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Environmental Law: New Legal Concepts in the Antipollution Fight

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Comment

ENVIRONMENTAL LAW: NEW LEGAL CONCEPTS IN THE ANTIPOLLUTION FIGHT

I. INTRODUCTION

> What do you do when a municipality decides that the highest and best use of a mighty river is an open sewer? What do you do when the Army Corps of Engineers or the Bureau of Reclamation decides to drown the Grand Canyon or most of Central Alaska, or insists upon destroying the delicate ecological balance of an entire state like Florida?
>
> Just what can you do?
>
> SUE THE BASTARDS!
>
> We must knock on the door of the courthouses of this nation and seek equitable protection for our environment. . . . Industries and government can ignore your protests, ignore your picket signs, and certainly they can repress your demonstrations. But no one in industry or government ignores that scrap of legal cap that begins:
>
> YOU ARE HEREBY SUMMONED TO ANSWER THE ALLEGATIONS OF THE COMPLAINT ANNEXED HERETO WITHIN TWENTY DAYS OR JUDGMENT WILL BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED.
>
> Victor Yannacone[1]

Until quite recently it has been the accepted view that one of man's chief functions was to control and to exploit his environment. Only within the last year have most Americans begun to realize that we do not possess an inexhaustible supply of natural resources; that in fact the quality of man's life is threatened and perhaps his very existence.

This public concern for the quality of our environment is beginning to be felt in the courtroom. Private citizens have attempted to preserve the livability of this country by bringing legal action against the federal government, the states, and private industry as well as the state and federal administrative agencies which are supposed to be protecting the environment. There are dozens of suits pending in federal and state courts involving environmental or pollution issues.[2] These cases present a great diversity of

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1. *Sue The Bastards,* speech delivered on "Earth Day" at Michigan State University, April 22, 1970.

2. Sklar v. Park Dist. of Highland Park, No. 69H164 (Cir. Ct. 19th Jud. Cir., Lake County, Ill., filed Aug. 11, 1969) (water pollution); Sierra Club v. Minn. Pollution Control Agency, No. 662,008 (Dist. Ct., 4th Jud. Dist., Minn., Sept. 19, 1969) (water pollution); Environmental Defense Fund v. Hoerner Waldorf Corp., Civil No. 1694 (D. Mont., filed Nov. 13, 1968) (air pollution).
Sierra Club v. Hickel, Civil No. 51,464 (N.D. Cal., filed June 5, 1969);

legal theories ranging from constitutional claims to a pollution-free environment to more conventional theories such as nuisance or trespass. The whole area of environmental law is quite new and sometimes confusing because lawyers and courts have not yet settled on any one best legal theory that will accomplish the goal of protecting the environment. This comment is an attempt to bring together these diverse theories and to explain some of the legal concepts in this developing area of environmental law.

The first part of this article will deal with the structure of the common law doctrines of nuisance, trespass and riparian rights and their adaptability to the control of pollution. In recent years there has been a sharp decline in the number of common law decisions reported in the environmental field. Nevertheless, an understanding of the common law is vital because it forms the basis of statutory regulation. While the state and federal regulatory agencies now have the dominant role in managing our environment, the common law supplements this body of statutory law. Secondly, this comment will consider procedural difficulties (primarily the standing requirement) encountered by private litigants trying to participate in the administrative process. Lastly, there will be a discussion of new theories for creating substantive rights in environmental quality.

II. The Traditional Legal Theories: Common Law Nuisance, Trespass and Riparian Rights

A. *Private Nuisance*

Nuisance law has traditionally been divided into areas characterized as "public nuisance" and "private nuisance." The common law of private nuisance prohibits the unreasonable use of property so as to substantially interfere with the use and enjoyment of another's property.[3] A specific example of a private nuisance case would be a situation where a factory in emitting caustic chemicals, dust or fumes which damage neighborhood crops and interfere with the use and enjoyment of that land. In such cases, the plain-

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Parker v. United States, Civil No. C-1368 (D. Colo., filed Jan. 7, 1969) (challenging the Forest Service about use of public land).

Weingand v. Hickel, Civil No. 69-1317-EC (S.D. Cal., filed July 10, 1969) (questioning the Secretary of the Interior about regulation of federal offshore oil leases).

Kelly v. Kennedy, Civil No. 69-812-G (D. Mass., filed July 29, 1969) (airport extensions); Abbot v. Osborn, No. 1465 (Super. Ct., Dukes County, Mass., filed March 28, 1969).

Citizens Comm. for Hudson v. Volpe, 302 F. Supp. 1083 (S.D. N.Y. 1969); Citizens Comm. for Hudson Valley v. McCabe, No. 2872/68 (Sup. Ct., Rockland County, N.Y., filed Oct. 1, 1968) (highway locations).

Robbins v. Department of Pub. Works, 244 N.E.2d 577 (Mass. 1969) (destruction of parklands).

Ottinger v. Pennsylvania Cent. Co., No. 68 Civil 2638 (S.D. N.Y., filed June 28, 1969) (oil dumping). These actions are cited in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 473 (1970).

3. 236 App. Div. 37, 258 N.Y.S. 222 (1932); *see generally* 39 Am. Jur. *Nuisances* § 2 (1942); 10 Ariz. L. Rev. 107 (1968).

tiff's remedy is often restricted to money damages. However, if the plaintiff can show that he meets certain requirements for the exercise of equity jurisdiction, the court, using its equity powers, will enjoin the nuisance.[4]

Jurisdiction of equity to issue an injunction against a polluter depends upon such factors as whether the nuisance is continuous or merely temporary, whether the activity threatens permanent or irreparable injury to life or property, and the adequacy of the remedy at law.[5] Further, the defenses customarily available in suits for equitable relief such as laches, unclean hands, balancing of equities or conveniences are available in such nuisance suits.[6]

Until recently, the few antipollution suits that had been brought were all common law actions for nuisance. While at first glance a private nuisance suit by an individual against a polluter to recover his damages with the possibility of an injunction would appear to provide an adequate means of pollution control, the obstacles to the plaintiff's recovery are actually quite formidable. To obtain relief from a nuisance a plaintiff must have suffered material harm or substantial interference with the use and enjoyment of his property.[7] Usually no private action can be maintained for water pollution that kills fish in the rivers, or air pollution that kills birds or wildlife.[8] Thus, even though serious pollution exists thereby creating a nuisance, a private individual can not bring the action because he can not show special personal damages.[9]

Further, courts apply a reasonable use test to the defendant's use of his land to determine whether there has been a nuisance. Certain amounts of pollution are tolerated as a reasonable use of one's property. Unreasonableness of the nuisance is a question of fact that is left to a jury.[10] In addition, the plaintiff must prove that his injury was a result of the defendant's pollution. With hundreds of industrial establishments, utility companies, and private citizens pouring pollutants into the air or water, this is often an impossible task. In most cases the pollution that kills our environment is a cumulative result of all these various discharges and there is therefore no way of pinning down a particular polluter.

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4. *See* Griffith v. Newman, 217 Ga. 553, 123 S.E.2d 723 (1962); Pendaley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963); *see also* 21 STAN. L. REV. 293 (1969).

5. *See* H. MCCLINTOCK, HANDBOOK ON EQUITY (1948). The history of nuisance law is set forth in L. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 212-13 (1906); Winfield, *Nuisance as a Tort*, 4 CAMB. L.J. 189 (1947); McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

6. *See* de Funiak, *Requisites for Equitable Protection Against Torts*, 37 KY. L.J. 29 (1948); W. PROSSER, TORTS § 90, at 621-23 (3d ed. 1964); Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186 (1966).

7. W. PROSSER, TORTS § 88, at 598 (3d ed. 1964).

8. Selma v. Jones, 202 Ala. 82, 79 So. 476 (1918); New Orleans v. Lenfant, 126 La. 445, 52 So. 575 (1910); Riggins v. District Ct., 89 Utah 183, 51 P.2d 645 (1935).

9. Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939); Goldsmith & Powell v. State, 159 S.W.2d 534 (Tex. Civ. App. 1942).

10. W. PROSSER, TORTS § 36, at 206 (3d ed. 1964).

Probably the greatest obstacle to the effectiveness of the private remedy as a pollution control device is the court's continued tendency to balance the equities or conveniences.[11] The court may recognize that the defendant's polluting activities have caused the plaintiff's injury, yet the court will "balance the equities," which means that it weighs the damage done to the plaintiff against the damage that would be sustained by the polluter were he forced to cease his activities. A classic example of a court "balancing the equities or conveniences" occurred in the recent New York case of *Boomer v. Atlantic Cement Co.*[12] The plaintiff landowners brought an action seeking an injunction to restrain a cement company from emitting dust and raw materials, a situation created by excessive blasting in operating its plant. The trial judge denied the equitable remedy of injunction although operation of the defendant's plant did create dust and vibration nuisance. An injunction was not issued and the plaintiffs were confined to their legal remedies. The reason given by the court was that the

> [d]efendant expended more than $40,000,000 in the erection of one of the largest and most modern cement plants in the world. The company installed at great expense the most efficient devices available to prevent the discharge of dust and polluted air into the atmosphere.[13]

Although the court found that there was a nuisance and that the plaintiffs' land was reduced in value from $346,000 to $161,000 as a result of plant operations, the pollution was allowed to continue thereby depriving the neighbors of the use of their property. The trial court stated:

> [I]f the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficient hand and remit the plaintiff to his legal right and remedies.[14]

On appeal the property owners lost[15] with the appeals court finding that balancing the equities was a proper way to try a nuisance case,[16] that the company used modern and efficient pollution devices in an unsuccessful attempt to prevent discharges, and that zoning was consistent with the use

11. However, some states have rejected the balance of convenience doctrine in water pollution cases. *See* Indianapolis Water Co. v. American Strawboard Co., 53 F. 970, 57 F. 1000 (C.C.D. Ind. 1893); Barrington Hills Country Club v. Village of Barrington, 357 Ill. 11, 191 N.E. 239 (1934); Parker v. American Woolen Co., 195 Mass. 591, 81 N.E. 468 (1907); Whalen v. Union Bag and Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913); Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900); Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 199 N.W. 390 (1924).

12. 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 (3d Dept. 1968) *See* Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts,* 55 CORNELL L. REV. 674 (1970).

13. 55 Misc. 2d at 1024, 287 N.Y.S.2d at 113.

14. *Id.* at 1025, 287 N.Y.S.2d at 114.

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

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

by the cement company.[17] Therefore, by paying the property owners fair compensation for their land a private company was able to seize private property and lay waste to the neighborhood.[18]

When they engage in balancing the equities, courts put on one side of the scale loss of jobs, loss of revenue to the community, loss of taxes to the city or state, and how much the polluter has spent in his unsuccessful attempt to curb pollution. On the other side of the scale the losses to "one" property owner are weighed. Some environmentalists have suggested that the courts are not weighing all the relevant factors and that the solution is to broaden the list of those factors to include "injury to society."[19]

On occasion courts have refused to balance the equities and have found in favor of the plaintiff property owner, despite the fact that such relief results in a far greater economic loss to the community in general. The case of *Hulbert v. California Portland Cement Co.*[20] is an example of a case where the court refused to balance the equities. The court there stated:

> Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim de minimis non curat lex is applicable; but every substantial, material right of person or property is entitled to protection against the world.[21]

However, in most courts the balancing of equities is by far the more prevalent practice, especially where an injunction is sought.[22]

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17. *See* Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases,* 1955 WIS. L. REV. 440; 16 SYRACUSE L. REV. 860 (1965).

18. Lester, *Nuisance—As a "Taking of Property",* 17 U. MIAMI L. REV. 537 (1963). Clearly in *Boomer* there is an element of inverse condemnation. However, it is worth noting that there are differences in application of the comparative convenience doctrine between cases which grant damages (like *Boomer)* and cases which deny relief altogether. *See* Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886). There appears to be a difference in application of the comparative convenience doctrine for purposes of determining (1) whether relief should be granted, and (2) what is appropriate relief. The same kind of balancing technique may be used, but the weighing of the various factors may be quite different for the two purposes.

19. This discussion of balancing the equities is not an assertion that in all cases the doctrine is an unacceptable judicial method of determining whether an interest deserves protection. However, it is an assertion that the courts must weigh environmental factors when they engage in balancing. One author suggests that courts reject comparative convenience when it wishes to find for the plaintiff, and accepts comparative convenience when it favors the defendant. (See P. Davis, to be published WIS. L. REV. Summer 1971).

20. 161 Cal. 239, 118 P. 928 (1911).

21. 161 Cal. at 251, 118 P. at 933. *See* Schuck, *Air Pollution as a Private Nuisance,* 3 NAT. RES. LAWYER 475 (July 1970).

22. This summation of some of the difficulties encountered in a private nuisance suit is only intended to be representative. There are other obstacles encountered by a plaintiff such as "coming-to-the-nuisance." In Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 721, 82 N.W.2d 151, 158 (1957) the court stated:

> [T]he right of a person to pure air may be surrendered in part by his election to live in a city where the atmosphere is impregnated with smoke, soot and other impurities. These statements are especially applicable to one who elects to live in or adjacent to an industrial district.

Today this common law private remedy is of little significance in pollution control. It has become increasingly clear that litigation by private parties suing to protect their own special interest can not cope with the problems created by large industrial and municipal complexes. Added to this is the difficulty of pleading and proving a private nuisance case. Further, litigation is expensive and many people will submit to living in a polluted environment rather than bear the high cost of litigation.

B. *Public Nuisance: Not Easily Transferable to Resource Problems*

A public nuisance has been defined as "the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public."[23] This would seem to cover explicitly a situation where our water, air, and food are being poisoned, thus definitely endangering the health and safety of the public. However, public nuisance has been historically associated with abatement of brothels, gambling dens, and similar institutions, and the case law is therefore not easily transferable to natural resource problems.[24]

There have been some cases dealing with bad odors, smoke, dust and vibration,[25] obstructing navigable streams,[26] and even pollution of streams.[27] However, the result of all these cases is that a private individual cannot sue to enjoin a public nuisance. The suit ordinarily must be brought by the state or federal attorney general in the name of the state or the people of the state.[28] Only in a few states have statutes expressly permitted individuals to sue to enjoin particular kinds of public nuisances.[29]

However, nuisance law does recognize that the same act can create both

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23. City of Selma v. Jones, 202 Ala. 82, 83, 79 So. 476, 477 (1918); Commonwealth v. South Covington & C. St. R.R., 181 Ky. 459, 463, 205 S.W. 581, 583 (1918).

24. State *ex. rel.* Williams v. Karston, 208 Ark. 703, 187 S.W.2d 327 (1945); State *ex rel.* Leahy v. O'Rourke, 115 Mont. 502, 146 P.2d 168 (1944) (gambling houses); Cranford v. Tyrrell, 128 N.Y. 341, 28 N.E. 514 (1891) (cases on house of prostitution); Black v. Circuit Court of Eight Judicial Dist., 78 S.D. 302, 101 N.W.2d 520 (1960); State v. Navy, 123 W. Va. 722, 17 S.E.2d 626 (1941).

25. Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952); Soap Corp. of America v. Reynolds, 178 F.2d 503 (5th Cir. 1950); Wesson v. Washburn Iron Co., 13 Allen 95, 90 Am. Dec. 181 (Mass. 1868): Potashnick Truck Serv. v. City of Sikeston, 351 Mo. 505, 173 S.W.2d 96 (1943).

26. Carver v. San Pedro, L.A. & S.L.R.R., 151 F. 334 (C.C. Cal. 1906); Piscataqua Nav. Co. v. New York, N.H. & H.R.R., 89 F. 362 (D. Mass. 1898); Willard v. City of Cambridge, 3 Allen 574 (Mass. 1862).

27. State *ex. rel.* Wear v. Springfield Gas & Elec. Co., 204 S.W. 942 (Spr. Mo. App. 1918).

28. *See* Attorney General v. City of Grand Rapids, 175 Mich. 503, 141 N.W. 890 (1913); Columbia River Fisherman's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939); Goldsmith & Powell v. State, 159 S.W.2d 534 (Tex. Civ. App. 1942). Note that at common law a public nuisance was a crime comprehending a variety of petty offenses, all based on some interference with the comfort, convenience or health of the general public. For a further discussion see W. PROSSER, TORTS § 89, at 605 (3d ed. 1964).

29. Littleton v. Fritz, 65 Iowa 488, 22 N.W. 641 (1885); Carleton v. Rugg, 149 Mass. 550, 22 N.E. 55 (1889).

private and public nuisance.[30] For example, if pollution of a river destroys the fish, such pollution would constitute a private nuisance where the river flowed through private property, and a public nuisance in those areas where the public right to fish was interfered with. So public nuisance can also be a tort, giving rise to a private cause of action provided the plaintiff can demonstrate that he has suffered some special or particular damages. However, proving these special damages is difficult because of the substantive and procedural burden that the plaintiff is required to sustain.

A public nuisance action would offer the "possibility" of more effective pollution control if state and federal officials will exercise their powers to abate a nuisance.[31] This is because the state or municipality brings the action, therefore reducing many of the major difficulties faced by private litigants. However, public nuisance has historically been a catchall for petty criminal offenses ranging from blocking a public byway to running a house of prostitution. It has therefore been difficult to adapt public nuisance theory to resource problems. Thus, public nuisance like private nuisance remains an inadequate pollution control device.[32]

C. *Trespass*

A few anti-pollution suits have employed the principle of trespass, which is an unprivileged entry of a person or object on land possessed by another. To establish trespass, one need only show an intentional, unprivileged entry onto the land, whereas to prove nuisance, a substantial and unreasonable interference with the use and enjoyment of land must be shown.[33] Therefore in a trespass case, the plaintiff's burden of proof may be less than in a nuisance case. This is because the plaintiff need not show that the defendant's conduct is unreasonable or that substantial injury has resulted.[34]

The real disadvantage to recovering in pollution cases under a trespass theory is the necessity of a "direct" physical entry by a person or "object." In defining "object" some courts have held that entry of smoke, dust, fumes or gas onto the plaintiff's land is not substantial enough to be a trespass.[35] Also, some courts have held that if an intervening force, such

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30. *See* Nolan v. City of New Britain, 69 Conn. 668, 38 A. 703 (1897); Bair v. Central & So. Fla. Flood Control Dist., 144 So. 2d 818 (Fla. 1962).

31. For successful public nuisance actions in the pollution field, see: Platt Bros. & Co. v. Waterberry, 80 Conn. 179, 67 A. 508 (1907); Dunlop Lake Property Owners Ass'n. Inc. v. City of Edwardsville, 22 Ill. App. 2d 95, 159 N.E.2d 4 (1959).

32. There are additional problems when a nuisance theory is followed. One writer states:

> Nuisance cases are virtually impossible to summarize or even categorize since they differ so greatly from state to state as to the reasonability of the defendant's conduct, the nature of the plaintiff's interest, and the interrelationship with other remedies. . . . Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere,* 33 BROOKLYN L. REV. 17, 25 (1966).

33. RESTATEMENT OF TORTS § 158 (1934); H. MCCLINTOCK, HANDBOOK ON EQUITY § 132, at 361-62 (1948).

34. Longennecker v. Zimmerman, 175 Kan. 719, 267 P.2d 543 (1954).

35. *See* Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942); Annot., 54 A.L.R.2d 764, 778 (1957).

as wind or water, carries the contaminants onto the plaintiff's land, then the entry is not "direct."[36]

In *Lampert v. Reynolds Metal Co.*[37] the United States District Court of Oregon refused to engage in this elaborate distinction. The plaintiffs, who raised agricultural crops, brought the action against the defendant for money damages and injunctive relief for injuries caused by fluoride gases emitted from the defendant's aluminum plant. The Court of Appeals for the Ninth Circuit affirmed a judgment for money damages, but held that the district court, before granting an injunction against Reynolds, "should weigh the apparent value to society of defendant's plant against the value to society of plaintiff's farming activities."[38] So in deciding this trespass case the court engaged in a balancing-of-interests test similar to that involved in nuisance cases such as *Boomer v. Atlantic Cement Co.*[39]

The difficulty of pinpointing which among many sources of pollution in an area caused the injury to the plaintiff, the court's tendency to balance equities, and the cost of litigation against huge corporations discourages the filing of trespass suits. As with nuisance theory, trespass theory is inadequate for effective pollution control on any major scale.

D. *Riparian Rights and Water Pollution*

The common law doctrine of riparian rights[40] has traditionally governed the relationship between landowners abutting watercourses. The riparian doctrine states that each proprietor of land abutting on a watercourse has a co-equal right to use water in that watercourse. Persons complaining of pollution of waters abutting their land have redress by a lawsuit against the alleged polluter. This doctrine has been accepted in 31 American states, primarily east of the Mississippi, as the rule controlling the rights to use of water in watercourses.[41]

There are two separate concepts embodied in the riparian doctrine: (1) the "natural flow" concept—the idea that each riparian as a right to have the water in the watercourse come down to him unchanged in quantity or quality, and (2) the "reasonable use" concept—the idea that each riparian has an equal right to make reasonable use of the water even if alteration in quantity or quality occur.[42] The particular interpretation of the riparian doctrine followed in any particular state is determined by which of these two concepts is emphasized by its courts. However, most states have adopted a reasonable use interpretation of riparian rights. The reasonableness of

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36. Arvidson v. Reynolds Metal Co., 125 F. Supp. 481, 488 (W.D. Wash. 1954).

37. 372 F.2d 245 (1967).

38. *Id.* at 247. *See also* Martin v. Reynolds Metal Co., 221 Or. 86, 342 P.2d 790 (1959).

39. 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (3d Dept. 1968).

40. The doctrine was judicially formulated in the case of Tyler v. Wilkinson, 4 Mason 397, 24 F. Cas. 472 (1827).

41. In the western states the rule of prior appropriation is followed. It is a different concept from riparianism, being based on statute, and will not be discussed in this article.

42. P. DAVIS, INSTITUTIONAL DESIGN FOR WATER QUALITY MANAGEMENT: A CASE STUDY OF THE WISCONSIN WATER BASIN, *Five Legal Studies on Water Quality Management in Wisconsin,* Vol. VII § 1, at 8-10 (1970).

each use will be measured by its relation to use made by others on the same watercourse.

The question arises whether a riparian's rights under the majority reasonable use concept includes the right to make reasonable uses of the waters for waste disposal. A logical reading of the reasonable use concept would seem to suggest that waste disposal should be permitted if reasonable with respect to uses by other riparians. However, this would not be the case if the natural flow idea was followed, because no alteration of the stream's quality would be allowed. This minority natural flow position was taken in *City of Richmond* v. *Test*[43] where the court stated:

> The principle is well settled that in the absence of grant, license, or prescription limiting his rights, a riparian proprietor has the right to have the waters of a natural watercourse flow along or through his premises as it would naturally flow, without change of quantity or quality.[44]

In the past, however, the reasonable use concept has been chosen over natural flow by a majority of the courts because it avoided the severe limitations on economic and industrial growth implicit in natural flow. The reasoning behind the reasonable use concept was explained in *Merrifield* v. *City of Worcester*:[45]

> So the natural right . . . to have the water descend to [a riparian] in its pure state, fit to be used for various purposes to which he may have occasion to apply it, must yield to the equal right in those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. . . . The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy.[46]

In determining reasonableness the courts and the jury may consider many factors:

> The decision of this question depend[s] not alone upon the extent and nature of the impurities projected into the stream, but upon the location of the plaintiff's land, the use to which it [is] devoted, the effect upon it of any impurities in the stream, and the extent to which pollution of the waters may [be] attributable to other sources. . . . Surrounding circumstances such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience of doing business, and indispensable public necessity of cities and villages for drainage are taken into consideration. . . .[47]

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43. 18 Ind. App. 482, 48 N.E. 610 (1897).

44. 18 Ind. App. at 493, 48 N.E. at 614; *see also* H. B. Bowling Coal Co. v. Ruffners, 117 Tenn. 180, 189-90, 100 S.W. 116, 119 (1906).

45. 110 Mass. 216 (1872).

46. *Id.* at 219.

47. *See* Reese v. City of Johnston, 45 Misc. 43, 44, 92 N.Y.S. 728, 729 (Sup. Ct. 1904), quoting Townsend v. Bell, 167 N.Y. 462, 471, 60 N.E. 757, 760 (1901).

Therefore, it seems clear from the above that reasonable use under riparian rights requires a balancing of factors or conveniences in much the same manner as the courts have done under the private nuisance and trespass doctrines. The reasonable use concept carries with it a right of a riparian to discharge wastes into a watercourse provided the discharge is not unreasonable.[48]

The courts in these cases have been concerned only with "economic considerations" and have rejected such considerations as the natural beauty of a watercourse, public health factors, and other general aesthetic considerations.[49] In one case, the plaintiff brought an action claiming impairment of his riparian right to maintenance of the original beauty of the river. The court rejected his contention, stating: "A riparian owner has no proprietary right in a beautiful scene presented by a river any more than any other owner of land could claim a right to a beautiful landscape."[50] In another case, the New York court said: "In enjoining a nuisance, there shall be not merely a sentimental, psychological, aesthetic, or artistic complaint."[51] In recent years, the attitude toward environmental quality has been changing very rapidly and such applications of the riparian doctrine as these are unlikely to fill the needs of a satisfactory legal doctrine to preserve the quality of a rapidly deteriorating environment.

E. *Conclusion*

The common law doctrines are concerned primarily with relationships between individuals. They are not well suited to situations involving diffused damages or rights of the public. The unsuitability of the common law to protect the public interest has been recognized and administrative regulation has been established in all states as an alternative to the common law. In effect these administrative agencies represent the public. Their decisions on environmental questions are extensive in scope and likely to seriously affect public interests. Yet, in many cases these agencies have been criticized for not pursuing the good of the public as a whole. In such cases, members of the public have sought to use our courts to challenge these agency decisions. Instead of getting judicial review the public has been met by various procedural requirements imposed by the courts. For the environmentalists the most serious of these procedural burdens has been the "standing" requirement.

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48. *See* Donnelly Brick Co. v. City of New Britain, 106 Conn. 167, 175, 137 A. 745, 748 (1927); Ferguson v. Firmenich Mfg. Co., 77 Iowa 576, 578, 42 N.W. 448, 449 (1889); Dwinel v. Weazie, 44 Me. 167, 175 (1857).

49. *See* Borough of Westville v. Whitney Home Builders, Inc., 40 N. J. Super. 62, 76-82, 122 A.2d 233, 239-43 (1956); Kennedy v. Moog Servocontrols, Inc., 48 Misc. 2d 107, 264 N.Y.S.2d 606, 615 (Sup. Ct. 1965); International Shoe Co. v. Heatwole, 126 W. Va. 888, 892-93, 30 S.E.2d 537, 540 (1944).

50. International Shoe Co. v. Heatwole, 126 W. Va. 888, 892-93, 30 S.E.2d 537, 540 (1944).

51. Kennedy v. Moog Servocontrols, Inc., 48 Misc. 2d 107, 264 N.Y.S.2d 606, 615 (Sup. Ct. 1965).

III. Procedural Problems Faced By a Litigant Seeking To Participate In Environmental Decisions

A. *Standing Requirement for Judicial Review*

1. Introduction

For the environmentalist, the primary doctrine which has operated as a limitation upon the availability of judicial review or judicial relief is "standing to sue."[52] Standing is used to determine whether a particular person is a proper party to raise a particular issue.[53] Unless the person has a "personal stake in the outcome of the controversy"[54] there is no standing to sue. The question of a person's legal standing to apply for judicial relief in the courts has nothing to do with the merits of his suit; it concerns the authority of the court to entertain the action. Although standing is derived from no particular source, it is closely related to the limitations of Article III, Section 2, of the United States Constitution which provides that the federal courts must decide only "cases and controversies."[55] Thus, federal courts will not adjudicate a dispute which presents only a political question,[56] seeks an advisory opinion,[57] or is moot because of later developments.[58]

2. Evolution of the Doctrine of Standing

The question of standing to seek judicial review of actions of regulatory agencies was first raised in *Edward Hines Yellow Pines Trustees* v. *United States*[59] where the plaintiffs challenged a decision of the Interstate Commerce Commission. The court held that:

> [P]laintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charge cancelled. They must show also that the order alleged to be

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52. United States *ex. rel.* Chapman v. F.P.C., 345 U.S. 153 (1953); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), Standing to sue has been called one of "the most amorphous (concepts) in the entire domain of public law." Statement of Prof. Paul A. Freund, *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess., at 498 (1966); *See* Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 Stan. L. Rev. 433 (1962).

53. Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

54. *Id.* at 101.

55. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the "United States," and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States—between Citizens of the same state claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. U.S. Const. art. III, § 2.

56. Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Luther v. Borden, 7 How. 1, 49 U.S. 1 (1849).

57. United States v. Fruehauf, 365 U.S. 146 (1961); Muskrat v. United States, 219 U.S. 346 (1911).

58. California v. San Pablo & T.R.R., 149 U.S. 308 (1893).

59. 263 U.S. 143 (1923); *See* L. Jaffe, Judicial Control of Administration Action (1965).

void subjects them to legal action, actual or threatened. This they have wholly failed to do.[60]

Also, in a 1937 decision, *Tennessee Electric Power Co.* v. *TVA*,[61] the Court held there was no standing for the plaintiff's action "unless the right invaded is a *legal right*—one of property, one arising out of contract, one protected against tortious invasion or one founded on a statute which confers a privilege."[62] So despite illegal agency action the plaintiffs had no recourse. For them to have standing their interest had to be a special personal interest threatened by the unlawful agency action and not an interest held in common with all citizens.[63]

3. A Turning Point in the Evolution of the Standing Requirement[64]

The second phase in the evolution of the standing cases began in 1940 with the Supreme Court's decision in *F.C.C.* v. *Sanders Brothers Radio Station*.[65] The question in *Sanders* was the standing of an existing broadcasting station, which would be economically injured by competition, to contest the Federal Commerce Commission's grant of a construction permit for a new station. The Court held that Sanders' economic injury, although not relevant in and of itself, afforded Sanders standing for the purpose of litigating the public interest. A significant enlargement and clarification of standing also occurred in *Associated Industries* v. *Ickes*[66] where the *Sanders* doctrine was reconciled with the constitutional requirement of a "case or controversy."[67] Here it was held that the case or controversy requirement is met if a citizen is considered as a "private Attorney General" acting to vindicate the public interest.

However, since *Associated Industries* the doctrine of standing has had an uneven development and application. The courts have applied or ig-

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60. 263 U.S. at 148.

61. 306 U.S. 118 (1937).

62. *Id.* at 137 (emphasis added).

63. *See also* Perkins v. Lukens Steel Co. 310 U.S. 113 (1940); Stark v. Wickard, 321 U.S. 288 (1944), where the court stated:

> It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally.

64. The previous discussion of standing and the discussion to follow deals with standing to sue in the federal courts. Some state courts have created broader definitions of standing at an earlier date (for example the Wisconsin courts). The case of Muench v. Public Service Comm., 261 Wis. 492, 53 N.W.2d 514, *rehearing*, 261 Wis. 515, 55 N.W.2d 40 (1952), involved an application by a private power company to build a dam on the Namekagon River. The case arose upon an appeal from the decision of the commission to permit the project. The commission had made no findings on the effect that the proposed project would have on public rights to hunting, fishing, and scenic beauty. Muench, the plaintiff, had standing in the Wisconsin court because as a member of the public he had a legal right to use the state's waters.

65. 309 U.S. 470 (1940).

66. 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). *See also* Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942); F.C.C. v. NBC (KOA), 319 U.S. 239 (1943).

67. U.S. CONST. art. III, § 2.

nored the requirement as they have seen fit in a particular case.[68] The presence or absence of standing has been a result oriented conclusion which the court marshalls to explain why it sustained or dismissed the complaint.

B. *A Recent Redefinition of the Standing Requirement*

At a recent conference on law and the environment it was stated that

> [t]he first, and perhaps the greatest hurdle in a suit with the federal government is the motion to dismiss for lack of jurisdiction. Because the government puts so much of its litigation effort into such motions, he who defeats one may consider himself to have won a major victory. In fact, establishing the right of the citizen to sue to protect the environment by defeating such motions is the first priority. Precedents in the field are trophies to be sought after.[69]

The 1966 decision of *Scenic Hudson Preservation Conference* v. *F.P.C.*[70] is a significant case and the starting point for any environmentalist's search for precedents in order to meet the standing requirement.

In *Scenic Hudson* the Federal Power Commission licensed the Consolidated Edison Company of New York to construct a hydroelectric project on the Hudson River in an "area of unique beauty and major historical significance."[71] The action was brought by two towns and a conservation group seeking a reversal of the licensing order on the grounds the Commission had failed to properly weigh environmental factors. The court agreed with the complainants that the Commission's licensing practices must include "a basic concern for the preservation of natural beauty and national historic shrines."[72] More significantly, the court held that because of the plaintiffs' interest in the area they had standing in order "to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development."[73]

In *Road Review League, Town of Bedford* v. *Boyd*,[74] a civic organization of Bedford, New York residents challenged the determination of the Federal Highway Administrator on his approval of a route for a portion of interstate highway which failed to take into account factors such as planning and conservation. The court concluded that

> these provisions are sufficient under the principle of *Scenic Hudson* to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interest.[75]

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68. Good examples of this technique are United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), where the Supreme Court stated that jurisdiction depended on standing to seek review, and Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953), where the Court ignored the standing requirement because the issue was not raised before the Court.

69. Moorman, *Outline for the Practicing Environmental Lawyer* 2, presented to the Conference on Law and the Environment, Sept. 11-12, 1969, in Warrenton, Virginia.

70. 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

71. *Id.* at 613.

72. *Id.* at 624.

73. *Id.* at 616.

74. 270 F. Supp. 650 (S.D.N.Y. 1967).

75. *Id.* at 661.

Scenic Hudson and *Road Review League* do not solve all the problems of standing because the plaintiffs in those cases were from the areas where the proposed projects were to be located, and it could be argued that they had a special personal interest over and above their interest as environmentalists.

However, in *Citizens Committee for the Hudson Valley* v. *Volpe*,[76] the Sierra Club, a national conservation organization with chapters throughout the United States, was held to have standing in a suit to enjoin the Secretary of the Army, the Chief of the Corps of Engineers, and the Secretary of Transportation from issuing permits for the construction of causeways and dikes along the Hudson River. There was standing despite the fact that the conservation group had "no personal economic claim to assert."[77] Citing *Scenic Hudson* and *Road Review League,* the court concluded:

> The rule, therefore, is that if the statutes involved in the controversy are concerned with protection of natural, historic, and scenic resources then a congressional intent exists to give standing to groups *interested* in these factors and who allege that these factors are not being properly considered by the agency.[78]

Scenic Hudson, Road Review League, Citizens Committee, and dozens of other state and federal cases[79] have laid down the principle that "groups interested in conservation" have standing to act as a watchdog for protection of the environment without the necessity of a personal legal right or economic interest being threatened.[80] A person or group no longer needs a direct stake in an environmental issue in order to go to court. The new test of standing for environmentalists is only that a natural resource be threatened and that the plaintiff be a responsible person or organization sincerely *interested* in the preservation of that natural resource.

C. *The Increased Scope of Judicial Review of Agency Actions: Recent Supreme Court Clarification*

Added to the significant relaxation of the standing requirement is the fact that judicial review of agency actions is now more readily available than ever before. Historically it has been the pratice of the courts to allow administrators to formulate substantive agency policy within the broad statutory guidelines, and judicial review of such agency actions was obtainable only if the actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[81]

In a 1967 decision, *Abbott Laboratories* v. *Gardner*,[82] the Supreme

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76. 302 F. Supp. 1083 (S.D.N.Y. 1969).
77. *Id.* at 1092.
78. *Id.* (emphasis added).
79. *See* note 2 *supra. See generally* Tarlock and Tippy, *The Wild and Scenic River Act of 1968,* 55 CORNELL L. REV. 707 (1970); Yannacone, *Plaintiff's Brief in Project Rulison Case,* 55 CORNELL L. REV. 761 (1970).
80. *See* Association of Data Processing Serv. Organization, Inc. v. Camp, 397 U.S. 150, 154 (1970), where the Court outlined the interests sufficient to give a plaintiff standing to sue.
81. Administrative Procedure Act § 10, 5 U.S.C. §§ 701, 706 (Supp. IV, 1969).
82. 387 U.S. 136 (1967). For a discussion of this case see Sax, *Public Rights in Public Resources: The Citizens Role in Conservation and Development,* in Uni-

Court held that the courts should restrict access to judicial review "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent. . . ."[83] and added further that the "[P]rocedure Act's generous review provision must be given a 'hospitable' interpretation."[84] Such cases as *Cappadora* v. *Celebrezze*,[85] *Road Review League,* and *Citizens Committee* have added to *Abbott* to the point that now there is a "presumption" of a court's jurisdiction under the Federal Administrative Procedure Act; a presumption that can only be overcome by a clear showing that Congress did not intend judicial review.

Further, on March 3, 1970, in the cases of *Association of Data Processing Service Organization, Inc.* v. *Camp*[86] and *Barlow* v. *Collins*[87] the Court handed down significant precedents dealing with public control over a regulatory agency and challenges to the validity of that agency's actions. The Court in these cases made judicial review available to all persons who are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[88] Therefore, these agencies that make important decisions concerning our environment, and whose governing statutes contain no provision for review will now have their action subject to review by persons *interested* in preserving the environment.

Also, the Court, in a clarification of the *Abbott* decision, made it plain that these provisions are to be liberally construed in favor of review by stating:

> Where statutes are concerned, the trend is toward enlargment of the class of people who can protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. . . .[89]

And in *Barlow* v. *Collins* the Court added:

> It is . . . only upon a showing of clear and convincing evidence of a contrary legislative intent that the courts should restrict access to judicial review.[90]

With this broadened concept of standing these agencies find their actions being challenged in numerous suits brought by conservation groups, recreation groups, and just plain concerned citizens. It would appear that the federal and state agencies' legal shelter, standing, is now coming to an end. Instead, these agencies will constantly be engaged in litigation over those decisions which affect our environment.

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versity of Texas Law School Water Law Conference: Contemporary Developments in Water Law (C. Johnson & S. Lewis ed. 1970).

83. 387 U.S. at 141 (1967).
84. *Id.*
85. 356 F.2d 1 (2d Cir. 1966).
86. 397 U.S. 150 (1970).
87. 397 U.S. 159 (1970).
88. *Id.* at 168.
89. Association of Data Processing Serv. Organization, Inc. v. Camp, 397 U.S. 150, 154 (1970).
90. Barlow v. Collins, 397 U.S. 159, 167 (1970).

D. *Conclusion*

Private citizens are no longer willing to accede to the efforts of administrative agencies to protect the public interest and have begun to take the initiative themselves. The result has been a proliferation of lawsuits which present a diversity of legal theories that range from mere assertions that an administrator committed a procedural error to constitutional claims to a decent environment. The remainder of this article will be an attempt to present some of these new theories for creating substantive rights in environmental quality.

IV. Public Trust Doctrine

A. *Introduction*

One of the new substantive approaches for bringing the public interest to the attention of the courts has been suggested by Joseph Sax in an excellent article explaining the "public trust doctrine."[91] The concept of public trust law considers land such as rivers, seashores, parkland (*i.e.*, any public land) as held in trust for the benefit of the public. The public trust doctrine, as advanced by Sax, seeks to develop a comprehensive legal approach to resource management by meeting three necessary criteria: 1) the concept of a legally enforceable right in the public; 2) enforceability against the government; 3) an interpretation consistent with present concerns for environmental quality.

The source of the public trust doctrine originated with the Roman and English concept that the public had an enforceable right to prevent infringement of their rights of navigation, fishing, use of running water and use of the highways. Historically, the concept as developed in the United States included public land below the low water mark of the oceans and great lakes and the water within the rivers. Also included were park and forest lands, especially if donated by a private person for "public use only."

B. *Public Trust Doctrine As Applied to Resource Management*

In the area of public resources the interests of the majority are in many cases subjugated to the will of well financed minority interests. Certain interest groups such as utility companies, large industrial interests and certain government agencies have clear and immediate goals that they seek to accomplish. In many cases these powerful minority interests have an undue influence on resource decisions made by legislative and administrative bodies. Further, administrative agencies and their bureaucracies are frequently insulated from their particular constituencies. It is in this situation that the public trust lands are likely to be put in jeopardy.

The classic example in American law where the concept of public trust was applied to remedy a grievious injury to the public interest was the Supreme Court decision in *Illinois Central R.R.* v. *Illinois*.[92] In 1869, the

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91. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970). Much of the explanation of the public trust doctrine in this comment is from the Sax article which has an extended discussion of the concept.

92. 146 U.S. 387 (1892).

Illinois legislature made an extensive grant of land to the Illinois Central Railroad including all the land underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along the business district of Chicago.[93] By 1873 the legislature, realizing what it had done, sought to repeal the grant. The Supreme Court upheld the repeal holding that such a conveyance of trust land was beyond the power of the state legislature. The Court stated that the state's title to navigable waters of Lake Michigan is

> [D]ifferent in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[94]

In general, governments exist to provide broad public services to all their citizens such as schools, police protection, parks and other similar services. When a government takes governmental resources and uses them to benefit small groups, the court's suspicions should be aroused. The Massachusetts courts have taken this principle and developed a rule that a change in the use of public lands is not permissible without a clear showing of legislative approval. In *Gould* v. *Greylack Reservation Commission*,[95] Mount Greylack, a mountain surrounded by natural forest, was under the control of a Massachusetts state agency, Greylack Reservation Commission, which acted as a park commission. This commission leased 4,000 acres of the reservation to an organization called Tramway Authority for the development of an elaborate ski operation. The plaintiffs, five citizens of the county in which the reservation was located, brought the suit as beneficiaries of the public trust under which the reservation was held. The Supreme Judicial Court of Massachusetts held both the lease and management agreement invalid on the ground that they were in excess of the statutory grant of authority creating the commission.[96] The court questioned why a state should subordinate a public park to the demands of private investors for such a commercial facility. The court devised a presumption that a state does not ordinarily intend to divert public trust property in such a manner as to lessen the public uses. Under the Massachusetts rule this presumption will guide resource management cases unless the legislature clearly indicates a desire that a particular resource be handled otherwise. In a situation where the public trust is endangered the court will send the case back for express legislative authority.

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93. This grant comprised virtually the whole commercial waterfront of Chicago and was of incalculable value.

94. 146 U.S. at 452.

95. 350 Mass. 410, 215 N.E.2d 114 (1966).

96. The court in Gould v. Greylack Reservation Commission stated:
The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit. 350 Mass. at 426, 215 N.E.2d at 126.

C. *Role of the Courts Under the Public Trust Doctrine*

Sax has stated "the function which the courts must perform, and have been performing is to promote equality of political power for a disorganized and diffuse majority by remanding appropriate cases to the legislature after public opinion has been aroused."[97] In a dispute between advocates of a park and those wanting to take the parkland for a highway, the courts' task would be to make sure that one interest is not underpresented in the political process. Once both sides were adequately represented, the court would withdraw leaving the final result to the democratic process.

Also, any resource decisions made by a county or municipal agency which are of statewide interest will have to be approved by a state agency or the state legislature. Courts will chose an entity, be it local, state-wide or federal, that insures representation of all significant interests. In other words, the fundamental function of the courts in the public trust area will be one of "democratization." The courts will rectify political imbalances that exist where certain interests have difficulty in organizing to oppose certain legislative and administrative resource decisions.

What criterion will the court use in a particular case to determine whether a particular resource decision has been improperly handled at the administrative or legislative level? Sax proposes four guidelines that the court can use:

1) Has the public property been disposed of at less than market value under circumstances which indicate no obvious reason for the grant of a subsidy? As an example, if the land is being given away to a developer of luxury apartments then a court can reexamine the transaction.

2) Has the government given a private interest authority to make resource-use decisions which subordinate important public resource uses to that private interest?

3) Has there been an attempt to reallocate public uses either to private uses or public uses which have less breadth? For example, an attempt to convert a public park into a little-used or needed ski area or a decision to close a local beach and use it for garbage disposal or highway development would fit into this category.

4) Whether the resource is being used for its natural purpose, e.g., whether a lake is being used "as a lake." Generally, a natural resource has its broadest and most beneficial use when left in its natural state. A lake contains fishing, swimming, boating, scenic beauty and wildlife. To fill the lake in and build luxury apartments would benefit only a small minority of citizens.[98]

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97. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 473, 560 (1970).

98. Some environmentalists consider not only public land, but private land as held in trust for the public benefit. Land and natural resources are not something that can be taken and squandered for the gathering of private fortunes. Instead, they are something that belong to each of us as trustees for future generations, to be used wisely by whomever might hold them at the particular time.

V. Constitutional Argument For The Right To A Pollution Free Environment

A. *Ninth, Fifth, and Fourteenth Amendments Approach*

In *Environmental Defense Fund* v. *Hoerner Waldorf Corp.*[99] the plaintiffs sought declaratory and injunctive relief on the constitutional ground that continued emission of noxious sulphur compounds by the defendant violated the rights of the plaintiffs guaranteed under the ninth amendment of the Constitution and the due process and equal protection clauses of the fifth and fourteenth amendments. The case has not been decided by the Montana court; however, the "constitutional right" argument runs something like this: The right to a pollution free environment is one of the fundamental unenumerated rights guaranteed by the ninth amendment to the Constitution of the United States,[100] which says:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people

and protected under the due process clause of the fifth amendment to the Constitution of the United States:[101]

> nor shall any person . . . be deprived of life, liberty or property, without due process of the law. . . .

and made applicable to the states under the due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States:

> no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[102]

This "constitutional rights" argument may find a substantial precedent in the Warren Court's decision of *Griswold* v. *Connecticut*.[103] In that case an officer of the Planned Parenthood League and a licensed physician were convicted of violating Connecticut statutes making it a crime to teach birth control techniques even to married couples. It appeared that there was little the Court could do because the right to birth control information was guaranteed nowhere in the Bill of Rights. Yet the Court, with Justice Douglas writing for the majority, struck down this Connecticut statute which attempted to regulate morals. The Court stated that each of the specific rights listed in the Bill of Rights has "penumbras . . . that help give

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99. Civil No. 1694 (D. Mont., filed Nov. 13, 1968); *see also,* National Audubon Soc'y. v. Resor, No. 67-271, CIV-TC (S.D. Fla., filed March 15, 1967).

100. U.S. Const. amend. IX.

101. U.S. Const. amend. V.

102. U.S. Const. amend. XIV. For further discussion of this Constitutional right argument, see Victor Yannacone, Sue The Bastards, speech delivered on "Earth Day" at Michigan State University, April 22, 1970.

103. 381 U.S. 479 (1965).

them life and substance."[104] The Court found a right of privacy in the Bill of Rights which the Connecticut legislature could not invade.[105]

Reasoning from *Griswold,* there must surely be a right to an environment fit for human habitation. If the poisoning of the environment continues we will surely be deprived of "life, liberty, or property, without due process of law. . . ."[106] Further, the listing of specific rights "shall not be construed to deny or disparage others retained by the people,"[107] such as freedom to live in a decent environment.

Even if the courts are presently not willing to accept such a doctrine, they may be persuaded to accept the more limited assertion that the public has a constitutional right to procedural due process in such cases.[108] In essence, the claim would be that the public has a sufficient interest in public resource allocation decisions, that it is entitled to notice and access to data; in other words some sort of administrative due process.[109]

B. *Constitutional Amendments*

Because of the ease with which statutory protection of the environment can be evaded, and the difficulties of traditional legal theories, some legislators have proposed that only an amendment to the Constitution, guaranteeing each citizen a wholesome environment, can overcome these inadequacies.[110] By declaring a clean environment to be a national policy, much of the indecision that exists in our courts and administrative control agencies would be rectified. The courts and federal agencies would have the guidelines they need in the form of a constitutional mandate to clean up the environment.

In fact, some states have introduced amendments to their constitutions seeking to establish the right to a clean environment. Typical of these is the Pennsylvania Constitutional Amendment:

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

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104. 381 U.S. at 484; *see* Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts,* 55 CORNELL L. REV. 674, 690-91 (1970).

105. *See* NAACP v. Alabama, 357 U.S. 449 (1958), finding a "right of association" in the Bill of Rights.

106. U.S. CONST. amend. V & amend. XIV.

107. U.S. CONST. amend. IX.

108. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 473, 476 (1970).

109. Just such a theory was advanced in Weingand v. Hickel, No. 69-1317 EC (C.D. Cal., filed July 10, 1969), where an action was brought to enjoin the Secretary of the Interior from approving oil operations of federal lessees in the Santa Barbara Channel "without first according . . . to members of the public . . . a full and fair hearing, after adequate notice, and without, prior thereto, according the . . . public access to data upon which . . . recommendations were based. . . . Complaint para. XVI, at 11.

110. Richard L. Ottinger, United States Representative from New York, was among a group of legislators who proposed such an amendment. H. R. Res. 1321, 90th Cong., 2d Sess. (1968). *See* Ottinger, *Legislation and The Environment: Individual Rights and Government Accountability,* 55 CORNELL L. REV. 666, 671-72 (1970).

Section 27. Natural Resources and Public Estate.—The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic and esthetic 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.[111]

VI. Writ of Mandamus to Review Administrative Actions

A legal device likely to be put increasingly to use by conservationists is the writ of mandamus, a court order to a person or officer, usually a public official, requiring the performance of a particular duty which results from the official station of the party.[112] Administrative mandamus can be used by citizens and conservation groups to get judicial review of actions of administrative agencies which have the power of judge, jury, and executioner of our natural resources. Therefore, mandamus type relief is likely to be sought against government agencies that fail to take environmental factors into account when placing highways and dams or authorizing pipelines, powerlines and power plant construction.

Rule 81 (b) of the Federal Rules of Civil Procedure provides: "The writs of . . . mandamus are hereby abolished. Relief heretofore available by mandamus . . . may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." So Rule 81 (b), while abolishing the writ of mandamus, preserves the "relief heretofore available by mandamus." Thus, the Court of Appeals for the District of Columbia, in a clarification of Rule 81 (b), held "that the remedy which before adoption of the new Federal Rules of Civil Procedure was known as mandamus, is available under the new rules and is governed by the same principles as formerly governed its administration."[113]

Generally, courts have used administrative mandamus to review quasi-judicial actions such as suspensions or revocations of existing rights. The tendency of the courts has been to imply the requirement of a hearing and notice whenever the administrative agencies were engaging in what was in effect an adjudication of a complainant's rights. By the use of a writ of mandamus the courts would require that the administrative agencies do their duty toward the affected parties.[114]

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111. Pa. H.R. 958 (1969). *See* Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts,* 55 Cornell L. Rev. 674, 686-87 (1970).

112. *See* 34 Am. Jur. Mandamus § 2 (1941); 55 C.J.S. *Mandamus* § 1 (1948); K. Davis, Administrative Law §§ 24.02-24.07 (1958); Netterville, *Administrative "Questions of Law" and the Scope of Judicial Review in California,* 29 S. Cal. L. Rev. 434 (1956); Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions—1949-1959,* 12 Stan. L. Rev. 554 (1960).

113. Hammond v. Hull, 131 F.2d 23, 25 (1942), *cert. denied,* 318 U.S. 777 (1942).

114. *See* 25 Iowa L. Rev. 638 (1940); 27 Iowa L. Rev. 291 (1942); Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions —1949-1959,* 12 Stan. L. Rev. 554 (1960).

The orthodox statement of the mandamus doctrine was made in *Wilbur* v. *United States ex rel. Kadrie*:[115]

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way. . . .[116]

The law in the past has rested upon this "ministerial–discretionary"[117] distinction. If the administrative action involved an exercise of administrative judgment or discretion on an uncertain question, then the courts could not interfere with this judgment because it was discretionary. However, where an interpretation was clear from the authorizing statute, and the administrative agency was acting erroneously, then the courts could compel the agency to do its duty.

In the past it has been possible for an administrative agency to contend that the consideration and weighing of environmental factors was discretionary and therefore the courts could not exercise judicial review over its resource decisions. However, in 1969 the groundwork was laid and the principle codified for requiring administrative agencies to give serious considerations to our environment. Congress passed the National Environment Policy Act of 1969[118] which requires all federal agencies to consider environmental factors. The stated congressional purposes of the Act are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources inmportant to the nation; and to establish a Council of Environmental Quality.[119]

More importantly from the private litigant's point of view, the Act attempts to enforce this stated purpose by requiring that "to the fullest extent possible" federal laws and administrative policies shall be interpreted in a manner consistent with the Act.[120] Specifically, federal legislation and actions of federal administrative agencies must include a statement on (1) the impact on man's environment of the proposal, (2) any adverse environmental effects which cannot be avoided, (3) alternatives to the proposed action, (4) the relationship between short term uses of the environment and the maintenance and enhancement of long-term productivity, and (5) any

115. 281 U.S. 206 (1930).
116. *Id.* at 218.
117. *See* State *ex. rel.* South St. Paul v. Hetherington, 240 Minn. 298, 301, 61 N.W.2d 737, 740 (1953) "[M]andamus . . . does lie to set the exercise of that discretion into motion where the board fails to act or obtain a new bona fide exercise of discretion when it appears that the board has acted without discretion or in a clearly arbitrary and capricious manner."
118. 42 U.S.C.A. §§ 4321-47 (Supp. 1970).
119. *Id.* § 4321.
120. *Id.* § 4331 (b) (6).

irreversible and irretrievable commitments of resources which would be involved in the proposed action.[121]

A full consideration of environmental factors by administrative agencies is now a congressional mandate. A private citizen concerned about the effects of an agency action should be able to go into court and pray for judicial review of this action by contending non-compliance with the National Environmental Policy Act. The court, using mandamus or mandatory type relief, can then compel the agency and its officers to perform their "statutory duty" toward the environment.

VII. Other Theories: Class Actions, Declaratory Judgments, And Qui Tam Actions

A. *Class Actions*

The class action[122] has provided a device so that mere numbers will not disable large groups of individuals with united interests from enforcing their rights. By Rule 23 the Supreme Court has extended the use of the class action device to the entire field of federal civil litigation by making it applicable to all civil actions.[123] It provides a means by which a large group of persons who are interested in a matter, such as pollution, may sue or be sued as representatives of the class without needing to join every member of the class. There are only two general requirements for the maintenance of a class action:[124] (1) that the persons constituting the class must be so numerous that it is impractical to bring them all before the court, and (2) the named representatives must be such as will fairly insure the adequate representation of them all.

Only one pollution case has been brought as a formal class action. That was the case of *Storley* v. *Armour & Co.*[125] where 56 riparian plaintiffs (representing 70 downstream farms) brought a class action against a slaughterhouse for polluting a river. Damages were awarded by the district court. However, *Storley* is a class action only in the sense that one action was substituted for 32 separate actions, and is not a class action in the same sense as a stockholder's derivative suit. Further, the case does not state the conditions under which a class action for pollution abatement may be brought and the case does not define how substantial a plaintiff's interest must be before he can act as a representative of a class. In addition, a recent Supreme Court case[126] interprets the Federal Rules of Civil Procedure to require that each member of a class in a federal diversity case must meet the jurisdictional requirements. The *Storley* case provides only a foot-in-the-door. A clearcut decision in the pollution class action field is still lacking.

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121. *Id.* § 4323.

122. 2 Barron and Holtzoff (Wright ed.) §§ 561-63, 567-72; Symposium, *Federal Rule 23—The Class Action,* 10 B.C. Ind. & Com. L. Rev. 497 (1969).

123. Montgomery Ward and Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

124. Donelon, *Prerequisites to a Class Action Under New Rule 23,* 10 B.C. Ind. & Com. L. Rev. 527 (1969).

125. 107 F.2d 499 (8th Cir. 1939).

126. Snyder v. Harris, 394 U.S. 332 (1969), holding that the aggregate claims of the members of the class will not satisfy the $10,000 jurisdictional requirement.

B. *Declaratory Judgments*

The most important non-statutory form of proceeding for review of an administrative action in the federal courts has been the declaratory judgment followed by an injunction. The Federal Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . , upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . .[127]

Unless a statute makes some other form of proceeding exclusive, federal administrative action is reviewable by a proceeding for an injunction or for a declaratory judgment or both. Declaratory judgments are also the customary means of review of state administrative actions in the federal courts.[128]

At the state level thirty-five states have adopted the Uniform Declaratory Judgments Act which provides that:

> Any person . . . whose rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the statute . . . and obtain a declaration of rights, status or other legal relations thereunder.

Declaratory relief may be appropriate to obtain a determination whether an administrative agency action is valid or whether that agency has sufficiently weighed environmental factors. Or an individual may seek a court declaration that a particular industry or individual is creating a nuisance, has committed a trespass, or has failed to meet federal or state pollution standards.

As public concern for the environment grows, state legislatures have begun to respond to pressure for public participation. Recently, Michigan enacted an environmental protection act which stated its purpose as: "An act to provide for *declaratory* and equitable relief for protection of air, water and other natural resources and the public trust therein. . . ." The act further provides that "The attorney general, any political subdivision of the state, . . . *any person,* partnership, corporation . . . may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is *likely to occur*. . . .[129]

C. *Qui Tam Actions under the Rivers and Harbors Act of 1899 (Refuse Act of 1899)*[130]

The 1899 Refuse Act is a powerful, but little used, weapon in the federal arsenal of water pollution control legislation. Section 13 of the

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127. 62 Stat. 964 (1948), amended, 63 Stat. 964 (1949), 28 U.S.C. § 2201 (1948).
128. K. DAVIS, ADMINISTRATIVE LAW TEXT § 2304 (1959).
129. Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, M.C.L.A. §§ 691.1201-.1207 (1970) (emphasis added).
130. *See* "Our Waters and Wetlands". How the Corps of Engineers Can Help Prevent Destruction and Pollution" H. R. REP. No. 91-917, 91st Cong., 2d Sess. (1970).

Act[131] prohibits *anyone,* including any individual, corporation, municipality, or group from throwing, discharging, or depositing any "refuse" matter of any kind into the nation's navigable lakes, rivers, streams, or any tributary to such waters. The term refuse has been broadly defined by the Supreme Court to include all foreign substances and pollutants.[132] It includes solids, oils, chemicals, and other liquid pollutants. In addition, the section prohibits anyone, without a Corps of Engineers permit, from placing on the bank of navigable waterways any material that could be washed into the waterway.

Violations of the Refuse Act are subject to criminal prosecution and penalties of not more than $2,500 nor less than $500 for each day or instance of violation, or imprisonment for not less than 30 days nor more than 1 year, or both fine and imprisonment.[133] The Refuse Act of 1899 also provides that "one-half of [the] fine [imposed for violation of the Act is] to be paid to the person or persons giving information which shall lead to conviction."[134] The issue is whether Congress by the use of this language has allowed *citizens* the right to bring *qui tam* actions to enforce the Refuse Act. The Act does not explicitly state that citizens have a right to sue the polluter directly. But it does not explicitly deny this right to citizens.

However, there are several American cases which support the proposition that where a statute providing for a reward to informers does not specifically either authorize or forbid the informer to institute a *qui tam* action, such a statute is to be construed to authorize such a suit.[135] Further, the likelihood that the Refuse Act will be given a liberal interpretation has been greatly increased by the passage in the last few years of many statutes and the issuance of executive orders designed to minimize pollution, maximize recreation, and preserve natural resources.[136] The Refuse Act can be used as a broad grant of authority and a powerful legal tool for preventing the pollution of all navigable waters.

VIII. Conclusion

Environmental degradation has been a way of life in this country. Our whole economy has been premised on the freedom of public and private enterprises to release pollutants and to destroy natural resources. In the past we have been motivated only by short-term economic considerations

131. 33 U.S.C. 407 (1899).

132. *See* United States v. Standard Oil Co., 384 U.S. 224, 230 (1966); United States v. Republic Steel Corp., 362 U.S. 482, 490 (1960).

133. 33 U.S.C. 411 (1899).

134. *Id.*

135. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1942); Adams, qui tam v. Woods, 6 U.S. (2 Cranch) 336 (1805); United States v. Loescki, 29 F. 699, (N.D. Ill., 1887); United States v. Stocking, 87 F. 857 (D. Mont., 1898): Chicago and Alton R.R. v. Howard, 38 Ill. 414 (1865).

136. Some of these statutes and orders are:
Federal Water Power Act of 1920 as amended (16 U.S.C. 701, et seq.);
Federal Water Pollution Control Act (33 U.S.C. 466, et seq.) as amended by Water Quality Act of 1965 (Public Law 89-234, 79 Stat. 903);
Clean Water Restoration Act of 1966 (Public Law 89-753, 80 Stat. 1246);
Water Quality Improvement Act of 1970 (Public Law 91-224, 84 Stat. 91).

and have dumped wastes into rivers, discharged fumes into the air and stripped the earth of its minerals. Yet recently, many concerned citizens have realized that if we continue to act as an irresponsible lord and master over our environment we are headed for extinction. They have begun to realize the true social costs of continuing to exploit our environment.

The legislative and executive branches of our government have been excessively slow in enacting environmental legislation and have been almost paralyzed when it comes time for using what powers they already possess. This phenomenon has been due in many cases to the nature of our political system. Powerful economic interests exert significiant influence on our legislators and the agency bureaucrats that control resource allocation decisions in our environment. James Nathan Miller, in *Rape on the Oklawaha,* writing about an attempt to stop the United States Army Corps of Engineers from constructing a barge canal over the Oklawaha River in Florida, put it in these terms:

> Thus the tragic irony: while there is probably no issue which the American people are more united than the need to preserve their environment, there is no fight they are losing faster. The reason: distribution of forces. On one side are the huge number of conservationists, split up into localized fractionalized units, working in their spare time, with their own money, mainly in their own communities. On the other side are the developers—well paid businessmen and bureaucrats, tightly organized in trade associations and lobby groups whose influence extends statewide or even nationwide. In the Oklawaha battle, for instance, while there wasn't a single conservation lobbyist in the state capitol at Tallahassee, there were at least 50 lobbyists for pro-canal interests. It's a case of a horde of unarmed amateurs fighting a few professionals who are equipped with the latest weapons.[137]

So what can the private citizen do? The courts offer the possibility of a fair and impartial forum to remedy environmental wrongs. The courts are not subjected to the same political and economic pressures that legislative and administrative branches of government are subjected. The judiciary system which provides that each side may present evidence, call experts, and cross-examine presents the best opportunity for a wise and reasoned resource allocation decision. In addition, the courts in the fifties and sixties have begun more and more, to hand down decisions in the areas of social legislation that meet the needs of our rapidly changing society. Recently, the courts have restructured the whole system in such areas as due process,[138] reapportionment,[139] and civil rights.[140] The courts have broken new ground in areas where the other branches of government had lagged and refused to act.

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137. Miller, *Rape of the Olkawaha,* 96 READ. DIGEST 54-60 (Jan. 1970).

138. *See* Brown v. Mississippi, 297 U.S. 278 (1936); McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1959); Malloy v. Hogan, 378 U.S. 1 (1964).

139. *See* Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

140. *See* Brown v. Board of Education, 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

However, the passive nature of the courts and the procedural difficulties of maintaining an action are significant obstacles to the use of the judiciary as a means of stopping the degradation of our environment. Courts can not initiate actions; these actions must be brought by private citizens. These concerned citizens are relatively unorganized and are often localized environmentalists; they may be unwilling or unable to bear the expense and trouble of litigation. In addition, private citizens are usually unaware or unaroused until after irreparable injury takes place or harmful construction begins. Further, the private litigant never knows when the court will parade out such theories as contributory fault, assumption of risk, coming to the nuisance, balancing equities or standing. Therefore, aside from the actual environmental suits themselves, another function of our courts in this fight to save our environment may be as a forum for environmentalists to focus the attention of our legislators on the basic issue of human existence.

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