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COMMENT

AIR POLLUTION CONTROL IN INDIANA IN 1968: A COMMENT

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The passage of the Air Quality Act of 1967,[1] in effect, has issued a federal mandate to the Indiana State Legislature to take direct and immediate steps to solve the state's air pollution problems. Indiana has had an Air Pollution Control Board since 1961, but its effectiveness may be termed minimal. The Board was constituted by the Indiana Air Pollution Control Law[2] to operate under the existing machinery of the Indiana State Board of Health, which concurrently houses the Water Pollution Control Board.

The Water Pollution Control Board has been quite successful in coping with Indiana's water pollution problem. A state legislator, Senator Mankin, in a recent comment on the Water Control Board's work has stated:

> Since the enactment of the Indiana Law, 170 orders have been issued to municipalities and 85 to industries. As a result of this aggressive enforcement program, 97% of the muncipal sewage in Indiana is treated, and 85% to 90% of the industrial waste.[3]

Senator Mankin has also pointed to the success of the Water Pollution Control Board in meeting federal directives contained in the 1965 amendment to the Water Pollution Control Act,[4] which was similiar in content to the 1967 Air Quality legislation.

> The 1965 amendment to the federal Water Pollution Control Act states that if a state files a letter of intent that it will, before June 30, 1967, adopt both water quality criteria applicable to interstate waters or portions thereof within a state, *and* a plan for the implementation and enforcement of the water quality criteria adopted, then, if the Secretary of the Interior accepts the state's plan, such state criteria and plan shall there-

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1. 81 Stat. 485 (1967).
2. IND. ANN. STAT. §§ 3-4601 to -4608 (Supp. 1967).
3. Mankin, *States Must Seize Initiative in Pollution Problems*, 2 LEGISLATIVE LEDGER 4 (1967).
4. 33 U.S.C. § 466 (1964), *as amended*, (Supp. 1965).

after be the federal water quality standards applicable to such interstate waters or portions thereof.

However, if the state does not take such action, the Secretary may prepare regulations himself, and if the state does not, within six months of publication of the Secretary's report, adopt its own consistent standards, the Secretary shall promulgate his regulations.

Why was Indiana's plan among the first of those to be approved? Apparently, most states thought that the federal government required only that they develop and adopt criteria applicable to their state waters. However, the law also requires that they adopt a plan of implementation. So Indiana proposed criteria but in addition it documented all Indiana towns and industries which have pollution problems, along with a deadline for each to meet. There is also a salvation clause for exotic problems—ten years.

As a result, Indiana got early acceptance by the federal government and established its own "federal standards" for Indiana waters. The probable reason why only ten states thus far have met the federal requirements is that most state governments seem to be unwilling to make future commitments for eradicating their problems.

The result of the Secretary's adoption of Indiana's plan is that now the hierarchy of city-county-state-federal government is unbroken in Indiana so far as water pollution standards which Indiana itself has prescribed for interstate waters.[5]

This admirable record in matters concerning water pollution has not been matched by the activities of the Indiana Air Pollution Control Board. Section one of the Indiana Air Pollution Control Act states:

> It is the intention of this Act that primary responsibility for the control of the emission of air contaminants into the atmosphere shall rest with the responsible local governmental agency and that affirmative, remedial action by this State shall be taken only in those areas of this State where no local air pollution law or regulation consistent with the provision of this Act is now, or hereafter, in effect, or where, after hearing, the Control Board determines that the local law or regulation is not being enforced adequately and, in the opinion of the Control Board, it is not intended that it be so enforced.[6]

5. Mankin, *supra* note 3, at 4.
6. IND. ANN. STAT. § 35-4601 (Supp. 1967).

Even though fewer than ten local air-pollution ordinances have been passed in Indiana, action by the State agency has been minimal.[7]

However, the federal Air Quality Act of 1967 definitely compels action by the state as well as a legislative redrafting of our present air pollution legislation. The procedure for adopting local standards under the Air Quality Act differs from the procedure followed under the Water Pollution Control Act. Section 107 of the Air Quality Act provides:

> The Secretary shall, after consultation with appropriate advisory committees and Federal departments and agencies, from time to time, but as soon as practicable, develop and issue to the States such criteria of air quality as in his judgment may be requisite for the protection of public health and welfare.[8]

Unlike the water pollution standards, the air quality standards which the states must adopt under Section 108,[9] along with a plan for implementation, must be in accord with the criteria promulgated by the federal government. Furthermore, the Air Quality Act requires that compliance with federal criteria be accomplished by state action in the first instance. This necessitates an immediate and total revision of the present Indiana law to meet the new federal provisions.

This comment concerns two areas which should be carefully considered by the legislators in their deliberations over the revision of the present statute. The first is the effect of a provision such as Section Five

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7. INDIANA AIR POLLUTION BD., 1965 ANNUAL REPORT 5, 7, 10 (1966). The dearth of activity is explainable at least in part by the inadequacy of the Board's budget. *Id.*

8. 81 Stat. 485, § 107(b)(1) (1967).

9. *Id.* Section 108(c)(1) of the Air Quality Act provides:

> If, after receiving any air quality criteria and recommended control techniques issued pursuant to section 107, the Governor of a State, within ninety days of such receipt, files a letter of intent that such State will within one hundred and eighty days, and from time to time thereafter, adopt, after public hearings, ambient air quality standards applicable to any designated air quality control region or portions thereof within such State and within one hundred and eighty days thereafter, and from time to time as may be necessary, adopts a plan for the implementation, maintenance, and enforcement of such standards of air quality adopted, and if such standards and plan are established in accordance with the letter of intent and if the Secretary determines that such State standards are consistent with the air quality criteria and recommended control techniques issued pursuant to section 107; that the plan is consistent with the purposes of the Act insofar as it assures achieving such standards of air quality within a reasonable time; and that a means of enforcement by State action, including authority comparable to that in subsection (k) of this section, is provided, such State standards and plan shall be the air quality standards applicable to such State. If the Secretary determines that any revised State standards and plan are consistent with the purposes of this Act and this subsection, such standards and plan shall be the air quality standards applicable to such State.

81 Stat. 485, § 108 (c)(1) (1967).

in the present Indiana Air Pollution Control Act upon the rights of individuals to take legal action against air pollution. The second area includes selective comments on present problems in the drafting and implementation of control statutes.

Private Control of Air Pollution

Possible Impact of Section Five.

> Section Five of the Indiana Air Pollution Control Act provides:
>
> The discharge into the outdoor atmosphere of air contaminants so as to cause air pollution and create a public nuisance is contrary to the public policy of the State of Indiana and the provisions of this Act.
>
> The jurisdiction of the Control Board to receive and entertain complaints shall be limited to complaints concerning air contaminant sources located in areas in this State where no local air pollution law or regulation consistent with the provisions of this Act is now, or hereafter, in effect or where, after a hearing, the Control Board determines the local law or regulation is not being enforced adequately and in the opinion of the Control Board, it is not intended that it be so enforced.[10]

It may be argued that this provision deprives a citizen of his right to seek a judicial remedy for the damages caused to him by air pollution. Such a result could be reached through the application of the principle of primacy of administrative jurisdiction. This theory would give to the state the exclusive jurisdiction over areas which were previously considered amenable to private action.

The Indiana courts have not considered this question, but it is the unofficial opinion of the State Board of Health that Section Five does not exclude the public from air pollution control litigation. In any case, the problem is readily alleviated by the inclusion of a savings clause such as the one in comparable California legislation.[11] The leading case in this area, *Harvey v. Renken,*[12] an Oregon state decision, held that private rights are effectively saved by the inclusion in the statute, expressly or impliedly, of a savings clause.

Scope of Private Control

It is submitted that the ability to pursue private remedies is impor-

10. Ind. Stat. Ann. § 35-4605 (Supp. 1967).
11. Cal. Civ. Pro. Code § 731 (a) (West 1954). *Cf.* Gelfand v. O'Haver, 33 Cal. 2d 218, 200 P.2d 790 (1948); Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (149).
12. 226 F. Supp. 169 (D. Ore. 1963).

tant to the total air pollution control problem in this state. Private control has been an effective, if little used, weapon against air pollution offenders, particularly since it poses a threat of the economic consequences of pollution.

What is meant by *private* control? Generally speaking, it is the right individuals have, absent any statute or ordinance on the subject, to bring suit against other individuals, corporations and even governmental units for compensation for the personal or property damages suffered from air pollution and/or for an injunction against the continuance of the pollution.[13]

In considering the possible scope of private control, it will be helpful to use an illustration. Assume a Hoosier family that lives in the close vicinity of an industrial plant emitting substances into the air which injure the lungs of the young children, kill or injure livestock kept on the pemises, and produce odiferous substances. There is no local ordinance giving these individuals a right or method of complaining. Also, there is no air pollution control board that can or will come to their aid. What legal rights may these individuals assert?

There are three principal legal theories on which the family may base its claim against the polluters: (1) nuisance, (2) trespass, and (3) negligence.

1. Nuisance.

A nuisance action is based upon alleged interference with the plaintiff's enjoyment of property.[14] The right of a man to enjoy his property is clearly a right that a court will protect—and air pollution has long been recognized as a potential source of interference with the enjoyment of property. In 1611, Lord Coke held that an action grounded in nuisance would lie against a defendant whose hogsty odors "contaminated and infected the air" of the plaintiff.[15]

The Supreme Court of Georgia in a case decided in this century stated:

> Every person has the right to have the air diffused over his premises, whether located in the city or country, in its

13. For a more complete discussion of the private aspects of air pollution control see Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126.

14. IND. STAT. ANN. § 2-505 (1961) provides:
Nuisance: Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.

15. William Aldred's Case, 77 Eng. Rep. 816 (K.B. 1611).

natural state and free from artifical impurities.[16]

Not all courts are this lenient with private citizen suing air polluters. This is especially true when the individual seeks an injunction against further pollution. Courts that are quite willing to award damages and in effect make the polluter pay for the harm his pollution has caused the plaintiff are reluctant to enjoin continued pollution. In the injunction situation the courts start balancing the equities, *i.e.*, comparing the harm caused to the plaintiff with the benefit derived from the activity which causes the pollution.

A brief look at two cases that reach opposite results will illustrate the range of ideas the courts have developed.

In *Madison v. Ducktown Sulphur, Copper & Iron Company*,[17] a 1904 Tennessee case, the court found, in reference to the damages the plaintiffs suffered as a result of the air pollutants emitted by defendants, that:

> Their timber and crop interests have been badly injured, and they have been annoyed and discommoded by the smoke so that the complainants are prevented from using and enjoying their farms and homes as they did prior to the inauguration of these enterprises. The smoke makes it impossible for the owners of farms within the area of the smoke zone to subsist their families thereon with the degree of comfort they enjoyed before. They cannot raise and harvest their customary crops, and their timber is largely destroyed.[18]

Although the court awarded damages to the plaintiffs, it refused to grant an injunction. The Tennessee court justified its decision by stating:

> It is found, in substance, that, if the injunctive relief sought be granted, the defendants will be compelled to stop operations, and their property will become practically worthless, the immense business conducted by them will cease, and they will be compelled to withdraw from the State. It is a necessary deduction from the foregoing that a great and increasing industry in the State will be destroyed, and all of the valuable copper properties of the State become worthless.[19]

In *Hulbert v. California Portland Cement*,[20] a 1911 California case,

16. Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (Sup. Ct. 1919).
17. 113 Tenn. 331, 83 S.W. 658 (1904).
18. 83 S.W. at 660.
19. *Id.* at 661.
20. 161 Cal. 239, 118 P. 928 (1911).

the court found that the cement dust emitted by defendant:

> [I]s, and for some years past has been, falling upon the properties of the plaintiffs, covering and coating the ground, filtering through their homes, into all parts thereof, forming an opaque semi-cemented encrustation upon the upper sides of all exposed flowers and foliage, particularly leaves of citrus trees, and leaving ineradicable, yet withal plainly discernable, mark and evidence of dust, dusty deposits, and grayish coloring resulting therefrom, upon the citrus fruits. The encrustations above mentioned, unlike the deposits occasionally occurring on leaves because of the presence of undue amounts of road dust or field dust, are not dissipated by the strongest winds, nor washed off through the action of the most protracted rains. Their presence, from repeated observations, seems to be as continuous as their hold upon the leaves seems tenacious. The [lower] court further found that the deposit of dust on the fruit decreased its value; that the constant presence of dust on the limbs and leaves of the trees rendered the cultivation of the ground and the harvesting of the crop more costly than it would have been under ordinary conditions; and that said dust added to the usual and ordinary discomforts of life by its presence in the homes of the plaintiffs.[21]

The defendant stressed the importance of its product and the great expense that would be involved in any diminution of the pollution. However, the court enjoined further operation of defendant's plant unless it installed air pollution control devices.

Although the first reaction of those concerned with air pollution control is to favor the *Hulbert* decision rather than *Ducktown*, it is not really practical to oppose the reasoning of the court in *Ducktown*. What is regrettable about the case is not that the Tennessee court based its decision on the greatest good to the greatest number, but that the court did not consider the harm caused by the air pollution to citizens other than the plaintiffs. It is only when the court takes into consideration the full ramifications of the pollution as well as the ramifications of the defendant's enterprise that there can be a true balancing of the equities. There has been a surprisingly small amount of litigation in this area in Indiana. However, the leading case, *Owen v. Phillips*,[22] would indicate that Indiana follows the "balancing the equity" approach of *Ducktown*. The *Owen* case concerned an attempt to enjoin the rebuilding of a flour

21. 118 P. at 931.
22. 73 Ind. 284 (1881)

mill which had been destroyed by fire. The neighboring residents alleged that the mill created a nuisance by polluting the surrounding air and water. The court stated:

> It is not every injury which will support an action for damages that will entitle the complainant to relief by injunction. There are solid reasons for this rule. A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one. Damages may be paid by the author of the nuisance and the business not be stopped, but if injunction issues then the right to conduct the business is at an end. The necessity which will authorize the granting of the writ of injunction, to restrain the carrying on of a business, lawful in itself, must be a strong and impervious one. If it were otherwise, all mills and manufacturies might be stopped at the demand of those to whom they caused annoyance, even though the injury complained of might be slight and trivial.[23]

It is to be noted, however, that the court remanded the case on the question of damages. The court stated that whether a business was or not a nuisance did not depend entirely upon the notions of the residents of the vicinity. The court said that, while these were an important factor:

> The owner of property is entitled to enjoy the ordinary comforts of life, and that right is not to be measured by the notions of the persons of a particular locality. . . . No man has a right to take from another the enjoyment of what are regarded as the reasonable and essential comforts of life, because the notions of the people of a given locality may not correctly estimate the standards of such comforts.[24]

The Indiana court, therefore, is sympathetic to the private pollution controller. The recent case of *Hedrick v. Tubbs*[25] indicates that relief through injunction is possible. In *Hedrick* the court found a continuing nuisance and enjoined the burnnig of trash and rubbish which carried smoke, dirt, and odors onto plaintiff's property. Obviously, there will not be many litigious neighbors who will go as far as the state supreme court to protect their backyard from garbage pollution, but it is possible to do so as long as the right of the private citizen to defend himself against air pollution is preserved by our statute.

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23. *Id.* at 287-88 (citations omitted).
24. *Id.* at 295.
25. 120 Ind. App. 326, 92 N.E.2d 561 (1950).

2. Trespass.

Martin v. Reynolds Metals Company,[26] a 1959 Oregon case, involved a suit for damages based on an alleged injury caused to plaintiff's cattle by ingesting fluorides emitted by defendant's plant. Plaintiff brought his suit in trespass. Defendant appealed the lower court's judgment for plaintiff on the ground that there had been no entry onto the plaintiff's real property and therefore no trespass. The Supreme Court of Oregon upheld the lower court and stated:

> The view recognizing a trespassory invasion where there is no "thing" which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E=mc^2$ has taught us that mass and energy are equivalents and that our concept of "things" must be reframed. If these observations in science in relation to the law of trespass should appear theoretical and unreal in the abstract, they become very practical and real to the possessor of land when the unseen force cracks the foundation of his house. The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm.[27]

Whether the Indiana courts would entertain an action based on trespass is problematical. In *Ohio and Mississippi Railroad Company v. Simon*,[28] portions of the complaint were dismissed because the court held valid the defense that the statute of limitations had run as to an action grounded in nuisance. However, the court did not indicate that the plaintiff suggested or that the court entertained any theory of trespass. The *Hedrick* case, decided on the theory of continuing nuisance, indicates that the court might be sympathetic to an action grounded in trespass. In other jurisdictions the courts in the fluoride caess[29] have frequently reiterated

26. 342 P.2d 790 (Sup. Ct. Ore. 1959).
27. *Id.* at 793-94 (citations omitted).
28. 40 Ind. 278 (1872).
29. Fairview Farms v. Reynolds, 176 F. Supp. 178 (D. Ore. 1959); Arvidson v. Reynolds, 125 F. Supp. 481 (W.D. Wash. 1954); Martin v. Reynolds Metals Co., 342 P.2d 790 (Sup. Ct. Ore. 1959).

the diminishing difference between trespass and continuing nuisance, and a plaintiff in an Indiana court might well succeed with a trespass claim based on the sound authority of the recent decisions in sister states.

3. Negligence.

In *Hagy v. Allied Chemical & Dye Corporation*,[30] a 1954 California case, Mrs. Hagy sought recovery for damages suffered to her larynx when she and her husband drove through smog containing injurious sulfuric acid compounds negligently emitted from defendant's plant.

The court described the plaintiffs' theory as follows:

> The theory of plaintiffs' case is (1) that Mrs. Hagy had a cancer of the larynx before her exposure to the smog but it had not been diagnosed as such, and her condition was such that she did not know it; (2) that her exposure to the smog and the irritation therefrom "lighted up" the dormant cancer; (3) that immediately following the exposure she lost her voice; (4) that her doctors then pressed their examinations, ruled out tuberculosis, took a biopsy of the larynx, and determined therefrom that she had a cancer of the larynx; (5) that a complete laryngectomy was then performed and (6) *that such operation might have been averted had she not been exposed to the smog and irritation therefrom.*[31]

In spite of defendant's strong arguments that no causal relation had been shown between its air pollutants and plaintiff's laryngectomy, the appeals court affirmed the verdict for plaintiff.

Private Control in Indiana.

The purpose in setting forth some examples of nuisance, trespass and negligence actions based on pollution-caused damage has been to demonstrate that without any public control legislation or machinery, individuals have legal avenues through which they may recover for air pollution-caused injury. Such recoveries have direct control consequences if the court grants an injunction. But even if only damages are awarded, there are indirect control consequences since the award makes the pollution more expensive for defendants, and the cost of the present judgment plus the fear of future judgments furnishes economic motivations for them to control their pollution.

It is to be noted, however, that few Indiana cases have been cited as examples. Although Indiana has its share of smoke and odor nuisance-

30. 122 Cal. App. 2d 361, 265 P.2d 86 (1954).
31. 265 P.2d at 90.

oriented cases,[32] air pollution cases of the magnitude of those just discussed have not reached the courts of record in Indiana. It would be pleasant to explain this by suggesting that air pollution is not the serious problem in Indiana that it is elsewhere. Unfortunately, this explanation seems foreclosed by the designation of both the Calumet area and Indianapolis as among the twenty most polluted areas in the United States.[33] Perhaps Hoosiers are not as litigious as Californians, for example, or perhaps their claims have been settled out of court or not appealed to the two courts of record. Perhaps the Indiana Bar has been slow to realize the potential for private recovery for air pollution-caused damage. One can only speculate as to which of these factors is responsible, but it is submitted that there is nothing different about Indiana law that would preclude such private actions.

Public Control of Air Pollution

By stressing private avenues of pollution control it is not suggested that their availability lessens the need for or importance of public control. Any control through the assertion of private rights depends on the willingness and financial ability of individuals to go to court.[34] At our present rate of pollution, our population would suffocate before the private approach could appreciably alleviate the problem.

Fortunately, therefore, the private controller has now been joined by the public in the form of air pollution control regulation. The passage of

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32. Hedrick v. Tubbs, 120 Ind. App. 326, 92 N.E.2d 561 (1950); City of New Albany v. Armstrong, 22 Ind. App. 15, 53 N.E. 185 (1899); Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 47 N.E. 2 (1897); Owen v. Phillips, 73 Ind. 284 (1881); Ohio & Miss. R.R. Co. v. Simon, 40 Ind. 278 (1872); Smith v. Fitzgerald, 24 Ind. 316 (1865).

33. Conservation Foundation, C.F. Letter 8 (1967).

34. For example:

> While air pollution, particularly smoke, was not a nuisance per se at common law, evidence in each particular case could show that it was in fact a nuisance. Despite this abstract protection of the common law against air pollution, private litigation for relief from the effects of such pollution has been unsuccessful as a means of control. The remedy of injunction is so drastic as to limit its use to extreme cases, and the collection of damages where a plaintiff is successful is often merely a recurrent fee that the defendant is willing to pay. The failure of individual action as an answer to the problem is not at all surprising in face of the following facts of legal life: (a) The suffering of any given individual has often been neither significant nor irreparable, nor readily enough demonstrable in terms of dollars of damage to satisfy the doctrine that limits the granting of effectively deterrent kinds of relief; (b) The difficulty and cost of investigating and of properly proving from among all possible sources, the source or sources responsible for a given injury have been too far out of proportion to the likely benefits of successful litigation; (c) In an urban setting, pollution may stem from innumerable sources, many of which, although contributing to the harm complained of, constitute no readily indentifiable source of injury.

Rogers and Edelman, *Air Pollution Control Legislation*, 2 Air Pollution 428 (1962).

the Air Quality Act of 1967 heightens interest in the content of our public regulations.

Indiana air pollution control law leaves regulation up to local units of government.[35] The 1965 Annual Report of the Indiana Air Pollution Control Board lists six full-time air pollution control programs in the state.[36] There is also, at this time, an Indiana-Illinois compact on Air Pollution Control which is being considered for Congressional approval. The compact was passed by the Indiana legislature in 1965 and is not yet out of committee in Congress.[37] The immediate problem faced by the state of Indiana is the need to revise and strengthen the present legislation to meet the requirements necessary for federal approval. This is not only because the negative aspects of federal intervention in the case of state inaction are important, but also because there are many positive areas of assistance and benefits to be gained from the federal program through state action.

Section 101(a)(3) of the federal Air Quality Act states that "the prevention and control of air pollution at its source is the primary responsibility of State and local governments."[38] The Act proceeds to list the types of support that are available to state governmental units, state agencies, interstate agencies, and private bodies, for research in and implementation of programs for the control of air pollution. But these programs must meet the criteria established by the federal government through the agency of the Secretary of Health, Education, and Welfare. It is to this problem of tailoring our legislation to federal standards that we now direct our attention. A thorough analysis of the Indiana Air Pollution Control Act is not attempted in this discussion. However, a few of the major areas which should be critically analyzed are pointed out with the intention of bringing them within the careful scrutiny of the legislators in their deliberations over the revision of the present Indiana air pollution legislation.

Problems included in this discussion are those which may arise from our legislation relating to the definition of air pollution, the enforcement of the regulations issued under the legislation, and the procedural problems raised by recent Supreme Court decisions on right of entry and inspection clauses.

Definition of Air Pollution

Article II of the Indiana-Illniois Air Pollution Control Compact reads:

35. IND. ANN. STAT. §§ 35-4601 to -4608 (Supp. 1967).
36. INDIANA AIR POLLUTION CONTROL BD., 1965 ANNUAL REPORT 10 (1966).
37. IND. ANN. STAT. §§ 35-4621 to -4624 (Sup. 1967).
38. 81 Stat. 485 (1967).

> As used in this compact "air pollution" means the presence in the outdoor atmosphere of particulate matter, dust, fumes, gas, mist, smoke or vapor, or any combination thereof in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, or to property, or which unreasonably interferes with the comfortable enjoyment of life and property.[39]

This definition must be read in relationship with Article I of the Compact, "Findings and Purposes," subsection (c):

> It is recognized by the party states that no single standard for outdoor atmosphere is applicable to all areas within the two party states due to such variables as population densities, topographic and climatic characteristics and existing or projected land use and economic development. The guiding principle of this compact shall be that air pollution originating within a party state shall not injuriously affect humans, plants, animal life, or property, or unreasonably interfere with the enjoyment of life and property in the other party state.[40]

The Indiana Air Pollution Control Law defines air pollution as:

> [The] presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life and property.[41]

Subsection (d) defines air contaminants as, "dust, fumes, gas, mist, smoke, or vapor, or any combination thereof." The addition of "particulate matter" seems to be the only innovation in the compact, and this would seem to be covered by the other listings in the Indiana law.

Compare these definitions with the draft in the *Harvard Journal on Legislation* for a projected Illinois-Missouri Compact:

> Article I. Definitions (b) "Air Pollution" means the presence in the outdoor atmosphere of one or more air contaminants in a quantity and of a duration which *is or may tend to be* injurious to public health, or welfare, animal or plant life, or property, or which might unreasonably interfere with the enjoyment of life or property.[42]

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39. IND. ANN. STAT. § 35-4621 (Supp. 1967).
40. *Id.*
41. IND. ANN. STAT. § 35-4602(c) (Supp. 1967).
42. 4 HARV. J. LEGIS. 369, 373 (1967) (emphasis added).

Some consider a "may tend to be" standard such as that described above to be too vague for effective enforcement by regulators or definition by the courts. On the other hand, the comments to the Harvard draft criticize the Indiana-Illinois Compact, and by implication the Indiana control statute, for failing to list potential hazards in its definition. The commentators argue for the Harvard definition by stating:

> The words "may tend to be injurious" obviate the necessity for proving that contaminants have actually harmed someone or something before they can be declared to constitute pollution.[43]

It is interesting to note that the Gary Ordinance No. 67-19 on air pollution, in its draft from, has adopted the "are or may tend to be injurious" definition of air pollution. The Gary Ordinance also broadens the scope of air contaminants to include smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic or radioactive substances, waste, particulate, solid, liquid, or gaseous matter, or any other materials in the outdoor atmosphere.

Whether a practically or unconstitutionally vague "may tend to be" standard is worth the risk is a question that cannot be decided without the help of scientists and engineers in learning the nature and effect of pollutants. It is suggested, however, that the scope of the Air Quality Act demands such a standard and that the federal criteria will alleviate definitional problems.

Enforcement of Pollution Regulations.

However specific, general, or all-inclusive the legislation is, the principal problem for those who are concerned with its enforcement is whether there exists in the law adequate enforcement machinery. The Indiana statute states:

> [P]rimary responsibility for the control of the emission of air contaminants into the atmosphere shall rest with the responsible local governmental agency and that affirmative, remedial action by this state shall be taken only in those areas of this state where no local air pollution law or regulation consistent with the provisions of this act is now, or hereafter, in effect or where, after hearing, the control board determines that the local law or regulation is not being enforced adequately and, in the opinion of the control board, it is not intended that it be so enforced.[44]

43. *Id.* at 373.
44. IND. ANN. STAT. § 35-4601 (Supp. 1967).

Presumably, sanctions are to be contained in the ordinances passed by the local governmental units. The Gary Ordinance, for example, contains appropriate penalties for violations. But through what means does the Board force local governmental units to either adopt air pollution legislation or to enforce legislation? May a private citizen obtain a remedy against a recalcitrant governmental unit or is the Board the only enforcement agency? And if the Board proceeds against a private wrongdoer in a case where local legislation does not exist, what standards is the Board to be guided by and what sanctions or penalties may be placed upon the wrongdoer to gain compliance with the Board's decisions? The Indiana Air Pollution Act[45] is within the province of the Indiana Administrative Adjudication and Court Review Act which provides:

> Any agency may bring a proceeding in equity against any *person* against whom a final order or determination has been made to compel compliance therewith, and the court or judge thereof in vacation in such action shall have jurisdiction to enforce such order or determination by prohibitory or mandatory injunction.[46]

Apparently, in the context of compelling a governmental unit to pass or to enforce legislation, the Board's sole enforcement sanction is the injunctive power of the court against the proper person—whoever that might be—charged with the enactment or enforcement of air pollution control regulations. In reference to the Board's powers to enforce the air pollution statute in the absence of local regulations, it would, once more, appear to have only the use of the injunction as a sanction. This is a weak area of the state statute, and it definitely needs to be revised. A successful attempt to control the pollution problem in Indiana cannot be made without real enforcement power lying in the hands of the agency responsible for the solution. And, as has been noted, the Air Quality Act demands an adequate program for implementation in order to gain federal approval.

To complete this somewhat dismal picture, the permissive quality of the Indiana-Illinois Compact provides no solution for the problem of enforcement. Article IV, "Functions," allows the Commission created by

45. IND. ANN. STAT. § 35-4606 (Supp. 1967).

46. IND. ANN. STAT. § 63-3027 (1961) (emphasis added). One must look to IND. ANN. STAT. § 63-3002, "Definitions," for a definition of *person*:

> The word "person" whenever used in this act shall mean and include any person, firm, association, partnership or corporation. It shall also include municipalities and all political subdivisions of government against which any agency may make an order or determination.

the compact to make studies of air pollution existent in the two states and section (d) provides that:

> No less than six months after the commission furnishes a report to the appropriate state and local air pollution control agencies pursuant to paragraphs (a) and (b) of this article and, if the recommendations made in such report for the prevention, abatement or control of air pollution from a specific source or sources have not been implemented, or if the appropriate state or local air pollution control agencies have not taken sufficient action to prevent, abate, or control the air pollution, the commission may after a duly conducted and constituted hearing on due notice issue an order or orders upon any municipality, corporation, person or other entity causing or contributing to air pollution in a state other than that in which the air pollution originates. . . .[47]

And subsection (e) provides:

> It shall be the duty of the municipality, corporation, person, or other entity to comply with any such order issued against it or him by the commission. Any court of competent jurisdiction shall entertain and determine any action or proceeding brought by the commission to enforce any such order against any municipality, corporation, person, or other entity domiciled or located within such state. . . .[48]

The means of eliciting compliance with the court orders is totally ignored in the legislation and, again, we face the situation of a well-intentioned statute which is incomplete because of a lack of sanctions and enforcement procedure. It is to be noted that the Air Quality Act of 1967, unlike its predecessors, provides for federal jurisdiction over interstate pollution upon the application of the Secretary of Health, Education and Welfare to the Attorney General.[49] Also, the federal Act provides that, in the

47. IND. ANN. STAT. § 35-4621 (Supp. 1967).
48. *Id.*
49. 81 Stat. 485, § 108(c)(4)(i) (1967) provides:
Whenever, on the basis of surveys, studies and reports, the Secretary finds that the ambient air quality of any air quality control region or portion thereof is below the air quality standards established under this subsection, and he finds that such lowered air quality results from the failure of a State to take reasonable action to enforce such standards, the Secretary shall notify the affected State or States, persons contributing to the alleged violation, and other interested parties of the violation of such standards. If such failure does not cease within one hundred and eighty days from the date of the Secretary's notification, the Secretary—
(i) in the case of pollution of air which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges

case of intrastate pollution, the Secretary may, at the request of the Governor of the state, assist in the institution of state proceedings *or* proceedings brought by the Attorney General in a United States District Court, to secure abatement.[50]

The lack of specific jurisdictional power and positive sanctions in present Indiana legislation creates a definite need for careful revision. It is suggested that such revision should consider enactment of the less drastic economic sanctions, so that the need for abatement through total injunction is avoided by an earlier solution of the problem.[51]

Right of Entry and Inspection.

Section 35-4607 of the Indiana Air Pollution Control Act provides:

> It shall be unlawful . . . to refuse to permit such personnel to perform their duty by refusing them, after proper identification or presentation of a written order of the control board, entrance at reasonable hours to any premises.[52]

The Indiana-Illinois Compact, Article VI, "Right of Entry," provides:

> The commission acting by any duly designated officer, employee or agent thereof, shall have the right to enter at all reasonable times in or upon any private or public property except private

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(causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States in the appropriate United States district court to secure abatement of the pollution.

50. 81 Stat. 485, § 108(c)(4)(ii) (1967) provides:

(ii) in the case of pollution of air which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, at the request of the Governor of such State, shall provide such technical and other assistance as in his judgment is necessary to assist the State in judicial proceedings to secure abatement of the pollution under State or local law, or, at the request of the Governor of such State, shall request the Attorney General to bring suit on behalf of the United States in the appropriate United States district court to secure abatement of the pollution.

51. It might be noted at this point that there exists a certain amount of disagreement concerning the effectiveness of positive tax incentives to encourage control measures as opposed to negative sanctions against emissions. While taxation incentives may be well suited for water pollution problems where the tax can be based on and used for the cost of purifying the water, air pollution offers no such solution. There is, at present, no method of purifying the air once it has been polluted. Therefore it is urged that negative sanctions in the form of gradually ascending fines be placed on emissions. And if the recalcitrant offender cannot justify his failure to install proper controls within a specific time or if the damage caused by the emissions outweighs the economic and social value of the operation, then an injunction should be issued.

Mills, *Economic Incentives in Air Pollution Control,* in THE ECONOMICS OF AIR POLLUTION 40 (Wolozin ed. 1966).

52. IND. ANN. STAT. § 35-4607 (Supp. 1967).

residences for the purpose of inspecting and investigating any condition which the board shall have reasonable cause to believe to be an air pollution source.[53]

Two recent Supreme Court cases, *Camara v. Municipal Court of City and County of San Francisco*[54] and *See v. City of Seattle*,[55] declared unconstitutional, as violative of the Fourth Amendment, ordinances which granted to city officials the right of inspection and entry without a search warrant. The cases expressly overruled an earlier Supreme Court decision which had upheld a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect her premises without a search warrant.[56]

In the *Camara* case the plaintiff was a private citizen in a multiple dwelling; the city ordinance read:

> Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.[57]

The appellant refused to allow the inspectors access without a warrant, and a complaint was filed, charging him with a violation of the ordinance. The case went to the United States Supreme Court on a special writ of prohibition, and the Court declared the unconstitutionality of the ordinance and granted the writ.

The companion case, *See v. City of Seattle,* has much more potential impact on the inspection and entry provisions in air pollution control ordinances. Here the appellant was a commercial warehouseman. The ordinance specifically excluded private dwellings:

> It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.[58]

The Court considered the issue as being whether the *Camara* rule applied to similar inspections of commercial structures which are used as

53. IND. ANN. STAT. § 35-4621 (Supp. 1967).
54. 87 Sup. Ct. 1727 (1967).
55. 87 Sup. Ct. 1737 (1967).
56. Frank v. Maryland, 359 U.S. 360 (1959).
57. 87 Sup. Ct. at 1729 (quoting § 503 of the San Francisco Housing Code).
58. 87 Sup. Ct. at 1738 (quoting § 8.01.050 of the Seattle Fire Code).

private residences, and held that it did. It is interesting to note the language of the Supreme Court in discussing the implications of this ruling:

> We do not decide whether warrants to inspect business premises may be issued only after access is refused, since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspections will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.[59]

The impact of this language is left open for speculation.

In a well-reasoned dissent, Justice Clark deplored the possibilities foreshadowed by this decision. Pointing out the futility of the majority's statement on the case of obtaining a warrant Justice Clark stated that, in truth, search warrants, "will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course."[60] He asked whether this is not merely constructing an absured facade around our Constitution.

Whether Clark's prediction will obtain is purely speculative. The decisions, however, do illustrate the necessity of careful drafting of an inspection clause that is both constitutionally sound and utilitarian in operation. The starting point is a careful analysis of what the Court thinks must be included in such a clause in order to protect the individual's right against illegal search and seizure. Also included within this analysis must be the power of the state to protect the interest of the public against the individual. There is, on its face, no reason why a clearly-stated inspection clause with well-defined limitations should not meet the objections of the Court. It is suggested that the inclusion of an effective inspection clause is a vital part of a successful control act.

These are but a few of the elements of the Indiana air pollution control legislation which must be seriously considered in a revision of the present laws. Analysis and revision of areas which require scientific knowledge, economic training, or other areas of competence are also part of the enormous task facing our legislature. A cooperative effort by members of every interested sector of the population—business, education, government, the professions, and the general public—is necessary if Indiana is to have a sound piece of legislation which will meet the challenge of the Air Quality Act of 1967.

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59. *Id.* at 1740 n.6.
60. *Id.* at 1741.

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