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Environmental Litigation - Where the Action Is

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Current interest in the protection of the environment and legal involvement in ecological concerns have engendered a lively enthusiasm for environmental litigation. Environmental lawyers report "an explosion" of interest among law students, and law schools throughout the country have begun to offer courses in environmental law. Early in 1970, a group of lawyers organized a New York corporation, the National Resources Defense Council, to concentrate on the development of precedent-setting cases for the preservation of the environment. Newspapers have reported large numbers of environmental lawsuits pending in trial courts throughout the country, not as yet reported in the law books. The value of environmental litigation has been stressed, and at times overstressed, and enthusiastic lawyers, particularly young lawyers, seeking a place in the newly developing field, have focused their interest on litigation. The central effort in environmental law has been to strike a blow in the courts for a better environment.

The history of litigation to protect the environment has been both long and short, depending on one's point of view. For centuries persons who violated health and sanitary codes that dealt with aspects of environmental protection have been prosecuted. Private lawsuits to protect environmental interests, on the other hand, are of relatively recent origin. This article will examine the kind of lawsuits included in the term "environmental litigation" today, and whether such litigation is an appropriate tool for all aspects of environmental protection, or is rather limited to a fairly restricted class of cases. The effort will be to distinguish areas where environmental litigation


‡B. A. Barnard College, 1964, J. D. Columbia Law School, 1970. Assistant Director, Legislative Drafting Research Fund. The views here expressed are the authors' individual views and should not be attributed to the institution of their common association.


2. See e.g. OHIO REV. CODE ANN. § 3707.01 (1964); OKLA. STAT. ANN. tit. 50, § 16 (1962); Lawton v. Steele, 152 U.S. 133 (1894); State ex rel. Weller v. Snover, 42 N.J.L. 341 (Sup. Ct. 1880); Board of Health of Caldwell Tp. v. Shaw, 13 N.J.Eq. 507, 167 A. 869 (1933); Miller v. Sergeant, 10 Ind. App. 22, 37 N.E. 418 (1894); State v. United Cork Cos., 113 N.J.Eq. 4, 172 A. 347 (1934).
can make a significant contribution from those where primary reliance on other tools may be more effective.

I. ENVIRONMENTAL LITIGATION: WHAT IS IT AND WHAT IS NEW ABOUT IT?

Three kinds of cases have been lumped under the heading environmental litigation. The first is simply litigation between private parties — plaintiff sues for an injury caused by an environmental condition for which defendant allegedly bears responsibility. The second is made up of prosecutions and other enforcement actions brought by a public agency for violations of laws and regulations protecting the environment. The third, and perhaps only novel category, involves actions by private citizens, frequently acting through organizations established to protect particular environmental interests, against a public agency, either to compel it to take steps to protect the environment, or more commonly, to stop a project or an activity which will allegedly have adverse environmental effects.

II. LITIGATION BETWEEN PRIVATE PARTIES

Although commonly included in the rubric of environmental litigation, actions between private parties do not really belong there. The plaintiff in such an action is basically complaining not of the damage done to the environment but of the damage done to him or to his economic interests. Such actions normally fall into the traditional common law areas of nuisance or trespass and, while a successful outcome may have incidental effects on environmental protection, that is not the main purpose of the action. Indeed, when an action is brought on the theory of nuisance, the plaintiff may have to show some individual injury apart from that suffered by the many persons affected by what is described as a public nuisance.3

Even in this traditional area litigation is neither easy nor commonplace. While older actions between private litigants involving noise nuisances, flying rocks from blasting operations, or stench problems may have been relatively simple to prove, modern litigation between the same parties which involves the broader questions of water and air pollution may run into significant technical issues entailing substantial problems of proof. Expert testimony relating to sophisti-

cated technology may be required to make a good case.\textsuperscript{4} Aside from these problems—which litigation between private parties has in common with the other types of environmental litigation—there are significant substantive roadblocks. In nuisance actions, for instance, the problem of balancing the equities between the harm caused to the plaintiff and the benefit arising from the defendant's contribution to the economy, as well as the doctrine of reasonable use may cause significant difficulties.\textsuperscript{5} Moreover, there is the recurring issue of whether a particular invasion of rights constitutes a nuisance or a trespass. Sometimes the resolution of the issue may have different procedural effects, particularly with respect to the relevant statute of limitations. However, courts are increasingly moving in the direction of recognizing that there may be some combined nuisance-trespassory action and have on occasion stated that every nuisance also involves a trespass.\textsuperscript{6}

Litigation between private parties also runs into some fundamental problems of public policy. It has been viewed as an inappropriate vehicle for legal control over the environment, because such control requires overall planning, not possible in a case by case approach, and a greater degree of expertise than that which obtains in the courts. It is also probably impossible to construct a coherent environmental policy from a composite of private case law precedents. The creation of environmental policies is thus essentially a legislative function.\textsuperscript{7}

Even if it were possible to develop the law through court action it is unlikely that a consistent policy could be achieved without a substantial number of cases, and the burdensome and costly nature of litigation is likely to deter prospective plaintiffs from bringing a sufficient number of suits.\textsuperscript{8} These considerations were implicit in a recent decision by the New York Court of Appeals. In rejecting a private plaintiff's action for a permanent injunction against industrial air pollution by a substantial industrial enterprise, the court pointed out:

\begin{enumerate}
\item\textsuperscript{4} Juergensmeyer, \textit{Control of Air Pollution through the Assertion of Private Rights}, 67 Duke L.J. 1126, 1131-45 (1967).
\item\textsuperscript{5} Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970).
\item\textsuperscript{7} Cold Facts on Hot Water: Legal Aspects of Thermal Pollution, 69 Wis. L. Rev. 253, 264 (1969); Hines, \textit{Nor Any Drop to Drink: Public Regulation of Water Control}, 52 Iowa L. Rev. 186, 200 (1966).
\item\textsuperscript{8} \textit{Id.}
... it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. ... It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives beyond the rights and interests before the court. ... 9

This case firmly reflects the court's reluctance to set standards and deliver far-reaching policy judgments in litigation between private parties. But will the courts be more willing to reflect public policy and environmental standards already set by statutes in deciding cases between private litigants? As yet there is no simple answer to this question. The person who suffers the consequences of another's breach of law may of course recover under the doctrine of negligence per se if he is within the class of persons whom a statute seeks to protect, even though the statute provides for criminal prosecution only. 10 In Gulf Oil v. Alexander 11 this doctrine was applied to an environmental injury; a violation of a state railroad commission's rule that a company should not pollute was held to create a strict liability, enforceable by a private citizen. So too, in Renken v. Harvey Aluminum Inc. 12 the court referred to the 1955 and 1963 Federal Air Pollution Control Acts as evidence of the public's concern with air pollution in allowing a trespass action by adjoining land owners for past damages to fruit trees and in granting an injunction against further pollution. But negligence per se and other doctrines which derive private rights from public prohibitions have not been uniformly applied. In Renken, for instance, it was suggested that the public standard would not be used if the legislative remedy could be shown to have preempted the field. This notion of official pre-emption has been generally rejected, either because (as in Renken) the statute contained a savings clause, or under the older doctrine that statutes in derogation of the common law (i.e., statutes that would deprive plaintiff of his normal tort action) should be strictly construed. 13 In some instances, however, statutes are clearly and expressly limited to public enforcement. For instance, the New York

11. 291 S.W.2d 792 (Tex. 1956).
water pollution and air pollution control laws provide that no private litigant may base an action on the provisions of the law or even on successful prosecutions brought under them.\textsuperscript{14}

In summary, while litigation between private parties will continue to play a part, it cannot be viewed as a substantial vehicle for general environmental protection. To the extent that an action between private parties results in the removal or control of a major source of pollution, it may result in an incidental benefit to the public at large, but both court-created and legislatively-established limitations on the reach of such private litigation are likely to continue to limit its total impact.

III. ENFORCEMENT LITIGATION BY PUBLIC AGENCIES

The most significant aspect of all enforcement litigation is that it is entirely based on legislation. Unless the agency charged with water or air pollution control or with the control of noise or radiation is specifically authorized to prosecute or to sue in the courts to enforce the law or regulations made pursuant to it there is no basis for litigation. Moreover, the kind of litigation — whether criminal, civil or equitable — and the applicable procedures are statutorily determined, either by the law which gives the agency its basic powers, or by more general provisions of administrative or penal codes.

Thus, while enforcement litigation may serve a useful purpose in forcing compliance with environmental controls, it does not fulfill the environmental lawyer's ideal — to use litigation as an affirmative device to expand the law; it merely validates the expansion of environmental protection created by existing legislation. Enforcement litigation has, though, resolved questions of constitutional and administrative law arising under pollution control statutes. Such statutes have been attacked on the state and local level on a number of grounds, including unconstitutional interference with interstate commerce, violations of due process resulting from unconstitutional vagueness, illegal delegation of legislative power, and taking of property without just compensation. In addition, defendants have argued violations of specific sections of state constitutions. The regulations promulgated by regulatory agencies and actions taken under them have been attacked as \textit{ultra vires}, arbitrary and unreasonable and otherwise constituting an abuse of the administrator's discretion.\textsuperscript{15}


\textsuperscript{15} For cases discussing delegation see State v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968); Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board, 80 N.M. 633, 459 P.2d 159 (1969); Oriental Boulevard Co. v. Heller, 58 Misc.2d
In recent years, however, both state and federal statutes to protect the environment have fared rather well in the courts. In upholding state statutes, these decisions constitute a reaffirmation of the broad sweep of the police power. On the federal level, statutes have been upheld as falling within particular delegated powers of Congress. These decisions reflect growing awareness in the courts of the need for environmental controls. Thus while in earlier years a New York court could invalidate a city smoke pollution ordinance as applied to a vessel in foreign commerce, some years later, in a case similar in its significant facts, the United States Supreme Court in *Huron Portland Cement Company v. City of Detroit* upheld Detroit's smoke abatement code against the argument that it created an undue burden on interstate commerce when applied to a vessel in interstate and foreign commerce on the Great Lakes. In holding the ordinance a valid exercise of the police power, the court relied on the legislative finding of the Federal Air Pollution Control Act of 1955 as indicative of both a national concern with air pollution and a congressional intent to leave the responsibility for air pollution control primarily with state and local governments. Other constitutional arguments and challenges to alleged unconstitutional exercises of administrative power have been rejected in nearly every case in which they have been raised, often by an exceedingly liberal application of the presumption in favor of statutes involving the exercise of police power.

920, 297 N.Y.S.2d 431 (Sp. T. 1969) (also raising every other imaginable constitutional argument); and City of Utica v. Water Pollution Control Board, 182 N.Y.S.2d 584, 156 N.E.2d 301 (1959). Vagueness is discussed in People v. Detroit Edison Co., 16 Mich. App. 423, 168 N.W.2d 320 (1969) (representing a very liberal approach in dealing with antipollution statutes), and Metropolitan Sanitary District of Greater Chicago v. U.S. Steel Corp., 41 III.2d 440, 243 N.E.2d 249 (1969); the taking issue in Brandel v. Civil City of Lawrenceburg, 230 N.E.2d 778 (Ind. 1967) and Vermont Woolen Corp. v. Wackerman, 122 Vt. 219, 167 A.2d 533 (1961); violations of specific state statutes in State v. Duxbury, *supra*; and State ex rel. LaFollette, 33 Wis.2d 384, 147 N.W.2d 304 (1967) (also representing a very liberal approach); the ultra vires issue in Department of Health v. Passaic Valley Sewage Commission, 100 N.J. Super. 540, 242 A.2d 675 (Super. Ct. Ch. 1968); and the defense that the agency action is arbitrary and unreasonable in Wylie Bros., *supra*; Oriental Boulevard, *supra* (where plaintiff's type of operations created less than 1% of the air pollution in the area); and Vermont Woolen, *supra*.

18. *Id.* at 442.
Not only has the government been successful in better than four out of five enforcement cases, but in their decisions the courts have expressly indicated an awareness of the dimension of environmental problems and of the public policies that reflect the prevailing public interest. For example, in *United States v. Standard Oil Company*, a case which itself constituted a broad extension of the Rivers and Harbors Act of 1899 to encompass modern water pollution problems only arguably within its terms, Justice Douglas observed:

> This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution — one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe § 13 of the Rivers and Harbors Act in a vacuum.

In the few cases in which the government has not been successful in compelling enforcement, special circumstances were invariably present. One situation involved a balancing of two competing environmental interests—the construction of a modern sewage disposal plant and the maintenance of the purity of a city water supply. Other cases included: failure by the administrative agency to provide a hearing as required by its governing statute; a clear violation of a statutory restriction on the amount of fines that could be imposed by municipalities; actions taken prematurely under the relevant statute; an order not addressed to a legal person; and a failure by the triers of fact to attend the hearings or read the record.

Enforcement litigation has made another valuable contribution in


20. Id.
27. Metropolitan Dade County v. Florida Processing Co., 218 So.2d 495 (Fla. 1969).
the development of the law of nuisance. As previously noted, standards and defenses developed for private actions are not particularly appropriate to deal with modern problems of air and water pollution, where balancing of individual interests, for instance, may fail to provide the public with adequate protection. When enforcement actions are brought, however, on a statutory action for nuisance, many of the bases for these common law rules do not apply. As a result some traditional restrictions have been abandoned. Balancing of equities, for example, was rejected in a number of cases, holding that the expense to the defendant was irrelevant in determining whether an injunction was appropriate when a nuisance, as defined by statute, had been found. The defense of prescription has also been held not to apply to a statutory nuisance violation.

Enforcement litigation thus presents no legal problems that a well-drawn statute with an adequate range of authorized sanctions and an administration which conscientiously follows its terms cannot cure. But at present it is significantly limited by several non-legal factors. One of these is the willingness and ability of the appropriate agency to take action under the statute. Another is the delay caused in the effective enforcement of such laws by challenges based on constitutional grounds. The combination of these factors can seriously weaken enforcement. Under both the federal water and air pollution control laws, for instance, the conditions under which enforcement action against a polluter may be taken are rather limited, and both provide for a lengthy sequence of conferences and hearings at six-month intervals before court action may be brought. In many instances, of course, successful conference and hearing procedures may make litigation unnecessary. Thus, under the Federal Water Pollution Control Act, 43 conferences had been held and only one court action commenced by 1968. The record is less impressive in the air pollution field, however. Though a number of proceedings have been instituted, only one case (U.S. v. Bishop Processing Co.) has been brought under the Clean Air Act of 1965, and that required more than five years for disposition from its first inception until the final affirmation by the Supreme Court in 1970. Senator Muskie indicated

29. State ex rel. Board of Health of Township of Saddle Brook, supra, note 19.
32. 45 Denver L.J. 278 (1968).
in February 1969 that little enforcement action could be expected that year under the Air Quality Act of 1967 because the law was "still in its infancy." Since the action in Bishop was taken under the 1965 Act, and since the procedures of the 1965 Act are continued under the 1967 Clean Air Act, it is likely that as staunch an environmental protectionist as Senator Muskie would agree that federal enforcement statutes are having some difficulty in growing up. Currently efforts are being made to move them to adulthood by providing more effective and less delay-producing procedures for enforcement.

The history of the federal government's anti-trust suit brought in 1969 against the major automotive manufacturers demonstrates both agency reluctance to enforce, and that litigation need not necessarily be brought to a decisive conclusion to accomplish its purposes. The Department of Justice brought suit in the Federal District Court in Los Angeles in 1969 charging that major automobile manufacturers had conspired to delay the development and use of devices to control air pollution from automobiles, and seeking an injunction against the continuation of the conspiracy. In September of that year the Department announced that it would settle the suit. This action was protested by the City of Los Angeles, New York City, a considerable number of state and federal legislators, and by the Attorney General of California who objected that, as a result of the settlement, grand jury minutes would be sealed making it difficult for plaintiffs in subsequent actions to obtain evidence against automobile manufacturers on particularly complex technical issues. After postponing the effective date of the consent decree to allow a hearing on this issue, the court nevertheless approved the settlement. Actions were subsequently filed by New York State, New York City and the City of Philadelphia, but thus far no automobile manufacturer has been found in violation of the federal air pollution control statute or guilty of a conspiracy to pollute the air by preventing the adoption of air pollution control devices. The relative lack of willingness to enforce existing antipollution legislation is also reflected to some

34. N.Y. Times, Feb. 4, 1969, at 78 col. 3.
36. E.g., the placement of all major activities involving environmental protection under a single agency, a proposal recommended by the President's Advisory Board on Executive Organization. A new independent agency, the Environmental Protection Administration, would be established to assume responsibility for antipollution functions now performed by various other departments. N.Y. Times, June 6, 1970 at 1, col. 7.
extent in the fact that the worst problems of pollution exist in the states with the longest standing antipollution legislation. On the other hand, following the unsuccessful federal and state litigation, the automobile industry has announced increased expenditures for pollution research.\(^3\) The major airlines, targets of suits by Newark, New Jersey, and the state of Illinois in 1969 and New York City in 1970 assured HEW in January that steps would be taken within ninety days to install fuel burners to decrease pollution and, recently, made an agreement with Newark to take steps to alleviate air pollution there.\(^9\)

Constitutional challenges as well as agency reluctance have seriously impeded prompt enforcement in the past. In New York City, for example, enforcement of a significant part of the 1966 Air Pollution law was delayed by the real estate industry for four years pending the decision on the constitutionality of incinerator regulations.\(^4\) In view of the fact that pollution control legislation has been so widely upheld, agencies and courts should not permit such dubious constitutional challenges to delay effective enforcement. Attempts to secure stays of enforcement for extended periods while constitutional litigation is pending, ought to be strongly resisted unless it can be demonstrated that there is some basic merit in the constitutional challenge.

Recent developments indicate, however, that agencies are becoming more enforcement-minded. Some encouragement may be gained from the recent spate of actions, some 40 in number, brought within a few months under the Rivers and Harbors Act of 1899 by the States of New York and New Jersey.\(^4\) Another indication of this development is the changed position of the Army Corps of Engineers. One of the prime targets of conservationists in years past,\(^4\) the Corps of Engineers traditionally took the position that the responsibility imposed upon them under the 1899 Rivers and Harbors Act was limited to the mere enforcement of regulations protecting navigation. Recently, however, the Corps held a precedent-breaking press conference to announce that it would establish an environmental advisory board to consider the environmental effects of all projects subject to its approval. This, admittedly, reflects the Corps'\(^4\)

\(^3\) Id., December 11, 1969, at 1, col. 2.
\(^5\) Id., May 27, 1970, at 47, col. 3.
response to the National Environmental Policy Act of 1969 which requires consideration by all public agencies of the environmental impact of their decisions. The Corps has done better than merely pay lip service to the new dispensation, however, and has played a vigorous role in undertaking the necessary investigation to support recent federal enforcement action under the 1899 Rivers and Harbors Act. While the Rivers and Harbors Act is not perhaps the instrument best designed to clean up our rivers and harbors — because it relies on rather small penalties and does not provide for injunctive remedies — its use reflects a growing search by government agencies for instrumentalties which will allow them to commence compliance action directly and without substantial delay.

IV
PRIVATE ACTIONS AGAINST PUBLIC AGENCIES TO COMPEL ENVIRONMENTAL PROTECTIONS

The brief survey of litigation between private parties indicated that environmental protection for the public benefit is a secondary, incidental consequence of nuisance and trespass actions brought between private parties to recover for private wrongs. It is wholly traditional in scope, presents little that is new, and has recently been cut back sharply by the courts as an improper vehicle for the determination of public policy. Enforcement litigation by public agencies against persons who violate laws and regulations made to protect the environment has also shown little novelty. As indicated in the previous discussion, the basic legal principles are not significantly different whether a public authority prosecutes for destruction of a privy vault, or whether a more modern department of environmental protection sues for a violation of a sophisticated particulate emission standard. The only difference is that in the second case the technical expertise necessary for proof may be more difficult to come by. Not even the constitutional issues raised by modern environmental enforcement litigation are new; the same issues were raised with respect to the enforcement of far more primitive environmental standards fifty or a hundred years ago. What may perhaps

46. See e.g., Metropolitan Board of Health v. Heister, 37 N.Y. 661 (1898); State v. Reed, 43 N.J.L. (14 Vroom) 186 (1881); Commonwealth v. Parks, 155 Mass. 531, 30 N.E. 174 (1892).
be new is the greater readiness on the part of the courts to find the constitutional power to make and enforce environmental regulations. It may be that the more complex and technically advanced the regulations, the less likely a court is to understand it, and by the same token, the less likely the court is to question the expert technical judgment of the standard-setting agency.

If then, any dramatic new developments in environmental litigation are to be found, they will have to be in the developing field of litigation by private persons or associations against government agencies, either to stave off or to compel official action which affects the environment. The recent phenomenon of private attempts to compel enforcement of public law or to vindicate the public interest is not restricted to environmental matters. A similar development may be noted in other areas where individuals have sought to fill the gap left by official recalcitrance and slowness in enforcement through private litigation. One such area is that of housing code enforcement where, in recent years, greater rights have been demanded by and granted to tenants to bring actions against landlords, to vindicate, not contractual rights, but their interest in the proper enforcement of the housing codes. Code enforcement had previously been held to be the concern of the municipality alone and not that of the tenant who was primarily affected by the violation. Precisely the kind of argument which is made against private environmental litigation today was used to preclude private enforcement of housing codes. The codes, it was said, were passed for the protection of the general public and no one individual tenant had standing to prosecute or to sue for compliance because an owner of a dwelling owed compliance to the municipality or to the state and not to the tenant, who was at best a beneficiary of the municipality’s code enforcement efforts.47

A parallel situation was encountered in the environmental field. Because no claims could be asserted by the private litigant against the public agency until the private litigant’s standing, his very right to challenge the public agency, had first been established, it is not surprising that the first major break-through in environmental litigation, properly so called, had to come in the area of procedure. Having said this, however, one has really said just about everything that is significantly new in environmental litigation, for though this development has caused much discussion, and though many cases may be pending in different parts of the country, there are but a handful of reported cases today and their substantive holdings are minimal at best.

The current break-through in environmental litigation came in 1966 with the landmark decision in Scenic Hudson Preservation Cor-

47. Health Dept. v. Rector of Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1895).
There Judge Hayes held for a unanimous Court of Appeals that plaintiffs, a group of conservation organizations and neighboring towns, had standing to petition for a judicial review of a decision by the Federal Power Commission to grant Consolidated Edison a license to construct a pump storage hydroelectric project on Storm King Mountain above the Hudson River. Petitioners objected to the grant of the license on the ground that the project would destroy the natural beauty of an area of great historical significance. Their substantive argument was based on the alleged failure of the Federal Power Commission to give adequate consideration to environmental consequences in arriving at its decision or to consider alternative ways of meeting New York City’s power demands during peak periods. The court based plaintiffs’ standing on section 313(b) of the Federal Power Act which gave a right to persons “aggrieved” to challenge agency actions in the courts. Because the statute also provided in section 10(a) that recreational purposes should be considered in granting a license for a power plant at a particular site, the court found that the conservation groups were “aggrieved” within the meaning of section 313(b). The neighboring townships were found to have standing because the loss in tax revenues from the proposed site was held to represent a sufficient economic interest, as was the New York-New Jersey Trail Conference, another plaintiff, because of the loss of the use of its trails. The victory was consolidated when the Supreme Court subsequently denied certiorari. On the substantive side, however, the holding of the case is quite limited. First, it is clear that there is nothing to compel the Federal Power Commission to arrive at a different conclusion after reviewing the case and taking environmental factors into account. Second, the decision makes it abundantly clear that but for useable language in the statute, the court could neither have found standing nor could it have found that there was a defensible interest in environmental protection per se. The holding of the court hinges completely on the rather casual language in the statute that recreational purposes must be considered and on the general provision giving standing to persons aggrieved.

The extremely limited nature of the substantive holdings in suits brought by private litigants for the vindication of environmental interests has remained a fairly constant feature on the field. The 1967 case, Road Review League, Town of Bedford v. Boyd, was a pyrrhic victory. The plaintiffs gained standing but lost on the merits. They had attempted to reverse a decision of the Federal Highway

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Administration to build Interstate Route 87 through a certain outstandingly scenic area of Bedford, New York. The relevant statute contained no reference to persons "aggrieved" as had that in *Scenic Hudson*, but the court held that plaintiffs had standing under the federal Administrative Procedure Act to which the Highway Code made specific reference. The substantive law, like that in *Scenic Hudson*, provided that environmental effects must be considered in selecting highway routes; the petitioners consequently were persons aggrieved within the legislative intent. On the merits, however, the court held that the administrative determination must stand unless it was clearly wrong, that is, it applied the rule generally relied on in reviewing administrative determinations, namely, that the court will not substitute its judgment for that of the administrative agency in decisions involving special technical expertise. The court did not touch the question of whether the evaluation of scenic or aesthetic factors required such special technical expertise.

*Road Review League*, at least in its holding on standing, was reaffirmed in 1969 in the case of *Citizens Committee for the Hudson Valley v. Volpe*. Suit was brought by the Town of Tarrytown, the Citizens Committee and the Sierra Club to prevent construction of a highway that required the filling in of a section of the Hudson River. The court followed the reasoning of *Road Review League* in finding standing under the Administrative Procedure Act. So well established had the notion of standing in cases of this kind become that by the time the case went up on appeal, plaintiffs were told by the court that it would be unnecessary to argue the matter at length.

What is of interest in the case is that plaintiffs won their substantive point on an issue which had nothing to do with environmental protection. The highway construction proposed involved an encroachment on the Hudson River. Approximately 22,000 feet of the road was to rest on 9,500,000 cubic yards of fill, extending 1,300 feet into the river at its widest point. Early in 1968 the New York State Department of Transportation had applied to the U.S. Corps of Engineers under section 403 of the Rivers and Harbors Act of 1899 for a permit authorizing the fill operation. The court found, as the plaintiffs had argued, that within the meaning of Section 401 of the Rivers and Harbors Act, fill extending into the river constituted a "dike" which could only be constructed in a navigable river with the

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50. *Id.*, at 659.
51. See *e.g.*, *American Airlines v. Civil Aeronautics Board*, 192 F.2d 417 (D.C. Cir. 1951).
53. Interview with Nicholas Robinson, third year student, Columbia Law School, who worked on the brief.
consent of Congress and the approval of the Secretary of the Army. It is clear from the opinion that had the structure to be built been a "bridge" under the technical definition of the Act, that is, resting on supports extending into the Hudson, such Congressional consent would not have been necessary, although from the conservationists' point of view a "bridge" would have been just as bad as the "dike." The plaintiffs had argued scenic and aesthetic as well as environmental damage, but though the court mentions these arguments in its opinion, the holding that the Corps of Engineers exceeded its authority in issuing the permit rested squarely on the finding that the structure to be built was a "dike." While the decision shows a willingness to protect environmental concerns — the court might just as well have found that the structure was not a dike — it leaves much to be desired as a substantive holding in environmental protection. It entirely fails to define the nature of the environmental interest to be protected, and, while it accomplishes the protection of these interests, it does so by relying on what is a basic irrelevancy to the environmentalists' argument. Moreover, the case again demonstrates that the private litigant suing a government agency can succeed only if he has some statutory base on which to rest his action. In this instance the action rested firmly on a dike.

The holding on standing in *Scenic Hudson* has been followed in other circuits in situations involving urban renewal in Pennsylvania, construction of highways in Washington, D.C. and North Nashville, Tennessee, as well as in many cases not involving environmental law. It is difficult to tell, however, whether liberalization of the standing rule was the result of energetic environmental litigation, or whether it resulted from a generally more relaxed attitude on the part of the courts as to who has a right to bring an action. Two recent Supreme Court cases virtually limiting the doctrine to a requirement of economic injury support the latter thesis. In any event, there is no doubt that with a favorable disposition of the issue of standing, the way lies open to more litigation by private persons and groups against government agencies.

The establishment of standing to sue leaves the field of environmental litigation in something of a quandary. In many instances environmentalists are likely to find themselves proper plaintiffs without

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a solid cause of action. First, this new kind of private litigation has thus far been limited to a rather discrete set of circumstances. In every one of the cases referred to, the purpose of the action was to stop a government agency from building a road or some other structure, or from issuing a permit for its construction. In other words, private litigation against public agencies has been successfully used in situations where all that was sought was a prohibition on some building program or on some exercise of the licensing power on the part of the agency. None of the cases involved situations that required the court to exercise continuing supervision over an agency's activity or exercise of power. In each the object was to stop a particular project that would cause damage to the environment if completed. In none did plaintiff seek to force positive governmental action to improve the environment. Indeed, cases involving plaintiffs who asserted a more general right to a pure environment have not been liberal even on the issue of standing. The Environmental Defense Fund, formed in 1967 to pursue environmental litigation, has had considerable difficulty in establishing standing in a series of suits seeking to enjoin the use of pesticides.6

Thus, litigation by private persons and groups against public agencies has worked best when conservation interests were involved, that is, when particular natural or scenic resources were to be protected against encroachments. It has worked with far less success when a more generalized environmental interest — such as the promiscuous use of pesticides — is involved. There is no indication whether such actions will work at all in the context of the urban environment where the object of the litigation, for instance, may be to compel a municipality to engage in more vigorous enforcement of its air and water pollution regulations. Not only would such an attempt raise serious issues of standing because the environmental protection agency is already charged with the specific enforcement function, but it would also involve major remedial problems. Even if standing were found, it would be difficult to phrase a decree to compel an agency to enforce the code vigorously and to enable the court to supervise such enforcement activities over a period of time. Moreover, the problem of separation of powers would arise, because in such a setting the court would have to assume administrative and supervisory functions for which it was not equipped, and for which it might be unable to assume responsibility under the constitutional scheme of powers.

V. ENVIRONMENTAL LITIGATION AND THE GROWTH OF THEORY

While environmental litigation has not as yet had any startling successes, it has stimulated an abundant growth of new legal theories. Perhaps the most thoroughly documented, and theoretically and realistically most defensible, is the thesis advanced by one of the foremost of the environmental litigators, David Sive. Mr. Sive has called attention to the fact that environmental litigation has brought about some critical evaluations of the administrative process that may eventually lead to the development of newly refined theories of judicial review. In the past the notion that a court will not disturb an administrative agency's technical judgment unless it could clearly be shown to be wrong has had the characteristics of an article of faith. Since the administrative agency was better qualified to make scientific and technical judgments, the court, which lacked this expertise, was unwilling to second-guess the specialists. However, as recent environmental litigation, particularly litigation by private persons against public agencies, has demonstrated, agencies that are technically expert at road-building and at determining the technically most suitable site for a power plant are not necessarily better equipped to make value judgments on aesthetic, scenic and conservation issues. A state highway department ought to be trusted to determine whether one route will present greater or lesser construction problems or will cost more or less than another route. It is not necessarily better equipped than the court to make the judgment that the scenic and conservation values to be served by the more expensive route are not worth the price. Judgments of this nature are not technical but evaluative, and when it comes to value judgments courts generally feel quite at home, for they have had long practice in balancing different social values in a variety of contested cases. Indeed, this is the court's special technical competency, just as technical determinations on road building are those of the highway department. It is likely, as pointed out in Sive's recent article, that environmental litigation will bring about a change in the character of judicial review.

Other theories are less convincingly substantiated. Perhaps the broadest proposed is constitutional; its basic premise is that the right to a decent environment is subsumed in the catchall provisions of the Ninth Amendment. The Ninth Amendment, however, has been used as the basis for decision in but a single concurring opinion, that of

57. Sive, supra, note 1.
Mr. Justice Goldberg, who has read into the Amendment the substantive right to use birth control devices. The Court as a whole has never relied on the Amendment as a basis for the recognition of any substantive rights.

An alternative approach is reflected in the various proposals to amend the federal and state constitutions expressly to provide for such a right. An amendment to this effect was introduced in Congress last January by Senator Gaylord Nelson and has recently been added to the New York State Constitution. It is significant, however, that neither the proposed federal amendment nor the New York State Conservation Amendment expressly grants actionable rights to private persons. While they state generally that every person is entitled to a decent environment, these amendments fail to indicate how that right is to be vindicated. There is a nice question in the State of New York whether the constitutional amendment has any effect at all on the provisions of the State Water Pollution and Air Pollution Control Acts that expressly provide that the standards set by the respective agencies, or the decisions made in particular cases may not be used as a basis for private rights or private litigation. There is at least some question whether the energies spent in putting across constitutional amendments of such uncertain reach might not be better spent on the enactment of well drafted legislation that clearly provides standing and creates viable causes of action to protect environmental interests.

One such new legislative proposal involves the imaginative use of the ancient *qui tam* actions. These actions are generally authorized in tax and customs laws and provide for a sharing of damages by private citizens who supply public authorities with information leading to the conviction of violators. The statutes that provide for such actions have been held to create a right in the citizen to bring a suit himself if the public official fails to act. Representative Reuss of Wisconsin recently filed an information with the appropriate United States Attorney under a clause in the Rivers and Harbors Act of 1899, stating that he viewed this as a good device to force federal action against polluters.

Another constitutional approach, based on the due process clause, is now being tested in the second circuit in *Citizens Committee v.*

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59. N.Y. Times, January 20, 1969, at 29; N.Y. Const. Art. XIV, § 4, as added by amendment approved by the vote of the people at the 1969 general election, popularly referred to as the “Conservation Bill of Rights.”
Volpe. The issue is whether the federal government’s exercise of eminent domain may itself be subject to constitutional limitations. Rejected by the court, the argument is that the condemnation power, traditionally exercised with the broadest discretion, is subject, under a number of prior cases, to federal constitutional limitations other than just compensation, including that of due process. Previous attempts to question the eminent domain power have not been successful; a favorable decision in this case would provide a basis for expanding constitutional development in this area. The general argument will be that air and water pollution constitutes a taking of life or property without due process of law.

Given the difficulty of obtaining a major constitutional decision, environmental lawyers have also turned to more traditional theories. In Texas Eastern Transmission Corp. v. Wildlife Preserves Inc., for example, the exercise of eminent domain was challenged by the property owner, the operator of a wildlife preserve, on the theory of prior public use. The argument was that property dedicated to the public interest could not be alienated for a second public use which was against the public interest. The owner of the wildlife preserve argued that his property, although privately owned, was dedicated to a prior public use. The court accepted this argument to the limited extent of allowing the plaintiff a preliminary trial on the issue of alternative routes, recognizing that he had a status superior to that of the ordinary private citizen, but it rejected the general application of the public use theory to a private citizen.

At the Airlie House Conference on Law and the Environment in September of 1969, it was suggested that this case could be considered as part of a broader theory applicable to environmental litigation, the trust doctrine. The basic theory is that lands held by the government are held in trust for the citizens and must not be alienated or used in a manner detrimental to the public interest. When the public trust doctrine is to be applied to private property, it is essential to establish that the state has held all lands in trust for the people since the beginning of constitutional history. It is then argued that all subsequent transfers carry an implicit obligation or covenant that the land be used in the public interest. This theory has not yet

62. Brief for appellant, Citizens Committee v. Volpe, Nos. 34010, 34057-58, 34081, 34099, 34100 (2d Cir. April 16, 1970). The court rejected the due process arguments in a few sentences, stating that plaintiffs had not established facts sufficient to support their argument or cited any authority supporting judicial intervention in such a case.
64. 48 N.J. 261, 225 A.2d 130 (1966).
been tested, and the reluctance of the court in *Texas Eastern* to extend the public use doctrine indicates that the further legal fiction of public trust may not be a particularly effective tool in environmental litigation as applied to private lands. Even with respect to public lands the theory remains essentially untested and, where it has been used, it has seldom represented the sole ground for the decision.⁶⁷

Among environmental litigators, great hopes have been expressed that the National Environmental Policy Act of 1969 will provide a broad basis for environmental litigation. The Act does have some very fine general language, stating the national policy to preserve and protect the environment. Moreover, section 102 of the Act requires every agency “. . . to identify and develop methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations,” and, moreover, requires every federal agency to “include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment,” a detailed statement by the responsible official on “the environmental effects of the proposed action and any alternative to it.”⁶⁸ Environmental lawyers have suggested that this provision provides a sound basis for judicial review of agency actions in suits brought by private litigants.⁶⁹ However, the legislative history of the Environmental Policy Act of 1969 may possibly provide a countervailing argument; as first introduced, a section in the bill would have provided an express “fundamental and inalienable right” to private individuals to enjoy a healthful environment but this language was watered down in the course of passage to read that “Congress recognizes that each person should enjoy” such an environment.⁷⁰ Moreover, while the so-called “Section 102 Statements” will undoubtedly be available to private litigators under the Federal Freedom of Information Act,⁷¹ it is not entirely clear whether such statements will necessarily aid the cause of private litigation because, at least on their face, section 102 statements will certainly allege that environmental values have been considered in reaching decisions. One other possible weakness is the fact that there is no real sanction to compel agencies to file such statements.

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67. The *Illinois Central* case represents the only Supreme Court decision under the doctrine.
CONCLUSION

Environmental litigation in the sense of action by private individuals or organizations against public agencies to compel protection of the environment is very new and as yet not fully developed. It is clear that its future useful development needs substantial legislative assistance not only on the procedural side but primarily in the creation and definition of new causes of action. Environmental litigation undoubtedly will continue to have a part to play in a coordinated effort to use all of the instrumentalities of law for the protection of the environment. It does not serve the law or the environment well, however, to overstate and overstress the role of environmental litigation. Its utility in the conservation field, in preventing harmful intrusions of the works of man upon the landscape has been demonstrated. Whether or not such litigation will serve the need of the urban environmentalist seeking to compel government action against air and water pollution hazards over a continuing period of time remains to be demonstrated; there is some doubt that it can be successful. In any event, environmental litigation is a useful political device to focus attention on environmental problems in a dramatic fashion. It may show the need and pave the way for adequate legislation in the field. While there will thus always be a role for private litigation as a stimulus to official action, the protection of the environment must ultimately rest on imaginative government programs, based on sound legislation adequately supported by resources — men and money — to do the job.