

## ENVIRONMENTAL LITIGATION: STRENGTHS AND WEAKNESSES

*By Joseph J. Brecher*♦

Environmental lawyers often tell their clients that litigation should be attempted only as a last resort, yet they constantly find themselves before the courts. The reason is that the litigation process, despite some serious drawbacks, offers unique advantages. The courts are indispensable in emergencies. When all other political, administrative, and educational efforts have failed, and the bulldozers are poised to begin their work, only the courts can offer relief. They may issue a temporary injunction, halting an environmentally dangerous activity until a full-fledged trial can be had.

In order to invoke this drastic remedy, conservationists must make a convincing showing that continued activity will lead to severe environmental damage. To do this environmental lawyers must work closely with scientists. They must become thoroughly familiar with the technical data so that they can translate it into terms that will move reluctant judges to take momentous actions. In the Alaska Pipeline<sup>1</sup> and Cross-Florida Barge Canal<sup>2</sup> cases, the lawyers for the conservationists marshalled such impressive evidence of potential ecological dislocations that the courts stopped both projects, even though the developers had millions of dollars invested.

Courtroom battles can be very dramatic. Forceful legal argument and hard-hitting cross-examination fires the imagination of the press and the public. Starting a lawsuit helps to dispel public cynicism and apathy by demonstrating in a highly visible way that it *is* possible to do something about pollution. An aroused public can then exert tremendous political influence.

For example, a lawsuit revived flagging political efforts to stop a land-grab at Upper Newport Bay, California, the finest

remaining natural estuarine area on the Pacific coast. The county supervisors and the State Lands Commission had agreed to give away the priceless state-owned tidelands around the bay to a developer who planned to construct an expensive, privately owned resort community. In exchange, the State was to receive a nondescript upland area, two small bay access points, and a new "waterway" that was to be created when several islands in the bay were excavated to provide fill for the shoreline development. The net result would have been to convert the bay from a magnificent wildlife refuge, open to all, into a sterile, semi-private lake for the rich to enjoy. Publicity generated by the lawsuit<sup>3</sup> stimulated public outrage. Two of the supervisors who had supported the exchange were voted out of office and a third was forced to reverse his stand by public pressure. The Board recently voted 5-0 to rescind the deal, and to instruct its counsel to switch sides in the suit. The vote came just in time, because there were indications that the judge was about to rule against the conservationists.

Court proceedings give environmentalists their only effective chance to cross-examine polluters. Anyone who has observed political press conferences or government officials testifying at Congressional hearings realizes that it is impossible to get direct answers from reluctant politicians. Industry representatives can make themselves unavailable to the press or refuse to comment. More than six weeks after the massive San Francisco Bay oil spill of January 18, 1971, Standard Oil officials were still refusing to estimate the amount of oil spilled, despite intense pressure by the media and conservationists. But in the course of a law suit, at pre-trial depositions and at the trial, itself, environmental lawyers are entitled to cross-examine on any relevant subject and, in most cases, the witness can be compelled to give a direct answer.

Skilled cross-examination can bring out the true beliefs of industrial spokesmen who claim they are concerned with environmental quality. In the Storm King case,<sup>4</sup> a United States Appeals Court reversed a decision by the Federal Power Commission to license a proposed pumped storage hydroelectric generating station that would have destroyed the scenic qualities of a uniquely beautiful and historic part of the Hudson valley. It sent the case back to the Commission to "include as a basic concern the preservation of natural beauty," in deciding whether the plant should be built.

At the renewed FPC hearing, the power company's consultant on beauty, a landscape architect named Conover, enthusiastically touted his plan to transform the wild slope of Storm King Mountain into a dreary "recreational area" surrounding the pumping machinery, complete with parking lots, headquarters buildings, picnic tables, grassy malls, and comfort stations. David Sive, one of the conservationists' attorneys, asked Conover whether he could conceive of *any* natural area that should be left wild, untouched by the works of man. Conover replied, "Personally, I think practically anything can be improved. In my past experience, I have not had any area which wasn't improved. . . ." Unguarded responses like this reveal far more accurately than slick public relations speeches and brochures the true measure of the electric power industry's regard for environmental quality.

Litigation also places a very powerful weapon, "discovery," in the hands of environmental lawyers. The federal courts and most state courts have an elaborate set of pre-trial disclosure procedures, called discovery, in which lawyers may examine their opponents' records, cross-examine their employees and other witnesses at depositions, and obtain formal written statements setting forth contentions of fact and, to some extent, the legal arguments on which they rely.<sup>5</sup>

In most environmental lawsuits, the resource user's files contain most of the data that will be at issue. Specifications for air and water pollution control devices, data regarding the quality and quantity of emissions from a factory, and the results of tests to determine the ecological effects of pesticides are but a few examples. If these data are not already in its files, the resource user usually has on its staff, or can hire, experts to develop the necessary information. All this information can be discovered by the environmental lawyer through a painstaking and time-consuming process of examining witnesses at depositions, framing precise written questions, and going through the resource user's files.

Two factors sometimes stop conservationists from making the fullest use of these procedures. First, discovery is one of the most expensive parts of a lawsuit. Depositions require a great deal of lawyers' time, since there are often dozens of witnesses, whose depositions drag on for days. There may be substantial travel time and expense, since depositions are often held at widely scattered locations. Also, deposition reporters' fees for recording and transcribing can run into thousands of dollars.

Second, environmental lawsuits are often conducted in frantic haste, since they are usually started with the bulldozers poised to strike. If a judge orders a work halt, he has already stuck out his neck for the conservationists. Under those circumstances, resource users invariably demand an immediate trial, arguing that delay is costing them money, and the judge is almost bound to turn a deaf ear to conservationists' pleas for further delays in order to conduct discovery.

Litigation by private citizens strengthens and hastens government's anti-pollution efforts. This is one of the factors that contributed to the recent decision by the Internal Revenue Service not to challenge the tax-deductible status of public-interest law firms doing environmental work.<sup>6</sup> This is also the main goal of several recently-enacted statutes authorizing citizen suits against polluters. Michigan's Environmental Protection Act of 1970<sup>7</sup> allows citizens to seek an injunction against any activity that threatens to pollute, impair, or destroy the air, water, or natural resources of the state. The Federal Clean Air Act amendments of 1970 authorizes citizen suits not only against firms violating air pollution standards and orders, but also against the Administrator of the Environmental Protection Agency if he fails to carry out his enforcement duties under the Act.<sup>8</sup>

Litigation offers one final advantage. It cuts down, to some degree, the polluters' inherent superiority in terms of money, power, and influence. Lobbying is not an appropriate litigation technique and judges are not subject to the same types of pressures that work on legislators. And, unlike most bureaucrats, judges are sometimes willing to listen to new arguments and act flexibly.

But resorting to the courts presents serious drawbacks as a means for achieving environmental quality. Again, the prime difficulty is expense. Environmental lawsuits are often protracted, requiring hundreds of hours of lawyers' time. The controversy over the Storm King project, still raging, has been before the Federal Power Commission or the courts since 1964. Most conservationist attorneys are unpaid or accept sharply reduced fees for their services, but there is a limit to the amount of volunteer labor to be expected from even the most dedicated environmentalist. There are other, large fixed expenses—secretarial and clerical assistance, court fees, bond premiums, and compensation for experts are a few examples.

These expenses are not so crushing to industry and government as they are to the chronically underfinanced conservationist side. Government lawyers can call on the vast Justice Department staff and, if necessary, the whole federal bureaucracy. Industry starts with an immense monetary advantage and, to make matters worse, its efforts are heavily subsidized. Litigation costs may be written off as a business expense, borne in part by the taxpayers. Public utilities, such as water and power companies, receive a second subsidy from their customers, since their rates include a reserve for litigation expenses. This financial superiority enables industry to hire the best available lawyers and technical experts. It also may deny access for conservationists to the best technical assistance. In the Santa Barbara oil spill litigation, conservationist lawyers were hard-pressed to find an expert to advise them; most of the men they talked to were supported directly or indirectly by grants from the oil industry and were not about to jeopardize their future livelihood for the sake of ecology.

Resource users' financial power poses another problem. Typically, they have a heavy investment in their ecologically unsound activities and, they are quick to point out, they provide jobs for many local residents. Closing down a polluting plant can cause serious economic losses for the polluter and considerable local unemployment. Judges are not eager to bring about this kind of result, even if the plant is ecologically disastrous. For instance, in *Boomer v. Atlantic Cement Co.*,<sup>9</sup> the court conceded that clouds of dust produced by a cement plant were causing severe damage to neighboring property-owners and that the plant was a nuisance, as that term is understood at law. Despite a long-standing rule that a court must abate a nuisance that causes continuous and serious harm, the court refused to close down the plant, noting that the cement company had invested \$45 million and employed 300 people. The court did award "permanent damages," a hollow victory for the plaintiffs, who wanted clean air, not filthy lucre.

The majority opinion in *Boomer* asserted another reason why it would not order and supervise a clean-up of the plant's operations. Although it acknowledged the serious nature of the air pollution problem and the urgent need to solve it, the court felt that the judiciary is not the proper institution to effect the needed changes:

A court should not try to do this on its own as a byproduct of private litigation, and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.<sup>10</sup>

The court passed the buck on the ground that it was unequipped to supervise a clean-up program. This premise is faulty. Judges should have no more trouble dealing with the complexities of pollution control technology than they have in anti-trust, malpractice, or other types of cases that involve technical subjects. Indeed, in criminal cases, the courts frequently order a polluting firm to install designated pollution control devices according to a strictly-enforced timetable. For example, a Pennsylvania company was recently ordered to install two half-million dollar precipitators within six months and to take interim steps, including limiting the use of certain boilers, and purchasing low ash-content coal.<sup>11</sup>

But the *Boomer* opinion did point out a more serious drawback of the litigation process. The courts are empowered to deal only with the parties before them and with the issues that the parties choose to raise. They have no power to prescribe industry-wide changes of practice, to order public authorities to spend money, or even to decide what levels of pollution are tolerable. These, and most other questions of environmental policy, are political questions that must be decided by Congress, the state legislatures, and administrative functionaries.

Nor do the courts have the power to compel vigorous enforcement of anti-pollution statutes. For example, the Refuse Act of 1899 makes pollution of navigable streams a crime and instructs the Justice Department to prosecute violators "vigorously."<sup>12</sup> The courts have been eager to help enforce the Refuse Act, issuing a number of very favorable rulings.<sup>13</sup> Nonetheless, until last year there had been only a handful of prosecutions and only now, under great political pressure, has the Justice Department begun to implement a policy of systematic prosecution against violators.<sup>14</sup>

Court victories in environmental cases are often transitory.

Environmentalists cheered the decision in the *Scenic Hudson* case mentioned earlier. But the Federal Power Commission, following a second round of hearings ordered by the court, again decided to license the Storm King hydro plant. And the Commission had learned from its past mistakes. This time around, the FPC made sure that the record was replete with evidence that it have considered factors of environmental quality and scenic beauty—it made 376 detailed findings of fact in all.<sup>15</sup> The chances of winning a second reversal appear dim.

A similar result is possible in the Alaska Pipeline case.<sup>16</sup> There, the court forbade the Secretary of Interior to issue a permit to construct a haul road or take gravel from public lands because it had not submitted an impact statement, as required by the National Environmental Policy Act of 1969, discussed below. The decision effectively stopped the pipeline. But Interior has since submitted an environmental impact statement which concludes that the pipeline should be built because it is vital for national defense. Conservationists were offered a small ray of hope when Rogers Morton, the newly appointed Secretary indicated that he was not completely convinced of the need to build the pipeline; the hopes grew brighter when the Environmental Protection Agency also expressed reservations.

In contrast, a court decision halting work on the Cross-Florida Barge Canal<sup>17</sup> spurred a decision by President Nixon to order a permanent moratorium on construction to prevent “potentially serious environmental damages.” Political decisions like this are usually far more permanent than court decisions.

There is no single “best” type of lawsuit to combat pollution. Depending on the facts of the case, dozens of statutes or common law rules may be applicable. One method that appears particularly promising is to sue under the National Environmental Policy Act of 1969.<sup>18</sup> A large number of NEPA actions have already been filed. NEPA declares a national policy of restoring and maintaining environmental quality and orders all federal agencies to submit detailed statements on the environmental effects of any projects they plan to undertake, permit, or finance. The provisions of NEPA apply to virtually any activity with environmental impact, since federal approval or funding is almost always required. The Council on Environmental Quality has developed interim guidelines for the preparation of the environmental impact statements. Among other things, the statements

must consider cumulative and long-range effects; alternative actions that might avoid adverse environmental effects; and irreversible or irretrievable commitments of resources.

The courts have already based several pro-environment decisions on the provisions of NEPA. In the Cossatot River case,<sup>19</sup> the court ordered a halt to construction work on an Army Corps of Engineers dam that was sixty percent completed because the Corps' environmental impact statement was inadequate. Other courts have ruled that NEPA authorizes the Army Corps of Engineers to refuse a dredging permit for ecological reasons<sup>20</sup> and that an environmental impact statement under NEPA must be submitted before work on the Alaska Pipeline may continue.<sup>21</sup>

A second opportunity is presented by the Refuse Act of 1899, a statute that declares pollution of navigable waters to be a crime and provides for fines of up to \$2,500 per day. One half of those fines, at the discretion of the court, may be paid to "persons giving information which shall lead to conviction."<sup>22</sup> Recently, environmental lawyers have been dusting off an ancient common law form called a *qui tam* action, permitting an informer to sue to collect a fine when a statute authorizes him to keep a portion of it.

The Conservation and Natural Resources Subcommittee of the House Committee on Government Operations, chaired by Rep. Henry Reuss (D-Wis.), has issued a report on *qui tam* citizens actions under the Refuse Act. The report recommends that a citizen with information about refuse discharged into navigable waters should follow these procedures:

1. Contact the Army Corps of Engineers to see if the Corps has issued a permit for the discharge, and if so, whether the permittee is complying with its terms.

2. Submit an affidavit to the U.S. Attorney describing the nature, method, date, and place of the discharge, the name of the discharger, and a list of other possible witnesses. The affidavit should state that the Corps of Engineers has not issued a permit for the discharge, and that the receiving stream is navigable. If possible, photos and samples should be included.

3. Request that the U.S. Attorney seek an injunction forbidding future discharges, requiring removal of prior discharged material, and ordering the discharger to apply for a permit from the Corps of Engineers.

4. If no action is forthcoming, begin a civil *qui tam* suit in the U.S. District Court.



The short opinion by Judge Wyatt in *U.S. v. Transit-Mix Concrete Corp.*<sup>23</sup> shows how dogged persistence may pay off in *qui tam* actions. The claimant in that case first noticed the defendant dumping waste into the East River, New York City, from her window in April, 1968. She then began a long and frustrating series of telephone calls and letters to the Corps of Engineers and U.S. Attorneys, who took no action for almost two years. Finally, prosecution was begun in March, 1970 and \$25,000 in fines was collected. The court awarded half that amount to the claimant, despite the fact that the government had information about the discharges even before she first contacted the Corps of Engineers. But the court recognized that the claimant's persistent campaign did, in fact, "lead to conviction," and therefore concluded she was entitled to half the fine.

There is considerable doubt whether a *qui tam* action may be maintained if the government refuses to prosecute. In one case dealing with this question, a district judge dismissed a *qui tam* action because he did not want to be placed "in the awkward position of determining priority between a criminal prosecution . . . and a civil suit . . . by an informant. It would be unreasonable to conclude that a court would entertain both actions simultaneously."<sup>24</sup>

Another useful tool is the class action. One of the most serious problems in bringing environmental lawsuits is that the plaintiff's monetary damages are miniscule (if, indeed, there are any, at all). It has been estimated, for example, that air pollution costs the average American about \$65 a year for increased cleaning, medical, and other expenses.<sup>25</sup> The prospect of a \$65 recovery is hardly likely to encourage the average lawyer to rush out and file an environmental law suit. But by bringing a class action, one individual may sue on behalf of all others similarly situated. The aggregate total of damages for the class is usually very large and provides a great incentive for lawyers to undertake such suits.

An imaginative class action was recently brought by conservationists against Standard Oil of California.<sup>26</sup> The suit arises out of a collision between two Standard tankers in San Francisco Bay that resulted in a massive oil spill. The plaintiffs seek to recover the reasonable value of the services donated by thousands of volunteers who helped clean birds and beaches in the days after the spill. They claim that it was Standard's legal duty to clean up the mess caused by its negligence, that the

company could and should have foreseen that many Bay Area residents would react to the disaster by volunteering their labor, and that Standard should not be allowed to reap the advantage of that labor without payment.

Only within the last few years have the courts been willing to accept the concept that environmental outrages are actionable. Because the field is so new (and the law is generally slow to change), conservationists must overcome various procedural hurdles just to persuade the court to hear their case. One such hurdle is the problem of "standing." Typically, the environmental plaintiff is a conservation organization or individual who has suffered no real monetary damage. The defendant usually objects that such a plaintiff lacks "standing to sue," i.e., that because the plaintiff lacks a direct pecuniary interest in the suit, the court will be called on to render an unconstitutional advisory opinion. Another apparent danger is that the courts would be overrun by conservationists filing frivolous lawsuits.

Objections of this type were rejected by a federal appeals court in two landmark decisions, *Scenic Hudson Preservation Conference v. Federal Power Commission*<sup>27</sup> and *Citizens Committee for the Hudson Valley v. Volpe*.<sup>28</sup> The court concluded that non-economic interests, such as concern for the environment, are entitled to judicial protection, that conservationist groups with serious and long-standing interests in the area were proper guardians of that concern, and that the large expense of environmental litigation would effectively discourage frivolous lawsuits.

More than a dozen opinions have accepted the rationale of *Scenic Hudson* and *Citizens Committee*. But recently, the federal appeals court for the Ninth Circuit ruled that the Sierra Club lacked standing to challenge a plan to construct a commercial ski resort development in Mineral King Valley, within the Sequoia National Game Refuge.<sup>29</sup> In effect, the court decided that the Sierra Club had no legitimate interest in protecting the Sierras! The Supreme Court has agreed to review that ruling and conservationists are optimistic that it will be overturned.

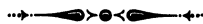
Another major problem is administrative delay. Many federal agencies empowered to make decisions of great environmental significance are usually hostile to conservationists and their point of view. One technique they have used quite successfully to thwart conservationists is to move as slowly as possible in response to their requests. Environmentalists then face a quandary,

since the courts usually refuse to review an agency's action until it has rendered a final decision.

That was the situation in *Environmental Defense Fund v. Hardin*,<sup>30</sup> a case in which the Department of Agriculture was asked to use its emergency powers to suspend immediately the interstate sale of DDT. Agriculture sat on the request, taking no action. But when conservationists sought judicial relief, the Department argued that the court should not take jurisdiction because it had not rendered its final decision yet.

The court did not accept this argument. It asserted: "[W]hen administrative inaction has precisely the same impact on the rights of the parties as a denial of relief, an agency cannot preclude judicial review by casting its decision in the form of an order denying relief. . . . The suspension power is designed to protect the public from an 'imminent hazard'; if petitioners are right in their claim that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale. The controversy is ripe for judicial resolution . . ."

Despite the expense and difficulties of environmental litigation, this embryonic field has shown remarkable progress in a few short years. But judicial litigation can only be a stop-gap measure in the fight for environmental quality. It would be an unconscionable waste of resources if every issue of environmental policy had to be fought out in court. What is needed is a new ethic emphasizing harmony between man and nature and a new, workable institutional framework to implement such a policy. Neither can be achieved through the courts. Instead, we will require a massive process of re-educating the public and an intense political campaign to establish as one of our primary goals the maintenance of the earth as a fit habitat for the human species.



#### FOOTNOTES

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<sup>1</sup> *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

<sup>2</sup> *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971).

<sup>3</sup> *Orange County v. Heim* (Cal. Orange Co. Super. Ct. No. M1105).

<sup>4</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965).

<sup>5</sup> See, e.g., Federal Rules of Civ. Proc. 26-37; Cal. Code of Civ. Proc. §§2016-2036; *Burke v. Superior Court*, 71 Cal. 2d 276, 78 Cal. Reprtr. 481 (1969).

<sup>6</sup> See, e.g., the letter of Sept. 30, 1970 from Russell Train, Chairman of the Council on Environmental Quality to the IRS Commissioner quoted at *Environment Reporter Current Developments*, Nov. 13, 1970, p. 745.

<sup>7</sup> House Bill No. 3055, 75th Leg., Regular Sess. 1970, *Environment Reporter State Water Laws* p. 811:0121.

<sup>8</sup> Clean Air Amendments of 1970 §304(A), 42U.S.C.A. 1857h-2 (1971).

<sup>9</sup> 26 N.Y. 2d 219, 309 N.Y.S. 2d 312 (1970).

<sup>10</sup> 26 N.Y. 2d 219, 223 (1970).

<sup>11</sup> *Environment Reporter Current Developments*, Dec. 18, 1970, p. 874. See also the detailed air pollution control schedule established and enforced in *Philadelphia v. Philadelphia Coke Div.*, 2 *Environment Reporter Decisions* 1057 (Philadelphia, Pa., Ct. of Comm. Pleas 1970).

<sup>12</sup> 33 U.S.C. §413.

<sup>13</sup> See e.g., *United States v. Republic Steel Co.*, 362 U.S. 482 (1960); *U.S. v. Standard Oil Co.*, 384 U.S. 224 (1966); *United States v. Interlake Steel Co.*, 297 F. Supp. 912 (N.D. Ill. 1969).

<sup>14</sup> The Justice Department recently issued revised guidelines giving U.S. Attorneys much greater latitude in instituting Refuse Act prosecutions. See *Environment Reporter Current Developments*, Feb. 12, 1971, p. 1099.

<sup>15</sup> *Consolidated Edison Co.*, F.P.C. Opinion No. 584, Aug. 19, 1970, 1 *Environment Reporter Decisions* 1526.

<sup>16</sup> *Wilderness Society v. Hickel*, *supra* note 1.

<sup>17</sup> *Environmental Defense Fund v. Corps of Engineers*, *supra* note 2.

<sup>18</sup> 42 U.S.C. §4321 *et seq.*

<sup>19</sup> *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E. D. Ark. 1971).

<sup>20</sup> *Zabel v. Tabb*, 430 F.2d 199, (5th Cir. 1970).

<sup>21</sup> *Wilderness Society v. Hickel*, *supra* note 1.

<sup>22</sup> 33 U.S.C. §411. In *United States v. St. Regis Paper Co.*, 2 E.R.C. 1619 (W.D. Wis., May 26, 1971, No. 70-CR-705), the court held that if an informer fills the requirements of the Act, he is entitled to one-half the fine and the court has no discretion to deny such an award.

<sup>23</sup> 2 *Environment Reporter Decisions* 1074 (S.D.N.Y. 1970).

<sup>24</sup> *Durning v. I.T.T. Rayonnier, Inc.*, 325 F. Supp. 447 (W.D. Wash.

1971). See also United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971).

<sup>25</sup> Goldman, "Pollution: The Mess Around Us," in Goldman, ed., *Controlling Pollution* 17 (Prentice-Hall, 1967).

<sup>26</sup> Shettler v. Standard Oil of California (San Francisco Super. Ct. No. 627,285, filed January 26, 1971).

<sup>27</sup> 354 F.2d 608 (2d Cir. 1965).

<sup>28</sup> 425 F.2d 97 (2d Cir. 1970).

<sup>29</sup> Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

<sup>30</sup> 428 F.2d 1093 (D.C.Cir. 1970).