Environmental Law--Air Pollution Abatement--A Supplemental Damage Remedy under the Clean Air Act

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A Supplemental Damage Remedy Under the Clean Air Act

Air pollution adversely affects man and his environment in many ways. It soils his home and interferes with the growth of plants and shrubs. It diminishes the value of his agricultural products. It obscures his view and adds unpleasant smells to his environment. Most important it endangers his health.¹

I. INTRODUCTION

Air pollution has been a part of man's environment since primitive cave dwellers first built a fire. Only in the past decade or two, however, has man awakened to its menace. Indeed, air pollution has become so much a part of the American lifestyle that young children in many of our large cities have never experienced the sensation of breathing air free of industrial odors. Rarely have these children viewed the sun unobscured by a pall of smog.² Many urban dwellers have become so inured to air pollution that it is accepted without question. Congestion and burning eyes are resignedly viewed as inevitable by-products of an industrial age.

Air pollution affects mankind in a multitude of ways. First and foremost, it damages health. Persons living in urban areas show twice as high an incidence of lung cancer as those in non-urban areas.³ The death rate from emphysema has increased by over five hundred percent during the past fifteen years, with the major increases coming in heavily polluted urban centers.⁴ Moreover, various other disorders are increasingly being linked to air pollution.⁵ It has been estimated that 110,000 deaths occur in the United States each year that are at least partially attributable to air pollution.⁶

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² It has been estimated that 40% of Chicago's sunlight and 25% of New York's is cut off by air pollution. Pollution, LIFE, Feb. 7, 1969, at 38.
³ The lungs of residents of heavily polluted urban areas may be affected as extensively as those of a two package per day cigarette smoker. Nailing Lung Cancer to Air Pollution, Sci. News, Sept. 16, 1972, at 183.
⁴ Emphysema is now the fastest growing cause of death in the United States. Briehl, Air Pollution, AMERICA, May 17, 1969, at 581.
⁵ Certain pollutants are thought to cause or aggravate such disorders as skin cancer, dermatitis, hyperpigmentation, and acne. Nailing Lung Cancer to Air Pollution, supra note 3.
⁶ Briehl, supra note 4.
Beyond damage to health, the destruction to property is also considerable. President Lyndon Johnson estimated the economic costs of air pollution at eleven billion dollars annually. The typical suburban homeowner probably spends from two to three hundred dollars per year to repair the damage caused by pollution.

In 1968 alone, 143 million tons of particles emitted into the air fell back on America creating serious smog problems in nearly every major United States city. The Environmental Protection Agency reported that the number of serious smog incidents in the summer of 1972 may have set a new record. When these massive emissions of particles are combined with a thermal inversion, the potential for mass death is great. Air pollution creates a further problem that is not as readily perceived. According to a Public Health Service survey, the amount of sunlight reaching the earth is seriously curtailed by air pollution.

This figure is exclusive of medical costs. Such economic damages include:
(1) The corrosion of industrial and building materials; (2) the destruction of paint and exterior materials on homes and other buildings; (3) the more frequent need for cleaning; (4) the reduction of real estate values due to urban decay; (5) increased rust and dirt on automobiles; and (6) the destruction of recreational areas.

In a typical large city, twenty tons of dust per month fall on each square mile. Briehl, supra note 4, at 580. The cities are not the only areas adversely affected. In many regions, farm production is suffering. Certain crops will no longer grow in particular regions of the country. In Maryland, for example, farm productivity has been reduced by 20%-25% because of the effects of air pollution. If You Think Smog Has Been Bad—, U.S. News & World Rep., Oct. 16, 1972, at 80.

The greatest danger areas are the cities of the Atlantic and Pacific coasts and those in certain parts of Texas. In Houston, for example, smog exceeded minimum federal health standards 34% of the time in May and 12.8% of the time in June. If You Think Smog Has Been Bad—, supra note 10.

A thermal inversion occurs when warm air is trapped under a layer of cold air close to the surface. This inversion acts as a lid on upward motions of the air below. Consequently, diffusion upward of pollutants (dust, smoke, etc.) is extremely limited. If the inversion lingers, pollutants may build up in massive amounts. Under these conditions, great potential for environmental disaster exists. Such an inversion led to the infamous air pollution incident in Donora, Pennsylvania. During the last week of October, 1948, the town of Donora experienced a thermal inversion that lasted for nearly a week. Emissions for the town’s large steel plant built up in the limited air space under the inversion. The average number of deaths in Donora had previously been two per week, but on October 30 and 31 alone nineteen persons died. Over 5900 people (42.7% of the population) became ill, mostly with respiratory disorders. Eighty percent of persons with previous chronic disease were adversely affected. Hodgson, Acute Health Effects Induced by Commonly Occurring Nonepisodic Levels of Urban Air Pollution, 48 J. Urb. L. 657 (1971).

This problem is discussed in note 2, supra.
In a few areas of the country, effective steps have been taken to curtail pollution, but, for the most part, public officials have reacted sluggishly to the problem. Legislation has, so far, been ineffective in the majority of cases, and it remains to be seen whether the Clean Air Amendments of 1970 can solve the problem. At present, timely compliance with the standards established pursuant to the Amendments is extremely unlikely.

The earth is a remarkable ecosystem that can absorb vast quantities of pollutants with little or no adverse effect, but even nature is not infinite. This note accepts the basic premise that air pollution poses a serious problem that can be cured only through a comprehensive body of legislation, enforced by agencies adequately staffed, funded, and motivated. Still, private citizens, through legal action, can play a crucial role in the area of motivation. Thus far, however, private use of the courts has had little effect on pollution control.

Essentially, this note can be divided into two parts: (1) A survey of existing pollution remedies along with a look at promising new theories; and (2) the suggestion that the nucleus of a comprehensive air pollution remedy lies within the "Citizen suits" provision of the Clean Air Amendments of 1970. The suggestion is speculative but firmly grounded in judicial precedent. If pollution is to be

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14 In November, 1971, the Environmental Protection Agency went to court to force Birmingham's largest polluters to curtail emissions. The city's pollution problem in 1972 was greatly improved over the crisis conditions that existed in 1971. If You Think Smog Has Been Bad—, supra note 10.


16 The Clean Air Act Cuts More Teeth, BUSINESS WEEK, May 8, 1971, at 18. New York, for example, will have to take major steps to decrease its pollution to acceptable levels within the time limits established pursuant to the Act. The table below indicates the scope of the problem:

<table>
<thead>
<tr>
<th>Pollutant</th>
<th>1970 Level</th>
<th>Level Required by 1975</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sulfur Oxide</td>
<td>238</td>
<td>80</td>
</tr>
<tr>
<td>Particulates</td>
<td>130</td>
<td>75</td>
</tr>
<tr>
<td>Nitrogen Oxide</td>
<td>220</td>
<td>100</td>
</tr>
<tr>
<td>Carbon Monoxide</td>
<td>37,000</td>
<td>10,000</td>
</tr>
<tr>
<td>Photochemical Oxidants</td>
<td>248</td>
<td>160</td>
</tr>
<tr>
<td>Hydrocarbons</td>
<td>Not Available</td>
<td>160</td>
</tr>
</tbody>
</table>

* Highest average reading at any of New York's 38 monitoring stations. All figures are micrograms of pollutants per cubic meter of air.
Data: Environmental Protection Agency, New York City's Environmental Protection Administration.

curtailed, citizens must take a more active part. In effect, they must assume the role of private attorneys-general. The courts must be willing to discern new methods by which interested citizens can enforce existing laws. The Clean Air Amendments provide one such opportunity for the private enforcement necessary to make anti-pollution legislation effective.

II. THE TRADITIONAL REMEDIES

The common law did not leave the injured victim of air pollution totally defenseless, though it may often have seemed so. The three basic common law remedies were nuisance, trespass, and negligence. A fourth, less common remedy — strict liability for an ultrahazardous activity — will also be examined briefly.

A. Nuisance

Common law nuisance is by far the most common remedy available to air pollution victims. Air pollution has been considered capable of constituting a nuisance since at least 1611. Thus, a considerable body of law should have developed by the present day. However, the numerous difficulties inherent in maintaining a nuisance action for air pollution have greatly inhibited the effectiveness of the remedy.

Traditionally, nuisance has been divided into two areas — public nuisance and private nuisance. A public nuisance is criminal in na-

18 William Aldred's Case, 77 Eng. Rep. 816 (K.B. 1611). The plaintiff alleged that the defendant had erected a "hogstye" so near plaintiff's house as to corrupt the air. The court held that an action on the case was proper and awarded damages to the plaintiff. In supporting its decision, the court offered the following hypothetical situation: "And the building of a lime kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters the house, so that none can dwell there, an action lies for it." Id. at 820.

19 A major difficulty in maintaining such an action is defining the term nuisance. William Prosser has stated:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.


One case has held that nuisance law "is a definition of the dividing line between the right of any owner to use his property as he so desires and the recognition of that right in another." Roberts v. C. F. Adams & Sons, 199 Okla. 369, 371, 184 P.2d 634, 637 (1947).
ture, offering no individual recourse to the courts. To constitute a public nuisance, the polluting source must interfere generally with all persons within a certain defined area. Since a public nuisance is criminally actionable, the state is the proper party to abate the nuisance, and, when government officials fail to act, those adversely affected by the alleged nuisance are left virtually without a remedy.

Under some circumstances, however, an individual can maintain an action in tort for a public nuisance. The party seeking to bring the action must have suffered "damage of a special character, distinct from the injury suffered by the public generally." As a result of this policy of the common law, unless a special injury converts a public nuisance into a private nuisance as to the individual specially affected, the sole responsibility for remediying public nuisance rests with public officials. In the case of air pollution, where the polluter is of great financial worth to the community, such nuisances often go unabated, and the public is left to suffer discomfort and injury in frustrated silence.

Unlike public nuisances, private nuisances are actionable by individual citizens. A private nuisance, unlike a nuisance of a public nature, involves one or a few individuals who have suffered a particular and distinct injury, not suffered by the public at large, caused by an invasion of their property rights.

20 Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 807, 12 S.E. 1085, 1086 (1891), distinguished between public and private nuisance thusly:

COMMON [PUBLIC] NUISANCE: A common nuisance affects the people at large, and is an offence against the State, but an action may be brought in his own name by any one who suffers damage peculiar in kind or degree beyond what is common to him and to others.

PRIVATE NUISANCE: A private nuisance affects one or more as private citizens, and not as a part of the public, and is ground for a civil suit only.

For a general discussion of the two remedies, see 1 V. YANNACONE, JR., B. COHEN, & S. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES 77 (1972) [hereinafter cited as YANNACONE, COHEN, & DAVISON].

21 YANNACONE, COHEN, & DAVISON, supra note 20, at 78. A public nuisance need not injure all persons to the same degree. For example, a factory that pollutes the air to such an extent as to cause discomfort to the residents of a town may constitute a public nuisance.

22 Id. at 81. The injury suffered by the complainant must be different in kind, not merely in degree, from that suffered by the rest of the class affected. International Shoe Co. v. Heatwole, 126 W. Va. 888, 30 S.E.2d 537 (1944); Davis v. Spragg, 72 W. Va. 672, 79 S.E. 652 (1913); Pence v. Bryant, 54 W. Va. 263, 46 S.E. 275 (1903); Hale v. Town of Weston, 40 W. Va. 313, 21 S.E. 742 (1895).

23 Private nuisance has been defined as:

any wrongful act which destroys or deteriorates the property of an
Theoretically, private nuisance would seem to be a promising path for the environmental attorney to follow. In practice, a number of pitfalls limits its effectiveness. The interference with an individual’s property rights necessary to sustain an action for private nuisance must be both substantial and unreasonable. What is substantial and unreasonable differs greatly from jurisdiction to jurisdiction.

An environmental nuisance case faces two further tests: (1) Does a decrease in the quality of the environment represent a substantial interference with the use and enjoyment of land that the law should recognize; and (2) if an equitable remedy is sought, does the need for such relief by the individual outweigh the value to society of allowing the activity to continue? This second test is often referred to as “balancing the equities” and is the principle reason why an action of private nuisance lacks promise as an effective, comprehensive remedy for environmental destruction. In Madison v. Ducktown Sulphur, Copper & Iron Co., pollutants from defendant’s plant prevented plaintiffs from raising crops on their land and destroyed a quantity of timber. The court refused injunctive relief because it found that the defendant could not change its operation and would, if ordered to abate, be forced to shut down, thus removing one-half of the county tax base and leaving ten thousand persons jobless. Instead, the court balanced the equities and awarded damages in lieu of an injunction. The defendant was, in effect, granted a license to pollute. Certainly the damage award was proper, but, at least from the environmentalist’s point of view, such damages should have been incidental to injunctive relief and not a substitute for such relief. However, the Ducktown position has been accepted by most courts.

individual or of a few persons or interferes with their lawful use or enjoyment thereof, or any act which unlawfully hinders them in the enjoyment of a common or public right and causes them a special injury different than that sustained by the general public. Yannacone, Cohen, & Davison, supra note 20, at 78. Prosser, supra note 19, at 580; C. Smith & R. Boyer, Survey of the Law of Property 209 (2d ed. 1971).

E.g., Dixie Ice Cream Co. v. Blackwell, 217 Ala. 330, 116 So. 348 (1928) (defendant company’s emissions of smoke and soot held to constitute an actionable nuisance, regardless of the locality); Higgins v. Decorah Produce Co., 214 Iowa 276, 281, 242 N.W. 109, 111 (1932) (no injunction for alleged “foul and offensive odors,” since city residents must “endure without the right of legal recourse, annoyances and discomforts ordinarily and necessarily incident to urban life”).

Perhaps the *Ducktown* view can best be attributed to a fallacious application of the balancing test. As in *Ducktown*, the courts generally balance the harm to the individual plaintiff from the pollution against the benefit derived by society from allowing the polluter to continue to operate. Where the polluter is a large plant, employing many residents of a town or city and performing other services for the community, this application of the test will almost invariably result in substituting damages for injunctive relief. This application of the balancing test is inadequate. The result would perhaps be different if the *overall harm to the community* from the pollution were considered, rather than confining the inquiry to the harm suffered by a particular individual. This more accurate balancing of the equities, however, has found little acceptance in judicial opinions.

Even assuming the existence of a private nuisance and a reasonable likelihood that a balancing of the equities will result in complete relief, numerous defenses exist that further hinder effective justice. In some jurisdictions a polluter may gain a prescriptive right to maintain a private nuisance.28 "Coming to the nuisance,"29 while not generally a permissible defense,30 may be considered as grounds for estoppel31 or as a matter to be considered in "balancing the equities."32

The law of nuisance poses far too many complications to become the basis for an effective and comprehensive pollution abate-

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28 [Dangelo v. McLean Fire Brick Co., 287 F. 14 (6th Cir. 1923); Crump v. Lambert (1867) 3 L.R. Eq. 409, 413, *Contra*, Ralston v. United Verde Copper Co., 37 F.2d 180 (D. Ariz. 1929), *aff'd*, 46 F.2d 1 (9th Cir. 1931).] A prescriptive right to maintain a nuisance is similar to an easement and may be obtained where the nuisance has continued over a long period of time without protest by affected parties. Originally, the use of the easement must have commenced so far back in time that no one could remember its origin. In West Virginia, however, the current time fixed for gaining a prescriptive right is prima facie the statutory period for the recovery of real property. Wooldridge v. Coughlin, 46 W. Va. 345, 33 S.E. 233 (1899). Thus, presumably, a prescriptive right to maintain a nuisance may be established by the running of the ten year statute of limitations prescribed in *W. Va. Code* ch. 55, art. 2, § 1 (Michie 1966).

29 Where a person acquires property which, to his knowledge, is adversely affected by another's activity, he has no standing to complain about damage to his person or property. Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954).

30 [E.g., Ensign v. Walls, 323 Mich. 49, 34 N.W.2d 549 (1948); Forbes v. City of Durant, 209 Miss. 246, 46 So. 2d 551 (1950).]

31 [E.g., McClung v. Louisville & Nashville R.R., 255 Ala. 302, 51 So. 2d 371 (1951).]

32 [E.g., Hartung v. County of Milwaukee, 2 Wis. 2d 269, 86 N.W.2d 475 (1958).]
ment remedy. The remedy is inflexible, firmly embedded in the stare
decisis effect of voluminous case law. Nevertheless, nuisance con-
tinues to be the most popular remedy for air pollution because it
represents, under existing law, the best possible chance to gain com-
plete relief in one action. As long as this remains true, the nuisance
action, although of dubious value, will continue to be used.

B. Trespass

In a limited number of cases, air pollution victims have sought
a remedy through an action of trespass. Although avoiding some of
the problems inherent in a nuisance action, trespass is difficult to es-

tablish in most air pollution cases. Trespass is described as a physical
invasion or interference with the property of another. Since an
actual physical invasion is necessary, air pollution is difficult to bring
under trespass law, although some courts have allowed this action.

If a trespass is found, the courts do not “balance the equities,” but
instead impose strict liability. Thus, if plaintiff can establish air
pollution as a trespass, he is entitled to injunctive relief plus damages
for injuries already suffered. However, the ability of the trespasser to
gain a prescriptive right precludes recovery, for all practical pur-
poses, “in urban air pollution cases or others where the defendant
has continued to pollute for a long time.”

The Ducktown view of the function of nuisance is indicative of the
priorities that the courts have generally set: “[T]he law must make the best
arrangement it can between the contending parties, with a view to preserving
to each one the largest measure of liberty possible under the circumstances.”

The original common law trespass action allowed the plaintiff to recover
at least nominal damages regardless of whether he suffered any discernible
injury. Trespass on the case, which involved an indirect or accidental invasion
of another's property, required proof of actual damage. Prosser, supra note
19, at 66. The Restatement of Torts has abolished the distinction between
direct and indirect invasions. The Restatement requirement for a trespass is
merely an actual entry of a person or thing upon the land of another. Restate-
ment (Second) of Torts § 158, comment i at 278-79 (1965).

For a discussion of prescriptive rights, see note 28, supra.

Note, Legal Aspects of Air Pollution in Ohio 1971: Critiques and Propo-
sals, 40 U. Conn. L. Rev. 511, 517 (1971) [hereinafter cited as Legal Aspects
of Air Pollution in Ohio].
C. Negligence

To maintain a negligence suit for an injury caused by air pollution, it is necessary to find the following elements: 39

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

2. A failure on his part to conform to the standard required. . . .

3. A reasonable close causal connection between the conduct and the resulting injury. . . .

4. Actual loss or damage resulting to the interests of another.

The standard of care is difficult to determine because of the uncertainties of technological developments that can reduce pollution. It may be extremely difficult, if not impossible, to connect the damages suffered with a particular polluter in a large city where many factories and other sources contribute to the overall problem. 40 Also, the defenses of assumption of risk and contributory negligence may be available to the polluter. 41 In any case, the recovery in negligence actions is limited to damages and serves no valuable purpose in the overall effort to improve the quality of the environment.

D. Strict Liability

The theory of strict liability for an ultrahazardous activity 42 has rarely been applied to air pollution cases. What few decisions exist are split over the applicability of the doctrine to the emission of dangerous gases. 43 At any rate, successful cases are likely to be so rare as to have a negligible effect on pollution control.

39 Prosser, supra note 19, at 143.
40 Legal Aspects of Air Pollution in Ohio, supra note 38, at 517-18.
41 Furthermore, the statute of limitations may have run against the injured party. In West Virginia, if a personal injury is involved, the applicable statute is two years. W. Va. Code ch. 55, art. 2, § 12 (Michie 1966).
42 Rylands v. Fletcher, 3 L.R.H.L. 330 (1868). The Restatement of Torts uses the term "abnormally dangerous activity," and provides that contributory negligence shall be no defense except where the plaintiff "voluntarily and unreasonably (subjects) himself to the risk of harm." Restatement (Second) of Torts § 484 (1965).
43 In two similar cases brought for injuries caused by the escape of a dangerous gas, the Delaware and California courts came to opposite conclusions. In Fritz v. E. I. duPont De Nemours & Co., 45 Del. 427, 438, 75 A.2d 256, 261 (1950), the court stated its belief that to hold any person or corporation
III. TOWARD A NEW REMEDY

A. Modern Theories

Resourceful attorneys, dissatisfied with the limitations of traditional remedies, have pursued new and innovative theories to gain complete relief for victims of environmental pollution. Most of these have, as yet, found little acceptance in the body of the law. Two, however, bear mentioning as offering fresh possibilities for environmental action.

The "public trust doctrine" was first advanced in 1892. Under this theory, certain lands are held in trust for the people of the state. The theory was originally applied to land beneath navigable waters. As applied to the environment, the "public trust doctrine" would make government the trustee of "those valuable natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man." Thus, if the air is included as part of the

 absolutely liable for possessing a dangerous substance or carrying on a hazardous activity "would be but to strangle corporate and individual enterprise in many well-recognized fields of endeavor." The opposite view was taken in Luthringer v. Moore, 31 Cal. 2d 489, 498, 190 P.2d 1, 7 (1948), where the court imposed absolute liability for an activity which "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage,"


45 Id. The ownership of certain submerged land in the Chicago harbor and consequent control of the waters above such land was conveyed to the railroad by the Illinois legislature. The State later brought suit to reclaim the land. The Supreme Court held that the legislature was not competent to deprive Illinois of its ownership of such land:

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstructions or interference of private parties.

Id. at 452.

The Court went on to note that Illinois could make improvements by the erection of wharves, docks, piers, etc., so long as the public interest was not impaired. But the Court denied the proposition that the state could convey title and general control to land beneath the lake to a private party: "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." Id. at 453.

public trust, no individual or corporation could pollute to the extent that such pollution interferes with the individual citizen's property right in a clean environment. As yet, however, the "public trust doctrine" has had little recognition in the area of environmental protection.

Also promising is the use of the ninth amendment\(^\text{47}\) to create a constitutional right to a clean environment. This theory is grounded in the concurring opinion of Mr. Justice Goldberg in *Griswold v. Connecticut.*\(^\text{48}\) Justice Goldberg found a guaranteed right to privacy within the provisions of the ninth amendment. He went on to indicate his belief that there are other fundamental rights not enumerated in the Bill of Rights, but which fall within the penumbra of the enumerated rights and are equally worthy of protection.\(^\text{49}\) A ninth amendment right to clean air is still largely an academic proposition. However, when taken together with the "public trust doctrine," there is, at least, some promise for the environmentalist.

**B. The Clean Air Amendments of 1970**

This general survey of pollution law leads to the thesis of this note — that the Clean Air Amendments of 1970\(^\text{50}\) may provide the first complete and effective judicial remedy for air pollution. The "Citizen suits" provision\(^\text{51}\) of the Amendments should be interpreted to provide both injunctive relief and supplemental damages. Such a remedy would provide the injured pollution victim with an adequate avenue of relief. For this reason alone, an implied remedy is justified. However, there is a more fundamental justification for the extraction of an implied remedy from the "Citizen suits" provision. Since such a remedy would provide, in one legal action, full compensation to the victim of air pollution plus abatement of the offending source without resort to such artificial tests as "balancing the equities," individuals would be encouraged to avail themselves of the remedy. This, in turn, would serve to effectuate the purpose of the Amendments — the control of air pollution. Since the inclusion of the "Citizen suits" provision clearly contemplates maximum utilization of individuals to enforce the provisions of the Clean Air Act, a procedure that would

\(^{47}\) "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

\(^{48}\) 381 U.S. 479, 486 (1965).

\(^{49}\) Id. at 483.


\(^{51}\) Id. ¶ h-2. For the text of this provision see note 62, infra.
serve to promote this concept can hardly be said to be outside of the scope of the Amendments.

The 1970 Amendments are the latest step in a series of acts that date back to 1955.52 The legislation acquired no significance until amended extensively throughout the mid-1960s.53 The predecessors to the present "Clean Air Act"54 used a conference system to abate pollution.55 Following a series of administrative conferences, provision was made for a hearing before a board appointed by the Secretary of Health, Education and Welfare56 and, finally, as a last resort, an action in the district court, instituted by the Attorney General at the request of the Secretary.57 No provision was made for any litigation by private citizens.

The ineffectiveness of the enforcement provisions of the prior Act is amply demonstrated by the only case decided by a court under its provisions. In United States v. Bishop Processing Co.,58 the circuit court settled a pollution problem that first arose eleven years earlier. The controversy began in 1959 when the states of Maryland and Delaware requested the Secretary to institute proceedings under the Clean Air Act. A series of conferences and recommendations — all without result — followed, and a public hearing was held in May of 1967. Bishop Processing Company was instructed to abate its emissions by December 1, 1967. When the company continued polluting, the Secretary filed a complaint in the United States District Court for Maryland seeking an injunction.59 After denial of its motion to dismiss, Bishop Processing agreed to a settlement that it promptly ignored. The Secretary then moved, pursuant to the settlement, for an order directing the defendant to cease operations. After a request for further evidence was satisfied, the motion was granted. The company appealed and the circuit court affirmed the order. Thus, eleven years after the

56 Id. § 108(f)(1).
57 Id. § 108(g).
58 423 F.2d 469 (4th Cir. 1970), aff'd 287 F. Supp. 624 (D. Md. 1968). The polluter in Bishop was a chicken processing plant near Bishop, Maryland. The pollution consisted of alleged odors that moved across the state line to pollute the air of Selbyville, Delaware.
problem first arose, Bishop Processing was finally required to suspend operations.

Certainly Bishop is illustrative of the need to make air pollution legislation effective — a need recognized by Congress in 1970. Thus, the Clean Air Amendments of 1970 attempted to put teeth into the enforcement procedures. The most significant provision of the Amendments was the section allowing private citizens to initiate actions, after appropriate notice, against the alleged polluter or against the Administrator of the Environmental Protection Agency to enforce the provisions of the Act. The provision creates no express right to sue for damages supplemental to injunctive relief. Neither, however, does it specifically exclude such a remedy. If, therefore, a remedy is fairly implied within the provisions and purposes of the Act,


Senator Muskie, sponsoring the bill on the Senate floor, recognized past inadequacies:

A nation which has been able to conquer the far reaches of space, which has unlocked the mysteries of the atom, and which has an enormous reserve of economic power, technological genius, and managerial skills, seems incapable of halting the steady deterioration of our air, water, and land.

The legislation we take up today provides the Senate with a moment of truth: a time to decide whether or not we are willing to let our lives continue to be endangered by the wasteful practices of an affluent society, or whether we are willing to take the difficult but necessary steps to breathe new life into our fight for a better quality of life.


(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Sixty days notice must be given to the Administrator, the state and the alleged polluter before instituting a civil action. Id. § h-2(b).

Since 1970, the Environmental Protection Agency has administered the Act. Prior to this time, enforcement was in the hands of the Secretary of Health, Education and Welfare.

See the text of the “Citizen suits” provision in note 62, supra.

See text accompanying notes 87 and 88.
then, absent a clear congressional intent to the contrary, the Amendments should be construed in such fashion as to best accomplish their ultimate objective — the control of air pollution.

1. The Precedents for an Implied Remedy

Interpreting the provisions and purposes of a legislative act so as to create a civil remedy where none is expressly stated is not a new legal concept. Courts have often found remedies within an act's provisions where such remedies have been necessary to effectuate the purposes for which the legislation was enacted. For example, implied civil actions for injunctive relief and damages have been found within the provisions of section 14a\(^67\) and section 10\(^68\) of the Securities Exchange Act of 1934. The courts have reasoned that since the primary purpose of that Act is to protect investors and since Congress did not specifically deny private relief, such a remedy exists if the injured party is a member of the class to be protected.\(^69\) More importantly, for purposes of analogy to the Clean Air Act, the Supreme Court observed that if federal jurisdiction were limited to declaratory relief, the complainant would be compelled to seek remedial relief in the state courts. The burden of bringing in all parties necessary for complete relief in two separate actions might prove insuperable to the complainant.\(^70\)

\(^{67}\) 15 U.S.C. § 78n(a) (1970). In J. I. Case Co. v. Borak, 377 U.S. 426 (1964), an action was brought by a shareholder of petitioner's company for deprivation of his and other shareholder's preemptive rights by a merger allegedly effected through the use of false and misleading proxy statements. The Court determined that a private action could be maintained for recission or damages, noting that a backup procedure was needed to supplement enforcement by the Securities and Exchange Commission.

\(^{68}\) 15 U.S.C. § 78j (1970). In Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), the defendant was accused of conspiracy to induce plaintiffs to sell their stock for less than its true value. In allowing the action to be maintained, the court, using reasoning similar to that of the Supreme Court in \(\)Borak\(\)\(^,\) cited the \(\)RE TATEmmNT OF TOris§ 286 (1938):

The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if; (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect.

\(^{69}\) F. Supp. at 514.

It can be contended that the intent of the Clean Air Act is, at least in part, to protect the rights of citizens to clean air and that one who violates emissions standards established pursuant to the Act certainly violates this right.

\(^{69}\) E.g., J. I. Case v. Borak, 377 U.S. 426, 432 (1964). Similar reasoning would seem applicable to the Clean Air Act, 42 U.S.C. § 1857 (1970): "(b) The purposes of this subchapter are — (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . ."

\(^{70}\) 377 U.S. at 434-35.
Although implied civil remedies have most often been found in the securities field, such relief has not been limited to that area.\textsuperscript{71} One of the earliest and most significant examples of such court-created remedies was derived from the provisions of the Rivers and Harbors Appropriation Act of 1899.\textsuperscript{72} The Act was created solely to aid in maintaining navigable waterways free of obstruction.\textsuperscript{73} Criminal sanctions are provided, and the Attorney-General of the United States is authorized to institute enforcement proceedings.\textsuperscript{74} There is no express provision for a private civil action.

In \textit{Neches Canal Co. v. Miller & Vidor Lumber Co.},\textsuperscript{75} the Fifth Circuit allowed a private action for an injunction in equity, with attendant damages, for a violation of the Act. The court held that the plaintiff, "being the user of the navigable stream which was obstructed in violation of the statute, was a beneficiary of the statute forbidding its obstruction, and the remedy given by the statute was available in behalf of (the plaintiff)."\textsuperscript{76} At least one circuit has taken a further step. In \textit{Alameda Conservation Association v. California},\textsuperscript{77} the plaintiffs alleged that the defendant, Leslie Salt Company, intended to fill and obstruct a great portion of San Francisco Bay in violation of sections 401-406 of the Rivers and Harbors Act and asked for a declaratory judgment on the validity of the state law under which the filling was to be undertaken. Significantly, the plaintiffs alleged no damage to navigation. Instead, the harms forecast included the de-

\textsuperscript{71} E.g., Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). In implying a civil remedy from the Federal Safety Appliance Acts, the Court set out the following principle of statutory interpretation: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." Id. at 39.


\textsuperscript{73} Briefly, the Act makes it unlawful to (1) construct bridges, dams, dikes, or other similar obstructions over navigable waters without the consent of Congress and approval of the Army Corps of Engineers and the Secretary of the Army (33 U.S.C. § 401); (2) build wharves or piers, or excavate or fill any port, harbor or navigable channel without the prior approval of the Army Engineers and authorization by the Secretary of the Army (33 U.S.C. § 403); and (3) discharge refuse into navigable waters, thereby impeding navigation (33 U.S.C. § 407).


\textsuperscript{75} 24 F.2d 763 (5th Cir. 1928). The defendant dammed a navigable stream, the waters of which were used by the plaintiff to operate a sawmill. Thus, plaintiff's mill was forced to close down for a period of time with attendant loss of profits. The court upheld plaintiff's right to sue in equity under the Rivers and Harbors Act and awarded \textit{injunctive relief plus damages}.

\textsuperscript{76} Id. at 765.

\textsuperscript{77} 437 F.2d 1087 (9th Cir. 1971), \textit{cert. denied}, 402 U.S. 908 (1971).
struction of fisheries and wildlife from which the plaintiffs personally benefitted and the destruction of the flushing characteristics of the Bay with a consequent unfavorable effect on the climate of the area. The defendants moved to dismiss for failure to state a claim on which relief could be granted, but the court denied the motion, holding that the plaintiffs had alleged a violation of the Rivers and Harbors Act that would cause them injury in fact. Therefore, the plaintiffs' claim, if proved, was sufficient to entitle them to relief. *Alameda*, then, is truly an innovative decision, extending the protection of the Rivers and Harbors Act to purely environmental interests. 78

2. Standing

The "Citizen suits" provision of the Clean Air Act clearly confers standing 79 on private citizens to sue in the federal courts, at least for abatement of pollution. The question of whether standing to sue under a legislative act also confers a remedy for all injuries suffered due to the act's violation appears to have been affirmatively answered by the recent Supreme Court decision in *Association of Data Processing Service Organizations v. Camp.* 80 *Data Processing* established a two part test to determine standing: (1) Whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise; and (2) whether the interest sought to be protected is arguably within the zone of interests to be protected by the statute. 81

In *Alameda*, much the same test was used by the court to find an implied remedy within the provisions of the Rivers and Harbors Act. There, the plaintiffs alleged economic injuries (*i.e.* destruction of fisheries from which they made their living) as well as environmental injuries (*i.e.* climatic changes) and, thus, met the first test of *Data Processing.* The second test — that the interest to be protected is arguably within the zone of protection of the statute — was not expressly considered by the court. However, the *Alameda* court deter-

78 The *Alameda* decision may have been influenced by a Fifth Circuit decision earlier the same year. In *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court held that the Secretary of the Army could consider the ecology of navigable waters when deciding whether to issue permits under the Act.

79 The standing requirement seeks to test whether the party bringing the action has a sufficient interest in the outcome to insure that the proceedings will be conducted in a genuine "adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101 (1968).


81 Id. at 153.
mined that the purpose of the Rivers and Harbors Act — to protect the use of navigable waters — need not be narrowly applied to the actual navigation of those waters. The court, in effect, acknowledged that the second test of *Data Processing* had been met; the protection of environmental qualities of navigable waterways is arguably within the zone of interests to be protected by the statute. Thus, the test applied in *Data Processing* to determine standing was, in actuality, the same test used in *Alameda* to find an implied remedy within the provisions of the Rivers and Harbors Act.

It has been argued that the *Alameda* decision does no more than confer standing on the plaintiffs to assert their claims in the federal courts and that no private cause of action is thereby created. It would appear, however, as at least one commentator has suggested, that the definition of standing advanced in *Data Processing* forecloses this objection. If the court finds that there has been an injury in fact and that the alleged injured interest is arguably within the statute's zone of protection, the prerequisites, not only of standing, but of the right to a private cause of action have been satisfied. If this view is correct, it would seem that there is no significant distinction between standing and the right to a private cause of action.

Applying the above analysis to the Clean Air Act, it is certainly arguable that where an individual has standing under the Act to sue in the federal courts, that standing gives rise to an implied right to maintain an action for complete relief for all injuries suffered due to violation of the Act. The pollution victim must allege some personal injury or damage to property to meet the first test. The second test is easier to meet than in *Alameda*. The stated purpose of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . ." It is certainly arguable that an individual's right, at the very least, not to be injured by air pollution, is within the zone of interests to be protected or regulated by the statute. The "Citizen suits" provision clearly recognizes the existence

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82 The interest sought to be protected by the statute "may reflect 'aesthetic, conservational, and recreational' as well as economic values." 397 U.S. at 154. This language extends the class of injury for which relief may be sought well beyond purely personal or economic injuries and recognizes the trend toward enlarging the class of individuals entitled to protest agency action. Id. at 154.

83 This was the view of the *Alameda* case taken by the court in Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala. 1971).

84 *Private Cause of Action Under the Rivers and Harbors Appropriation Act*, supra note 72, at 1259-63.

of these two elements by expressly conferring standing to sue on private citizens. Therefore, according to the test in *Alameda*, this standing to sue should include the right to recover damages if the injury is established. This result is clearly in line with the equitable principle of providing complete relief in one action and is necessary to facilitate the enforcement of the "Citizen suits" provision.

3. *The Congressional Purpose*

Assuming the existence of standing, there is nothing — absent a firm showing of congressional intent to the contrary — to prevent construction of the "Citizen suits" provision to provide a complete and comprehensive air pollution remedy. The Act itself does not exclude the remedy. The relevant language of the "Citizen suits" provision is that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be." Although this provision does not clearly express the right to a damage remedy plus injunctive relief, it does not exclude such relief "very clearly and plainly." In fact, the term enforce, although often thought to connote declaratory relief, includes the use of all remedies necessary "to make effective" the congressional purpose.

If such a supplemental damage remedy is to be held excluded, there must be other language that shows Congress' *clear* intent to deny such relief. The issue was raised during Senate consideration of the Amendments, and it is apparent that certain Senators viewed a damage remedy unfavorably. However, when considered in the light of the total legislative history of the Act, no clear congressional intent to exclude the remedy appears. Senator Muskie, in response to questions from the floor of the Senate, stated that the bill included an express provision for injunctive relief, but none for damages. This

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86 Id. ¶ h-2(a).
87 *The court in Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), created the requirement:
   Of course, the legislature may withhold from parties injured the right to recover damages arising by reason of violation of a statute but the right is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear *very clearly and plainly*.
88 *BLACK'S LAW DICTIONARY* 621 (Rev. 4th ed. 1968).
served to calm the fears of some senators that the problems inherent in a damage suit would create great judicial inconvenience and backlogs in the federal courts.91 Regardless of his express language, Senator Muskie certainly contemplated making the Act effective: "Although the committee does not advocate these [citizen] suits as the best way to achieve enforcement, it is clear that they should be an effective tool."92 Senator Hart, another sponsor of the Act, also clearly contemplated extension of the "Citizen suits" provision to include damages:93

Even if litigation is in fact expanded under this bill, it must still be contended that such expansion is justifiable. As Ramsey Clark also stated at the hearing previously referred to (Senate Subcommittee on Energy, Natural Resources and the Environment):

"There is no question that justice is denied in America because it is delayed, and court backlogs are a serious problem for society from every standpoint. But society has to have priorities and survival should be a pretty high priority. Survival depends upon the protection of our environment, and I think legal redress will be a major method of protecting that environment. The imposition of any additional caseload that might follow from this bill on the courts is one that it must gladly assume."

It seems possible that the drafters of the Clean Air Amendments failed to include an express provision for a damage remedy because of the fear of creating, by statute, a situation analogous to that which

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The purpose of the legislation reported unanimously by your committee is to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the nation is wholesome once again. The Air Quality Act of 1967 (Public Law 90-148) and its predecessor acts have been instrumental in starting us off in this direction. A review of achievements to date, however, make abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing these strategies often have been slow and less effective than they might have been.
exists in the area of nuisance. That is, they wished to avoid a "balancing of the equities" situation where the court could grant damages in lieu of an injunction. If the Act were so construed, it would represent no improvement over the remedies available under the common law. Thus, it is made clear under the Act that an injunction is mandatory for violation of pollution standards and that damages are not to be substituted for abatement. On the other hand, the "Citizen suits" provision should not be read to foreclose the award of supplemental damages to one who has proved such a violation and who has been injured by it. In fact, the violation of the statute might reasonably be held to create a standard of strict liability toward those whose injuries result from its violation. In any case, litigants injured by air pollution are unlikely to use the federal courts to enforce the Act if they are then forced to sue again in the state courts for damages stemming from the same cause of action. Certainly, this procedure would tend to promote the very multiplicity of suits and backlog in the courts that judicial economists so zealously decry.

IV. Conclusion

The law offers many prospective remedies to air pollution victims, but as history has shown and the condition of the environment today amply illustrates, relief has been elusive or non-existent. It seems clear that congressional legislation is the best hope of halting

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94 Thus, unlike the view in Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904), the court is not to consider such factors as the value of the polluter to the community.

95 A supplemental award of damages is consistent with equitable principles. Where a court takes jurisdiction to grant equitable relief, it may retain jurisdiction to grant all relief justifiable under the circumstances. This policy is reflected in the maxim, "[e]quity delights to do justice and not by halves." G. CLARK, PRINCIPLES OF EQUITY 29 (1937).

96 The need for a supplemental damage remedy is, perhaps, most obvious where a polluter, who is being sued under the "Citizen suits" provision, closes down his operation and moves to another location where standards are less stringently enforced. The purpose of the Act has clearly not been achieved, because the polluter is still in operation, albeit in another location. The injured pollution victim may not be able to get service on the polluter if he has moved to another state (depending, of course, on the state of incorporation). If the Clean Air Act is read to limit relief to an injunction, the complainant will have no remedy. The knowledge that damages can be recovered against him under the federal law may cause the polluter to decide that it will be less expensive to curtail emissions than to move to a more favorable location.

97 The "Citizen suits" provision makes no distinction between intentional and unintentional violations of emissions standards. The criminal liability is to be imposed, regardless of intent, for a mere violation of the standards. William Prosser has stated the principle that where a statute imposes an absolute duty, the defendant may incur civil liability merely by violating the statute. PROSSER, supra note 19, at 197.
environmental decay. But again, time has shown that regulatory acts enforced by government agencies often fail to achieve their lofty purposes. This has been particularly true in the field of air pollution. The lack of enforcement of anti-pollution laws may be attributed in part to economic pressures applied by large-scale polluters and in part to understaffed and underfinanced enforcement agencies.

In short, pollution control by governmental action needs an assist. Such an assist can be provided by the "Citizen suits" provision of the Clean Air Act, if the provision is so interpreted as to have its maximum effect. To encourage injured pollution victims to demand enforcement of the Act, the "Citizen suits" provision should be interpreted to allow an individual who proves that a particular source is in violation of emissions standards not only the satisfaction of seeing the polluter closed down, but also monetary compensation adequate to repair, as nearly as possible, the injuries he has suffered. Otherwise, common law nuisance is likely to remain the most popular remedy for the evils of air pollution with the attendant possibility of a continued "balancing of the equities" in favor of allowing pollution to continue, in contravention of the needs of society. The application of a standard of strict liability for violations of the Act would do much to negate the fears of judicial economists that such a remedy will create a multiplicity of suits with impossible issues of proof. Even if an increased burden is placed on the courts, there are times when judicial convenience must yield to more important interests. The citizen's role in air pollution litigation is essential to effective abatement. To allow a complete and comprehensive remedy for injuries due to air pollution would be a major step toward insuring that the air we breathe is once again clear and free of the unnecessary by-products of industrialization.

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