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THE PROTECTION OF ENVIRONMENTAL INTERESTS BY NON-PUBLIC ACTION*

NATHAN HERSHEY**

I would like to use the time allotted to me today to present some ideas that might be useful to you in organizing the various legal concepts and theories related to environmental protection. After indicating some approaches to organizing legal material I will then direct my attention to the specific matter of legal action that may be taken by non-governmental organizations and individuals seeking to protect or safeguard environmental interests.

One way to organize legal material dealing with environmental protection is based upon the nature of the interests that one can describe within the broad subject of environmental protection. Within the concept of public enjoyment of property, which may either be publicly or privately owned, there are threats from both private uses or action and public action. Thus, we find regulations, pursuant to legislation, prohibiting the use of motor vehicles in designated "wilderness areas" within the national forests. The purpose of this measure is rather obvious, and criminal penalties may be imposed upon violators. In *McMichael v. United States*,¹ the administrative determinations resulting in designations of certain "wilderness areas" were upheld in the course of affirming the convictions of two motorcyclists for violating such regulations.

In addition to the interference with public enjoyment of property that can be laid at the feet of private persons, there are also the problems raised by public action, condemnation for example, that may create a situation where one can argue that public action constitutes an interference with, or sacrifice of the enjoyment of public property in the interest of assisting another public use of the property. According to newspaper accounts, clashes are already occurring between local governmental entities and public utility corporations over under-developed sites that can be used by both. For example, there is property that can be used both as a beach and as the location of a power generation plant.

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¹ 355 F.2d 283 (1965).

There is also an interest in the private enjoyment of privately-owned land that relates at least minimally to the community or public. This is illustrated by legal actions on a nuisance theory by a property owner adjoining privately-owned property that is used in a manner that causes harm to the property of the individual bringing the suit. Even though the activity constitutes a private nuisance as currently recognized in the law, there is a certain measure of benefit to the public at large in many instances in having the nuisance abated.

In the context of private enjoyment affected by activity in the public interest, a right of action on a theory of inverse condemnation by a public body exists for the property owner whose property's use is interfered with. Thus, in cases arising because of the effects of noise from the operation of aircraft over or close to his property, the noise is not abated, but the property owner receives compensation.² The public at large obtains no benefits at all from the individual property owner's success in court.

Another way to organize material dealing with environmental matters is in terms of the role of government at various levels. Legislation can be organized in terms of the federal, state and local levels. At each level the kinds of legislation that have been and can be enacted should be recognized, and the constitutional, political, and historic reasons for different roles played by different levels of government considered. For example, at the local level, specific legislation regarding air pollution, refuse disposal, zoning, laying utility wires underground, and other legislation of this nature is often found. One can also look at legislation in terms of how it is to be enforced, for example, the need to conduct proceedings before administrative bodies prior to taking action in court, as against going into court directly, and whether legislation permits private individuals and organizations to intervene at appropriate stages in the proceedings.

From what I have said so far it should be clear that I believe some kind of conceptual framework to organize the diverse legal material can prove valuable. It is also possible, of course, to organize material on the basis of subject, *e.g.*, water pollution, air pollution, noise, refuse, etc. Actually, the choice depends on where the individual plans to focus his attention. Having almost any

² U. S. v. Causby, 328 U. S. 256 (1946); Thornburg, v. Port of Portland, 224 Ore. 69, 415 P.2d 750 (1966).

framework for organization tends to demonstrate that when we talk about environmental problems, we are talking about effects upon health, effects upon aesthetic values, and effects upon a generalized sense of comfort within the environment that we would like to maintain and enhance. There are certain levels of noise that, at least so far, create no physical damage, but increase irritability and dissatisfaction with the particular environment in which one is at a particular point in time. While we cannot eliminate noise and probably would not want to, because silence might create psychological harm, a degree of restriction upon noise is in some circumstances defensible, if not necessary.

Now let us turn to some theories of, or bases for assertion of environmental protection arguments by private organizations and individuals. For several reasons it is worthwhile to devote attention to the potential for private legal actions to protect the environment. The most important are, first, that federal, state and local legislation, both forbidding certain activities that have adverse effects on the environment and restricting others that have similar effects, are in many instances inadequate to provide the level of protection desired by some individuals; second, the enforcement efforts of public agencies to bring about compliance with the laws has been, for a variety of reasons, less than aggressive in many areas; and third, because of small penalties and procedural hurdles, the enforcement process often consumes long periods of time, and when a penalty is eventually imposed its burden is miniscule on the organization causing the environmental harm.

Under the Federal Highway Act, the administrator is required to give local needs equal consideration with the needs of interstate commerce,³ and he is required to make maximum efforts to preserve federal, state and local government park land and historic sites because of their special values.⁴ In *Road Review League v. Boyd*,⁵ the court said that the ultimate test for arbitrariness of an administrative determination by the agency is whether the administrative determination is clearly wrong. While the court did not find that the administrative determination failed to meet this test respecting the route of an interstate highway, it permitted a legal action brought by civic associations, private wildlife sanctuaries and others on the basis that they were adversely affected or

³ 23 U.S.C. § 101 (b) (1964).

⁴ 23 U.S.C. § 138 (Supp. 1970).

⁵ 270 F. Supp. 650 (S.D.N.Y. 1967).

aggrieved by the agency action.⁶ In *Scenic Hudson Preservation Conference v. Federal Power Commission*,⁷ a celebrated battle involving a proposed Consolidated Edison plant, the court permitted Scenic Hudson, an unincorporated association consisting of non-profit conservation organizations, among others, to challenge the Commission's decision, although it could not show economic injury, a traditional test to determine standing.

The court in *Scenic Hudson* stated that any party showing an interest would have standing to challenge the commission's determination. It pointed out that in the process of determining whether a project is in the overall public interest, it is essential that the Commission discharge its duties properly. This includes meeting its statutory responsibility to carry out its planning function. Therefore the court set aside the license for the power plant on the Hudson to permit appropriate consideration by the Commission of the natural beauty of the area, which it was asserted would be destroyed, as well as consideration of the historic sites within the area that would be affected by the proposed power plant complex.

Private organizations that have the opportunity to participate in administrative proceedings and to seek judicial review on the basis that they are adversely affected may find the likelihood for success small. It is one thing to be able to intervene or to have standing and quite another to have a decent chance to prevail before administrative agencies or in the courts. With respect to the former, there is a feeling that the public agencies and commissions, charged with serving the public interest in reaching their decisions, rarely have taken an aggressive position when dealing with utilities or other industrial applicants seeking administrative authorization for a particular course of action or proposal. Rather, the public interest is often conceived of in a routine unimaginative manner. If the agency is concerned with power generation and capacity, it may overlook the public interests that tend to clash with increased capacity. The applicant for the license is viewed as the representative of the public interest; the opponent, often a conservation group or a confederation of groups, is viewed as a hindrance to achieving a solution that meets the public needs. Many groups concerned with environmental matters believe that the agencies and commissions are too prone to accept the data

⁶ *Id.* at 660. The court applied 5 U.S.C. § 702 (Supp. 1970) to permit judicial review of a legal wrong because of agency action.

⁷ 354 F.2d 608 (1965).

and the conclusions of the concern seeking administrative approval, without requiring them to deal with troublesome issues related to environmental consideration in any more than a cursory manner.

To make an effective case before an administrative agency or commission, it is often necessary to gather data, make studies, obtain expert witnesses who will testify at the proceedings, etc. The utilities have both the resources and the know-how to organize for such proceedings. The expenses for preparation and presentation before the agencies are not only business expenses, deductible for tax purposes, but also, with the utility ordinarily guaranteed a rate of return based on capital investment, the expenditures for these presentations do not substantially affect the utility's profit picture in the long run. On the other hand, what are the financial resources of the private organization seeking to assert a public interest in environmental protection? Not only are the financial resources often meager, but the know-how-the expertise in building a case—is often in short supply. To combat the latter problem, it is first necessary to devise a way to deal with the former. It is suggested that once the bona fide status of an opponent to a particular proposal is established before an administrative agency, or before the court if the environmental issues are to be raised on judicial review, the expenses of the legitimized environmental defender be borne by the utility to the extent equal to its own expense of preparation and presentation. Therefore, if the power company spends \$100,000 preparing its case before the Federal Power Commission, the private organization asserting the public interest would have made available to it by the utility an equal amount of money to utilize in the administrative proceeding, and for the expense of seeking judicial review if necessary. In this manner the cost of the defense of environmental interests will be passed on to the public at large, or at least that segment of the public served by the particular utility.

A theory of quasi-public use has been asserted in litigation in New Jersey in which Wildlife Preserves, Inc., a non-profit wildlife group, contested condemnation of a portion of unique marshland property it owned. An oil company, Texas Eastern Transmission Corp., sought to lay pipes through the wildlife preserve and owners asserted that, by a change in the plans for laying the pipe, damage to certain underground springs and other valuable facets of the property would be avoided. A number of judicial

decisions were rendered in the course of the litigation; the most prominent in terms of the protection of the environmental interests was that the highest court of New Jersey when it remanded the matter for further hearings in the lower court,⁸ and then later affirmed the condemnation orders issued by that court.⁹ The Supreme Court of New Jersey said that when a private organization asserts that the property in question is currently used for public purposes (and this would include property owned by a private group if it were dedicated for public purposes) the burden of proof in establishing arbitrariness of the lower court decision is not as great on appeal. It is necessary only in such an instance to show the threat of serious damage and the availability of apparently reasonable alternatives to shift the burden to the utility to establish that the determination is not arbitrary, and that the public convenience and necessity is being adequately taken into account. Perhaps future litigation involving contests between private groups that have dedicated their property for public purposes, and utilities, which have the power to condemn because they are considered devoted to public purposes, will lead to greater recognition of environmental interests.

In another context we find that the depredation of the environment may be part of an activity conducted by a public entity, such as a city or other governmental unit. In *Costas v. Fond du Lac*,¹⁰ an action seeking abatement of a public nuisance was brought against the city of Fond du Lac. The court ordered the nuisance, allegedly arising out of the operation of the City's sewage disposal plant, abated. In the course of its opinion, the court said that even if the facility had been approved in the past by a public agency, or met specific requirements of government agencies, a court is not precluded from finding that the operation of the facility constitutes a nuisance. The court stated that damages were not an adequate remedy and that abatement was the appropriate remedy to be employed to prevent injury to a variety of landowners in the area. Quite frequently odors and seepage from sewage disposal operations by public bodies create nuisances, and a number of courts have ordered abatement. Interestingly enough, in this type of case the public interest is asserted by pri-

⁸ *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966).

⁹ *Texas Eastern Transmission Corp. v. Wildlife Preserves Inc.*, 49 N.J. 403, 230 A.2d 505 (1967).

¹⁰ 24 Wis.2d 409, 129 N.W.2d 217 (1964).

vate individuals against governmental units which one might hope, but should not expect, would be very concerned about such environmental matters.

In the law of private nuisance, it is also possible to see a basis for protection of environmental interests. While the major damage may be to the land and property of an adjoining landowner, there are of course, some relatively intangible harms to the community at large. In a suit brought by an adjoining landowner against a cement company because of dust and other inconveniences affecting the use of the adjoining property, an attempt was made to obtain injunctive relief.¹¹ People using the roads and coming near the offending plant undoubtedly suffered some interference with their comfort, but it is unlikely they would have any basis for bringing a nuisance action. The relief afforded in *Boomer v. Atlantic Cement Company*¹² was an award of damages to the adjoining owner whose property suffered injury, but injunctive relief was denied. Payment of money damages in cases of this sort does not serve to protect the environmental interests. One might observe that as soon as a court's opinion starts to discuss weighing the economic interests involved, stress is frequently given to the fact that the environmental offender is an employer of the citizens of the community and is part of the economic base of the community. It then is a simple matter to forecast that at best, the private landowner will obtain only damages. Thus, the private nuisance case may recognize the interests of an adjoining landowner, but it rarely lays the basis for actual protection of the environment. In *Jones v. Rumford*,¹³ a suit against a chicken breeding plant, the court recognized that the operation of the plant constituted a nuisance, but permitted damages to the extent of only \$500 for the loss of the use of land by the adjoining landowner.

Actions brought on theories of inverse condemnation, often stemming from noise resulting from the operation of aircraft during landings and takeoffs, also does not result in the abatement or restriction of the environmental insult. The relief that is afforded is payment to the private individual whose property has been constructively condemned, and the environmental affront continues.

There have been a few articles in the law reviews discussing suits on negligence, trespass or strict liability theories for injuries

¹¹ 294 N.Y.S.2d 452 (App. Div. 1968).

¹² *Id.*

¹³ 64 Wash.2d 559, 392 P.2d 808 (1964).

to person and property from emissions of particulate and gaseous matter-air pollution. Apart from difficulties in showing departures from the standard of care, in establishing causation, in showing that the complained of activity is ultra hazardous, and in avoiding prescriptive rights defenses, the remedy ordinarily available is damages. Whether large recoveries, if they were obtained, would secure changes in industrial processes to which harm in specific areas was attributed is doubtful. Unless the cost of losing cases in court started to approach the expense of modifying the processes through the use of different kinds of equipment, change that is not required by statutory law would not result.

To sum up the situation as I see it with respect to private organizations and individuals operating in the interest of protecting the environment through litigation and within the administrative processes, the private organizations and individuals are in a weak, but not necessarily hopeless, situation. What is necessary is some more effective utilization of present theories, along with a process that provides the environmental protector access to the economic resources necessary to make the contest equal in the administrative and judicial settings. Ideally, private groups should not have to carry this burden of public protection, but we do not live in an ideal society and we must accommodate to the realities of the situation. The inequality of the resources available to the environmental predator and the environmental protector must be minimized, perhaps along the line of my suggestion in the case of the regulated utility that is guaranteed a rate of return.

There are many areas within our legal processes in which the sides are not evenly matched, and most of you are at least as well aware as I of many of them. I think all require the attention of the bar. I submit that the people present here should not overlook this imbalance, and should seek to correct it in the area of environmental protection.