INDUSTRY - THE VIEWS OF THE REGULATED

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With our nation, its fifty states and thousands of city and county governments now linked together in the multi-billion dollar attempt to make our air cleaner, where does Industry — a favorite and too often proper target — stand as to this problem? A simple answer is — right along with the rest of the public of which Industry is an inextricable part. But certainly at least Big Industry is now well aware that wishful thinking, legislative wands and mere words can be no substitute for the very costly action which alone will accomplish results. The "Regulated," the general public — all of the people — each of us — sooner or later must pay that cost. Industry is hopeful that the action taken will be based upon scientific research, attacking the big air pollution problems first, under sensible, planned programs which we can afford.

Industry As A Contributor

Once regarded by the public as the chief, if not sole culprit, Industry now seems to be recognized in its true posture as but one of the many segments of our society responsible for air contamination. Scientific evidence is bringing home the fact that perhaps one-fifth or less of the principal atmospheric pollutants in the United States is released from manufacturing plants, including electric power generating complexes. Motor vehicle engines, public dumps, incinerators, open fires and even vegetation pollen are being recognized for their own contributions.[1]

Over the decades of the air pollution *laissez faire* period, Industry has shared the irresponsibility of all of us, adding to contamination of the atmosphere to the point deemed convenient or at least essential for operations. On not infrequent occasions, only the legal restraints expensively obtained by plaintiffs — too often with larceny in their eyes — checked severe abuses of what seemed an abundant and tolerant nature. The law books contain many interesting reports of the litigation which hammered out the available legal remedies.[2]

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[1] No overall statistics are available. Each community is unique unto itself and must make its own particular inventory of emission sources — both "specific," as in the case of a particular plant, as well as "community," where the source is collective, as in the case of motor vehicles.

[2] For a comprehensive coverage of the law see Proceedings of the Rutgers Seminar on the Legal Aspects of Air Pollution (held on May 6, 1967, at New Brunswick, New Jersey).

As between the two basic legal concepts involved in nuisance cases — that the property owner can use his own property as he chooses, but that such use should not injure another's person or property rights — the early tendency was to favor the owner's use within the limits of reason. More than 350 years ago, however, one Aldred persuaded an English court that not-so-good neighbor Benson's pig sty was "infecting and corrupting the air" and should be abated as a nuisance, despite the plea that hog-raising was necessary and Aldred's nose was simply too delicate![3]

In addition to invocation of the law of nuisance — both public and private — other remedies available and effectively employed were actions sounding in trespass for damage to real property, trespass on the case, and the newer and somewhat more difficult but flexible action of negligence. Among the principal considerations involved in the choice of remedies would be the applicable statute of limitations in the particular forum.[4]

Case reports from our fifty states and the federal judiciary are replete with such actions, recording judgments ranging from dismissal, to substantial damages for injury to animal, vegetable and human life, and to real property. Occasionally, appropriate injunctive relief was provided including abatement or the mandatory installation of corrective equipment and operative practices.

A classic case involved a smelter where in addition to substantial damages, the federal court placed the late Dr. Robert E. Swain — then professor of chemistry and later acting president of Stanford University, an outstanding air pollution authority — in charge of several smelters as Master. His assignment was to supervise and oversee the performance of conditions laid down by the court as contingent to the lifting of an injunction against operations. The conditions included erection of new stacks, installation of bag houses, maintenance of furnaces at temperatures above minimum heat requirements, and establishment of simple claim procedures for the payment of damages.[5]

Another classic situation is that in Los Angeles, where the finger of plaintiff Preston D. Orem in his 1955 suit for damages and injunctive relief was first pointed publicly and with considerable popular acclaim at the nine oil refineries in the area. But as time went on and technical research was substituted for mere emotion and demands to "do something — anything," the public gradually became aware that the cumulative effect of their own incinerators and motor vehicles was the major

[3] William Aldred's Case, 77 Eng. Rep. 816 (K.B. 1610).

[4] Naturally plaintiffs will seek the cause of action with the longest statutory limitation term, while defendants try to shorten up the liability period. *See* Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178 (D. Ore. 1959).

[5] Anderson v. American Smelting & Ref. Co., 265 F. 928 (D. Utah 1919).

cause of the problem, and that the initially suspected culprits were responsible for less than five percent of the over-all contamination.[6]

While in theory the legal rule still provides that one is not liable unless his opponent, by competent evidence, proves that he indeed caused damage, in practice the courts have not hesitated to establish joint and several liability where injury is apparent, even though causation is difficult or impossible to apportion.[7] As Mr. Justice Holmes said many years ago, not logic but experience, in the light of facts, is really the guide of the law in its rough attempts to determine what is just.

Those interested in the litigation of the past — most expensive and extensive — should not overlook turn-of-the-century lawsuits involving Georgia and Tennessee,[8] the landmark international case determined by joint Canadian-United States arbitration involving the smelter at Trail, British Columbia,[9] the massive litigation involving the aluminum interests in Tennessee and the Northwest,[10] and many other lawsuits arising out of mining and earth processing operations.[11]

By and large, however, from all these litigious beginnings, Big Industry has learned that the preferable policy is to eliminate or reduce to a minimum its contribution to pollution of the air.

Industry Accepts Responsibility

The net result of this history of litigation has been the increasing willingness of Industry to assume its share of public responsibility for air conservation, in its own self-interest. To work with one's neighbor to reduce pollution and promptly to effect reasonable settlements, on the basis of scientific fact, of such damage as does occur, was obviously preferable to facing the threats of damage judgments, injunctions and abatement.

Thus, today it is the official position of the National Association of Manufacturers to cooperate with the federal government as well as with state and local authorities on programs to control air pollution. Not only plant management participates, but also top level management officials, who formulate policy and represent all cross-sections of Industry. The N.A.M. feels that the federal role should emphasize the necessary research and development to prevent and control air pollution, making possible the establishment, scientifically, of criteria to define which levels of pollutants are harmful. Then, the executive branch of

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[6] Information furnished courtesy of Legal Department Mobil Oil Company. Mobil is but one of many companies which has published its own policy statement involving the air pollution problem A PRIMER ON AIR POLLUTION.

[7] *See* United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 P. 262 (1931); *compare* RESTATEMENT (SECOND) OF TORTS § 433 A, comment d (1960), *with* RESTATEMENT OF TORTS § 881 (1939).

[8] Georgia v. Tennessee Copper Co., 237 U.S. 474 (1915).

[9] The Trail Smelter Case (United States v. Canada) INT'L ARB. AWARDS (1941).

[10] Aluminum Co. of America v. Loveday, 273 F.2d 499 (6th Cir. 1959).

[11] *E.g.*, Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (D. Wash. 1954); Ducktown Sulphur, Copper & Iron Co. v. Barnes, 60 S.W. 593 (Tenn. 1900).

the government should have the responsibility of "leading" rather than "driving" the states and communities to abate and control air pollution.[12]

Industry has been requested by the N.A.M. to begin now to make plans for installations which are likely to be required ultimately, and to act on a voluntary basis. In this connection requests have been made that there be some recognition by the state and federal governments of the non-productive costs of installing waste treatment facilities by way of accelerated tax amortization of facilities and investment tax credits.[13]

Similar positions have been taken by the national and various local Chambers of Commerce. The emphasis is on participation with all segments of the community in working for prevention and elimination of air pollutants — voluntarily without the necessity of resorting to strict legal sanctions.[14]

These are not just words; they are backed up by dollars which have supported massive research programs to develop the scientific know-how to meet the problems involved. For example, as early as 1911, electrostatic precipitators were being used to cut down damaging dust generated by cement and metal smelters. Excessive emissions of sulphur

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[12] Thayer, *An Industrial View of the Federal Role*, in PROCEEDINGS: THE THIRD NATIONAL CONFERENCE ON AIR POLLUTION 512 (Public Health Service Pub. No. 1649, 1967).

[13] The official statement of the N.A.M. is as follows:

> There are broad social benefits which accrue to all the people of the nation through water quality control efforts. Because in most instances the money spent for abatement facilities increases the cost of doing business and creates a burden on the competitive situation, Industry believes that there should be some recognition of the cost of installing waste treatment facilities.
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> This recognition should take the form of:
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> 1. Accelerated amortization up to and including write-off of the facility, at the option of the taxpayer; but this accelerated amortization should not eliminate the investment credit.
> 2. Certification of the facility should rest with the state or local agency.
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> The same policy should apply to air pollution control facilities.

[14] 1967/1968 POLICY DECLARATIONS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA 116:

> *Role of Industry.* Industry should acknowledge a sense of stewardship for the natural resources upon which our environment depends — air, land, and water. This involves sharing the mounting national concern for the quality of these resources as well as assisting to restore to acceptable levels those whose quality has suffered.
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> Industry has an obligation to recognize the impact of a growing population and its concentration. Acceptable resource management procedures of past years are no longer adequate and will be even less adequate in the years ahead.
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> Industry should assume leadership in jointly developing information from within the industrial community on which sound decisions can be based. The interaction of the components of environmental pollution are inextricably linked. Solutions must not aggravate other problems. Conflicting demands on multi-use resources must be reconciled.
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> It is essential that industry commit the technical and financial resources and talent needed to implement achievable improvement in our environment, as well as to undertake the basic and applied research programs that will provide for the continuing development of new concepts, methods and technology for managing the quality of our air, land and water.

dioxide have been diverted to produce sulfuric acid, developing a marketable product to reduce costs.[15]

To note a few current specific examples:

a. Aluminum Corporation of America has stated that its capital expenditures have been in excess of fifty-five million dollars for air pollution control facilities; plans call for further outlays of more than twenty-two million dollars over the next five years to maintain this equipment and install new and more modern facilities when needed. In Alcoa's latest two new potrooms, approximately one-eighth of the total invested capital was stated to have been spent for fume control and recovery equipment.[16]

b. Four major steel producers in the Chicago area have agreed to spend fifty million dollars by 1972 for equipment to eliminate virtually all of this industry's contribution to pollution — estimated to have been twenty-five to forty percent of the total dustfall in the Calumet District.

c. A metal smelting company became involved in litigation when its emissions were drastically increased as a result of the government's wartime requests. For decades this company has participated in research to develop scientific tolerances and to measure the effect of its emissions on the community. It has developed a grid work for sampling and acquired fee title, surface rights and smoke easements over an extensive area of thousands of acres. Damage has now been reduced from a six-figure annual total to a nominal amount. Payments for the damage which appears inevitable in this processing are automatically made under procedures worked out with community committees by checks mailed at the close of the growing season.

d. Another earth processing company expended more than ten million dollars in developing and installing corrective equipment after payment of some five million dollars in damages. Perhaps a million dollars was expended in research to develop tolerance levels and to determine just what damage was being done to animal life and vegetation subject to contact with the company's effluents. A continuing program is in operation to assure avoidance of further damage claims and to increase control over damaging emissions.

e. The American Petroleum Institute is reported to be funding 26 separate air pollution control programs at a cost of twenty-two million dollars per year. Many oil companies are also involved in independent

[15] One case where the information is public is that of Kennecott Copper Corporation's Garfield Smelter, where the production from six acid plants has steadily increased over many years to a newly announced current production of 1,440 tons per day of H_2SO_4.

Again, each community differs. What may be marketable in one community may not be elsewhere.

[16] Statement of Executive Vice-president John S. Harrison, *Hearings on S. 780 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess., pt. 3, at 2136 (1967).

research, such as the seven million dollar program of American Oil, Ford and Mobil Oil Company aimed at developing technology to make a smog-free automobile.[17]

These instances, of course, are of major operators — usually processors of earth materials. Currently, Industry's capital expenditures for air and water pollution control are estimated to be one and one-half to two percent of total capital expenditures; this is expected to rise by 1970 to ten to twenty percent.[18]

In fairness it must be said that certainly not all industry — large or small — has become "enlightened," any more than have all of the general citizenry. Probably no one really has yet earned a complete whitewash. A recent example on the dark side is an industrial plant which, because of cost pressures, refused to adopt methods and install equipment generally deemed in its own industry to be a part of the costs of production. The result was a classic head-on clash between the uncooperative company and untrained and uniformed enforcement officers. Unrealistic standards were imposed, and litigated; private litigation also became rampant; the plant's neighbors in the community became understandably irate; and the whole situation developed into one detrimental to all concerned.[19]

The point cannot be made too often that it is the cumulative effect of a lot of *little* industries — like the cumulative effect of a large number of motor vehicles — that contribute so greatly to community pollution. Current literature is full of reports of affirmative action on the part of many of these little industries: A crusher facility will install treated-water sprays at a cost of $15,000; a molding company will control nighttime operation of its silo burner; a rendering company will install a second condensor; a hot mix plant will install a scrubber control.[20]

Here it is, in small industry, that more action to control air pollution is needed. The cumulative cost is tremendous, with the public ultimately paying the bill one way or another. Unfortunately, insistence upon controls will cause many economic casualties, with attendant loss of jobs, if standards are really enforced. Further, in the myriad cases of the little industries, as well as the millions of residents who persist in operating their own incinerators and burning open fires, *local* control with adequate state and federal backing must do the job. Uncle Sam simply can't police every home fireplace, furnace or motor vehicle.

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[17] J. KNUDSEN, ENVIRONMENTAL CONTROL REPORT (4th Quarter 1967).

[18] ENVIRONMENT TECHNOLOGY OF ECONOMICS, Vol. 2, No. 11 Feb. 7, 1968.

[19] Industry is often hesitant for a variety of reasons to speak out and release figures. Included in these reasons is fear of adverse public reaction and damage to its public relations, particularly for industries whose emissions are visually obvious.

[20] Specific examples may be found in the weekly AIR/WATER POLLUTION REPORT, published by Business Publishers, Inc., P.O. Box 1067 Blair Station, Silver Springs, Maryland 21910.

A Caveat

As has been said so many times, the extent of the purity of our air and water depends almost entirely on how much all of us are willing to pay. The cost is already high — and can become staggering. At least $300 billion dollars is one estimated requirement over the next 30 years.[21] Industry has been doing its share, it is submitted; but it must continue to raise its own standards of control and augment still further its contributions to community-wide programs.

As we all join together in attempting to achieve clean air, it would not seem out of order to insist upon at least three general principles:

(1) Air pollution and its solution is not just a political issue or fad. It is a growing problem in our country and is here to stay. Sensible planning is a "must". All of us who constitute a community must devise local and state programs establishing what should be done, at a cost that we are willing to pay.

(2) Planning should be based upon the facts developed by scientific research with practical applicability to our own local situations. A community adopting an air conservation program is still responsible for its local economy. Emotional restrictions and unsound control measures can injure or destroy that economy. Costs which the public simply cannot pay, such as for controls far in excess of what is really necessary to abate contaminants to safe levels, should be avoided.

(3) There is great danger in attempting to establish single-level across-the-nation or even multi-state or statewide area standards.[22] America is an industrial nation where often a single industry is the only excuse for the existence of the community around it. Basic principles of our republic would seem to require leaving to the local community itself the right to determine at what point the benefits of having clean air are simply not worth the increased production cost and lessened productivity which would jeopardize that community's very existence. This assumes, of course, that no health or substantial property hazard is involved.

The responsibility for air conservation lies with each of us. Industry, although only one of the partners in the community, will continue to cooperate fully, doing its share and more.

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[21] Admittedly we are in the field of "guesstimates". This figure was used by U.S. News & World Report following reported studies of Government reports and contacts with dozens of industrial firms.

[22] Obviously, the location of a particular plant is a critical factor in applying controls. A smelter in the middle of a desert is an entirely different animal than one in Central Park. There is a constitutional question of denial of due process where plant emissions, confined to private property owned in conjunction with the plant, are prohibited. Proposed air quality criteria for sulphur oxides, even if suitable for electric power generating stations in the heart of Manhattan, can be utterly inappropriate for the smelting industry as a whole operating under entirely different environmental conditions.