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Samuel H. Logan, Editor

ECONOMICS OF POLLUTION ABATEMENT AND CONTROL BY CITIZEN-INITIATED LEGAL ACTION*

Donald R. Levi and Dale Colyer
University of Missouri and West Virginia University

If we are to stop present exploitation of environmental factors, it is essential that our legal structure at least be permissive, if not conducive to this goal. The purpose of this paper is to outline some legal remedies open to private groups and persons which may be used against "polluters", analyze their substantive and procedural deficiencies, and review the newer theories suggested to aid the concerned citizen in his quest for a cleaner environment. Mishan, in a recent article [8], adequately reviewed the post-war literature on externalities and related welfare concepts as they apply to what he refers to as environmental spillover; therefore, legal remedies are emphasized here.

Some Commod Law Remedies

If the requirements of specific common law remedies are met, such remedies may be available to those seeking an "acceptably clean" environment. However, these remedies are primarily concerned with private property rights and cannot be expected to be readily adaptable to protecting the public interest although providing a means for individual initiative.

Nuisance

Every landowner has a basic property right that he not be unreasonably interfered with in the enjoyment and use of his property. A nuisance legally exists whenever such interference occurs. Traditionally, a nuisance has involved air, water, solid wastes, or more recently, noise pollution. Its existence has usually been considered to be a question of fact, meaning that it is the jury which must determine whether a given set of circumstances constitutes an unreasonable interference. Generally to maintain a nuisance action, the plaintiffs must show some financial or irreparable physical damage.

Nuisance suits often seek a combination of damages and injunctive relief with damages often awarded while the injunction is denied. Many courts apply a balancing of interests doctrine to determine whether the injunction should be allowed [12], and since the polluter has significant interests, it frequently is denied. A trend is to require modifications to prevent or reduce the nuisance. A public nuisance, one affecting the general public, is more apt to result in enjoinment, and it may be significant that many state statutes declare air, water, and solid waste pollution to be public nuisances.

Trespass

A few pollution suits have employed the theory of trespass. It involves an intentional and unprivileged entry onto land, whereas with nuisance an unreasonable interference with enjoyment of property must be present. Since trespass need not affect enjoyment in any manner, *prima facie*, it would appear relatively less proof would be required of a plaintiff using the trespass remedy. The drawback to this is the traditional judicial requirement of a "direct" physical entry by some person or "object". However, in a recent Oregon case [7], the plaintiff-farmers sued for both an injunction and money damages, alleging flouride gases produced by the defendant's aluminum plant had drifted onto and damaged their crops. Damages were granted, but the request for an injunction was denied. The discouraging aspect of the case was the court's application of the "balancing of interests" test to determine whether to grant the injunction, as this test agruably gives polluters what amounts to a right of eminent domain.

Constitutional and Statutory Remedies

Declaratory Judgment Actions

A declaratory judgment action may be utilized by environmentalists seeking review of administrative agency actions on seeking to enjoin certain actions. If a federal agency is involved, the Federal Declatory Judgment Act [4] applies and provides ". . . any court of the United States . . . may declare the rights and other legal relations of any interested parties in such declaration. . .". In 35 states the Uniform Declaratory Judgment Act has been adopted, serving the same function for those states as the federal act does with federal agencies. At both the federal and state levels, a declaratory judgment action may ask the court to determine whether specific agency action is valid, or whether environmental factors have been taken into account as they should be -- which is especially important given the National Environmental Policy Act of 1969. Additionally, in some instances the individuals may go directly against a polluter in a declaratory judgment action.

Refuse Act of 1899 and Qui Tam Actions

The 1899 Refuse Act prohibits individuals, corporations, municipalities, or other groups from discharging or depositing "refuse" of any kind in the nation's navigable bodies of water, or water sources tributary thereto [11]. Fines of $500 to $2,500 for each day of violation are provided for, and "one-half of fine is to be paid to the person or persons giving information which should lead to conviction" [11, p. 411]. When an informer shares in a statutory penalty for a forbidden act, this is referred to as a qui tam action. If permitted in the pollution area, it could constitute an incentive for polluters to act to prevent further pollution.

National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 [9] was passed with the declared purpose of protecting the environment. This act requires all federal agencies to do several specific things designed to take the environmental effects of various courses of action into account. A primary requirement is that all federal agencies must include a report evaluating the environmental effects of all proposed actions and legislation. This appears to be a significant step, but, one Congressman has stated that the "widely publicized new legislation gives the appearance of action without the substance. It lulls the public into a false confidence that something is being done" [10, p. 671]. Though it gives a broad change, it contains no mechanism (penalty) to assure its stated purpose will be carried out by the agencies.

Mandamus

An action, available under the Federal Rules of Civil Procedure, permits review of administrative actions and contributes indirectly to the significance of the National Environmental Policy Act of 1969. The remedy of mandamus -- although no longer referred to by that term at the federal level [6] -- is still available under the Federal Rules of Civil Procedure. In its simplest form, a "writ of mandamus" is a court order requiring a particular person or public officer to perform his duty in the manner required by law. When combined with the National Environmental Policy Act of 1969, some "teeth" are inserted into the act. The court can compel agency officials to fully consider all environmental factors in the decision-making process as per the legislative directive. But, once these factors are considered, the decision of the agency is final.

Public Trust Doctrine

With respect to remedies available to environmentalists, a noted legal authority, Joseph L. Sax, has stated that "only the public trust doctrines seem to have the breadth and substantive content which might make it useful" [15, p. 474]. To fulfill this role, the public trust doctrine must contain some concept of a legal right in the general public, be enforceable against the government, and be capable of an interpretation consistent with contemporary concerns for environmental quality. Rivers, lakes, seashores, parks, and other public land can be considered to be held in trust for public benefit. Its application would prevent diversion of such resources to special interests. Sax further argues the public trust doctrine is superior to any other legal theory yet suggested because the public interests with which environmentalists are vitally concerned are distinctly different from those which are constitutionally protected.

Constitutional Guarantee to a Clean Environment

Some environmentalists hold that a fundamental and unenumerated right guaranteed by the ninth amendment to the U.S. Constitution is the right to live in pollution-free environment. Further, goes the argument, that the federal government shall in no way interfere with those unenumerated rights retained by the people is guaranteed by the due process clause of the fifth amendment to the Constitution, while the due process and equal protection clauses of the fourteenth amendment likewise prevent the states from interfering with these unenumerated rights. Others believe that this constitutional interpretation will not likely occur and, therefore, that the U.S. Constitution should be amended to expressly guarantee a pollution-free environment [10].

Standing to Sue - A Procedural Constraint

Concerned citizens may initiate actions against polluters in at least two ways. First, they may seek a judicial decree requiring an administrative agency or public official to carry out his legislatively assigned duties. Second, under some circumstances they may personally bring suit directly against a polluter. In the past, environmentalists have been unable to employ these two types of action because they lacked "standing to sue". Standing has traditionally required one to have a "personal stake in the outcome of the controversy" [5, p. 101].

The courts have made significant inroads in the standing requirement in recent years, first in the Scenic Hudson Preservation Conference v. Federal Power Commission [15] and then in Road Review Board v. Boyd [20]. In both of these, the plaintiffs were local citizens, municipalities, or citizen groups residing in and near the affected area.

For this reason the 1969 case of Citizens Committee of the Hudson Valley v. Volpe [2] is of major importance, since the plaintiff (The Sierra Club) had no personal economic stake in the controversy, and was still permitted to sue even though not located nearby. Also at the state level, a 1970 Michigan law [16] states that any person may maintain an action against present or prospective polluters in Michigan which means that standing has been completely abrogated there. Other legislatures are currently looking at similar bills.

Some Economic Considerations

The statutory and constitutional remedies discussed function by requiring, for the most part, that public agencies protect the environment. Only *qui tam*, and perhaps nuisance-based damages, function in a way to internalize the spillover effects of already committed acts of pollution although stiff requirements for approval of proposed projects can prevent or halt pollution by internalized preventive measures. *Qui tam*, however, bears no directly quantitative relationship to the external costs imposed by the polluter, and even the division of the fine may not be to those directly harmed by the act.

Attempting to do something with an existing situation, in particular, involves highly complicated economic interactions. On one side you have the producers and consumers of a product or service while on the other are the parties, including the public, harmed by the pollution. If pollution is prohibited, production of the goods involved probably will be more costly, output will be less, and consumers will be paying higher prices. On new installations this presents relatively few problems, since in determining the present value of an installation these factors are considered and the investment will not be made unless it appears profitable. With imposition of new requirements on an existing plant, however, the reduction in the flow of net returns can reduce the value of the plant and even make its use value zero. These considerations considerably complicate the process of eliminating pollution where all interests must be considered, but do not do away with the necessity of controlling pollution. The problem is to institute control programs in such a way as to consider the equity of all parties.

Some Concluding Comments

Pollution abatement and prevention is an extremely complicated matter from the standpoint of technology, economics, and various vested interests. An overriding interest, however, is protection of the environment to assure, if possible, a future for man and other forms of life. *Ad hoc* actions and approaches are unlikely to handle adequately such complicated issues. As Ayres and Kneese [1, p. 295] concluded, ". . . the production of residuals is an inherent and general part of the production and consumption process . . . there are important trade-offs in the forms these residuals may take . . . the environmental media which can receive and assimilate residual wastes are not free goods but natural resources of great value . . . the assimilative capacity of environmental media can sometimes be altered . . . and involves the planning and execution of investments with public goods aspects." If, however, action does not come through appropriate legislative and administrative processes, recourse to the courts may be necessary to induce necessary reforms. Even though the courts may not have all the resources needed to achieve the proper controls, they remain a way in which interested citizens, by use of the remedies discussed, may be able to exert pressure for improvements in the absence of more general approaches. Without the prompt action by legislative and administrative agencies, the courts may regain the "position of prominence they held when the common law was promulgated" [13, p. 698].

REFERENCES

1. Ayres, R.U., and A.V. Kneese, "Production, Consumption, and Externalities," AER, 59:282-297, June 1969.

2. Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1983 (1969).

3. City of Richmond v. Test, 18 Ind. App. 482, 48 N.E. 610 (1897).

4. Federal Declaratory Judgment Act. 62 Stat. 964 (1948), amended, 63 Stat. 946 (1949), 28 U.S.C. s 2201 (1948).

5. Flast v. Cohen, 392 U. S. 83 (1968).

6. Hammond v. Hull, 133 F. 2d 23 (1942).

7. Lampert v. Reynolds Metal Co., 372 F. 2d 245 (1967).

8. Mishan, E.J., "The Post War Literature on Externalities: An Interpretive Essay," J. Econ. Lit., 9:1-28, March 1971.

9. National Environmental Policy Act of 1959, 42 U. S. C. A. §§ 4321-47 (supp. 1970).

10. Ottinger, Richard L., "Legislation and the Environment: Individual Rights and Government Accountability," 55 Cornell L. Rev. 666 (1970).

11. Rivers and Harbors (Refuse) Act of 1899, 33 U. S. C. 407 (1899).

12. Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650 (S. D. N. Y. 1967).

13. Roberts, E.F., "The Right to a Decent Environment: $E = MC^2$: Environment Equals Man Times Courts Redoubling Their Efforts," 55 Cornell L. Rev. 674 (1970).

14. Sax, Joseph L., "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 473 (1970).

15. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965).

16. Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, M. C. L. A. §§ 691.1201 - .1207 (1970).