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# Recent Legal Developments in Environmental Defense

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# RECENT LEGAL DEVELOPMENTS IN ENVIRONMENTAL DEFENSE

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## I. INTRODUCTION

IN 1864, George Perkins Marsh, a Vermont lawyer, was the first to propose the modern concept of ecology.[1] Thus, ecology, or the study of the interrelationships between organisms and environment, has been a recognized scientific discipline for more than one hundred years. Yet when we look at our nation's polluted air and water, eroded soil, and endangered wildlife, we are forced to wonder when man will begin to appreciate the need to apply this science to the world in which he lives.

One hundred years ago Marsh expressed the thesis that man was trapped in his environment—a trap that would ultimately lead to the destruction of civilization.[2] Today, as we spew out 350 million tons of residential and industrial waste, 142 million tons of toxic atmospheric waste, and a billion tons of mining waste annually, his warning is just beginning to cause serious concern. Such a noted scientist as Clarence C. Gordon, of the University of Montana, recently stated that the "nation just hasn't the time to wait to correct these environmental insults.[3] Echoing Marsh's words Gordon warned that corporate shortsightedness is "pushing mankind to the brink of environmental doomsday."[4]

With these two warnings as a guide, and their own vision compelling them to action, lawyers have taken on the task of saving our environment. Aware of the limitations of educational conservation and the legislative process in preventing the destruction of our resources, these innovative attorneys have started a wave of imaginative legal action that is sweeping the country. It is the hope of these environmental lawyers that their activities will mobilize attention necessary to help our lawmakers take the positive, almost revolutionary, and immediate legislative action now needed.

The recent attempts by the legal community to protect the ecological integrity of our nation and some of the legal methods that are developing to help facilitate this movement should be of interest to lawyers.

Before considering the role of the lawyer in defending our environment, I

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* United States House of Representatives, 39th District of New York, 1964-_____. I would like to thank the participants in the first Conference on Law and the Environment for both their insight into this national tragedy and also their most incisive designs for arresting it. The Conference, the joint project of the Conservation Foundation of Washington, D.C., and the Conservation Research Foundation of New London, Connecticut, met recently at Airlie House in Warrenton, Virginia in an attempt to direct attention to the role of legal and legislative systems in fighting environmental deterioration.

1. Russell, *The Vermont Prophet: George Perkins Marsh*, HORIZON, Summer, 1968, at 16.
2. *Id.*
3. *Can Law Reclaim Man's Environment?*, TRIAL, August/September, 1969, at 10.
4. *Id.*

feel compelled to state the obvious: legislatures have the superior power to control the ever-increasing deterioration of our environment and its threats to human health. These bodies are empowered to make laws and proscribe the area of permissible activity for the citizens they represent. If certain individual or group activities pose a threat to the "general welfare," then the governing body is obligated to pass laws forbidding such future activity. Although I am quick to admit that it is most difficult to determine the exact role the government should play in protecting the environment, I am also quick to admit that whatever it is doing today is simply not enough. Pollution, in all forms, remains the number one threat to the prepetuation of humanity. Aware of this handicap, the environmental lawyer must assume the double burden of rejuvenating his conventional legal tools, such as nuisance and injunction in tort, and also devise new legal remedies in the field of environmental management.

This latter burden is the area in which the legal profession will most likely achieve its greatest successes. According to Victor Vannacone, a participant in the Law and Environment Conference, "every piece of enlightened social legislation in the past 50 or 60 years has been preceded by a history of litigation. It's the highest use of the courtroom—even if we lose—to focus public attention and disseminate information about intolerable conditions."[5] However, realizing that this process, under present conditions, is both slow and unproductive, and also recognizing the need for immediate remedial action, we must begin at once to sharpen our classical legal tools and develop new ones to make these legal manifestations of concern more effective. As public opinion is mobilized, we can begin to use these new tools to restructure our existing laws to protect our environment in much the same way that the body of civil rights law has developed during the past twenty years.

## II. Problems Confronting the Environmental Lawyer

### A. *Establishing Standing to Sue*

The problems confronting the "environmental" lawyer are formidable, but the fight has begun and the few successes in the field have been both satisfying and encouraging. Probably the greatest single obstacle for the attorney in environmental litigation is the difficulty of establishing "standing to sue." Traditionally, the courts in this country have required suit by a "proper" plaintiff before they will sit in judgment of a controversy. This has generally meant that the plaintiff must be seeking to protect a right granted to him by law—a personal right of sufficient interest to allow for a final and binding determination of the case. Obviously, in environmental litigation, where the plaintiff seeks to protect a non-economic interest in the name of the general public, these traditional characteristics of standing are not present. However, because of the growing recognition of the inherent right to a healthy environment, many states now

5. Conservation Foundation Newsletter, September 30, 1969.

allow what Professor Louis L. Jaffe calls a "public" action. After an intense study of the procedures of our state courts, Jaffe concluded that 29 states now allow any citizen to use mandamus to test official action, and that possibly 36 states allow a taxpayer to enjoin state action which he claims to be illegal and which involves the expenditure of funds even though the effect of such expenditures is minimal.[6] The impediments to court action by citizens seeking to protect an interest belonging to the public are becoming less and less imposing.

The procedural developments taking place in the federal courts are also promising. *Scenic Hudson Preservation Conference v. FPC*[7] is probably the most important federal case thus far. Conservationists representing citizens along the Hudson River intervened in an administrative proceeding to prevent Consolidated Edison of New York from obtaining a permit to erect a power plant on Storm King Mountain. The Federal Power Commission argued on appeal that the conservationists did not have standing to obtain judicial review because of their inability to claim economic injury.[8] The court held that Scenic Hudson was an aggrieved party and could bring the action. Scenic Hudson had claimed that the Commission had been remiss in its duty to consider the impact of the hydro-electric plant on the topography of the area. The court stated "the Constitution does not require that an 'aggrieved' or 'adversely affected' party have a personal economic interest"[9] to bring the action. The court reasoned that "[I]n order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties . . . ."[10] As a result of this decision non-economic interests such as environmental impact can be used to establish standing.

A year after the *Scenic Hudson* case, the Court of Appeals for the District of Columbia decided *Office of Communication of the United Church of Christ v. Federal Communications Commission.*[11] The court, aware of the breakthroughs initiated in the Second Circuit the year before, held that the petitioner, the United Church of Christ, had standing to bring a lawsuit even though its interest was not economic and it had not sustained any injury. At issue in the case was the right of the United Church of Christ to block the renewal of a broadcasting license intended for a Mississippi television station. Claiming that they represented the interests of the television viewers, the church requested an opportunity to participate in the license renewal proceeding before the Federal Communications Commission. Reversing the Commission's refusal to allow the church to participate, the court stated:

6. *Id.*
7. 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 971 (1966).
8. *Id.* at 615.
9. *Id.*
10. *Id.* at 616.
11. 359 F.2d 994 (D.C. Cir. 1966).

> The theory that the Commission can always effectively represent the listener interest in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evaluation of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.[12]

The court stated that the "Commission should be accorded broad discretion . . . for such public participation . . ."[13] to insure that the interests of the public are adequately protected.

Both the *Scenic Hudson* and the *United Church of Christ* decisions substantiate Jaffe's theory concerning the emergence of "public actions." Recent cases further substantiate this belief. In *Road Review League v. Boyd*,[14] decided in the Southern District of New York, the court, expanding upon *Scenic Hudson*, allowed as proper plaintiffs various groups of concerned citizens who were unhappy with the Federal Bureau of Roads' proposed location of an interstate highway. Even though there was no statute which permitted intervention by "aggrieved" parties, as there was in *Scenic Highway*, the court still held that the parties could intervene. An avenue for judicial review of official conduct which does not conform to prescribed statutory standards was opened up to any representative persons.

Another case that deserves mention is *Parker v. United States*.[15] Again, the issue of standing was resolved in favor of the concerned public. The case, which is presently pending before the Federal District Court of Colorado, involves a decision of the Federal Forestry Service to sell timber which is located directly adjacent to a proposed wilderness area. Groups of citizens sought to block the sale of the timber pending the final determination of the Executive concerning the proposed preserves. They have argued that it would be premature to sell this timber before the Department of Agriculture has had an opportunity to decide whether or not to include these peripheral woodlands in the wilderness area. The court summarily ruled against a motion to dismiss which included an allegation of lack of standing.

There has been no final decision in the case to date. However, because of the unobtrusive manner in which the court disposed of the standing question, it has become the latest in a growing number of federal decisions which promise to allow greater access to our district courts by concerned citizens seeking to participate in the protection of the interests of the general public. As the

12. *Id.* at 1003, 1004.
13. *Id.* at 1005, 1006.
14. 270 F. Supp. 650 (1967).
15. Civil No. 1368 (D. Colo., filed April 4, 1969).

traditional limitations of standing are removed, appeals to the courts to protect the integrity of our environment will increase.

### B. *Carrying and Sustaining the Burden of Proof*

Standing is not the only obstacle confronting the environmental attorney. There remain further hurdles that must be confronted and negotiated before success can be achieved. Most important, as plaintiffs, the conservationists or environmentalists must carry the burden of proof in a suit. The courts continue to place the burden of persuasion on the aggrieved person to demonstrate why the courts should act to remedy a situation. This is no small task in environmental litigation, because the petitioners must show more than mere speculative or contingent injury. They must show real and demonstrable harm resulting from the acts of the defendent. Considering the cumulative effects of much of environmental injury (the classic example being air pollution), this is an almost impossible burden.

Not to appear overly pessimistic, contemporary legal and legislative trends are slowly beginning to temper the burden of proof requirements. This shift has been the result of the economic realities of the twentieth century. Strict liability, based solely upon economic superiority, is slowly emerging to replace the concept of fault liability. Workmen's Compensation is the classic example of this progressive social policy.

Another reason why the environmental lawyer must work harder with the burden of proof is that courts may, when so motivated, subtly shift the burden from one party to another depending upon the interest they wish to foster. The ultimate effect of this process, especially in areas as complex as environmental litigation, is to establish new policies and make new laws without undertaking the difficult task of legislating the desired result.

Commenting that the rules governing burden of proof are in a period of change, Professor James E. Krier has noted the tendency of the judiciary to make full use of the flexibility of the rules governing burden to show favor and perpetuate "pet" interests. Krier has shown how the rules vary depending on the allegations and public policy involved.[16] Examples of such variations can be found in the distinctive requirements that apply to the rules governing the burden of proof in fraud. A person charging fraud must prove the fraud with clear and convincing evidence. Other examples of the differing burden requirements include the presumption of legitimacy of state action and the need to prove freedom from contributory negligence. Sensing a judicial desire to use the burden rules to keep courts abreast of the ever-changing political and social trends, Krier believes that the "age of ecology" is upon us and that courts are in a strategic position, aided by their ability to adapt the burden of proof rules, to respond to the needs of our deteriorating environment.[17]

16. J. Krier, Environmental Litigation and the Burden of Proof: Some Comments and Suggestions (1969).
17. *Id.*

Both *Scenic Hudson* and *United Church of Christ* demonstrate how the burden of proof rules can be used to implement the goals of environmentalists. In *Scenic Hudson*, the court placed the burden of demonstrating adherence to the mandates of the empowering legislation upon the Federal Power Commission.[18] The district court followed this approach in the second *Church of Christ* decision.[19] Both of these cases, which involve Federal agencies, suggest that concerned citizens should not be and will not be required to prove noncompliance on the part of the agency.

*Texas East Transp. Corp. v. Wildlife Preservation, Inc.*,[20] a New Jersey case, can even better illustrate how the adaptation of burden of proof rules can preserve environmental integrity. The controversy arose when Texas Eastern National Gas Company, a public utility with the power of eminent domain, attempted to condemn a right of way through Troy Meadows Preserve in New Jersey. Counsel for the Preserve argued that the right of way upon which the gas company had proposed the installation of a pipeline would cause irreparable harm to the Preserve, far outweighing the harm which would result were the gas company forced to select an alternate route. The Supreme Court of New Jersey reversed the trial court's decision that the Preserve's position did not constitute a valid defense as a matter of law. The court held that the Preserve had established that the proposed pipeline might cause serious harm to the ecology of the area and that "even a private property owner may present the issue of arbitrariness of a taking."[21] In reversing, the court stated a new reduced burden of proof rule:

> [D]efendant's devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection . . . . The public service being rendered must be considered and it cannot be evaluated adequately only in dollars and cents. . . . [T]he *quantum* of proof required of this defendant to show arbitrariness against it should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses.[22]

Accordingly, the burden placed upon the Preserve only required that it "introduce reasonable proof of (1) the serious damage claimed to result from installation of the pipeline on the path chosen by plaintiff, and (2) an apparently reasonably available alternate route or routes, which will avoid the serious damage referred to, [and then] the burden of going forward with the evidence will shift to [the gas company]."[23]

Even though the gas company eventually won the case, the court fashioned an easier burden of proof rule for the Preserve. It required the gas company

18. 354 F.2d 608 (2d Cir. 1965).
19. 359 F.2d 994 (D.C. Cir. 1966).
20. 48 N.J. 261, 225 A.2d 130 (Sup. Ct. 1966).
21. *Id.* at 273, 225 A.2d at 137.
22. *Id.* (emphasis supplied) (citations omitted).
23. *Id.* at 274, 225 A.2d at 138.

to develop, through the help of expert testimony, a public record which would demonstrate that it had closely studied its proposals, including the impact its plan had upon the environment. It then had to show that after balancing the hard facts it had logically decided upon the disputed route. As Krier pointed out in his review of the decision, the court had through its public airing both forced the would-be enterpriser to be more conscientious in its decision-making process, and also developed a record from which the court could better exercise its lawmaking role.[24] The case is a landmark because it clearly points out how the courts can use discretion to fashion procedural rules, here burden of proof rules, to protect the values of a favored class of litigants.

The natural extension of this process of adapting the burden of proof rules would involve the use of evidence as in the doctrine of res ipsa loquitur—let the facts speak for themselves—in environmental litigation. Although this doctrine could be used only after the alleged damage had occurred, it could be applied in much the same way as the process of shifting the burden of proof has been applied. Situated between fault liability and strict liability, the use of res ipsa loquitur would reduce the plaintiff's burden of proof after he establishes the simple prerequisites of the doctrine.[25]

In situations where ultra-hazardous activities are involved, a form of strict liability could be fashioned to insure that prospective polluters take environmental considerations into account before formalizing their course of action. A theory of strict liability would force the polluter to pay or internalize the cost of the damage caused in situations where the costs of their acts to society are all but obvious. This procedure has been used in other areas of the law where social policy has elevated an issue into the arena of special public concern.[26] Aware of this, the environmental attorney should begin at once to accelerate his offensive against environmental mismanagement. Such an offensive would provide the atmosphere in which courts could freely fashion potent remedies like strict liability which are necessary if we are to secure a healthy environment.

Lawyers may, however, wish to follow a course that offers more hope for immediate success. Simply reducing the initial burden to a showing of actual environmental damage and then shifting the burden to the defendant to show the use of the highest degree of care as was done in the *Texas Eastern* case[27] would effectively encourage responsibility on the part of those whose activities affect our environment.

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24. *See* note 16 *supra.*

25. This doctrine was used in Reynolds v. Yturbide, 258 F.2d 321 (9th Cir. 1958). Res ipsa loquitur applies "when injury is caused by an instrumentality which is under the control and management of the defendant, and when the accident is such as in the ordinary course of events does not happen if those who have the management use ordinary care." *Id.* at 329, *quoting* Ritchie v. Thomas, 190 Oregon 95, 105, 224 P.2d 543, 555 (Sup. Ct. 1905).

26. For example, strict liability applies in workmen's compensation and products liability.

27. 48 N.J. 261, 225 A.2d 130 (Sup. Ct. 1966).

### C. *Selecting a Legal Theory*

Even if the environmental attorney were to gain the advantage of a reduced burden of proof, he would still be confronted with alternative methods of remedying the alleged ecological damage. One such alternative, a holdover from the common law and probably the most commonly used device for controlling land use, is the suit to abate a nuisance. In such an action, the plaintiff seeks to enjoin the nuisance or in some special cases, seeks an ordinary money judgment. A point to be remembered about nuisance, however, is that an individual can seek an injunction to abate a nuisance which is destroying the use of *his* property, but he cannot seek an injunction to abate a nuisance as a member of the public in general.[28] This is the distinction between public and private nuisance. In the area of public nuisance, the private citizen simply does not have standing to bring the action. Therefore, to utilize this legal device effectively, the conservationists, with the aid of the environmental lawyer, must urge all those individuals most seriously affected by the alleged nuisance to request an injunction. This procedure has become more attractive since 1963, when the Supreme Court decided *NAACP v. Button*,[29] which allows persons seeking an injunction in such actions to receive assistance to finance the lawsuit as long as the subsidizer does not stand to benefit from a determination of the suit.

A further reason for the popularity of the nuisance suit has been the development and availability of class actions. Such actions provide a method of redress for all those people similarly situated who seek identical relief as a result of the alleged wrong. However, because class actions are in the nature of a private nuisance suit, their use in the field of environmental litigation is probably limited. The more promising area of development remains the representative actions formulated in the *Scenic Hudson* case which could be expanded to allow for more responsive standing rules in the area of nuisance.

Professor C. F. Roberts is not as optimistic about the future of the nuisance action in environmental litigation.[30] Professor Roberts looks upon the nuisance action as a form of zoning which only looks to balance the equities after the fact. He has used the case of *Madison v. Ducktown Sulphur, Copper and Iron Company*[31] to illustrate his point. The plaintiffs in that action, a group of farmers living in a valley adjacent to the mining company, sought an injunction to stop the company from polluting the air with sulphur dioxide, a by-product of their mining operation. The court, denying injunctive relief, allowed the pollution to continue, stating that "the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the

28. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (3d ed. 1964) 593, 594.
29. 371 U.S. 415 (1963).
30. Address, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, Conference on Law and the Environment, 1969.
31. 113 Tenn. 331, 83 S.W. 658 (Sup. Ct. 1904).

largest measure of liberty possible under the circumstances."[32] Presumably, the court felt that liberty was the freedom to pollute freely as long as the polluter was willing to pay for the immediate damage caused.

Roberts sees this result as the tacit approval of the private exercise of the power of eminent domain.[33] Professor Roberts cited two other cases where the courts allowed corporate defendants to continue polluting and rendering the area uninhabitable.[34] According to Roberts, these decisions amounted to the private condemnation of another person's property.[35] Although the nuisance action did attempt to balance the equities by allowing the injured party to recoup his financial losses, it did not attempt to enjoin activities that had caused the damage, nor did it consider the impact of the alleged damage on a broader ecological basis.

Beyond the action to enjoin nuisances, there are other legal methods by which the environmental lawyer can protect and defend the ecology. One such device, as well known to the law as nuisance, is the trust theory. The trust theory as applied to land actions was first stated by the Supreme Court in 1892 in *Illinois Central Railroad v. Illinois*.[36] This case ruled that public or private lands are held in trust for the people of the state. Although this landmark decision applied to land situated beneath navigable waters, it would be quite logical to argue that such things as clean air and clean water are equally subject to such a trust. As Bernard Cohen has noted: "Do not all citizens have a property right in public lands, submerged or otherwise? Do we not have a property right in clean air and clean water? Is there a civil right or unenumerated right to eat uncontaminated food?"[37] What Cohen suggests is that the state and federal governments do have an affirmative duty to protect our environment which they hold in trust, and that an expanded trust theory is a useful weapon in the war against environmental deterioration.

One final area that deserves discussion because of its potential as a technique for improving our environment uses the United States Constitution for assistance. Provoking arguments can be offered for the use of the ninth amendment as a means of curtailing the deterioration of our environment. It provides that the rights enumerated in the Constitution "shall not be construed to deny or disparage others retained by the people." It may be argued that the right to a healthy environment is an inherent right with which all citizens are endowed. Roberts has taken this position and believes that all that is needed is a "ringing decision to ratify this existential fact of life."[38] A point worth ponder-

32. *Id.* at 339, 83 S.W. at 667.
33. *See* note 30 *supra.*
34. Riblitt v. Spokane-Portland Cement Co., 41 Wash. 2d 249, 248 P.2d 380 (Sup. Ct. 1952); Powell v. Superior Portland Cement Inc., 15 Wash. 2d, 129 P.2d 536 (Sup. Ct. 1942).
35. *See* note 30 *supra.*
36. 146 U.S. 387 (1892).
37. *Legal Defense of Environmental Rights*, TRIAL, August/September 1969, at 27.
38. *See* note 30 *supra.*

ing at this time is the Supreme Court's use of the ninth amendment in *Griswold v. Connecticut*.[39] Roberts contends that if the ninth amendment gives even minimal support to the right to receive birth control information, surely it should sustain the right to live to enjoy the fruits of that information.[40]

## III. Conclusion

I have attempted to outline the methods available within the present framework of our legal system for redressing the wrongs that have been perpetrated upon the environment. Accepting the fact that legislatures are not responding to the crisis as rapidly as they should, I have described in general terms a few of the developments in our courts that show some responsiveness to our environmental needs. Although we prefer to look to the decision-making processes of our legislatures as a measure of the needs of the general public, there are times when we seek speed in our quest for change. It is during these times that the legislative process does not respond as rapidly as it should. I have previously mentioned how it was the courts that formalized our recognition that racism was illegal. Speed was of the essence when the Court decided *Brown v. Board of Education* and speed is of the essence now.

It is during these times of crisis that the legal profession must respond with imagination if we hope to live to see the fruits of our technological successes. In doing so, lawyers can serve all of us who are seriously concerned about the destruction of our environment.

39. 381 U.S. 479 (1964).

40. Others who look to the Constitution for assistance in their fight to preserve the environment are not as optimistic as Roberts. Concerned that environmental doom lurks around the corner, they call for a revision of the Constitution to bring it up to date with the scientific and technological realities of the day. One such advocate is W. H. Ferry, former Vice-President of the Center of Democratic Institutions, Santa Barbara, California. He favors revision "because [he] believes it is the only non-catastrophic way of fixing public attention on the radical change in our circumstances." (Conservation Foundation Newsletter, September 30, 1969.) According to Ferry the Constitution must be revised to restore the concept of accountability as a factor in the decision making process. Although men like Ferry who call for a revision see the difficulty of limiting the number of cars a person may possess or proscribing the area of accepted technological activity they see in a revision of the Constitution the opportunity for fixing the responsibility for the debilitating effects of technology on the environment. They would force technology to protect the environment by limiting the speed of its development, while at the same time allowing mankind the opportunity to live and enjoy the fruits of our past successes.