Legal Remedies for Pollution Abatement

Citizen-initiated legal actions can protect and improve the environment.

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The realization that our supply of natural resources is not unlimited has led to public concern over the ecological crisis (*1*). If the present exploitation of natural resources is to be halted, it is essential that our legal structure be at least permissive of, if not conducive to, such a goal. Several recognized legal remedies are available to the individual citizen or group wishing to combat specific acts of pollution or proposals deemed destructive of the environment. Other procedures are considered potentially useful mechanisms in aiding the concerned citizen in the quest for cleaner surroundings. It is not anticipated that these legal procedures will solve the problem of pollution, but that they might be useful tools in moving toward that goal.

The legal meaning attributed to pollution may vary with different legal remedies, but the term has a more specific meaning to others. According to Ayres and Kneese (*2*), pollution can be viewed as external to the polluter—that is, as a cost to others—because, in disposing of the residues of production and consumption, the polluter uses free or common resources, including air and water, and such resources are scarce (*3*). Since the solution to such environmental problems is complex, many interrelations exist, and there are large numbers of vested interests, the movement toward a solution seems very slow. The individual has relatively little weight in the normal legislative and administrative processes, but he may be able to have a more immediate and heavier impact through court action, even though litigation is usually a long, slow process.

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The court action approach may have two important results. First, actual or potential cases of pollution may be halted, reduced, or prevented. Second, the problems and insecurities following from many individual actions may lead to the more comprehensive and rational planning and development that is required in the current situation.

Common-Law Remedies

In some instances, common law may provide the individual with a recourse in fighting for an acceptably clean environment. Traditionally, a remedy of major importance has been provided by the nuisance law. Every landowner has the right to enjoy and use his property without unreasonable interference; when such interference occurs, a nuisance exists. Since the existence of a particular set of circumstances is considered to be a matter of fact, a jury usually must decide whether these circumstances constitute unreasonable interference. A nuisance also may be "public"; that is, the interference may be with the rights of the general public. Many state laws classify air, water, and solid waste pollution as public nuisances.

The typical nuisance suit is brought by a nearby landowner or a group of residents alleging that some form of pollution is interfering with his or their rights. Generally, the plaintiff must show some financial or irreparable physical damage. On the other side is the defendant and alleged polluter (perhaps an industrial plant, a municipality, or cattle feedlot), who generally has a substantial investment in facilities and who may provide jobs and other benefits. The suit may ask for damages or an injunction to prohibit continued pollution, or both.

A fairly common result is the awarding of damages while denying the injunction. Many courts apply the "balancing of interests" test to determine whether the nuisance should be closed down (*4*). Since substantial financial interests are threatened by such action, the injunction may be denied, although enjoinment is more likely in cases involving public nuisances. A judicial trend is to require modification where feasible. Thus future damages are eliminated or reduced, while the interest of the polluters is not destroyed—although the cost of such modifications may raise the costs of the polluters' operations vis-à-vis other producers.

A second legal approach to pollution problems may be available through trespass provisions. Trespass involves an intentional and unprivileged entry onto land, and since it need not affect enjoyment in any way, it should, *prima facie,* require less proof than do nuisance cases. The traditional interpretation has required that direct entry be proven and has denied that smoke, dust, or gas fumes, especially if transported by an intervening agency such as wind or water, constitute trespass (*5*). A recent Oregon case, however, awarded damages to a group of plaintiff-farmers whose crops had been damaged by fluoride gases from an aluminum plant (*6*). Unfortunately from the viewpoint of environmentalists, the request for an injunction was denied after the balancing of interests test was applied.

Finally, many of the nation's water laws were developed through common law, and these water laws may provide approaches to pollution control, despite their not having been very useful in the past. Either the riparian doctrine, the prior appropriation concept, or a combination of the two is used in most states. Under the riparian system, those with property along the waterway are entitled to make a reasonable use of the water, and reasonable use may include waste disposal. Under the natural flow theory, a minority view, the riparian owner is held to be entitled to have water flow by him undiminished in either quantity or quality (*7*). Such an interpretation has not been used historically because, in part, it has represented a potential threat to economic development and growth, which have been thought to be a "good" more important than the "bad" of pollution.

In a similar way, the prior appropriation doctrine, which is generally applicable in areas of limited water sources and which allows the first users of a source to maintain their use over later claimants,

has some precedent for requiring maintenance of the original quality of the water (*8*).

In general, the common-law remedies discussed are concerned with the property rights of individuals and cannot be expected to be readily adaptable to protecting the public interest. They provide remedies through damages for acts already committed and through the potential, under enjoinment, to halt such acts in the future, but they do not eliminate pollution, prevent irreversible acts, or provide any sort of general approach to the problem. Thus, while useful, they must still be supplemented by other legislation.

Statutory Remedies

Federal, state, and city laws that affect the environment and the uses made of it exist in large numbers. It is impossible to review these in detail, but there also exist several important or broadly applicable legal remedies established under statutory acts. Several of these provide a basis for actions that an individual or a group may initiate to halt or prevent damage to the environment.

At least one water pollution case was initiated as a class action; that is, where a few members of a large group bring the action, but where its results apply to the whole group (*9*). A more recent case, however, makes such an action less feasible because each class member must meet the diversity requirement for federal jurisdiction (*10*). Consequently, at present there is no clear precedent for using class actions for abating pollution.

Another possible remedy is a declaratory judgment action, which may be utilized under the Federal Declaratory Judgment Act (*11*) or the Uniform Declaratory Judgment Act adopted by 35 states. Under such acts, the courts are empowered to declare the rights and legal relations of interested parties. Such a suit may ask the court to determine the validity of specific agency actions or to determine if environmental actions are being adequately considered—an important consideration, especially when combined with the National Environmental Policy Act of 1969. In addition, it is sometimes possible to directly sue the polluter under provisions of these acts.

Among the statutes more specifically directed toward pollution control is the River and Harbor Act of 1899 (*12*), commonly referred to as the Refuse Act of 1899. It prohibits individuals, corporations, and municipalities from discharging or depositing refuse in navigable bodies of water and their tributaries. Fines of $500 to $2500 are provided for each day of violation, and one-half of the fine is to be paid to the person or persons providing the information leading to conviction. When an informer shares in a statutory penalty, it is referred to as a *qui tam* action. It is not entirely clear that the Refuse Act of 1899 authorizes a *qui tam* action, but if permitted and used, such action could be a strong prod in causing polluters to reduce such activities (*13*). This, of course, can only be applied against water pollution.

Another possibly strong statutory remedy is provided by the National Environmental Policy Act of 1969 (*14*). The purpose of this act is to protect the environment. Among other provisions, it establishes a council on environmental quality and requirements for reports on and consideration of environmental factors for all federal agencies proposing projects or legislation. The statement is to include an evaluation of the environmental impact, any adverse effects that cannot be avoided, alternatives to the proposed action, short- and long-term effects, and any irreversible or irretrievable commitments of resources.

While the legislation appears to be a significant step, one congressman stated that the "widely publicized new legislation gives the appearance of action without the substance" (*15*). The act has been interpreted to require that the agency consider the environmental effects in "good faith" and that, while the decision rests with the agency, the procedural requirements of the act be followed (*16*). Thus the judgment of the environmentalist cannot be substituted for that of the agency involved. Nonetheless, the remedy of mandamus (*17*) may be used by individuals to ask the court to compel officials to "responsibly" consider all environmental factors, but in the absence of "bad faith," it cannot force acceptance of alternative opinions (*18*).

Other Approaches

In addition to legislative remedies, constitutional provisions and more general concepts may provide environmentalists with useful tools for attacking pollution. Some current proposals for action that have not yet been tested in the courts for the purpose of fighting pollution have been used in other contexts, such as human rights.

Perhaps the most potential exists in the public trust concept (*19*). Sax has stated that "of all concepts known to American Law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems" (*20*). To fill this role, the action must meet three criteria: (i) it must contain some concept of a legal right in the general public, (ii) it must be enforceable against the government, and (iii) it must be capable of an interpretation consistent with contemporary concerns for environmental quality. Rivers, lakes, seashores, parks, and other public land can be considered as being held in trust for the benefit of the public and should not be allowed to be diverted for more restrictive or special-interest group use.

Another approach suggested is to consider that the environment is protected by provisions of certain constitutional amendments. Specifically, it is argued that a pollution-free environment is guaranteed as an unenumerated right of the Ninth Amendment, which states, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people" (*21*). Further, it is contended that the federal government cannot interfere with these unenumerated rights under the due process clause of the Fifth Amendment and that the Fourteenth Amendment extends this same concept to the states. Sax and others contend, however, that such an interpretation is not likely to occur, in part because those that have been held to be unenumerated rights are for permanent minorities and that the constitutional arguments for environmental protection are not correct and cannot be expected to succeed (*22*). Thus some have proposed that constitutions, both federal and state, be amended to specifically require such protection (*4*, *15*).

Standing to Sue

A procedural constraint—standing to sue—has frequently prevented concerned citizens from being able to institute a legal action against perpetrators of environmental damage. Traditionally, this has required one to have a "personal stake in the outcome of the controversy" (*23*), a requirement that is rooted in history and that in no way reflects on the

merit of the action. It embodies the concept that one must be personally affected before being considered a proper party to complain, it prevents many suits of little more than nuisance value, and it reduces overloading of the dockets.

Recent court decisions have made important inroads into the restrictive application of standing on environmentally related cases. In such cases, it can be argued that everyone is personally affected by a deteriorated condition. The first breakthrough came with the decision in *Scenic Hudson Preservation Conference* v. *Federal Power Commission* (*24*). The Federal Power Commission had licensed Consolidated Edison Company to construct a Hudson River hydroelectric project at a location considered unique, beautiful, and of historical interest. It was decided that the commission should have a basic concern for the preservation of beauty and national shrines and, significantly, that the plaintiffs, who were local citizens, had standing to sue. A 1967 case was decided similarly (*25*). In both of these the plaintiffs were local groups who could be considered to have a greater interest in the results than environmentalists in general. Thus, the 1969 decision that the Sierra Club had standing in *Citizens Committee for the Hudson Valley* v. *Volpe* (*26*) is equally important, since the plaintiffs were a national organization (*27*).

These actions have significantly increased the likelihood of judicial review of administrative action. Traditionally, such review was likely only when the agency actions could be shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (*28*). States may also be moving in this direction, as evidenced by a 1970 Michigan law that allows any person to maintain an action against present and prospective polluters (*29*).

Economic Considerations

The effects of pollution and environmental misuse are crucial in that the quality of life and even the possibility of life depend upon how well these problems are handled. This must be the ultimate and prevailing concern, but penultimate are economic considerations. Every action of pollution and pollution abatement has economic consequences with differential effects on different parties (*30*). The economic interests too frequently have been the basis of actions; future decisions will have to go beyond economic interests, but nonetheless cannot ignore them because of the widespread influence they have and the requirement for public support to accomplish environmental reform in a country characterized by democratic as well as special-interest institutions.

Solutions to environmental problems are complex, both with respect to technical factors and the interrelationships of the various parties affected by changes in operational conditions. While it is easy to blame specific groups for our current crisis, nearly all of us are, in some respect, to blame. We as a species have been greedy, wanting to increase our material comforts, and, with a typical lack of foresight, we did not anticipate the consequences of our actions. It is essential that realistic, rational, and equitable solutions be found and implemented, but given the complexity of the situation and the inertia of most of us this is unlikely to occur posthaste. However, the courts offer one means of speeding up the process. The courts cannot be expected to be capable of solving the problem, but individuals can sometimes get improvements in specific circumstances by using some of the legal approaches discussed. Furthermore, a substantial body of litigation may speed up the search by legislators, administrators, educators, and industrialists for solutions and their implementation.

References and Notes

1. To facilitate the discussion of available legal remedies, such a crisis is assumed to exist and the claims of environmentalists are accepted without question.
2. R. U. Ayres and A. V. Kneese, *Amer. Econ. Rev.* **59**, 282 (1969).
3. A. V. Kneese, *ibid.* **61**, 153 (1971).
4. E. F. Roberts, *Cornell Law Rev.* **55**, 674 (1970).
5. Arvidson *v.* Reynolds Metal Co., 125 Fed. Rep. Supp. 481 (West. Dist. Wash., 1954) and Ryan *v.* City of Emmetsburg, 232 Iowa 699 (1942).
6. Lampert *v.* Reynolds Metal Co., 372 Fed. Rep., 2nd ser. 245 (1967).
7. City of Richmond *v.* Test, 18 Ind. Appel. Rep. 482; 48 N.E. Rep. 610 (1897).
8. Naches *v.* Cowiche Ditch Co., 87 Wash. Rep. 224; 151 Pac. Rep. 494 (1915).
9. Storley *v.* Armour and Co., 107 Fed. Rep., 2nd ser. 499 (8th Cir. Ct., 1939).
10. This refers to class actions filed in federal courts because the plaintiffs believed they could not get a fair trial in the state. A nonresident might make such a claim and have the case diverted, but if a resident is involved, it is presumed that a fair trial is possible in the state court. In a class action, at least one member of the class is apt to be a resident of the state involved. See Snyder *v.* Harris, 394 U.S. 332 (1969).
11. 28 U.S. Code 2201 (1948), amended 63 Stat. 946 (1949).
12. 33 U.S. Code 407 (1899).
13. Washington *Post*, 30 May 1971, p. 1-F, reports two cases—one in which half the fines were awarded, the other a suit just filed against steel firms. Various other actions have been initiated under the act, either by the Justice Department or with information supplied by private individuals. Regarding applicability of *qui tam*, see *Qui Tam Actions and the 1899 Refuse Act*, U.S. Congress, House of Representatives, Committee on Government Operations, Subcommittee on Conservation and Natural Resources (91st Congr., 2nd sess., 1970). A recent ruling, however, casts doubt on the conclusion reached; since a Federal District judge held that private citizens could not initiate criminal actions. See Bass Anglers Sportsman Society *v.* U.S. Steel, 324 Fed. Rep. Suppl. 412 (N. Dist. Ala., 1970).
14. U.S. Code 4321-47 (1970).
15. R. L. Ottinger, *Cornell Law Rev.* **55**, 666 (1970).
16. Environmental Defense Fund *v.* Hardin, Civ. Action No. 2319 (District of Columbia, 1970).
17. Although abolished in name, the procedure formerly known as mandamus is still available and is governed by the same principles as before. See Hammond *v.* Hull, 133 Fed. Rep., 2nd ser. 23 (1942).
18. More specifically, in Environmental Defense Fund *v.* Hardin (*16*), it was required that agencies (i) complete a diligent research effort, (ii) prepare and distribute an environmental impact statement, and (iii) utilize ecological information in resource-oriented projects. A request for a preliminary injunction to halt the fire ant–Mirex control program was denied. That the National Environmental Policy Act can be useful was shown in its forcing the Atomic Energy Commission to change its procedures to include other than radiation effects in its environmental evaluation [C. Holden, *Science* **173**, 799 (1971)]. Other projects that have been halted under suits claiming that appropriate environmental impact reports have not been prepared include dams in West Virginia and Arkansas, highway projects in California and Wisconsin, and the Tennessee Tombigbee Canal. See *Environ. Rep.* **2**, 599, 821, 881, and 1028 (1971).
19. Only the skeleton of the public trust doctrine is presented here. For a more complete analysis, see J. L. Sax (*20*).
20. J. L. Sax, *Mich. Law Rev.* **68**, 473 (1970).
21. U.S. Constitution, Amendment IX.
22. This view is held by Sax (*20*). The Sierra Club raised the constitutional issue in a case challenging the right of the Corps of Engineers to issue permits for discharging wastes under the 1899 Refuse Act. Although the Corps has been enjoined from doing so, it was on the basis of failure to require the reports mandated under the National Environmental Protection Act. See Kalure *v.* Resor, No. 1331–71 (U.S. Dist. Ct., D.C., 1971).
23. Flast *v.* Cohen, 392 U.S. 83 (1968).
24. Scenic Hudson Preservation Committee *v.* Federal Power Commission, 354 Fed. Rep., 2nd ser. 608 (1965).
25. Road Review League, Town of Bedford *v.* Boyd, 270 Fed. Rep. Suppl. 650, (S. Dist. N.Y., 1967).
26. Citizens Committee for the Hudson River Valley *v.* Volpe, 302 Fed. Rep. Suppl. 1083 (1969).
27. Sierra Club *v.* Hickel, 433 Fed. Rep., 2nd ser. 24 (9th Cir. Ct., 1970) may be contrary, although probably distinguishable on the facts, because in this case the Sierra Club was not joined by local organizations. A clearer delineation of the precise status of standing may soon be forthcoming, as the Supreme Court granted certiorari in Sierra Club *v.* Morton, 91 Supreme Ct. 870 (1971) on 22 February 1971 and heard arguments on 17 November; as of early January, a decision had not been handed down. (This is the same case, but it now carries the name of the current Secretary of the Interior.)
28. 5 U.S. Code 701–706 Suppl. IV (1969).
29. Mich. Compiled Laws Annotated, 691.1201–.1207 (1970). The constitutionality of this law, however, has been challenged by Crandall *v.* Biergans, filed in the Clinton County, Michigan, Circuit Court on 1 September 1971. During 1971, legislatures in Florida, Massachusetts, Minnesota, and North Carolina passed laws expanding the rights of citizens to initiate legal actions in the environmental area. See *Environ. Rep.* **2**, 387, 412, 590, and 591 (1971).
30. The economics of pollution has been widely discussed and thus is only touched upon here. For some of the better discussions see Ayres and Kneese (*2*), Kneese (*3*), or R. M. Solow, *Science* **173**, 498 (1971). A review article that presents much of the formal argument is E. J. Mishan, *J. Econ. Lit.* **9**, 1 (1971).