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RECENT DEVELOPMENTS IN THE EPA OFFICE OF THE OMBUDSMAN

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS

AND THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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RECENT DEVELOPMENTS IN THE EPA OFFICE OF THE OMBUDSMAN

TUESDAY, JULY 16, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS
MATERIALS JOINT WITH SUBCOMMITTEE ON HEALTH,
Washington, DC.

The subcommittees met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Paul E. Gillmor (Chairman, Subcommittee on Environment and Hazardous Materials) presiding.

Members present from the Subcommittee on Environment and Hazardous Materials: Representatives Gillmor, Shimkus, Pallone, Barrett, Luther, and DeGette.

Members present from the Subcommittee on Health: Representatives Bilirakis, Norwood, Brown, Barrett, Pallone, Stupak, and Wynn.

Staff present: Jerry Couri, policy coordinator, Amit Sachdev, majority counsel; Hollyn Kidd, legislative clerk, and Dick Frandsen, minority counsel.

Mr. GILLMOR. The subcommittee will come to order. And today's hearing is being called at the request of Mr. Bilirakis to explore recent events in the Office of EPA's Ombudsman, and it is actually a joint hearing of the Environment and Hazardous Materials Subcommittee and the Health Subcommittee of which Mr. Bilirakis is the chairman.

The Office, which Congress established in 1984, was a 4-year project thought to build a bridge between concerned citizens and government bureaucracy; bringing the government processes back to the people. Internal and external events over the past several years have created a public liaison that has been eager to be responsive to the public. But not necessarily responsible to it. And a true Ombudsman is both.

While personalities have dominated some of this past history, the heart of the alleged problems within the Ombudsman's Office can be trace of the question of whether a neutral entity can act independently within an agency that supports it. People who have previously served in that Office have asserted that it cannot.

Last year, the General Accounting Office issued a report detailing how the Ombudsman functions. In April of this year, Administrator Whitman moved the Ombudsman function into the statutorily-independent EPA Office of Inspector General. Some believe that a conflict of interest still exists with the Ombudsman's func-

tion housed within the Inspector General's Office. I think that assessment is premature, but I'm eager to hear their suggestion for the proper way to handle this matter.

We will not reach all the answers this morning, but I hope we understand the importance of breaking down the barriers of bureaucratic indifference and opening these processes to free and open input, creativity, and constructive criticism in defense of human health and the environment.

Even though Congress has not authorized the Hazardous Waste Ombudsman Office in 14 years, EPA has found this function important enough to administratively kept it alive all this time. And whether we agree on the proper place to put the Ombudsman, we must not shut out the public from the important decisions on their local areas and environments.

I look forward to hearing from our very distinguished panel of witnesses and to thank them for taking the time to be with us during a very hectic time on Capitol Hill. They possess the greatest background and experience to help us begin to answer some of the questions that will help us maintain an independent Ombudsman function within the EPA.

Though some may want to get into the personalities or past disputes behind this issue, we must remember that it was Congress that thought up this role and we should ensure that it operates responsively to the public and responsively to the tax payers.

Additionally, I'm very interested in the GAO statement and what they have found in respect to the Ombudsman Office operations within the Office of Solid Waste and Emergency Response. We must seek the lessons of the past if we're going to avoid problems in the future.

And I'd like to recognize the gentleman from New Jersey, the ranking member of the Environment Subcommittee, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman, and I see Chairman Bilirakis here as well. This is a joint subcommittee hearing. I just wanted to mention, before we began, a couple of process things, Mr. Chairman, because I am concerned that we just found out about this hearing last week and I think that we have to pay more attention to the process so that the minority is aware when the subcommittee is actually going to have hearings in a little more timely fashion.

In addition, our side, I don't know about the Republican side, but the Democrats didn't receive a copy of the testimony from the EPA until about 6:30, 7 o'clock last night. And if I can mention, Mr. Chairman, the committee rules say that we're supposed to receive copies of the witnesses' testimony 2 working days in advance of the hearing. I'm not pressing this too much, because I do think that it's important that we have the hearing. We have been asking to have a hearing on the Ombudsman for some time. But we do have to do a better job in terms of notifying the minority about when the hearing is going to take place and also getting the testimony from the EPA in the future.

The other thing I wanted to say, Mr. Chairman, is that I really think that we need to move as a subcommittee on some of the legislation. There was an article in today's Congress Daily that talked about effective implementation of the Brownfields Law which is

you know we were very successful in working on a bipartisan basis to put that together. And the EPA is now touting it as a great program. I'd like to see the same thing done with some of the other issues. We've had a hearing on the safe drinking water, which I thought was a good hearing. And I think that's another area where maybe we could work together and try to achieve a bill that would pass and go to the President just like the Brownfields.

There are a number of these things I think need attention and even though it's already July, you know we still have a few months that maybe we can work together and try to move some of these important bills that even the administration has said that they'd like to see moved.

With that, I want to say that I am relieved that we are finally having this hearing on the EPA Ombudsman. The job of the Ombudsman cannot be lightly as their role is to serve as a public advocate and receive inquiries and complaints from the public regarding the administration of RCRA and the Superfund program. The Ombudsman positions were created to be independent and objective, basically, an objective voice of reason for the public. After concerns arose in October of 2000 over the adequacy of the independence of the Office of Ombudsman from the Office of Solid Waste and Emergency Response, a GAO investigation was completed. And the investigation discovered that among other things the national and regional offices suffer from not only a structural lack of independence, but limited control over their budgetary resources as well.

In response to these findings, the EPA issued a memorandum relocating the Office of Ombudsman to the Office of the Inspector General. After legal challenges and public opposition, the EPA Inspector General's Office received the functions of the Ombudsman in April of this year.

Mr. Chairman, I have to say that I don't think that anyone would quarrel with the difficulties in establishing true independence for the Ombudsman function. But what myself and many of my colleagues have a problem with is that I believe that effectively the EPA under Republican Administration has essentially dissolved the Ombudsman function when the Department ordered it transferred to the Inspector General because it's eliminating the position description, removing the ability to find problems in select cases, and restricting communication from the outside world of the EPA.

I don't understand, Mr. Chairman, what the EPA feels it has to hide. You know, I think that I have to come to the assumption that they're trying to hide something if they feel that they have to essentially dissolve or destroy the Ombudsman's function. Somehow they see it as a threat to the Agency or something. That's the only conclusion I can come to. And I think that it's very sad that the Agency lost Bob Martin in the process. I see that he is in the audience with us today. I think he did a good job and you know was very independent, was sort of the epitome of what independence was supposed to be about.

But beyond Bob, the public has lost the position in general. They've lost their voice when it comes to cleaning up Superfund sites, which is one of the biggest concerns that I have right now, among other things.

Bob Martin actually states in his testimony, which I guess he has written testimony, that without a true EPA National Ombudsman function, communities are at risk from an unchecked bureaucracy. And I really believe that. I believe that unless this is established again and changed in a way that it truly becomes an independent voice, we are going to lose in our communities the ability to effectively check on the EPA. That's what Ombudsman was supposed to be. I don't think it functions in that capacity anymore and hopefully this hearing will shed some light on that. So I'm glad we're having the hearing. Thank you.

Mr. GILLMOR. I thank the gentleman. Regarding the testimony, we're sorry you didn't get it until 6:30 last night, but I checked with my staff and that's when we got it. So you received it the same time the majority did.

Now I'll recognize the chairman of the Health Subcommittee, Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman, and let me begin by expressing my thanks to you and Chairman Tauzin for scheduling today's hearing. They both know how strongly I feel about the need for an independent Ombudsman function at the Environmental Protection Agency, and I'm grateful they worked patiently with me to arrive at this point, particularly after several months of trying. We're not here today, I trust and hope, to finger point or to engage in partisan bickering about environmental policy. We're here today because we have a responsibility to our constituents. We have a responsibility to ensure that those families living in communities burdened with hazardous waste sites are able to participate in decisions affecting their health and safety. An Ombudsman guarantees public access to this process.

An Ombudsman can only be as effective as he or she is independent. Nowhere is this as evident as it is in the EPA. Mr. Pallone used the words "the Office was created to be independent and objective." And I certainly agree. I was one of the few members of this committee that was here back in the mid 1980's when we worked into the late hours of the night working on the Superfund and the creation of the Ombudsman Office.

In its report, "EPA's National Regional Ombudsmen Do Not Have Sufficient Independence," the General Accounting Office found the EPA Ombudsman did not have the necessary level of independence. As a result of the GAO's subsequent recommendations, EPA decided to transfer the Ombudsman function to the Office of Inspector General.

Does the EPA's decision to relocate the Ombudsman to the OIG provide true independence? That's really the question of this hearing. I wish that we could have explored this issue before the transfer was implemented. We tried. God knows we tried. But I do look forward to the opportunity to hear from the EPA and ask questions about this transfer.

I will say obviously that Ms. Whitman made an effort, I think, to abide by what she thought were the concerns that the GAO raised. Certainly, no effort had been made prior to that point in time.

This past Saturday I sponsored a town meeting with Inspector General Nikki Tinsley and acting Ombudsman Mary "Peggy" Boyer

in my home community of Tarpon Springs, Florida. While I appreciated their willingness to come down and to listen to the concerns of area residents, my constituents raised some valid concerns about the role of the Ombudsman in the OIG, and I anticipate all of us exploring those issues today.

I'm particularly pleased that my constituent, Heather Malinowski, came to Washington on such short notice. If you think you got short notice, she even got shorter notice, and had to incur the expenses of the airlines when you have to catch a flight at the last minute. But anyhow, she did come to Washington on such short notice to testify this morning. Mrs. Malinowski has years of experience in dealing with the EPA. I would say that she's reflective, I think, of so many people out there, so many Americans who really care about the process, want to be involved in the process. I know I spent much of my life listening to the term "you can't fight city hall."

Well, I'm here to tell you that she's emblematic of people who can fight city hall and do a pretty darn good job of it. And not necessary to beat City Hall, because that's not what it's all about. But fighting them to make sure that your concerns and the community's concerns are heard and paid attention to. And she's done that. So she's going to do a better job than I can in explaining how important an independent Ombudsman is for the Tarpon Springs community and obviously for the other similar communities around the country.

I believe the testimony of our witnesses will highlight how critical it is to have an independent Ombudsman at EPA. That function is a valuable tool for citizens across the United States. It was a creation of Congress and ought to stay within the intent of this legislative body in the true function of independence that's vital for the effective operation of the office.

Thank you very much, Mr. Chairman.

Mr. GILLMOR. The Chair recognizes the gentleman from Michigan for an opening statement.

Mr. STUPAK. Thank you, Mr. Chairman, and thank you for holding this hearing today on the recent developments in the EPA Office of Ombudsman. I'm afraid that the discourse about the Office of Ombudsman at EPA is just one more indication that this administration places little value on protecting the public from hazardous materials and Superfund pollution. There have been several disturbing news reports recently about the lack of the administration support for Superfund cleanups.

An EPA Inspector General's report issued recently says that 33 Superfund sites in 18 States are no longer getting funds from a special polluter pays cleanup fund that is running out of money.

Dozens of other States are getting some cleanup and long term remediation money, but less than regional officials say is needed. The Bush Administration wants to shift funding for the 33 cleanup projects to the Government's general fund from the Superfund trust fund, meaning tax payers will now pay for cleanups. But payments out of the general fund would require Congressional approval, which we all know would most certainly slow down the process or halt work entirely at some sites.

The 1980 Superfund Law states very clearly, that polluters should pay to clean up their own environmental messes. This special fund came from taxes on chemical and petroleum companies. But those taxes expired in 1995 and the majority party has not allowed a renewal of those taxes.

The fund will now dwindle to a projected $28 million at the end of next year. At one time, this fund contained $3.6 billion for clean-up work. Congress has not renewed the taxes which fund this account and President Bush now opposes the renewal of the taxes. My home State of Michigan is one of the States affected by this decision. President Bush has indicated time and time again that the environment is not his priority.

Time and time again I'm surprised and astounded at the lengths he will go to be a supporter of big business to cut the life out of environmental programs. It's no wonder that things over at the EPA are in disarray. And it's no wonder we have them in front of us on Superfund issues. I hope to learn more from the hearing today whether or not the important Ombudsman function at EPA can stay alive and well under the Agency's transfer plan.

I'm concerned that this Ombudsman dispute is just one more indication that the EPA under the management of this administration continues to ignore its mission of protecting the public from the environmental hazards created by industrial pollution.

Mr. Chairman, I yield back the balance my time and I look forward to an opportunity to question the witnesses today.

Mr. GILLMOR. The gentleman from Georgia, Mr. Norwood.

Mr. NORWOOD. Thank you very much, Mr. Chairman, and I'm appreciative of you having this hearing. It appears to me that in a nonpartisan way all of us certainly agree that the Ombudsman should be independent. That's what this hearing is about. That's what we're trying to get done. We're trying to make certain that individual and that group of individuals is independent of EPA which is what Congress wants. I would plead with the members of this committee, if they could simply leave their politics out of this just for a little while. Perhaps we can actually get something done with this. It does not help one bit anybody in this room for the attack dogs to use this forum to be political. We need to be here for the very reason Mr. Bilirakis pointed out.

And with that, Mr. Chairman, I have a very long statement, I would just as soon submit it for the record and let's move forward to the questioning of the witnesses and let's move forward to the purpose of this hearing which is to determine if or if not the Ombudsman is independent and if not, why not. Thank you.

Mr. GILLMOR. Thank you. The gentleman's statement, in its entirety, will be made a part of the record. The gentleman from Illinois, Mr. Shimkus.

Excuse me. The distinguished ranking member of the Health Subcommittee. He snuck in when I was looking the other way. I'm pleased to recognize Mr. Brown from Ohio.

Mr. BROWN. As my remarks will be brief, as we know the recent decision from Administrator Whitman to place to Office of the Ombudsman within the Office of Inspector General has sparked enormous controversy and has caused many to question, particularly my friend from Florida has done, Mr. Bilirakis, whether the Om-

budsman can continue to fulfill his or her mission in EPA. Last month the Senate Environment Public Works Committee held a hearing. The General Accounting Office offered testimony based on investigation of position they have previously done for Chairman Bilirakis. This is what they said about the Administrator Whitman's decision, "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 Ombudsman within the OIG it has not achieved that objective." I'm inclined to strongly agree with this statement.

I'm concerned, like many others, that the Administrator has sought to marginalize the Ombudsman because the Office has done too good a job at pointing out the Agency's shortcomings and not to make it more independent as she has claimed. It seems to run pretty rampant through this administration, the problems of secrecy, the problems of loyalty to the point of never speaking out. And I think this is an another example of how this administration has gone in a wrong direction that way.

I welcome all our witnesses today and I look forward to their testimony on this sensitive issue. I hope that we can remedy this problem. Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you, Mr. Brown. The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I agree with a lot of the statements. I think that my colleagues on the other side, actually I've been pleased with a lot of stuff the EPA has done, but I always wondered when I was in the legislative branch when the executive branch would fall into the hands of our own party, would I be as vigilant in some of my statements toward the EPA and some of the other Federal Agencies that I had criticized. And it's good to see, and we'll get a chance to talk to and visit with Bob Martin, who I worked with in the previous administration. I found him to be a man of honor and integrity and I look forward to talking with him today.

My position is very simple. The Ombudsman should be—we are the Ombudsman for our citizens when we don't have a credible Ombudsman in an agency. And so if we have a credible Ombudsman in an agency, then that takes some of the burden off of us to try to fight all the myriad of battles we have to fight for our citizens through all the various agencies.

And really I'm pretty appalled that the treatment of Mr. Martin while on official business than on sick leave and coming back to have the locks changed, the files taken out, when I've always known him to be a conscientious individual. So that's what my focus will be.

Let's restore an office in the EPA of an Ombudsman that has some real teeth, that our citizens can go to. That we can have help in trying to rectify issues and problems. No one is perfect and no agency is perfect and we all need each others help.

So Mr. Chairman, to both Chairmen, I look forward to this hearing and I think we can move in the right direction if we work together to try to identify the problems and move the debate into a positive direction of having a very effective Ombudsman. And I yield back my time.

Mr. GILLMOR. The gentleman yields back. If there are no other members wishing to make opening statements, the Chair will now call up the first panel.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. ED TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you, Chairman Bilirakis and Chairman Gilmor for holding this joint subcommittee hearing to examine the Environmental Protection Agency's decision to move the Office of the Ombudsman from the Office of Solid Waste and Emergency Response to the Office of Inspector General. I must begin by stating my "New York bias" as detailed in a letter to the EPA Administrator less than a month ago. In the letter, I joined several of my colleagues in urging that Mr. Martin, the now former Ombudsman in the Office of Solid Waste and Emergency Response, be allowed to return to EPA to complete the cases that remained open when he left EPA in late April. I believe that it is critical that Mr. Martin return to complete these cases because they involve potentially debilitating health problems. There is no time to waste.

The situation surrounding the World Trade Center site in New York is a prime example of why it is important that Mr. Martin return to complete his cases. Prior to his separation from EPA, Mr. Martin amassed an outstanding record of service on behalf of his constituents, the American people. As the Ombudsman in OSWER, Mr. Martin was able to bring attention and pressure on EPA to reverse their decision not to clean residences covered in soot and dust by the events of 9/11. As you may recall, shortly after the tragic events of 9/11, the EPA Administrator declared the air and water in lower Manhattan safe. Through the efforts of Ombudsman Martin, Senator Clinton, Congressman Nadler and others, the EPA reversed their decision and is now making limited clean-up services available to residents upon request. This would not have happened if not for the work of Ombudsman Martin. It would not have happened if EPA was left to their own devices. In fact, EPA's response still has not gone far enough. To date, EPA is only cleaning visible dust and they are testing for asbestos. Were the clouds of debris that spread out over lower Manhattan and downtown Brooklyn made solely of asbestos? What was in those clouds and why isn't EPA specifically testing for those compounds? Moreover, the focus of their efforts has been exclusive to the area immediately surrounding "Ground Zero". The residue from the Twin Towers showered down on Brooklyn. I will be sending a letter to Administrator Whitman in the next fourteen days requesting that testing be done on buildings and residences in downtown Brooklyn. While a great deal of time has passed since this tragedy occurred, I believe that there are clean-up issues outstanding that could still pose long-term health risks. We must take whatever steps necessary to prevent this from happening.

What will my options be if the Administrator denies my request? Could I contact the Office of Inspector General and request intervention by the Ombudsman? Under the restructured EPA, the Ombudsman cannot decide whether or not this is a case worth taking. If the Ombudsman is supposed to act as a gatekeeper when other avenues into EPA have failed, shouldn't this position have true independence? This was the conclusion of the GAO's study of this question. If the GAO agrees that there is an independence problem, why would the Administrator place the Ombudsman in an Office that is clearly not independent? There seems to be a belief that the Ombudsman will be independent based on the independence of the Office of Inspector General. While this almost seems logical, one need only look at the fact that the Office of Inspector General has an audit responsiblity for the Ombudsman's Office. How can there be true independence? If the Ombudsman cannot make independent decisions on staffing or anything else for that matter how can the Ombudsman be independent?

I would ask the EPA to answer these questions as well as others that I will submit for the record and I would also ask that the Administrator reconsider the relocation of the Ombudsman Office to the Inspector General's Office, a decision which I believe has the exact opposite effect of what was intended; that is, it moves the EPA further away from its constituency, the American people.

Mr. GILLMOR. Our first panel consists of Mr. Robert Fabricant, the General Counsel of the U.S. Environmental Protection Agency; John Stephenson, the General of the General Accounting Office's Division of Natural Resources and the Environment; and Mr. Mark

Bialek, who is a counsel in the Office of Inspector General in the U.S. Environmental Protection Agency.

Gentleman, we have your written testimony and we'll make it part of the record. If each of you would like to take 5 minutes to summarize your remarks it would be greatly appreciated. Our committee is eager to begin asking you questions and we'll do so once each of you has presented your testimony.

Mr. Fabricant.

STATEMENTS OF ROBERT E. FABRICANT, GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY; JOHN B. STEPHENSON, DIRECTOR OF ENVIRONMENTAL ISSUES, U.S. GENERAL ACCOUNTING OFFICE; AND MARK BIALEK, OFFICE OF COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. FABRICANT. Thank you, Mr. Chairman. Good morning, Mr. Chairman and members of the subcommittee. My name is Robert Fabricant and I am the General Counsel for the U.S. Environmental Protection Agency. I appear today to discuss the move of EPA's Office of Solid Waste and Emergency Response Ombudsman function from OSWER to the Office of the Inspector General.

I would like to open my remarks by commenting briefly on the history of the OSWER Ombudsman function. In 1984, the Congress amended the Resource Conversation and Recovery Act and required EPA to establish an Ombudsman function to address individual complaints and requests for information about the Agency's programs and policies under the Solid Waste Disposal Act and to make appropriate recommendations to the Administrator. The amendments specifically provided that the Office of Ombudsman would sunset as of November 1988. After the statutory authority for the Ombudsman expired in 1988, EPA, as a matter of policy, continued to maintain an Ombudsman function within OSWER. In 1991, EPA expanded the function by broadening the scope of OSWER programs or activities over which the Ombudsman could receive complaints or requests for information.

In addition, as various Superfund administrative reforms undertaken by EPA in 1995, Regional Ombudsman positions were established in the EPA Regional Offices. The Regional Ombudsman addressed Superfund issues and, depending on the region, other issues including RCRA, UST, and chemical emergency prevention and preparedness.

Since its original establishment in 1984, the OSWER Ombudsman function has, like other Agency activities and offices, undergone occasional review and reorganization. Starting in 2000, OSWER had begun to actively and substantially reevaluate the Ombudsman function and consider proposals to further reorganize the activity. That work continued into 2001, when EPA was informed that GAO had initiated its own inquiry in the ombudsman function. In light of GAO's ongoing study, the Agency suspended its internal review to await GAO's report and recommendations. At the time of the GAO study, the Ombudsman reported to the Deputy Assistant Administrator for OSWER, who was responsible for supervisory, performance, and budget decisions of the Ombudsman function.

In September 2001, GAO issued its report, entitled "EPA's National and Regional Ombudsman Do Not Have Sufficient Independence." GAO indicated that it had reviewed the Ombudsman function in response to concerns about institutional barriers to the fulfillment of that function. GAO noted that an effective Ombudsman must have both actual and apparent independence from any person who may be the subject of a complaint or inquiry. GAO also observed that the OSWER Ombudsman function responsible for addressing complaints and inquiries about OSWER programs and activities was not independent of the organizational unit it was responsible for investigating.

Therefore, GAO recommended that EPA take steps to strengthen the independence of the OSWER Ombudsman function by locating it outside of OSWER. EPA reviewed and carefully considered the GAO report and recommendations. GAO's main concern was that the independence of the Ombudsman function was jeopardized by the location of the function within OSWER. This echoed additional comments echoed this that we received from Congress and others. Although recommending that the Ombudsman function be located outside of OSWER, the GAO report did not recommend any specific location for that function. In meetings to consider GAO's recommendations, EPA officials considered various options for relocating the Ombudsman function, including the Office of the Administrator, the Office of the Inspector General, and my office, the Office of General Counsel.

After weighing these options and considering staff recommendations, EPA concluded that OIG offered the greatest opportunity to ensure the independence of the Ombudsman function. OIG's operations, budgeting and hiring decisions are made independent of any influence or control by OSWER. In addition, OIG already had considerable expertise and resources dedicated to auditing and investigatory activities and a well established professional reputation.

OIG is by statute an independent organization within the Agency with an excellent record of objectivity in evaluating the interests of all parties and ensuring that inquiries receive appropriate and thorough answers. The Inspector General agreed that the Ombudsman function would complement activities within OIG and agreed to accept the function. Exercising administrative and managerial discretion, EPA decided on November 27, 2001, to relocate the Ombudsman function in OIG.

In January 2002, then Ombudsman, Robert Martin, and an organization known as the Government Accountability Project, filed suit in the United States District Court for the District of Columbia to enjoin EPA's decision to move the Ombudsman function to OIG. On April 12, 2002, the Court dismissed the Ombudsman's lawsuit. The decision to move the Ombudsman function became effective on April 13, 2002. It's my understanding that Mr. Martin resigned from EPA effective April 29, 2002. And although the Federal District lawsuit challenging the decision to move the Ombudsman function was dismissed, administrative claims relating to the Ombudsman function are pending before the U.S. Department of Labor and the United States Office of Special Counsel.

EPA is currently responding to that administrative litigation. Questions about the continuing activities of the Ombudsman func-

tion since April 13 will be addressed in testimony by representatives of EPA's OIG. Mr. Bialek will take that portion of the testimony. Thank you for the opportunity to appear before you today and I'll be happy to respond to any questions you have.

[The prepared statement of Robert E. Fabricant follows:]

PREPARED STATEMENT OF ROBERT E. FABRICANT, GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Good morning, Mr. Chairman and Members of the Subcommittees. My name is Robert Fabricant and I am the General Counsel for the Environmental Protection Agency. I appear today to discuss the move of EPA's Office of Solid Waste and Emergency Response (OSWER) ombudsman function from OSWER to the Office of the Inspector General (OIG).

I would like to open my remarks by commenting briefly on the history of the OSWER ombudsman function. In 1984, Congress amended the Resource Conservation and Recovery Act (RCRA) and required EPA to establish an ombudsman function to address individual complaints and requests for information about the Agency's programs and policies under the Solid Waste Disposal Act and to make appropriate recommendations to the Administrator. The amendments specifically provided that the Office of Ombudsman would cease to exist as of November 1988. After the statutory authority for the ombudsman expired in 1988, EPA, as a matter of policy, continued to maintain an ombudsman function within OSWER. In 1991, EPA expanded the function by broadening the scope of OSWER programs or activities over which the ombudsman could receive complaints or requests for information.

In addition, as part of various Superfund administrative reforms undertaken by EPA in 1995, regional ombudsman positions were established in the EPA Regional Offices. The regional ombudsmen addressed Superfund issues and, depending on the region, other issues including RCRA, underground storage tanks (UST), and chemical emergency prevention and preparedness.

Since its original establishment in 1984, the OSWER ombudsman function has, like other Agency activities and offices, undergone occasional review and reorganization. Starting in 2000, OSWER had begun to actively and substantially reevaluate the ombudsman function and consider proposals to further reorganize the activity. That work continued into 2001, when EPA was informed that the General Accounting Office (GAO) had initiated its own inquiry into the OSWER ombudsman function. In light of GAO's ongoing study, the Agency suspended its internal review to await GAO's report and recommendations. At the time of GAO's study, the ombudsman reported to the Deputy Assistant Administrator for OSWER, who was responsible for supervisory, performance, and budget decisions of the ombudsman function.

In September 2001, GAO issued its report, entitled "EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence." GAO indicated that it had reviewed the ombudsman function in response to concerns about "institutional barriers" to the fulfillment of the ombudsman function. GAO noted that an effective ombudsman must have both actual and apparent independence from any person who may be the subject of a complaint or inquiry. GAO also observed that the OSWER ombudsman function, responsible for addressing complaints and inquiries about OSWER programs and activities, was not independent of the organizational unit it was responsible for investigating. GAO recommended that EPA take steps to strengthen the independence of the OSWER ombudsman function by locating it outside of OSWER.

EPA reviewed and carefully considered GAO's report and recommendations. GAO's main concern that the independence of the ombudsman function was jeopardized by the location of the function within OSWER echoed comments that EPA had received from members of Congress and others. Although recommending that the ombudsman function be located outside of OSWER, GAO's report did not recommend any specific location for the function. In meetings to consider GAO's recommendations, EPA officials considered various options for relocating the ombudsman function, including the Office of the Administrator, the Office of Inspector General (OIG), and my office, the Office of General Counsel.

After weighing these options and considering staff recommendations, EPA concluded that OIG offered the greatest opportunity to ensure the independence of the ombudsman function. OIG's operations, budgeting, and hiring decisions are made independent of any influence or control by OSWER. In addition, OIG already had considerable expertise and resources dedicated to auditing and investigatory activities and a well-established professional reputation. OIG is by statute an inde-

pendent organization within the Agency with an excellent record of objectivity in evaluating the interests of all parties and ensuring that inquiries receive appropriate and thorough answers. The Inspector General agreed that the ombudsman function would complement other activities within OIG and agreed to accept the function. Exercising administrative and managerial discretion, EPA decided on November 27, 2001 to relocate the ombudsman function to OIG.

In January 2002, then ombudsman Robert Martin and an organization known as the Government Accountability Project (GAP), filed suit in the United States District Court for the District of Columbia to enjoin EPA's decision to move the ombudsman function to OIG. On April 12, 2002, the Court dismissed the ombudsman's lawsuit. The decision to move the ombudsman function to OIG became effective on April 13, 2002. I understand that Mr. Martin resigned from EPA effective April 29, 2002. Although the Federal District Court lawsuit challenging the decision to move the ombudsman function was dismissed, administrative claims relating to the ombudsman function have been asserted by certain current or former EPA employees, including claims before the United States Department of Labor and the United States Office of Special Counsel. EPA is responding to that administrative litigation. Questions about the continuing activities of the ombudsman function since April 13 will be addressed in testimony by representatives of EPA's OIG.

Thank you for the opportunity to appear before you today. I am happy to respond to the Subcommittee's questions at this time.

Mr. GILLMOR. Thank you very much, Mr. Fabricant.

Mr. Stephenson of the GAO.

STATEMENT OF JOHN B. STEPHENSON

Mr. STEPHENSON. Thank you, Mr. Chairman, and members of the subcommittees. I'll briefly summarize my statement by describing the standards for Ombudsman that have been published by professional organizations and then comparing the EPA's reorganized Ombudsman function to those standards.

Let me stress that these observations are preliminary because the EPA has not yet developed operating policies and procedures or an official job description for the position. My observations today are based on limited work we have done in response to a request from Representative Diana DeGette.

Based on our work to date, we believe placement of the Ombudsman function within the OIG Office raises several issues that should be considered. While there are no Federal standards or requirements specific to the operation of the Ombudsman offices, several professional organizations do provide standards of practice, relevant to Ombudsmen who deal with inquiries from the public as is the case here.

These standards incorporate the core principals of independence, impartiality, and confidentiality. According to guidelines published by the American Bar Association, key indicators of independence include control over budget and use of resources and the power to appoint, supervise and remove staff. Standards of practice published by another professional group, the Ombudsman Association, advocate that ombudsmen report to the highest authority in the organization. These standards also stress the importance of impartiality and confidentiality.

We found that the Ombudsman at Federal agencies we reviewed for our report last year did reflect these standards. For example, at the Federal Deposit Insurance Corporation and the Food and Drug Administration, the Ombudsmen had their own budget and reported directly to the highest level of the agency. We recommended in our report that EPA take actions intended to increase consistency with the standards including locating the Om-

budsman outside the Office of Solid Waste, the organizational unit that is subject to the Ombudsman's investigations. Some months later EPA announced the reorganization relocating the National Ombudsman to the IG's Office. While this reorganization raises several issues, the most fundamental is intent.

If the Congress and EPA intend to have an Ombudsman function that is consistent with the way the position is typically defined, then placing the function within the IG's Office will not achieve that objective. This is because the role of the Ombudsman typically includes responsibilities such as helping to informally resolve program related issues and mediating disagreements between the agency and the public. Assigning these responsibilities to a position within the IG's Office would conflict with the Inspector General's Act, which prohibits the transfer of such program operating responsibilities to an Inspector General.

On the other hand, to omit these responsibilities as EPA has apparently done, 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, it may not result in the degree of structural and functional independence that is consistent with the professional standards. For example, according to EPA authority for budget and staffing for its Ombudsman will rest with a newly created Assistant Inspector General and the IG, not the Ombudsman.

Also according to EPA, the Inspector General, not the Ombudsman, will have the authority to select and prioritize his or her own case load independent of other needs. In addition, the EPA has not yet addressed the concerns we raised in our report about the independence of the ten Regional Ombudsman, whose positions are collateral duties still within the Office of Solid Waste.

Finally, the OIG could no longer independently audit or investigate the Ombudsman's activities as he or she can at other Federal agencies were the functions are separate.

Conversely, there may be a conflict if the Ombudsman receives a case that has already been reviewed by the Inspector General.

Mr. Chairman, that concludes my oral statement. I will be happy to answer any questions you or any member of the subcommittee may have.

[The prepared statement of John B. Stephenson follows:]

PREPARED STATEMENT OF JOHN B. STEPHENSON, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT. U.S. GENMERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee: 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 jurisdic-

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

tion to include Superfund[2] 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 ombudsman[5] 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

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

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

[4] The 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.

[5] U.S. General Accounting Office, *Hazardous Waste: EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence,* GAO01813 (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 standards[8] 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.

[6] The 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,* GAO01466 (Washington, D.C.; Apr. 13, 2001).

[7] The 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.

[8] To 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-

[9] Gottehrer, 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).

[10] For 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 Subcommittee 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 Subcommittee may have at this time.

Mr. GILLMOR. Thank you, Mr. Stephenson.

Mr. Bialek.

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[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,* GAO01794 (Washington, D.C.: June 29, 2001)

STATEMENT OF MARK BIALEK

Mr. BIALEK. Good morning, Mr. Chairmen, members of the subcommittee. My name is Mark Bialek and I'm counsel to the Inspector General at the Environmental Protection Agency. I'm pleased to be here this morning on behalf of the Office of Inspector General to speak about recent developments and implementation and the operation of the Ombudsman function within OIG.

As has been mentioned the original intent and authority of the Ombudsman mission was to provide information and to investigate complaints and grievances from the public relating to EPA's administration of the Superfund and other hazardous waste programs.

Given that the former Ombudsman's role was so similar to the work we were created to perform in the Inspector General's Office, and because we report both to Congress and to the Administrator, the Inspector General believed our Office was well suited to assume the investigative functions of the Ombudsman's office. As the subcommittees I'm sure are aware, the Inspector General's Act gives us very unique and independent authorities and responsibilities, including the authority to issue subpoenas, obtain access to any records of the Agency, to obtain assistant from other Federal, State, and local governmental organizations. We have independent hiring and budget and contracting authority and independent reporting responsibilities to Congress.

Now some, including GAO, have debated as you've heard just a moment ago, whether our assumptions of the Ombudsman responsibilities is consistent with the American Bar Association standards or other organizations' standards for a traditional Ombudsman function. It was not our intention to change the function of the preexisting Ombudsman at OSWER so that it would come into conformance with the ABA standards or other organization standards for a traditional Ombudsman. We do not intend to become advocates for individuals or groups or to be disseminating basic information about the program or the operation.

What we do intend to do is to assess and review all complaints in an impartial and objective manner, to assess the quality of EPA's program management and decisionmaking and to issue reports to Congress and to EPA with findings and recommendations that are designed to solve problems.

Since the early 1980's, we've had maintained a hot-line function where members of the public can call in or write in to allege wrong doing or to make complaints about any problems they have had with EPA. They can either do that by calling the toll free number. They can write in to us and recently we have set up an internet capability for people to communicate with us.

We have, as part of this transfer, decided to expand the services that we will be offering and not limit it only to Superfund or hazardous waste issues but extend the Ombudsman function to cover any and all programs and operations of EPA. The Ombudsman will have access to the various disciplines that are currently available with the Office of Inspector General including auditors, investigators, program evaluators, chemists, attorneys, and others.

I'd like to give you a very brief update on what we've accomplished in the relatively short time that we've had this function. At the very end of April, the Inspector General appointed acting Om-

budsman Mary Peggy Boyer and since then Mary and her staff have been assiduously reviewing 130 boxes worth of records which we inherited from the Ombudsman's Office at OSWER. We have eight staff members assigned full time reviewing those records, which I might add is at least twice as many staff that we were assigned previously in OSWER.

According to GAO's report issued a year ago, there were 20 open cases when they issued their report last September. We have finished going through these records and have determined that of those 20, 10 appear to be closed or resolved. The remaining 10 we have prioritized in terms of what deserves our immediate attention. Certainly the Marjol Battery site, the Shattuck Chemical site, Bunker Hill, Coeur D'Alene are on that list.

We have also listed seven additional cases to that list based on records we have reviewed or media accounts since the issuance of the GAO report.

We have also begun outreach efforts. We've offered to brief any Member of Congress and we've done so on a number of occasions and committee staff. We have made contact with citizen groups in several of the communities where we have open cases. We have participated in public hearing as Chairman Bilirakis mentioned. He hosted us in Tarpon Springs, Florida this past weekend. We will be participating in meetings in Idaho and Washington later this week.

At the same time we're working on implementing policies and procedures to address the handling of cases, including case selection criteria. We have had extensive discussions with the Regional Ombudsman's Offices and set up a coordinated approach for addressing issues of mutual concern. We've met a number of times with the Ombudsman for ATSDR as well.

We will publicly report on a annual basis the work we've accomplished, status report on all open cases and recommendations or findings that we have reported to the Agency.

The Inspector General and I are very proud of the track record of EPA OIG. We want to assure the public, EPA stakeholders, and Congress that we will conduct Ombudsman work with total independence and professionalism.

We welcome the committee's assistance in terms of information or suggestions to us as we carry on these new responsibilities. That said, I hope you will reserve judgment until such time as we've had an opportunity to produce some reports.

Thank you for the opportunity of being here today and happy to respond to any questions you have.

[The prepared statement of Mark Bialak follows:]

PREPARED STATEMENT OF MARK BIALEK, COUNSEL TO THE INSPECTOR GENERAL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Good Morning Chairman Gillmor and Members of the Subcommittee. My name is Mark Bialek and I am Counsel to the Inspector General of the Environmental Protection Agency (EPA). I am pleased to speak to the Subcommittee today on behalf of the Office of the Inspector General (OIG) about recent developments in the 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, the Inspector General believed our office was well suited to assume the investigative functions of the Ombudsman's office. In April of this year, the Ombudsman's Office was transferred from EPA's Office of Solid Waste and Emergency Response (OSWER) to the OIG.

Congress established the Inspectors General through the Inspector General Act of 1978 (IG 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 IG 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 OIGs in order to ensure 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 assure 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 OIGs 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.

Some, including the GAO, have debated whether EPA OIG's assumption of the Ombudsman function is consistent with standards established by the American Bar Association (ABA) or other organizations for the conduct of Ombudsman business. It was not our intention to change the function of the Ombudsman after it transferred to the OIG to conform to ABA standards for a "traditional" Ombudsman. We will not become advocates for individuals or groups. We will not be disseminating basic information about the programs and operations of the EPA. We will review all complaints in an impartial, objective manner, assess the quality of EPA's program management and decision-making, and issue reports (to Congress and EPA) with findings and recommendations designed to correct problems.

Since the early 1980s, 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. However, if the primary responsibility for handling the matter rests elsewhere in the Agency, we will make a referral. In many cases, identification and referral of a matter by the OIG are sufficient to get Agency action. This is our current operating procedure for all complaints. In some cases, we expect to find that 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 his or her 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 of the Ombudsman function, we have expanded the services of the Ombudsman to include all EPA administered programs, rather than limiting them 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 13 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. Mary "Peggy" Boyer was appointed OIG's Acting Ombudsman in April. We then inventoried and organized 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. Currently, we have eight OIG staff members assigned full-time 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 OSWER 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 ten cases range in age from more than 20 months to five years and appear to be unresolved. These cases include the following Superfund sites: Marjol Battery, Shattuck Chemical, and Bunker Hill/Coeur d'Alene. Further, we are determining the status of seven additional cases for which we have found documents or have media accounts. These include 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 resolve these as quickly as possible. We have also begun outreach efforts in order both to explain how we plan to perform the Ombudsman function and to collect additional information. We offered to brief any member of Congress who has indicated an interest in these cases. As a result, we have met with a number of individual members, including Congressman Bilirakis. We remain willing to continue to brief members or committee staff on our Ombudsman work. We have made contact with citizen groups in several of the communities where there are open cases. We participated in a public hearing in Tarpon Springs, Florida this past weekend hosted by Congressman Bilirakis, and we will be participating in meetings in Idaho and Washington later this week.

In resolving the existing cases, 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 incoming cases. This includes case selection criteria. We have been working closely with the Regional Ombudsmen and are developing a coordinated approach for addressing the issues at all levels in a timely and appropriate manner. We have also met with the Ombudsman from the Agency on Toxic Substances and Disease Registry (ATSDR) on several occasions regarding work of mutual interest.

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

Members of the Subcommittee, the Inspector General and I are 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 our commitment to be responsive to any questions or comments you may have as we move forward with this important work. We welcome your assistance in providing any information or suggestions relating to our new responsibilities. That said, I hope that you withhold judgement 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 be glad to respond to any questions the Subcommittee may have at this time.

ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Mary Mosley,	) Civil No. 8:01CV-2407-T-17MAP
Plaintiff,	)
v.	)
Christine Todd Whitman, in her official capacity as Administrator of the United States 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).

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[1]While 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.

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

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

¶¶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 investigations 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]

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[3]The 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

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 to OIG, pursuant to her authority under 5

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improperly influenced in his decision. S. Rep. No. 95-1071 at *28, reprinted in 1978 U.S.C.C.A.N. 2676, 2703 (1978).

U.S.C. app. 3, §9(a)(2). The proposed relocation is not a violation of §9(a)(2) of the IG Act.[4]

II. 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:CV-01-2461 (James M. Munley) (M.D. Pa.); City of Smelterville v. Whitman, Cv. No. 02-0005-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]

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[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

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.

Dated: April 8, 2002

Respectfully submitted,

MAC CAULEY
UNITED STATES ATTORNEY

_____
Warren Zimmerman, Chief, Civil Division
United States Attorney's Office for the
Middle District of Florida

OF COUNSEL:
Charles G. Starrs
Office of the General Counsel
Environmental Protection Agency

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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.

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ATTORNEYS FOR DEFENDANT

Mr. GILLMOR. Thank you very much. We'll now move to a round of questions. I will point out that we've been joined by Mr. Nathan Deal, a member of the subcommittee and by Diana DeGette of Colorado who is not a member of either subcommittee but is a member of the full committee and will be sitting in for the purpose of questioning.

Mr. Fabricant, in your opinion, does the Agency possess the legal authority to move the Ombudsman from OSWER to OIG?

Mr. FABRICANT. Yes, Mr. Chairman. Although the statutory language sunset in 1988, as a matter of policy we've maintained a function of the Ombudsman within OSWER, and we think there is sufficient authority to have the transfer to OIG and to undertake the functions of the Ombudsman within that Office.

Mr. GILLMOR. In your opinion, I take it then, the Agency has not violated any laws in making decisions considering the Ombudsman's function or handling?

Mr. FABRICANT. Mr. Chairman, no. The Agency—the actions of the Agency have been perfectly lawful.

Mr. GILLMOR. Going back and looking at a little bit of the history of the Ombudsman activities in the past, the GAO report of last July said there were 34 cases listed that the Ombudsman initiated between October 1992 and December 2000. And the GAO reported the Ombudsman issued only 4 reports and 3 interim reports and that of those 34 cases, 14 of them were unresolved. And some of those unresolved cases go back to 1997.

It's my understanding that since 1997, the Ombudsman resolved only two cases with 19 new cases open since which have been unresolved. Does that fit in with your understanding? And in your opinion, has that been a good use of government resources by the Ombudsman at that period of time?

Mr. FABRICANT. The facts as you laid them out, Mr. Chairman, are consistent with my understanding of the track record of the

OSWER Ombudsman and we believe with the shift to the Office of the Inspector General we can do better. It's again an administrative management prerogative to reorganize the Agency and we're looking to improve on that record in the Office of the Inspector General.

Mr. GILLMOR. And if I might go to Mr. Stephenson. One of the items that your report touched on last year was the need to establish accountability within the Ombudsman Office. In your opinion, do the standards and the culture of the IG's Office meet the threshold for proper accountability?

Mr. STEPHENSON. Yes, we're not taking issue with the accountability of the IG or the professionalism of the IG. They do, in fact, meet those standards. What we were pointing out is that the previous Ombudsman didn't meet accountability standards because he didn't do annual reports or didn't do systematic reporting and that was a problem in our view.

Mr. GILLMOR. And your report also said that the Ombudsman doesn't have a final say in staffing and resource decisions, but that the Ombudsman would have input into those things. Is this more than what the EPA Ombudsman previously enjoyed?

Mr. STEPHENSON. For the current placement in the IG?

Mr. GILLMOR. Right. I'm asking for the comparison between this placement and the previous——

Mr. STEPHENSON. The previous Ombudsman really didn't have any input into staffing and resource decisions. It was an individual position and there was a loose, non-supervisory working relationship between the National Ombudsman and the ten Regional Ombudsmen, so I can't really answer the question if it's consistent with that. There was no Office of the Ombudsman. There was an individual person who was the Ombudsman.

Mr. GILLMOR. Okay, thank you. And one question for Mr. Bialek.

Could you briefly describe the changes the OIG has put in place in regard to the responsibilities and the activities and the functions of the OSWER Ombudsman? In other words, what are the significant ways that you believe the OIG's Office is running the program differently if any than the way it was run before?

Mr. BIALEK. Well, I think the best way to answer that is to say that the first thing we're doing is establishing some rigor to the decisionmaking process on which cases we think warrant attention, to develop standards and set priorities and to adequately staff those efforts and to be able to issue reports in a timely fashion to address and hopefully resolve problems we uncover using professional auditing standards, whether they be the GAO Yellowbook standards or other standards of the professions that we have within OIG, to have a separate budget allocated, to have separate reporting in terms of our own internal record keeping system which will identify and track each and every Ombudsman action in terms of the receipt of a complaint and a processing of a complaint and timelines established for resolution.

Mr. GILLMOR. My time is expired and we will recognize the gentleman from New Jersey, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. Mr. Stephenson, from what I can see based on your testimony, the heart of the issue here really is whether or not the decision by the EPA to place the Om-

budsman in the Inspector General's Office meets the test of what you call or actual and apparent independence. That's what this is all about.

My concern is, you know, in your testimony you mention that indicia, if you will, of that independence will be authority over your own budget, the ability to hire or fire staff, the ability to make decisions, you know, to decide what kind of cases would be selected.

And I listen to the chairman's remarks, and I know he was asking about the IG and asking you whether the IG met the test of independence, but I guess I have two questions. One is the issue of whether the Ombudsman meets the test of independence is really separate from whether the IG does. If you could answer that.

And then the second thing is whether or not the test of actual and apparent independence is met by putting the Inspector General under the IG. If you could answer those two.

Mr. STEPHENSON. Well, the standard says control over resources and staffing and prioritizing his or her own decisions. We see the function of the IG and the Ombudsman as very different. The Ombudsman is typically defined as an informal problem solving organization between the citizens and the Federal agencies. Placing it in the IG puts it down several layers under an Assistant Inspector General who reports to the Inspector General who ultimately reports to the Administrator. We don't see that as unincumbered, and so we don't think it meets the test of independence by placing it in that type of an organization.

If you want an enhanced IG capability to look at more Superfund sites and address citizen concerns similar to what the hot-line function already does, that's fine. But if you want a true Ombudsman, this isn't it.

Mr. PALLONE. My understanding that other agencies the GAO looked at, such as the Food and Drug Administration and the Internal Revenue Service, that in those cases the Ombudsmen have their own budget and reported directly to the head of the Agency. You looked at those two and that's what you found?

Mr. STEPHENSON. That's correct.

Mr. PALLONE. So I guess, you know, a question to Mr. Fabricant, given what the GAO says which is there is no actual and apparent independence here, and given the fact that there are other agencies that GAO looked at, such as FDA and IRS, that have their own budget and reported directly to the Administrator and clearly met the test, why is it that Administrator Whitman didn't follow the recommendation to the GAO and these other examples of these other agencies and having the Ombudsman report directly to her Office?

Mr. FABRICANT. Congressman, when the Administrator began the review process, we had the benefit of the GAO report. And looking at the terms of the GAO report and the expressed standard that was being applied, the test for independence really referred back to whether the supervisor would be anyone subject to the Ombudsman's jurisdiction. So in that important respect in the Office of Inspector General, the Ombudsman function would not be using its good offices to look at the Inspector General.

And we looked at that and we thought that was an important distinction, as opposed to the Administrator's Office where if there

was a direct report to the Administrator, like in the other agencies, and again, we don't think this Agency should be bound by what's typical at other agencies, especially after the thoughtful consideration of the various options and examples we had before us.

Then in particular, if it was placement in the Administrator's Office, then in fact there would be a report by the Ombudsman to a person who was subject to that jurisdiction. You just don't find that in the Office of the Inspector General. There's much more independence. And that was a decisionmaking process that we undertook.

Mr. PALLONE. I understand what you're saying, but I think what Mr. Stephenson is saying, and he couldn't be more clear, is that by putting it under the IG, even though the IG is independent, you're basically downgrading the Office and making it sort of unimportant and almost like an appendage if you will to the IG. And that the whole idea is that this Ombudsman has to be important and report directly to the Administrator, so that they don't have these intervening layers of bureaucracy that would get in the way of their trying to influence the Administrator or reporting to them.

I mean, I understand what you're saying but he doesn't agree and I assume that part of the purpose of the hearing today is to maybe have you change your mind. After you're listening to what you're saying, do you think—are you making an effort into looking into the possibility of changing it and making it more like the FDA or the IRS?

Mr. FABRICANT. Again, Congressman, I will be reporting back the debate and the discussion of this hearing to the Administrator, but as of today, we're continuing to move forward with the transition to the Office of the Inspector General. And again, we agree with you about the importance of the function and we think placement in OIG is complemented by many of the functions that are currently in the Office of the Inspector General, and it can be a more effective and efficient operation as well as more——

Mr. PALLONE. What about the fact that he said there's some inability to hire or fire your own staff, that there's no authority over your own budget. You're not worried about those things?

Mr. FABRICANT. Again, I think turning back to the idea of independence, the notion of Ombudsman is not having no supervision whatsoever. It's supervision by a person who is subject to the inquiries that could create conflicts.

Mr. PALLONE. Mr. Stephenson said that the new person can't hire or fire their own staff. Doesn't have authority over their own budget. Not clear if she has the ability to select cases. I mean, it seems like if you eliminate all those things that this person, you might as well have the IG and not bother. What's the point of having it at all? What is it going to do differently from the IG?

Mr. FABRICANT. Congressman, again, I think I'd refer some of the actual nuts and bolts logistics of the process to Mr. Bialek at OIG so he can elaborate further on how it will actually function.

Again, I think it's a very recent transition that's occurred here and I think it's again——

Mr. PALLONE. I'm just trying to have you answer the questions. I mean, I'll go one step further. We haven't heard Mr. Martin's testimony yet, but in his testimony he talks about how there's also re-

strictions in terms of communication with the outside world. That's even more disturbing to me. I don't know if you want to comment on that at all.

Mr. FABRICANT. Again, I will refer those questions over to Mark Bialek.

Mr. PALLONE. All right. You're not helping me, so let me ask Mr. Bialek.

What do you have to say about the fact that this person is essentially under the IG? How are they going to assert any independence if they can't hire or fire their own staff, can't exclusively select cases, don't have authority over the budget, or even can't communicate to some extent? Now that was stated not by the GAO but it's in Mr. Martin's testimony that we're going to get later.

Mr. BIALEK. The way we have structured this operation does not allow for the Ombudsman to make his or her own decisions in a vacuum about hiring, about budgeting, about case selection. This individual does have a supervisor, as did the previous OSWER Ombudsman have a supervisor. That structure isn't any different.

What's different is how it's now housed within the organization that has an independent head, the Inspector General. The Ombudsman will be making recommendations to the Inspector General through an Assistant Inspector General for budgeting, for personnel. I will add that originally there was an estimate of her needing five full time staff to start the review process. She was given five. She came back and said she needed more. She now has eight and she is formulating a proposal to give to the Inspector General for additional funding and additional full time staff to be able to carry out this responsibility.

Mr. PALLONE. I know my time is expired, but I just have to say, Mr. Chairman, it sounds to me like Mr. Fabricant and Mr. Bialek just don't agree with what Mr. Stephenson is saying, that this should be independent. I think that's ultimately what you're saying.

I yield back.

Mr. GILLMOR. The gentleman's time is expired. The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. Fabricant, in my opening statement I talked about the dismissal of Mr. Martin. And is that account accurate?

Mr. FABRICANT. No, Mr. Congressman. The letter was received by the Agency on April 22 of this year regarding Mr. Martin's voluntary resignation.

Mr. SHIMKUS. Was that prior to the changing of the locks and the removal of the files?

Mr. FABRICANT. Again, I dispute the characterization of what occurred regarding the transition.

Mr. SHIMKUS. Did someone from the Agency talk to Mr. Martin prior to his resignation about the elimination of the Office or the problems?

Mr. FABRICANT. No, I think the resignation occurred after the U.S. District Court dismissed the claims that Mr. Martin had raised regarding trying to enjoin the transfer.

Mr. SHIMKUS. We'll get a chance to hear from Mr. Martin and I really want to follow up on this whole timeline of events. I don't know, have you ever fired anyone, Mr. Fabricant, personally?

Mr. FABRICANT. No.

Mr. SHIMKUS. Mr. Stephenson, have you?

Mr. STEPHENSON. No, not directly.

Mr. SHIMKUS. Mr. Bialek, have you?

Mr. BIALEK. No, I've put people on Performance Improvement Plans and that's led to their resignation.

Mr. SHIMKUS. I would suggest that it's not a fun thing to do which I have done and I've always thought that out of professional courtesy you would at least meet with someone before you would lock them out of the Office or grab their files. And I'd like to know who was the individual who may have made this decision. And I'm going to continue this search, so maybe having someone from the Office come in and visit with me in my Office so I can get the timeline. If it occurs as it's being told to me, I'm not very pleased. It's truly unprofessional and we've got to be able to do a better job.

Mr. BIALEK. Congressman, I can respond to that briefly by saying that our Office, in particular, the Acting Assistant Inspector General to whom the Ombudsman was expected to report attempted on many occasions to contact Mr. Martin by phone and by e-mail and was unsuccessful in doing so.

We provided a listing of each of those attempts to the Senate and I'd be happy to make a copy of that listing and provide it to you.

Mr. SHIMKUS. I'd like to have that. Thank you.

Mr. Bialek, in essence in your opening statement you've admitted in your testimony that you do not want this be the traditionally defined Ombudsman. Is that correct to say? I mean that's what your opening statement said.

Mr. BIALEK. Yes.

Mr. SHIMKUS. And I would probably make the statement on behalf of myself that that's exactly what I want. I mean, that's what I want, is a traditional Ombudsman for my opening statement's comment. And it's based upon past experience with issues. One was that a large Superfund sight in Quincy, Illinois, that I thought it would have been helpful to have someone—I see the Office of the Inspector General, and I served in the Army and we had an IG. But I see the IG as addressing internal complaints and internal problems and legal issues and things that are going on inside the Office.

I'm looking for someone who will help us relay to the public that we're concerned about what's going on as far as the EPA or as grass roots become issues. Because we serve that role.

And the other benefit of an external Ombudsman person looking outside, is that they can go back and continue to give the grass roots perspective, the same things we're hearing from our citizens is also coming in from another information point that may help your folks in the EPA Legislative Office understand what we're trying to say here in our hearing.

So if I were to take your comment as your word, then I would just say that what I'm looking for is a traditional Ombudsman.

Mr. BIALEK. And I guess my reaction, Congressman, is it kind of depends on what factors are most critical to you in defining what's a traditional Ombudsman and what's not.

We are in the business of receiving complaints from all sources, for criminal wrongdoing of agency officials, for criminal wrongdoing of contractors and grantees. We review the media——

Mr. SHIMKUS. Okay, well let me jump into that because you're going to be constrained. The role of a Federal Agency in the executive branch is to enforce the laws. Well, what if laws are so screwy that the individual citizen is just being raked over the coals. Well, you're going to come down and say well, it's the law. EPA is doing what it's supposed to be doing and we're following the law and I don't care if this small business has to sell its assets to pay this legal fee or this extortion by the EPA on a 25 year old Superfund site. You're going to say it's the law.

Mr. BIALEK. We have direct reporting responsibilities to Congress. We're obligated under our statute to keep Congress fully and currently informed of problems in our Agency. If we think there's a law that has a negative impact that's causing problems in terms of the EPA being able to properly administer its programs, our responsibility is to come to Congress and lay all of that out.

Mr. SHIMKUS. Let me just end by saying we got that law changed with help of Chairman Gillmor just last year. I'm not sure EPA was at the forefront of helping us change that law, but I thank the chairman for helping us ease some of burden on small business in the Superfund sites. And this is exactly why I want an independent Ombudsman. I yield back my time.

Mr. GILLMOR. Thank you very much, Mr. Shimkus. The gentleman from Michigan.

Mr. STUPAK. Mr. Bialek, how does the OIG position then square with the legislative purpose in establishing the Office of Ombudsman? It was, you know, established in the 1984 amendments published in the Federal Register November 24, 1986, and it's, I'm quoting now, "it's the function of the Office of Ombudsman to receive individual complaints, grievance, and problems submitted by any person with respect to any program or requirement under the Resource Conservation Recovery Act, RCRA. The objective of the RCRA Ombudsman is to ensure that the general public is provided with assistance with complaints or problems."

So who's going to act for the public when the issues come up regarding the EPA's conduct on Superfund and other clean-up sites?

Mr. BIALEK. If we receive complaints, and we decide that because——

Mr. STUPAK. Who's we? OIG?

Mr. BIALEK. Inspector General Ombudsman's Office.

Mr. STUPAK. The Office of Ombudsman or OIG?

Mr. BIALEK. We have an OIG hotline which will receive complaints.

Mr. STUPAK. Right, but doesn't Gary Johnson, Deputy IG, doesn't he really call the shots over at the Ombudsman Office?

Mr. BIALEK. The Ombudsman is the one who is responsible for the activities of that Office. That Ombudsman reports to Mr. Johnson.

Mr. STUPAK. Sure, so if a complaint comes in and whether or not the Ombudsman is going to pursue it, who is going to determine that, the Office or Mr. Johnson?

Mr. BIALEK. The Ombudsman will make recommendations to Mr. Johnson.

Mr. STUPAK. So Mr. Johnson will make the decision.

Mr. BIALEK. Yes.

Mr. STUPAK. The OIG is making these decisions, right?

Mr. BIALEK. Yes.

Mr. STUPAK. In your statement you said we will not become advocates for individuals or groups. We will not be disseminating basic information about the programs and operations of the EPA.

How do you do that in light of what I just read about what your stated purpose is? How can you just suddenly change the focus of the Ombudsman?

Mr. BIALEK. There's a two-part answer to that. The first part has to do with the dissemination of information. That is a programmatic operating responsibility. We are not permitted to get into programmatic operating responsibilities. Basic information dissemination about the programs doesn't fall into an IG's framework of responsibility for auditing, for investigating.

Mr. STUPAK. But it does or doesn't fall under the law that was created by Congress.

Mr. BIALEK. The OSWER Office retains the responsibility for responding to requests for information about the OSWER programs and OSWER operations.

Mr. STUPAK. What's the second part?

Mr. BIALEK. The second part of your question, if we receive complaints that warrant an investigation, we open the case and we assign staff and we get to the bottom of the problem. If we should decide not to open up a case, that it doesn't warrant an Ombudsman case, not every complaint that comes in warrants a case being open. We will make an appropriate referral to the organization or the office or the agency that's responsible for that issue and probably ask them to report back to us on how they've addressed that complaint.

Mr. STUPAK. So the part where it says the Ombudsman is to ensure that the general public is provided assistance with complaints or problems, you don't see that as your role?

Mr. BIALEK. If providing assistance means making a referral to the appropriate office that can best address the problem or the complaint, I think we have fulfilled that responsibly.

Mr. STUPAK. Not making a referral. It says to ensure the general public is provided with assistance with complaints or problems. Same thing that Mr. Shimkus said. We're concerned that the nature of the Ombudsman is suddenly diluted and it's now an OIG function further on down the line. That the true purpose and intent, which was enacted in 1984 and was published in the Federal Register in 1986 is being disregarded, especially when we see statements like yours that you will not become advocates for individual groups, you will not be disseminating basic information about the programs and operations of the EPA. That's contrary to what an Ombudsman is supposed to do, so we don't have problems in getting clean-ups at Superfunds, and other sites.

So, let me go back to my original question. So who will act for the public when these issues come up regarding the EPA if you're just going to be a function of the Office of the Inspector General?

Mr. BIALEK. As I've said, we will be providing assistance by making sure those complaints are addressed. What I said is that we may not be the office to address each and every complaint that we receive, but we will make sure they are forwarded to the appropriate officials to respond and monitor the response and make sure that each matter has been resolved by somebody. That's providing assistance.

Mr. STUPAK. When you take a look at it, with the transfer over to the OIG, the Ombudsman becomes just one more investigation and there will be no special priority or focus on Superfund or hazardous waste functions. Correct?

Mr. BIALEK. We're starting with the focus on Superfund and hazardous waste because that's the workload that we've inherited and those are the priorities that we have taken on. But we are leaving open the option of the same kinds of problems being raised with us on any particular program or any operation of EPA. We're not going to turn people away if they want to call and relay information or make allegations along the same lines outside of the Superfund program.

Mr. STUPAK. How are you going to relay that information? Are you going to assist them in their complaints and investigations as the Ombudsman?

Mr. BIALEK. We will capture the complaint. We will provide the results of any preliminary inquiries we may do in our efforts to determine whether to open up an Ombudsman case or not and refer those in writing to the appropriate officials if we decide not to conduct an Ombudsman investigation ourselves and make sure that there's appropriate follow-up.

Mr. BILIRAKIS. [presiding] The gentleman's time has expired. I'm going to use the prerogative of the Chair and recognize myself.

Mr. Bialek, I guess everybody has been sort of dancing around this, but no one has really been that specific. Regarding the series of recommendations that GAO made on how to improve the Ombudsman function at EPA, can you describe how your office has responded to or is responding to each of these recommendations?

Now there are five of them here and my time will not allow you to go into each one of them. There are too many specifics. But possibly you can summarize each briefly and follow it up with something in writing afterwards.

GAO recommended EPA provide the Ombudsman with a separate budget and, subject to applicable civil service requirements, the authority to hire, fire, and supervise his own staff.

Quickly, any comments regarding that?

Mr. BIALEK. The Ombudsman will have responsibility for making recommendations on the hiring of staff and budgeting for approval by the Assistant Inspector General for the CPO.

Mr. BILIRAKIS. So the answer is no regarding that GAO recommendation. Is that right?

Mr. BIALEK. The Ombudsman will not have the authority to make that determination in a vacuum.

Mr. BILIRAKIS. They will not have a separate budget.

Mr. BIALEK. There will be a separate budget allocated, yes.

Mr. BILIRAKIS. But not have the authority to hire, fire, supervise their staff. GAO suggested that EPA should require the Ombudsman to develop written criteria for selecting and prioritizing cases for investigation and to maintain records on his investigations and other activities sufficient to serve as the basis for a reasonable estimate of resource needs.

Mr. BIALEK. That's precisely what we're doing.

Mr. BILIRAKIS. You're doing that?

Mr. BIALEK. Yes we are.

Mr. BILIRAKIS. So you're requiring the Ombudsman to develop those written criteria, right?

Mr. BIALEK. Correct.

Mr. BILIRAKIS. GAO stated that EPA should require the Ombudsman to establish a consistent policy for preparing written reports in his investigations, consult with agency officials and other affected parties to obtain their comments before his findings are made public, and include written Agency comments when reports are published.

Mr. BIALEK. Yes, we've asked our Ombudsman to do that.

Mr. BILIRAKIS. You've asked your Ombudsman to do that.

GAO recommended that EPA require the Ombudsman to file an annual report summarizing activities and make it available to the public.

Mr. BIALEK. Yes.

Mr. BILIRAKIS. Finally, GAO called on EPA officials to assess the national demand for Ombudsmen services and determine the places they are most needed and the places where the Ombudsman is located; ensure that these regional Ombudsmen meet relevant professional standards for independence.

I'm not sure even I understand that.

Mr. STEPHENSON. Would you like me to explain it, Mr. Chairman?

Mr. BILIRAKIS. Please explain it, Mr. Stephenson.

Mr. STEPHENSON. Right now there's a Regional Ombudsman in each of the ten regions that's in the OSWER organization that as a collateral duty, performs some information dissemination to the public on Superfund programs. And that's really not an Ombudsman either. It's still in the Office of OSWER, therefore it's not independent. And since it's a collateral duty it's not their primary function, so they're really not serving as a Ombudsman. What we ask is that EPA address that concern with the Regional Ombudsman, not the National Ombudsman.

Mr. BILIRAKIS. You know, I suppose Ms. Malinowski will refer to this in her comments, I don't know. But back in the early part of June 2000, we had scheduled what we call a Town Meeting in Tarpon Springs, Florida. The former Administrator refused to afford enough funds to allow the Ombudsman and his investigator to come down for that town meeting. Now I know it happened before your watch, Mr. Bialek. I don't know how long you've been counsel of the OIG. I suppose your documentation may go into that. But in any case, it took me and Mr. Oxley, who at that time chaired this particular subcommittee, and also Mr. Tauzin in an conversation with the Administrator to allow those funds to be made avail-

able. And I might add that's the meeting in which the EPA officials from the Region got up and walked out at a certain time and refused to answer any more questions. That's all a matter of record.

So, you know, we talked about independence. Now granted that was OSWER. But I'm not sure if that same sort of thing can now take place under the IG. As much confidence as I have in the IG insofar as the functioning of their office as I understand it over the years, going all the way back to when I was in the military, I don't know if that function would lend itself to any good effort insofar as the Ombudsman is concerned.

I don't know if you have a real quick response to that. My time is expired and I don't want to take advantage.

Mr. BIALEK. All I'll say is we allocated I think approximately $600,000 to this function and have asked the Ombudsman to prepare and provide a budget on what she thinks she needs to fully fund the operation.

Mr. BILIRAKIS. Let's see, who is next? Ms. DeGette? Is she on the subcommittee?

Ms. DEGETTE. No.

Mr. BILIRAKIS. You're not on the subcommittee. Mr. Barrett.

Mr. BARRETT. To make it easier, since I'm on the subcommittee, I'll yield to Ms. DeGette. If that's okay with you, Mr. Chairman.

Mr. BILIRAKIS. I suppose so.

Ms. DEGETTE. Thank you, Mr. Chairman, for letting me sit in on this hearing today. And thank you also, Mr. Chairman, for your leadership on this issue with the Ombudsman. We've been working a long time together. I got involved in the issues with the Ombudsman when he came out and worked on a very difficult case in Denver, my District, with the Shattuck decision. This was a record of decision that had been closed and which was an incredibly problematic decision and which with the leadership of the Ombudsman we were able to get reversed and now we have a much more appropriate remedy, appropriate for the neighborhood, appropriate for the health of the community. And for that I want to publicly thank the Ombudsman for doing this.

I should say I want to thank the former Ombudsman, Bob Martin. In the process of working on this, I became quite concerned about the independence of the Ombudsman's Office because it really takes somebody who's out there as an advocate for the public to to be talking about these environmental decisions.

So needless to say, Mr. Chairman, I was quite concerned when the EPA made the decision to move the Ombudsman's Office into the Office of the Inspector General. And I think the line of questioning we've seen from both sides of the aisle would show that in fact the EPA has achieved its objective which is to subsume the Ombudsman into another agency to remove the Office's independence and to put them as part of the bureaucracy. And I want to ask some questions around that.

The first one, Mr. Fabricant, what was the staffing and the budget of the Ombudsman before this recent move into the Office of the Inspector General?

Mr. FABRICANT. Just a second. I'll get the information for you.

Ms. DEGETTE. All right. While you're looking for that, Mr. Bialek, let me tell you I have enormous respect and admiration for

the Office of the Inspector General and I think my colleagues will join me in saying we don't have a problem with what you folks do. We just don't think that's what an Ombudsman does. So I want to ask you some questions around that.

I think it's been pretty clear from the questioning that the concept is now that the Ombudsman will do this research, but they really will report to a Deputy in the Inspector General's Office, right? That's the concept.

Mr. BIALEK. Yes.

Ms. DEGETTE. And so ultimate decision for which cases are pursued, that will be determined by the Inspector General's Office, right?

Mr. BIALEK. There will be criteria established to guide——

Ms. DEGETTE. But if the Ombudsman said I want to go investigate what's going on at Shattuck in Denver, ultimately that's going to be subject to a decision by a Deputy in the Office of Inspector General. Is that correct?

Mr. BIALEK. That's correct.

Ms. DEGETTE. Now I want to ask you a few questions about the experience of the OIG in dealing with these cases. Let me ask you, first of all has the EPA Inspector General's Office ever held public investigative hearings on hazardous wastes in Superfund sites? Yes or no.

Mr. BIALEK. Public hearings, no.

Ms. DEGETTE. Okay. Has the EPA Inspector General ever been involved in informal mediation between complainants, citizens, the Agency and other stakeholders in disputes arising out of hazardous waste in Superfund cases?

Mr. BIALEK. Depends on how you define informal assistance. By making referrals to appropriate officials to address problems and complaints, if you consider that informal assistance, then we have done that.

Ms. DEGETTE. The OIG has not actually—you've made referrals, but you haven't participated in those mediations. Correct?

Mr. BIALEK. Correct. If what you're asking is will we mediate or will we arbitrate those kinds of disputes, acting in that capacity, the answer is no.

Ms. DEGETTE. That's because the Inspector General is not authorized to do those activities under the Inspector General's Act, right?

Mr. BIALEK. That comes full force into the issue of whether that's a programmatic operating responsibility, correct.

Ms. DEGETTE. So what you're saying, I'm sorry, the IG is not authorized to do those activities currently?

Mr. BIALEK. Correct.

Ms. DEGETTE. Mr. Fabricant, did you get an answer?

Mr. FABRICANT. General information from the budget year 2000 to 2001, in 2000 it was $518,000 allocated for the Ombudsman. The number increased to $786,000 in 2002 and generally in terms of staffing, there's been the Ombudsman himself and an additional employee detailed to provide assistance.

Ms. DEGETTE. I mean, part of the problem before I thought was we had this Ombudsman but he was really inadequately funded. It was basically him and one other person and then these regional

people who as part of their job were supposed to report to him, right?

Mr. FABRICANT. Generally, yes.

Ms. DEGETTE. And what Mr. Bialek said——

Mr. BILIRAKIS. Gentlelady, as part of their jobs did you say the regional people would report to the Ombudsman?

Mr. FABRICANT. There was a coordination between——

Mr. BILIRAKIS. Coordination, okay.

Ms. DEGETTE. Right, and just one last question, Mr. Bialek. What you're saying is right now you deploy now five or seven more employees to help the new Ombudsman?

Mr. BIALEK. Yes.

Ms. DEGETTE. See, Mr. Chairman, I think that's part of the problem. They just didn't give Bob Martin enough resources. But why take away the independence of the Office in order to give the office the resources it needs?

Mr. BILIRAKIS. Amen to that. It's really in our hands to do something about that.

Mr. Norwood to inquire.

Mr. NORWOOD. Thank you very much, Mr. Chairman. Is it Bialek?

Mr. BIALEK. Bialek.

Mr. NORWOOD. Bialek?

Mr. BIALEK. Yes sir.

Mr. NORWOOD. How long you been with the EPA?

Mr. BIALEK. Three years.

Mr. NORWOOD. Three years. You apparently like the language in the Solid Waste Disposal Act regarding Ombudsman. Is that correct?

Mr. BIALEK. About investigating complaints and following up on complaints. Yes, that's what we're here to do.

Mr. NORWOOD. Your general attitude is that the Ombudsman doesn't need to be independent?

Mr. BIALEK. That depends on how you define independent. The Inspector General is independent.

Mr. NORWOOD. Let me put it this way. Let's say that the EPA comes up with a finding on a Superfund site and a constituent of mine goes to the Ombudsman and said we think they're wrong. We want you to investigate this. The Ombudsman does that and does indeed disagree with EPA. Who wins?

Mr. BIALEK. We issue a report with recommendations. If we believe EPA has done something wrong, we tell them how to correct that problem. We keep Congress informed as we go.

Mr. NORWOOD. How long has the Ombudsman been under the Inspector General?

Mr. BIALEK. Since April.

Mr. NORWOOD. So we don't do that very long. What's been going on the last 3 years prior to being under the Inspector General? And if you do produce a report for the EPA, do you ever know of the time that EPA has said yes, Mr. Ombudsman, you're correct. We're wrong. Has that ever occurred?

Mr. BIALEK. That question is better addressed by those who were involved in that process before we assumed it.

Mr. NORWOOD. Well, is there anyone in the room who can answer that?

Mr. STEPHENSON. Well, you're pointing out a problem of independence. If the Inspector General has produced reports on Superfund sites, then the Ombudsman gets an inquiry on the same Superfund site and finds differently than the Inspector General, then there may be some conflict with independence in that particular case.

Conversely, in other agencies, the IG can look at the Ombudsman activities, so you're losing both of those aspects of independence when you merge the two Offices together.

Mr. NORWOOD. So you actually think that's probably not a good idea to merge those together.

Mr. STEPHENSON. That's what we've stated.

Mr. NORWOOD. And I don't think there's anybody I've talked to or heard speak on this panel, from Members of Congress who don't think that it ought to be independent as well.

How can someone who works for the EPA, even though it's an Inspector General's Office, who I know you say is independent, how can they ever come up with anything that's different from the EPA and I'd like somebody to tell me whenever that has occurred. Anybody have that answer? Back here.

Mr. KAUFMAN. Ombudsman Martin in doing the mediation activities that Mr. Bialek says the IG is not authorized to do has gotten EPA 80 percent of the time to change their decisions. With Mr. Martin being gone, there is no function no in EPA to get EPA to change decisions because Mr. Bialek has said rightly so, the IG doesn't have that authority. It doesn't exist any more.

Mr. BILIRAKIS. That's highly irregular.

Mr. NORWOOD. I know it is, Mr. Chairman, but somebody here ought to be able to answer that kind of question.

Mr. BIALEK. Congressman, we issue audit reports all the time that take issue with the behavior, the conduct, the performance of EPA. We prosecute employees and officials of EPA. On occasions we have taken issue with the legal position that EPA has taken. So it's not fair to say that we don't object and report and disagree with EPA's decisionmaking.

Mr. NORWOOD. The problem is since April, you don't have anything to turn to to show us that on the Ombudsman. Is that correct?

Mr. BIALEK. As I've said, since April, our efforts have been directed at going through this massive volume of records, very disorganized records, with no case filing to try to understand what the current status is of these open cases. We thought that was our first priority.

Mr. NORWOOD. Mr. Chairman, it appears to me if Members of Congress really do want the Ombudsman to be independent, we've got to say so legislatively. It is not clear in the Solid Waste Disposal Act, and I can't find anywhere in the definition of Ombudsman does it mean independent. And you know, clearly the EPA is going to control that Office until we tell them different, where they don't have any choice. So I think that's the bottom line. That's the purpose of the hearing. That's why we're here. We want those persons are independent so they can actually rule.

Mr. BILIRAKIS. That certainly is the purpose of the hearing. For the record, since we did allow irregular order, Mr. Kaufman, would you stand, and for the purpose of the court reporter state your name and your employment? He's just going to give you his name.

Mr. KAUFMAN. My name is Hugh B. Kaufman and I was the Chief Investigator for the Ombudsman up until the beginning of this year, and the United States Department of Labor has ordered the Environmental Protection Agency to put me back to work in that job.

Mr. BILIRAKIS. Thank you. Mr. Wynn to inquire.

Mr. WYNN. Thank you, Mr. Chairman. Thank you for calling the hearing. I apologize for being late. I do have a couple of questions. First of all, in the GAO's recommendation, it indicates that you are to develop an Ombudsman, rather is to develop a written criteria for selecting and prioritizing cases for investigation. Has this been done?

Mr. BIALEK. The Inspector General is undertaking that right now.

Mr. WYNN. So that's in process?

Mr. BIALEK. I think so.

Mr. STEPHENSON. Yes, that's correct.

Mr. WYNN. And are you required to submit that to Congress to this committee?

Mr. BIALEK. No, we're not required to do that.

Mr. WYNN. Okay, are you willing to do that?

Mr. BIALEK. Absolutely.

Mr. WYNN. Can I put it on the record a request that you provide us with that criteria once it's developed?

Mr. BIALEK. Of course.

Mr. WYNN. And about approximately how long do you believe that will take?

Mr. BIALEK. A matter of a few weeks.

Mr. WYNN. That would be great, thank you.

Mr. BIALEK. A few weeks, no. Wouldn't you like to get something a little more certain?

I'm assuming he means at least 3 weeks, approximately the time just before we have——

Mr. WYNN. We have a piece of legislation here and this hearing is intended to help us determine how we're—what route we're going to take.

Mr. BIALEK. Mr. Chairman, would you say that the date certain would be appropriate and if so, I would defer to the chairman's guidance on this.

The Ombudsman is currently in Idaho and Washington and I'm not sure if her expected return—obviously, she's going to be the one who will be drafting these guidelines, so I'd like to consult with her to see what her availability is to address this, if you'd like.

Mr. WYNN. Should we say 3 weeks then, Mr. Bialek? I'm don't mean to be unfair, but so we can be somewhat certain here. All right, thank you.

Thank you, Mr. Chairman. Also, it indicates in the recommendations to make it a consistent policy to consult with Agency officials and it says other affected parties which I presume to be the public

prior to include their comments and prior to making their findings, is that your practice?

Mr. BIALEK. I'm sorry, could you restate the question?

Mr. WYNN. In its recommendations it says "Ombudsman should maintain records on his investigation and other activities sufficient to serve as a basis for a reasonable estimate of resource needs. In the interest of fairness, EPA should require the Ombudsman to establish a consistent policy for preparing written reports on his investigations by consulting with Agency officials and other affected parties to obtain their comments before his findings are made public. And including written Agency comments when reports are published."

Are you consulting, is it your policy to consult with the public in preparing these written reports?

Mr. BIALEK. Certainly to consult with all affected parties and if the public is an affected party, absolutely.

Mr. WYNN. So if you have a complaint, that that party's complaints would be included?

Mr. BIALEK. Absolutely.

Mr. WYNN. Okay. Next, are other Federal Ombudsmen prohibited by the Agency from communicating without proapproval when they're communicating with Members of Congress, the media and the public? Is that standard government practice?

Mr. BIALEK. Not to my knowledge.

Mr. WYNN. So this would be unique to the EPA Ombudsman?

Mr. BIALEK. Correct.

Mr. WYNN. And what's the basis for that policy?

Mr. BIALEK. The basis is that the Office of Inspector General speaks with one voice, that we want to make sure when information is imparted, whether it's to Congress or to the media that it's accurate and complete and pulls from all of the information——

Mr. WYNN. I think I understand, but it does seem to be then a very unusual policy relative to other Ombudsmen's Offices. Are the Ombudsman's cases currently housed in the IG's Office open to the public, Members of Congress and the news media? Are the case files open?

Mr. BIALEK. Yes. No, they're government records.

Mr. WYNN. Are they subject to Freedom of Information Act requests?

Mr. BIALEK. Absolutely.

Mr. WYNN. But that's the only way they can be obtained?

Mr. BIALEK. That's the appropriate way for them to be obtained from the public.

Mr. WYNN. What about Members of Congress?

Mr. BIALEK. We follow the rules whether they're Ombudsman records or investigative records or audit records——

Mr. WYNN. What specific rulemakes those records confidential?

Mr. BIALEK. They're not public records. They become public when we issue them as final reports, for example.

Mr. WYNN. Once they're final reports, then are they public record, available to the public?

Mr. BIALEK. Our intention is to publish our reports publicly.

Mr. WYNN. But the files themselves are only available through Freedom of Information, is that your position?

Mr. BIALEK. That's the typical response of any government agency when it comes to working paper files that support final reports.

Mr. WYNN. Okay.

Mr. BIALEK. They are available——

Mr. WYNN. That's fine. I think I understand. Now you said fairly emphatically that you're not going to be an advocate or disseminate information on operations. If a citizen complains or a group complains about dumping or hazardous waste that have not been properly handled, what is your role? I mean do you then take on the role of advocate for that or do you investigate and if, in fact, it is true, do you then press for prosecution, recommendation prosecution? What do you do when you have hard evidence provided by a member of the public?

Mr. BIALEK. If we've conducted an investigation and have obtained information about a violation of a law, whether it's civil or criminal, we pursue the appropriate remedies, whether that's a criminal prosecution or a civil fraud lawsuit. If there are violations of regulations, or other responsibilities and obligations by agency officials, then we issue our reports to publicize that.

Mr. WYNN. Have you recommended any prosecutions, civil actions, fines or any action based on these findings?

Mr. BIALEK. Not since we inherited this function about 13 weeks ago. We have been about the business of going through those records and making an assessment as to where we need to spend most of our time and attention pursuing those high priority cases that were left over from the previous office.

Mr. BILIRAKIS. The gentleman is granted an additional 2 minutes.

Mr. WYNN. Thank you, Mr. Chairman. So you're looking at the cases now and then you're going to make recommendations?

Mr. BIALEK. Correct.

Mr. WYNN. Do you believe it's within your purview if the facts support it, to become then an advocate for prosecutorial action, to recommend prosecutorial action?

Mr. BIALEK. Absolutely.

Mr. WYNN. So that is going to be your policy. Okay. Now you made an interesting comment, I think it was Mr. Shimkus was asking you about quote kooky regulations and you said that if you found there were problems, you'd bring them, laws may be adversely affecting a small business, you'd bring them to Members of Congress. Was that your position?

Mr. BIALEK. Yes.

Mr. WYNN. Have you reviewed the laws or complaints about laws in this area?

Mr. BIALEK. We have about 17 open cases right now. I don't know if any of them include complaints about laws themselves or regulations themselves.

Mr. WYNN. So you're not aware of any problems with the law that might adversely affect the small business person?

Mr. BIALEK. I'm not personally aware of any right now.

Mr. WYNN. But it's your position that if this—what's the criteria you would use? I guess we're kind of getting back to that. How do you make your decision? What's the basis for your decision?

Mr. BIALEK. I think that's what you asked us to produce for you in a few weeks from now.

Mr. WYNN. So right now, you don't have anything is what you're saying? You don't have a criteria. You're just in the evaluation phase?

Mr. BIALEK. Correct.

Mr. WYNN. Mr. Chairman, I relinquish the balance of my time. Thank you.

Mr. BILIRAKIS. Mr. Norwood, an additional 2 minutes.

Mr. NORWOOD. Mr. Chairman, I think we've established what I need to know.

Mr. BILIRAKIS. Thank you. Mr. Pallone? Mr. Pallone doesn't wish an additional 2 minutes.

Ms. DeGette, an additional 2 minutes.

Ms. DEGETTE. Thank you, Mr. Chairman. I just have—I want to actually take this discussion and put it on its head for a minute.

Mr. Stephenson, in agencies where the Ombudsman function and the Office of Inspector General are separate entities, one of the things that the Office of Inspector General can do is audit the Ombudsman, correct?

Mr. STEPHENSON. Correct.

Ms. DEGETTE. Now when you put the Ombudsman into the Office of Inspector General, the OIG can now no longer independently audit the Ombudsman, right?

Mr. STEPHENSON. Correct.

Ms. DEGETTE. Thank you. I don't have any further questions.

Mr. PALLONE. Mr. Chairman, I just wanted to enter something into the record, if I could.

Mr. BILIRAKIS. Please describe it.

Mr. PALLONE. I would ask that correspondence relating to documents requested from the EPA with respect to the Ombudsman be inserted into the record and there's a letter from Mr. Dingell and myself to Mrs. Whitman and I guess a response from Mrs. Whitman and a letter from me to Chairman Gillmor also.

Mr. BILIRAKIS. Without objection, that will be the case.

[The information referred to follows:]

MICHAEL BILIRAKIS, FLORIDA
JOE BARTON, TEXAS
FRED UPTON, MICHIGAN
CLIFF STEARNS, FLORIDA
PAUL E. GILLMOR, OHIO
JAMES C. GREENWOOD, PENNSYLVANIA
CHRISTOPHER COX, CALIFORNIA
NATHAN DEAL, GEORGIA
STEVE LARGENT, OKLAHOMA
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LEE TERRY, NEBRASKA

ONE HUNDRED SEVENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

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DAVID V. MARVENTANO, STAFF DIRECTOR

September 10, 2001

The Honorable Christine Todd Whitman
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Whitman:

The Subcommittee on Environment and Hazardous Materials has scheduled a hearing on the subject of the Environmental Protection Agency (EPA) Ombudsman for Friday, September 14, 2001. To assist us in providing the members of the Subcommittee with full and complete information about the status and operations of the EPA Ombudsman we request the following information no later than Wednesday, September 12, 2001. We appreciate the extremely short nature of the response time, but our staff was only provided confirmation of the hearing after the close of business on Friday, September 7, 2001.

1. Please provide all memoranda and other correspondence, including electronic correspondence, between any EPA employee and Mr. Bob Martin or Mr. Hugh Kaufman subsequent to December 1, 2000, that relate to the operations, personnel staffing, independence, or funding of the Ombudsman's Office.

2. Please provide any memoranda or correspondence, including electronic correspondence, initiated by Mr. Martin or Mr. Kaufman and sent to the Acting Assistant Administrator for Waste, Mr. Michael Shapiro, or any other EPA employee since December 1, 2000, which relate to the operations, personnel staffing, independence, or funding of the Ombudsman's Office. This includes, but is not limited to, a letter or memorandum dated on or about February 13, 2001, from Mr. Martin to Mr. Shapiro.

3. Have any administrative or judicial complaints or actions been noticed or filed by any EPA employee since January 1, 2000, against the EPA Ombudsman or any current or former employee assigned to or detailed to the Office of the

Ombudsman? If so, please provide a copy of the complaint or action and all related materials.

4. Has the EPA Ombudsman or any former employee, including Mr. Kaufman, noticed or filed an administrative or judicial action against the EPA or any of its employees since January 1, 2000? If so, please provide any documents or other information about the administrative or judicial action, including any adverse personnel actions that have been noticed or filed.

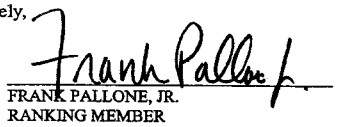
5. Please provide all materials or documents in the possession of the EPA initiated, received, or sent subsequent to January 1, 2000, that discuss in any manner the impartiality of the EPA Ombudsman or any of the current or former employees assigned to or detailed to the Office of the Ombudsman.

6. On January 5, 2001, Mr. Martin, the EPA Ombudsman sent a letter indicating that he was delaying work on all pending national Ombudsman cases until he received clear and consistent direction from EPA management. Please provide any information indicating the directions provided by EPA management and specify the actual work, if any, on pending cases conducted by the EPA Ombudsman since January 5, 2001.

Thank you for your cooperation with this request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER
COMMITTEE ON ENERGY AND COMMERCE



FRANK PALLONE, JR.
RANKING MEMBER
SUBCOMMITTEE ON ENVIRONMENT
AND HAZARDOUS MATERIALS

cc: The Honorable W. J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Paul E. Gillmor, Chairman
Subcommittee on Environment and Hazardous Materials

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 9 2001

THE ADMINISTRATOR

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington D.C. 20515

Dear Congressman Dingell:

Thank you for your letter dated September 10, 2001, requesting records about the Office of the Ombudsman. I appreciate your interest in this matter and hope we can work together to get you the information and documents you need.

A number of documents relating to the Office of the Ombudsman are enclosed. Unfortunately, for the reasons set forth in this letter, many of the documents you asked for cannot be released to you because of legal constraints placed on the Agency by the Freedom of Information Act (FOIA), 5 U.S.C.552, and the Privacy Act, 5 U.S.C. 552a.

Many of the records at issue are of the kind often associated with the Privacy Act: memoranda describing an employee's performance of work duties. Any "unauthorized" disclosure of such records would be a violation of the Privacy Act. An intentional violation of the Privacy Act carries with it both criminal and civil penalties, including fines of up to $5,000, 5 U.S.C. § 552a(g), (i).

The Privacy Act requires withholding of personal information, except under limited circumstances, 5 U.S.C. § 552a(b). Like the FOIA, the Privacy Act includes a special access provision for Congress, 5 U.S.C. § 552a(b)(9) but, as with the FOIA, this exemption to the Privacy Act is limited only to Congress itself, either house, or a committee or subcommittee, including a committee chairman acting on behalf of Congress. Swenson v. U.S.P.S., 890 F.2d 1075, 1077 (9th Cir. 1989); *see also*, OMB Guidelines, 40 Fed. Reg., 56,471 56,742 (1975). Individual congressmen, even though they may be requesting information in their official capacity, may not avail themselves of the special access provision in section (b)(9). *Id.* Therefore, until the request is resubmitted as a request from Congress as an institution, section (b)(9) does not authorize disclosure.

A disclosure is also considered "authorized" and not in violation of the Privacy Act if the FOIA requires disclosure, 5 U.S.C. § 552a(b)(2). Disclosure is required upon receipt of a FOIA request unless an exemption applies. Section (b)(2) of the Privacy Act merely prevents agencies from making discretionary releases of information that is exempt from mandatory disclosure under the FOIA. The central question, then, is whether any FOIA exemption applies to the records at issue here. If an exemption applies, even a discretionary one, the records must be withheld under both the FOIA and the Privacy Act. If no exemption applies, release of the records to you would constitute an "authorized disclosure" and would not violate the Privacy Act.

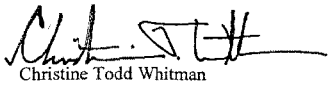
The FOIA guarantees public access to government records, unless one of nine exemptions applies, 5 U.S.C. § 552(b). FOIA exemptions, however, may not be used as justification for withholding information from Congress acting by itself, or by the Senate President, Speaker of the House, or committee chairmen acting on behalf of Congress, 5 U.S.C. §552(d). In applying this provision, courts and the Department of Justice have stated that requests for information from individual congressmen are not to be treated as requests from or on behalf of Congress.

Exemption 6 of the FOIA applies to "personnel, medical or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6). "Similar files" has been broadly defined, and the protection of Exemption 6 extended, to include any files that contain "information which applies to a particular individual." Dep't of State v. Washington Post, 102 S. Ct. 1957, 1961 (1982). Exemption 6 protection extends to personal privacy information regardless of the source or file and not just to those records contained in a Privacy Act System of Records.

A person does not have an expectation of privacy in information that is widely available in the public domain, Avondale Indus. V. NLRB, 90 F.3d 955, 961 (5th Cir. 1996), nor in information that the person himself has already made public, Nation Magazine v. U.S. Customs Service, 71 F.3d 885, 896 (D.C. Cir. 1995). Distributing some of the documents to certain members of the public, or select members of Congress, does not in itself mean the subject no longer has a privacy interest in keeping the same information from other people. *See e.g.*, Mueller v. Dep't of the Air Force, 63 F. Supp. 2d 738, 743 (E.D. Va. 1999).

I hope the documents we have forwarded to you and this explanation of the constraints we are facing with regard to the remaining documents meets some of your needs. Again, I appreciate your interest in the Office of the Ombudsman and hope we can work together to resolve any outstanding issues. Please feel free to call me with any additional questions or your staff may call Randy Deitz in the Office of Congressional and Intergovernmental Relations at 564-3683.

Sincerely yours,



Christine Todd Whitman

Enclosures

ENERGY AND COMMERCE COMMITTEE:
ENVIRONMENT AND HAZARDOUS MATERIALS SUBCOMMITTEE
RANKING MEMBER
HEALTH SUBCOMMITTEE
RESOURCES COMMITTEE:
FISHERIES CONSERVATION, WILDLIFE AND OCEANS SUBCOMMITTEE
NATIONAL PARKS, RECREATION AND PUBLIC LANDS SUBCOMMITTEE
DEMOCRATIC POLICY COMMITTEE:
COMMUNICATIONS VICE CHAIR
email:Frank.Pallone@mail.house.gov
http://www.house.gov/pallone

FRANK PALLONE, JR.
6TH DISTRICT, NEW JERSEY

Congress of the United States
House of Representatives
Washington, DC 20515–3006

REPLY TO:
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WASHINGTON, DC 20515–3006
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(732) 571-1140
☐ 87/89 CHURCH ST.
KILMER SQUARE
NEW BRUNSWICK, NJ 08901
(732) 246-3802
☐ I.E.L. AIRPORT PLAZA
1350 RT. 36, #104
HAZLET, NJ 07730–1701
(732) 264-8104

January 22, 2002

The Honorable Paul E. Gillmor
Chairman
Subcommittee on Environment and
Hazardous Materials
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Subcommittee on Environment and Hazardous Materials had initially scheduled a hearing on the subject of the Environmental Protection Agency (EPA) Ombudsman for Friday, September 14, 2001, which was then canceled because of the September 11th terrorist attack. In anticipation of the hearing, Mr. Dingell and I requested by letter dated September 10, 2001, documents in the possession of the EPA relating to the operations, personnel staffing, independence, and funding of the Ombudsman's Office (enclosed).

Almost two months later on November 9, 2001, we received a partial response which transmitted some documents but withheld many other documents. A copy of the EPA response is also enclosed. While I disagree with EPA's characterization that the Freedom of Information Act (FOIA) prevents the EPA from providing documents to Members of Congress, I do agree with their acknowledgment that you, acting in the capacity of Subcommittee Chairman, can upon request obtain the withheld documents for the benefit of the Members of the Subcommittee on Environment and Hazardous Materials.

In December 2001, when your staff discussed rescheduling the Ombudsman hearing with my staff and our minority counsel, your staff was informed of my strong interest in obtaining the withheld documents prior to a re-scheduling of the Ombudsman hearing. Along with Mr. Bilirakis and a number of other members I support your efforts to conduct an oversight hearing to fully examine the independence and funding of the EPA Ombudsman and Administrator Whitman's plan to place the Ombudsman under the control of the EPA Inspector General.

Therefore, I request that in your capacity as Chairman of the Subcommittee you obtain for the Subcommittee Members all of the withheld documents, including those in the possession of the Inspector General, to assist Subcommittee members in evaluating the important issues relating to the Ombudsman and preparing for a future hearing.

Thank you for your attention to this request.

Sincerely,

Frank Pallone Jr.

FRANK PALLONE, JR.
RANKING MEMBER

Mr. PALLONE. Thank you.

Mr. BILIRAKIS. Mr. Fabricant, what is the status of Mr. Martin now? What is taking place regarding his situation, if anything? Can you share that with us?

Mr. FABRICANT. I can generally describe for you the status. Again, it's in litigation. There are components of it that involve litigation, so I can't elaborate too deeply on it.

Mr. Martin, in April of this year, submitted a letter indicating a voluntary resignation, after a United States District Court dismissed a case regarding Mr. Martin's allegations about inappropriate activity by the Agency. The dismissal of that action was for failure to exhaust administrative remedies, so Mr. Martin is now before the Department of Labor, actually. Office of Special Counsel is looking at the allegations levied by Mr. Martin and we're currently, administratively, litigating the concerns raised.

Mr. BILIRAKIS. You're litigating those concerns?

Mr. FABRICANT. In an administrative adjudication, yes.

Mr. BILIRAKIS. Administrative adjudication.

Mr. FABRICANT. Yes.

Mr. BILIRAKIS. The word mediation has been presented to me. Is there anything to that?

Mr. FABRICANT. We are in the preliminary stages of that litigation and I characterize them as settlement negotiations and discussions of the terms of possible mediation are being discussed as we speak, but again, the actual terms are confidential in settlement negotiations and I can't go into any detail.

Mr. BILIRAKIS. I appreciate that. Look, we have two bottom lines here in my opinion. One is congressional intent. Now, you know, maybe we weren't as clear back in the wee morning hours in 1984 when the Office of the Ombudsman was created in terms of the function and in terms of independence and things of that nature. But I think it's quite clear, and should be quite clear. I know you're counsel, you're attorneys, I'm not sure how much you get involved as far as the public is concerned and whether you go down and see what's happening with some of these sites, but I assure you that based on our experience in Tarpon Springs, Florida, there's a lack of confidence, there's a lack of trust, there's a lack of credibility insofar as the Environmental Protection Agency is concerned. And I say there is, while it sounds like it's just today, this actually goes back quite a ways back. That's why in my opening remarks I said

this should not be a partisan thing. These problems go well back before this administration.

So you good gentlemen, I'm an attorney, too, and you're doing your job as counsel. I just question whether you get involved from that standpoint and maybe your function is to not be concerned with all of that. Maybe your function is to have the blinders on and be concerned only with the legal aspect of it all. But I say to you, from the standpoint of the public who we are here to serve, it is best—no reflection on the IG—as Ms. DeGette said, they're a fine organization, and they do a great job, in general, but we don't think that their role as far as the Ombudsman is concerned is something that should take place and is taking place. But something should be continued.

Mr. Martin, and his Investigator, in my opinion, ought to have something worked out with those people so they can continue to function. Let's not worry about turf. Let's not worry about the politics. Let's not be concerned about whether or not they rubbed us wrong in the past and everything. Let's be concerned about what we're supposed to be doing for our constituents. There's a level of confidence in these individuals and let's give them an opportunity to finish their work. I mean, maybe I've gone a little bit too far in making that comment, but do you have a quick comment regarding that?

Mr. FABRICANT. In general, Mr. Chairman, the Governor—Governor Whitman shares the concerns of the committee and really, the goals of the committee in terms of improving the Ombudsman's functions within the Agency.

We truly believe that the independence of the Agency has been enhanced with the shift to the Office of Inspector General. Although it's in its earliest stages at OIG, we think there's been significant headway made in terms of getting a handle on the case load and prioritizing and moving forward in a very efficient and effective fashion to resolve many of the conflicts on cases that are out there.

So generally, our goals are shared. I will report back to Administrator Whitman your concerns on the other matters, including Mr. Martin, but again, we're in the context of litigation and we will be continuing those discussions with Mr. Martin.

Mr. BILIRAKIS. You use the term getting a handle on it. We've talked about the boxes and boxes that they haven't had an opportunity to go through yet. They've mentioned in Tarpon Springs this last Saturday morning and we're talking about a huge gap of time here.

So why should they have to get a handle on it? Why should the gap take place and all that when we've got people who are experienced and have been involved from a consistency and stability standpoint? Let them finish their work. That would be the easiest way in my opinion, and any way you look at it, that would be the easiest way to go.

Now I'm not trying to put the EPA in a position where they, in the process of mediation or negotiation or whatever the case may be, don't have a position. You've got to have a position, and hopefully, if we're talking true mediation, we're talking give and take. And hopefully that is going to be the case on everybody's side.

Well, all right. Having said all that I do want to thank you, gentlemen, for—Mr. Shimkus. John, I apologize, you snuck in on me.

Mr. SHIMKUS. I'm sorry, Mr. Chairman.

Mr. BIALEK. Please proceed if you'd like to inquire.

Mr. SHIMKUS. Just a quick question, a follow-up. What is the problem with a view that an Ombudsman should be involved in addressing disputes from the citizens in an external position versus the critical role that the IG plays internally?

And I'd like to start with Mr. Stephenson. Based upon that definition of an Ombudsman, is the Ombudsman's role historically defined as doing both external and internal? Because I know the role of the IG, in my experience with IGs has been internal aspect and internal issues within organizations.

Let's start with Mr. Stephenson?

Mr. STEPHENSON. As typically defined, the Ombudsman is an informal problem resolver, an unencumbered problem solver between the public and the Agency head.

Mr. SHIMKUS. So that kind of supports my basic premise.

Mr. Bialek, do you have a problem with that definition?

Mr. BIALEK. We do both internal and external, but I think it probably depends again on your definition. If you define external as going after contractors or going after grantees for having engaged in misconduct, we do that and that's external. We define internal as employees of EPA and the EPA programs and trying to correct problems——

Mr. SHIMKUS. I would define internal contractual problems as being part of the EPA because you're contracting, you're going into an agreement. My issue is who is speaking for the individual citizen and that's where I think my argument would be that maybe inside the IG, not disputing the work that you do, is better, more defined by what Mr. Stephenson has defined as the role of Ombudsman.

Mr. Fabricant, do you have anything you want to add to this?

Mr. FABRICANT. Congressman, just generally, again the Office of Inspector General submits reports to the Administrator regarding the activities of EPA onsites and would be appropriately able to submit those reports and again, we take the recommendations and move forward accordingly with those recommendations.

There are both functions, internal within EPA and EPA activities as well as external.

Mr. SHIMKUS. Well, put me down in a position that I think they should be separate and in two different locations. I think I'm making my point fairly clear.

Mr. Bialek, all these—what are you doing with all these boxes that—can you just briefly tell me what you've had to do since the receipt of all this information once you took over the oversight? I'm not a lawyer, so—once you've taken over the Ombudsman Office and brought it into the IG.

Mr. BIALEK. If I can just follow-up 1 minute on your last issue——

Mr. SHIMKUS. You're not going to convince me——

Mr. BIALEK. No, I just want to make it clear. I didn't want to mislead anyone here. I think Congresswoman DeGette asked a question about public hearings. Although we have not had public

hearings in the sense that I think of a hearing with a magistrate and testimony, we have held public meetings and we will continue to hold public meetings. I don't want these committees to think we do not intend to engage in or maintain a dialog with members of the public.

That's the first point.

The second, to answer your question, there is a certain organization that needs to be brought to these records. They were in total disarray when we got them. We need to understand what has been done, what the status is of what was done by the prior group and what's happened since then. As we've said, they're voluminous records and we've been trying to understand their current status. We have asked—we have invited Mr. Martin to come in and meet with our Acting Ombudsman to try to assist us in that endeavor and then we will be able to move out and launch our teams to go pursue those open priority cases.

Mr. SHIMKUS. Mr. Chairman, I'll yield back my time, thank you. Thank you, Panel.

Mr. BILIRAKIS. If Mr. Shimkus will yield to you.

Mr. SHIMKUS. I'd be happy to yield for my friend from Georgia.

Mr. NORWOOD. The records were in total disarray that you've got. Doesn't that have a lot to do with the fact that the EPA was steadily undermining the Ombudsman's Office with this budget by cutting it, reducing it, lowering it? We don't want to hear from you. We'll cut your money out from under you. Isn't that why you have boxes that's in disarray?

Anybody? Mr. Fabricant?

Mr. FABRICANT. Congressman, I wouldn't speculate as to why the boxes.

Mr. NORWOOD. You can then speculate on did their budget get cut?

Mr. FABRICANT. No, again, the budget has been increasing over time, dramatically. It's doubled in——

Mr. NORWOOD. Now we have other witnesses that are coming up next that I'm going to ask this same question to.

Mr. FABRICANT. The budget has doubled between 1999 and 2001, so there's been incremental increases over the last several years to improve the budget and the finances of the Ombudsman function.

Mr. NORWOOD. I'm going to remember that now because I'm going to ask that same question to the next panel and they're going to tell me why that budget may have been doubling, but they weren't getting it.

Thank you, Mr. Chairman.

Mr. BILIRAKIS. All right, well, again as I started to say, our gratitude to you. As some of you know, we always have written questions that we'd like to submit to the panelists and you would be agreeable to responding to those, and again, we thank you.

I don't know if we proceed forward with this legislation regarding the true independence that was intended by Congress initially. I would hope that you all will be cooperative in that regard, even while there's always a concern about the unintended consequences and things of that nature. So hopefully, you all will be helpful and Mr. Stephenson, obviously, we would depend upon you greatly.

Thanks for all your time. Thank you very much.

We'll call the second panel, Mr. Robert Martin. It says here "Citizen." Come on up here, Citizen. Former Ombudsman, obviously. And Ms. Heather Malinowski, Secretary, Pinellas-Pasco Technical Assistant Grant, fondly referred to as Pi-Pa/TAG from Tarpon Springs, Florida.

You've both submitted written testimony and what we would hope you would do is sort of complement, supplement that testimony, summarizing it, if you can. I'll set the timer on 5 minutes and hopefully, you'll finish within that period of time. If you run over somewhat, no problem, you've sat around and been patient for quite a while here.

So Mr. Martin, why don't we just start off with you?

STATEMENTS OF ROBERT J. MARTIN; AND HEATHER MALINOWSKI, PINELLAS-PASCO TECHNICAL ASSISTANCE GRANT

Mr. MARTIN. Thank you, Mr. Chairman. Can I be heard?

Mr. BILIRAKIS. Your mike, your mike.

Mr. MARTIN. How about now?

Mr. BILIRAKIS. Now we can hear you.

Mr. MARTIN. All right, thank you very much, Mr. Chairman, and for accepting my testimony into the record. I would like to touch on several points thematically as we proceed to consider what's become of the Office of Ombudsman.

First, I would like to note that true independence of the EPA National Ombudsman function has always been an issue within the EPA, at least during my tenure and that's been, that was 9½ years which is to say, Mr. Chairman, that problems around independence don't go to merely—I'll just say, one administration or another. It's always been a problem, as you've noted in your own Ombudsman case in Tarpon Springs. I'm sure people in Idaho can tell stories. I'm sure people in Ohio can tell stories and in Colorado.

I think that's an important tone to set as we proceed to deliberate, but I must note that the EPA National Ombudsman function, as it existed during my tenure, has been dissolved and that there is not now an Ombudsman function. The critical independence of the Ombudsman was removed entirely and I say this based upon the elimination of my position description which provided that I would have quote unquote maximum independence in doing this job on behalf of the American people.

Also, the ability to define a problem, I mean just to say hey, I think we've got a problem here. That's very important in a bureaucracy. It's very important in government to be able to say so publicly, especially to people in communities who often feel very distant from their government. That ability was also removed. And that's really important because if you can't do that, you can't stand up for them and whether it's the MacIlmurray family in Georgia or folks in Overland Park in Denver, folks in Tarpon Springs, on a much larger scale, people in lower Manhattan, affected by the collapse of the World Trade Centers, if you can't say I think we have a problem, as an Ombudsman, you don't have an Ombudsman and people don't have help and that's wrong. And I would not agree with that. And that's why I resigned.

I do not believe the EPA National Ombudsman function can exist within the EPA Office of Inspector General, both as a legal and a practical matter. And that's not to say that the Inspector General Office, that they're bad people. I'm sure they're good people and they do a good job as OIG, but they're not an Ombudsman. They can't be.

And I feel that by the dissolution of the EPA National Ombudsman function, American communities, American people that live in proximity to Superfund sites or hazardous waste and I think that's as many as 1 in 4 in the United States and that's quite a lot, have lost something. They've lost at a very critical time—it's always a critical time. Ombudsman attributes of truth and openness and a commitment to listening and I'll just say it, without a true EPA National Ombudsman function, communities are at risk from an unchecked bureaucracy and that's again not to say that EPA is full of bad people. I'm not here to pound that. But there needs to be checks and balances so that people get listened to when they've got a problem and that their problems get fixed when they need to be fixed and that's what I stood for in the job and I don't think that's going to happen now. I may be wrong, but I don't think it's going to happen.

So I'm here to ask you to listen to that and also your own folks and to say that a truly independent National Ombudsman function needs to be established in law for the benefit of the American people. I think the legislation needs to be worked on and reported out of this committee and passed by the Congress. I think the Ombudsman needs to be separate, needs to be truly independent so that people can get the help they deserve. And we're not talking here about giving an Ombudsman function all kinds of power or billions of dollars of money. I was very clear. For many years, I had no power. Other people at EPA have decisionmaking power. My only power was to go where people were and listen and come back and say I think we've got a problem. Let's see if we can fix it. Can we agree we have a problem that needs to be fixed? And that's really important. We don't have that right now.

I guess factually, I'd like to take issues with a few matters, that the records were in total disarray which I maintained as Ombudsman, I disagree. I feel the records were very well maintained and I know if I had to, I could find whatever I needed to within an hour on any case around the country.

Also, I've received no invitation to speak to the Inspector General or for that matter to anyone in EPA, following my resignation and I would like to note that the resignation, in my view, was made under duress. I felt I had no choice. I have consistently tried to work out any problems that I have with the EPA. I think many of the folks who you represent would say the same for themselves, that they try.

There is the prospect of a mediation, but there is no mediation yet. And I can say that I have offered, in good faith, to go to the table with EPA and work out a return, solely for the purpose of finishing these cases. And then I'll go.

The Agency has not responded to that and I think it's vitally important that the work which was begun, whether it's in Tarpon

Springs or Augusta, Georgia or Lower Manhattan, gets finished and gets finished with integrity.

I think frankly, as Mr. Norwood spoke earlier, the rest is up to Congress to make sure that this function, this Ombudsman function, has the right kind of charter and that it's separate and independent and then hopefully the rest will be history. But I do take issue with that.

Also, I'd like to note that over time, I have offered to meet the Administrator, to work out any potential differences around the placement of the Ombudsman function. That never happened. There's been no response and never was a response to that. Instead, there was a decision, in my opinion, dissolve.

So I guess that's what I've got to say for the moment. I'm glad to receive any questions that any member and I thank you.

[The prepared statement of Robert J. Martin follows:]

PREPARED STATEMENT OF ROBERT J. MARTIN

Thank you Mr. Chairman and distinguished members of the Committee for the opportunity to appear and testify before you in connection with recent developments in the EPA Office of the Inspector General. I understand the focus of the hearing is 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 ten 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 decision-making 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 follow up 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 US 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, United States 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, eighteen 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, US 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 US 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, US 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 US 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 "rulemaking 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 than an agency which has

adopted a rule cannot abandon it casually and go back to ad hoc decision making 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 statue is the source of an agencies 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 United States 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, six 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 two 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.

Mr. BILIRAKIS. Thank you, Mr. Martin.

Heather, please speak into the mike and tell us why you feel that there is a great need for independence for the Ombudsman's Office?

STATEMENT OF HEATHER MALINOWSKI

Ms. MALINOWSKI. Is this mike on?

Mr. BILIRAKIS. It's on.

Ms. MALINOWSKI. Okay, thank you for giving me the opportunity to speak to you today. My name is Heather Malinowski. For 7 years I've been Secretary of a community group in Tarpon Springs that's involved with the clean-up of the Stauffer Chemical Superfund site. We hold an EPA technical assistance grant in order to provide information to the community about the site. And I'm here to tell you our story as it relates to the Office of the EPA Ombudsman.

I want to start by saying that the State of Florida rests on a base that's made up largely of limestone which is a soft rock and when limestone is exposed to water filtering down through it, it dissolves and it forms caverns and craters and tunnels and so it's a very econologically fragile type of environment in certain areas, not the whole State.

The Stauffer Chemical Plant is situated in one of these areas where sinkholes are very common because of this geographical—the big problem about this is that just underneath this lies the Florida aquifer which serves as the main source of drinking water

for most of the people that live in the State. Stauffer Chemical was a phosphate processing plant. It is located in a residential community. It's across the street from an elementary school. And it's located right on a small body of water, the Anclote River, just before it empties into the Gulf of Mexico.

When they closed down in 1981, they left behind over 500,000 tons of chemical and radiological contaminants. These contaminants were buried in drums. They were poured into unlined pits. They were poured directly on to the ground. For years, they've been washing into the Anclote River and filtering down toward the aquifer. The more superficial layers of the aquifer are already contaminated.

The site was placed on the national priority list in 1994. EPA Region 4 has mismanaged this site and I want to tell you just a few of the things that were most upsetting to us. First of all, they refused to honor the State of Florida's clean-up goal for arsenic. They promised us that they would give us residential standards in the clean up because it's located in a residential community. But when we received the Record of Decision with the little chart that tells you what the clean-up goals will be, the part about arsenic was blank. And there was a note that said when they clean up all the other contaminants, they assumed that arsenic would be cleaned up also.

And when we asked them why this was the case and why they didn't actually give us the standard, they said don't worry, you're going to get your residential standard as we promised. Well, with much digging and no help from EPA, we found that residential standard is a relative term and what they planned on doing was regulating arsenic as a common poison instead of a carcinogen because that would be much less protective, but they didn't actually want it in the document.

Also, they ignored concerns expressed by the State Environmental Protection Agency, by the County Health Department and by the Technical Advisors that we had hired. Stauffer proposed containing all the contaminants onsite, but it was a decision that was based on inadequate data because they never finished the geophysical studies that would show whether or not the area was going to be prone to sinkhole formation. They never performed the geological, hydrogeological studies that would tell where the water, which was already contaminated was flowing to. And they never checked to see if the cement that they planned on mixing with the contaminants below the water table, they didn't check to see if that would leach. And it's known that that cement will break down with exposure to salt.

But the worst thing that they did in September 1999 was to send the Consent Decree to the Justice Department which was based on these inadequate studies. We asked them not to send it and they refused. They went ahead and they did.

In December 1999, the Ombudsman Office began an investigation into the site. As a result of that investigation, the EPA and Stauffer decided that they would accept the State's arsenic standard, the industrial standard, not the residential, but it was still much better than what they had planned on doing.

They also stopped ignoring all the reviewers. There was communication and coordination between all the levels of reviewers, the State, the county, our people. They withdrew the Consent Decree and they began working up work plans for these, what they called additional studies, but what really should have been part of the feasibility study. And also, two new things that happened. They brought in the U.S. Geological Survey which was wonderful because those are the experts in the geology down there and it was also revealed that there had been corporate and financial maneuverings and that a new company had taken over and had not been thoroughly investigated as to their ability to cover the costs.

Residents and elected officials really believed that progress had been made. We were ecstatic. We really felt we were doing well. And then in June 2000, the system began to fall apart. As Congressman Bilirakis said, there was a town meeting scheduled where all the reviewers were going to come together and talk about the amended Consent Decree. EPA sent two staff members. They showed up. They said they would make a brief presentation. They would stay and answer questions for 10 minutes, as long as they strictly were to their presentation, which was really just reading the list of changes and telling us what pages to find them on. And then under questioning, they just got up and they refused to answer questions and they walked out, in full view of the television cameras with Congressman Bilirakis and Mr. Martin and Mr. Kaufman telling them that they should stay.

The second thing that happened is—well, the next thing that happened, everybody knows. Mr. Martin was not able to control his staff any more. In December of 2000, the Investigator, Mr. Kaufman was told that he could no longer work for that office and Mr. Martin was reminded that he had no authority over his own staff, whether or not to keep them or to let them go.

And eventually, the Ombudsman Office became crippled. It's been 2 years since what we call the walkout meeting occurred and we've been waiting. There was a brief period of hope and at this point the people in the community have no faith in this Agency. We do not believe that they will do the right thing here.

As to the transfer of the Ombudsman Office to the Inspector General, I think that's been covered. I probably don't need to talk about it, but I will say that looking back in history, there have been times when injustices went on for much longer than they should have because there was someone willing to step into the job of another person who was refusing to accept a bad situation and we believe that this is the case here.

We understand that the large issue is the long-term stability and effectiveness of the Ombudsman function, but I do need to say something about Mr. Martin. Many people start out with integrity, but I believe sometimes it takes a great deal of courage to maintain that integrity in certain situations. Mr. Martin has exhibited both of these qualities, integrity and courage in very large measure. The only criticism we've heard is that his files were messed up, but he was obviously trying to function with very little support of staff. We believe he should be given the support and the resources he needs to do his work and to set the standard for others who will follow him.

I've come here with two requests. The first one is very selfish and if at some point there's an opportunity for you to be supportive of mediation, we would really ask that you would do this because we would really like to see Mr. Martin and his investigator returned to our site and the other sites and finish the work that they're already very involved in. These are all sites with serious problems. And the second, of course, is to be supportive of this piece of legislation. It's really deserving of nonpartisan support. This is a democracy and everybody can agree that government agencies need to be accountable to the people that they were formed to serve.

Thank you for listening to me. I'd be glad to answer questions.

Mr. BILIRAKIS. Thank you, Heather.

Ms. MALINOWSKI. I would like to add one more thing.

Mr. BILIRAKIS. Add one.

Ms. MALINOWSKI. The Inspector General and the new Acting Ombudsman did visit our community over the weekend and what was revealed at that point is that someone did ask them to intervene 3 years ago in our situation and they did not. The woman who had made the request made the point that if they had done their job at the time, we never would have needed the Ombudsman Office to come down and help us.

Thank you.

[The prepared statement of Heather Malinoski follows:]

PREPARED STATEMENT OF HEATHER MALINOWSKI, SECRETARY, PINELLAS-PASCO TECHNICAL ASSISTANCE GRANT

Dear Sirs: I would like to thank you, Chairmen Gillmor and Bilirakis, Ranking Members Pallone and Brown, and Members of the Subcommittees for giving me the opportunity to testify before you today. My name is Heather Malinowski, and I am secretary of the community group Pinellas-Pasco Technical Assistance Grant, known as Pi-Pa-TAG.

Pi-Pa-Tag, Inc., holds a Technical Assistance Grant to provide the community with information concerning the cleanup of the Stauffer Chemical Superfund Site in Pinellas County, Florida, under EPA Assistance Agreement number 1994931-01-0. Our newsletter reaches over seven hundred concerned citizens at the intersection of Florida's Pinellas and Pasco counties.

OPENING STATEMENT

We are writing on behalf of the community living in the vicinity of the Stauffer Chemical Superfund Site in Tarpon Springs, Florida, as well as others across the nation who may have been adversely affected by hazardous waste sites located in their communities.

I am presenting this testimony on behalf of the entire Board of Pi-Pa-TAG, Inc. With this letter, we would like to express our complete and unconditional support for the creation of an independent, fully staffed and funded, EPA National Ombudsman Office.

We request that this letter be included as testimony in the Subcommittee hearing record.

ST. PETERSBURG TIMES EDITORIAL

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.

I would like to tell you our story, as it applies to the EPA National Ombudsman Office.

STAUFFER CHEMICAL SUPERFUND SITE IN TARPON SPRINGS, FLORIDA

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 lie the Florida Aquifer Systems which serve 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 and across the street from an elementary school, the site sits on the bank of a small waterway, the Anclote River, just before it empties into the Gulf of Mexico. It is located very close to the Greek "Sponge Docks", a prime center for the tourist trade upon which this area heavily depends. Nearby is an estuary which serves as the breeding ground for a once-thriving, but now struggling, local fishing industry. It is a beautifully picturesque, but also an ecologically fragile environment. Because of its coastal location, the area is annually subject to potential flooding, storm surges, as well as hurricanes.

This phosphate ore processing plant closed down in 1981, but left behind approximately 500,000 tons 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. The site was placed on the federal EPA National Priority List of Superfund Sites in 1994.

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 was intended to be mixed with the contaminated soil below the water table, and which is known to break down upon exposure to salt water, 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, in September 1999, over strong objections raised by community members, 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.

OTHER CONTROVERSIAL EPA REGION 4 ACTIONS AT THE STAUFFER SUPERFUND SITE

* EPA Region 4 refused to honor, or even to acknowledge, the State of Florida's Soil Cleanup Target Level for Arsenic of .8 parts per million (ppm) for residential areas.

* EPA Region 4 attempted to mislead residents into believing that the arsenic on the site would be cleaned up to the promised residential standards (.8 ppm), when their intention was, in reality, quite different. They had decided to regulate arsenic in soil as a common poison instead of as a carcinogen, which would have allowed them to apply a much less stringent cleanup level of 21.1 ppm. They continued to tell the community that they were using residential standards, but neglected to mention that "residential standards" was a relative term, and that the residential

standard for a poison was much less protective than the residential standard for a carcinogen. Arsenic is known to be a Class A Carcinogen.

* EPA Region 4 shelved and ignored specific reviews and recommendations from the Florida Department of Environmental Protection (FDEP), as well as reports submitted by a university toxicologist hired as a scientific advisor by the state agency.

* EPA Region 4 ignored the Pinellas County Health Dept. / Dept. of Environmental Engineering, in spite of their repeated attempts to have input into the process.

* In spite of having granted a Technical Assistance Grant (TAG) to the community group Pi-Pa-TAG, Inc., EPA Region 4 dismissed concerns raised by the group on the advice of their independently hired technical advisors.

EPA NATIONAL OMBUDSMAN INVESTIGATION AT THE STAUFFER SUPERFUND SITE

Three months later, in December 1999, at the request of Congressman Mike Bilirakis, 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 US 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.

A Town Meeting had been scheduled by Congressman Bilirakis' office, at which the Ombudsman Office was to hold the Third Public Hearing for the purpose of reviewing changes which had been made to the newly Amended Consent Decree. The meeting was to be attended by all the various reviewers (State of Florida, Pinellas County, TAG Advisors), and members of the community.

OMBUDSMAN FUNDING REQUEST DENIED

Shortly before the Town Meeting, we received word that the EPA Ombudsman and his Chief Investigator would not be able to attend the meeting. Their Request for Funding Approval had been denied, and they had been told that they were to apply their resources elsewhere. It was only after Congressman Bilirakis and a few other Congressional Members discussed the matter with then-EPA Administrator Carol Browner, that the funding was approved, and the meeting could proceed as planned.

AGENCY REFUSAL TO COOPERATE WITH OMBUDSMAN INVESTIGATION

The Town Meeting took place on June 5, 2000. The two previous Ombudsman Hearings had been attended by EPA Region 4 staff representing all five levels of authority—from the Regional Administrator down to the Remedial Project Manager for the site. In contrast, only two EPA Region 4 employees attended this particular meeting. They informed the group assembled that they had their own plan. They would make a very brief presentation (basically, reading a list of changes made to the Amended Consent Decree, and indicating what pages these changes were to be found on). They would then spend ten minutes responding to questions, which they said must be strictly limited to their presentation, and then they would leave. Which they did.

Refusing to answer any further questions, over the strong objections voiced by Congressman Mike Bilirakis, Ombudsman Bob Martin, and Investigator Hugh

Kaufman, and in full view of television cameras, the EPA Region 4 employees got up and walked out of the meeting.

OMBUDSMAN DENIED RIGHT TO MAINTAIN HIS OWN STAFF

The next assault on this office occurred in December 2000. At that time, the Chief Investigator for 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.. Hiring and firing was under the direct jurisdiction, and at the discretion of, his supervisors in the Office of Solid Waste and Emergency Response (OSWER).

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.

CURRENT SITUATION

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 during 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 that the agency will really do what the former U.S. EPA Assistant Administrator Timothy Fields had promised, in person, on November 16, 1999: that the agency would "do right by this community".

The Independence of the EPA National Ombudsman Office has been a fantasy.

PURPOSE OF AN OMBUDSMAN OFFICE

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"*.

TRANSFERENCE OF EPA NATIONAL OMBUDSMAN OFFICE TO EPA INSPECTOR GENERAL'S OFFICE

EPA Administrator Christie Whitman has recently transferred the EPA National Ombudsman Office to a position within the EPA Inspector General's Office. In our opinion, this is a step in the wrong 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.

The United States Ombudsman Association (USOA) has stated that "the most important element in the design of an effective ombudsman's office in government is structural independence, that is, structurally separating the ombudsman from the

agency under the ombudsman's jurisdiction." They have criticized the above transference as being an ineffective step towards the goal of creating a truly Independent Ombudsman Office.

The United States General Accounting Office (GAO) has stated that, "If the EPA intends to have an Ombudsman function that is consistent with the way the position is typically defined within the ombudsman community, placing the national ombudsman within the OIG does not achieve that objective."

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.

HR1431

To these ends, we respectfully request that you give your full support to the Ombudsman Reauthorization Act of 2001 (HR1431).

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.

Mr. BILIRAKIS. Thank you. Let's see. Mr. Martin, you served, in my opinion, with distinction as an Ombudsman. Did you have complete independence to determine what cases should be opened, and what cases should be closed? Can you go into the process there for us?

Mr. MARTIN. Sure. I had uncomfortable maximum independence.

Mr. BILIRAKIS. Uncomfortable. Why don't you go into that?

Mr. MARTIN. Which means that I got some very nasty problems to look at and some very controversial matters. I would say yes. I made the calls as I saw them and that's because I had a job description which provided for maximum independence. That protected that ability, but I did make those calls. I made them as long as I could until I couldn't make them any more.

Mr. BILIRAKIS. I guess I don't quite understand. At what point were you not able to make them any more?

Mr. MARTIN. I'm sorry, sir. When the temporary restraining order awarded by Federal Judge Roberts was vacated, not on the merits, but to move the case to the Office of Special Counsel for administrative pursuit of remedies, when that TRO was vacated, within hours there was communication to, in my opinion, dissolve the function and my position description along with it. It was at that time while I was away on official travel to New York and to Colorado, that I ceased to have the ability to make those calls.

Mr. BILIRAKIS. Let me ask you though, prior to that when you were in the office during all these years, did you have the independence to open cases, to decide what cases you would work on, that sort of thing?

Mr. MARTIN. I had the independence to select cases and that independence has been removed by the transfer to the Office of Inspector General, clearly. What was lacking is the ability to control the case once I had decided it needed to be——

Mr. BILIRAKIS. But let's go back to that June 5, 2000 town meeting that Ms. Malinowski referred to and I referred to briefly earlier. And I know that your plan was to come down for that gathering. We coordinated the dates and the time and location and everything all together, and did you run into a problem there?

Mr. MARTIN. Yes, I did.

Mr. BILIRAKIS. What was that problem?

Mr. MARTIN. The problem was that the travel was being held up. I needed authorization to travel as did my former Chief Investigator to do the hearing in Tarpon Springs.

Mr. BILIRAKIS. So you weren't completely independent?

Mr. MARTIN. No. And I think the GAO has pointed out in what respects there was no independence.

Mr. BILIRAKIS. Did you have at any time the authority to hire, to fire, to supervise your own staff?

Mr. MARTIN. No.

Mr. BILIRAKIS. I seem to recall that you had the Chief Investigator. How many permanent employees or staffers did you have?

Mr. MARTIN. Well, first, I didn't have any staff because I'm now allowed to hire, fire or supervise. So that needs to be made clear. The same goes for the budget. I mean there can be a budget, but I had no authority to supervise the budget.

I had over the course of 9 years, on and off, one person to help me.

Mr. BILIRAKIS. And that one person was the Chief Investigator?

Mr. MARTIN. Yes, and intermittently, one other man, Mr. Bell, who helped me in a couple of cases. That's it.

Mr. BILIRAKIS. And those people were assigned to you by the particular office——

Mr. MARTIN. By them, yes.

Mr. BILIRAKIS. By them. Mr. Martin, you've been around a long time so you know the process here in terms of getting legislation through the system, and if we are successful in terms of the legislation to really place the Office in an independent status, it could be some time before it goes through the entire process, etcetera.

In the meantime, you have resigned. I guess I would ask you the question, are you willing to come back to finish your work?

Mr. MARTIN. Yes, I am.

Mr. BILIRAKIS. Why should EPA allow you to return after the Judge dismissed your suit?

Mr. MARTIN. Because—well, I can defer to my legal counsel for the——

Mr. BILIRAKIS. I don't want you to defer to him.

Mr. MARTIN. I'm not going to give you legal reasons. I'm going to give you the real reason and that is so that the people who need this kind of help will have the benefit of receiving it. They're not getting it now, in my opinion.

Mr. BILIRAKIS. Bob, you don't feel that being within the Office of the IG is true independence?

Mr. MARTIN. No, I do not.

Mr. BILIRAKIS. But do you feel, taking into consideration that you have resigned, No. 1; No. 2, that it would take a while before the legislation were to get through the process, if ever; and No. 3 because of your concern for the public in Denver and in Tarpon Springs and other locations——

Mr. MARTIN. Uh-huh.

Mr. BILIRAKIS. Do you feel that you could, if you had the opportunity, do the job, complete those jobs within the confines of the OIG? If that is going to be changed, it's going to take legislation, and that will take time. Taking into consideration the concerns of the public and your relationship with them, as well as the trust and confidence, could you do that within the confines of the OIG?

Mr. MARTIN. No.

Mr. BILIRAKIS. No. You could not?

Mr. MARTIN. No.

Mr. BILIRAKIS. So you would not be willing to even try?

Mr. MARTIN. I'd be willing to within the context of a negotiated agreement come back within the original purview of my position description which allowed for independence and allowed me to do the things that Ombudsman do.

I cannot do those things within the Office of Inspector General. It just doesn't work. If I could have, I would have stayed.

Mr. BILIRAKIS. My time has long expired. Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. Mr. Martin, I have to say that I was somewhat taken aback by the first Panel because it was pretty clear to me, based on the questions that my colleagues asked, that the EPA, Mr. Fabricant and Mr. Bialek, as well, were basically saying that the independence that the GAO felt was necessary for the Ombudsman was not something that they were willing to give. In other words, that in fact, the IG was going to decide the budget, decide who was hired, and decide what cases were going to be considered, and so that the very criticism, if you will, that the GAO was giving out, was not something that the EPA cared about. They were going to proceed to do the opposite, essentially. So under those circumstances, I don't—it's a little difficult to be—to ask where we go from here because they have no intention of following through on what the GAO wants.

So I guess I had a couple of questions relating to what the chairman said here, in other words, is there any authority under existing statute that requires independence? In other words, you said that you job description was changed.

Mr. MARTIN. Eliminated.

Mr. PALLONE. Eliminated.

Mr. MARTIN. Right.

Mr. PALLONE. Is there recourse here other than legislation? Could one make an argument that pursuant to the original legislation or some intent of Congress that they couldn't do what the EPA has done?

Mr. MARTIN. I believe one could, yes.

Mr. PALLONE. I mean I ask that because you know it's always difficult to get legislation. Mr. Bilirakis is talking about legislation and obviously, I support that, but I don't know whether we're going to get it past here, so tell us what you think we could do under the existing law, to try to correct the situation?

Mr. MARTIN. Well, I think the Federal Office of Special Counsel has provided an opportunity to achieve mediated or negotiated settlement of this entire matter. I indicated early on when asked by the Office of Special Counsel if I would be willing to mediate, absolutely yes, so that I could return integrity, to finish the work that needs to be done and go.

Mr. PALLONE. So there's a possibility based on what's happening with the Office of Special Counsel that they could mandate that you be reinstated in the old position or in the old way or with a certain amount of independence.

Mr. MARTIN. The answer is yes.

Mr. PALLONE. What could we do to effectuate that here as Members of Congress or this committee? Is there anything we can do to help?

Mr. MARTIN. I suppose to say that would be the sensible thing to achieve just that.

Mr. PALLONE. I didn't hear what you said.

Mr. MARTIN. I suppose to do the sensible thing and just say yeah, let's do that. Let's work this out and——

Mr. PALLONE. So maybe we could do—I'm not suggesting that that's what we're going to do, Mr. Chairman, we can talk further, but we might be able to send a letter or to indicate the sense of this committee in some respect, that that's what we would like to have done on a bipartisan basis or through letter or some communication?

Mr. MARTIN. Yes.

Mr. PALLONE. I mean I would just say Mr. Chairman, that I'd like to see us do something like that only because I know we're running out of time here with 3 or 4 months and I don't know if we can actually pass legislation.

In terms of these cases that are open, I didn't really get any indication from Mr. Fabricant or Mr. Bialek that they were actually going to do anything with these open cases. What are they doing at this point here to your knowledge? They say they're going through the files, but they didn't say that as a result of that they were going to help out with the local situations or do anything to move the cases forward that you working on.

Mr. MARTIN. That may be correct. I have no direct knowledge since I've not spoken to EPA.

Mr. PALLONE. But I mean you're strongly of the opinion that unless you come back, none of those—there isn't going to be any follow up.

See, the other thing, Mr. Chairman, that is so obvious to me and I don't even know if it's a question, maybe it's a comment, but I'll try to make it into a question, is there's a clear link, it seems to me between the purpose of the citizen groups like Ms. Malinowski's, you know, with the TAG grants. I mean we established TAG grants and citizens' groups because we knew that there was a problem in the sense that if the EPA didn't have local citizen groups for these sites and there weren't TAG grants to fund them, that they wouldn't be the local input and it seems to me that the link between what you do and what the Ombudsman does to sort of put some kind of watch dog status, if you will, on the bureaucracy of the EPA, is linked and I worry that if you don't have the

Ombudsman to be sort of the national person that the citizen groups can go to with their TAG grants, that the TAG grant program and the purpose of the citizens' groups loses its meaning or ability to function along what Congress intended.

I know my time is up, but maybe Ms. Malinowski could just respond to that.

Ms. MALINOWSKI. Yes, I think that the TAG program is a wonderful program because originally we were faced with 12 volumes of material and a lot of it was technical and it was hard for us to know what to do with that and it's important to have the scientific input.

However, I will say that once we had the scientific input and made decisions based on that, we were ignored and we were patronized and the TAG grant was not enough really for us to participate. It should have been, but it wasn't. And we felt like we were listened to much more readily once Mr. Martin and Mr. Kaufman came to Tarpon Springs.

Mr. BILIRAKIS. Would the gentleman yield to me even though he doesn't have any time?

Mr. PALLONE. Yes, sure.

Mr. BILIRAKIS. Ms. Malinowski, let me ask you, you see the situation here. Mr. Martin has resigned. We all have had a fantastic level of confidence and trust in him in Tarpon Springs, and I assume the same sort of situation in Denver, and some of these other sites. But he has resigned.

We don't know what the future of this legislation is going to be. I mean we can't wave a magic wand and Mr. Pallone is right, time is wasting here and if it doesn't get done this year, you start all over again next year. Mr. Bialek asked that we not prejudge the OIG and that sort of thing. And I guess, in a way, we already have in terms of its relationship with the Ombudsman function. But we've asked Mr. Martin if he would return, if he could, to EPA under a mediation type of a process. At this point in time, however, because the Administrator transferred the function to the OIG, the only place he could go back to would be the OIG. I mean let's be logical here. So do you feel with the proper oversight on our part and the OIG being aware of what has taken place in the past—that he could complete this job and complete this work within the confines of the OIG?

It's not the independence that we all want, but in the interest of the public in getting these sites cleaned up. Do you have an opinion? If you don't have one, don't feel like——

Ms. MALINOWSKI. I don't have an opinion.

Mr. BILIRAKIS. I know you've had a personal experience.

Ms. MALINOWSKI. And I'm trying to put myself away from the personal experience, except that's why I'm here because it is my personal experience. It has been our experience that throughout this ordeal, and I've been involved for 7 years, other people even longer. EPA has talked at us, not to us. And I've listened to the two gentlemen here representing the Inspector General Office and EPA, again, and I have to tell you that they sound very much like the people that talked to us before Mr. Martin came. And I want Tarpon Springs cleaned up. I want that site cleaned up.

Mr. BILIRAKIS. Properly.

Ms. MALINOWSKI. Properly. I want it cleaned up properly. We all do. However, I don't want to have to spend more time dealing with an agency that has intention of really responding to us. I've done that for 7 years and you know, I don't have the experience with these agencies myself. I have to say that if Mr. Martin believes that he would be straight jacketed and would not be able to help us the way he did before, I have to accept that opinion.

Mr. BILIRAKIS. Yes, but the alternative to that is a big gap in time. Region 4 possibly may perk up and do the job that we would hope and all that, but the oversight of the Ombudsman, I guess, we don't have the confidence—all right.

I'm going to finish because my time is up——

Ms. DEGETTE. Mr. Chairman, I'd ask unanimous consent that Mr. Pallone be granted an additional minute to yield to me.

Mr. BILIRAKIS. Without objection.

Mr. PALLONE. Thank you. I just wanted to say, Mr. Chairman, I don't have any additional questions, I just wanted to ask that we spend a little time after the hearing is concluded to talk about possibly sending a letter or some statement by the committee.

Mr. BILIRAKIS. Well, there have been a number of letters. I've sent an individual letter. There is a group letter that I know was circulating around for signatures that apparently didn't get into your office.

Well, all right——

Ms. MALINOWSKI. Could I say one more thing? Would it be possible?

Mr. BILIRAKIS. It's possible. You came a long way at your own expense.

Ms. MALINOWSKI. Thank you. I have to say that during the hearings there were a couple of public hearings that were held, very lengthy public hearings and it wasn't until these public hearings where everyone came together, the Ombudsman, Congressman Bilirakis, the State, the county, the city, all of us were and it was because of these hearings where everyone communicated that we made progress. It's my understanding that that is not the way it's going to be under the Inspector General Office, but that's what helped us. That's how we got past* the impasse was when everyone came together in public and talked about this.

Mr. BILIRAKIS. Thank you, ma'am.

Mr. PALLONE. Mr. Chairman, just on this point, if I could just ask——

Mr. BILIRAKIS. Well, now wait a while. Let's get regular order here. Diana, do you have some time to be——

Ms. DEGETTE. The comment I wanted to make, Mr. Chairman, everybody's talking about it takes a long time to get legislation and we don't know if this can happen. Truthfully, legislation can happen in 1 day. On the floor later today, we're going to be voting on a corporate responsibility bill that was just introduced today or yesterday. So I think on a bipartisan basis, this is a critical problem. We should urge our leadership to move an Ombudsman bill to the floor quickly on the suspension calendar and I think we could have it happen. Thank you, and I yield back.

Mr. BILIRAKIS. I wish it was always that easy. Mr. Gillmor to inquire.

Mr. GILLMOR. Thank you, Mr. Chairman. Mr. Martin, in the GAO Report, they stated that from 1997 that the Ombudsman Office had resolved only two cases and that 19 new cases were open in that time which were not resolved.

I guess my question is is that accurate? It does not appear to be a good use of government resources and why was that, if it is accurate?

Mr. MARTIN. I think perhaps the proper characterization would be closed as opposed to resolved. There were many cases pending. I tried to help as many communities as I could. As I did so, I engaged in a lot of what's been termed mediation or alternative dispute resolution, some of the results of which Ms. Malinowski alluded to just a moment ago where people are brought together as opposed to straight out audit function such as the Office of Inspector General performs. So the reason there were many cases pending is that those efforts were on-going in very many places and also that I was essentially just one person.

Mr. GILLMOR. One of the things, an issue identified by GAO was the need for additional resources which you referred to. In fiscal year 2001, the Ombudsman function was granted an additional $900,000 for salary, contracts, grants, other support costs which is about a twofold increase.

It's my understanding and you can tell me, I guess this is a two-part question. It's my understanding that this money came from other functions in OSWER to go to the Ombudsman function in order to increase its independence and its funds to pursue its work. And second, how did you use the money, the additional funds in the function?

Mr. MARTIN. Well, you'd have to inquire of OSWER, precisely where the money was allocated from to the Ombudsman function. As I testified earlier, the funding was not under my control and it's difficult to do the job without that being the case.

I do not believe that resources should come at the expense of independence.

Mr. GILLMOR. You did get the additional money, right?

An additional $900,000? I guess, what I'm asking is did you get the $900,000 that GAO said and what did you use it for?

Mr. MARTIN. I did not because I never had a budget.

Mr. GILLMOR. Okay.

Mr. MARTIN. So without actually having an account that I control, I don't have it.

Mr. GILLMOR. Were additional people hired out of that?

Mr. MARTIN. No.

Mr. GILLMOR. $900,000, where did it go, do you know?

Mr. MARTIN. You'll have to ask OSWER where that funding lies.

Mr. GILLMOR. Okay. Very good. The answer is you never really got your hands on it.

Mr. MARTIN. I can tell you that a portion of the allocation was provided for the expense of my Chief Investigator who was summarily removed. Therefore, as an example of money provided that could not be spent.

Mr. GILLMOR. Thank you.

Mr. MARTIN. You're welcome, sir.

Mr. NORWOOD. Would the gentleman yield?

Mr. GILLMOR. If I have a little time left, I'd be happy to yield to the gentleman from Georgia.

Mr. NORWOOD. Let me follow up on that budget question. Mr. Chairman, is there anybody here from the EPA?

Did anybody remain in the room from EPA? Could you raise your hand? How did I know? Okay, the budget question real quickly. They kept alluding to the fact that your budget was doubled, increased, whatever. You couldn't get airline tickets to go to Florida.

Mr. MARTIN. That's correct.

Mr. NORWOOD. Now what good is it to have doubled your budget and come here and imply to Congress that what's wrong? We doubled their budget when in effect you were not getting the funds in your budget. So they didn't double your budget. They just did a few number maturations. Have I got it?

Mr. MARTIN. Yes.

Mr. NORWOOD. Mr. Chairman, they didn't get any more money. They sat right here at this table and would make us think that they had doubled the budget for the Ombudsman when in fact there wasn't any.

I don't know if you call that lying or what do you call that?

I yield back.

Mr. GILLMOR. I yield back all 4 seconds I have left.

Mr. BILIRAKIS. Mr. Norwood to inquire.

Mr. NORWOOD. I'm so happy. Thank you, Mr. Chairman.

Mr. BILIRAKIS. On your own time.

Mr. NORWOOD. Ms. Malinowski, I've been here 7½ years. There is no agency in the United States that is more patronizing or arrogant than the EPA. I knew who was in here from the EPA just watching the smirks on their face as this testimony was going on.

Ms. MALINOWSKI. I recognized them also.

Mr. NORWOOD. Well, I'm looking right at them. They're behind you and they're smirking and laughing at this hearing as if oh, those dumb Congressmen, they don't know what they're doing and these poor people up here are just complaining about something.

All right, now we've established the fact that although they said the budget was increased tremendously, it was not.

Now Mr. Martin, help me. My impression of this is that when EPA comes out with a policy, they typically back that up with EPA science and at the end of the day there is nothing more important to the EPA than not being proved wrong. It's a bureaucratic thing. They—yeah, they want the sites cleaned up, but that's not most important. First and foremost, what's important is that we didn't make a mistake.

Now I've seen that happen in my District, as you well know. EPA comes out with a particular finding that tells the people of the country how, for example, you might use waste water sludge. That turns out to be a very bad thing for a lot of people. You ask the EPA about it and they say what do you mean it's bad? Our people said it was okay. Then we ask somebody independent of this Agency to look into this, what actually is happening here? These cows aren't dying because it's hot. What's going on here? And we find out that perhaps they were wrong, not that they will ever admit it to anybody under any circumstances. They would rather the cows

die. They'd rather destroy Americans than admit that they are wrong.

Now is that not why you had to resign under the pressures of an Agency that could not tolerate anybody saying that they may have made a mistake and this is just one mistake, ladies and gentlemen, that has happened in my District in 7 years. There are other people up here having the same problems, but I'm just talking about one of many.

Now isn't that basically what's going on and isn't that the reason we need to get you as independent as possible so somebody can tell the truth because we know for a fact that EPA bureaucrats will not.

Mr. MARTIN. Yes sir.

Mr. NORWOOD. I yield back, Mr. Chairman. That's what this hearing is about.

Mr. BILIRAKIS. The Chair recognizes the gentleman from Illinois.

Mr. SHIMKUS. Thank you, Mr. Chairman. I've got three brief points. First of all, Mr. Martin, can you identify the individual sitting to your right and the individual sitting behind you just so I know who they are? Are they counsel to you?

Mr. MARTIN. Sure, counsel is seated to my right, Mr. Hartnett. The individual sitting behind me is a former Chief Investigator, Mr. Kaufman with the Environmental Protection Agency.

Mr. SHIMKUS. Thank you. Mr. Martin, you've been here the whole time. You've heard my various statements, both on questions and opening statements. Address this external/internal debate that I'm talking about as far as the role of the Ombudsman versus the role of the Inspector General. And does that make some sense? Or in your previous office, were you also conducting internal issues as an IG would do?

Mr. MARTIN. Okay, properly so, the charge of the Inspector General is to examine matters relating to waste, fraud and abuse. The charge of the Ombudsman, however, I feel is quite different in nature and virtually goes to truth, justice and democracy, openness, bringing people together, setting differences aside, moving forward, informally initially and then once consensus is reached, doing it formally so that an agreement may be had to fix problems. I think the two charges are vastly different. I did not engage in reviewing any matter internally within the Environmental Protection Agency during my tenure. However, when any matter relating to a wrong doing or criminality came to my attention, I did provide appropriate referrals to either the Inspector General or the Criminal Investigation Division of the EPA or, in one or two cases, a U.S. Attorney.

Mr. SHIMKUS. So the analysis of Ombudsman externally fighting for the citizens with respect to the Federal bureaucracy versus the interactions is really what you would envision an Ombudsman role to be?

Mr. MARTIN. Yes.

Mr. SHIMKUS. And then finally, I'm not going to belabor it, I think we'll get a chance to talk about the dismissal and all that other aspect. If the accounts you portray are accurate, I apologize, that's not the way you treat professionals in any type of professional office, but in my background I did have to fire a Federal em-

ployee once as a Reserve Officer and I know that he hung on for a long time and finally we personally went before a Federal Judge for the final departure ceremony, I guess, or lack of a better word.

You did not exhaust all of your remedies in-house and my question would be why not?

Mr. MARTIN. That may be a better question for counsel to respond to.

Mr. BILIRAKIS. I don't know——

Mr. SHIMKUS. Mr. Chairman, if that's an improper question, I'll just pull it and maybe it's not timely since there's pending Court action.

Mr. BILIRAKIS. I think it's probably not.

Mr. MARTIN. I'll just try to make a long story very short. I did file grievances within the EPA relating to the actions taken against the Ombudsman function. They were never responded to.

Mr. SHIMKUS. My concern would be it's better to fight when you're there under the protections than to leave and try to fight from outside and we've had a lot of great discussions over the years. It's not a partisan debate. Under the current administration we were fighting for your independence, as you know and we will continue to do that. I just—it probably would have been easier inside, rather than outside.

Mr. MARTIN. I understand that and the principal reason for the resignation, under duress, was that to go over to the IG would be in my view to cooperate and lie, that there could be an Ombudsman there. And I wouldn't do that. I wouldn't betray myself or the communities I worked for.

Mr. SHIMKUS. And I appreciate that, Mr. Chairman, thank you for the time and I yield back the balance.

Mr. BILIRAKIS. I thank the gentleman.

Ms. DeGette?

Ms. DEGETTE. Thank you, Mr. Chairman. Just a couple of questions. Mr. Martin, you testified that when you were the Ombudsman, basically, it was you and then you had Mr. Kaufman helping you out. Is that right?

Mr. MARTIN. He provided assistance for about a 2-year period.

Ms. DEGETTE. And a lot of the sites that you investigated involved complex scientific issues, didn't they?

Mr. MARTIN. Yes, they did.

Ms. DEGETTE. Did you ever have the budget to hire scientific experts to prepare reports or analyses for you?

Mr. MARTIN. Not until the last 2 years.

Ms. DEGETTE. What sites did you—how many sites were you able to get that expert assistance with?

Mr. MARTIN. Several. For example, the Shaddeck site being one example in Denver. I asked our Environmental Response Team in New Jersey to provide assistance and review the technical merits of the record of decision.

Ms. DEGETTE. So that was an internal group within the EPA that helped you do that?

Mr. MARTIN. Yes, but autonomous from the EPA Regions.

Ms. DEGETTE. I've got you. Did you ever hire outside environmental experts?

Mr. MARTIN. I believe on one or two occasion, I did.

Ms. DEGETTE. And how many cases did you investigate during your tenure as the EPA Ombudsman?

Mr. MARTIN. I think fully 36 cases were opened during my 9½ year tenure as Ombudsman.

Ms. DEGETTE. Okay, so I want to ask you a couple of questions. One is if you had been given the budget for hiring outside scientific experts on some of these sites, would that have assisted you in your duties?

Mr. MARTIN. Yes.

Ms. DEGETTE. And did you ever ask for outside assistance?

Mr. MARTIN. yes.

Ms. DEGETTE. And what was the response of the Agency?

Mr. MARTIN. The budget solves the problem and the real problem was that I had to ask.

Ms. DEGETTE. Why was that the real problem?

Mr. MARTIN. Well, because an Ombudsman should not have to, if he's truly independent, or she's truly independent, ask the bureaucracy for the resources needed to look into a matter.

Ms. DEGETTE. Did you feel that you from time to time had to resort to sort of a bully pulpit tactic to get these issues known because of lack of resources given to you by the Agency?

Mr. MARTIN. Well, I believe that it was necessary in the circumstances, we just discussed, to hold public hearings at which everyone who had a concern could come forward with their own technical experts as the case may be, to aid in the truth finding process.

Ms. DEGETTE. I think we'd all agree that was not always maybe the best way to get the information that we needed, but it was the only way you had, right?

Mr. Kaufman, who is sitting behind you, certainly agrees.

Let me—I mean you've had ample time to reflect on this issue. Who do you think that—I mean aside from this legislation we've got that we're all working on, hopefully, with great rapidity, who do you think that the EPA Ombudsman should report to?

Mr. MARTIN. I think ideally the Ombudsman should report to Congress, the people's body.

Ms. DEGETTE. Directly to Congress?

Mr. MARTIN. Yes, with the ability to make recommendations, collaterally, to the executive branch.

Ms. DEGETTE. Who do you think should fund the EPA Ombudsman?

Mr. MARTIN. Congress.

Ms. DEGETTE. So you think the appropriation for the EPA Ombudsman should come directly by a Congressional appropriation and not through the Agency?

Mr. MARTIN. Yes, I do. In that deliberation, I've concluded that it would be good to have the Ombudsman function exist much like the former Office of Technological or Technology Assessment, the OTA, which existed to provide more autonomous or independent information and recommendations to the Congress.

Ms. DEGETTE. So what you're saying is your view is that there is some precedent for an independent type of office like this that would report and be funded by Congress?

Mr. MARTIN. Yes, very much so.

Ms. DEGETTE. I have no further questions and yield back the balance of my time, Mr. Chairman.

Mr. BILIRAKIS. I thank the gentlelady. If any of you are wondering why it looked like we skipped over her questioning, it is because she is not a member of either one of these two subcommittees and there are rules in that regard. She understands, but she's been of invaluable assistance, obviously, and it's great working with her, particularly on this issue.

Bob, and I'm not asking you to reveal to us any of your negotiating strategies or anything like that, but under what circumstances would you be willing to come back? You said something about returning and then leaving which means you're thinking temporarily, right? You'd be willing to come back to clean up the sites that have been assigned to you initially?

Mr. MARTIN. Finish the pending national Ombudsman——

Mr. BILIRAKIS. Finish pending. But under what circumstances? You don't want to do it under the OIG. You're certainly not going to want to do it under the prior office. It's going to be under EPA because you're hoping to negotiate with EPA. But you've already testified as to the question regarding whether you think it ought to be even outside of the scope of EPA?

Mr. MARTIN. I think ultimately Congress——

Mr. BILIRAKIS. Ultimately, right.

Mr. MARTIN. Ultimately, Congress needs to decide the appropriate placement of the Ombudsman function.

Mr. BILIRAKIS. Yes.

Mr. MARTIN. That's bigger than me. What is within my power is to come back and finish that which needs to be done. And——

Mr. BILIRAKIS. And to report to whom? And report directly to whom? To the Administrator?

Mr. MARTIN. That could be done or perhaps the Assistant Administrator for the Office of Solid Waste and Emergency Response who has control and authority over these matters.

It could be done through a reinstatement of a position description that was eliminated, or simply through a contractual arrangement.

Mr. BILIRAKIS. Yes. Independent contract——

Mr. MARTIN. Without revealing all the details of a potential negotiation.

Mr. BILIRAKIS. Okay, thank you. Heather, anything else you want to finish up with here? We're about to finish.

Ms. MALINOWSKI. I guess, all I can say is that in our community, Mr. Martin and Mr. Kaufman are looked on as heroes as is Congressman Bilirakis for bringing them there and supporting the process and we just really hope that you can make something out of this mess because we really need the help and so do all the other communities that are depending at this point on you. Thank you.

Mr. BILIRAKIS. Well, thank you so very much. If there are no further members seeking time to ask questions, I want to thank this Panel for their time, their patience and their testimony. Obviously, we do want to request your availability to respond to any written questions that we and staff may provide to you.

I would announce that Panel 2 was supposed to be three witnesses, but shrunk to just two. Mr. Bob Spurling of Denver, Colorado was supposed to be a witness in this Panel, but he had press-

ing business concerns that forced him to cancel his trip yesterday. He has agreed to submit written testimony to our committee and any member is welcome to submit written questions to him for inclusion in the record.

All members, of course, have 5 legislative days to submit opening statements for the record. Without objection, so ordered. This hearing is now terminated. Our timing was perfect. Thank you very much.

[Whereupon, at 12:15 p.m., the proceedings went off the record.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF ROBERT L. SPERLING

First, thank you for accepting my message in lieu of my being present due to a business conflict. I am honored by your invitation to testify and hope in few words to relate my experience with the National EPA Ombudsman and the relationship of that office to this community.

I am a long term resident of Denver, an active member of the business community and a citizen concerned about the environment. I wish to talk principally about the need for an independent National Office of the EPA Ombudsman.

I first encountered the office when I was involved with the cleanup of the Shattuck site which was causing quite a stir in Denver. Shattuck was and is an EPA Super fund Site in Denver that was contaminated with radioactive radium in the early 20's and with uranium, thorium and other heavy metals more recently. The contamination was so high it was placed on the National Priorities List of only 3% of the nations most contaminated sites.

What made Shattuck unique was that it is the only site along the historic South Platt River publicly scheduled for cleanup. Then behind closed doors, the decision that while the material from other sites was removed the Shattuck waste would be buried on site. This was carried out in spite of opposition by the community. Also, local regulations and statutes were ignored along with objections by the Rocky Mountain Low Level Waste Board. It was during this period that the National Ombudsman's office was notified. That office informed the community that a letter from an elected official was necessary for a review process to be considered.

Letters were sent by several members of our Congressional delegation and, I think, from Governor Owens. Within a matter of weeks Mr. Martin and Mr. Kaufman came to Denver and toured the Shattuck site. It isn't hard to find; located in Central Denver with a clear view of the downtown skyline. Most disturbing is that 50,000 cubic yards of radioactive soil sits astride two of Denver's fresh water aquifers, the Denver and South Platt.

Although the community could not challenge the remediation process, once it had begun, a number of questions were raised by the Ombudsman's office. These with other events raised questions in the minds of Representative Diana Degette and Senator Wayne Allard. It was the inquiry of Martin and Kaufman with that of our elected officials and the efforts of the Denver Post investigative environmental reporter, Mark Eddy, that prompted—or I should say forced—the EPA to revisit, review, reconsider, and finally REVERSE their decision and to remove the waste.

It was Messers Martin and Kaufman who were the first EPA officials to listen to the community, to inquire into their concerns, and to respond in a manner we consider appropriate given all the facts unfolding and the nature of the agency and its mission.

Our community strongly supports the role and mission of the EPA and has repeatedly made this clear to their personnel at all levels up to the Regional Administrator. Their role should be unencumbered by political bias or corporate influence to address environmental risks and act appropriately.

Some may denigrate the Ombudsman's activities in Denver, but I believe that without the efforts of the Ombudsman's office and the Blue Ribbon Panel put together by Region 8's Administrator to oversee a second 5 year review our successful cleanup would not have come to pass. Their decision was that there was insufficient data in the short run to declare the site safe or unsafe, and in the long run to have confidence the the cap on the monolith would not suffer catastrophic failure in the next 3-15 years. This is not reassuring for a CIRCLA site with a 1,000 year life.

No organization is free of faults, especially one in a very powerful position. We are seeing it around us every day. Certainly most of those at our major accounting firms do an admirable job but there is always the possibility that things will go astray. I am not sure the EPA realizes that the role of the Ombudsman is not that

of an advocate but rather to determine whether the law is being followed. Only those who break it have reason to fear.

We need the office of Ombudsman to be respected since he is on a par with the judicial system, be independent of all influence and be independently funded so his budget cannot be used to influence his decisions. Access to records was denied the Ombudsman during his Denver investigation and to Senator Wayne Allard. The Region classified records as 'privileged' to keep information from the public.

Our great democratic country and the agencies that protect it and enforce its laws must not abuse the responsibilities given them.

The American Bar Association has established guidelines that appear to be well suited to the Office of the Ombudsman. Those guidelines would provide for the independence and integrity necessary for a constructive Ombudsman's office.

I ask the committee to rise above partisan politics as our Congressional members did when Representative Degette and Senator Allard worked jointly to see the right course of action be taken. Reestablish the independent office of the EPA Ombudsman. Work out guidelines for the EPA and the Ombudsman's Office so the community may be served and the EPA may truly achieve its mission in a way that is "Protective of Human Health and the Environment".

Thank you again for this opportunity.

I will be happy to respond to any direct questions the subcommittee may have.

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