

WATER POLLUTION: ROLE OF THE COURTS

I. INTRODUCTION

Within the past several years, there has been a startling awakening to environmental problems. It may be premature to speculate on the scope and penetration of this new awareness, but mass participation in Earth Day, April 17, 1970, and increased coverage of environmental affairs by the communications media illustrate broad public concern.¹ This past year has seen much activity—expansion of basic research, investment in pollution abatement devices, state and federal legislation, and the establishment of a major federal agency, the Environmental Protection Agency.² While the goals reached are relatively minor in proportion to the total situation, these are important first steps. A year and a half ago the cry was for attention, the need now is for detailed and specific programs and careful evaluation of methods and procedures for resolving pollution problems.

Among the institutions most pressured by the advent of environmentalism are the courts. There has been a great upsurge in litigation.³ Yet, it is not so much the sheer volume of cases which is critical, rather the role within the scheme of environmental reform which courts are urged to take. This paper analyzes the scope of court action with respect to a particular problem—inland water pollution—and evaluates the utility of the courts as a primary tool in remedial action.

Environmental litigation can be conveniently divided into three areas: 1) private lawsuits seeking damages or equitable relief against polluting sources; 2) the adjudication of criminal and civil charges against alleged violators of pollution control statutes; and 3) citizen suits challenging the activities of public officials in preserving or administering public resources.⁴ Unfortunately, the assumption persists

1. See generally, *THE EARTH TOOL KIT: A FIELD MANUAL FOR CITIZEN ACTIVISTS* (S. Love ed. 1971).

2. The Environmental Protection Agency was established by Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

3. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. Rev. 429, 448 (1970).

4. *Id.* at 429. Professor Krier also lists as a role of the courts, "the policing of

that the courts are equally effective in all three areas. The consequence of this line of thinking has been to find a solution to pollution problems in the simple motto, "sue the bastards."⁵ A more detailed analysis demonstrates that the effectiveness of the courts varies with respect to each type of suit.⁶

II. ACTIONS BY PRIVATE PARTIES AGAINST POLLUTERS

The most common forms of private litigation against water polluters are the resurrected common law torts of riparian rights, nuisance, and trespass. Riparian rights proceeds from the doctrine that each proprietor of land abutting a watercourse has a co-equal right to use water in that watercourse.⁷ An early rule held that each riparian had the right to water in a substantially natural condition,⁸ but the more modern and majority view is that each riparian can make reasonable use of the water even if this alters its quantity or quality.⁹ The court, in deciding whether a use is reasonable, considers the nature of the impurities released in the water flow, the size and velocity of the stream, the extent of the injury, and the economic costs of pollution abatement to industry and municipalities.¹⁰ Damages or injunctive

legislative programs under the constitutional requirements of due process and equal protection." Since, however, constitutional problems may arise in any of the three categories, it seems to us best to include this area with the first three.

5. Address by V. Yannacone, delivered on "Earth Day" at Michigan State University, April 22, 1970.

6. Environmental litigation should also be distinguished from litigation that only affects the parties to the action. Environmental litigation is concerned with decisions by courts that will have a significant impact on the environment. This type of litigation is often, though not necessarily, initiated by an ideological or non-Hohfeldian plaintiff. This type of plaintiff is concerned with the use of the courts as an institutional tool in solving problems of environmental pollution rather than with the courts' more traditional task as arbiter of duties and rights. See generally, Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. OF PENN. L. REV. 1033 (1968); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

7. *Tyler v. Wilkinson*, 24 F. Cas. 472 (no. 14,312) (C.C.R.I. 1827). A similar doctrine exists for owners of land abutting still waters such as lakes. See, e.g., *Humphreys-Mexia Co. v. Arseneaux*, 116 Tex. 603, 297 S.W. 225 (1927).

8. *International Show Co. v. Heatwole*, 126 W. Va. 888, 30 S.E.2d 537 (1944). See also *City of Canton v. Schock*, 66 Ohio St. 19, 63 N.E. 600 (1902).

9. *Merrifield v. City of Worcester*, 110 Mass. 216 (1872); *Borough of Westville v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62, 122 A.2d 233 (Super. Ct. 1956). See also W. PROSSER, *LAW OF TORTS* 599-601 (4th ed. 1971).

10. *Reese v. City of Johnstown*, 45 Misc. 432, 92 N.Y.S. 728 (Sup. Ct. 1904), quoting *Townsend v. Bell*, 167 N.Y. 462, 60 N.E. 757 (1901).

relief may be awarded when the court finds defendant's pollution an unreasonable use.

Actions in trespass have also been suggested as a device for environmental litigation, but their usefulness is limited by the rule that a trespassory invasion must be a physical entry by a person or object.¹¹ Although the plaintiff need not show, as with riparian rights, a substantial or unreasonable injury, it is very difficult to show that water pollution has actually invaded one's land.¹² Moreover, as in the case of riparian rights actions, it is often difficult to establish that one single source along a polluted waterway is the individual "trespassor".

To a certain extent, a nuisance action alleviates the difficulties of bringing an action under the riparian rights or trespass theories. It does not require a showing of physical trespass, nor does it require the plaintiff to be a contiguous landowner.¹³ Generally, a nuisance is an interference with the peaceful enjoyment of land.¹⁴ It is divided into "private nuisance" and "public nuisance", with some hybrids combining elements of both. Private nuisance is an interference with private enjoyment of land, and public nuisance is behavior that impairs the welfare and comfort of the general community.¹⁵ Some behavior can be classified as both public and private. For example, if pollution of a river causes fish to die, there may be a private nuisance where the river flows through private property, and a public nuisance in areas where there is an interference with the public's right to fish.

11. *Anderson v. Reynolds Metal Co.*, 125 F. Supp. 481 (W.D. Wash. 1954).

12. *RESTATEMENT OF TORTS* § 158 (1934).

13. *Mandell v. Pivnick*, 20 Conn. Supp. 99, 125 A.2d 175 (Super. Ct. 1956); *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957). See also W. PROSSER, *LAW OF TORTS* 572 (4th ed. 1971).

14. W. PROSSER, *LAW OF TORTS* 571 (4th ed. 1971). While the law of nuisance can be described generally, it has many pitfalls and has often been described as an "unbelievable morass". Moreover, the rubric of nuisance is often stretched by the courts to cover anything from a cockroach in a piece of cherry pie to a bawdy house. See, e.g., *Carroll v. New York Pie Baking Co.*, 215 App. Div. 240, 213 N.Y.S. 553 (1926); *Black v. Circuit Court of Eighth Judicial Dist.*, 78 S.D. 302, 101 N.W.2d 520 (1960).

15. *City of Selma v. Jones*, 202 Ala. 82, 79 So. 476 (1918). See also W. PROSSER, *LAW OF TORTS* 572 (4th ed. 1971). Certain extremely hazardous or offensive activities may be designated as nuisances per se. Ultimately, however, the courts must still make reasonable use determinations for these activities just as for other nuisances.

Some fairly refined conceptual distinctions have been drawn to separate these two torts,¹⁶ but the major practical difference is that a public nuisance action may traditionally be brought only by a public official.¹⁷ Since water pollution usually involves wide proliferation of the pollutant throughout a water course or littoral body of water, it has ordinarily been classified as a public nuisance. While courts have on occasion allowed private nuisance actions to abate a public nuisance,¹⁸ the plaintiff has been required to show some special injury, different in kind, not merely in degree, from that suffered by the general public.¹⁹ Courts have been hesitant to recognize such special injuries.²⁰

The common law actions of trespass, riparian rights, and nuisance were originally designed to settle disputes and establish relationships between private individuals.²¹ They are not easily adapted for use as wide-scale anti-pollution tools. The average citizen, a city dweller, seeking to abate pollution through court action encounters two significant difficulties. First, he probably lacks standing to sue. Unless he has an interest in land on or near a watercourse, he has no basis to maintain a riparian rights or trespass action, and, because of the public nature of water pollution, he is foreclosed from bringing a private action in nuisance. Second, even if a plaintiff has the proper standing to bring a common law suit, he encounters the "balancing of equities

16. For example, the courts may try to draw lines concerning the number of litigants involved in bringing the action. Apparently, the "public" may consist of six people in South Dakota. *Watson v. Great Lakes Pipeline Co.*, 182 N.W.2d 314 (S.D. 1970); 16 S.D.L. REV. 510 (1971).

17. *Attorney General v. City of Grand Rapids*, 175 Mich. 503, 141 N.W. 890 (1913); *Gibbons v. Hoffman*, 203 Misc. 26, 115 N.Y.S.2d 632 (Sup. Ct. 1952). See also W. PROSSER, *LAW OF TORTS* 583 (4th ed. 1971).

18. *Gibbons v. Hoffman*, 203 Misc. 26, 115 N.Y.S.2d 632 (Sup. Ct. 1952); *Kuehn v. City of Milwaukee*, 83 Wis. 583, 53 N.W. 912 (1892).

19. Some jurisdictions allow the special damages even if there is only a difference in degree. *Watson v. Great Lakes Pipeline Co.*, 182 N.W.2d 314 (S.D. 1970); 16 S.D. L. REV. 510 (1971).

20. See, e.g., *Kuehn v. City of Milwaukee*, 83 Wis. 583, 53 N.W. 912 (1892), where a professional fisherman on Lake Michigan brought an action against city officials to stop pollution of the Lake. He sought to enjoin them from further garbage dumping, contending that the destruction of fish and rotting of his nets were sufficient special damage for him to bring an action of abatement against the public nuisance. The court, however, held that since any member of the public could fish in public waters, there were no exclusive damages which would allow a private suit.

21. Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 197 (1966).

doctrine."²² Under this doctrine courts balance the plaintiff's injury against the cost of abatement. Courts consider such things as loss of jobs, taxes, and revenue to the community.²³ Thus, even though a plaintiff suffers severe injury, courts are reluctant to award large money damages or injunctive relief if the costs of abating the pollutants are high.²⁴

Environmental litigants have attempted to overcome the problems of standing to sue and the balancing of equities doctrine inherent in the old forms of action.²⁵ Devices such as anti-trust suits,²⁶ stockholders derivative suits²⁷ and class actions²⁸ have been employed to alleviate standing difficulties and to consolidate the claims of many individuals.²⁹ In a more direct approach, legislation to facilitate private litigations against polluters has also been suggested. To date, one

22. Apparently the doctrine is of ancient vintage. An old case said in regard to candle-making in a town: "Le utility del chose excusera le noisomeness del stink". W. PROSSER, *LAW OF TORTS* 581-82 (4th ed. 1971). See generally, Roberts, *The Right to a Decent Environment, E=MC²: Environment Equals Man Times Court Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970).

23. *Boomer v. Atlantic Cement Co.*, 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968); *Soukoup v. Republic Steel Corp.*, 78 Ohio App. 87, 66 N.E.2d 334 (1946).

24. *Boomer v. Atlantic Cement Co.*, 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968).

25. The balancing of equities doctrine is almost always used in riparian rights and nuisance actions. It may even have been used rarely in trespass actions. See, e.g., *Lampert v. Reynolds Metal Co.*, 372 F.2d 245 (9th Cir. 1967).

26. To date, only one such anti-trust class action has been brought against a polluter, but it has been held that a major obstacle to environmental class actions under the anti-trust laws, the requirement of a commercial relationship between the litigants, is not necessary. *In re MultiDistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment*, 1970 Trade Cas. 89,251 (C.D. Cal.). See also Comment, *Private Antitrust Actions Against Air Polluters—Commercial Relationship Between Litigants Not Necessary to Maintain an Action for Violation of Section 1 of Sherman Act*, 24 VAND. L. REV. 126 (1971). Anti-trust actions are particularly attractive because of the treble-damages provisions for those injured. Clayton Act § 4, 15 U.S.C. § 15 (1964).

27. Comment, *Shareholder's Derivative Suit—A Solution to the Pollution Problem?*, 5 VAL. U.L. REV. 149 (1970).

28. In a class action, suit may be brought by members of a class as representatives of the entire class, so long as these representatives meet certain standards. FED. R. CIV. P. 23. This device can get out of hand, however. In *Diamond v. General Motors Corp.*, No. 947429 (Super. Ct. Cal., Aug. 20, 1969), appeal docketed Civ. No. 36600, 2d Dist. Ct. App., Oct. 15, 1969, a class action was filed on behalf of all the people in Los Angeles County against 291 companies polluting the air. The court dismissed the action. For an extended argument favouring class actions, see Lamm, Dabison, *Environmental Class Actions Seeking Damages*, 16 ROCKY MT. M.L. INST. 59 (1971).

29. *Storley v. Armour & Co.*, 107 F.2d 499 (8th Cir. 1939).

state, Michigan, has enacted such legislation. The Michigan Environmental Protection Act of 1970³⁰ creates a right of action in any person, corporation, governmental agency, or other legal entity against another legal entity "for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction."³¹ Since the Act is relatively new, it is difficult at the present time to describe its scope with complete authority. By conferring upon each citizen an affirmative right to seek redress against polluters, however, the statute goes far to alleviate standing difficulties.³² The statute does retain, though, the balancing of equities doctrine and, as an affirmative defense, defendants may still plead that there is no feasible and prudent alternative to their conduct.³³ Thus, the courts can continue to weigh the cost of pollution abatement against the harm done to the environment.

The Michigan statute facilitates private litigation, but even more far reaching than this are proposals for a constitutional right to a clean environment. It has been argued alternatively that such a right presently exists, or, if not, then it should be created by amendment to the Constitution. One recent case, *Environmental Defense Fund v. Hoerner Waldorf Corp.*,³⁴ has indicated that a constitutional right to a clean environment may be one of the "unenumerated" rights found in the ninth amendment.³⁵ Proposals have also been introduced to amend the federal³⁶ and state³⁷ constitutions to provide such

30. MICH. COMP. LAWS. §§ 691.1201-.1207 (Supp. 1971).

31. MICH. COMP. LAWS. § 691.1202(1) (Supp. 1971).

32. Comment, *Michigan Environmental Protection Act of 1970*, 4 J. LAW REFORM 121, 123 (1971).

33. MICH. COMP. LAWS. § 691.1202(2) (Supp. 1971). The defendant may of course also simply deny the facts as stated by the plaintiff.

34. No. 1694 (D. Mont., Aug. 25, 1970).

35. Comment, 32 MONTANA L. REV. 161 (1971). This argument may, perhaps, find some precedent in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where a so-called "right of privacy" was constructed out of a penumbra surrounding certain of the amendments to the Constitution. An individual right to a clean environment has also been discovered in the Environmental Protection Act of 1969, Pub. L. No. 91-190, January 1, 1970, 83 Stat. 852. See Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

36. Representative Ottinger has proposed an amendment to the federal constitution guaranteeing "to each citizen a wholesome and unimpaired environment." Ottinger, *Legislation and the Environment: Individual Rights and Governmental Accountability*, 55 CORNELL L. REV. 667, 672 (1970).

37. In Pennsylvania, the text of H.R. 958 (1969) reads as follows:

a right. These amendments would have a significant impact on the "balancing of equities" doctrine.³⁸ Although courts have balanced constitutional rights such as freedom of speech and freedom of the press against competing interests,³⁹ they are notoriously reluctant to admit that constitutional guarantees can be denigrated unless the competing interests are all but overwhelming.⁴⁰

Analysis

Despite recent developments which increase the citizen's ability to utilize private litigation as a means for seeking environmental reform, the adjudication of this type of dispute continues to pose serious difficulties for the courts.

Environmental litigation presents questions demanding the evaluation of complex technical and scientific data. It is true that various types of litigation have involved courts in technological assessment.⁴¹ Courts have made their own scientific determinations of the effects of dams on steelhead trout⁴² and the effect of cedar rust on apple

That article one of the Constitution of the Commonwealth of Pennsylvania be amended by adding at the end thereof—, a new section to read:

Section 27 Natural Resources and the Public Estate—The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and aesthetic values of the environment. Pennsylvania's natural resources including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth, are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall preserve and maintain them for the benefit of all the people.

See also Roberts, *The Right to a Decent Environment, E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 687 (1970).

38. Constitutional amendments would also seem to reduce standing to sue difficulties for plaintiff's bringing environmental actions. Professor Roberts argues that such amendments would not be self-executing, but would require enabling legislation, however. Roberts, *The Right to a Decent Environment, E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 688 (1970). This would seem to us hardly self-evident. The first amendment guarantee of free speech requires no such legislation.

39. For example, Justice Holmes' classic example of a man yelling "fire" in a crowded theatre. *Schenk v. United States*, 249 U.S. 47 (1919).

40. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (Black and Douglas dissenting).

41. See, e.g., *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961); *Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 249 A.2d 65 (1969) (plaintiff sues for hepatitis contracted as a result of blood transfusion).

42. *Udall v. FPC*, 387 U.S. 428 (1967).

orchards,⁴³ but the propriety of such activities is questionable.⁴⁴ First, technical questions put a heavy burden on the courts. It is difficult for a judge and jury untrained in highly scientific areas such as water pollution to make competent decisions even when aided by expert testimony.⁴⁵ Second, the legal preoccupation with precedent may encumber technological evaluation. In the past, lawyers and judges have produced a historical drag on technology and have slowed recognition of new developments.⁴⁶

Courts encounter another difficulty in the formulation of appropriate remedies for pollution cases. The award of money damages is usually unsatisfactory. Where a water course is polluted by many sources, the assessment of the physical injury caused by an individual polluter can be nearly impossible.⁴⁷ Even where courts can make a fair assessment, the payment of damages allows the defendant to continue polluting, in effect granting him an easement over the plaintiff's property.⁴⁸ For these reasons, injunctive relief is preferable.

Injunctive relief can be an extremely quick and effective form of remedy, and courts have on occasion ordered the immediate cessation of polluting activities.⁴⁹ Nevertheless, the economic effects of imme-

43. *Miller v. Schoene*, 276 U.S. 272 (1928).

44. Note, *The Role of the Courts in Technology Assessment*, 55 CORNELL L. REV. 861, 872 (1970).

45. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

46. Comment, *The Role of the Courts in Technology Assessment*, 55 CORNELL L. REV. 861, 871. A particularly lurid example is noted by the authors. In *Gursky v. Gursky*, 34 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), the court held that a child conceived by artificial insemination from third party donor semen was illegitimate, even though both husband and wife consented.

47. In *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 255, 248 S.W.2d 731, 733 (1952), the court stated: "(T)he courts of the country seem to be virtually unanimous in refusing to impose joint and several liability on multiple wrongdoers whose independent tortious acts interfere with a landowner's interest in the use and enjoyment of land by interfering with his air or water." See *Farley v. Crystal Coal & Coke Co.*, 85 W. Va. 595, 102 S.E. 265 (1920); RESTATEMENT OF TORTS § 881 (1934). But see *Phillips Petroleum Co. v. Hardee*, 189 F.2d 205 (5th Cir. 1951); *Prairie Oil & Gas Co. v. Laskey*, 173 Okla. 48, 46 P.2d 484 (1935).

48. *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 P. 928 (1911). Some have seen defendant as virtually condemning plaintiff's land to his own use. *Boomer v. Atlantic Cement Co.*, 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967), *aff'd* 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968).

49. *Western Paper Co. v. Pope*, 155 Ind. 394, 57 N.E. 719 (1900); *People ex. rel. Stream Control Commission v. City of Port Huron*, 305 Mich. 153, 9 N.W.2d

diately closing down large industrial plants are simply too great to permit permanent injunctions which would force the shutting down of all operations.⁵⁰ Court-appointed masters to oversee the installation of anti-pollution equipment and to submit periodic progress reports to the courts have been suggested.⁵¹ There is considerable precedent for the fashioning of complex equitable decrees, even if this engages the court in a supervisory capacity.⁵² The Supreme Court has prospected for oil and gas, drilled wells, and sold petroleum products.⁵³ Other courts have regulated drive-in movie theater speakers⁵⁴ and acted as terminal control authorities at airports.⁵⁵ The Supreme Court has, however, very recently indicated that it is unwilling to take on the task of overseeing a major pollution clean-up project, and has implied that any court will find difficulties in hearing and supervising pollution problems.⁵⁶ With the already crowded dockets in most courts, it is certainly doubtful whether the courts are physically able to supervise the time consuming difficulties that many pollution cases present. Also, the grafting of complex administrative machinery on the structure of the courts by means of masters, continuing decrees, and supervisory duties would, to a large extent, necessitate restructuring the courts.⁵⁷

Finally, environmental suits present issues which are more appro-

41 (1943); *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907); *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913).

50. *White Lake Improvement Ass'n v. City of Whitehall*, 22 Mich. App. 262, 177 N.W.2d 473 (1970); *Monroe Carp Pond Co. v. River Raisin Paper Co.*, 240 Mich. 279, 215 N.W. 325 (1927); *Gilpin v. Jacob Ellis Realties, Inc.*, 47 N.J. Super. 26, 135 A.2d 204 (1957); *Boomer v. Atlantic Cement Co.*, 55 Misc. 2d 1023, 287 N.Y.S. 2d 112 (Sup. Ct. 1967), *aff'd*, 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968); *York v. Stallings*, 217 Or. 13, 341 P.2d 529 (1959). An example is given in Comment, *Cold Facts on Hot Water: Legal Aspects of Thermal Pollution*, 1969 Wisc. L. REV. 253.

A large electric plant in Clearfield County, Pennsylvania, discharged hot water into a river, raising the temperature to 93 degrees for four miles downstream. However, closing of the plant would have deprived the county of its only significant source of income.

51. *Renken v. Harvey Aluminum, Inc.*, 226 F. Supp. 169 (D. Ore. 1963). See also Comment, *Air Pollution, Nuisance Law, and Private Litigation*, 1971 UTAH L. REV. 142, 147 n.35.

52. *Id.*

53. *Oklahoma v. Texas*, 256 U.S. 602 (1921).

54. *Payne v. Johnson*, 20 Wash. 2d 24, 145 P.2d 552 (1944).

55. *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (Ch. 1969).

56. *Wyandotte Chem. Corp. v. Ohio*, 401 U.S. 493 (1971).

57. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429, 459 (1970).

priately resolved by political or legislative means than by the courts. This becomes evident when one considers industrial pollution. Industry uses water as a natural resource just as it uses coal to heat furnaces or iron ore to make steel. In the past, industry has not been charged for its use of water.⁵⁸ The "cost" has been borne by the public at large in terms of polluted and mutilated lakes and streams. Environmental litigation has attempted to internalize the costs upon industry through the use of heavy damages or injunctions.⁵⁹ This cost to industry will to a great extent be passed along to the consumer. Thus, by imposing liability on a defendant polluter, the court is making an environmental quality decision, determining that consumers are willing to pay higher prices for cleaner waters.⁶⁰ Such decisions are ordinarily left to a legislative body, since courts are not equipped with the proper fact-gathering or opinion-taking tools.⁶¹

Courts have decided questions which seem political or legislative in nature. This is demonstrated by court decisions in the reapportionment⁶² and desegregation cases.⁶³ Courts should be extremely wary, however, in approaching such questions, and should develop criteria to decide how effective their decisions will be.⁶⁴ Conscious decisions on water quality will have to be made, but they will almost certainly involve the establishment of priorities of water use for an entire river basin.⁶⁵ Some streams to be used for drinking water and recreational purposes will require a high level of water purity. Others to be used

58. Water pollution "represents a case where certain costs are imposed on society at large by the activities of polluters, and because of failures in the market mechanism those costs remain external to their source—that is, they are not taken into account by polluters in deciding whether or not their activities are worthwhile to them or society at large." Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429, 444 (1971).

59. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429, 444 (1971).

60. *Id.* at 458.

61. *Id.*

62. *See, e.g.*, *Baker v. Carr*, 369 U.S. 1 (1964).

63. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

64. Professor Jaffe suggests the following criteria: (1) whether there are well-developed principles in the area; (2) whether the court's decision would be awkward because the question is closely related to a complex of decisions beyond the court's jurisdiction; (3) whether the court's decision would lack effectiveness. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1304 (1961).

65. Hoak, *The Thermal Pollution Problem*, 33 J. WATER POLLUTION CONTROL FED'N (1961).

for industrial and sewage purposes can have a lower level.⁶⁶ No precedent is available to guide the courts in making such decisions. The comprehensiveness needed for water planning militates against the effectiveness of judicial decision making in private litigation.

III. PUBLIC ACTION AGAINST POLLUTERS

Court action against polluters is by no means limited to private litigation. State and federal governments have long maintained pollution control statutes, many dating from the 19th century.⁶⁷ Some of these are surprisingly forceful and comprehensive, with a full complement of enforcement tools—fines, imprisonment, and injunctions.⁶⁸ These statutes, generally, have taken one of two forms: proscriptive laws imposing an absolute ban on the disposal of pollutants in waterways, and prescriptive laws setting minimum standards of water purity.⁶⁹ In the past, such measures were largely unenforced and unsuccessful.⁷⁰ The growth of concern over environmental problems, however, has brought new attention to such statutes, and has also brought pleas for vigorous enforcement.⁷¹

66. *Id.*

67. *See, e.g.*, an 1892 Wisconsin statute which authorized any city to abate nuisances upon river banks, to remove rubbish from which offensive drainage could come, and to exclude from city waters any waste "inconsistent with or detrimental to the public health, or calculated to render the water . . . impure or offensive, or tending in any degree to fill up or obstruct the same." Laws of 1899, Ch. 326 § 52, Wis. Laws 57.

68. E.F. MURPHY, *WATER PURITY: A STUDY IN LEGAL CONTROL OF NATURAL RESOURCES* 59 (1961).

69. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429, 435 (1971).

70. E.F. MURPHY, *WATER PURITY: A STUDY IN LEGAL CONTROL OF NATURAL RESOURCES* 23-28 (1961).

71. *See* letter to the Attorney-General from Representative Reuss and reply. Reported in 1 E.R.C.D. 157 (1971). The hopes of many individuals and environmental groups that the Refuse Act could be utilized in a broad clean up campaign is evidenced by the great number of Qui Tam actions initiated. *See, e.g.*, *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (N.D. Wash. 1970); *Reuss v. Moss-American*, 323 F. Supp. 848 (E.D. Wis. 1971); *Bass Angler Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Matthews v. Florida-Vanderbilt Dev. Corp.*, 326 F. Supp. 289 (S.D. Fla. 1971); *United States ex. rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347 (D. Neb. 1971); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 330 F. Supp. 695 (D. Conn. 1971). Courts have, however, almost invariably dismissed these actions on the grounds that Qui Tam actions may not be maintained under the Refuse Act. *See generally*, Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81.

The Refuse Act of 1899⁷² is demonstrative of a proscriptive statute. It lay nearly dormant for over 50 years, but it has recently been revived to serve as the basis for several suits against polluters.⁷³ The Act outlaws the disposal of "refuse" in navigable waterways or tributaries of any navigable waterway.⁷⁴ It has been construed to grant the Attorney General authority to prosecute criminally⁷⁵ or seek injunctive relief against polluters.⁷⁶ The only pollutants exempted are those materials running from streets or municipal storm sewers in liquid form.⁷⁷ The pollutants need not be waste in the conventional sense. Substances of considerable economic value such as 100 octane aviation fuel have been held to be "refuse" within the meaning of the Act.⁷⁸ The government need not show regular commerce or economic use to prove navigability necessary to gain federal jurisdiction,⁷⁹ but rather the potential use of the stream for commerce or transportation.⁸⁰ Furthermore, the Act imposes strict liability, which eliminates the need to show intent or negligence,⁸¹ or actual injury to navigation.⁸²

While criminal prosecution under the Refuse Act is a potent device, primary emphasis has been placed upon administrative action and the utilization of negotiation, rather than litigation, to settle environmental disputes.⁸³ Enforcement of prohibitive statutes is secondary and lim-

72. The Rivers and Harbors Act, 33 U.S.C. §§ 407, 411 (1970).

73. See, e.g., *United States v. Vulcan Materials*, 2 E.R.C. 1145 (S.D.N.Y. 1970); *United States v. Transmix*, 2 E.R.C. 1075 (S.D.N.Y. 1970); *United States v. Maplewood Poultry*, 320 F. Supp. 1395 (D. Me. 1970); *United States v. U.S. Steel*, 328 F. Supp. 354 (N.D. Ind. 1971); *United States v. Armco Steel*, 2 E.R.C. 1067 (D. S.D. 1971); *United States v. St. Regis Paper*, 328 F. Supp. 660 (W.D. Wis. 1971).

74. The Rivers and Harbors Act, 33 U.S.C. § 407 (1970) provides:

It shall be unlawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the U.S.

75. The Rivers and Harbors Act, 33 U.S.C. § 411 (1970).

76. *United States v. Florida Pwr. & Light Co.*, 311 F. Supp. 1391 (S.D. Fla. 1970). Injunctive relief will lie to restrain the deposit of refuse in navigable waters.

77. See note 74 *supra*. Solid materials suspended in the runoff from sewers do not come within the exception. *United States v. Republic Steel Corp.*, 363 U.S. 482 (1960).

78. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

79. *United States v. Cavalliotis*, 105 F. Supp. 742 (E.D.N.Y. 1952).

80. *Id.*

81. *The Gansfjord*, 25 F.2d 736 (D.C. La. 1928).

82. *La Merced*, 84 F.2d 444 (9th Cir. 1936).

83. See President Nixon's Message to Congress, dated February 10, 1970, reported in 2 E.R.C.D. 203 (1970), outlining a broad seven point proposal for water pollution

ited to emergencies. The policy has been to refrain from actions under the Refuse Act unless immediate and irreparable harm to the environment is threatened or in situations where there has been a gross or deliberate abuse of the environment such as the accidental discharge of large amounts of pollutants.⁸⁴

The current program administered by the Environmental Protection Agency features the establishment of water quality standards and the issuance of discharge permits. Under the Federal Water Pollution Control Act,⁸⁵ states are responsible for developing water standards which define maximum pollution loads for individual watercourses.⁸⁶ Water quality standards are a prescriptive approach towards pollution control and form a basis for conferring liability on polluters who contribute to their violation.⁸⁷ Under section 9 of the Refuse Act, polluters are obligated to seek discharge permits from the Army Corps of Engineers.⁸⁸ Persons applying for such permits are required to provide detailed information concerning the nature and amount of pollutants they propose to discharge.

Despite efforts to coordinate enforcement of the Refuse Act with the water quality standards and permit program, some conflicts do arise, at least from the prospective defendant's point of view. The Refuse Act is not superceded by other legislation. Compliance with the latest quality standards does not afford a defense,⁸⁹ nor does the submission of, and application for, a permit under section 9 of the Refuse Act suspend enforcement of the criminal sections.⁹⁰ The possible confusion of prospective defendants is perhaps understandable; the calculation of the anti-pollution risk for individual polluters is at the moment difficult. But, as one court recently pointed out, at a

control. *See also* Executive Order No. 79834, dated December 23, 1970, reported in 2 CLEAN AIR AND WATER NEWS 53 (1970). The order states that the Refuse Act is to supplement and be subsidiary to the Federal Water Pollution Control Act.

84. *See* Letter from Assistant Attorney-General to Representative Reuss reported in 2 E.R.C.D. 157 (1971). *See also* President Nixon's Message to Congress, February 10, 1970, reported in 2 E.R.C.D. 203 (1970), authorizing the Secretary of the Interior to seek injunctive relief in emergency situations.

85. 33 U.S.C. § 1151 *et. seq.* (1970).

86. 33 U.S.C. § 1160 (1970).

87. *Id.*

88. 33 U.S.C. § 403 (1970).

89. *United States v. Pennsylvania Indus. Chem.*, 229 F. Supp. 1118 (W.D. Pa. 1971); *United States v. Maplewood Poultry*, 320 F. Supp. 1395 (D. Me. 1971).

90. *Id.*

time when many aspects of the environmental programs are embryonic, some overlap between statutes and theoretical inconsistency may be of little consequence.⁹¹

A slightly different situation is encountered in several states where criminal sanctions against polluters are integrated with a general administrative program. Here the doctrine of primary jurisdiction is often applied⁹²—judicial relief is postponed until the designated administrative remedy has been sought.⁹³ Minnesota requires a preliminary period of negotiation between the polluter and the State Water Pollution Commission in which the parties attempt to arrange a mutually agreeable modification in waste disposal before the state can seek court action.⁹⁴ Florida law is similar, and, in a recent case, one court observed that while water pollution is a frightening problem “(n)ow is not the time to discard the concepts of due process, fair play and substitute ‘quick justice’ in the name of ‘kill the pollutants’.”⁹⁵ This is not to say that Florida is tied to time consuming administrative proceedings when great environmental damage is threatened. It is still free to seek injunctive relief, but the *modus operandi* envisioned in the usual situation of continuing pollution is administrative.⁹⁶ The distinction at the federal level is that the Refuse Act is by its terms not preempted by administrative action. This is accomplished instead by policy—prosecution discretion.

Analysis

Many of the difficulties incident to private environmental litigation are alleviated by the enforcement of pollution control statutes. The standing of litigants to sue is no longer an issue, and the problems posed by technological assessment and the political nature of environmental disputes are reduced. Anti-pollution statutes, proscriptive or prescriptive, appraise the standards of wrongful conduct. While courts may be left with difficult factual determinations, especially with regard

91. *United States v. U.S. Steel*, 328 F. Supp. 354 (N.D. Ind. 1971).

92. *White Lake Improvement Ass'n v. City of Whitehall*, 22 Mich. App. 262, 177 N.W.2d 473 (1970).

93. K. DAVIS, *ADMINISTRATIVE LAW* 664-73 (1951).

94. *Reserve Mining v. Minnesota*, 2 E.R.C. 1135 (Minn. Sup. Ct. 1970). *See also Virginia Water Bd. v. Supervisor*, 1 E.R.C. 1482 (Va. Cir. Ct. 1970). *But see Diamond (N.Y.) v. Mobil Oil*, 65 Misc. 2d 75, 316 N.Y.S.2d 734 (Sup. Ct. 1970).

95. *St. Regis Paper v. Florida*, 237 So. 2d 798, 801 (Fla. 1970).

96. *Id.*

to prescriptive statutes, they are no longer responsible for the determination of what constitutes culpable abuse of water purity. The statute, as an expression of the legislative will, has made the political decision allocating the economic and social costs of pollution abatement.

There are difficulties, however, inherent in the judicial process which diminish the court's capacity as a primary arbiter of environmental disputes. Even ambitious programs of enforcing pollution control statutes have shown little success.⁹⁷ A recent Boston study revealed that of some 800 complaints registered by citizens, only four were prosecuted and still fewer, one, resulted in conviction.⁹⁸ Comprehensive enforcement of pollution statutes entails a mammoth policing operation, multiplication of investigative agencies, and an added burden to overtaxed prosecutor's offices. While preliminary injunctions have been granted quickly,⁹⁹ criminal suits seeking heavy fines or permanent injunctions are as costly and time consuming as civil suits. Whatever the circumstances, violators must be afforded constitutional guarantees and due process.¹⁰⁰

Lastly, it is doubtful that water pollution is amenable to the essentially *ad hoc* solution offered by court action. Even the most rudimentary steps in pollution abatement require the interaction of all levels of government and the private sector. The construction of municipal treatment plants entails coordination of planning, design, and finance among local, state, and federal governments.¹⁰¹ The elimination of dangerous pesticides from our water resources will only come with research and development, regulation, and education. Industry, agriculture and government must all assume roles.¹⁰² The most promise lies with regional planning under which entire river basins may be monitored and the concentration of pollutants controlled through systems of dams or the temporary cutback in industrial production.¹⁰³ A successful program must feature a comprehensive out-

97. Kovel, *A Case for Civil Penalties: Air Pollution Control*, 4 J. URBAN LAW 153 (1968).

98. *Id.* at 154.

99. *United States v. U.S. Steel*, 328 F. Supp. 354 (N.D. Ind. 1971).

100. *St. Regis Paper Co. v. Florida*, 237 S.2d 798 (Fla. Dist. Ct. App. 1970).

101. J. KNEESE, *THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT* 127 (1964).

102. B. COMMONER, *THE CLOSING CIRCLE* 83 (1971).

103. J. KNEESE, *THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT* 127 (1964). See also Roberts, *River Basin Authorities: A National Solution to Water Pol-*

look, a responsiveness to the situation at hand, and technological expertise.

IV. PRIVATE SUITS AGAINST AGENCIES

Because of the potential flexibility, efficiency, and comprehensiveness of administrative agencies,¹⁰⁴ the creation of a strong administrative body seems the only practical method to deal with the myriad, complex problems of water pollution. Still, the public has reason to be apprehensive. In the past, administrative regulatory agencies have demonstrated certain shortcomings. Too often agencies have turned into bureaucracies, unresponsive to the public needs and desires.¹⁰⁵ Top administrators of agencies such as the F.C.C. and F.T.C. have often been chosen from the ranks of the very businesses and industries which the agency was created to regulate, giving the agency a pronounced bias.¹⁰⁶ To give weight to the public voice, a new concept has developed—the citizen suit. Through suits initiated against governmental agencies, citizen “watchdogs” have sought greater control over planning and policy decisions which may adversely affect the environment.¹⁰⁷

Two questions have been raised to confront litigants interested in the judicial review of administrative decisions: standing to sue and the scope of judicial review. The first case clearly to define standing, *Edward Hines Yellow Pines Trustees v. United States*,¹⁰⁸ required that a plaintiff suffer some “legal injury” in order to contest an administrative decision.¹⁰⁹ This narrow requirement hindered a plaintiff who

lution, 83 HARV. L. REV. 1527, 1544-56 (1970). Professor Roberts points out the success of River Basin Authorities in Germany and England.

104. K. DAVIS, ADMINISTRATIVE LAW Ch. 3 (1951).

105. Professor Joseph L. Saxe of the University of Michigan Law School testified: “Official agencies which are created to promote and protect the public interest sometimes become too single-minded. In the past few years, a number of cases have brought home the degree to which important regulatory agencies failed to take into account all the information and all the perspectives which a proper regard for the public interest required.” Testimony of Joseph L. Saxe before the Committee on Conservation and Recreation, House of Representatives of Michigan, on H.B. 3055, January 21, 1970, quoted in Comment, *Michigan Environmental Protection Act*, 4 J. OF LAW REFORM 121, 122 (1970).

106. See, e.g., Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666 (1970).

107. Krier, *Environmental Watchdogs: Some Lessons From a “Study” Council*, 23 STAN. L. REV. 623 (1971).

108. 263 U.S. 143 (1923).

109. *Id.* at 148.

sought to protect the public interest in his suit.¹¹⁰ Subsequent cases have extended and broadened standing requirements.¹¹¹ The most recent test announced by the Supreme Court is that a plaintiff has standing to challenge an administrative action if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹¹²

The implications of this general broadening of standing requirements for "environmental watchdogs" is illustrated by the celebrated case of *Scenic Hudson Preservation Conference v. Federal Power Commission*.¹¹³ The Federal Power Commission licensed Consolidated Edison to build a hydroelectric plant in a scenic area of the Hudson River Valley. The plaintiff sued the Commission asserting that it had failed to take into account environmental factors such as wildlife kills and fish destruction in reaching its decision. The court found that the F.P.C. was required by statute to take environmental factors into consideration in reaching a decision. Since the plaintiff was a group interested in environmental activities, it had standing to sue the Commission.¹¹⁴

Even liberalized standing requirements are probably not sufficient, however, unless the scope of judicial review of administrative action is broad enough to protect the public interest in pollution control.¹¹⁵

110. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 617-19 (1970).

111. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (standing requirement only a shadow of its former self); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1948). See also Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 272 (1961).

112. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Barlow v. Collins*, 397 U.S. 159, 164 (1970). See also Flast v. Cohen, 392 U.S. 83 (1968).

113. 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

114. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965). *Accord*, *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971); *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401 (D. D.C. 1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970). But see *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), cert. granted, *Sierra Club v. Morton*, 401 U.S. 907 (1971). See also Comment, *Concern of Conservationist Group Held Not Sufficient to Confer Standing to Challenge Agency Action*, 71 COLUM. L. REV. 172 (1971).

115. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 619 (1970).

Traditionally, the scope of judicial review was limited to ascertaining if the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹¹⁶ Handicapped by the narrow scope of review, the courts deferred too often to administrative expertise, regardless of the adequacy of the agency's investigation of environmental factors.¹¹⁷ Recent decisions have liberalized the scope of judicial review.¹¹⁸ More importantly, for citizens concerned about the environmental impact of agency decisions, the National Environmental Protection Act of 1969¹¹⁹ has provided a new and effective tool.

Under the provisions of the N.E.P.A., all federal agencies are required to draw up "environmental impact studies" for every major administrative action which may have a significant effect on the quality of the human environment.¹²⁰ Such studies must include adverse environmental effects of the proposed action;¹²¹ possible alternatives;¹²² the "relationship between local short-term uses of the environment and the maintenance of long-term productivity";¹²³ and "any irreversible and irretrievable loss of natural resources" by the proposed action.¹²⁴ Courts have granted injunctive relief to halt proposed agency action where no impact study was undertaken,¹²⁵ or where the study was inadequate.¹²⁶

116. Administrative Procedure Act, 5 U.S.C. §§ 701, 706 (Supp. IV 1969).

117. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 615-17 (1970).

118. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). See Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) where the court said: "This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the 'licensing of the project would be in the overall public interest.' The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." See also Udall v. FPC, 387 U.S. 428 (1967).

119. National Environmental Protection Act, 42 U.S.C. §§ 4321-47 (1970).

120. *Id.* at § 4332(c).

121. *Id.* at § 4332(c)(ii).

122. *Id.* at § 4332(c)(iii).

123. *Id.* at § 4332(c)(iv).

124. *Id.* at § 4332(c)(v).

125. West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971).

126. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971).

Despite the liberalized provisions of the N.E.P.A., there are still obstacles to successful citizen litigation against agencies. The environmental watchdog is confronted by the awesome technical staffs, financial resources, and industrial allies of administrative agencies.¹²⁷ While a few conservation groups are well-funded, with large legal departments and adequate technical staffs,¹²⁸ the majority of groups and individuals are more accurately described as Davids pitted against administrative Goliaths.¹²⁹ Even when funds are available to procure expert witnesses, scientists and engineers are reluctant to testify against agencies, which are responsible for letting many research and consultation contracts.¹³⁰ Furthermore, essential evidence may be obtainable only from the agency, and it can be extremely reluctant to divulge such information.¹³¹

Of paramount importance to a citizen who attempts to exercise some control over agency action is the receipt of proper notice when action is being contemplated. Yet, our agencies are allowed to carry on their activities in an almost impenetrable cloud of secrecy.¹³² For instance, under the N.E.P.A., agencies need only publish notice of impending action in the Federal Register.¹³³ Few citizen groups composed of laymen and organized on a local level could be expected to be aware of, or have access to, the Federal Register.¹³⁴ Unless citizens are sufficiently informed, timely intervention into agency proceedings is impossible. The consequences of late action for prospective litigation

127. Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No Win" Agency Proceeding*, 13 *ATOMIC ENERGY L.J.* 1, 2 (1971).

128. The Sierra Club is reputed to have 100,000 members, a budget of \$3,000,000 and a sixty-man staff. *Sierra Club Mounts a New Crusade*, *BUSINESS WEEK*, 64-65 (May 23, 1970).

129. Like, *Multi Media Confrontation—The Environmentalists' Strategy for a "No Win" Agency Proceeding*, 13 *ATOMIC ENERGY L.J.* 1 (1971).

130. See Sive, *Securing, Examining, and Cross Examining Expert Witnesses in Environmental Cases*, 68 *MICH. L. REV.* 1175 (1970).

131. Forkosch, *Administrative Conduct in Environmental Areas—A Suggested Degree of Public Control*, 12 *S. TEX. L.J.* 1, 13-15 (1970).

132. *Id.* at 2-3.

133. National Environmental Protection Act, 42 U.S.C. § 4332(c) (1970). N.E.P.A. requires notice of administrative actions in accordance with Administrative Procedure Act, 5 U.S.C. § 552 (1967). This law requires publication in the Federal Register. In addition, some agencies, such as the vast military establishment, are exempted from publication requirements altogether.

134. Forkosch, *Administrative Conduct in Environmental Areas—A Suggested Degree of Public Control*, 12 *S. TEX. L.J.* 1, 2-3 (1970).

against agencies are well illustrated in *Nashville I-40 Steering Committee v. Ellington*.¹³⁵ A citizens group contested the routing of a proposed highway which would cause severe dislocation to certain residents of the community. Some nine years of planning and \$10,000,000 had already been invested in the project. Although the plaintiff's had not received sufficient notice, the court denied relief and stated that it could only regret that "appellants waited so late to begin their efforts to correct the grave consequences which will result from the construction of this highway."¹³⁶

Agencies have not always welcomed participation by citizens. The increased demand for involvement by individuals in the decision-making process has placed a considerable strain on their time, energy, and ingenuity.¹³⁷ From the agency perspective, citizen-suits further aggravate the situation. They feel, with some justification, that protracted litigation can cause major delays of projects that have considerable economic and social consequences.¹³⁸ Still, agencies may, in fact, be responsible for bringing litigation upon themselves. If citizens were encouraged to participate in the earliest stages of planning, many of the issues which result in suits could be resolved without court action. Citizens have been compelled to use courts as a last resort to control unrestrained agency power.

V. CONCLUSION

The effectiveness of court actions as a means of environmental reform varies greatly with the type of litigation. In the context of private litigation, environmental suits present issues involving technical assessments which are not readily justiciable. More importantly, courts are often urged to make decisions which transcend their traditional role. Environmental reform entails changes as basic as the modification of industrial production and the reallocation of economic burdens among various segments of society. The sponsorship and supervision of such an undertaking is more properly a legislative rather than judicial function. The enforcement of anti-pollution statutes by public officials removes some of the difficulties encountered

135. 387 F.2d 179 (6th Cir. 1967).

136. *Id.* at 186.

137. Miller, *Ecology and the Administrative Process*, 23 AD. L. REV. 59, 63 (1970).

138. Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 S.W.L.J. 731, 738 (1970).

in private litigation; however, water pollution is a complex affair. The analysis and resolution of problems which involve entire river basins and water way areas require a flexibility and comprehensiveness which courts are ill-suited to provide. Administrative agencies are a more appropriate institution.

Yet, the courts do have an important role in remedying pollution of our water, not as the primary organ through which reform is sought, but as the instrument with which citizens may oversee the operation. Experience has shown that if administrative agencies are to be responsive to the public, citizens must have a measure of control. Attendance at public hearings, registration of complaints, and publicity may significantly influence agency decisions, but these efforts can prove meaningless unless the courts are available as an ultimate check on the agencies. Lessened standing requirements and increased scope of review have promoted the effectiveness of citizen-suits, but notice problems and lack of resources combine to undermine the effectiveness of citizen watchdogs. Yet, it does not seem impossible to integrate the concept of a comprehensive administrative approach to water pollution control with the court's role as an effective tool for the citizen to utilize.

If citizens are to provide a countervailing force to possible abuse of power by agencies, several measures are necessary. Citizen action is dependent upon public awareness, and it is most effective when exercised at the earliest possible point in agency proceedings. For this reason, new notice requirements should be imposed upon agencies. Such requirements could include publishing proposals for major agency action in trade papers, dailies, announcements to groups and organizations, and public posters.¹³⁹ These requirements could be enforced through the judicial power to entertain suits for injunctions and damages for non-compliance.¹⁴⁰ Further steps to inform the public might include hearings held in the neighborhood of proposed power plants, dams, sewage treatment plants, etc. These could be conducted on weekends or in the evenings to allow maximum citizen participation.¹⁴¹

At the present time, government agencies enjoy an overwhelming advantage over citizen watchdogs in terms of financial resources and

139. *Id.*

140. *Id.*

141. Miller, *Ecology and the Administrative Process*, 23 AD. L. REV. 59, 64 n.15 (1970).

expertise. This disparity must be overcome. Several suggestions have been forwarded to meet the needs of citizens. A Canadian author has proposed the creation of public action funds available to public interest groups who seek to initiate effective environmental litigation.¹⁴² Still other authors suggest setting up environmental ombudsmen to aid and advise citizens seeking to represent the broad public interest.¹⁴³ Another possibility is to provide free counsel for an indigent plaintiff seeking review of an agency decision, much in the same manner as that already provided to defendants in criminal trials.¹⁴⁴ Clearly, no one suggestion may solve the entire problem. But, all of the suggestions lead toward the same goal: a strong administrative approach to the comprehensive conservation of our water resources balanced against an intelligent and effective citizenry who may look to the courts to safeguard against the abuse of power.

142. Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, 6 U. OF BRIT. COL. L. REV. 167, 189 (1971).

143. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 650 (1970).

144. Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No Win" Agency Proceeding*, 13 ATOMIC ENERGY L.J. 1, 24 (1971).