (RCRA). The objective of the RCRA Ombudsman is to ensure that the general public is provided assistance with complaints or problems." 51 FR 42297 (11/24/86). The Federal Register notice set forth procedures for submitting complaints to obtain the assistance of the National Ombudsman.

- Following sunset of the congressional authorization for the National Ombudsman in 1989, the EPA broadened the jurisdiction of the National Ombudsman to include in 1991 the Superfund program, and all other solid and hazardous waste. See, GAO Report at pg. 5-6. The EPA National Ombudsman is responsible for responding to citizen concerns, assisting industry in complying with environmental regulations, providing information and investigating the merits of complaints and grievances arising from the relevant programs. Although the EPA National Ombudsman does not have the legal authority to reverse or modify program decisions

“based on sound information gained through contact with the public, the Ombudsman may, on occasion, effect program adjustments in resolving particular problems.” (See, EPA Hazardous Waste Ombudsman Handbook at pg. 1–3.) These adjustments are made through the National Ombudsman’s ability to influence Agency decision-making and through the National Ombudsman’s role as a mediator and ability to conduct alternative dispute resolution proceedings. (See, Handbook at pgs 1–5).

- The United States Environmental Protection Agency hired Robert J. Martin on October 18, 1992 as a career employee and exceptional candidate to be Ombudsman. For the next several years, Ombudsman Martin undertakes cases in Apollo, PA., Southington, CT., Jacksonville, AR., Houston, TX., Triumph, ID., Pensacola, FL., and McFarland, CA. all of which result in successful mediations with EPA and changes in decision. Among the changes in direction in these communities are time critical removals of hazardous waste, departures from incineration as a remedy where site characterization was not adequate or operations were not safe; negotiation for shared decisionmaking between the EPA and State government; and permanent relocation of an African American community as well as multi-phase investigation of pesticides contamination in an Hispanic American community.

- The United States Environmental Protection Agency establishes a Regional Superfund Ombudsman program, however, the Regional Ombudsman do not perform the job full time and most importantly, have inherent conflicts of interest as they would have to investigate their supervisors in order to followup on complaints from citizens. (1995). Further, the Regional Ombudsmen do not report to the National Ombudsman and attempt to exercise primary jurisdiction over National Ombudsman cases. By 1998, EPA decides to transfer all new National Ombudsman cases to the Regional Ombudsmen but then withdraws that decision in the face of widespread objections by the National Ombudsman, the public and the Congress.

- Following the establishment of the Superfund Regional Ombudsman, Ombudsman Martin undertakes more controversial investigations of the Rocky Mountain Arsenal in Denver, CO., the Drake incineration project in Lockhaven, PA., and the Times Beach incineration project in Eastern Missouri. These investigations lead to adoption of many operational safeguards for the incineration projects. A Federal criminal grand jury is convened in St. Louis, MO. As a result of the Ombudsman investigative report in that case. Ombudsman Martin provides testimony to the grand jury under subpoena.

- Ombudsman Martin undertakes to investigate the Shattuck case in Denver, CO. at the request of Senator Allard and Representative Degette as well as Denver Mayor Webb and Governor Owens. Public on the record hearings are convened and hosted by Members of Congress. The decision by EPA to leave radioactive waste on the Shattuck site is reversed following recommendations by Ombudsman Martin to remove the waste on the basis of evidence provided at the hearings. (1999). During the Shattuck proceedings, EPA convenes a special Task Force comprised of representatives from all the Regional offices, the Office of General Counsel and the Office of Inspector General. The Task Force develops guidelines to restrict the independence of the National Ombudsman function.

- Ombudsman Martin undertakes additional cases in Tarpon Springs, FL., Throop, PA, the Couer D’Alene Basin in Idaho, East Liverpool and Uniontown, OH., and Riviera Beach, FL. Results included withdrawing a consent decree to do further characterization work; deferring implementation of a remedy to provide for final Ombudsman report; further risk assessment and testing at a hazardous waste incinerator and provision of funding to help a predominantly African American community pay for the cost of cleaning their contaminated drinking water. At the end of 2000, EPA reassigns and prohibits Ombudsman Martin’s Chief Investigator from helping Mr. Martin and otherwise participating in the function.

- On January 3, 2001, EPA published the “Draft Guidance for the National Hazardous Waste Ombudsman and the Regional Superfund Ombudsmen Program” in which it attempted to define the National Ombudsman function and to limit the scope of the Ombudsman’s authority. See, 66 Fed. Reg. 365 (January 31, 2001).

- On February 14, 2001, Senator Arlen Specter, Senator Rick Santorum and U.S. Representative Sherwood wrote to EPA Administrator Whitman requesting that she insure that National Ombudsman Martin would be afforded the opportunity to proceed with the Marjol Battery case without hindrance and on March 8, 2001 that as a result of recent meetings with the Administrator Ombudsman Martin would receive additional staffing and resources immediately. On that day Ombudsman Martin was notified that the Inspector General of the EPA, at the request of the Administrator, would be detailing Bernard Stoll from the Inspector General’s office to perform the Marjol investigation. On March 16, 2001, Assistant Inspector General Johnson wrote to ombudsman Martin that Mr. Stoll had no actual or apparent conflict of interest regarding the Marjol case. On March 27, 2001 Ombudsman Martin

notified the Inspector General of the EPA and the Administrator that Mr. Stoll, in fact, did have a conflict of interest because of his wife's position at the EPA. The EPA Office of Inspector General then withdrew Mr. Stoll, without any admission as to conflict of interest.

- On July 27, 2001, the General Accounting Office of the United States issued a report at the request of the Chairmen of the Sub-Committee on Environment and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives, which outlined the value and significance of the National Ombudsman's office and concluded that the EPA should "provide the Ombudsman with a separate budget and . . . The authority to hire, fire and supervise his own staff." In addition, the GAO found all Federal Ombudsmen are independent and report directly to the head of the Agency and that the EPA National Ombudsman does not have sufficient independence.

- On October 2, 2001, National Ombudsman Martin wrote to the Administrator recommending how the EPA should comply with the GAO report. This included a discussion of how and why moving the National Ombudsman's office to the EPA Office of Inspector General would reduce the National Ombudsman's independence further and would not comply with the GAO report.

- On October 10, 2001, National Ombudsman Martin issued a preliminary report on the Marjol case and recommended further site investigation to ensure a more thorough clean-up. The report also documented that the EPA Office of Inspector General attempted to hinder and obstruct the independent National Ombudsman investigation of the Marjol case.

- In November of 2001, Administrator Whitman wrote National Ombudsman Martin that she was deliberating the GAO recommendations and would decide on the matter of National Ombudsman Martin's status soon. Administrator Whitman was silent on National Ombudsman Martin's invitation to meet and to discuss how to best implement the GAO report. On November 27, 2001, Administrator Whitman issued instructions transferring the National Ombudsman Martin to within the EPA Office of Inspector General and transferring control of all National Ombudsman cases to the EPA Inspector General. National Ombudsman Martin vehemently objected to Administrator Whitman the same day enunciating the dissolution of Ombudsman independence and the hindrance and obstruction of the EPA Office of Inspector General in the Marjol case.

- On December 7, 2001, 18 United States Congressmen wrote to Administrator Whitman requesting that she not implement her planned dissolution of the National Ombudsman's office and transfer control of the National Ombudsman's investigations to the EPA Inspector General until after congressional hearings on increasing the independence of the National Ombudsman in early 2002. On December 18, 2001, Assistant Inspector General Johnson notified National Ombudsman Martin that he would be Mr. Martin's supervisor at the Office of Inspector General. On December 19, 2001, nine additional United States Congressmen wrote to Administrator Whitman requesting that she not proceed with the planned dissolution of the National Ombudsman.

- Later in December of 2001, U.S. Senator Wayne Allard of Colorado wrote Administrator Whitman and asked several questions relating to the National Ombudsman's status in the EPA Office of Inspector General after the impending transfer had been completed. Administrator Whitman replied, among other answers, that Mr. Martin would no longer be able to independently select his cases and would have no supervisory or managerial authority over his budget .

- On January 7, 2002, National Ombudsman Martin had undertaken the World Trade Center case as an independent investigation supported by U.S. Representative Jerrold Nadler of New York. By early January, a private citizen in Tarpon Springs, Florida sought injunctive relief against the planned dissolution of the Ombudsman function as did Throop Borough and Lackawanna County, PA. and several local governments in Idaho. The foregoing lawsuits were pending when National Ombudsman Martin filed his own action for injunctive relief in Federal district court in Washington DC seeking to prevent the dissolution of the National Ombudsman function.

- On January 11, 2002, U.S. Federal District Court Judge Roberts issued a Temporary Restraining Order against EPA Administrator Whitman preventing her from dissolving the National Ombudsman function. Judge Roberts set down the case for full hearing for a motion on preliminary injunction on April 12, 2002. During the interim period, National Ombudsman Martin help expedited public hearings on the World Trade Center case in New York City which were hosted by U.S. Representative Nadler. National Ombudsman Martin recommended that the EPA use its statutory authorities and expertise to help the residents of New York City clean their

residences following the terrorist attack upon the World Trade Center. Those recommendations were subsequently adopted by the EPA.

- On April 12, 2002, Judge Roberts vacated the Temporary Restraining Order and referred the case to the United States Office of Special Counsel for exhaustion of administrative remedies. Within hours, Administrator Whitman and the EPA Office of Inspector General proceeded to dissolve the independent EPA National Ombudsman function. By April 19, 2002, while National Ombudsman Martin was on official travel and then requested sick leave to care for his child who was being treated for a heart condition, the EPA Office of Inspector General had changed the locks to the Ombudsman office, removed all the computers and phones and had taken all the files for the pending National Ombudsman cases.

- On April 22, 2002, National Ombudsman Martin resigned his position from the United States Environmental Protection Agency, subject to any prospective ruling from the United States Office of Special Counsel. In May of 2002, the United States Office of Special Counsel requested Mr. Martin to engage in mediation of his case with the United States Environmental Protection Agency. Mr. Martin agreed and indicated that he would like the opportunity to return to the EPA for a year to finish his cases for the many American communities which had asked for independent Ombudsman investigations. He continues to await a reply from the EPA.

DISCUSSION

A true and independent National Ombudsman function cannot exist within the EPA Office of Inspector General. First, EPA itself has recognized that any change or limitation on the scope of the EPA National Ombudsman's function is a "rule-making subject to notice and comment requirements. Specifically, on January 3, 2001, EPA published "Draft Guidance for the National Hazardous Waste Ombudsman and the Regional Superfund Ombudsmen Program" in which it attempted to more clearly define the ombudsman's office and to limit the scope of the ombudsman's authority where matters in litigation were concerned. 66 Fed. Reg. 365 (Jan. 31, 2001). Whereas EPA recognized the need to comply with the rulemaking requirements on January 5, 2001, Administrator Whitman simply ignored them on November 27, 2001.

Administrator Whitman's unilateral decision to eliminate the EPA National Ombudsman's office was rulemaking subject to notice and comment requirements under 5 U.S.C. §553. Administrator Whitman did not publish notice and no comment period was provided. Because the decision to eliminate the Office of the Ombudsman is a rulemaking act, doing so without giving notice and comment period clearly violated the APA rulemaking requirements listed above. Administrator Whitman's decision was, thus, invalid.

By establishing the EPA National Ombudsman's office, prescribing a set of procedures for handling complaints and grievances and establishing the ombudsman program, EPA created a program to deal with public grievances and complaints. Where an agency "has crystallized what its policy shall be, the agency must abide by that policy. The *Morton v. Ruiz* decision in 1974 illustrates that an agency which has adopted a rule cannot abandon it casually and go back to ad hoc decisionmaking without first undoing or making exceptions from the rule." O'Reilly, James T., *Administrative Rulemaking*, §3.07 (1983). Administrator Whitman's decision was more than merely moving EPA's National Ombudsman from the OSWER building to the OIG building. It was the elimination of an entire program for addressing and resolving grievances and complaints from the public which has both environmental and economic impacts. Any decision which has such a significant impact on the public is more than merely "agency organization, procedure and practice." Such a decision is clearly not within exceptions to rulemaking requirements.

As a matter of law, Administrator Whitman's decision necessarily terminates the National Ombudsman function. Whitman's decision to "transfer the function" of the EPA National Ombudsman's office to the OIG was ultra vires because the OIG lacks the authority to act as an ombudsman and Administrator Whitman cannot expand the OIG's authority as delegated by Congress. The root of this argument was aptly explained by one commentator as follows:

"An administrative agency is a creature of the legislature." As a corporation is to its charter, the administrative agency is to its enabling legislation. This means that the basic doctrine of administrative law, as of corporation law, is the doctrine of ultra vires. The jurisdictional principal is the root principle of administrative power. The statute is the source of an agency's authority as well as its limits. If an agency act is outside [the statutory limits] (or vires), it is invalid.

Schwartz, Bernard, *Administrative Law*, §4.4 (1984) (citations omitted). This principle was clearly stated by the U.S. Supreme Court, “When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.” *Stark v. Wickard*. 321 U.S. 288, 309 (1944).

Unlike the EPA itself, the OIG was not created by executive order but by an Act of Congress. Inspector General Act of 1978, 5 U.S.C. Appx. §1. Although EPA tried to characterize Administrator Whitman’s decision as nothing more than moving the ombudsman function from one office in the agency to another for purposes of expediency, this is a completely inaccurate characterization.

The OIG, although housed within EPA, is actually a completely separate entity. Administrator Whitman even admitted this in the November 27, 2001 decision where the Administrator stated, “The OIG is by statute an independent organization within the agency.” (Memo, Nov. 27, 2001 Decision). The OIG’s narrow authority and functions are prescribed, and circumscribed, by the Inspector General Act of 1978. *Stark v. Wickard*. 321 U.S. at 309. This Act authorizes the OIG to investigate waste, fraud, and abuse, to report criminal activity to the United States Attorney for prosecution, and to recommend policies and procedures for avoiding and prohibiting waste, fraud and abuse to the head of the agency. *See* 5 U.S.C. Appx §1 *et seq.* Nowhere in the ‘OIG’s organic statute is the OIG authorized or delegated authority to act as an ombudsman or to perform the duties and responsibilities of seeking to resolve citizen complaints and grievances. The OIG is not authorized by its organic statute, 5 U.S.C. Appx. §1, to perform the duties and responsibilities identified in the “Duties and Responsibilities” attachment to the “Position Description” EPA published for the National Ombudsman position.

Further, the “ombudsman” function is not a subordinate role to those functions authorized by Congress and the ombudsman function is not a necessary component of the OIG’s other functions. In fact, Congress explicitly recognized that the OIG was not intended to function as an EPA “ombudsman” by creating the National Ombudsman’s Office, 6 years after the Inspector General Act of 1978, via the 1984 Solid and Hazardous Waste Amendments to the Resource Conservation and Recovery Act. *See* H.R. Rep. No. 98–198 (May 17, 1983) (“EPA has been hampered in its ability to communicate with the public by not having a single office whose essential purpose is to respond to citizen inquiries and complaints. The Committee recognizes this important need and as adopted a provision establishing, within the Agency, the Office of Ombudsman.”)

“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.” *Chrysler Corp. v. Brown*. 441 U.S. 281,302 (1979). Because the OIG does not have a delegation of authority from Congress to act as an “ombudsman,” it lacks the ability to receive the National Ombudsman “function” purportedly transferred by Administrator Whitman’s November 27, 2001 decision. Thus, the purported transfer of the ombudsman function to the OIG was ultra vires and invalid.

EPA sought refuge in the provision of the Inspector General Act that authorized the Administrator of the EPA, at the time the 1978 Act was adopted, to transfer “offices or agencies, or functions, powers or duties” to the OIG. However, this power is limited to those offices or agencies, or functions, powers or duties that are “properly related to the functions of the Office [of Inspector General]” and which do not involve “program operating responsibilities” and the Administrator cannot transfer functions not properly related to the functions of the OIG set forth in the statute, all of which concern waste, fraud and abuse. Inspector General Act, §9(a)(2).

The Ombudsman program is not properly related to the functions of the OIG as set forth in the Inspector General Act of 1978. The kind of offices intended to be transferred to OIG were those offices within the various agencies that would duplicate the OIG upon its creation. *See e.g.*, Inspector General Act, §9(M)(Transferring the EPA “office of Audit” and the PEA “Security and Inspection Division” to the OIG). Further, EPA fails to recognize that Congress created a “program” when it required EPA to create the Office of Ombudsman and transferring the ombudsman program would necessarily involve the transfer of “program operating responsibilities.” The EPA National Ombudsman “is primarily responsible for national coordination of the Hazardous Waste Ombudsman Program and for the ongoing review, evaluation and analysis of the program.” (Hazardous Waste Ombudsman Handbook at 2–4 (emphasis added, numerous other references to the National Ombudsman’s program operating responsibilities can also be found within the handbook). Thus, a transfer of the National Ombudsman “function” to OIG would require the OIG to accept “program operating responsibilities” in violation of §9(a)(2) of the Inspector

General Act. Administrator Whitman's decision which purportedly transfers the ombudsman function to OIG was not authorized by the Inspector General Act and was ultra vires.

Given that the transfer of authority to OIG was invalid and that the exercise of the "ombudsman function," by the OIG would be ultra vires, one must look at the remaining effect of Administrator Whitman's decision. The remaining elements of the decision are, essentially, the EPA National Ombudsman's files for "review," and the transfer of Robert Martin, the EPA National Ombudsman, from a "management official" position to a non-supervisory, "unclassified position" at OIG. Clearly, Administrator Whitman's decision worked a termination of not only the office, but the function of the EPA National Ombudsman.

However, the OIG, which is entirely independent from EPA, has a limited scope of authority that does not permit it to perform the ombudsman "function." 5 U.S.C. Appx. § 1. OIG has no right, authority, or obligation to carry on any of the investigations, except to the extent of looking for waste, fraud and abuse, reporting criminal conduct to the attorney general and making policy recommendations for avoiding or mitigating waste, fraud and abuse. 5 U.S.C. Appx. § 1 Because the National Ombudsman does not handle matters relating to waste, fraud and abuse, but instead forwards them to the OIG (Hazardous Waste Ombudsman Handbook at 3-3: allegations of such wrongdoing to be forwarded to OIG), these should be little or nothing in the Ombudsman's cases that the OIG has authority to handle. Thus, as a matter of law, the OIG will not be able to, and cannot be compelled to continue any of the Ombudsman cases.

Third, as a practical matter, EPA's own "Position Description" defines the PEA National Ombudsman as:

A management official (as defined by Title VII of the Civil Service Reform Act) who formulates, determines, or influences an organization's policies. This means creating, establishing, or prescribing general principles, plans, or courses of action for an organization; deciding on plans or courses of action for an organization; or bringing about a course of action for the organization.

Management officials must actively participate in shaping the organization's policies; not just interpret laws and regulations, give resource information or recommendations, or serve as experts or highly trained professionals who implement and interpret the organization's policies and plans.

Further, EPA's "duties and responsibilities" attachment to the National Ombudsman's "Position Description" describe the function of the National Ombudsman:

The . . . Solid and Hazardous Waste Ombudsman . . . is the public official who investigates people's concerns regarding matters pertaining to the disposal of solid and hazardous waste. [It] will receive and take action on individual complaints, grievances, and requests for information submitted by any person with respect to any program or requirement under solid and hazardous waste programs. Based on any findings, will make appropriate recommendations to the Assistant Administrator, and to other appropriate Agency officials. . . .

Id. (Duties and Responsibilities Description at 1). EPA authorized the National Ombudsman to formulate, determine or influence EPA's policies. The EPA further gave the National Ombudsman the duty to investigate people's concerns, to take action on individual complaints and grievances, and, based upon findings, to make appropriate recommendations to EPA officials through the Assistant Administrator.

Id. (Duties and Responsibilities Description at 1-2). Further, the EPA National Ombudsman "[s]erves as the Agency's expert on matters concerning the relationship between solid and hazardous waste statutes and the public. The [National Ombudsman] performs this function through coordination, implementation, and interpretation of current policy as it affects the public." *Id.* The National Ombudsman "[d]irects and manages staff and resources establishing internal operating policies and procedures, allocating resources, assigning and evaluating work, and carrying out the objectives of [the] unit." Thus, the National Ombudsman was authorized to determine the means of carrying out his duties, including holding public hearings and conducting alternative dispute resolution proceedings.

When Administrator Whitman eliminated my position description and transferred me to the EPA OIG to an "unclassified" position, the National Ombudsman function was essentially obliterated.

To properly function as an "ombudsman," I would have to be completely independent and impartial and would require the ability to have an independent budget, to hire, fire and supervise my own staff and to make independent decisions regarding which complaints and grievances the Ombudsman would investigate and resolve and which to forward to other agencies. (GAO Report, at 6-10; Hazardous Waste Ombudsman Handbook at 1-1.)

VISION

An ombudsman should be entirely independent of the Agency that it investigates. I agree with the testimony of the United States Ombudsman Association, therefore, that the National Ombudsman function established by the Congress should be located within Congress and report directly to the Congress with the ability to make collateral recommendations to the executive branch through the EPA and the White House Council on Environmental Quality. As I enunciated in my resignation nearly 2 months ago, the American people deserve nothing less than a truly independent and empowered National Ombudsman to protect their health and environment. I entrust the Congress with the noble task of establishing this Ombudsman institution for the people of the United States of America. Thank you for your support and consideration.

STATEMENT OF DANIELLE BRIAN, EXECUTIVE DIRECTOR, PROJECT ON
GOVERNMENT OVERSIGHT

I want to thank you for asking me to testify today on the EPA National Ombudsman's Office, and the brazen attempts spanning two Administrations of EPA management to weaken, and ultimately destroy, that office. The Project On Government Oversight (POGO) investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the Federal Government to powerful special interests. Founded in 1981, POGO is a politically independent, nonprofit watchdog that strives to promote a government that is accountable to the citizenry.

POGO first became aware of a problem when citizens from Lake Township, Ohio, brought the Industrial Excess Landfill (IEL) Superfund site to our attention more than 5 years ago. From the beginning, citizens, public officials, and independent scientists have raised legitimate questions about conflicts of interest, inappropriate testing methods, quality of site characterization, and adequacy of the methods of remediation selected by the EPA for the site clean-up. Because of these issues, citizens from the community had attempted to gain a National Ombudsman review of the IEL. Their request was denied—not by the National Ombudsman, but by the Environmental Protection Agency (EPA) itself. When we petitioned the EPA National Ombudsman's office to review the site, our request was also denied—again by Administrator Carol Browner, not by the Ombudsman. It took repeated requests from POGO and Representative Tom Sawyer over almost an entire year to get top EPA management to overturn their decision to prevent Ombudsman Robert Martin from reviewing the site. The mere fact that the Ombudsman was not allowed to decide for himself whether or not the case was worthy, but instead had to receive approval from both the head of the Superfund Office as well as the Administrator, made a mockery of the independence of the office.

We decided to look at other EPA regions around the country to see if the problems at IEL were unique. Unfortunately, we found that they were not. We learned about the Shattuck site in Denver, Colorado; the Brio site in Harris County, Texas; about McFarland, California; Tarpon Springs, Florida, and on and on. The communities affected by these sites had all come to view the EPA not only as unresponsive to their concerns, but as active partners with the polluters. And the only place left to consider the concerns of these communities was the National Ombudsman's office. Against the odds, in these and other cases the Ombudsman was able to make all proceedings public as well as conclude or begin the process of resolving longstanding disputes.

Despite the obstacles, the National Ombudsman's Office has been remarkably effective at getting the EPA to review its decisions and correct its mistakes. Not only did the Ombudsman offer the communities successful resolutions to their particular troubles, he gave them reason to believe that sometimes the government can do the right thing. Unfortunately, the success of the Ombudsman's work embarrassed the EPA, and has ultimately resulted in an effort by the EPA to undermine that Office. I find it remarkable that so much effort has gone into silencing the Ombudsman's office, when this office can only make recommendations—they cannot overturn EPA decisions.

Our concern over the Ombudsman's lack of independence led us to suggest to EPA top management in November 1998 that a public process and working group be initiated to develop recommendations for improving the independence of the National Ombudsman's Office. We recommended that representatives from the U.S. Ombudsman Association, environmental community, labor, industry, good government public interest groups, the EPA, the National Ombudsman's office, members of affected communities, and others be included in this working group. In a response to our

letter, however, EPA management stated "I do not find that such a review as depicted in your letter is necessary."

Apparently, while no public review was necessary, the EPA found that a covert one was. EPA Management promptly convened a behind-closed-doors EPA committee on the National Ombudsman "problem." Why was an internal EPA management committee created to change a process that is lauded by the public and their elected officials?

Since that time, interference by the management of EPA into the Ombudsman's work has occurred again and again, culminating in the total dismantling of the office. At one point, EPA established a network of part-time Regional Ombudsmen—approximately 20 percent of the time they were supposed to be Ombudsmen while 80 percent of the time they were working for the very bureaucracy whose decisions they were supposed to be evaluating. This move clearly revealed a lack of understanding by EPA management of the purpose of an Ombudsman office.

It is fairly clear to us why the office of the National Ombudsman has come under constant attack by EPA top management. It is because the Ombudsman has been effective in doing exactly what an Ombudsman is supposed to do—to investigate complaints of inadequacies in the EPA's handling of Superfund sites and to suggest remedies to the problems he finds.

It must be noted that hostility to this office began under a Democratic Administration, and continued under a Republican one. Good Ombudsman work is welcomed by the communities, and even the Potentially Responsible Parties (PRPs), but never by the management whose decisions he is scrutinizing.

We are here today because S. 606 has been introduced to provide the Ombudsman's Office statutory authority. This step is absolutely essential given the EPA's history, and especially given Administrator Christine Todd Whitman's decision to raid the office and move the files to the Inspector General. The Ombudsman's Office has been closed simply because Robert Martin was doing his job despite the liabilities under which he was forced to work—a tiny and shrinking staff, repeated pressure from management not to take on cases, and constant efforts to further limit his authority.

In addition to this legislation, the Whistleblower Protection Act Amendments, S. 995, would give the Ombudsman necessary protections to carry out his job responsibilities. Were these amendments in effect today, Robert Martin would have had legal protection from the EPA's attempts to dismantle his office simply because he did his job. Amazingly, being fired for doing ones job is only one of many inexcusable loopholes that have made the law irrelevant. I urge all the Members of this Committee who have not yet become co-sponsors to support this important legislation.

The Government Accounting Office (GAO) examined four other agencies with ombudsman programs for its report on the status of EPA's Ombudsman: the Agency for Toxic Substances and Disease Registry, the Food and Drug Administration, the Federal Deposit Insurance Corporation, and the Internal Revenue Service. All of these ombudsman programs have independence from the agency within which they are organizationally situated and some have control over budgetary and staffing resources. These agencies also all have Inspectors General, though none of their ombudsman programs are under the aegis of, or in any way affiliated with, the respective Inspectors General.

We believe in the independence of the Inspectors General as well as the Ombudsman's Offices. They each serve important, but different functions. According to the legislative history of the creation of the Inspectors General,

Broad as it is, the Inspector and Auditor General's mandate is not unlimited. Issues requiring substantive or technical expertise will often fall outside his proper sphere. For instance, if the Inspector and Auditor General at the Environmental Protection Agency received a report that a new type of sewage treatment system in Milwaukee was not functioning according to specifications, resulting in dangerous levels of pollution, the Inspector and Auditor General could quite properly decide that responsibility for handling the issue rested elsewhere and make the proper referral.

In fact, the office to which the Inspector General could make that "proper referral" would likely be the National Ombudsman's office. An IG does not have the technical expertise to evaluate a proposed remediation and determine whether the EPA's decisionmaking is sound. In other words, the IG is set up to investigate waste, fraud, and abuse, and audit programs. The Ombudsman, on the other hand, is the proper office to receive complaints, either from the community or the PRPs, that a cleanup plan is somehow inadequate. After an investigation, the Ombudsman can evaluate the validity of this plan something the IG would not and could not do.

It is particularly that the EPA have an independent Ombudsman Office because of a regulation in the Superfund Act that prevents a remedy decision from being challenged until after the remedy has been implemented. This rule, CERCLA section 113(h), eliminates the option of challenging a remedy through the courts that, for example, the community thinks will further endanger its health or safety. While the rule was adopted to prevent parties from tying up a good remedy in the courts, it also serves, in reality, to allow the EPA to implement a bad remedy.

Although the entities responsible for the pollution, the PRPs, cannot challenge a remedy through this route, the EPA allows them to conduct the studies and provide the data that influence the design of a site remedy. Citizens in Superfund communities have not been allowed that same opportunity. The Ombudsman is the only recourse for citizens who feel that the EPA has not adequately protected their health or the environment.

These concerns are not new. It was 13 years ago that the Senate Subcommittee on Superfund issued a bipartisan report which found that, statistically, the involvement of the PRP's led to cheaper remedies that did not necessarily protect health and safety. The report stated, "This data raises the disturbing possibility that EPA, in an effort to achieve settlements or to compel responsible parties to pay for clean-ups, may be sacrificing health and environmental standards as required by law."

We are releasing today the results of our investigation into the EPA's handling of Superfund sites, using the IEL site in Ohio as a case study. It is entitled, "A Partial Approach to Clean-up: EPA Mishandles Superfund Investigations." We conclude that because the EPA has come to rely so heavily on the PRPs to help develop the cleanup plan for the sites, the system is skewed to favor the cheapest, but not necessarily best, remedy. At the same time, the communities are essentially powerless to protect their interests. As a result, the National Ombudsman's office is the last recourse for communities to ensure that a thorough and adequate investigation of the site has taken place and the best interests of the community have been considered.

Legislation such as S. 606 is essential for the independence of this critical function. However, we have come to believe that although the Ombudsman's Offices reviewed by the GAO did report to Senior Administrators of their Agencies or Departments, the plan in S. 606 to move the EPA's Office of the Ombudsman to the Administrator's Office will not work. From our work investigating the oversight offices at other agencies, including the Department of Energy and the Nuclear Regulatory Commission, POGO has determined that genuine independent oversight cannot proceed from within the bureaucracy it evaluates. In this case, we would encourage the Committee to consider placing a National Ombudsman's Office in either a White House office or as part of the legislative branch, perhaps attached to the General Accounting Office. We also believe that the legislation should include whistleblower protections for those who come to the Ombudsman with information.

We would be happy to work with you on this issue, and to answer any questions you may have.

STATEMENT OF KATHERINE ZANETTI, SHOSHONE NATURAL RESOURCES COALITION

INTRODUCTION

Mr. Chairman, my name is Kathy J. Zanetti. I am a 49-year-old grandmother of four and a proud member of a fifth generation family from the Historic Silver Valley of North Idaho.

I would like to thank you and Senator Crapo for the opportunity to speak before this committee today on a topic that has dominated the attention of my community for the last 2 years.

I am honored to represent the Citizens of Silver Valley and testify in support of Senate Bill 606. As Senator Crapo stated, I am the chairman of Shoshone Natural Resources Coalition, a non-profit group of volunteer citizens, who work and live in the Coeur d' Alene basin and are concerned about Human Health, Environmental and Economic Issues.

We are a grassroots organization made up of a very diverse group of individuals. SNRC represents business owners, district school officials, community leaders, local elected officials and generations of Silver Valley Families. Many of our members have been involved in EPA issues in the Upper CDA Basin for 20 plus years.

And although our approach and opinions about cleanup in the Silver Valley may be different, we are united in the common need for a truly independent Ombudsman.

We are a community filled with an intense pride, for our heritage, our families and most of all our way of life. A way of life now held precariously in peril by the decisions of various Federal agencies.

The Environmental Protection Agency came to the Silver Valley in the early 1980's shortly after CERCLA [Superfund] became law, to address specific cleanup at the Bunker Hill Smelter and they have been there ever since.

Although, there may have been a human health risk that warranted their presence at the time, there is no medical or undisputed scientific evidence that one exists today.

In the last 20 some years, the EPA has spent over \$400million dollars in the Silver Valley and has not even completed the original scope of cleanup. EPA Region 10 deceived the public by first promising that the superfund site in Kellogg would not extend beyond its initial 21-square mile box.

Yet, they have unilaterally expanded the range of remediation by 1500 square miles, crossing state lines, adding to the cost another \$360million dollars (possibly as much as \$1.3billion) and creating the Nation's Largest Superfund Site. With little or no regard to the citizens or communities who must endure these ever changing boundaries.

Whereupon today, after all the money and billion-dollar expansion plans, EPA's own Central Impoundment Area at the Bunker Hill Superfund Site, remains the largest point source contributor of metals into our watershed.

It is our sincere wish to take care of any necessary cleanup that remains to be done in the Upper Basin, to get out from under the Stigma of "Superfund", and to rebuilding our lives, as well as, the economic stability of our community.

Superfund actions around the Nation have taken on a life of their own, which hold communities such as mine in a never-ending state of limbo. It appears that Region 10 EPA in their dealings with the Coeur d' Alene River Basin of North Idaho has become a Bureaucratic machine, driven by personal agendas.

After years of attending meetings, drafting comments and writing hundreds of letters, we realize that our voices have fallen on deaf ears. When in reality, we were merely being counted as part of the agencies numbers game. They hold hearings and workshops but do not seem to listen to the concerns of the communities involved.

We have truly had nowhere else to turn, until the Ombudsman stepped forward.

EPA'S OFFICE OF HAZARDOUS WASTE AND THE OFFICE OF INSPECTOR GENERAL

The Office of the Ombudsman has answered our call to the Silver Valley.

First, under the Office of Solid Waste and Emergency Response, where it's authority was maintained by the very entity it was investigating, budgets and personnel were used to control ombudsman activities and who's mail was often intercepted by EPA congressional Affairs. All of which resulted in a total lack of independence. Where the United States Department of Justice even attempted to kill the investigation to protect its Natural Resource Damage lawsuit.

Second, at present, under the Office of Inspector General, the Ombudsman is to assume duties other than those designated under Superfund, take on an increased workload and basically ceases to exist as an office because, it is now a part of yet, another bureaucracy within a larger bureaucracy.

While we welcome the attempt to work with the IG's office and will welcome them with open but cautious arms to the Silver Valley, we feel that in the long term this situation cannot work. There must be a dedicated, independent Ombudsman.

The National Ombudsman serves as the only intermediary between EPA and citizens when things have gone terribly awry. This office is the last resort and sometimes the only resort for the common citizen and common sense. The Office of the Ombudsman, above all else, requires independence, so that it may work effectively with both sides to find reasonable and successful solutions that are environmentally sound and meeting the needs of communities everywhere.

The ombudsman position is the people's court of last resort. Communities like the Silver Valley need an Ombudsman who not only can, but also who must, intervene on environmental health and safety issues on our behalf. Without having their hands tied, actions influenced and censored by the controls of other agencies.

Only the Ombudsman can answer our call to do the right thing!

SENATE BILL 606, THE OMBUDSMAN REAUTHORIZATION ACT

To be effective and of true service to the public, an Ombudsman must be independent, accountable and unbiased. I believe Senate Bill 606 achieves these objectives. Without S606 communities like mine have nowhere to turn when they have exhausted all hope of working constructively with the EPA. And I for one; refuse

to continue to allow the Environmental Protection Agency to use my own tax dollars unchecked against either me, or my family.

Finally, in this Great Nation, our structure of government is set up with many forms of checks and balances, so that citizens have a channel to express concerns against abuse or cupreous acts of public officials.

The National Ombudsman Office is that channel, and therefore, should be able to work unimpeded to help achieve fair, as well as reasonable, checks and balances of the EPA.

In conclusion, I would like to also submit this written testimony.

Thank you for the opportunity to testify before this committee today and I urge you to please support Senate Bill 606.

STATEMENT OF SUSAN SHORTZ, CITIZEN OF THROOP, PA, PRESIDENT, HALT ENVIRONMENTAL LEAD POLLUTION (HELP) AND MEMBER, CITIZEN REVIEW COMMITTEE FOR THE MARJOL SITE

The Borough of Throop is a small residential community with a population of about 4,100. The Marjol Site is a former lead-acid battery recycling facility located in the Borough. The 43.9-acre Site is owned by Gould Electronics, Inc. There are approximately 65 residential homes within 500 feet of the Site boundary and 25 of those homes are within 50 feet of the Site. The Lackawanna River borders the Site to the West. Over 500,000 cubic yards of battery casings are stockpiled and buried on this site. There are PCB's, PAH's, antimony, arsenic, cadmium and other carcinogens buried on this site. Lead has been measured at levels as high as 250,000 parts per million in the soil. In addition, a large volume of soil offsite became contaminated with lead from Site operations, fugitive dust emissions, and stormwater runoff. This area is undermined from previous anthracite deep coal mining. Our county is the site of numerous mine fires and mine subsidence occurrences over the years and some are still ongoing. In reality it is an illegal, toxic, hazardous waste dump, in the middle of small town, without benefit of permits or regulatory controls such as liner, or leachate collection systems.

Several State and Federal site assessments were initiated between 1967 and 1987 because of elevated airborne emissions and high soil lead concentrations in the neighborhood. In 1987 USEPA's Technical Assistance Team collected soil samples from onsite and offsite areas. In response to elevated lead concentrations onsite and offsite in residential areas, the USEPA issued the CERCLA Order on April 6, 1988. Although the EPA assured us there were only a few homes contaminated, and they would be out of our lives in 2 years, this order resulted in the residential cleanup of 111 homes. The families and community endured soil excavation, tree and shrub removal, and interior cleaning and carpet removal. Although we later found out, through the Ombudsman's investigation, that on environmental threat alone we qualified for Superfund cleanup on the NPL listing, EPA did not list the site on the National Priority List. On June 11, 1990 a RCRA Administrative Order of Consent was signed between Gould and the EPA. For the next 10 years, we attended meetings, watched timelines come and go. And over and over the EPA continued to say that our site would be cleaned up in 2 years. Then finally in 2000 we got a glimpse of EPA's statement of basis (cleanup order). We were very disappointed that only a portion of the hazardous waste would be removed, and most of the hazardous waste would remain onsite, covered only by a thin cap. The citizens of our small community had been fighting to get our site fully cleaned up in a manner that would protect the health and welfare of our people imputably. Gould, the owner of the site, has stated since the 80's that they will only agree to cap the hazardous waste—not to clean it up. Although the Borough of Throop had spent almost \$1.5 million to prove to EPA that a "cap" is not appropriate, EPA has refused to listen. EPA has repeatedly bowed to Gould's "demands", has deliberately withheld or covered up information agreed to with Gould, and mislead us. When we heard about the National Ombudsman, Robert J. Martin's involvement in the Tarpon Springs, Florida Site, we went to Senators Arlen Specter and Rick Santorum and asked for their assistance to get National Ombudsman Martin to review our case. Mr. Martin's presence in Throop, along with Chief Investigator Hugh Kaufman marked the first time our concerns were listened to and acted upon.

The first Ombudsman hearing took place in August 2000. Following that hearing, interrogatories were sent. The results were amazing. We found out there were over 240 potentially responsible parties, including the Federal Government, who had financial liability for cleaning up the site besides Gould. We further learned that Gould received millions of dollars from the Government and other private parties, as well as numerous liability policies. We also found out the specifics of a secret

amendment to the Consent Order, which changed the requirement of temporary storage of contaminated soil onsite to permanent entombment. Through the National Ombudsman's geologist, Douglas Bell's discussions with our engineering consultants, Gannett-Fleming, we finally found someone to give credence to our concerns about mine subsidence and the impact of a potential mine fire on the site. As the investigation continued we were called to Philadelphia to meet with EPA Region III Administrator, Bradley Campbell. He listened to our concerns and told us he would wait for the recommendations from the Ombudsman before making a final decision. Then suddenly in December 2000 a final decision was handed down on the Marjol Site. It no longer called for any guaranteed removal, only what would not fit under the cap. It also no longer called for solidification of the remaining contaminants under the cap. It also came out before the Ombudsman had an opportunity to complete his work and make his recommendation to EPA. Recommendations EPA had promised to listen to. Needless to say we were shocked. Then on January 5, 2001, this case, and every other National Ombudsman case, was suspended, until "clear and consistent direction" was received from EPA Management. EPA Management initiated blatant interference with the National Ombudsman cases, including Marjol. Among other things EPA prohibited the National Ombudsman's Chief Investigator, Hugh Kaufman, from helping the Ombudsman and attempted to have an Inspector General official, with a conflict of interest, review the case. All of this was done throughout 2001 over the strong objection of Senators Specter and Santorum. We hit another stone wall.

The Pennsylvania delegation communicated with EPA Administrator Christine Todd Whitman, asking EPA to allow Ombudsman Martin to complete his work on the Marjol Site without further hindrance. The delegation met with Administrator Whitman on March 8, 2001 and received assurances that Ombudsman Martin would receive staffing and other resources immediately to proceed with his work. The EPA decision for the Marjol Site was on hold. Despite promises not to hinder the Ombudsman, EPA Management and the EPA Inspector General proceeded to unilaterally detail an investigator from the EPA Office of Inspector General to perform the National Ombudsman Marjol Investigation. This was done without notice, consultation, or approval of the National Ombudsman, even though the individual had a known potential conflict of interest. The Pennsylvania delegation has continued to try to intervene to get EPA to keep its promises to them and our community to no avail. As recently as February 2002, National Ombudsman Martin and his Chief Investigator Hugh Kaufman held the second round of hearings on the Marjol Case. This time EPA failed to participate in the Ombudsman process. One of the many new revelations that came out of that hearing was the fact that EPA has continued to lie to the community of Throop and active officials by falsely stating that the Site could not be cleaned up under the Superfund program. And on goes the saga.

The Independent National Ombudsman's office within the EPA plays an important role. It serves as a watchdog for the citizens and as backstop to ensure that the best decisions are being made for their community. Trust in the process is heightened when people know they have an "independent Ombudsman" to closely examine the agency decisions. My concern is to ensure that the National Ombudsman's office be resurrected to allow it to continue to operate in a transparent way and provide meaningful assistance to local communities, like Throop, when EPA falters as it has in our case. EPA officials have publicly assured us of their full support for the National Ombudsman's efforts. Their actions suggest otherwise. No government official who supposedly works for us and is paid by us should be afraid to have their decisions subjected to public and substantive Ombudsman scrutiny.

The National Ombudsman Martin's work on the Marjol Site was essential in exposing the following problems. The Ombudsman's investigation found withheld documents; secret agreements between Gould and EPA; they questioned the EPA's choice of Resource Conservation Recovery Act (RCRA) as a remediation process; they questioned the EPA's use of authority to allow regulations and permitting processes to be avoided. I would also like to mention the questioning of the EPA's "sound science", that allows a remediation of a hazardous waste site, that has lead levels at 250,000 PPM as well as Polychlorinated-Biphenyl's (PCB's) and Poly aromatic Hydrocarbons (PAH's), to be abandoned in the middle of a residential community; that is adjacent to the Lackawanna River, and on a site that has continuing mine subsidence and the potential for mine fires, with EPA's official recommendation of only a thin cap.

The General Accounting Office (GAO) issued a report in April and July 2001 concerning the EPA's handling of the Ombudsman office. They concluded that EPA did not provide the Ombudsman with sufficient independence and that the EPA treated their Ombudsman much less independently than did other Federal agencies. They felt he should be allowed to choose his own staff, supervise them and manage his

own budget. The GAO also said he should report to the Administrator and Congress like all other Federal Ombudsman. Senators and Congressman have expressed their support. Citizens and communities all over the United States have agreed. Thousands of signatures have been collected, and Federal Register comments were provided in 2001. Yet to no avail. As a matter of fact, all of their recommendations are covered in Senate Bill 606. Christine Todd Whitman refused to listen. She mischaracterized the GAO report and used that mischaracterization to fold the National Ombudsman under the Inspector General. She has ignored the pleas of the people. She has ignored the GAO recommendations. She has ignored the Senators and Congressman. She has boycotted meetings and ratified Region III's boycotting of our recent National Ombudsman hearing. Please stop this injustice and help us to regain our faith in the government in a time when it is most needed. Truth and honesty must prevail.

The National Ombudsman Office is where we can have our complaints and concerns heard. He is a public advocate. Mr. Martin and his staff, Mr. Kaufman and Mr. Bell, did their best for many communities even though their hands were tied. I ask that you meet with Administrator Whitman and ask her to reconstitute the National Ombudsman Office under Robert Martin and pass S. 606 so that no EPA Administrator in the future can harm American communities as Christine Whitman has done. You are our last hope.

AMERICAN BAR ASSOCIATION,
Washington, DC., July 2, 2002.

Hon. JAMES M. JEFFORDS,
Chairman, Committee on Environment and Public Works,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the American Bar Association ("ABA") and its more than 400,000 members throughout the country, I write to express our support for the greater use of ombuds¹ to receive, review, and resolve complaints involving public and private entities and of your committee's efforts to clarify the role of the EPA Ombudsman. Accordingly, we are pleased to submit these comments regarding S. 606, the "Ombudsman Reauthorization Act of 2002," and we ask that this letter and attachment be included in the record of the June 25, 2002, hearing regarding this legislation.

S. 606 instructs the EPA Administrator to establish the Office of the Ombudsman of the Environmental Protection Agency (EPA) and then defines the duties, powers, and responsibilities of the ombudsman. As the ABA examined the establishment of ombuds in Federal, State, and local governments, academic institutions, and private organizations, it found that the role of the ombuds in these entities, how they function, and the issues they address vary widely and significantly. Individuals who come to ombuds for help cannot know what to expect, and the offices may be established in ways that compromise their effectiveness. In August 2001, the ABA House of Delegates adopted a formal policy endorsing Standards for the Establishment and Operation of Ombuds Offices (ABA Standards). Attached for your consideration is a copy of the ABA's resolution and report. The resolution expresses the ABA's official policy; the accompanying report is included for informational purposes only.

The ABA adopted this policy to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. All ombuds must operate with certain basic authorities and essential characteristics. The Standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds.

THE ROLE OF THE OMBUDSMAN

An ombuds is a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds' defined jurisdiction and to address, investigate or otherwise examine these issues independently and impartially. The ABA believes that in order to properly fulfill its important functions, the ombuds must be given the appropriate power and authority.

¹The term ombuds in this letter is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman.

S. 606 contains a number of useful provisions designed to create a strong and effective EPA Ombudsman office. In particular, the ABA supports the provisions of S. 606 authorizing the ombudsman to examine records and documents (Sec. 2008(d)(2) and (3)) and requiring the ombudsman to publish periodic reports on the status of complaints filed with the ombudsman (Sec. 2008(e)(4)). The ABA also supports the provision granting the ombudsman the discretion to initiate action without receiving a complaint or question (Sec. 2008(d)(1)). While these provisions are useful as far as they go, the ABA believes that S. 606 should be amended to grant the ombudsman greater discretion in determining whether to accept or act on a particular complaint or question, because the ombudsman is in the best position to determine whether a complaint has any merit. The ABA also suggests that the committee amend S. 606 to expressly authorize the ombudsman to initiate litigation when necessary to enforce a subpoena or to otherwise enforce or protect the responsibilities of the office.

The ABA Standards state that an ombuds office should be established by a legislative enactment or publicly available written document "which clearly sets forth the role and jurisdiction of the ombuds" and which authorizes the ombuds to engage in a variety of enumerated activities. To clearly set forth the role of the ombudsman, the ABA also recommends that S. 606 state whether the EPA Ombudsman is a "classical" or "advocate" ombuds. A classical ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. An advocate ombuds, like a classical, evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved and may issue reports to the legislature or a specific agency. In addition to stating whether the EPA Ombudsman is a classical or advocate ombuds, S. 606 should also more clearly enumerate the activities that the ombudsman is expected to perform.

Although an ombuds should be granted clear and appropriate powers, the ABA also believes that in order to ensure the ombuds' independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombuds' authority. An ombuds works outside of line management structures and has no direct power to compel any decision. An ombuds should not, nor should an entity expect or authorize an ombuds to make, change, or set aside a law, policy, or administrative/managerial decision nor to directly compel an entity or any person to make those changes. While an ombuds may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombuds cannot compel an entity to implement the recommendations.

The ABA also believes that when defining the powers of an ombuds, care must be taken to protect the rights of those who may be affected by the actions of the ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds' review to serve as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds' inquiry or investigation is not a substitute for an administrative or judicial proceeding, and in such proceedings, the deciding official should not consider the ombuds' review or recommendations to be controlling. Instead, the deciding official must conduct a de novo examination of the matter.

The ABA supports those provisions in S. 606 that seek to protect the existing due process rights of claimants, including the provisions stating that the legislation shall not limit any remedy or right of appeal (Sec. 2008(g)(1)) and the provision stating that the establishment of the EPA Office of Ombudsman shall not affect any procedure concerning grievances, appeals, or administrative matters under the legislation or any other law, including regulations (Sec. 2008(g)(2)). In order to further protect the due process rights of the parties, however, the ABA recommends that S. 606 be amended to expressly state that the ombuds' review shall not make, change, or set aside a law, policy or administrative decision, make binding decisions or determine rights, or directly compel an entity or any person to implement the ombuds' recommendations. In addition, S. 606 should expressly state that the ombuds should not accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent, and it should state that an ombuds' inquiry or investigation does not substitute for an administrative or judicial proceeding.

ESSENTIAL CHARACTERISTICS

The ABA believes that in order to permit an ombuds to properly discharge his or her duties, an ombuds program must promote the core qualities of independence, impartiality, and confidentiality. Although various provisions of S. 606 seek to address these issues regarding the EPA Office of Ombudsman, the ABA encourages

the committee to amend the bill to reflect these characteristics more fully. Great care has to be exercised in establishing the structure of the ombuds to ensure that the independence, impartiality, and confidentiality essential to the ombuds are, in fact, achieved.

Independence

To be credible and effective, the office of the ombuds must be independent in its structure, function, and appearance. Independence means that the ombuds must be free from interference in the legitimate performance of duties. In assessing whether an ombuds is independent, one key factor to consider is whether anyone subject to the ombuds' jurisdiction or anyone directly responsible for a person under the ombuds' jurisdiction can control or limit the ombuds' performance of duties. In addition, other key factors are whether a person can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources.

As currently written, S. 606 includes a number of provisions aimed at promoting the independence of the EPA Ombudsman. In particular, S. 606 grants the EPA Ombudsman the power to investigate any action of the EPA's Assistant Administrator for Solid Waste and Emergency Response on receipt of a complaint or in the ombudsman's discretion (Sec. 2008 (d)(1)) and the power to examine any documents of the EPA and enter and inspect, without notice, any property under the EPA's administrative jurisdiction (Sec. 2008(d)(2)). In addition, S. 606 grants the EPA Ombudsman authority to request that the EPA Inspector General subpoena material documents or testimony (Sec. 2008(d)(3)), as well as the authority to administer a budget (Sec. 2008(d)(6)), appoint Associate Ombudsmen and evaluate and carry out personnel actions (Sec. 2008(e)(1)), and maintain contact information different from other EPA offices (Sec. 2008(e)(2)), among other things.

While these provisions will help promote the independence of the EPA Ombudsman, the ABA is concerned that they do not go far enough to guarantee the independence of the ombudsman. For example, the ABA is concerned that in order to subpoena persons or records, the ombudsman must request the assistance of the EPA Inspector General (Sec. 2008(d)(3)). Because we believe that this is inconsistent with the ombudsman's independence, we encourage the committee to amend S. 606 to provide the ombudsman with independent subpoena authority. In addition, the ABA encourages the committee to consider other amendments that would contribute to the ombudsman's independence including new provisions that would create a set term of office, access to and resources for independent legal advice and counsel, prohibition of disciplinary actions against the ombudsman for performing the duties of the office, and removal only for cause.

Impartiality

The ABA also believes that in order to be effective, an ombuds must be impartial. The ombuds' structural independence is the foundation upon which the ombuds' impartiality is built. If the ombuds is independent from line management and does not have administrative or other obligations or functions, the ombuds can act in an impartial manner. Acting in an impartial manner, as a threshold matter, means that the ombuds is free from initial bias and conflicts of interest in conducting inquiries and investigations. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change or from otherwise being an advocate on behalf of a designated constituency when the ombuds position is created as an "advocate" ombuds. The ombuds, therefore, has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change.

While S. 606 provides some structural independence, as noted above, the bill is silent with regard to the type of ombuds being created. The ABA encourages the clarification of the intended ombuds role by specifying whether the EPA Ombudsman is to be a classical or an advocate ombuds, and hence, whether the EPA Ombudsman is to be totally impartial or is to serve as an advocate for the designated constituency.

(3) Confidentiality

The American Bar Association also believes that confidentiality is an essential characteristic of ombuds that permits the process to work effectively. Confidentiality promotes disclosure by reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party.

Confidentiality must extend to all communications with the ombuds and all notes and records maintained by the ombuds in the performance of assigned duties. It be-

gins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity but may want the ombuds to act on the information presented. An ombuds should discuss confidentiality and any exceptions with individuals who communicate with the office.

S. 606 contains a sweeping confidentiality provision that states that the EPA Ombudsman “shall maintain as confidential and privileged any and all communications concerning any matter pending, and the identities of any parties or witnesses appearing before the Ombudsman.” (Sec. 2008(d)(5)). Unfortunately, this provision may be overly broad and appears to conflict with the Administrative Dispute Resolution Act (ADRA).²

In creating a confidentiality section in ADRA that is the most detailed of any Federal or State ADR statute, Congress explicitly stated its intent to give parties in federally related ADR proceedings assurance that their dispute resolution communications would generally be immune from discovery. Congress went on to define these protections in detail. ADRA forbids neutrals from disclosing such communications, and also states that the neutrals shall not “be compelled to disclose” the communications. The existing statute also guarantees certain due process protections, including prior notice to parties in any case where protected data are sought, an opportunity for the parties to contest disclosure before a Federal court, and a decision by the court reached under a balancing test based on specific statutory criteria. The ADRA goes on to say that a dispute resolution communication which is between a neutral and a party and which may not be disclosed under the confidentiality provisions of the ADRA shall also be exempt from disclosure under the Freedom of Information Act.

While the ABA supports the general confidentiality principle outlined in S. 606, we believe that Section 2008(d)(5) should be amended to comport with the confidentiality provisions of the ADRA. ADRA represents a careful balance between open government, oversight, and confidentiality, in which Congress makes clear the standards and procedures that should govern whenever disputed issues of confidentiality arise in agency-related ADR, which includes the activities of an agency ombuds. The ADRA’s stated intent is clear: to assure parties to ADR proceedings involving Federal programs that communications they make in those proceedings will not later be used against them. Its language precluding voluntary and compulsory disclosure is explicit, its coverage broad, its exceptions narrowly drawn, and its procedures spelled out in detail.

Congress established the EPA Ombudsman to provide help to the public in resolving issues and concerns about EPA’s solid and hazardous waste programs. Because an ombuds works for the resolution of an individual issue and, where necessary, makes recommendations for the improvement of the general administration of the entity, establishing an ombuds is appropriate. In order to be credible and effective, the ABA believes that the EPA Office of the Ombudsman must be truly independent in structure, form, and appearance; must be impartial; and must promote and protect confidentiality consistent with the ADRA. In order to ensure the effectiveness of the EPA Ombudsman, we urge you to adopt the amendments outlined above.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA’s positions on these issues, please contact our legislative counsel for administrative law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

ROBERT D. EVANS.

²5 U.S.C. § 574

Approved by the ABA House of Delegates
107D
August 7, 2001

AMERICAN BAR ASSOCIATION, SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, SECTION OF DISPUTE RESOLUTION, SECTION OF BUSINESS LAW, SECTION OF STATE AND LOCAL GOVERNMENT LAW, GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION, SENIOR LAWYERS DIVISION, COMMISSION ON THE LEGAL PROBLEMS OF THE ELDERLY, NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES, STANDING COMMITTEE ON ENVIRONMENTAL LAW

RECOMMENDATION*

RESOLVED, that the American Bar Association supports the greater use of "ombuds" to receive, review, and resolve complaints involving public and private entities.

FURTHER RESOLVED, that the American Bar Association endorses the Standards for the Establishment and Operation of Ombuds Offices dated August 2001.

STANDARDS¹ FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES

PREAMBLE

Ombuds² receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, State and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories: A Classical Ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. Both types may conduct inquiries or investigations and suggest modifications in policies or procedures. An Advocate Ombuds may be located in either the public or private sector and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These standards were developed to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombuds are:

- independence
- impartiality in conducting inquiries and investigations, and
- confidentiality.

ESTABLISHMENT AND OPERATIONS

A. An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the "charter") which clearly

*The "Recommendation" and the "Standards," but not the attached "Report," constitute official ABA policy.

¹These standards expand on a 1969 ABA resolution to address independence, impartiality, and confidentiality as essential characteristics of ombuds who serve internal constituents, ombuds in the private sector, and ombuds who also serve as advocates for designated populations.

²The term ombuds in this report is intended to encompass all other forms of the word, such as ombudsperson, ombuds officer, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to:

- (1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds's jurisdiction as defined in the charter establishing the office
- (2) exercise discretion to accept or decline to act on a complaint or question
- (3) act on the ombuds's own initiative to address issues within the ombuds's prescribed jurisdiction
- (4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
- (5) gather relevant information
- (6) resolve issues at the most appropriate level of the entity
- (7) function by such means as:
 - (a) conducting an inquiry
 - (b) investigating and reporting findings
 - (c) developing, evaluating, and discussing options available to affected individuals
 - (d) facilitating, negotiating, and mediating
 - (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them
 - (f) identifying complaint patterns and trends
 - (g) educating
 - (h) issuing periodic reports, and
 - (i) advocating on behalf of affected individuals or groups when specifically authorized by the charter
- (8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

QUALIFICATIONS

B. An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

C. To ensure the effective operation of an ombuds, an entity should authorize the ombuds to operate consistently with the following essential characteristics. Entities that have established ombuds offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any such deficiency.

(1) *Independence.* The ombuds is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.

(2) *Impartiality in Conducting Inquiries and Investigations.* The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombuds from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombuds may become an advocate within the entity for change where the process demonstrates a need for it.

(3) *Confidentiality.* An ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombuds's office. An ombuds does not reveal the identity of a complainant without that person's express consent. An ombuds may, however, at the ombuds's discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal

its source. An ombuds should discuss any exceptions to the ombuds's maintaining confidentiality with the source of the information.³

LIMITATIONS ON THE OMBUDS' AUTHORITY

D. An ombuds should not, nor should an entity expect or authorize an ombuds to:

- (1) make, change or set aside a law, policy, or administrative decision
- (2) make binding decisions or determine rights
- (3) directly compel an entity or any person to implement the ombuds's recommendations
- (4) conduct an investigation that substitutes for administrative or judicial proceedings
- (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent
- (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any existing Federal, State, or local labor or employment law, rule, or regulation, unless the ombuds is authorized to do so by the collective bargaining agreement or unless the collective bargaining representative and the employing entity jointly agree to allow the ombuds to do so, or if there is no collective bargaining representative, the employer specifically authorizes the ombuds to do so, or
- (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

REMOVAL FROM OFFICE

E. The charter that establishes the office of the ombuds should also provide for the discipline or removal of the ombuds from office for good cause by means of a fair procedure.

NOTICE

F. These standards do not address the issue whether a communication to the ombuds will be deemed notice to anyone else including any entity in or for which the ombuds acts. Important legal rights and liabilities may be affected by the notice issue.

CLASSICAL OMBUDS

G. A classical ombuds is a public sector ombuds who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, or public employee. In addition to and in clarification of the standards contained in Paragraphs A-F, a classical ombuds:

- (1) should be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office
- (2) should have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office
- (3) should be authorized to issue public reports
- (4) should be authorized to advocate for change both within the entity and publicly
- (5) should, if the ombuds has general jurisdiction over two or more agencies, be established by legislation⁴ and be viewed as a part of and report to the legislative branch of government.

ORGANIZATIONAL OMBUDS

H. An organizational ombuds facilitates fair and equitable resolutions of concerns that arise within the entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an organizational ombuds should:

- (1) be authorized to undertake inquiries and function by informal processes as specified by the charter

³A classical ombuds should not be required to discuss confidentiality with government officials and employees when applying this paragraph to the extent that an applicable statute makes clear that such an individual may not withhold information from the ombuds and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the ombuds.

⁴The 1969 ABA Resolution, which remains ABA policy, provided that a classical ombuds should be "appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds."

- (2) be authorized to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office
- (3) be authorized to issue reports
- (4) be authorized to advocate for change within the entity.

ADVOCATE OMBUDS

I. An advocate ombuds serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an advocate ombuds should:

- (1) have a basic understanding of the nature and role of advocacy
- (2) provide information, advice, and assistance to members of the constituency
- (3) evaluate the complainant's claim objectively and advocate for change relief when the facts support the claim
- (4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter, and
- (5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

REPORT

The American Bar Association (ABA) adopted a resolution in 1969 recommending that State and local governments consider establishing ombuds who would be authorized to inquire into administrative action and to make public criticism. That policy also recommended that the statute or ordinance creating the ombuds contain 12 essential points. The ABA then adopted a resolution in 1971 recommending that the Federal Government experiment with the establishment of ombudsmen for certain geographical areas, specific agencies, or for limited phases of Federal activities.

Over the past three decades, and particularly recently, an extraordinary growth in the number and type of ombuds⁵ has taken place. Congress has established several ombuds in various programs. In addition to specific legislation concerning ombuds, the Administrative Dispute Resolution Act authorizes Federal agencies to use "ombuds."

Federal, State and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories. A Classical Ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. Both types may conduct inquiries or investigations and suggest modifications in policies or procedures. An Advocate Ombuds may be located in either the public or private sector, and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds's office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These standards were developed to provide advice and guidance on the structure and operation of ombuds offices to the end that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process.

The ABA's Board of Governors establishes legislative and governmental priorities annually. Based on its importance to society, to the practice of law, and in the administration of justice, one of the year 2001 priorities is alternative dispute resolution. The ABA supports the greater use of alternative dispute resolution by private parties, government agencies, and the courts "as a necessary and welcome component of America's civil justice system, so long as all parties' legal rights and remedies are protected." As a protector of individual rights against the excesses of public and private bureaucracies, an ombuds receives complaints and questions from individuals concerning the functioning of an entity, works for the resolution of particular issues, and where necessary, makes recommendations for the improvement

⁵The term ombuds in this report is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

of the general administration of the entity. As an independent, impartial, and confidential complaint handler, an ombuds serves as an alternative means of dispute resolution a means by which issues may be raised, considered, and resolved.

Consistent with ABA priorities, the Sections of Administrative Law and Regulatory Practice and of Dispute Resolution have worked together and appointed a steering committee consisting of representatives from the Coalition of Federal Ombudsmen, the National Association of State Ombudsman Programs, the International Ombudsman Institute (IOI subsequently withdrew), The Ombudsman Association, the United States Ombudsman Association, and the University and College Ombuds Association, as well as other experts in the field. The committee consulted with numerous ombuds from Federal, State, and local agencies, academic institutions, companies, and non-profit organizations. Further, it solicited, received, and considered comments from the international community of ombuds. Based on the steering committee's work and following extensive consultation with the Commission on Legal Problems of the Elderly, the Section of Business Law, and the Section of Labor and Employment Law, the Sections of Administrative Law and Regulatory Practice and Dispute Resolution have developed a resolution encouraging the use of ombuds in the public and private sectors that adhere to the Standards for the Establishment and Operation of the Ombudsman Offices (Standards).

The Resolution and Standards broaden the ABA's existing policy to address ombuds who are appointed within government, academia, and the private sector, and who respond to complaints from individuals from within and outside the entity. Further, they clarify the means by which various types of ombuds operate.

For Federal, State, and local governments that want to create a Classical ombuds who would be authorized to address, investigate or inquire into administrative action and to criticize agencies, officials, and public employees, the ABA's 1969 policy continue to serve as a model.⁶ This Resolution and the Standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds. Ombuds must operate consistently with these essential characteristics to discharge the duties of the office effectively. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

THE RESOLUTION

The resolution recognizes the value of the ombuds in the public and private sectors. For example, the Organizational Ombuds in one prominent company resolves several hundred workplace matters every year; that experience is echoed by other companies and increasingly by government agencies and academic institutions. Classical Ombuds have investigated and issued reports on important issues that need to be addressed by the body politic; a recent prominent example concerned prison conditions. Advocate Ombuds have been successful in protecting vulnerable populations, such as children and residents of nursing homes. As a result, the Resolution recognizes the contribution these offices make in providing a means by which complaints are received, the underlying facts developed through an informal inquiry or a more formal investigation, and those complaints found to have merit are suitably addressed in a means that fits the situation. The Resolution, therefore, supports the greater use of ombuds.

⁶The 12 essential characteristics that were identified in the original ABA resolution continue to have vitality and remain ABA policy. They are: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority of the legislative body, such as two thirds; (4) independence of the ombudsman through a long term, not less than 5 years, with freedom from removal except for cause, determined by more than a majority of the legislative body; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of civil service and classifications acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; and, (12) immunity of the ombudsman and his staff from civil liability on account of official action.

The Resolution also recognizes that entities that create ombuds offices should adhere to the Standards for the establishment and operations of the ombuds offices. The fundamental underlying premise of this resolution is that all ombuds must operate with certain basic authorities and essential characteristics. The effort here is to provide practical advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process.

STANDARDS

Section A. Establishment and Operations

An ombuds is a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds's defined jurisdiction and to address, investigate, or otherwise examine these issues independently and impartially.

Importantly, the ombuds's jurisdiction who complains and who or what are complained about needs to be defined in advance, setting out the scope of the duties and authority. The ombuds's jurisdiction must be defined in an official act that establishes the office, which is appropriately called the "charter" in the standards. The charter may be a legislative enactment⁷ or a publicly available written policy. The jurisdiction may be limited to a defined constituency or population. For example, a State ombuds may receive complaints or questions from any person, while a university student ombuds may receive complaints or questions only from students at that university, and a long-term care ombuds has jurisdiction only to resolve complaints initiated by or on behalf of residents receiving long-term care.

The ombuds determines whether to accept or to act on a particular complaint or question. The ombuds also has the discretion to initiate action without receiving a complaint or question. An ombuds may determine that the complaint is without merit. Or, an ombuds may receive a complaint or question on a specific topic and conduct an inquiry on a broader or different scope.

Appropriate subjects for an ombuds to review include allegations of unfairness, maladministration, abuse of power, abuse of discretion, discourteous behavior or incivility, inappropriate application of law or policy, inefficiency, decision unsupported by fact, and illegal or inappropriate behavior. It is essential that the ombuds operate by fair procedures to aid in the just resolution of the matter. Ombuds need access to all information relevant to a complaint or a question so that the review is fair and credible, and the charter should authorize access to all relevant information. The entity must be responsible for protecting those seeking assistance from or providing information to the ombuds from personal, professional, or economic retaliation, loss of privacy, or loss of relationships.

An ombuds may make a formal or informal report of results and recommendations stemming from a review or investigation. If such a report is issued, the ombuds should generally consult with an individual or group prior to issuing a report critical of that individual or group, and include their comments with the report. Moreover, the ombuds should communicate the outcome, conclusion or resolution of a complaint or an inquiry to the complainant and may also communicate with other concerned entities or individuals.

In addition, to ensure the office's accountability, an ombuds should issue and publish periodic reports summarizing the ombuds's findings and activities. This may include statistical information about the number of contacts with the ombuds, subjects that the ombuds addressed, evaluation by complainants, etc. These reports may be done annually, biannually, or more frequently.

In receiving complaints or questions and examining problems, the ombuds may use a variety of dispute resolution and other techniques. These processes include: conducting an inquiry; investigating and reporting findings; developing, evaluating, and discussing the options which may be available for remedies or redress; facilitating, negotiating, and mediating; making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have authority to act on them; identifying complaint patterns and trends; and educating.

As necessary, the ombuds may advocate on behalf of affected individuals or groups when authorized by the charter and the situation warrants that action. An ombuds may initiate litigation to enforce or protect the authority of the office. For example, if an ombuds issues a subpoena and the subpoena is ignored, the ombuds should be able to initiate litigation to compel a response. In addition, an ombuds

⁷The "legislative enactment" might be in a constitution, statute, local government charter, or local ordinance depending on the establishing jurisdiction.

may initiate litigation as otherwise provided by these standards or as required by law. For example, an advocate ombuds should be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

An ombuds uses the powers of reason and persuasion to help resolve matters. The goal of the ombuds's efforts is to provide a path to fairness and justice. Therefore, the ombuds's quest is to seek the fair and just resolution of the matter.

SECTION B. QUALIFICATIONS

An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

SECTION C. THE ESSENTIAL CHARACTERISTICS

The original 1969 resolution contained 12 essentials for the ombuds described in it. These have been distilled and expanded in the Standards. The core qualities are independence, impartiality in conducting inquiries and investigations, and confidentiality. Without them, an ombuds cannot discharge the duties of the office effectively. The Standards therefore provide that an entity should authorize an ombuds it establishes to operate consistently with these essential characteristics to ensure the effective operation of the duties of the office. The Standards also recognize, however, that some entities may have already established offices that lack appropriate safeguards to comply fully with the characteristics. The Standards then provide that such entities should take prompt steps to remedy any such deficiency.

1. Independence in structure, function, and appearance

To be credible and effective, the office of the ombuds is independent in its structure, function, and appearance. Independence means that the ombuds is free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry. In assessing whether an ombuds is independent, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of duties, or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources.

Historically, ombuds were created in parliamentary systems and were established in the constitution or by statute, appointed by the legislative body, and had a guarantee of independence from the control of any other officer, except for responsibility to the legislative body. This structure remains a model for ensuring independence, and a number of States have followed it. In more recent times, however, ombuds have been created by public officials without legislation, by regulation or decree, and by private entities. Ensuring the independence of the ombuds is equally important in these instances, but will require other measures.⁸

Great care has to be exercised in establishing the ombuds structure to ensure that the independence described in the resolution is, in fact, achieved. Choosing which of these approaches are appropriate will depend on the environment. The instrument used to establish independence should be the strongest available and should guarantee the independence of the ombuds from control by any other person.

The 12 essential characteristics of the 1969 ABA Resolution continue to serve as the model for an ombuds reporting to the legislative branch of government who is

⁸In the United States since the late 1960's, a number of other ways have been developed to ensure independence. Examples of approaches that contribute to an ombuds's independence include: establishment of the office through a formal act of a legislature or official governing body of an organization; establishment outside the entity over which the ombuds has jurisdiction; a direct reporting relationship to a legislative body, the official governing body of an organization or the chief executive; designation as a neutral who is unaligned and objective; a broadly defined jurisdiction not limited to one part of the entity or one subject matter; appointment or removal of the ombuds free of influence from potential subjects of a complaint or inquiry; a set term of office; no reporting relationship to someone with assigned duties that conflict with the ombuds's role; no assignment of duties other than that of the ombuds function; specifically allocated budget and sufficient resources to perform the function; freedom to appoint, direct, and remove staff; sufficient stature in the organization to be taken seriously by senior officials; placement in an organization at the highest possible level and at least above the heads of units likely to generate the most complaints; discretion to initiate and pursue complaints and inquiries; access to and resources for independent legal advice and counsel; prohibition of disciplinary actions against the ombuds for performing the duties of the office; removal only for cause; provision of an employment contract that the ombuds will receive a significant severance provision if terminated without good cause.

authorized to investigate administrative action, help provide legislative oversight, and offer criticism of agencies from an external perspective. While there are a number of potential avenues of achieving independence, experience on the State and local level has demonstrated rather consistently that unless there is a structural independence for these ombuds akin to the 1969 ABA Resolution that independence will not be accomplished and the office will not be able to function as envisioned in this resolution and the accompanying standards.

Structuring independence for ombuds who serve inside organizations and classical ombuds who address issues within a single program or agency require similar care. These elements should be in the charter. The ombuds position should be explicitly defined and established as a matter of organizational policy, authorized at the highest levels of the organization; the ombuds should have access to the chief executive officer, senior officers and the oversight body or board of directors of the organization; the ombuds should also have access to all information within the organization, except as restricted by law; and the ombuds should have access to resources for independent legal advice and counsel.

The Standards recognize that at this time there are ombuds who have not achieved this goal. The Standards urge and anticipate that these variations will be eliminated over time.

2. Impartiality in conducting inquiries and investigations

The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. If the ombuds is independent from line management and does not have administrative or other obligations or functions, the ombuds can act in an impartial manner.

Acting in an impartial manner, as a threshold matter, means that the ombuds is free from initial bias and conflicts of interest in conducting inquiries and investigations. Acting in an impartial manner also requires that the ombuds be authorized to gather facts from relevant sources and apply relevant policies, guidelines, and laws, considering the rights and interests of all affected parties within the jurisdiction, to identify appropriate actions to address or resolve the issue.

The ombuds conducts inquiries and investigations in an impartial manner. An ombuds may determine that a complaint is without merit and close the inquiry or investigation without further action. If the ombuds finds that the complaint has merit, the ombuds makes recommendations to the entity and/or seeks resolution for a fair outcome. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change nor from otherwise being an advocate on behalf of a designated constituency. The ombuds therefore has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change. For example, when an ombuds identifies a systemic problem, it would be appropriate for the ombuds to advocate for changes to correct the problem. An advocate ombuds may initiate action and therefore serve as an advocate on behalf of a designated population with respect to a broad range of issues and on specific matters when the individual or group is found to be aggrieved. But, when determining the facts, the ombuds must act impartially.

3. Confidentiality

Confidentiality is an essential characteristic of ombuds that permits the process to work effectively. Confidentiality promotes disclosure from reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party. Confidentiality is a further factor that distinguishes ombuds from others who receive and consider complaints such as elected officials, human resource personnel, government officials, and ethics officers.

Confidentiality extends to all communications with the ombuds⁹ and to all notes and records maintained by the ombuds in the performance of assigned duties. It begins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity but may want the ombuds to act on the information presented. Therefore, an ombuds does not reveal the identity of a complainant without that person's consent. The ombuds may, however, disclose con-

⁹For example, the Model Ombudsman Statute for State Governments that was developed by the Ombudsman Committee of the Section of Administrative Law and Regulatory Practice in 1974 directs the ombudsman to "maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before him." See, Bernard Frank, State Ombudsman Legislation in the United States, 29 U. Miami L.R. 379 (1975).

fidential information so long as doing so does not compromise the identity of the person who supplied it. It should be emphasized that the decision whether or not to disclose this information belongs to the ombuds, and it would not be appropriate for anyone to demand that the ombuds disclose such information, except as required by statute. To the extent that an ombuds may not maintain confidentiality, the ombuds should discuss those exceptions with individuals who communicate with the office.

The authorizing entity should allow the ombuds to provide confidentiality of the identity of persons who communicate with the ombuds and of information provided in confidence. The authorizing entity should not seek information relating to the identity of complainants nor seek access to the ombuds's notes and records.

Providing for confidentiality and protection from subpoena in a statute is particularly important because, where statutes have not provided confidentiality, State courts have not consistently recognized an ombuds privilege nor granted protective orders to preserve the confidentiality of communication made to ombuds. One Federal district court, *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987), recognized a limited privilege under Federal law for an ombuds with a State statutory privilege. The only Federal circuit court to have addressed the issue, *Carman v. McDonnell Douglas Corp.*, 114 F. 3d 790 (8th Cir. 1997), failed to recognize an ombuds privilege.

Short of explicit statutory authority, ombuds offices should adopt written policies that provide the fullest confidentiality within the law. These policies should be publicly available, broadly disseminated, and widely publicized. Several existing model ombuds acts and policies of ombuds organizations address confidentiality.

An ombuds will rarely, if ever, be privy to something that no one else knows. Therefore, providing confidentiality protection to the ombuds allows the ombuds to perform assigned duties while at the same time, society continues to have access to the underlying facts. As evidenced by the statutes and policies that have been developed, there may be instances in which other, competing societal interests dictate that the ombuds must disclose some information. If an individual speaks about intending harm to himself or herself or others, an entity may require an ombuds to disclose this information. Moreover, an ombuds may be compelled by protective service laws or professional reporting requirements to report suspected abuse.

Section D. Limitations on the Ombuds' authority

An ombuds works outside of line management structures and has no direct power to compel any decision. The office is established by the charter with the stature to engender trust and to help resolve complaints at the most appropriate level of the entity. To ensure the ombuds' independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombuds' authority.

An ombuds should not, nor should an entity expect or authorize an ombuds to make, change, or set aside a law, policy or administrative/managerial decision, nor to directly compel an entity or any person to make those changes. While an ombuds may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombuds cannot compel an entity to implement the recommendations.

It is essential that an ombuds operate by fair procedures which means that the actions taken will likely vary with the nature of the concern, and that care must be taken to protect the rights of those who may be affected by the actions of an ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds's review to serve as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds's inquiry or investigation does not substitute for an administrative or judicial proceeding. In an administrative or judicial proceeding, the deciding official should not consider the ombuds's review or recommendations to be controlling. Rather, the deciding official must conduct a de novo examination of the matter.

Moreover, it would not be appropriate for the ombuds to act as an appellate forum when a complainant is dissatisfied with the results in a formal adjudicatory or administrative proceeding. Thus, an ombuds should not take up a specific issue that is pending in a legal forum without the concurrence of the parties and the presiding officer. It may, however, be fully appropriate for an ombuds to inquire into matters that are related to a controversy that is in litigation so long as they are not the subject of the suit.

Further, an ombuds should not address, nor should an entity expect or authorize an ombuds to address, any issue that is the subject of a collective bargaining agreement. There are two potential exceptions to this general prohibition: An ombuds may address issues concerning employees who have a lawfully designated collective

bargaining agreement if: (1) the ombuds is authorized to do so by the collective bargaining agreement covering the employees or (2) the collective bargaining representative and the employing entity jointly agree to allow the ombuds to do so.

Even where there is no collective bargaining agreement, the involvement of an ombuds in matters that fall within the purview of labor or employment laws raises sensitive issues that may implicate the rights and liabilities of the parties under those laws, such as the issue of notice mentioned in Section F of the Standards. Accordingly, the Standards contemplate that an employer, in establishing an ombuds office, should consider its overall policies for maintaining compliance with those laws, and determine in that light whether to authorize the ombuds to address those matters. That recommendation is in no way intended to suggest, however, that a policy of authorizing an ombuds to address labor- or employment-related matters should be a suspect or disfavored practice. On the contrary, involvement in such matters is a role typically performed by Organizational Ombuds, and the growing reliance on ombuds at institutions across the country is largely attributable to the broad satisfaction with ombuds' fulfillment of that role on the part of both management and the affected employees. Thus, the language in the Standards indicating that an employer should specifically authorize an ombuds to address labor- or employment-related matters does not require any detailed or ponderous recitals. Rather, it should be read as simply a particularized application of the generalized expectation in Section A of the Standards that the jurisdiction of an ombuds office should be identified in its charter.

Finally, an ombuds should not act in a manner inconsistent with the grant and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

Section E. Removal from office

Entities which establish ombuds offices need to ensure their accountability. Therefore, the charter that establishes the office of ombuds should also provide for the discipline or removal of the ombuds for good cause by means of a fair procedure.

Section F. Notice

When meeting with an ombuds, people discuss allegations of unfairness, maladministration, abuse of power, and other sensitive subjects. They may fear personal, professional, or economic retaliation, loss of privacy, and loss of relationships. Faced with sexual or racial harassment, for example, many people will quit, get sick, or suffer in silence. People often need help in developing ways to report or act so that these matters will be considered and resolved.

Communications must be protected if people are to be willing to visit and speak candidly with the ombuds. As noted above, some ombuds have confidentiality protected by law. Under these Standards, entities that establish an ombuds should authorize the ombuds to operate with confidentiality and independence. If an ombuds functions in accordance with these Standards by operating with confidentiality and independence, it can be strongly argued that management lacks the control over day to day operations that is essential for someone to be deemed an agent. Likewise, there would be a strong argument that any communication to the ombuds should not be imputed to any other person, including the entity. Rather, the ombuds would be deemed independent of the entity itself for these purposes. Thus, it would not be appropriate for the ombuds to accept notice on the entity's behalf with respect to any alleged grievance.

However, some ombuds offices that have been instituted outside the framework of these Standards do not operate with confidentiality or independence. In some cases, management's control over the ombuds may be so extensive as to weaken substantially the argument that the office cannot be deemed to be an agent of management. This circumstance would, in turn, give force to the argument that a communication to the ombuds should be imputed to management.

Because the law in this area is continuing to evolve, it is unclear what a court might decide with regard to notice in the wide range of circumstances that may arise. These Standards, therefore, do not address the issue of whether a communication to the ombuds will be deemed notice to anyone, including any entity in or for which the ombuds acts. Important legal rights and liabilities may, however, be affected by the resolution of that issue. Accordingly, an ombuds should, in appropriate circumstances, advise an individual that, unless the individual authorizes the ombuds to inform the management of an entity about a matter, the entity may not be deemed to have notice of the matter and such failure to give notice to the entity about the matter might impair the individual's legal rights.

Section G. Classical Ombuds

A Classical Ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. A Classical Ombuds may conduct inquiries or investigations and suggest modifications in policies or procedures. To ensure access to all pertinent facts, a Classical Ombuds should be granted subpoena power for testimony and evidence relevant to an investigation. In addition, a Classical Ombuds should be authorized to issue public reports and to advocate for change both within the entity and publicly. To ensure the essential independence, the standards provide that whenever a classical ombuds has general jurisdiction over two or more agencies, that position should be established by legislative action and the ombuds should be regarded as part of the legislative branch of government. Thus, for example, it would be appropriate for an agency to establish an ombuds who has jurisdiction over a single program, but the agency should provide the essential independence in the charter establishing the program. To the extent that an agency has established ombuds offices with jurisdiction over a single agency or program but that do not comply with the essential characteristics as described in Paragraph C of the Standards, it should take prompt steps to remedy any deficiency and to provide the requisite independence. If, however, the ombuds has jurisdiction over multiple agencies, experience has shown that it is extraordinarily difficult to provide independence if the ombuds reports to someone in the executive branch.

Section H. Organizational Ombuds

An Organizational Ombuds ordinarily addresses problems presented by members, employees or contractors of an entity concerning its actions or policies. An Organizational Ombuds may undertake inquiries and advocate for modifications in policies or procedures.

Section I. Advocate Ombuds

The Advocate Ombuds may be located in either the public or private sectors, and like the Classical and Organizational Ombuds, also evaluates claims objectively. However, unlike other ombuds, the Advocate Ombuds is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Because of the unique role, the Advocate Ombuds must have a basic understanding of the nature and role of advocacy. In addition, the Advocate Ombuds should provide information, advice, and assistance to members of the population identified in the law or publicly available written policy. Further, the Advocate Ombuds represents the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies.

CONCLUSION

Government, academia, and the private sector are answering demands for fairness and responsiveness by establishing ombuds. Ombuds receive complaints and questions concerning the administration of the establishing entity. However, the basic authorities of these persons called ombuds and the independence, impartiality, and confidentiality with which they operate vary markedly. An ombuds works for the resolution of a particular issue, and where necessary, makes recommendations for the improvement of the general administration of the entity. To be credible and effective, the office of the ombuds must be independent in structure, form, and appearance. The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. The ombuds must conduct investigations and inquiries in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombuds, which helps ombuds perform the functions of the office. Without these Standards, individuals may be reluctant to seek the ombuds's assistance because of fear of personal, professional, or economic retaliation, loss of privacy, and loss of relationships. This Resolution and the Standards for the Establishment and Operation of Ombuds Offices are appropriate now to ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies.

Respectfully submitted,

RONALD M. LEVIN, CHAIR,
Section of Administrative Law and Regulatory Practice.

BENJAMIN F. OVERTON, CHAIR,
Section of Dispute Resolution.

Pi-PA-TAG, Inc.
June 21, 2002.

Hon. JAMES M. JEFFORDS,
Chair, U.S. Senate Environment and Public Works Committee,
Washington, DC.

DEAR SENATOR JEFFORDS: On August 30, 2000, a St. Petersburg Times Editorial began with the following words:

"No one will ever accuse the U.S. Environmental Protection Agency of learning a lesson the easy way. While seeking judicial approval of a controversial cleanup plan for the Stauffer Chemical Superfund Site, EPA officials offended U.S. Rep. Mike Bilirakis, fought with the Florida Department of Environmental Protection, ignored Pinellas County health officials and angered Tarpon Springs residents."

The editorial then went on to describe a few of the many events which have led to the loss of public confidence in this Federal agency.

As secretary for Pi-Pa-TAG, Inc., a community group holding an EPA Technical Assistance Grant for the Stauffer Chemical Superfund Site, I would like to tell you our story, as it applies to the EPA National Ombudsman Office.

STAUFFER CHEMICAL SUPERFUND SITE

The State of Florida rests on a base made up largely of limestone, a soft rock, which on exposure to water filtering through it, dissolves, forming craters, caverns and tunnels. As Florida is a watery place, surrounded by the Gulf of Mexico and the Atlantic Ocean, and replenished heavily with water during the summer rainy season, the conditions for these geological transformations are both regular and frequent. In specific areas, the formation of sinkholes is very common.

At the heart of this foundation formed of limestone, clay and sand lies the Aquifer System which serves as the drinking water supply for the vast majority of Florida residents.

The Stauffer Chemical Superfund Site is located in Tarpon Springs, Florida, one of the areas which has often been subject to the formation of sinkholes. Situated in the midst of a thriving residential community, the site sits on the bank of a small waterway, the Anclote River, just before it empties into the Gulf of Mexico. This phosphate ore processing plant closed down in 1981, but left behind huge amounts of chemical and radiological processing wastes, buried in drums, poured into unlined pits, and sometimes directly onto the ground. For years, these contaminants have washed into the Anclote River and filtered down toward the main Aquifer System.

Stauffer Management Company (SMC), with the approval of EPA Region 4 personnel, proposed containing all the contaminants onsite, rather than removing them.

They did this without first completing the geophysical studies needed to properly characterize the site and to determine the potential for sinkholes. They did this without first completing the hydrogeological studies needed to determine exactly which directions the already contaminated water in the superficial layers of the Aquifer System was flowing. They did this without even determining whether or not the semi-cement mixture, which is known to break down upon exposure to salt water, and which was intended to be mixed with the contaminated soil below the water table, could keep the contaminants from leaching out.

Residents repeatedly questioned the safety of these plans, and were told that their questions would be answered later. What they were not told was that EPA Region 4 and SMC planned to go ahead and sign a Consent Decree in court, which would establish the containment method, chosen on the basis of inadequate data, as the valid cleanup plan for this site. While EPA Region 4 would continue to communicate with local residents, the important decisions would have already been finalized.

Involved residents were outraged. The community was being effectively barred from any further meaningful participation in the process that would determine the fate of precious community resources. EPA was asked to withdraw the Consent Decree until crucial studies had been completed and valid scientific questions had been answered.

They refused.

OMBUDSMAN INVESTIGATION

Three months later, in December 1999, the EPA National Ombudsman Office began an investigation into issues related to the Stauffer Chemical Superfund Site. As a result of information brought to light as part of the ongoing Ombudsman Investigation:

(1) EPA Region 4 & Stauffer Management Company (SMC) agreed to withdraw the Consent Decree from the Department of Justice, and to begin drawing up

workplans for the additional geophysical and hydrogeological studies which need to be completed for accurate site characterization. These workplans were to be reviewed in the course of the Ombudsman Investigation.

(2) EPA Region 4 agreed to include the U.S. Geological Survey (USGS) as reviewers of the workplans and additional study data, when it was completed.

(3) EPA Region 4 & Stauffer Management Company (SMC) agreed to honor the State of Florida's Arsenic Soil Cleanup Level for industrial use (3.7 ppm), which is much more protective than the level initially proposed (21.1 ppm).

(4) It was revealed that corporate and financial maneuverings had recently taken place, and that EPA Region 4 had allowed a "new company" to sign the Amended Consent Decree, without first performing a thorough investigation into the financial standing and reliability of the new company to assume the responsibility of covering the costs of the cleanup.

Residents in the community and their elected officials believed that much progress was being made. After years of conflict and delays, communication was finally being facilitated between all the involved parties, and the Superfund process was finally getting back on track. Then, in June 2000, the system fell apart.

First, the Ombudsman Office's Request for Funding Approval, in order to continue with the ongoing investigation, was denied. It was only reinstated due to the intercession of Congressman Bilirakis and elected officials from other affected sites.

Second, agency personnel refused to cooperate with the ombudsman investigation. In June 2000, EPA Region 4 staff walked out of a public meeting, refusing to answer any further questions.

Third, the agency denied the Ombudsman the right to maintain his own staff. In December 2000, the Chief Investigator in the Ombudsman Office was denied permission to do any more work for that office, and the Ombudsman was informed (or reminded) that he did not have the right or the authority to control his own staff. With the expulsion of the Chief Investigator, who was intimately involved in the cases, the office struggled and foundered, and ultimately had to suspend work on most of their current investigations.

Two years have now passed since what we refer to as "The Walk Out Meeting" occurred, the occasion when EPA's initial resistance to the Ombudsman Investigation in our community gave way to outright obstruction, to be followed by the eventual crippling of that office. After a brief period of hope, when through the Ombudsman Hearings we saw EPA finally becoming responsive to the concerns expressed by the TAG Advisors, the Florida Department of Environmental Protection (FDEP), the Pinellas County Health Dept. and members of the community, we now have no faith in this agency.

The Independence of the EPA National Ombudsman Office has been a fantasy.

GAO REPORT

In July 2001, the General Accounting Office (GAO) issued a Report entitled: "EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence"

On the first page of the GAO report, it states that, "In particular, ombudsmen help Federal agencies be more responsive to persons who believe that their concerns have not been dealt with fully or fairly through normal problem-solving channels."

And why would normal, problem-solving channels not be sufficient?

Perhaps there are many reasons. One important reason has to do with what Professor Larry B. Hill (Professor of Political Science, University of Oklahoma) refers to as, "the institution's relevance to the issue of the emerging relationship between bureaucracy and democracy." While on the one hand, we extol the importance and benefits to society which can only be gained through participatory democracy, the immense size and complexity of our governmental structures threaten to dwarf and crowd out the role played by individual citizens. The fortress-like structure of a bureaucracy can become impenetrable to private citizens. A bureaucracy can sometimes function with the cold, unreasoning efficiency of a machine which has been rigidly programmed, remaining unresponsive to any new or unfamiliar input.

For this reason alone, there need to be mechanisms which can, in the words of the GAO Report, "provide the public an informal and accessible avenue of redress".

EPA Administrator Christie Whitman's decision to transfer the EPA National Ombudsman Office to a position within the EPA Inspector General's Office is not a step in the right direction. Faced with a GAO Report indicating the need for Independent Ombudsmen, the agency seems to be desperately attempting to avoid establishing a truly Independent Office, by announcing this pseudo-compliance with the recommendations made in the GAO Report.

We do not believe that this move would establish an Independent Ombudsman Office—by a long shot. It does not give the Ombudsman control over prioritizing and

choosing cases, over deciding what level of involvement the Ombudsman Office will have in each case chosen, over how the Ombudsman Office budget will be allocated, or over the hiring, supervising and dismissing of office staff.

EPA has stated that the Inspector General Office is the only independent office within the agency. Our response to this is that it is time for them to establish another one.

B 606

To these ends, we respectfully request that you give your full support to the Ombudsman Reauthorization Act (SB 606).

This piece of legislation is well-deserving of complete bipartisan support, as everyone can agree with the concept that, in a democracy, government agencies must remain accountable to the citizens they were created to serve.

An Independent National EPA Ombudsman Office can be one of the most valuable and powerful tools we are able to establish in seeking to ensure that the Federal EPA exhibits this accountability. It would be a commitment to maintaining a system of Quality Control, and where needed, would help to legitimize the Superfund Process in communities where the agency has assumed jurisdiction for remediating toxic waste sites.

ST. PETERSBURG TIMES EDITORIAL

The St. Petersburg Times ends their August 30, 2000 Editorial with the words,

We now know there is no substitute for vigilance in the Superfund process.

Please support this Ombudsman Office which has acknowledged public vigilance and worked to safeguard, not only community resources, but also the process of democracy-in-action at the community level.

Thank you for your consideration of this matter of such great importance to affected citizens.

Respectfully,

HEATHER MALINOWSKI,
Secretary, Pi-Pa-TAG, Inc.

U.S. OMBUDSMAN ASSOCIATION,
Nashville, TN, June 19, 2002.

Hon. JAMES M. JEFFORDS,
Chairperson, Environment and Public Works Committee,
U.S. Senate,
Washington, DC.

Re: Written Testimony for Hearing of Committee on Environment and Public Works
June 25, 2002

DEAR SENATOR JEFFORDS: As President of the United States Ombudsman Association (USOA), I am submitting this written testimony in regard to S. 606, the bill which proposes the reauthorization of the Office of the Ombudsman of the Environmental Protection Agency. As our Nation's oldest and largest organization of ombudsmen working in government to address citizen complaints, the membership of the USOA includes practicing ombudsmen at all levels of government, some of whom have general jurisdiction, and others who have jurisdiction over a specified subject matter or agency. (Detailed information regarding the USOA can be found at the Association's website: <http://www.usombudsman.org/>.) As a matter of good public policy, the USOA supports the establishment of independent ombudsman's offices for the investigation and resolution of complaints involving administrative agencies in government at all levels. An ombudsman can serve as an independent office not only to address individual concerns, but also to identify systemic problems and recommend improvements in policies, practices, and procedures. An ombudsman can also help in the important effort to provide public and, indeed, legislative oversight of administrative agencies in government.

In view of recent developments regarding the operation of the EPA's Ombudsman's Office, the USOA believes that it is critical that Congress act now to reauthorize and strengthen that office. To the extent that S. 606 would accomplish this end, the USOA supports that bill, in principle. However, the USOA also believes that S. 606 will have to be substantially changed from its present form, if the bill is to meet the need for a truly independent and effective ombudsman in the EPA.

Based upon our collective years of experience as practicing ombudsmen in government, we are writing today to offer our suggestions for improvements to that bill.

Our Association believes that the most important element in the design an effective ombudsman's office in government is structural independence, that is, structurally separating the ombudsman from the agency under the ombudsman's jurisdiction. Under S. 606 in its current form, however, the EPA Ombudsman would continue be structurally situated within the EPA. The EPA Ombudsman would report directly to the EPA Administrator and would presumably be subject to being hired and fired by that official. In addition, the Administrator would have oversight authority to direct the work of the Ombudsman, including activities and decisions related to investigations and reports. This structure makes it extremely difficult for the Ombudsman to feel free to criticize, when appropriate, the actions of the Administrator or other officials under the Administrator's supervision. In light of these features, the USOA is concerned that S. 606 in its current form would not provide the EPA Ombudsman with the independence necessary for that office to function effectively.

It is widely understood by students and practitioners of the ombudsman institution in government that structural independence is a critical element in the design of any effective ombudsman's office. Our experience has shown that it is crucial that the ombudsman be protected from the potential of interference by officials who might be inconvenienced or embarrassed by the ombudsman's investigations and criticisms. Indeed, we believe that the recent events involving the previous EPA Ombudsman offer a textbook example of how administrators will interfere with the operation of internal agency ombudsmen. Thus, the USOA believes that, to the greatest extent possible, an ombudsman in government should be structurally separated from the entities that are subject to the ombudsman's review or investigations. This independence allows the ombudsman to act, and to be viewed by the public as acting, as an impartial official who reports findings and recommendations based on an objective review of the facts and the applicable law.

The USOA believes that the best way to make an ombudsman truly independent is by situating the ombudsman's office in the legislative branch of government. Indeed, the model for an ombudsman's office in government that is internationally recognized as the preferred model is one that situates the ombudsman in the legislative branch, as opposed to making the ombudsman a part of the administrative agency itself. This model has worked remarkably well, not only in scores of countries around the world, but also in our country in the States of Alaska, Arizona, Hawaii, Iowa and Nebraska. In light of this, the USOA would recommend that Congress explore the possibility of changing S. 606 to create a truly independent legislative ombudsman for the EPA, perhaps by situating the office in the GAO.

If an arrangement situating the ombudsman in the legislative branch is not viewed to be feasible, then our Association would recommend that everything reasonably possible should be done to maximize an ombudsman's independence within the agency where the office is situated. To that end, the USOA would recommend that S. 606 be amended by making the following changes:

Appointment of the Ombudsman.—We would suggest that the Ombudsman should not be appointed by anyone within the EPA, the EPA Administrator included. With that in mind, our Association would recommend that the bill be amended to provide that, similarly to Inspectors General, the EPA Ombudsman "shall be appointed by the President, by and with the advice and consent of the Senate." We would also suggest that S. 606 be amended to specify that the EPA Ombudsman shall be appointed for a specific term of years, as is typically done with ombudsmen in government.

Removal of the Ombudsman.—We would also suggest that S. 606 be amended to make it clear that neither the EPA Administrator, nor any other officer in the EPA, for that matter, shall have the authority to remove the Ombudsman from office. Specifically, we would recommend that S. 606 be amended to provide that the Ombudsman "may be removed from office only by the President," and that the "President shall communicate the reasons for any such removal to both Houses of Congress."

Interference with the Ombudsman.—While S. 606 does require "cooperation" with the EPA Ombudsman, the USOA believes that, consistent with provisions of Federal law relating to Inspectors General, there also needs to be a specific clause in the bill forbidding interference with the Ombudsman. In that regard, we would recommend the addition of a provision stipulating that "neither the Administrator nor any other officer or employee of the Environmental Protection Agency shall prevent or prohibit the Ombudsman from initiating, carrying out, or completing any investigation, or from issuing any report, or from issuing any subpoena during the course of any investigation."

Again, our Association would stress that we believe that the best approach to protecting the independence of the Ombudsman is through situating the office in the legislative branch of government. The recommendations outlined above are offered only as an alternative, if it is determined that a true legislative ombudsman for the EPA is not feasible.

In addition to these recommendations on the subject of ombudsman independence, the USOA has a few additional suggestions for changes that we feel would improve S. 606. Specifically, the USOA would further recommend that S. 606 be amended by making the following changes:

Access to the Administrator.—The USOA believes that an agency ombudsman, like an agency inspector general, should be guaranteed quick and easy access to the chief executive of the agency. With that in mind, our Association would suggest that a provision be added to S. 606 to specify “the Ombudsman shall have direct and prompt access to the Administrator, when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act.”

Subpoena Power.—As drafted, S. 606 requires the EPA Ombudsman to ask the EPA Inspector General for the issuance of a subpoena needed in connection with an Ombudsman’s investigation. Typically, ombudsmen in government have unilateral subpoena power. Our Association believes that requiring the EPA Ombudsman to go through the Inspector General to obtain a subpoena would invite the IG’s office to second guess and, perhaps, to interfere with Ombudsman investigations. As an alternative, the USOA would suggest that Section 2008(d)(3) of S. 606 be amended to state that “in a case in which the Ombudsman experiences difficulty in gathering information pertaining to an investigation conducted by the Ombudsman, the Ombudsman may require by subpoena the production of all information, documents, reports, answers, records, papers, and other data and documentary evidence necessary in the performance of the functions assigned to the Ombudsman by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforced by order of any appropriate United States district court.”

Special Reports.—Section 2008(e)(4) of S. 606 requires the EPA Ombudsman “at least annually” to publish a report “on the status of health and environmental concerns addressed in complaints and cases brought before the Ombudsman.” Typically, ombudsman legislation also makes it clear that the ombudsman is empowered to publish special or “critical” reports, when the ombudsman deems it necessary to do so to bring an issue to the attention of the public and the policymakers. With that in mind, the USOA would suggest that Section 2008(e)(4) of S. 606 be amended to specify that “the Ombudsman shall also be authorized to publish such special reports as are, in the judgment of the Ombudsman, necessary or desirable.”

In summary, the USOA enthusiastically supports action by Congress to reauthorize and strengthen the EPA Ombudsman. In addition, the USOA urges that, as S. 606 is being considered, Congress give particular attention to changing the bill in ways that would maximize the independence of the ombudsman to the extent feasible. Our Association would suggest that this focus upon independence, together with the other changes that we have outlined in this letter, would give the EPA Ombudsman the best chance to function effectively.

If the USOA can provide any information or assistance as your Committee considers and evaluates S. 606, then please contact either Mr. Marshall Lux or me. The United States Ombudsman Association appreciates and thanks you for the time and resources you are devoting to this important issue.

Sincerely,

ROBIN K. MATSUNAGA,
President,
U.S. Ombudsman Association.

STATEMENT OF L. ROGERS AND ANTONIA M. HARDY, HARRISON, ID

Senate Environment and Public Works Committee. It is imperative that the National EPA Ombudsman Office remain independent and free from the bureaucracy and internal politics within any agency that can hamper, manipulate, stall, or circumvent vital investigations. The Independent National Ombudsman functions to insure protection of our shared environment, of ecological and human health. Ombudsman independence is a basic component of the checks and balances that validate our democratic system, and continued independence certainly is basic for insurance that public voice and options will be heard and considered. We know from direct experience (with Region 10 EPA in the Coeur d’Alene Basin Superfund) that continued Ombudsman independence is absolutely essential. In addition, we assert that Robert Martin, in particular, must be allowed to finish the open investigations.

Without his support and help, our grass-roots citizen group's voices within the Basin Superfund would likely never even have begun to be heard.

Our particular issues center around a small but very integral sliver of land within the Coeur d'Alene Basin, the now-abandoned 72-mile Union Pacific Railroad spur line between Mullan and Plummer. This abandoned line, which runs through the entire guts of the 1500 square mile Basin, was just beginning to be investigated by Ombudsman Martin when the changes within EPA happened. We believe that Martin's work with our group must continue, especially since the 72-mile right-of-way, highly contaminated by mine and railroad waste, is being converted into a PRECEDENT SETTING CERCLA/SUPERFUND RESPONSE recreational trail that will contain over 900 warning signs. Our group has submitted scientific data to Ombudsman Martin, and we compiled 27 pages of interrogatories which we submitted to him for investigation into Region 10 and the Bunker Hill Superfund. We believe that our rights as citizen/stakeholders were circumvented, ignored, abused, and our faith in EPA as the agency mandated to protect our human and environmental health and welfare has been seriously compromised. We believe that only with Ombudsman Independence can our truth be told.

We hold very dear our rights to have voice within our government. We take very seriously our duties as citizens to exercise our voices. We have spent years documenting what we believe are serious problems within the Coeur d'Alene Basin Superfund: inadequate testing, inaccurate descriptions within EPA documents, double-speak, even fatal-flaw information that, we believe, should be considered seriously before any EPA ROD (Record of Decision) is released this July. Yet, our voices continue to be ignored. In fact, the EPA-appointed contact person, assigned to answer citizen questions and concerns, has not answered our urgent and legitimate citizen/stakeholder questions in over 3 months. In fact, since the inception of this precedent trail plan which, we assert, hides tons of improperly characterized contamination, our voices have been systematically ignored and excluded from processes affecting directly our lives, our environment, our land. Without an Independent Ombudsman, we do not see how EPA can be held accountable to adhere to its own CERCLA/SARA mandated Public Policy dictates.

We support the Idaho Delegation's legislation to keep the Ombudsman independent. At the same time, we would urge that Ombudsman Martin be the one to continue his open investigations, including Union Pacific Railroad. To do otherwise would, we believe, be a misuse of the millions of tax dollars as well as the millions of hours of work ours included already invested into the Basin Superfund. Martin knows the problems, and he must be allowed to finish what he has begun.

In closing, during these times of change, when more and more immoral and questionably legal actions and schemes come to light, we think it is imperative to insure public voice, public scrutiny, public accountability. And we do not mean a semblance of public inclusion, but we mean genuine voice. After all, it is WE, The People, who, ultimately, are the ones affected directly by those decisions made in Washington D.C., and whose lives and well-being are entrusted to EPA. And so, as representatives of "The People", we urge you to reinstate immediately the Independent Ombudsman, and give Robert Martin the authority to complete his investigations.

Thank you for the opportunity to address your committee.

STATEMENT OF BARBARA MILLER, SILVER VALLEY PEOPLE'S ACTION COALITION,
KELLOG, ID

Senate Environment and Public Works Committee. God created a natural order when he made the earth. The air we breathe and the soil that we walk upon was not intended to do us harm. When that order is disrupted and as severely as it has been in the area of Shoshone County, otherwise known as the Silver Valley Bunker Hill Superfund site, chaos, confusion, and adversity of health reign, even one hundred years after the first reporting of the lead and heavy metal pollution.

Silver Valley People's Action Coalition is a sixteen-year-old non-profit organization established in Shoshone County and whose main mission has been to resolve the issues of environmental injustice resulting in a century of renegade mining operations.

It was SV PAC who first requested the investigation of Bob Martin EPA National Ombudsman when technical advisors for the nation's second largest Superfund site found that after 10 years of remediation that Region Ten EPA had failed to remove lead and other heavy metal pollutants such as cadmium, arsenic, zinc, mercury and give the 5000 citizens living in four towns of the 21 sq. mile site a quality cleanup. It was determined in 1998 that even though EPA had the technology to do so, "the cleanup at Bunker Hill is inadequate and residents are still at risk", Dr. Joel

Hirschhorn, Technical Advisor for the Bunker Hill Superfund site, Kellogg, Id. In his report reviewing the studies done at Bunker Hill, in 1986 when SV PAC first became involved it was reported that the Federal Government had spent somewhere in the area of \$25,000,000 on studies of the site and not one shovel full of dirt had been removed! The report goes on to state that the lesser quality cleanup had been negotiated by EPA with the mining companies years before.

As a result of the site not being adequately remediated, today more than 300,000 citizens in a 1500 sq. mile area beginning at the Montana border and extending into Washington State are awaiting a Record of Decision for alternatives to cleaning up lead and mine waste that has traveled downstream. One of every four children tested outside the 21 sq. mile "box" is found to have an elevated lead and are now lead poisoned. Numerous children in the Bunker Hill site are also still being tested a routine began in about 1974 and are found with elevated lead levels. Tragically nothing is done to properly diagnose or treat these children and the figures are being used by health officials to say that the site is cleaned up. When in fact the Record of Decision for the Bunker Hill site calls for the total removal of lead from the interior of homes and schools. Homes where in a 1992 pilot study found to have 2 to 50 times more lead in them than the yards that have been replaced. To this day nothing has been done to remove the lead from the interior of homes and unacceptable protocols to do testing in schools has been only partially carried out.

In September 1998 SV PAC took these concerns to Region Ten who agreed that 12 specific areas identified by the Technical Advisors needed to be addressed for additional cleanup. At the same time it was recommended to call upon Idaho's political delegation to assist with an investigation to assure that these areas targeted for cleanup were indeed addressed by EPA. This is when then Cong. Crapo first cooperated with our organization and the need for an Ombudsman investigation.

We are concerned at this time of Idaho's political leaders involvement in this process after selecting a member of the special interest mining group who has only been established in the area for less than 2 years to speak on behalf of SB 606. The group she represents is not only small in number but also has the backing of the local newspaper owned by one of the PRP's of the Superfund site that has no limits to the slander, lies and personal attacks directed at the victims who suffer from lead poisoning, oppression and economic depression brought on by the pollution. We live in fear of what is done to us on a local front for speaking out and actively working with EPA to bring the best possible cleanup and improved quality of life to our families and even tourists.

It is because of conflicts such as this that necessitates the importance for an independent National Ombudsman office to be established. An Ombudsman office that is free from bureaucratic and political pressures too often found in Superfund sites and communities with extreme pollution and contamination. The Ombudsman's position would maintain a fair, objective and impartial playing field for all of the citizenry involved.

These are only some of the facts and problems arising from the largest Superfund site in the Nation. These are reasons why SV PAC who has been long invested and worked with EPA, politicians, other agencies and most importantly the affected citizens support the permanent establishment of the Ombudsman's office. Due to his high level of commitment and impartiality in carrying out the work of the EPA Ombudsman office, Bob Martin is the person who has the experience and ability to fulfill the responsibilities of this office over the long haul.

In closing we thank this committee for holding these hearings and respectfully request that Robert J. Martin be reinstated as the national ombudsman for the EPA allowing him to bring closure to hours of work he has begun. In so doing this committee, present administrator and administration will witness a be part of an office it can be truly proud of!

STATEMENT OF RON SCHOLL, MISSOULA, MT

I would like to throw my support strongly behind legislation that would guarantee the independence of the office of the National EPA Ombudsman office. Although I do not live in a community that is part of a past or present Ombudsman case, I live near one (Alberton, Montana), and have followed the Ombudsman activities here and elsewhere, such as in Denver at the Shattuck site and Tarpon Springs, Florida.

Outside of the contaminated communities the Ombudsman has investigated, very few people nationwide are even aware of the existence of the Ombudsman office, much less of the impressive record of Robert Martin as Ombudsman. But contaminated communities can occur anywhere, and will continue to occur. The public de-

serves a voice to air reasoned complaints about EPA handling of hazardous sites, and a listening ear uninfluenced by politics, including bureaucratic politics.

There is only one thing that outrages and alarms me more than some of the revelations uncovered in Ombudsman investigations, and that is the attempt by the EPA, under both the Clinton and now the Bush Administrations, to undermine the effectiveness of this watchdog office. Rather than learn from their mistakes, the EPA administration has retrenched.

A truly independent Ombudsman—at least in the United States of America—should not be directed what cases to chose or drop, should not have his budget or staff depleted at whim, should not be told he can't speak to lawmakers or the public, and should not have his files illegally seized. Please protect the health of the people and our environment by supporting legislation that would keep intact and strengthen the purpose of the EPA Ombudsman: to investigate citizen complaints about EPA activity at hazardous waste sites in an objective manner and in an atmosphere of openness and full disclosure.

STATEMENT OF LUCINDA HODGES, DIRECTOR, ALBERTON COMMUNITY COALITION FOR ENVIRONMENTAL HEALTH (ACCEH), MISSOULA, MT

Senate Environment and Public Works Committee. The Alberton Community Coalition for Environmental Health is a non-profit chemical injury advocacy group dedicated to improving the quality of life for victims of the April 11th, 1996, Montana Rail Link train derailment and chemical spill: the largest mixed chemical spill in railroad history. Members of ACCEH have worked with the Ombudsman since 1998 and the Alberton, MT, site is one of many open investigations that has been left pending. It is our highest hope that you will stand behind both the man and the office and vote in favor of Senate Bill 606.

The following testimony is offered to illustrate the effects of living in a contaminated community and the reason why this Nation needs an Independent EPA National Ombudsman who performs the job with both courage and integrity.

April 11th, 1996, the numbers:

- 133 tons—71 tons of spent oil refinery waste spilled and combined with 62 tons of chlorine creating a toxic plume that closed I-90 for 17 days.
- An initial “hot zone” of 72 square miles resulted in over 1,200 people evacuating from their homes, 352 people were treated at local hospitals, and one man died from exposure to toxic fumes.
- 25,000 hazardous waste filled railcars annually pass through Montana—The Last Best Place—with an average of 5.3 accidents each month. In 1995 & 1996, Montana Rail Link was ranked by the FRA as having the 2d highest accident record for its class of railroad.

- Recent soil sampling revealed dioxins remain in the soil on the derailment site.

The story behind the numbers:

Despite all assurances from the EPA that the “hot zone” was safe for returning evacuees' many residents and workers experienced a wide range of debilitating health problems upon entering the former “hot zone”. Reported acute symptoms ranged from shortness of breath, headaches, migraines, blurred and double vision, nausea, dizziness, loss of concentration, muscle twitching, fatigue, skin rashes, joint pain to chronic conditions that developed over time such as seizures, balance disorders, lupus, asthma, fibromyalgia, chronic fatigue, cancer, and toxic encephalopathy. Thus began what is still an unresolved and tragic controversy that revolves around this simple question—Is it really safe to live in Alberton, MT?

By 1998, after YEARS of phone calls, letters, costly trips to EPA Region 8 Headquarters in Denver, Colorado, Washington, DC, the production of a documentary film, “A Toxic Train Ran Through It,” and several well researched masters thesis's delving into the consequences of exposure to 133 tons of toxic waste—were ignored by EPA officials—ACCEH petitioned the office of the National Ombudsman of the EPA to intervene. Shortly thereafter Robert Martin visited the community, met with individuals, reviewed public documents, and determined an investigation was warranted.

In November of 2000 more than 5 years after the derailment the first public and only hearing was held by EPA National Ombudsman, Robert Martin, in Missoula, MT. newspaper editor, Ken Picard, reported at the time, “For 10 grueling hours they brought forth medical records, news articles, videotapes, and photographs of defoliated trees and chemically injured animals. Some displayed large plastic bags and tackle boxes full of the prescription drugs they now rely on to survive. Mothers spoke of previously healthy children who can no longer play sports and whose medical bills total in the tens of thousands of dollars. Others asked why schools and

playgrounds were never remediated, what became of the toxic soil hauled through Missoula, and why residents weren't put through the same rigorous decontamination measures as rescuers. Grown men who recounted their experiences were reduced to tears and could not continue with their testimony. Their hopes are pinned on Robert Martin, national ombudsman for the environmental Protection Agency (EPA) who was asked to hold these hearings by Sen. Max Baucus (D-Mont.)."

The ombudsman promised to conduct a second hearing and provide Senator Baucus with a full assessment of the Alberton community and the derailment site. Mr. Martin concluded the hearing with these words; "You're very brave. And for the record, you're not alone." Unfortunately, we are once again alone. Ombudsman Robert Martin, has not been able to keep his promise to the people of Alberton, MT due to direct and purposeful interference from the agency he is mandated to police. Only weeks after the hearing in Missoula, MT, ACCEH received this memo from Ombudsman Martin, "In view of reported recent personnel transfers and pending implementation of EPA Ombudsman Guidelines . all schedules for all National Ombudsman cases have been put on hold and/or delayed until further notice."

What we have learned in over 7 years of working with the EPA is that there is no such thing for an average American citizen as a "working" relationship with the EPA. There is no legitimate process for citizen complaints within the hierarchy of the agency. Without reauthorization of the Ombudsman legislation this investigation and many others will never be completed. Years of work by local volunteers will be lost forever, and one more contaminated community will be left in an untenable position. A position that is well defined by Professor Michael R. Edelman in his book, Contaminated Communities, "Most toxic victims suffer from citizen's bind. In seeking publicity, they enhance their community's stigma. In actively seeking answers, they enhance their level of stress. In depending on government for assistance, they are likely to be disappointed. And facing a mitagory gap, wherein an extended period of time elapses between the definition of the exposure and the execution of the steps to correct it, victims may find themselves trapped in a situation where they are damned no matter what they do."

What has prevailed in Alberton, MT, are corporate politics, bad science, poor site management, and no accountability for millions of superfund dollars. The real-life human consequences of this malfeasance have been documented and witnessed everyday over the past 7 years in our little town by chronic illness, blighted housing, boarded up business's, and dislocated families with the tab mostly being picked-up by the American tax payer every time someone's mother, father, or child, requires assistance from social services, disability, or full time care-taking. The true social and economic costs to our town and this Nation for the broken lives of the chemically injured are staggering.

In closing, we thank you for holding this hearing and we respectfully request that Robert Martin be reinstated as the EPA's National Ombudsman and be allowed to finish the investigations he began and continue on under this legislation as a truly independent EPA National Ombudsman that the entire Nation can be proud of.

CINDY KOKE,
Denver, CO.

SENATOR JEFFORDS: I am writing today in reference to bill 606 the Ombudsman Reauthorization Act of 2002. The bill relates to the reauthorization and restructuring of the office of Ombudsman of the Environmental Protection Agency. The Ombudsman's office has been instrumental in investigating and righting wrongs at Superfund sites where mistakes were made. Every agency has entities in place to audit and investigate mistakes or wrong doing. Police Departments have internal affairs divisions. The political arena has sub committees armed with special prosecutors to investigate wrongdoing.

The environment is such an important issue. It affects the air we breathe the water we drink, the food we eat, In other words not only our health but also our very existence. It is just common sense, with such important issues at stake, that the American people have an Ombudsman concerning the environment. It also makes sense that this office should be funded independently so that the EPA cannot control or hinder investigations. The Ombudsman should be the one to pick which cases warrant investigation, not the agency that made the mistake. There are many wonderful people working for the EPA but as in all organizations people make mistakes. There is no reason to be afraid of the truth. We should all have the same interest at heart. Environmental protection should mean a remedy protective of health and environment.

The American people have been very fortunate to have had an Ombudsman like Bob Martin and a Special Investigator like Hugh Coffman, looking out for their interest. I recently attended a conference with citizens who live near Superfund sites all over the country and applause followed after any mention of their names. Many citizens felt that they would have never been heard had it not been for the Ombudsman. I live near the Shattuck chemical site. I feel that the Ombudsman's office was instrumental in correcting a mistake that had been made.

I implore you to support the Ombudsman process and to make sure that they are allowed to do their job, by letting them choose their cases and by funding them independent of the EPA.

Thank-you.

Cindy Koke.

STATEMENT OF WILLIAM A. SMEDLEY, EXECUTIVE DIRECTOR, GREENWATCH, INC.;
BOARD MEMBER, PEN; CHAIRMAN LEGAL COMMITTEE, AIR

Thank you for the opportunity to provide this testimony in connection with the June 25th hearing conducted in Washington DC. Although I was unable to attend this important hearing, I wish to provide the following testimony regarding my experiences with the National Ombudsman's office. This testimony is submitted on behalf of three non-profit organizations which I hereby represent: GreenWatch, The Pennsylvania Environmental Network (PEN) and Arrest the Incinerator Remediation (AIR).

Our grassroots citizens group AIR saw first-hand in Lock Haven Pennsylvania, with the Drake Superfund Incinerator, how the EPA is unresponsive and evasive to those citizens who are most affected by their decisions. We have seen for ourselves how the EPA bureaucracy has repeatedly tried to prevent and interfere with the Ombudsman's investigation at Drake and other Superfund Sites. I can tell you first hand that Mr. Martin is one of the few people in the EPA who has earned the respect, trust and admiration of AIR and other groups across Pennsylvania. Although we were unable to stop the operation of the Drake Incinerator, due to the unconstitutional language of Superfund law, Robert Martin helped us tremendously in his capacity as Ombudsman. Because of the unconstitutional provisions of Superfund law locking AIR out of Federal court (Section 113H), the Ombudsman was the only place for citizens to go where someone would independently hear their grievances and investigate their allegations. Mr. Robert Martin did an excellent job trying to mediate a bad situation only to find himself in a face off against Asst. Administrator Tim Fields and hostile, unreasonable Region 3 officials, namely one Thomas Voltaggio (promoted after Drake to Asst. Regional Administrator). The Ombudsman's recommendations and reports in the Drake case were professional, reasonable, well thought out and researched and should have resulted in, at least, a temporary shut down of operations at Drake until the issues were resolved. Officials from our State DEP even had the audacity to tell the Ombudsman that his involvement at Drake was "untimely". Untimely indeed, I pulled empty beer cans (in bags with Drake instrument calibration documents) out of secure Drake dumpsters shortly after the Ombudsman left town. Instead of Region 3 officials admitting that their contractors were drinking beer they did damage control saying publicly that empty beer cans were not proof that the contractors were drinking while operating a hazardous waste incinerator on a Superfund Site. The Region 3 Drake operation manager, Gregg Crystall later told me that EPA should have just admitted that the contractors were drinking but he allowed their public relations machine to spin the incident anyway. Drake burned in 1998 and we understand that since then EPA Region 3 officials have been trying to burn Mr. Martin in retaliation for doing his job as Congress had intended.

During the Drake fight, in reaction to Mr. Martin's report on Drake, we also saw EPA create the "regional ombudsman" program that we recognized immediately as a sham. The regional folks are nothing but seasoned yes men and we and others statewide and nationwide have boycotted any involvement with them. There is only one true Ombudsman, Mr. Martin. This ploy was nothing but an attempt to take away the power vested in Mr. Martin originally by Congress. Since then we have reviewed the GAO report on the National Ombudsman. The report verified our feelings that Mr. Martin did not have sufficient independence, was interfered with by EPA and that the regional "ombudsman" are compromised with tremendous conflict of interest and are far from independent. In my capacity as Executive Director of GreenWatch, a non-profit organization dedicated to helping citizens with environmental problems, I have seen the regional "ombudsman" at work. The "investigation" conducted by the Region 3 "ombudsman" in the Boyertown Bovine Site near

Gilbertsville, PA vindicated Region 3 officials and was insulting to us and our clients. His actions again reinforced our belief that the "regional ombudsman" program was designed to circumvent Mr. Martin's involvement and to do damage control for the Region. We still need Mr. Martin's help at this site as EPA Region 3 officials actually had the audacity to blame the farmers for their own dying dairy herd problems even in light of tremendous evidence of fluoride pollution from a local industry doing government contracts. While the farmers wait for the Ombudsman's help, and for your action on legislation, they slip faster toward bankruptcy.

On January 29, 2000, I traveled to Denver Colorado to testify at an Ombudsman hearing conducted by Senator Wayne Allard. I represented many citizens and several organizations in requesting that Senator Allard move Ombudsman legislation through the Senate and eventually through Congress so that citizens nationwide could have a truly independent, well funded National Ombudsman. Too much time has passed since then and citizens now find themselves without an Ombudsman due to EPA's attempt to transfer the Ombudsman to the Inspector General's office resulting in Mr. Martin's resignation. The EPA has demonstrated, on many occasions, that they cannot be trusted with allowing the Ombudsman to function independently leaving citizens with no Ombudsman to assist them. My opinions of EPA's treatment of the National Ombudsman's office and with EPA (Regional and National) interferences with the National Ombudsman's office have been formed from many interactions with citizens working with Mr. Martin and his office nationwide.

AIR worked closely with the citizens in Times Beach Missouri and learned how EPA rams incinerators down citizen's throats before the Drake Incinerator came to Lock Haven. On behalf of AIR, I traveled to Times Beach to learn from the citizens fighting EPA there and personally requested involvement from Mr. Martin at that time. I witnessed the EPA regional officials treatment of citizens in Times Beach and was horrified at thinking that we were next. Mr. Martin along with the professional assistance of his investigator, Hugh Kaufman, did their best to reason with Region 3 officials regarding Drake, only to be ignored and down played. I have worked with citizens in Denver fighting the Shattuck Superfund Site and saw how they were treated by their EPA regional officials, same game different city. Again, Mr. Martin and Mr. Kaufman did their best to help against the power and deception of the region and Mr. Fields. I also assisted the citizens of McFarland California with obtaining copies of their documents that were eventually turned over to the IG's office. I spent 6 hours copying thousands of pages of documents at EPA in order to preserve copies before they were confiscated by the IG's office. Citizens feared that once the IG's office got hold of their documents that they would be gone forever. Having no faith in the IG's office, we believe their fears were well founded. Citizens who are members of PEN in Troop PA fighting the Marjol Battery site again learned first hand about how Region 3 officials (Voltaggio again) treat people who question their authority and tactics. The Ombudsman's work is not done in Troop PA and citizens desperately need Mr. Martin and Mr. Kaufman back.

As I said previously, too much time has passed while citizens nationwide wait for action on legislation to fund a independent National Ombudsman office. Now we find ourselves with no place to turn for help with many situations were we desperately need the Ombudsman. I am convinced that Mr. Martin and Mr. Kaufman were targeted because of their honesty and integrity with their work on behalf of the U.S. Congress and the American People. I would be happy to appear before any Senate Committee anytime to testify about our experiences with Mr. Martin, his office and his integrity and about our negative experiences with Mr. Fields and USEPA Region 3 officials. I urge you on behalf of GreenWatch, AIR and PEN to do everything in your power to rapidly move legislation through Congress to again give the American people an independent office of National Ombudsman with Mr. Martin in charge with the power to manage his own staff and budget. The loss of the National Ombudsman office is a severe blow to our trust in our elected officials who ultimately bear the responsibility for the loss of our National Ombudsman. Please give us the National Ombudsman that was originally intended. While you wait and deliberate citizens suffer from the lies and deception of corrupt regional and national EPA officials who enjoy impunity from their fowl actions. Time is of the essence; please give us back our Ombudsman, Mr. Robert Martin. We have lots of work for him to do before it is too late.

Again, thank you for the opportunity to give testimony on this very important issue.

SUZIE CANALES,
Corpus Christi, June 21, 2002.

Committee of Environment and Public Works

DEAR COMMITTEE OF EPW, my name is Suzie Canales with Citizens for Environmental Justice (CFEJ) based in Corpus Christi, Texas.

We are a bipartisan watchdog group residing in a county that is mostly Hispanic and low-income. We live in an industrial City with numerous refineries. Over the last 50 years, Nueces County operated over 40 pre-regulation landfills.

For decades our county has been environmentally over-burdened. We have documentation of high cancer rates as well as high birth defects, yet Local, State and Federal Agencies have dismissed our environmental health concerns conducting studies that were inadequate, misleading and arbitrary.

Government agencies, in this case the EPA, must be held accountable. The only way to ensure that grassroots citizens groups get a fair and impartial review of our disputes with the EPA is to support S. 606. It is imperative that the National Ombudsman has the additional authority S. 606 proposes in order to conduct inquiries into disputes such as ours. This will ensure that the EPA, the agency charged with protecting the environment be held accountable to the people who turn to them with environmental concerns. If there is no effective accountability system in place, I can assure you it is not the EPA who will suffer, it is the people affected.

It is imperative that Robert Martin be reinstated with all the authority proposed in S. 606. In our corner of the world, this would insure that our community would at last get a fair investigation that we deserve.

Therefore, we respectfully request that the Committee of Environment and Public Works, support S. 606.

Sincerely Yours,

SUZIE CANALES,
Citizens for Environmental Justice (CFEJ).

ENVIRONMENTAL LAW SOCIETY, VERMONT LAW SCHOOL,
July 13, 2002.

Hon. JAMES M. JEFFORDS,
*Chairman, Senate Environment and Public Works Committee,
 U.S. Senate,
 Washington, DC.*

DEAR CHAIRMAN JEFFORDS: On behalf of Vermont Law School's Environmental Law Society, we would like to provide written comments for the record following the Senate Committee on Environment & Public Works Hearing on EPA's recent decision to move the EPA Ombudsman to the Office of Inspector General held on June 25, 2002. We write in strong opposition to the decision to locate the EPA Ombudsman in the Office of Inspector General and urge the Senate to properly reauthorize this critical check and balance, that has been available to communities who seek to protect their public health and their environment.

Throughout, the past year many Vermont Law School (VLS) students have followed the exceptional work and the associated controversy of the EPA National Ombudsman in his work in New York City, Idaho, Florida, Pennsylvania and Colorado. When citizens struggle with the intricacies of a hazardous waste cleanup or an EPA bureaucracy determined to implement a plan, the EPA Ombudsman provides an open and transparent process to help resolve their complaint. For citizens who do not have first hand experience with the government, and/or the often complicated bureaucracy of the EPA, the Ombudsman process may be difficult to imagine. Many do not fully understand what it is like to have decisions seemingly arbitrarily made to not cleanup a radioactive waste site (Shattuck Superfund site in Denver, CO), or not cleanup a lead battery dump (Marjol Battery in Throop, PA) or not have homes tested for contaminants in the case of residents surrounding the World Trade Center. The EPA Ombudsman provides a mechanism to help citizens obtain an independent review of Agency decisions that appear to be misguided.

Today, however, the EPA Ombudsman function no longer exists at EPA. Instead of acting on the recommendations of the General Accounting Office (GAO) made in July 2001¹—to give further independence and control of resources to the EPA Ombudsman—the move to the OIG has done just the opposite. The move has stripped the Ombudsman of any semblance of independence and further diminished the Om-

¹ See Gen. Acct. Off., Hazardous Waste: EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence, GAO-01-813 (2001).

budsman's ability to perform his job. While the OIG is an independent office with respect to the EPA, its guidelines and procedures that require it to speak with "one voice" run counter to the mandate of an ombudsman, which requires investigating complaints made about agency decisions, and not simply codifying agency decisions.

The OIG is a poor choice for the EPA Ombudsman for several reasons. First, the ombudsman does not have the independence necessary to perform the role of an ombudsman within the OIG. It is our understanding that the recently appointed IG "Ombudsman" does not have authority to decide which cases he or she will investigate. Second, the IG Ombudsman does not have the freedom to speak with citizens, Congress, or the press due to standard OIG procedures. Instead, the IG Ombudsman must work through a Community relations person or a Congressional liaison to speak with the public, Congress or the press. We know of no legitimate mainstream ombudsman who must jump through these hoops to perform their job. Third, we are not aware of any Federal Ombudsman that is housed in the Inspector General's office. Both the IRS and the FDIC Ombudsman report directly to the head of the respective agencies. The IG has an important role in government-investigating fraud and abuse—but the IG's mandate is much narrower than the charge of an Ombudsman.

We would like to take this opportunity to ask the Senate to take immediate legislative action to restore the independence of the EPA Ombudsman. The legislation should provide the EPA Ombudsman with functional and structural independence that is consistent with the professional standards of the Ombudsman community. The EPA Ombudsman must be able to choose his or her own cases, control his or her own resources and staff, communicate freely with the public and Congress, and maintain confidentiality with complainants.

We recommend the following changes to S. 606 "The Ombudsman Reauthorization Act of 2001." First, we recommend that the EPA Ombudsman have independent subpoena power, which is consistent with other Federal ombudsman. Second, we commend the EPA OIG for its decision to expand the Ombudsman function to apply to all programs that are under the jurisdiction of the EPA, and hope that the final legislation will incorporate this decision for we believe this change would help to better serve the public. We note specifically the need for an Ombudsman to receive complaints about EPA decisions that have the effect of disproportionately impacting low income communities and communities of color who are already over burdened by hazardous waste in this country.

Additionally, programs under other environmental laws such as the Clean Air Act might be well served by an independent ombudsman.

Third, we also recommend that the Regional Ombudsman be appointed by and report directly to the EPA National Ombudsman. The regional ombudsmen must do fulltime ombudsman related work and not do part time work on Superfund or other programs as is the case today. Past direct or perceived conflict of interest must be remedied in order for the ombudsman program to be effective at EPA. The Regional Ombudsman should merely be an extension of the National Office and must assist the National Ombudsman in investigating and reviewing complaints and other duties.

Fourth, we recommend that the Ombudsman be granted the specific power to petition the Administrator and/or Congress to seek additional funds from Congress to perform technical sampling or investigative support work.

Finally, we recommend that the EPA Ombudsman report directly to the Administrator of the Environmental Protection Agency. Although there has been significant controversy between the Ombudsman and his or her staff and the Administrator (in both of the past two Administrations), we believe that if legislation secures the EPA Ombudsman sufficient independence and control of his or her resources, that this structure is the most effective for an executive branch ombudsman. This is the structure that ombudsmen at the Federal Deposit Insurance Corporation and the Internal Revenue Services follow and we feel this is a good model for the EPA Ombudsman. Further protection could be provided to the Ombudsman in the legislation by enumerating cause of removal from the position. Whistleblower protection must be available to the EPA Ombudsman and associated staff. Provided that the EPA Ombudsman controls his or her own budget, staff and resources consistent with Federal Civil Service rules, we feel this structure is advantageous beyond the particular difficulties with either of the past Administrations.

If such a structure is not politically feasible, we recommend that the legislation be changed to have the EPA Ombudsman report directly to Congress as its own entity. We do not feel that GAO is a suitable location for the EPA Ombudsman because GAO does not receive complaints from the public.

Notably, in March of this year, former EPA Administrator Carol Browner spoke at Vermont Law School's conference entitled Women Rethinking the Environment.

During her 8 year tenure, there were certainly times when the Agency's bureaucracy tried to prevent the Ombudsman from investigating the Industrial Excess Landfill case in Uniontown, Ohio. In another case, the Ombudsman was temporarily denied authorization to travel to Tarpon Springs, Florida. This latter case, spurred Members of the House Energy & Commerce Committee to ask GAO to investigate the Agency's actions to hinder the Ombudsman's investigations. The GAO Report concluded the Ombudsman does not have sufficient independence or control of resources.

Today, have a Republican administration that has acted on the previous administration's desire to silence the people's advocate. As a result of the Administrator's decision to move the Ombudsman to the OIG, more than two dozen communities who previously relied on the Ombudsman process have been left without an independent watchdog to help safeguard their public health and their environment. This is especially critical given the dwindling level of dollars in the Superfund. We urge Congress to take this opportunity to reauthorize this critical watchdog position at EPA with the foregoing enhancements.

As a final note, we also recommend that Mr. Robert J. Martin be reinstated to finish his case work that is currently pending and that he be considered for any future position as Ombudsman if that may be authorized by Congress.

Thank you for your consideration of these comments on S. 606.

Sincerely,

*Kristen Huysman,
Environmental Law Society, Vermont Law School.*

MEMORANDUM FROM TOM DEVINE, GOVERNMENT ACCOUNTABILITY PROJECT

Re: Public policy impact from abolition of independent EPA Ombudsman

The alleged retaliatory reassignment and forced resignation of EPA National Ombudsman Robert Martin is far more than an employment dispute. It has serious consequences for communities who believe the agency illegally has permitted public health hazards to threaten their air and water supplies from hazards such as Superfund and toxic waste sites.

In April when he was forced to resign, Mr. Martin was pursuing and seeking resolution of more than two dozen cases at the request of citizen organizations and congressional offices. In each case, the communities had reached an impasse with normal EPA channels, and the Ombudsman was their last resort. During his decade in office, after investigations, public hearings sometimes hosted by Members of Congress and subsequent mediation efforts, Mr. Martin has broken the deadlocks to reach mutually acceptable resolution in some 80 percent of his cases.

Since reassignment of the Ombudsman function to EPA's Office of Inspector General ("OIG") and Mr. Martin's forced resignation, however, there has been no further progress on any of the cases. The OIG has made no efforts to work with Mr. Martin as a transition to renewed efforts. The citizens' accountability lifeline has been cut. Mr. Martin's goal in his Whistleblower Protection Act case is to return for a fixed time period to complete the work that he started on pending cases. The list below is a sampling of cases that have been functionally killed.

Alberton, Montana.—This Montana town suffered a disastrous train wreck 5 years ago that caused widespread chlorine contamination. It has caused health consequences such as blackouts, sexual dysfunction, memory loss and respiratory breakdowns. When he was removed, the Ombudsman was using videotape of the train's location to challenge EPA assertions that the toxic train could not be found. The search has been halted.

Northern Idaho.— In this Coeur d'Alene basin, residents protested that the agency is not requiring Union Pacific to pay for its share of a \$½–4 billion cleanup cost, although it is responsible for lead spills thousands of times above safe levels. The lead is contaminating rail and bike paths, to the extent motorists are still warned about leaving their cars to fix flat tires. At the request of the Idaho congressional delegation, Ombudsman Martin was pursuing the case when his efforts were halted by his removal. It remains dormant.

Pensacola, Florida.—Area Congressmen and municipal officials from this poor African American community asked for Ombudsman Martin's assistance when EPA decided not to remove toxic wastes contaminated with dioxin. This case was pending when the Ombudsman was removed.

Riviera Beach, Florida.— Four area Congressmen and the mayor of this poor African American community near West Palm Beach asked Ombudsman Martin to open a case, because the town's drinking water is contaminated by industrial solvents such as trichlorine ethylene. The residents protested that EPA was requiring the

municipality to foot the two million dollar annual cleanup cost for Honeywell's pollution. Last fall the Ombudsman successfully negotiated a solution to obtain funding from within EPA, but progress has now halted without any liability or enforcement action to hold Honeywell responsible.

Shattuck, Colorado.— This site near Denver stored radioactive wastes that could be toxic for 500 years. The storage area was within blocks of residential and recreation areas, as well as within range of the water supply. In response to requests ranging from Senator Allard to community organizations, an Ombudsman investigation found that EPA's plan to store the waste would only isolate it from 5–15 years. As a result, the agency agreed to require its removal. But costs were not negotiated and a settlement signed among the parties until almost a year after Ms. Whitman's arrival at EPA. Citizens protested that the subsequent proposed settlement only required Citigroup to pay \$7 million for a cleanup that requires from \$35–100 million to conduct adequately, without considering associated costs to remove radioactive contamination from the groundwater and other areas where leaks already had exceeded containment or the site boundary. After the U.S. District Court in Washington, D.C. issued a Temporary Restraining Order (TRO) enjoining abolition of the Ombudsman office, Mr. Martin completed compilation of an extensive record of public testimony and prepared a report for the Federal District Court judge in Colorado who must approve the proposed settlement. Although the settlement is still under review, there have been no further contributions to the record since Mr. Martin's removal.

Tarpon Springs, Florida.— After the EPA had decided to pile up and leave asbestos, phosphates and radioactive wastes for storage in the community, Ombudsman Martin analyzed the storage site at the request of Representative Bilirakis. He found that it was an area prone to sinkholes, and on top of an aquifer that provides drinking water for two counties. As a result, EPA withdrew its remedy to leave the toxic wastes, and withdrew an associated consent decree. Ombudsman Martin was actively negotiating a new solution when his office was abolished.

Throop, Pennsylvania.— Senators Spector and Santorum, as well as Lackawanna County and Throop Borough, asked Ombudsman Martin to review EPA's cleanup plan for this site to dispose of toxic wastes from a battery crushing operation. The controversy centered on whether it should be a Superfund site, and whether toxic wastes such as acid, arsenic, dioxin, lead and PCB's should be removed or stored in the area. EPA's plan was to leave the poisons in the community, just blocks from residential and recreation areas and within range of the water supply, covered by plastic liner bags. But the Ombudsman investigation found lead in the soil at levels up to 250 parts per million, revealed there already were weeds growing through the plastic bags, and concluded that the area's topography meant it was too geographically unstable to safely store toxic waste. After the District Court TRO permitted the investigation to resume, the Ombudsman held public hearings and found records demonstrating that EPA had concealed readings that the site contamination readings exceeded Superfund levels. Since Mr. Martin's removal, the case has been dormant.

Uniontown, Ohio.— At the request of area Congressman Sawyer, Ombudsman Martin opened a case of the IEL site near Canton, Ohio, for which tire companies today are primarily responsible. Radiation was emanating from the site with inexplicable tritium readings in the ground water, and the original owner alerted EPA that he had accepted a nuclear device from the army while operating the site as a landfill. The Ombudsman was investigating challenges to EPA assertions that the nuclear device did not exist, because it had not been found. Nonetheless, the agency also refused to look for it, based on the contradictory excuse that it would be too dangerous to do any digging. The Ombudsman case ended with Mr. Martin's removal.

Yucca Mountain, Nevada.— At the end of last year the Nevada congressional delegation, the state and Las Vegas' mayor asked the Ombudsman to investigate EPA-related issues from the proposed nuclear waste site, which has a Resource and Conservation and Recovery Act (RCRA) identification number. EPA's Office of General Counsel barred Mr. Martin from providing assistance.

World Trade Center.— At the request of Representative Jerrold Nadler, the Ombudsman opened a case to prepare cleanup recommendations and to probe EPA Administrator Whitman's widely publicized assertions that there were no environmental health hazards from the World Trade Center disaster. Ombudsman Martin conducted two eleven hour hearings hosted by Representative Nadler. The hearings developed extensive testimony contradicting Mr. Whitman's assertions, from scientists, citizens, firefighters and other cleanup workers, doctors and even counter terrorism experts. They exposed severe threats from asbestos and other particles released during the disaster. The Ombudsman presented detailed findings in testi-

mony to the New York state assembly, New York city council, and New York City Board of Education. Facing this record, EPA reversed its initial decisions and took serious steps such as stopping release of contaminated cars, and starting a systematic program of indoor air testing for lower Manhattan. City authorities also acted to limit exposure of cleanup workers and school children to the newly confirmed health hazards. None of these efforts would have occurred if the District Court had allowed Ms. Whitman to eliminate the National Ombudsman function as originally planned. Further oversight has ended entirely since his forced removal.

MEMORANDUM FROM COMMUNITY LEADERS FOR EPA ACCOUNTABILITY NOW
(CLEAN), COEUR D'ALENE, ID, TO SENATOR JEFFORDS

MEMORANDUM

June 21, 2002

RE: S. 606 National EPA Ombudsman Reauthorization Hearing

Thank you for committing to holding your hearing on the reauthorization of the National EPA Ombudsman.

Please accept the following written and attached submissions by Community Leaders for EPA Accountability Now for the S. 606 hearing, June 25, 2002.

It is the position of C.L.E.A.N. that an independent National EPA Ombudsman's function must be maintained—but outside the oversight of the EPA office of Inspector General. We fully support the position of U.S. Senator Mike Crapo in this regard.

In Oct. 2000, C.L.E.A.N. testified (U.S. House—Commerce Committee) in support of the National EPA Ombudsman's critical role of oversight over EPA.

If an agreeable timeline can be established, C.L.E.A.N. believes that reappointment of Ombudsman Robert Martin gives us our best hope for true resolution of the highly contentious issues our citizens, communities and elected leaders still have with EPA.

The magnitude of the two Ombudsman investigations of EPA at the Bunker Hill Superfund Site and the surrounding basin cannot be overstated. The investigations of EPA and EPA Region-10 in North Idaho must be resolved—in a timely manner.

Examples of our concerns with the critical need for a truly independent EPA Ombudsman are demonstrated in two attachments that show:

- EPA-OIG has yet to respond to fundamental questions from C.L.E.A.N. about the pending Ombudsman cases here;
- Concerns with EPA Region-10 actions continue to mount—despite the efforts by new Regional Administrator John Iani to ensure local community concerns are prevented and/or resolved.

C.L.E.A.N. respectfully submits this to you—in full support of Senator Mike Crapo's efforts and the testimony of Ms. Kathy Zanetti, of the neighboring Shoshone Natural Resources Coalition. Thank you.

COMMUNITY LEADERS FOR EPA ACCOUNTABILITY NOW (CLEAN),
April 30, 2002.

Ms. NIKKI L. TINSLEY, Inspector General
Environmental Protection Agency,
Washington, DC.

DEAR MS. TINSLEY: The sudden resignation of former National EPA Ombudsman Robert Martin last week, is prompting the following questions and inquiry by Community Leaders for EPA Accountability now (C.L.E.A.N.) based in beautiful Coeur d'Alene, Idaho.

C.L.E.A.N. and other organizations dealing with concerns from EPA, Region-10, its bureaucracy and future intentions in this region have very real reservations about the likelihood Mr. Martin's investigations of EPA will ever be resolved or fully disclosed.

In our effort to understand the IG's new role of managing the National EPA Ombudsman, please provide answers to the following:

1. We understand a successor to Mr. Martin has been named (Mary "Peggy" Boyer). What are her priorities as they relate to the pending investigations still open by the former Ombudsman?
2. Will the outstanding/pending "investigations" remain active or be reclassified/re-prioritized in any way? If so, how?

3. Please define the process in which the active investigations will be carried out and finalized? What status are they being given?

4. Since Mr. Martin and other elected leaders, citizens, and business-owners were unsuccessful in having Region-10 answer any of the interrogatories or requests for production of documents submitted to EPA, how do you intend to have the new Ombudsman re-submit or demand formal responses to the questions/requests previously raised?

5. What is the status of the current case-file; hearing transcripts, documentation, etc. submitted by communities involved with the former Ombudsman's investigations?

6. How exactly, are affected communities supposed to have faith in the National EPA Ombudsman's functions under OIG authority?

7. What is the timeline in which the active investigations into EPA at the Bunker Hill Superfund Site and in the surrounding basin are to be resolved?

8. Is it unreasonable for local communities to expect some timely conclusion to the outstanding/active investigations of EPA and Region-10 before the release of the forthcoming Record of Decision by EPA (originally due in Dec. 2000) and now due in June 2002?

9. Will the new Ombudsman personally visit the sites with active investigations? If so, please explain the schedule and purpose?

10. What is the process for citizens and communities with new concerns about EPA actions in their area/region who want to report them to the proper authority?

11. If Mr. Martin's administrative appeal and/or court actions over his concern about the transfer from EPA-OSWER to the EPA-OIG are successful, will he be given complete access and authority over the case files recently transferred to your office?

12. Do you intend to delegate these questions to Ms. Boyer? If so, we would like to know exactly when that will take place, and how soon we can expect a reply.

13. As you may or may not know, former Ombudsman Martin released "working findings" outlining eight separate issues of questionable EPA actions at the Bunker Hill Superfund Site and in the surrounding basin. Will they remain an active part of the ongoing investigations of EPA here? If so, how?

These are the priority questions from C.L.E.A.N. on behalf of many residents in our communities, elected leaders at all levels of government, including Congressional leaders who all have committed countless hours of testimony, research, documentation, etc. to prevent EPA from making more mistakes in our region. But more importantly, our collective efforts are also intended to hold accountable past and current EPA decisionmakers from unwanted actions in our region at taxpayer expense.

Furthermore, we also want to understand your current position on Idaho's Congressional attempts (Sens. Larry Craig, Mike Crapo; Reps. Butch Otter and Mike Simpson) through S. 606, to reauthorize the National EPA Ombudsman's office as an independent function within EPA.

We appreciate a timely response on the previous questions and the priority concerns outlined above. Please feel free to contact us at any time. Thank you.

Sincerely,

CARRIE OJA,
Chairperson.

BRET C. BOWERS,
Manager.

COMMUNITY LEADERS FOR EPA ACCOUNTABILITY NOW,
June 19, 2002.

JOHN IANI, Administrator,
*U.S. EPA—Region-10
Seattle, WA.*

RE: Bunker Hill Superfund Site/Cd'A Basin ROD

DEAR MR. IANI: The forthcoming Record of Decision on EPA's expanded Superfund cleanup in North Idaho is causing a great deal of anxiety in our region. The concerns stem partly from ongoing issues with EPA/Region-10 which have arisen or are yet to be resolved since your appointment as Regional Administrator.

Community Leaders for EPA Accountability Now respectfully seek responses and understanding from you on the following "current" topics:

1. During a May 30, 2002 conference call with EPA, DEQ, agency contractors and others, there was reference to a "draft" ROD already circulating between the govern-

ments and Tribes. Is a draft being circulated? When do you anticipate presenting a final ROD to the State of Idaho and Coeur d'Alene Tribe for their acceptance?

2. Why hasn't a Federal appointee to the Commission (likely EPA) been selected? When do you anticipate an appointment?

3. During your meeting with C.L.E.A.N. last year, we briefly discussed the Memorandum of Agreement (MOA) on the Coeur d'Alene Lake Management Plan between EPA and the State of Washington. What is the current status of that MOA and what specifically does it involve?

4. What can you tell us about how you intend to respond to allegations EPA is committing Clean Water Act violations at BHSS? Concerns in this area bring to light other "outstanding" human health and water quality issues that apparently the Basin ROD ignores. What will/is being done about the following:

- Remaining Yard remediation projects inside BHSS?
- Central Treatment Plant and acidic mine water drainage?
- Central Impoundment Area seeps?
- Remaining needs for the Page Waste-water treatment plant?

5. Will the ROD address specific questions raised about the obvious need for lead-speciation and the bio-availability of lead throughout the basin?

Other issues that have surfaced since you took office, or have yet to be resolved since your appointment as Regional Administrator include:

1. In the Fall of 2001, EPA's Maryanne Deppman, Sheila Eckman and Dick Martindale attended a CLEAN meeting. At that time, they were presented data pulled from EPA's web-page containing present-tense language regarding human health blood-lead levels at Bunker Hill estimating that, ". . . 7000 adults are effected." What specifically was done to rectify the web page and misleading information it contained?

2. Why does EPA R-10's webpage "In the News" section show a large disproportionate share of BHSS/Basin related stories from one newspaper, rather than both local papers providing a majority of the coverage? For example, a simple inspection of the web-site shows:

January 2000-June 19, 2002	No. posted	Percent Overall
Spokesman Review	159	74
The Coeur d'Alene Press	39	18
Independent/Other	18	8

3. C.L.E.A.N. has received differing positions from EPA personnel on separate occasions on whether the Basin ROD will define work areas. At the first Basin Commission meeting in May, Maryjane Nearman stated that ROD will specify clean up levels, but no identified work areas. Later, in a separate C.L.E.A.N. meeting, Maryanne Deppman explained the ROD will identify work areas. What can we expect?

4. Will/does EPA consider incorporated and unincorporated areas outside BHSS that have yet to be sampled as part of the "listed/designated Superfund" site?

5. Since the first discussion between C.L.E.A.N. and EPA representatives (Chuck Findley in June 2001) took place regarding EPA's "de-listing" process, C.L.E.A.N. has received several different versions about de-listing the Lake in particular. Recognizing EPA and local communities in North Idaho have clear disagreements over the expanded Superfund boundary, what is EPA Region-10's process to de-list any area?

6. How soon can EPA's "de-listing" process begin for Lake Coeur d'Alene?

7. When do you anticipate to begin "de-listing" areas inside BHSS that have already been remediated?

8. Why has Region-10 still failed to release final results of EPA's Summer 2001 public survey?

9. Will EPA allow any further public input on the pending basin ROD?

10. How much has the Basin-wide RI/FS and expenses associated with the pending ROD cost to date?

11. What is your desired outcome with the Technical Assistance Grant funding being considered for the new grant applicant in North Idaho?

12. Does EPA intend to use CERCLA funds for long-term monitoring needs for Lake Coeur d'Alene—and the Lake Management Plan?

Final questions from C.L.E.A.N. involve Region-10's current position on critical matters as they relate to issues on a national scale, rather than simply local and regional issues. Please help us understand the following:

1. Why did EPA fail to respond to 2001 interrogatories and requests for documents by the National EPA Ombudsman, as well as local elected leaders and industry representatives? When will you respond to the questions/requests?

2. Why hasn't EPA and its partners in the ongoing Natural Resource Damages litigation (*U.S. vs. ASARCO*) settled their case and in turn, commit new, but limited resources to the "outstanding" needs at BHSS or the new Basin Environmental Improvement Project Commission?

3. Why hasn't EPA Region-10 and National Administrator Whitman publicly endorsed S. 585 and the intent to supplement other Federal/industry funds with traditional EPA funding?

4. Should the final outcome involve recommendations that may change or impact past ROD(s) and or the pending ROD for the basin, please give us your best understanding of how EPA Region-10 intends to cooperate on:

- National EPA Ombudsman investigations that may lead to recommendations?
- National Academy of Sciences review of EPA Region-10?

Finally, we've seen first-hand the difficulties associated with the creation and operation of the new Basin Environmental Improvement Project Commission. We believe Federal Representation is needed to accompany the three Idaho Counties, the States, and the Tribe's representatives. We ask that you help ensure that an appointment is in fact made to the commission and does take place soon. In the meantime, we are pleased that your office has been represented in the new process.

On behalf of C.L.E.A.N. thank you for considering our request to help us understand the unresolved and pending concerns we have. We look forward to your responses. Please feel free to contact C.L.E.A.N. if you have any questions. Thank you.

Sincerely,

CARRIE OJA,

Chairman, Community Leaders for EPA Accountability Now.

A PARTIAL APPROACH TO CLEAN-UP: EPA MISHANDLES SUPERFUND INVESTIGATIONS,
JUNE 25, 2002

APPENDICES*

- Appendix A: Letter from David A. Ullrich, Acting Regional Administrator, U.S. EPA Region 5, to Concerned Citizens of Lake Township, October 21, 1998.
- Appendix B: "An SAB Report: Review of EPA's Approach to Screening for Radioactive Waste Materials at a Superfund Site in Uniontown, Ohio," U.S. Environmental Protection Agency, Science Advisory Board, (EPA-SAB-EC-94-010, September 1994).
- Appendix C: Memorandum from National Ombudsman Robert J. Martin to Region 5 Administrator Francis X. Lyons: "Industrial Excess Landfill Case/Preliminary National Ombudsman Recommendations," October 20, 2000.
- Appendix D: Letter from Dr. Mark Baskaran, Wayne State University, to Chris Borello, Concerned Citizens of Lake Township, October 16, 2001.
- Appendix E: "Record of Decision Industrial Excess Landfill Superfund Site, Uniontown, Stark County, Ohio," U.S. Environmental Protection Agency, (EPA/ROD/RO5-89/098, July 1989).
- Appendix F: Maps of Industrial Excess Landfill: Figure 1 Monitoring Well Locations, Figure 2 IEL Alternate Water Supply and Residential Wells. Exhibit 22 of IEL Groundwater Flow Patterns from "Comments on the Existing Public Record for the Industrial Excess Landfill for the Revision of the 1989 Existing Record of Decision," by Bennett & Williams Environmental Consultants, Inc., April 12, 1999.
- Appendix G: Lautenberg, Frank R., Chairman, and Dave Durnberger, Ranking Minority Member, "Lautenberg-Durnberger Report on Superfund Implementation: Cleaning Up the Nation's Cleanup Program," Senate Subcommittee on Superfund, Ocean and Water Protection, May 1989.
- Appendix H: Letter from Resnikoff, RWMA, to U.S. EPA, July 1, 1993.
- Appendix I: Ohio EPA Data on Tritium Levels at IEL

*Retained in Committee's file.

- Appendix J: Letter from M. Resnikoff, RWMA, to Ohio EPA, April 14, 1993.
- Appendix K: Letter from Dr. Mark Baskaran, Wayne State University, to Chris Borello, Concerned Citizens of Lake Township, September 27, 2001.
- Appendix L: E-mail communication from Arjun Makhijani to Lois Chalmers, "Re: Tritium—Naturally Occurring," February 5, 2002.
- Appendix M: Testimony of Dr. Robert K. Simon, *Beltz v. Hvbud Equipment*, No. 1993-CV720, Stark County, OH, 1994.
- Appendix N: Eyewitness Accounts from Liz and Harlan McGregor, April 8, 1999; Rex Shover, February 6, 1999; and Jim Shover, March 2, 1999.
- Appendix O: Letter from Elaine B. Panitz, MD, FACP, FACPM, to Assistant Director for Public Health Practice at ATSDR, December 1, 1992.
- Appendix P: "Revised and Supplemented Report of Investigation by the United States of America Regarding Certain Statements by Charles M. Kittinger," *U.S. v. Industrial Excess Landfill, Inc.*, U.S. District Court for the Northern District of Ohio, Eastern Division.
- Appendix Q: "Recap of IEL Customers," compiled by DOJ Investigators; "IEL 'Military' Dump Tickets," compiled by DOJ Investigators; and "Industrial Excess Landfill, Inc., Daily Reports," July 8, 1969; August 4, 196X; August 25, 1969; October 26, 1970.

INTRODUCTION

The handling of the Industrial Excess Landfill (IEL), a Superfund site in Uniontown, Ohio, has been a source of contention between the community and the U.S. Environmental Protection Agency (EPA) for over 20 years. Under the terms of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, the EPA is charged with addressing both the release and the substantial threat of a release of a hazardous substance into the environment.¹ Rather than fulfilling its mandate, however, the EPA has only grudgingly responded to the concerns of the people in this community and has essentially dismissed their concerns with no explanation for the problems that appear to afflict them. For over two decades, residents living near the site, represented by Concerned Citizens of Lake Township and American Friends Service Committee, have actively engaged the EPA over the quality of the characterization of the site, the accuracy of background data for various chemicals and radioactive materials, the methods used to test for contaminants, and the EPA's invalidation or dismissal of test results indicating the presence of radioactive contaminants at levels of concern. Although the community has raised several concerns regarding IEL, this report will focus specifically on the EPA's efforts to accurately characterize the potential for radioactive contamination of the site.

So far, results have been inconclusive as to whether or not radioactive contamination exists at IEL and several experts agree that further testing is required to find out. This report investigates the EPA's contradicting claims that the site has been adequately characterized. This site is only one example which serves to illustrate an apparent tendency at the EPA to give more weight to PRPs' financial considerations than to favoring remedies that are the most protective of human health and the environment. Illustrating this bias is EPA's general practice of allowing the parties suspected of polluting a site (known as Potentially Responsible Parties or PRPs) to perform the sampling and analysis of that site. The EPA states that "[a]llowing the PRPs to conduct groundwater sampling is not unusual and has been done at many other Superfund sites like IEL. In fact, having PRPs conduct and pay for sampling activities is actually the strongly preferred method of conducting business in the Superfund program," (Appendix A). This practice inherently taints the entire process, however, leaving the impression that the EPA has been "captured" by the industry it is intended to monitor. After all, those polluting companies have a financial interest in coming up with clean results lest they have to foot the bill for an extensive clean-up of a site. POGO is focusing on the IEL case in order to investigate the success of the EPA's Superfund program in accomplishing its mission.

BACKGROUND

The IEL Superfund site is located in Uniontown, Ohio, about 10 miles southeast of Akron. From 1966 to 1980, the landfill accepted industrial wastes which contaminated the soil and groundwater at the site. As a result of the extensive contamination and proximity to homes, the Environmental Protection Agency placed IEL on the National Priorities List (NPL), meaning it was one of the country's most con-

¹United States Code, Title 42, Chapter 103, Subchapter 1, Section 9604(a)(1)(A).

taminated sites. The companies identified by the EPA as PRPs include B.F. Goodrich Company, Goodyear Tire & Rubber Company, Bridgestone/Firestone, Inc., and GenCorp.

In 1989, the EPA issued a Record Of Decision (ROD) outlining an aggressive clean-up plan designed to prevent the further spread of contaminants which would include a protective cap and a pump-and-treat system. The cost of this remedy, in 1997 dollars, was estimated at \$25.9 million. After the release of the ROD, further studies meant to fine-tune the remedy were conducted. In 1997, the PRPs took over the performance of those studies and, based on their data, the EPA issued an amendment to the ROD in March 2000. The amended ROD substituted a passive plan, called "monitored natural attenuation," relying on rain water to cleanse the soil, for the original pump-and-treat design but retained a cap. The cost of this remedy, in 1997 dollars, was estimated at \$13.6 million. Now, the EPA is attempting to replace the cap portion of the remedy to a process called "phytoremediation," planting vegetation to absorb toxins, which will reduce the cost again to approximately \$7 million, in 2002 dollars.

"Monitored natural attenuation" and "phytoremediation" are processes by which a site is naturally corrected, without human intervention, within a timeframe that is reasonable. While phytoremediation and natural attenuation can be effective methods for addressing some sites, justification for such a remedy requires extensive site characterization and specific conditions. Selecting phytoremediation and natural attenuation at sites where unfavorable conditions exist could result in uncontrolled contaminant release. The decisions to formulate the original remedy and then change it without adequate site characterization came under considerable criticism from outside experts, Uniontown residents, and Congressional representatives.

Numerous illnesses occurring near IEL, which typically tend to be caused by radiation, and eyewitness accounts of suspicious disposals at the landfill, raised the public's concern of possible radiation contamination at the site. The EPA was skeptical because no indication of an illegal disposal of radioactive materials at the landfill had been found during its records search. However, public pressure from the Uniontown community finally forced the EPA to test for radiation in the early 1990's. Throughout the 1990's up to the present, the EPA has maintained that test results have shown no sign of disposal of radioactive materials at IEL.

But according to experts hired by a community group, Concerned Citizens of Lake Township (CCLT), and independent scientists, the EPA sampling and testing has actually been inconsistent and inconclusive at best. The problems have included the decision by the EPA to limit its testing to groundwater instead of the much more rigorous method of testing soil core samples; background wells that are too few in number and too close to the landfill to be untainted by the site; and the invalidation or dismissal of results indicating the presence of elevated levels of radiation, with seemingly weak justification by the EPA.

Of primary concern is the fact that much of the data has been highly inconclusive -neither indicative of the presence nor absence of radioactive contaminants. Yet, the EPA consistently interprets this data as proving the absence of such contamination and insists that it has found no indication of radioactive contaminants at IEL. With test results unable to credibly rule out radioactive contamination, such a vast array of anecdotal information, and some high level test results, as well as an unacceptable level of risk if the EPA is wrong, the EPA appears biased in its assessment of the site. Even when the former owner of IEL came forward last year with information of buried nuclear materials at the site, the EPA was skeptical and its year-long investigation failed to seriously investigate his allegations.

SITE INVESTIGATION

There have been numerous and varied problems with the EPA's handling of IEL. From the very beginning, unsubstantiated assumptions based on record searches and information requests seem to have clouded the judgment of EPA officials handling the EEL case. Because this initial record search did not uncover any indication of unauthorized disposal of radioactive contaminants at IEL, the EPA has stated that it does not consider it likely that such contaminants are present. Yet the very fact that such a disposal would have been unauthorized, and in fact illegal, imply that record searches are not likely to be fruitful. This initial assumption contributed to the selection of groundwater monitoring over soil core surveys and a less robust method of testing than may have otherwise been chosen. Other problems include the inadequate determination of background levels of radiation, inadequate characterization of the site, and questionable accuracy of the tests. Though EPA has noted in the past that IEL has undergone more radiological testing than any other Super-

fund site, disputed methods and results of these tests has cast doubt on the EPA's conclusions about radiological contamination at the site.

Community concerns led the EPA's Office of Solid Waste and Emergency Response to request that the Science Advisory Board (SAB) conduct a review of EPA's procedures at IEL. The SAB is part of the EPA and serves as a technical peer review panel. It established an ad hoc panel to conduct its review of EEL (Appendix B, p.8). The SAB's report stated that, ". . . the [groundwater] tests performed were appropriate and adequate to detect the occurrence of radionuclides," (Appendix B, p.4). This statement has repeatedly been used by the EPA to support its selection of testing methods and the resultant conclusion that there is no widespread problem of radiation at IEL. However, SAB's seemingly positive statement regarding the groundwater program was not without conditions. The SAB's full finding said that only with the implementation of various recommendations made by the SAB, would the program be adequate. These recommendations included increasing the number of background wells and testing for radiation at least once a quarter until successive quarterly samples produce a constant level of gross alpha and beta that is close to background.² The EPA followed none of SAB's recommendations, and in fact no sampling or testing for radiation occurred between 1993 and 2000. Yet the EPA continues to claim that the SAB supports its groundwater program.

There has also been an investigation into the handling of the site by the EPA's National Ombudsman. The Ombudsman program, among other things, handles complaints from citizens and industry, undertakes formal investigations, and takes part in dispute resolutions.³ The Ombudsman, in his preliminary findings, recommended that oversight and additional characterization of the site was necessary, and that the EPA should include trenching of the site to obtain a more complete picture of contamination at the landfill and the establishment of a "comprehensive monitoring network offsite and performance of microbial studies . . . to further understand the impact of potential migration of wastes to nearby homes and drinking water wells," (Appendix C, p.13).

Looking in the Wrong Place

There are three general approaches available to test for the presence of radioactive contamination at a site: ground surveys, groundwater monitoring, and soil core samples. Ground surveys are used routinely for initial screening and only detect radiation near the ground's immediate surface. Once a site has become overgrown with vegetation, it is difficult and often infeasible to use this method. Groundwater monitoring is effective at detecting the presence of soluble radioactive materials if they are both leaching into the groundwater and the concentrations are high enough so that they can be distinguished from background concentrations. The third option, soil core sampling, is more effective at identifying smaller quantities of immobile wastes than groundwater monitoring, but only if the core borings encounter those wastes, which is often difficult if the wastes are not spread over a wide area (Appendix B, pp. 11–12).

There are several concerns with the way in which the EPA determined which of these approaches to use. The EPA has stated that, based on studies it has performed, groundwater monitoring is the best way to find radioactivity at IEL if it exists there and that it is sufficient to properly characterize the waste buried at IEL. The EPA's own SAB, however, disagreed. The EPA used two scientific studies to support its selection of a groundwater monitoring program rather than a soil core sampling program—one demonstrating the infeasibility of the core monitoring program and the other supporting the adequacy of groundwater monitoring. However, according to the SAB, both reports "include technical flaws and provide no clear evidence that groundwater monitoring is more sensitive in detecting the presence of radioactive material in the landfill than would be a soil core sampling program," (Appendix B, p. 2). The SAB goes on to state, "[i]t certainly does not follow that the network of wells would detect the radiation with high probability if enough waste had been dumped to cause a threat to human health. . . . The Panel recognizes that both of these reports are based on a large number of assumptions that have not been validated for the IEL site," (Appendix B, pp.18–19).

Furthermore, as mentioned earlier, groundwater monitoring is only effective if the material being monitored is both soluble and leaching into the groundwater at high enough concentrations to be detected. However, some radioactive contaminants,

² Other recommendations include a protective wet-weather survey to monitor seepage points near the landfill during or following storm events, including a proactive search for contaminants where they are most likely to be found; also a full accounting of dissolved and particulate phase radioactivity. An SAB Report, pp. 2–3.

³ <http://www.epa.gov/earth100/records/a00154.html>, 2 May 2002.

such as plutonium tend to adhere to surfaces such as soil, sides of containers, and filter paper (Appendix D). One would therefore not expect to find plutonium concentrations through groundwater testing, even if it existed at the site. The EPA has insisted that trying to find radioactive contamination by soil core sampling would be like “trying to find a needle in a haystack,”⁴ and that the cost to sample soil cores from the entire 30 acres, in dollars, time, and possible exposure to toxic chemicals of the field workers and local citizens, is unacceptably high (Appendix B, p.17). Contrary to this assessment, however, outside scientists familiar with IEL are emphatic about the need to implement a soil coring program in addition to groundwater monitoring. These experts have stated on numerous occasions that, because some contaminants are not soluble, testing only groundwater for radiation will not give an accurate measurement of what radioactive contaminants may be buried at the site. By their assessments, groundwater testing is not an adequate methodology to properly characterize radiation at IEL. A soil core survey of the entire site may not be necessary. Anecdotal information from eyewitnesses, historical aerial photos of lagoon pits, and the location of wells that have consistently shown elevated levels of radiation point to much smaller areas that may be appropriate for a limited soil core sampling program.

Tainted Background Wells

Although a groundwater monitoring program without a soil core survey may not be adequate to detect radiation at TEL, groundwater monitoring can yield useful results if it is implemented properly. Before groundwater monitoring can even begin, it is important to determine the natural levels of chemicals and radiation that would have existed at a location had the contamination not been there. This is called the background⁵ concentration. This data is used as the control against which data from the site can be compared so that the site-related contaminants can be distinguished. If “background” wells are tainted by the same contaminants as the site being tested, those wells do not give an accurate representation of the background concentration. This point cannot be overemphasized. Without an accurate measurement of background concentrations, any comparison of site samples will be skewed. Background data should be gathered from the local groundwater aquifer, close enough to the site to be from the same soil and rock formation, but far enough away not to be effected by site contaminants (Appendix B, pp.13–14). Several background wells over a large area are necessary to determine what is truly background.

During its initial investigation of IEL, the EPA found that surface water from the landfill travels to Metzger Ditch, which creates the eastern boundary of the landfill (Appendices E & F). Additionally, the United States Geological Survey found that the groundwater flow pattern at IEL is radial which creates a complicated hydrogeological system, making it difficult to determine what areas have been affected by contaminants from IEL. This finding emphasizes the need for extensive sampling and testing to determine the true background of the area.

At IEL, the EPA uses only two background wells. One of the background wells is about 1000 feet north of the northeastern corner of the site, and the other is immediately adjacent to the eastern bank of Metzger Ditch. Those two wells are the source of background data for groundwater despite the conclusion by outside scientists and the EPA’s own SAB that the wells are not sufficient to reliably characterize background conditions. Even if the groundwater flow was uncomplicated, the SAB recommends five to ten wells at intermediate and varying distances from the site to adequately determine background. The SAB stated in its report on IEL that “the two wells are clearly inadequate for characterizing background,” (Appendix B, p.14).

The groundwater flow pattern at IEL creates uncertainty about what direction the groundwater will carry contaminants, and therefore about which wells are affected. Furthermore, in 1989, the EPA stated that samples of surface water, sediment, and soil associated with Metzger Ditch indicated that site-related contaminants discharge into the ditch (Appendix E). The possibility that these contaminants have similarly affected the background well next to Metzger Ditch is too significant to be ignored. The SAB declared data from that well to be “particularly suspect” because of the groundwater flow pattern at the site and the well’s proximity to the landfill (Appendix B, p.14). If the background wells are affected by site contaminants, contaminated groundwater will appear to be “natural” for the area, and therefore not actionable, when compared with background levels. A larger data set is necessary

⁴United States Environmental Protection Agency, Office of Public Affairs, Region 5, Questions and Answers About the Industrial Excess Landfill Superfund Site, December 1992, p. 6.

⁵Background includes man-made radiation that is ubiquitous, such as that from atmospheric fallout from nuclear weapons testing and accidents such as Chernobyl.

to give a reliable and scientifically credible characterization of background radionuclide conditions (Appendix B, p. 14).

The EPA has ignored the SAB's concerns, and argues that it has correctly designated only the two wells as background wells and that it has adequately determined background concentrations of radioactive materials. Despite contradictory findings by the EPA's own scientists, it has refused to construct and test additional background wells.

Botched Tests by the EPA and PRPs

To determine whether there is radioactive contamination at IEL, the EPA screened groundwater from monitoring wells and residential wells for general radioactive parameters.⁶ As mentioned earlier, it is essential to have an accurate basis for comparison in order to determine whether or not radioactive contaminants are present. It is no less important to have proper collection and analysis of the samples being tested. If the procedure for handling samples is not followed or is only inconsistently followed, the results would be highly unreliable. If wells are not sampled the same way each time, results cannot be compared to each other—either from the same well over time or from different wells across area and time.

Unfortunately, according to the EPA itself, there have been an inordinate number of errors and inconsistencies that cast enormous doubt on the accuracy of testing results from IEL. For example, as mentioned earlier, both of the studies which were pivotal in selecting groundwater monitoring over soil core sampling, were highly criticized by the SAB. Furthermore, the company that conducted one of the tests, the PRC Corporation, was then contracted by the EPA to collect the first seven rounds of samples at EEL. Serious errors were made by PRC Corp. during the collection of samples at EEL including broken chains of custody,⁷ inappropriate filtering of samples from residential wells, failure to record the volume of water passed through filters and the dry weight of the collected solids of filtered samples,⁸ failure to record the number of filters used on a number of samples, and the collection of samples in plastic containers which were to be tested for tritium. Instead of hiring a new contractor to collect samples, the EPA continued to use PRC Corp. at IEL. In 1997, responsibility for the collection of samples was handed over to the PRPs, who have an obvious vested interest in the outcome of the tests. The company hired by the EPA to oversee the tests is PRC Corp. (now known as Tetra Tech), the very company that had made so many mistakes in the past when working for the EPA. After taking over sample collection, the PRPs also made mistakes which may skew the results, such as inadequate purging of wells prior to sampling, the failure to immediately preserve samples for plutonium testing with acid, and the use of plastic containers for samples which were to be tested for tritium.

Furthermore, the analysis of these samples has often been questionable. In 2000, a Department of Justice criminal probe revealed that analysts at an EPA lab in Chicago may have manipulated test results to benefit polluters in approximately a thousand cases, including several Superfund sites. One of those sites was IEL. Regardless of the Justice Department's investigation, the EPA reasoned that the test results were still usable since the analysts implicated in the scandal were only part of the team that analyzed the IEL samples. Additionally, inappropriate standards have been used to analyze some of the samples for radioactive contamination at IEL and have been criticized by outside scientists. The Minimum Detectable Activity (MDA) is the level of each contaminant that will be tested for at a site. Amounts of radiation in groundwater below this level are not detected. If the MDA levels are set too high, potentially harmful levels of radiation will remain undetected. When testing reveals a gross alpha level above a certain level⁹ Federal regulations require a more specific analysis of individual contaminants. On a number of occasions, the MDA set for gross alpha at TEL was higher than the level at which Federal regulations mandate such a breakdown. More problematic is the fact that there have even been occasions when the MDA level at TEL was set above the Maximum Contami-

⁶The general radioactive parameters are gross alpha, alpha spectroscopy, gross beta, gamma spectroscopy, tritium, and Carbon-14. Alpha spectroscopy is done when the gross alpha exceeds a set level, and is a more specific analysis to determine the type and level of radioactive material in the groundwater.

⁷The chain of custody is the system by which samples are constantly monitored to ensure that they are not tampered with.

⁸"The failure to record the volume of water passed through the filter and the dry weight of collected solids for filtered samples at the IEL site was such that a full accounting of the dissolved and particulate concentrations of radioactive constituents could not be made." An SAB Report, p. 22.

⁹5 pCi/L

nant Level,¹⁰ the level which the EPA considers hazardous to human health and safety. When testing reveals a gross beta level above a certain level¹¹ Federal regulations require a more specific analysis of individual contaminants.¹² EPA failed to do this full characterization and identification of gross beta during the early rounds; of testing.

In addition to these mistakes, however, there are the larger problems of procedures and standards that have been approved by the EPA, but that outside scientists believe may not be protective of human health and the environment. Such procedures and standards include the filtering of monitoring well samples and the use of PRPs to conduct the investigation.

The method consistently used for testing at IEL has been EPA's "Gross Alpha and Gross Beta Radioactivity in Drinking Water." This method contains an inherent bias because it is intended to test drinking water. Therefore, it allows the filtration of sediment from the samples of groundwater, thereby increasing the likelihood of underestimating, or missing completely, any man-made radiation such as plutonium that tends to adhere to sediment or soil. Although the EPA states that the regulations require filtration to be done,¹³ several experts disagree with the EPA's use of the method at this site. The SAB also found this to be a problem, stating that, "EPA does not address radioactivity in suspended sediment, [making it] difficult to address whether or not the levels observed in the filtrate are within background levels," (Appendix B, p.15).

The EPA's use of PRPs to conduct the investigation of a site is a systemic problem that potentially taints the clean-up of every Superfund site. A 1989 report from the Chairman and Ranking Member of the Senate Subcommittee on Superfund, Ocean and Water Protection found, among other things, that statistically, the involvement of the PRPs led to cheaper remedies that did not necessarily protect health and safety. The report stated, "Enforcement lead sites (those sites where EPA is seeking to make potentially responsible parties assume cleanup costs) rely more on so-called containment (e.g. preventing the movement of rather than [sic] detoxifying) of contamination and less on treatment (including the most permanent types of treatment) than sites designated for public funding. This data raises the disturbing possibility that EPA, in an effort to achieve settlements or to compel responsible parties to pay for cleanups, may be sacrificing health and environmental standards required by the law," (Appendix G, pp.10-11). This study was done at a time when regulations required the EPA to lead the investigations of Superfund sites, but to negotiate settlements with the PRPs. Current practice within the EPA allows much deeper involvement by the PRPs, even allowing them to conduct the very tests which help determine the remedy. One can only assume that more involvement by the PRPs would only exacerbate the problem cited in the Subcommittee's 1989 report. The PRP's inclination to minimize both current and future costs is to be expected. It is the EPA's job to protect the public from this conflict.

At EEL specifically, when the PRPs took over sampling in 1997, they did not perform any sampling or testing for radiation until August 2000. After only one round of radiation testing, the EPA accepted the PRPs decision to drastically reduce the number of wells to be tested for radiation from 50 to 7. Unfortunately, the wells that were dropped from testing included several that were found to have elevated levels of radiation in the past.

FINDINGS OF RADIATION

Both the EPA and the Ohio EPA (OEPA) have collected groundwater samples for radiochemical analyses. Even with all the errors, inconsistencies in sampling, and questionable methods and standards, there have been findings of radioactive materials at EEL from the beginning—all of which have been discounted by the EPA and the PRPs.

At EEL, gross alpha concentrations have been consistently elevated, sometimes as much as tens of times higher than background well measurements for the rest of the county (Appendix H); gross beta has been elevated during numerous sampling rounds in a number of wells (as recently as May 2001), but has been consistently higher in two wells in particular; uranium has been found in various wells during every round; plutonium, which is man-made, has been found during several sampling rounds in various wells; and tritium and technetium-99, two other man-made radioactive contaminants, have been found in several wells. However, none of these

¹⁰ 15 pCi/L

¹¹ 50 pCi/L

¹² United States Code of Federal Regulations, 40 CFR 141.26 (b)(4)(i).

¹³ United States Environmental Protection Agency, Office of Public Affairs, Region 5, Questions and Answers About the Industrial Excess Landfill Superfund Site, December 1992, p. 8.

findings have been given any credence by the EPA. The gross alpha and gross beta readings have been attributed to turbid water samples and naturally occurring radionuclides. The uranium findings have been dismissed as being background concentrations. Plutonium, a man-made radionuclide, has been found a number of times and dismissed for various reasons: in 1990, the findings were invalidated; in 1991 and 1992 the EPA found traces of plutonium in deep groundwater that were said to be at only marginally detectable concentrations, which the EPA declared to be inconclusive; in November 2000, plutonium was found in deep groundwater in the background well next to Metzger Ditch, and the EPA said the concentration must be a background level because it was found in a background well; plutonium was detected in two other wells during the November 2000 round, but again the EPA found them to be inconclusive. There have also been several findings of tritium, another man-made radionuclide, at levels above Federal drinking water standards that were deemed invalid by the EPA. However, the OEPA found numerous tritium levels well above background that were validated (Appendix I). Because these were not above the drinking water standards, however, the EPA has concluded that it is not consistent with a public health concern. The technicium-99, yet another man-made radioactive contaminant, that was found was dismissed, again because it was not above the drinking water standard and therefore not considered to be of concern.

Other scientists take a different view of the findings that the EPA has dismissed so readily. For example, the OEPA's measurement for gross alpha from a shallow well in August 1992 was 140 times background measurements for the rest of the county. According to one outside scientist, measurements of that magnitude cannot be due to naturally occurring radioactivity (Appendix J). After analyzing November 2000 results, a second outside scientist concurred that there is man-made radiation present at the landfill, saying specifically that the uranium results "can either be due to bad data or there is some serious contamination of non-natural uranium . . ." (Appendix K).

Scientists also differ from the EPA regarding the findings of plutonium. Upon review of the November 2000 results, Dr. Mark Baskaran found the concentration of plutonium in the groundwater at IEL to be about 1000 times higher than that found in surface waters such as lakes, rivers, or oceans, indicating that the plutonium present at IEL is "most likely derived from one or more local sources," (Appendix D) rather than from atmospheric fallout. The mere fact that the plutonium was found in groundwater as opposed to surface water indicates that it is most likely not due to atmospheric fallout. He also found the amount of measurement uncertainties, the EPA's statistic estimating the accuracy of test results, associated with the plutonium concentrations to be "ridiculously high." He stated that any academic institution where there is any active environmental radioactivity research being conducted would be able to improve upon that precision by 100 to 1000 times (Appendix D).

On several different occasions, validated groundwater test results from, the OEPA showed elevated levels of tritium, including levels up to 6,600 pCi/L. According to Dr. Arjun Makhijani, concentrations of "300-4000 picocuries per liter in groundwater can be regarded as of anthropogenic [man-made] origin, provided that the measurements are reliable," (Appendix L). While these levels are not direct evidence of harmful levels of radiation, because tritium is rarely found naturally in groundwater, they can be viewed as evidence of site-related radioactive contamination (Appendix B, p.15). Because technicium-99 is also man-made radiation, its very presence in groundwater from the landfill can also be viewed as evidence of site-related radioactive contamination.

Additionally, in response to two testing rounds that were invalidated by the EPA, an outside expert reviewed the methods of one of the labs which EPA blamed for the invalidation. He found that, while the methods used by the lab were different from those used by the EPA, they were not wrong and that the results were "no more invalid" than those from the EPA's own labs (Appendix M, p.51).

ANECDOTAL EVIDENCE

Several witnesses have testified to seeing U.S. military vehicles entering and leaving IEL, some with radiation markers (Appendix N). Each witness reported strikingly similar accounts of suspicious U.S. Army activity at IEL in the late 1960's and the early 1970's. Of the four eyewitness accounts discussed here, two have extensive experience in recognizing radiation symbols, and a third is the former owner and operator of the landfill.

In a notarized statement to the EPA, Liz and Harlan McGregor of Uniontown, swore to seeing "many army trucks come into the landfill in the early 1970's. . . .

[The trucks] were loaded with 50–100 stainless steel canisters on flatbed trucks. [The] canisters had hazardous markings on them The tankers would come in all through the night and dump.” A decade later a U.S. Army engineer visited their home in Uniontown to inspect the premises without explanation.

Rex Shover, a second eyewitness, served on the Uniontown Volunteer Fire Department from 1958 to 1976. In a sworn affidavit dated February 6, 1999, Mr. R. Shover stated that during his time as a volunteer fireman, he “personally saw tanker trucks carrying radioactive insignia enter the Industrial Excess Landfill late at night after the landfill was closed.” Mr. R. Shover also asserted that his firefighter training included the labeling of radioactive materials. “I am familiar with and can recognize placards and labels used for radioactive materials.”

At the IEL public meeting held in Uniontown on March 2, 1999, Mr. R. Shover read a letter on behalf of a third eyewitness, his brother Jim Shover, who now lives in California. In the letter, Mr. J. Shover stated that he had spent his youth in Uniontown and had been employed at IEL as a mechanic’s helper in 1964—and 1965. Mr. J. Shover stated that, after joining the U.S. Navy in 1966, he often returned to Uniontown, and recalls seeing U.S. Army tanker trucks with radioactive material placards entering and leaving IEL on several occasions between 1966 and 1971. During his Navy career, Mr. J. Shover received training in nuclear warfare, industrial radiology, radioactive materials, and associated health problems in humans, and served on the Nuclear, Biological, and Chemical rapid response team, making him uniquely qualified to identify military vehicles and radiation symbols. He identified the trucks as “specially designed double-lined tankers designed to transport liquid radioactive waste material.”

In addition, in 1992, the Agency for Toxic Substances and Disease Registry (ATSDR) requested health information regarding IEL from Dr. Elaine Panitz. In her response she stated, “the case of Patient #1 . . . presents disturbing evidence that radiation (and possibly other carcinogens such as benzene, vinyl chloride, and chlorophenols) may be causing neoplasms [tumors] among residents surrounding the IEL site. The routes of exposure are likely to include ingestion (well water, fruits and vegetables), skin absorption (well water for bathing and washing clothes, as well as swimming or playing in marshy areas near IEL), and inhalation (radioactive dusts released from the landfill, radioactive gases released from contaminated ground and groundwater),” (Appendix O).

These eyewitness accounts coupled with the above medical opinion raise reasonable questions about the material buried at IEL as well as the EPA’s strategy in investigating credible concerns from Uniontown residents. During a recent year-long EPA investigation of the testimony of IEL former owner, Charles M. Kittinger, none of these eyewitness accounts were considered, even though the EPA itself had statements from each of them. This oversight casts considerable doubt on the notion that the EPA is attempting to find the truth.

Charles M. Kittinger, the owner of the EEL site from 1965 to 1972, went to EPA officials a year ago to admit that he had allowed the illegal disposal of nuclear materials by the U.S. Army at EEL. Since his disclosure, the EPA appears to have spent its resources attempting to discredit Mr. Kittinger and his allegations but has yet to determine the truth by a more thorough characterization of the site.

That significant time has passed since the incident obviously confuses the issue, raising questions as to the accuracy of witness accounts and 30 year old memories. This becomes a difficult obstacle in analyzing personal testimonies. This is to be expected. What is problematic is the inconsistency with which the EPA investigators use this fact. For example, while some statements from Mr. Kittinger’s testimony are discredited due to “the possibility that his recollection of events has been colored,” (Appendix P, p. 7) others are taken at their most literal meaning, such as the exact size of the hole or the capacity of the trucks that carried the materials, which the government maintains cannot be accurate. By insisting that Mr. Kittinger’s memory must be entirely accurate or entirely a fabrication, the investigators are able to dismiss facts and test results that may indicate something unusual. Under these parameters, no weight is given to evidence of a 1969 excavation site because it is 40 feet from where Mr. Kittinger indicated and 15 feet smaller than Mr. Kittinger had recalled (Appendix P, p. 97). In another example, a remote sensing anomaly is found a mere 11 feet deeper than Mr. Kittinger said the containers of nuclear material were buried, and is therefore entirely dismissed (Appendix P, p. 116). If it can be suggested that time has clouded Mr. Kittinger’s memory of facts that the government wishes to deny, then time may also blur the memory of such specific details.

The government’s conclusions that Mr. Kittinger’s claims are unfounded are partly based on the lack of documentation of the alleged delivery of this nuclear material. However, if such an illegal operation had occurred, the involved parties would

not likely be interested in keeping detailed records of their actions. By setting preposterous standards of proof for the investigation, it appears the EPA has ensured that it will not come up with an answer it doesn't want.

Even when there does appear to be some documentation, the investigators go out of their way to discredit the existing documents. At one point, the EPA's report of its investigation states that based on a review of the delivery tickets, no deliveries were made by the U.S. Army. It was not until the original draft of the report was completed and questions were raised on this point, that the EPA investigators admitted that no delivery tickets were reviewed that were dated prior to 1970 (Appendix P, p.16). Considering Mr. Kittinger's belief that the delivery was made in 1968 or 1969, though possibly 1971, it is not surprising that the investigation had not revealed corroborating documents.

When earlier tickets were later obtained and reviewed, corroborating evidence was discounted. Three entries in the delivery log (for which the delivery tickets are missing) were marked as deliveries from the "U.S. Army" (Appendix P, p. 19, & Appendix Q). However, it is assumed by the investigators that what was actually meant was the U.S. Army National Guard, which does not have access to nuclear materials. Because the government has a clear interest in the outcome of the investigation, it is disingenuous to draw such favorable conclusions from inconclusive evidence.

The investigators spent considerable time analyzing the policies and regulations of the U.S. Army, the Army National Guard, the Department of Energy, and NASA, apparently in order to discount the theory that nuclear materials would have been disposed of by them at IEL. However, it can clearly be assumed, even without such analysis, that a strictly illegal act would not be permitted by any of these agencies' regulations. Therefore, the extensive analysis of these regulations seems to be no ping more than a diversionary tactic.

For the investigation, the government solicited experts to assist in the analysis of historical aerial photographs and to apply remote sensing technologies to the landfill. The investigation report itself states, "the limitations of both the aerial photo analysis and the remote sensing technologies must be acknowledged," (Appendix P, p.6). But even when using these limited methods, the investigators seem to intentionally overstate their case, drawing conclusions where none are warranted.

In the report's description of the aerial photo analysis, the investigators admit that the photographs are incomplete and "do not exclude the possibility that the hole Mr. Kittinger described existed," but only that the available photos cannot prove that it did. Even after admitting that the photos were inconclusive, however, the investigators use them to imply that Mr. Kittinger's allegations are false, stating, "the aerial photographs from the relevant timeframe cast significant doubt on Mr. Kittinger's description of the hole," (Appendix P, p. 6).

The investigators' analysis of the remote sensing technologies is similarly flawed. The entire test, designed by the investigators, relies on the assumption that the radioactive materials are buried apart from any other metal objects. Yet this assumption is in direct conflict with Mr. Kittinger's statements that the radioactive materials were buried near several junked cars. Given this contradiction, the report admits, this technology can tell "nothing about the presence or absence" of containers of nuclear material (Appendix P, p. 113). Yet despite this flaw, the results from the test are continually used throughout the report to discredit Mr. Kittinger's claims.

The remote sensing test, in fact, did turn up the one result that may actually corroborate Mr. Kittinger's claims, yet the investigators attempt to explain it away. The report states that there is "one 'anomaly' that might be caused by stainless steel," which would be consistent with Mr. Kittinger's claims. Their defense against this startling evidence is to state that, "this anomaly could also be caused by other materials," (Appendix P, p. 7). Here again, inconclusive evidence, and even evidence that favors Mr. Kittinger's claims, is implied to favor their own case.

It is true that Mr. Kittinger's testimony raises more questions than it answers. The real failure of this investigation is not that it is unable to either prove or disprove Mr. Kittinger's claims, but that it is willing to brush these new questions aside without addressing them. The ultimate conclusions of the report are based on the failure to differentiate between evidence that does not definitively confirm Mr. Kittinger's claims and evidence that proves Mr. Kittinger's claims false. Ultimately, the evidence is inconclusive. The EPA seems willing to assume that inconclusive results imply there is no nuclear material at the site, thereby possibly putting hundreds of lives at risk. EPA's National Ombudsman has called for extensive testing and site characterization which would give much more conclusive evidence than was gained through this investigation.

CONCLUSION

The Industrial Excess Landfill in Uniontown, Ohio, is one case study of the EPA's mishandling of Superfund sites. The overt influence of the polluters in Superfund clean-ups must be addressed to ensure that the EPA is adequately protecting human health and safety as well as the environment. Furthermore, the lack of community access or influence, particularly in comparison to that of the polluters, should be immediately rectified. It is, after all, the communities that have the most to lose from an inadequate clean-up, while it may be noted that the polluters have the most to gain by a cheap remedy. It is the responsibility of the EPA to remain unbiased and fairly remedy Superfund sites.

RECOMMENDATIONS

- Legislatively create a National Ombudsman's Office which is wholly independent of the EPA. The Office should be placed in either a White House office or as part of the legislative branch, perhaps attached to the General Accounting Office.
- All ongoing investigations into a site, such as those performed by the SAB or the National Ombudsman, must be completed, and the recommendations made available to the public prior to the implementation of a Record Of Decision.
- The Potentially Responsible Parties (PRPs) should reimburse the government for the cost of, rather than being allowed to initially pay for, a site-related investigation. The EPA should be prohibited from allowing PRPs to conduct investigations or testing.
- If the government continues to allow the PRPs to remain a part of the investigation of sites, it should allow and facilitate, through financial and other means, communities to hire qualified experts to take samples for analysis from the site. The data and recommendations resulting from a community-led investigation should be given equal weight as those submitted by the PRPs.
- The scientific validity of standards and procedures utilized by the EPA, such as the use of filtering, needs to be re-evaluated by an independent organization such as the National Academy of Science.
- Technical corrections or recommendations geared toward strengthening protections or addressing community concerns, such as those made by the Science Advisory Board (SAB) or the National Ombudsman's Office, that are not implemented by the EPA, must be justified and certified by the EPA Administrator.

107TH CONGRESS
1ST SESSION

S. 606

To provide additional authority to the Office of Ombudsman of the
Environmental Protection Agency.

IN THE SENATE OF THE UNITED STATES

MARCH 23, 2001

Mr. CRAPO (for himself, Mr. ALLARD, and Mr. CRAIG) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To provide additional authority to the Office of Ombudsman
of the Environmental Protection Agency.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ombudsman Reauthor-
5 ization Act of 2001”.

6 **SEC. 2. OFFICE OF OMBUDSMAN.**

7 The Solid Waste Disposal Act (42 U.S.C. 6901 et
8 seq.) is amended by striking section 2008 (42 U.S.C.
9 6917) and inserting the following:

1 **“SEC. 2008. OFFICE OF OMBUDSMAN.**

2 “(a) DEFINITIONS.—In this section:

3 “(1) ASSISTANT ADMINISTRATOR.—The term
4 ‘Assistant Administrator’ means the Assistant Ad-
5 ministrator for Solid Waste and Emergency Re-
6 sponse of the Environmental Protection Agency.7 “(2) OFFICE.—The term ‘Office’ means the Of-
8 fice of the Assistant Administrator for Solid Waste
9 and Emergency Response of the Environmental Pro-
10 tection Agency.11 “(3) OMBUDSMAN.—The term ‘Ombudsman’
12 means the director of the Office of Ombudsman es-
13 tablished under subsection (b).

14 “(b) ESTABLISHMENT.—

15 “(1) IN GENERAL.—The Administrator shall es-
16 tablish within the Office an Office of Ombudsman,
17 to be directed by an Ombudsman.18 “(2) OVERSIGHT.—The Ombudsman shall re-
19 port directly to the Administrator.

20 “(c) DUTIES.—The Ombudsman shall—

21 “(1) receive, and render assistance concerning,
22 any complaint, grievance, or request for information
23 submitted by any person relating to any program or
24 requirement under this Act; and

1 “(2)(A) identify areas in which citizens have,
2 and assist citizens in resolving, problems with the
3 Office;

4 “(B) propose changes in the administrative
5 practices of the Environmental Protection Agency to
6 eliminate or, to the maximum extent practicable,
7 mitigate those problems; and

8 “(C) conduct investigations, make findings of
9 fact, and make nonbinding recommendations con-
10 cerning those problems.

11 “(d) POWERS AND RESPONSIBILITIES.—In carrying
12 out this section, the Ombudsman—

13 “(1) may, on receipt of a complaint or at the
14 discretion of the Ombudsman, investigate any action
15 of the Assistant Administrator without regard to the
16 finality of the action;

17 “(2) may, under the authority of this section or
18 section 104(e) of the Comprehensive Environmental
19 Response, Compensation, and Liability Act of 1980
20 (42 U.S.C. 9604(e)), examine any record or docu-
21 ment of, and enter and inspect without notice any
22 property under the administrative jurisdiction of, the
23 Environmental Protection Agency;

24 “(3) in a case in which the Ombudsman experi-
25 ences difficulty in gathering information pertaining

1 to an investigation conducted by the Ombudsman,
2 may request the Inspector General of the Environ-
3 mental Protection Agency to subpoena any person to
4 appear to give sworn testimony concerning, or to
5 produce documentary or other evidence determined
6 by the Ombudsman to be reasonably material to, the
7 investigation;

8 “(4) may carry out and participate in, and co-
9 operate with any person or agency involved in, any
10 conference, inquiry on the record, public hearing on
11 the record, meeting, or study that, as determined by
12 the Ombudsman—

13 “(A) is reasonably material to an inves-
14 tigation conducted by the Ombudsman; or

15 “(B) may lead to an improvement in the
16 performance of the functions of the Office;

17 “(5) shall maintain as confidential and privi-
18 leged any and all communications concerning any
19 matter pending, and the identities of any parties or
20 witnesses appearing, before the Ombudsman; and

21 “(6) shall administer a budget for the Office of
22 Ombudsman.

23 “(e) ADMINISTRATION.—

24 “(1) IN GENERAL.—The Ombudsman may—

5

1 “(A) appoint an Associate Ombudsman for
2 each region of the Environmental Protection
3 Agency; and

4 “(B) evaluate and carry out personnel ac-
5 tions (including hiring and dismissal) with re-
6 spect to any employee of the Office of Ombuds-
7 man.

8 “(2) CONTACT INFORMATION.—The Ombuds-
9 man shall maintain, in each region of the Environ-
10 mental Protection Agency, a telephone number, fac-
11 simile number, electronic mail address, and post of-
12 fice address for the Ombudsman that are different
13 from the numbers and addresses of the regional of-
14 fice of the Environmental Protection Agency located
15 in that region.

16 “(3) COOPERATION.—All Federal agencies
17 shall—

18 “(A) assist the Ombudsman in carrying
19 out functions of the Ombudsman under this
20 section; and

21 “(B) promptly make available, in such for-
22 mat as may be determined by the Ombudsman,
23 all requested information concerning—

24 “(i) past or present agency waste
25 management practices; and

1 “(ii) past or present hazardous waste
2 facilities owned, leased, or operated by the
3 agency.

4 “(4) REPORTS.—The Ombudsman shall, at
5 least annually, publish in the Federal Register and
6 submit to the Committee on Environment and Pub-
7 lic Works of the Senate, the Committee on Energy
8 and Commerce of the House of Representatives, the
9 President, and, at the discretion of the Ombudsman,
10 any other governmental agency, a report on the sta-
11 tus of health and environmental concerns addressed
12 in complaints and cases brought before the Ombuds-
13 man in the period of time covered by the report.

14 “(f) PENALTIES.—Any person that willfully—

15 “(1) obstructs or hinders the proper and lawful
16 exercise of the powers of the Ombudsman; or

17 “(2) misleads or attempts to mislead the Om-
18 budsman in the course of an investigation;

19 shall be subject, at a minimum, to penalties under sections
20 1001 and 1505 of title 18, United States Code.

21 “(g) APPLICABILITY.—

22 “(1) IN GENERAL.—This section—

23 “(A) shall not limit any remedy or right of
24 appeal; and

1 “(B) may be carried out notwithstanding
2 any provision of law to the contrary that pro-
3 vides that an agency action is final, not review-
4 able, or not subject to appeal.

5 “(2) EFFECT ON PROCEDURES FOR GRIEV-
6 ANCES, APPEALS, OR ADMINISTRATIVE MATTERS.—
7 The establishment of the Office of Ombudsman shall
8 not affect any procedure concerning grievances, ap-
9 peals, or administrative matters under this Act or
10 any other law (including regulations).

11 “(h) AUTHORIZATION OF APPROPRIATIONS.—

12 “(1) IN GENERAL.—There are authorized to be
13 appropriated to carry out this section—

14 “(A) \$2,000,000 for each of fiscal years
15 2002 and 2003;

16 “(B) \$3,000,000 for each of fiscal years
17 2004 through 2006; and

18 “(C) \$4,000,000 for each of fiscal years
19 2007 through 2010.

20 “(2) SEPARATE LINE ITEM.—In submitting the
21 annual budget for the Federal Government to Con-
22 gress, the President shall include a separate line
23 item for the funding for the Office of Ombudsman.

24 “(i) TERMINATION.—The Office of Ombudsman shall
25 cease to exist on the date that is 10 years after the date

8

1 of enactment of the Ombudsman Reauthorization Act of
2 2001.”.

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