

# Environmental Degradation And Legal Action

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There is not much point in discussing public legal action against air or water polluters, for the attorney general and various federal and state agencies are moved to act, if at all, by political considerations. If an aroused citizenry brings pressure upon these public bodies, then the bodies will act or make a semblance of acting. But an initial flurry of citizen concern does nothing to insure the integrity of the agency over a period of years. Most regulatory agencies were established in the midst of public scandals, but as time went on they became almost clients of the industries they were supposed to regulate. The process is an understandable one: members of a government agency are in daily contact with the businessmen whom they should watch over, and eventually the regulators adopt the perspectives and attitudes of those businessmen. Fidelity to an earlier enacted statute or to a vague concept of "public trust" is hardly sufficient to keep a regulatory commission on its toes.

I shall address myself instead to private legal initiatives. There is a deep tradition in this country that the courts exist to redress imbalances that may remain after the political branches of the government have had their say and played their part. Surely today the accelerating pace of environmental degradation on all fronts betokens an abiding failure on the part of the political branches of government. Thus citizens naturally feel that they ought to be able to turn to the courts for help. The courts are a penultimate resort; after that only demonstrations and riots can possibly work, but it is unlikely that the

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*"Most regulatory agencies were established in the midst of public scandals, but as time went on they became almost clients of the industries they were supposed to regulate." In that case, who will regulate the regulators? Professor D'Amato, a member of the faculty of the Northwestern University School of Law, examines the role of private initiatives in halting pollution. He has written on the ecological effects of nuclear testing by France in the South Pacific and on the effects of chemical weapons in Vietnam.*

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majority will ever be aroused to go that far. (Note, however, the demonstrations and activism of the previously staid Santa Barbara citizens after the oil spills.)

The basic difficulty with a lawsuit against an air or water polluter, or a proposed new airport or housing development or ski resort in the midst of a wilderness area, is that such a suit does not fit the accustomed court idea of what a lawsuit should be. Private law in this country, and earlier in England, developed its manifold rules and procedures in cases and controversies where one side had allegedly harmed another. This harm could be redressed by a judicial judgment ordering the defendant to pay a sum of money to the plaintiff. The concept of an injunction grew out of the basically private harm situation. The defendant here would be ordered to do something, or desist from doing something, but whatever he did would redound to the benefit of the plaintiff in a way that the mere

payment of money could not. Again, injunctions tended to be private matters, such as ceasing to trespass upon the plaintiff's land or desisting from an unfair method of business competition.

Historically, individual plaintiffs have sued to redress private injuries. The law has known some exceptions, such as limited class actions to abate a public nuisance, or shareholders' derivative suits. But by and large public nuisances, or corporation frauds, have been the province of the attorney general suing in behalf of the public. Legislation making such activities criminal in itself takes effective control out of the hands of the public, since no private person can bring a criminal action against any defendant.

## IF PLAINTIFFS LOSE

In theory, courts would not have to stretch too far to allow lawsuits brought by a number of people who claim to be affected adversely by the activities of an air or water polluter. There would be some problems inherent in the fact that if the plaintiffs lost, other members of the public later would be barred from suing again on the same grounds. The latter might object to being estopped in this manner. But such problems are inherent in any class action, and can be dealt with by publicity of the lawsuit in newspapers and in legal notices columns.

But in practice courts have been very reluctant to allow what it is now becoming fashionable to call "public interest litigation." The doctrine of "standing" is invoked by the courts—prodded, of course, by defendants—to bar the lawsuit before the merits of

the case are ever allowed to be heard. Proper "standing" is, in the usual case, an important safeguard for courts. To invoke judicial authority, a litigant must have been hurt in some way. It would make no sense, in the extreme, to allow the reader of a newspaper in New York to sue the Union Oil Company for the oil spill off Santa Barbara simply because the New Yorker's sympathy was engaged for the Santa Barbara citizens and he felt that he should do something about it. In a somewhat less extreme, but still easy example, courts do not allow a citizen to sue the President to cease and desist from engaging in war in Vietnam. Even though the citizen may claim that he is being "hurt" by the taxes extracted from him by a government to support what the citizen claims is an illegal war, courts nevertheless uniformly hold that the citizen lacks "standing to sue." The reason given is that his particular "harm" is suffered equally by every one else, and thus his "case" is actually a public matter, a political question. In furtherance of this denial of standing, courts often say that the citizen's harm is not distinguishable from that of the public generally, and therefore he lacks standing.

#### COURT'S OPINION

The emphasis upon a distinguishable harm suffered specifically by a given plaintiff has taken a bad twist in cases involving environmental degradation. Many courts have recently held that a group of private citizens suing a company that contributes heavily to community air pollution lack standing to sue because the harm they are suffering in the form of polluted air is not distinguishable from the harm suffered generally by the public. In other words, the courts have borrowed from the concept of "standing" as enunciated principally by the U.S. Supreme Court in taxpayer cases where one taxpayer is no different from two hundred million other citizens, and applied the jurisdictional bar to a plain-

tiff or group of plaintiffs complaining about air pollution, when it is obvious that the air pollution does not equally affect two hundred million other citizens in the same manner. To some extent this may be sheer naivité on the part of courts: Assuming that the "air" is "polluted" all over equally, they find no particular group of plaintiffs in any distinguishable position with respect to it. Of course, any scientist would be able to testify that the air is not polluted uniformly, and that indeed some citizens may have a distinguishable case. But these lawsuits do not get to the trial stage where there is testimony; they are barred at the outset on the basis simply of the pleadings.

#### A MATTER OF STRATEGY

The fact is that rational argument as to what constitutes "standing" is only the top of the iceberg in the game that lawyers play in influencing courts. Clearly the "public interest" type of lawsuit now assuming some prominence in the environment area falls somewhere between a purely private lawsuit by a plaintiff claiming that a defendant has harmed him, and a general lawsuit against the government by a taxpayer who does not like a particular policy of that government. In the former case there clearly is standing; in the latter there is not. A judgmental question exists as to the middle ground.

Convincing a court to accept a public-interest lawsuit in the environment area is mostly a matter of strategy and of education. As the public becomes more concerned with the fundamental threat to human existence posed by the continuing degradation of the environment that sustains us, it will follow that judges, reading the same newspapers and magazines, will also begin to want to do something about the problem. Judicial sympathy will go a long way in the determination of whether "standing" is a barrier to a given lawsuit. Public education, therefore, will have a direct

effect upon the law as well as upon the public. As for strategy, lawyers must do everything they can to make their case appear to be one that is at the private end of the spectrum between a general taxpayer suit and a traditional "he hit me" tort case.

One type of strategy is to emphasize the threat to property values in a case against an environmental pollutor. Courts are more inclined to find that a plaintiff has standing if his land values are threatened than if he complains that his health, physical or mental, is impaired. This tendency may only be slightly due to the fact that courts are more "at home" with questions of wealth rather than questions of well-being. A more important reason for the tendency is that courts have been historically convinced that land is unique (a major exception to the law of damages in contracts in early Anglo-Saxon law was the requirement of "specific performance" of contracts for the sale of real estate, on the basis that money alone cannot make up for a unique parcel of land). The threat to land and property values seems to add an element of specificity to a lawsuit and thus combats the standing barrier. Indeed, in a small but growing number of cases over the past couple of years, courts have allowed standing to litigants alleging a threat to the "scenic values" of their property posed by the intended construction of manufacturing facilities or electric power plants in their vicinity. The "scenic value" of a parcel of land may seem to be a rather intangible thing, but courts are quite alert to it. That they may be less alert to someone dying of emphysema from air pollution is simply a datum that must be taken into account by anyone planning a public-interest lawsuit.

#### THE ZION SUIT

A second strategy is the addition of an established organization to the group of plaintiffs. An organization of citizens has

a quasi-public aspect to it, and thus would seem to represent part of the public interest. If the "public" theoretically has standing, then part of the public, represented by an organization, does also. It is apparently better to get an organization that pre-exists the problem; a citizens' group against air pollution (such as GASP) would strike a court as an ad hoc group and thus not representative of the public at large.

An interesting case in the pleadings stage in the Circuit Court of Cook County, Illinois (Johnston vs. Commonwealth Edison Company, No. 69 L 13755) joins riparian property owners along Lake Michigan, the United Automobile Workers' Union (UAW) and several residents of communities bordering on Lake Michigan, as plaintiffs. They are suing to enjoin the construction of the Zion nuclear power plants north of Chicago by Commonwealth Edison Co., asking the court to require Edison to change the construction so that heated and radioactive waters will not be discharged into the lake. The plaintiffs allege substantial thermal pollution of the lake from the 2.16 billion gallons per day of water heated 20° F higher than lake water. They also allege that radioactive tritium will be discharged into the lake. By the number and types of plaintiffs involved, there is a good chance that the "standing" barrier will be surmounted in this case.

If the standing barrier is surmounted, there are numerous legal obstacles remaining. It would be unproductive to go into the numerous problems here, for different ones exist in different situations. In the Lake Michigan case, just to give an example, there is a substantial question whether one can sue a utility which alleges that it has complied with the standards promulgated by the Atomic Energy Commission. As a federal agency, the AEC might be held by a court to pre-empt state or local standards,

though the statute setting up the AEC is quite unclear about this point (it talks about cooperation between federal and state standards). There are numerous evidentiary difficulties with the case: Is tritiated water harmful to persons in the minute quantities to be injected into the lake? Will there come a point when the amount in the lake is harmful to health? Will such a point depend on how many other nuclear power plants are constructed on the lake? What kinds of lake currents are there that will affect the ecology of the lake with respect to the thermal pollution as well as radioactive pollution? These and many other questions would suggest a long and expensive suit, if the case gets to the trial stage.

#### REPELLING INVADERS

An expensive trial usually rounds to the benefit of the utility (or other defendant). It has great resources to conduct legal battles, whereas plaintiffs typically are loath to contribute much to a public-interest lawsuit that will benefit the non-contributors as much as it will help themselves. On the other hand, a lengthy trial tends to be in favor of plaintiffs. Here, perhaps, is the final and most important aspect of private legal initiatives in the environment area. Up to now, new industries, airports and power plants have been eminently welcome to communities which look upon them as a source of jobs, revenue and growth.

Companies, in turn, like to go into areas in which they are welcome. When a group of people in a given community band together and institute lawsuits against a proposed invader of their environment, the corporate invader looks elsewhere for his location. Of course, he may only look, while remaining to fight the battle in the courts. But as Herman Kahn pointed out in the international context, "legal harassment" is usually quite an effective weapon. Although the plaintiffs might lose, if they can get their day in court, the day may stretch into weeks, months and years; by

then, the defendant may simply get up and go elsewhere.

However, we must not conclude that, by chasing the defendant away, the problem will be solved. Eventually some defendants must move into a particular area because the public needs them. This is particularly true of electric power plants. Electricity in this country is approaching a critical shortage (although the electric utilities continue to urge the public via advertising to heat their homes electrically and to install air conditioning). The rising resentment against utilities for burning oil and coal thus contributing to air pollution will surely be used by the utilities as an argument in favor of going nuclear. The new nuclear power plants will be sold to the public as "clean" with respect to the air. The tremendous hazards of radioactive pollution will be downgraded, particularly because such pollution is not visible. But courts will tend to be persuaded that the public must have electricity, and that nuclear power stations should not be blocked by judicial action since there is no reasonable alternative. It thus becomes an important argument for lawyers who want ultimately to be successful in court in this type of case to suggest at some point in the proceedings a reasonable alternative to nuclear electric power. Here they will need great help from scientists and technicians. Ideas such as geothermal steam power, geo-thermal hot water and sea-tidal power must be developed, and scientists should testify as to the possibilities of solar-thermal power as well.

Ultimately, judges and juries are very practical; they will hesitate to rule against something the public wants unless there is a reasonable alternative. Law and science can no less be divorced in the development of such alternatives than they can be separated in the laborious course of testimony about the ecological and environmental effects of a given corporate defendant's activities.