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The Expanding Scope of Air Pollution Abatement

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STUDENT NOTES

The Expanding Scope of Air Pollution Abatement

The Department of Health, Education, and Welfare estimates that sixty per cent of all Americans now live in areas of persistent air pollution. Scientific evidence links the air pollution problem with increases in such health hazards as bronchitis, hypertension, lung cancer, emphysema, heart disease, circulatory ailments, and even the common cold. We learn that the quality of the nation's air has deteriorated to such an extent that it now costs the United States some eleven billion dollars annually to rectify the damage done by airborne pollutants. The federal government has cited

three separate areas in West Virginia as contributors to major interstate air pollution problems.  

Based upon such facts as these, it is evident that the air quality situation today is at best bleak. Yet it appears almost certain to grow worse since authorities predict that all major sources of pollution will increase in the future. To illustrate, it is said that industrial production will increase by fifty per cent in the next ten years alone. Automobiles, which are allegedly responsible for most of this country's smog problem, will also increase in number from 90 million today to about 120 million in 1980.

Such sobering facts as these have been responsible for a growing anxiety on the part of federal authorities. The magnitude of this concern is demonstrated by the fact that Congress has, since 1955, increased the federal appropriation for air pollution control from 186 thousand to over 109 million dollars.

Since governmental involvement in this area will undoubtedly continue to increase, the problem has special significance. Accordingly, it appears appropriate to trace the development and growth of the legal relief available in this field.

AIR POLLUTION AS A NUISANCE

Prior to the relatively recent enactment of state and federal statutes, the sole remedy for offensive air pollution lay in a suit for nuisance. A nuisance, it should be noted, actually may mean two separate things, for it may be a public nuisance or a private nuisance. Air pollution may fall into either of these categories, or both, depending upon the circumstances. In differentiating between the two forms, it is necessary to keep in mind that a private nuisance is a civil wrong, emanating from a disturbance of rights in land, for which the right to relief "lies in the hands of the individual whose rights have been disturbed." Conversely, a public nuisance,

4 Hearings on S. 780, supra note 2, at 1315.
6 Hearings on Air Pollution Control, supra note 5, at 116.
8 25 CONG. Q. WEEKLY REP. 2371 (Nov. 24, 1967).
10 W. PROSSER, TORTS § 87 (3d ed. 1964).
which was always a crime at common law, afflicts an interest of the public at large. Since the classifications of nuisance are not mutually exclusive, a landowner may in certain instances have an action against a polluter for private nuisance even if the polluter is guilty of a public nuisance.

Regardless of the type of nuisance claimed by an injured party, two requirements must be met in order for an action to be successful. First, for any problem to be adjudged a nuisance, it must be deemed to be substantial. Since the law does not take note of trifles, the nuisance must be "of definite offensiveness, inconvenience, or annoyance to the normal person in the community—the nuisance must affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment." In addition to being substantial, the nuisance must also be unreasonable, a term which depends to a large degree upon the prevailing conditions in the locale. For example, a plaintiff would have much less right to complain of the smoke eminating from a factory if he lived in a manufacturing area than he would if he resided in a neighborhood with a primarily residential character.

The shortcomings of the nuisance approach to the air pollution problem became apparent during the late 1930's and the early 1940's. At that time the industrial society's very size and technology caused large areas of our nation's atmosphere to become polluted. Although the number of sources of pollution rapidly increased, few of these sources could individually be termed substantial or unreasonable. Even though the courts regard interference by such things as smoke and noxious odor as capable of apportionment among the offending parties, this is not possible as a practical matter in most present-day air pollution situations. It would be absurd to attempt to apportion to each car owner and each furnace owner in a city of two million persons his share of air pollution damage.

This was not the only drawback to the nuisance remedy which became evident, however. Nuisance, by its nature, is a limited remedy which is workable only when local in nature and when the

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11 W. Prosser, supra note 10, at § 89.
12 E.g., City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).
13 E.g., Painter v. Gunderson, 123 Minn. 323, 143 N.W. 910 (1913).
14 E.g., Prior v. White, 132 Fla. 1, 180 So. 347 (1938).
15 E.g., W. Prosser, supra note 10, at § 88.
16 Restatement of Torts, § 822, comment j (1939).
17 See Hearings on Air Pollution, supra note 5, at 91.
pollution source is easily discernible. Unfortunately for the common law rule, our atmosphere refuses to confine itself to a single locality. Instead it is pervasive, flowing over wide areas, crossing state boundaries in the process. Pollutants are carried along in the atmosphere for long periods, thus affecting distant parts of the country. In this way, pollutants dumped into the air in New Jersey may well affect the air quality of Washington, D.C. It can be seen that the limitations of the nuisance remedy effectively preclude its use as a major force in promoting national air quality standards. Since this pollution is no longer entirely local or even intrastate in nature, nuisance abatement procedures are of small benefit. Realizing this need for new solutions, some few communities began to attack the problem in the late 1940's. These first steps, while heartening, were largely stopgap measures ill-designed to deal with an ever-increasing pollution problem.

Federal Involvement

By 1955, the problem of clean air had reached such proportions that Congress felt it necessary that the federal government take cognizance of the situation. Thus the initial federal program in air pollution emerged with the passage of Public Law 159 in July 1955.\(^1\) While this Act did not provide for legal action against pollution, it did authorize the Surgeon General of the Public Health Service, with the direction of the Secretary of Health, Education, and Welfare, to establish a program of research aimed at perfecting better methods of abatement and control of air pollution.\(^2\) Provision was also made to provide state and local air pollution agencies with technical assistance. Under the terms of this Act, which expired in 1964, cooperative activities and training programs were conducted, information was gathered, and experiments were conducted.

By 1963, with much basic research completed, the preparatory steps for a more comprehensive federal program had been made. The eighty-eighth Congress thus saw a number of air pollution bills introduced, culminating in the passage of the Roberts-Ribicoff bill as the Clear Air Act of 1963.\(^3\) Although this Act accelerated the research program established by the earlier law, it contained two major provisions not included in its predecessor. First, the federal

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\(^2\) Id. § 2(a).
\(^3\) Id. § 2(b).
government was authorized to provide financial assistance to state
and local governments for the creation or improvement of air
pollution control programs.\textsuperscript{22} Second, and most important to this
discussion, the Act established air pollution \textit{abatement procedures} for
both interstate and intrastate pollution problems.\textsuperscript{23} The procedure
attempted to continue the federal-state partnership characteristic of
the earlier federal air pollution legislation. It did, however, allow
the federal government unprecedented power to abate air pollution
originating in only one state. These then have become very vital
sections for they raise certain constitutional questions.

In a situation where air pollution is alleged to endanger the
health or welfare of persons in a state other than that in which the
pollutants were discharged, a conference of air pollution agencies
involved may be called at the request of the Governor, a state
control agency, or, in some instances, a municipal governing body.
The Secretary of Health, Education, and Welfare may also call such
a conference.\textsuperscript{24} If after the conference has been held, satisfactory pro-
gress is not made toward abatement, the Secretary will recommend
action.\textsuperscript{25} If this directive, in turn, is unheeded for six months, the
Secretary is empowered to convene a public hearing.\textsuperscript{26} The hearing
board, composed of state and federal representatives, is empowered
to make determinations of whether pollution is occuring and
whether progress toward abatement is being made.\textsuperscript{27} If it finds
that no progress is being made, it will recommend remedial mea-
sures to the Secretary.\textsuperscript{28} The Secretary will then send the findings
to the state agencies and those responsible for the pollution,
specifying that action be taken within a certain time interval.\textsuperscript{29} Finally,
if action is not then taken within the prescribed time, the Secre-
tary may request that the Attorney General bring a suit in a federal
court on behalf of the United States in order to secure abatement.\textsuperscript{30}
While the above procedure is utilized in all cases of interstate pollu-
tion, it should be noted that when dealing with exclusively intrastate
pollution there are two minor exceptions. First, the Secretary can call
a conference only at the request of the Governor, a state agency,
or a municipality.\textsuperscript{31} Second, the Secretary is authorized, upon request of the Governor, to provide technical and other assistance as needed by the state in abatement procedures. Or, at the Governor's request, the United States Attorney General shall be asked by the Secretary to bring suit on behalf of the United States.\textsuperscript{32}

In drafting this complex procedure, Congress apparently based its interstate abatement authority on its power to regulate interstate commerce.\textsuperscript{33} At first blush, it might appear difficult to understand how air pollution can be deemed to be in interstate commerce. It is certainly not sold nor carried across a state line. Neither is it directed to any specific destination. However, since air and the pollutants in it move from state to state, the basis for federal jurisdiction "is the fact of such travel or transportation, without regard to the 'navigable' character of the medium in which this is accomplished and without regard to the effect of such pollution on commerce."\textsuperscript{34} Thus the question of validity depends upon whether pollution carried in the atmosphere is \textit{commerce} in itself.

Once this hurdle is passed, it is not difficult to find cases which illustrate that the type of material involved in movement does not affect its character as commerce.\textsuperscript{35} Indeed, transportation is itself commerce. Simply because air pollution is not directed \textit{intentionally} across a state boundary does not take it from the field of interstate commerce. Bearing these considerations in mind, the constitutional justification utilized by Congress for a federal abatement program of interstate air pollution seems well grounded.\textsuperscript{36}

But what of the regulation of \textit{intrastate} pollution as outlined in the 1963 Clean Air Act? How can federal action be taken when a pollution problem is within the boundaries of a single state?

\textsuperscript{31} Id. § 1857d(e)(1)(B).
\textsuperscript{32} Id. § 1857d(f)(2).
\textsuperscript{33} U.S. Const. art. I, § 8.
\textsuperscript{34} Edelman, \textit{Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution}, 33 GEO. WASH. L. REV. 1070 (1965).
\textsuperscript{35} E.g., United States v. Underwriters Ass'n, 322 U.S. 533 (1943), which states, "[N]ot only ... may transactions be commerce though non-commercial, they may be commerce through illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons."
\textsuperscript{36} Even if this constitutional argument were found to be lacking, it appears, a fortiori, that interstate pollution could be regulated as a burden on interstate commerce or as a hazard to the navigable air space. These arguments are discussed \textit{infra} in connection with regulation of intrastate air pollution.
Upon a close analysis, the Act’s position on intrastate pollution appears to rest upon two firm constitutional principles. First, under the necessary and proper clause of the Constitution, Congress has the power to regulate an activity within a single state if that activity puts a burden upon interstate commerce. With the air pollution problem reaching alarming proportions, affecting the health and welfare of more and more citizens, it does not seem unreasonable that Congress has determined that an intrastate pollution problem puts an undue burden on interstate commerce. As further substantiation for the Act’s position on intrastate pollution abatement, Congress may rely upon its power to regulate and control the navigable airspace, a power which has long been established. Since pollution can and does seriously affect the ability of airlines to provide safe and efficient service, this argument also appears to be valid.

Undoubtedly the question of the constitutionality of the Clean Air Act’s abatement procedures will be held to the light of judicial scrutiny. But despite the fact that the Act was made law in 1963, not one court test of this procedure has been made to date, apparently owing to its complex nature. Although a final hearing was held in one instance, no suit has yet been brought by the Attorney General under the Act. Until the time a polluter is placed under a coercive order, it appears that no one will have sufficient standing to challenge the abatement procedure of the Act.

RECENT DEVELOPMENTS

Studies initiated under existing air pollution legislation have provided strong ammunition for those who advocated more stringent controls. A number of recommendations resulting from these studies

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37 For further discussion, see Edelman, supra note 34.
38 E.g., Wickard v. Filburn, 317 U.S. 111 (1942).
40 In the Matter of Interstate Air Pollution in Selbyville, Delaware-Bishop, Maryland Area (May 19, 1967). This hearing resulted in a finding that the Bishop Processing Co. was and is discharging “malodorous pollutants into the air” causing air pollution in Selbyville, Delaware and environs. Since satisfactory progress toward abatement had not been made, it was recommended that the company be given six months to cease the discharge of pollutants.
41 An attempt to test the constitutionality of the Act before an adverse court order had been rendered was made in the Bishop case. The Bishop Processing Co. filed a petition for a declaratory judgment and for judicial review under the Federal Administrative Procedure Act. This was denied by the court, holding that the dispute was not yet ripe for judicial decision. Bishop Processing Co. v. Gardiner, 36 U.S.L.W 2305 (D. Md. 1967).
were introduced into Congress in January 1965 and made law in October of that year.42 These amendments to the Clean Air Act deal mainly with the problem of pollutants from motor vehicles.43 Since motor vehicles move easily from state to state, only national controls, it was felt, would be truly effective. Accordingly, the Secretary of Health, Education, and Welfare is now empowered to promulgate pollutant emission standards for all new motor vehicles introduced into interstate commerce. At present, these regulations, which went into effect with the introduction of the 1968 model autos (fall of 1967), reduce the amount of pollutants emitted from each auto by roughly one-half. In this way, a gradual reduction in the amount of motor vehicle air pollution can be anticipated for several years.

Despite all of these measures taken to rectify the situation, the future of clean air in the United States still appeared bleak in 1967. This prompted President Johnson last year in a message to Congress, to ask that new legislation be enacted. In that message he stated that if strong measures were not forthcoming, "we shall have lost the battle for clean air" within the next ten years.44

To meet the challenge, Senate bill 780 was introduced in Congress early in 1967. The bill, which became law in November, 1967,45 goes much further in asserting federal authority over this field. Relying once more on the interstate commerce clause, the Act provides that in the event of an "imminent and substantial" danger to public health from air pollution, the Secretary of Health, Education, and Welfare may seek a court injunction against the emission of such pollutants as may be necessary to protect the public. Obviously, this power is much broader than any heretofore granted under the federal air pollution program in that it allows federal authorities to totally suspend any or all of the activities of any number of polluters in the event of an air pollution emergency. Other important provisions of the new act include the fostering of interstate air quality standards through a regional approach. This program relies principally upon a state controlled agency structure, but allows the federal government to set standards if the states are reluctant

43 This Act also contains several other significant sections, including provisions to halt international pollution, provisions to aid the expansion of research and facilities, and provisions for solid waste disposal.
44 Address by President Johnson, Message to Congress, Protecting Our National Heritage, Jan. 30, 1967
Implementation of these standards would probably be best administered by establishing emission standards for individual industries. If no action is taken by a polluter within 180 days of notice of the violation the Secretary of Health, Education, and Welfare may seek relief in a federal court.

**CONCLUSION**

Upon review, it is evident that the federal government has recognized an intense need for air pollution control on a national level. The necessity for an over-view which the individual states cannot provide has been clearly documented and a sound constitutional basis for federal legislation has been constructed. All of this is encouraging. Yet this must certainly be only a beginning, for the rapidly expanding industrial society insures that today's controls will not be adequate in 1980. West Virginia will of necessity play an important role in this new area of federal-state partnership.

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