



# TRAIL BLAZER-AT-LAW

*David P. Currie*

**T**ECHNOLOGY,” DR. BARRY COMMONER RECENTLY SAID, “has greatly magnified the wealth that is produced by human labor; it has lengthened our lives and sweetened the fruits of living.” But technology is also responsible for “growing deterioration of the environment and threats to human health.”<sup>1</sup>

Industrial wastes are poisoning our air and water; radioactive materials, lingering insecticides, and anti-knock lead are accumulating in our bodies; phosphates from detergents and nitrates from inorganic fertilizers are glutting our waters with algae.

Industry has often ignored its darker side, which generally causes harm to someone else. Workmen’s compensation, factory safety, and other measures lessening the costs industry imposed upon its employees came about only in response to union organization, public pressure and mandatory legislation.

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*The late David P. Currie was a freshly minted full professor of law at the University of Chicago Law School when this article first appeared in 1969. See David P. Currie, Trail Blazer-at-Law, Trial at 23 (Aug./Sept. 1969). Reprinted with permission of Trial. Copyright © American Association for Justice, formerly Association of Trial Lawyers of America (ATLA).*

<sup>1</sup> See Hearings before the Subcommittee on Intergovernmental Relations of the Senate Government Operations Committee on S. Res. 78, 91st Cong., 1st Sess. 233-43 (1969).

The same pattern is emerging today as the focus of concern shifts to industry's effects on its neighbors. Understandably but regrettably, those who benefit from technology make serious efforts to reduce the harm they cause to others *only when forced*.

Recent years have witnessed an accelerating concern for the preservation of our environment and a baffling proliferation of pollution laws and control agencies.

Despite the legislative trend toward setting up official agencies to safeguard the environment, the role of the individual and of his attorney is an increasingly important one if the assault on pollution is to be successful. While the job is too big and too technical to be handled without government agencies, there are a number of reasons why these agencies cannot function adequately without private support and prodding. There are numerous ways in which the interested citizen can contribute.



Some of the administrative machinery created to deal with environmental quality expressly incorporates and depends upon public participation. Public hearings are required, for example, in setting standards of water and air quality under the federal acts. We may prefer to think of the standard-setting process as a dispassionate, scientific search to maximize the public welfare, but in fact, the procedure is highly political. Industry is heavily represented at these hearings and it is crucial that the public interest be represented as well.

Indeed one of the more important things the environmental lawyer can do now is to help his clients prepare the testimony for the hearings on air-quality standards that are just beginning to take place all over the country. He should not be led into the trap of supporting a proposed standard just because industry inevitably urges that it is too strict. The proposal itself may represent a compromise with industry that is too lax to meet the criteria and guidelines published by the Dept. of Health, Education, and Welfare.

The attorney should insist that a second public hearing be held when the state attempts to translate its abstract standard into a con-

crete plan for implementation. He should also oppose any unreasonable delay in making standards effective.



There are many points in the administrative system at which public participation, while not built into the scheme or appreciated by officials, can ignite complacent administrators.

Citizens' groups in Chicago, irritated by the City's failure to prosecute an asphalt company after neighbors had complained for four years that it was violating the air-pollution ordinance, hired their own attorney. The city finally hauled the company into court for two days' violations, successfully opposed the citizens' motion to intervene, but was required by the judge to listen to their suggestions. With a courtroom full of irate citizens and the press, the judge imposed the maximum fine.

Similarly, interested citizens have sought to intervene in proceedings on variances from the Chicago air-pollution ordinance. In the case of Chicago's mammoth steel companies, this move succeeded in getting on the record and into the press some hint of the public's conviction that the steelmakers are violating their agreement with the city. The group proposed that a performance bond be required. The electric company's request for permission to continue burning high-sulfur coal resulted in a full-page newspaper advertisement castigating the company on the basis of its own figures.



Public agencies can often be indifferent about enforcement. Inadequate budgets, coupled with the sheer bulk of the problem, make it impossible for officials to do the whole job, even when driven by best intentions.

There are serious problems with private nuisance litigation: standing to sue, statute of limitation, joinder of defendants, causation, proof of damage and, in some jurisdictions, economic justification as a defense. Corrective legislation is in order.

Nevertheless, with the gross pollution we suffer today, there is often a high chance of success even in a common-law action. More-

over, victory is made more likely when the plaintiff can show the violation of a public regulation such as a smoke-abatement statute or an air-quality standard set by a local agency.

The Torts Restatement, reflecting judicial developments, declares that violation of a public duty gives the victims a cause of action;<sup>2</sup> the Supreme Court has recognized an implied right in the United States to seek injunctive relief against acts of pollution made criminal by the Rivers and Harbors Act;<sup>3</sup> a parallel development in the securities field<sup>4</sup> suggests the strong probability that an affected citizen can enforce the federal pollution laws in a private suit.

Apart from defeating a damaging proposal in the legislature, private litigation may be the most promising weapon against the increasing tendency of governments themselves to wreck the environment. Recent suits have attacked both Santa Barbara oil drilling and the earlier proposal for ABM near the cities as depriving people of life, liberty or property without due process of law, by creating unjustifiable risks of serious harm.

Despite the unsavory reputation of substantive due process in such matters as labor legislation, the doctrine is the basis of the whole extension of First Amendment guarantees to encompass action by the states, and its future in environmental litigation is enhanced by its recent invocation in such areas as birth control and the freedom to travel, which are not enumerated elsewhere in the Bill of Rights.<sup>5</sup>

There are many laws in effect today against spoiling the environment. In the last few years a number of individual lawyers have dedicated themselves to the problem, as well as Ralph Nader's task force on pollution, an environmental cousin of the ACLU established by recent Yale law graduates; and a training and action pro-

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<sup>2</sup> Restatement, Torts, § 286 (1934).

<sup>3</sup> *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

<sup>4</sup> *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Aptheker v. United States*, 378 U.S. 500 (1964).

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gram with an environmental dimension set up by five major law schools in Washington.

The environmental lawyer can do a great deal to strengthen and enforce the laws. He can help to stimulate public awareness of environmental problems and to make the citizen's views known at public hearings and in the press. He can ride herd on sluggish enforcement officials and he can represent injured citizens in private litigation.

Polluters, take notice!

