Annual Survey of Massachusetts Law

Volume 1970 Article 29

1-1-1970

Chapter 26: Environmental Law

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CHAPTER 26

Environmental Law

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§26.1. Introduction. A bill submitted by Governor Sargent in the 1969-1970 session of the Massachusetts legislature, which would have created a private right of action for "damage to the environment," defined that term as follows:

> "Damage to the environment" shall mean any significant impairment, actual or likely, to physical features of natural, historical or residential value to the Commonwealth or its citizens including, without limitation, air, water or noise pollution, or the impairment of parks, recreation facilities, open spaces, natural areas or natural resources, or the impairment of natural or man-made places of historic interest, or the impairment of residential neighborhoods.[1]

This definition highlights one of the fundamental facts about "environmental law": the difficulty of defining its scope. Certainly there are very few lawyers practicing in Massachusetts today who would consider themselves "environmental lawyers." Nonetheless, there are probably a great many lawyers in Massachusetts who have been involved with some form of environmental law simply because our physical environment can be affected in so many ways and under so many different circumstances. Some familiar situations in which a lawyer may be called upon to help resolve issues affecting the environment include application of the zoning and subdivision laws, eminent domain proceedings, the issuance of permits or licenses to carry on particular businesses, and actions for nuisance. The following decisions of the Supreme Judicial Court, all handed down within the past two years, illustrate the recurrent interaction of the law with environmental problems.

In *Framingham v. Department of Public Utilities*,[2] the Boston

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§26.1. [1] Essentially the same definition of environmental damage appears in a Michigan statute which became effective in June, 1970. See Mich. Stat. Ann. §§14.528(201) et seq. (1969).

[2] 355 Mass. 138, 244 N.E.2d 281 (1969).

Edison Company sought an exemption under G.L., c. 40A, §10, from applicable zoning restrictions in order to construct a line for the transmission of electricity on towers between the cities of Medway and Sudbury. A decision of the Department of Public Utilities approving the line was upheld by the Supreme Judicial Court over the objections of several towns (1) that the cost of an underground line was justified to prevent aesthetic damage, and (2) that there was potential damage to the health of persons residing near the proposed line. In *Hume v. Building Inspector of Westford,*[3] the Court held that a building inspector could be compelled by mandamus to enforce a local zoning law against the plaintiff's neighbor so as to eliminate an overly noisy dog kennel. In *Gulf Oil Corp. v. Board of Appeals of Framingham,*[4] a decision of a local board of appeals denying the plaintiff a special permit to construct a gasoline station was sustained, the Court holding that, even though the building of a station might not adversely affect the status of the neighborhood at the time of the application, the board was entitled to consider the possible adverse effect of a station upon future development in the area. In *Robbins v. Department of Public Works,*[5] the Department of Public Works was required, upon a petition for mandamus brought by a group of private citizens, to prevent the transfer of certain parcels of public land "of natural beauty" to part of an interstate highway system on the ground that explicit legislation authorizing the diversion of the land to this use did not exist. *MacGibbon v. Board of Appeals of Duxbury*[6] held that a local board of appeals could not refuse a permit to excavate and fill certain wetlands owned by the plaintiff simply on the ground that the wetlands should be preserved in their natural state. The Court stated that

> . . . the preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act.[7]

There was a flurry of legislative activity in connection with the environment in the 1970 session. Major bills were passed in the areas of water pollution,[8] solid waste disposal,[9] air pollution[10] and pesticides.[11]

To cover fully the ways in which legal issues concerning the en-

3 355 Mass. 179, 243 N.E.2d 189 (1969).
4 355 Mass. 275, 244 N.E.2d 311 (1969).
5 355 Mass. 328, 244 N.E.2d 577 (1969).
6 1970 Mass. Adv. Sh. 81, 255 N.E.2d 347.
7 Id. at 86, 255 N.E.2d at 351.
8 Acts of 1970, cc. 28, 150, 692, 693, 704, 767, 827, amending G.L., c. 21.
9 Acts of 1970, c. 839.
10 Acts of 1970, cc. 838, 841.
11 Acts of 1970, c. 874.

vironment may be presented and resolved in Massachusetts would be a difficult, if not impossible, task. This chapter therefore focuses solely on the federal and state laws relating to air and noise pollution as currently in effect in Massachusetts, and on some possible legislative and judicial reforms in this area.[12]

§26.2. The law concerning air pollution in Massachusetts: Federal law. The primary federal air pollution control law for all states is the Air Quality Act of 1967,[1] which was extensively amended by the Clean Air Amendments of 1970.[2] Pursuant to the act as originally passed in 1967, the secretary of Health, Education and Welfare was required to designate atmospheric areas and air quality control regions. In addition, he was required to publish air quality criteria and control technology data. Following the designations of such areas and control regions, each state was required, after public hearings, to adopt ambient air quality standards and an enforcement plan based on the air quality criteria and technical data for the particular region concerned. The act provides that economic and technological factors must be considered as well as the health and welfare of residents of the region. The act originally provided for rather cumbersome enforcement proceedings as follows: The secretary of Health, Education and Welfare, either at the request of the state's governor, or if he had reason to believe that pollution was "endangering the health and welfare of persons" in a state other than that which was discharging the pollutants, could call a conference of the pollution control agencies concerned at which all interested parties could present their views. After such a conference, the secretary would make recommendations to those pollution control agencies for remedial action. If nothing was done within six months by the agencies, the secretary could call a hearing before a special board provided for in the act. If nothing was done within six months after this board's findings and recommendations were sent to the agencies and polluters concerned, the secretary could request the United States attorney general to bring an enforcement action. As of the date of this writing, there has been only one such abatement action brought in the courts, and no abatement order has as yet been issued.[3]

Prior to the Clean Air Amendments of 1970, federal law was primarily designed to require the states to take the action necessary to

12 An excellent publication, A Compendium of Environmental Legislation, is available at nominal cost from the Massachusetts Department of Public Health and lists by subject matter all existing Massachusetts statutory law dealing with environment.

§26.2. 1 42 U.S.C. §§1857 et seq. (Supp. V 1970) [hereinafter referred to as the Clean Air Act].

2 Pub. L. No. 91-604, 91st Cong. 2d Sess., 84 Stat. 1676 et seq. (1970) [hereinafter referred to as the Clean Air Amendments of 1970].

3 United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970).

control air pollution. It provided no specific solutions itself. The 1970 amendments have preserved the basic concept of federal impetus for a state-administered program. However, the position of the federal administrator has gained new significance. He is now required to establish national air quality standards, after which the states must provide means of implementation satisfactory to the federal authorities.[4] Federal enforcement of the state implementation plans may be accomplished by an order of the administrator to any person violating such a plan, or by a civil action brought by the administrator in a federal district court.[5] These changes, together with others not here described, provide for more effective federal control of state regulation and enforcement. The states must now meet national air quality standards instead of simply setting their own. Also, the states can now more readily be brought into line by the federal authorities than under the previous "conference calling" system. Nonetheless, the regulatory scheme in each state should continue to be a state's primary means for achieving whatever air quality standards that are set. In most instances, then, it is to the state regulations that one must look to determine what the impact of air quality standards will be upon particular types of air-polluting activity. (One partial exception to this is the regulation of motor vehicle emissions.)

Since studies show that a substantial amount, and perhaps a majority, of air pollution is caused by vehicle emissions, the reduction of such emissions is clearly an important part of air pollution control. Federal air pollution control laws require the secretary of Health, Education and Welfare to establish exhaust emission standards for gasoline- and diesel-powered vehicles, and states are prohibited from adopting their own emission standards (with the exception of California, which had adopted standards prior to the enactment of the federal laws).[6] Acting pursuant to this legislation, the secretary has already set standards for hydrocarbon, carbon monoxide, and nitrogen oxide emissions.[7] In addition, recent amendments to federal law require a virtually pollution-free automobile by 1975, and authorize withdrawal of official approval of any model of automobile or vehicle failing to meet federal standards.[8] While it seems plain that the only comprehensive approach to air pollution caused by vehicle emissions is through federal legislation and regulations controlling vehicle engine manufacture, nevertheless there is room for state regulations concerning such aspects of vehicle emissions as the time and place where vehicles of different types may be used, and the control

4 §§109, 110, of the Clean Air Amendments of 1970.

5 Id. §103.

6 42 U.S.C. §§1857f-1 et seq. (Supp. V, 1970). The California standards are noted in Cal. Health and Safety §§39151 et seq. (West 1967).

7 Environmental Quality, First Annual Report of the Council on Environmental Quality, 21 Environment Rptr. — Federal Laws 0271 (Aug. 10, 1970).

8 Clean Air Amendments of 1970.

of mechanical defects which result in increased emissions. States may also play an important role in reducing air pollution due to vehicle emissions through their transportation planning programs by reducing urban highway transportation and increasing mass transit facilities.

One important but as yet untested provision in the Clean Air Amendments of 1970 is a section permitting private individuals to commence suit in federal district court against any person (including governmental authorities) who is alleged to be in violation of a standard for emissions set under the Clean Air Act or of any "order issued by the Administrator or a State with respect to such a standard."[9] Since "emission standard" includes state as well as federal standards in this context, the scope of this new private right of action seems broad enough to include enforcement of almost all federal and state air pollution regulations. Before bringing suit, however, the plaintiff must give 60 days notice to the federal administrator, the state authorities concerned, and the alleged violator. A suit cannot be brought if the federal or state authorities are "diligently prosecuting" a civil action against the violator in a state or federal court, but a private citizen may intervene in any federal court proceeding. The plaintiff may obtain equitable relief in his private proceeding, and may also recover reasonable attorney and expert witness fees, but there are no provisions relating to the recovery of damages and presumably these are not contemplated. (Rights of private citizens under other statutes or under common law, however, are expressly saved.) There are many questions of interpretation to be resolved concerning the private citizen suit under the Clean Air Act, but it provides an important new enforcement mechanism in the air pollution regulatory scheme.

§26.3. State law.[1] General Laws, c. 111, §§142A-142D provide that the Massachusetts Department of Public Health, with the approval of the governor, may establish air pollution control districts compatible with the federal air quality control regions; may establish other air pollution control districts as it may deem advisable and necessary; and may adopt and amend, after public hearings, air quality standards and plans for the implementation and enforcement of such standards. Pursuant to those sections, the department has, to date, set up six air quality control regions in Massachusetts, through its Bureau of Air Use Management: (1) Berkshire (Berkshire County); (2) Pioneer Valley (Franklin, Hampden and Hampshire Counties); (3) Central Massachusetts (Worcester County); (4) Southeastern Massachusetts (Barnstable, Bristol, Dukes, and Nantucket Counties, and a portion of Norfolk and Plymouth Counties); (5) Merrimack Valley (the northern portions of Essex and Middlesex Counties); and (6)

[9] Id. §304.

§26.3. [1] See also §24.15 *supra*.

Metropolitan Boston (Suffolk County and the remaining portions of Plymouth, Norfolk, Essex and Middlesex Counties). The department has adopted statewide standards for total suspended particulates (micrograms per cubic meter of air), and sulfur dioxide (micrograms per cubic meter of air). The standards were adopted after public hearings at which several groups and persons interested in air pollution testified. The standards were originally submitted for approval to the secretary of the United States Department of Health, Education and Welfare on January 15, 1970, were subsequently amended, at least partially in response to the demands of conservation groups that they be made stricter, and were finally approved by the National Air Pollution Control Administration (a subdivision of the Department of Health, Education and Welfare) in March, 1970. Ambient air quality standards for carbon monoxide, hydrocarbons, oxides of nitrogen, lead, fluorides, and odors are to be adopted in the future and may be in effect by the time this volume is published. Once a comprehensive set of standards has been established, it will set forth for the foreseeable future just how clean our Massachusetts air should be, *assuming*, of course, that the various standards can be met.

With respect to a state enforcement plan to bring the state's air into conformity with the existing and proposed air quality standards, regulations have been adopted by the Department of Public Health for all six air pollution control districts, which became effective between June and September, 1970. The regulations are essentially similar in all six districts, although, as might be expected, they are more rigid in several respects in the more populated eastern area of the state than in western Massachusetts.[2]

Regulation 1.1 for each of the districts provides:

> No person owning, leasing, or controlling the operation of any air contamination source shall willfully, negligently, or through failure to provide necessary equipment or to take necessary precautions permit any emission from said air contamination source or sources of such quantities of air contaminants which will cause, by themselves or in conjunction with other air contaminants, a condition of air pollution.

"Air pollution" is defined as the presence in the air of such contaminants as would cause a nuisance, or "tend to be" injurious to life or property, or "unreasonably interfere" with the enjoyment of life or property. Surely it is hard to quarrel with the sweeping prohibition contained in this regulation, which presumably is violated every day by every automobile driver and fuel burner in Boston, and which, by itself, would seem to have little, if any, effect. Fortunately, the remaining regulations are all more specific. Regulations 2, 3 and 4 require that the Department's approval be obtained before various types

[2] Copies of the regulations may be obtained from the DPU without charge.

of "thermal energy utilization facilities" can be constructed, and also provide for inspection and supervision of the continued operation of existing facilities. The intent of these regulations is clearly to require that as improved air pollution control devices are made available for fuel-burning facilities, that they be incorporated into new and existing installations. It is unclear, however, just how far the Department can go in terms of cost in requiring that the latest technological advances be utilized.

Regulation 5 prescribes the permissible sulfur and ash content for "fossil fuels" (namely, coal and oil). Based upon size of fuel facility and geographical location, a timetable is specified according to which most areas of the state will be burning a relatively low-sulfur-content fuel by October 1, 1971. The effect of Regulation 5 has already been felt in the Metropolitan Boston District, where low-sulfur fuel was required by October 1, 1970. Although the Boston Edison Company (the largest single user in the district) sought a variance from the low-sulfur-fuel requirement on the ground that the resulting decrease in contaminants was not justified by the increased fuel cost to be borne by consumers of electricity, the variance was denied, following a public hearing, on September 29, 1970. Since the cost-benefit argument would also seem to apply to other companies besides Boston Edison (although the latter claimed that its high stocks made it a special case), the denial of this variance was an important step in implementing the regulations.

Regulation 6 prohibits the emission of smoke from various sources in violation of specified standards for each source. The standards are expressed in terms of time periods and the so-called Ringelmann Scale, which is a scale of different shades of smoke. For example, after December 31, 1972, no aircraft will be permitted to emit smoke denser than #2 on the Ringelmann Scale for more than ten seconds during landing or takeoff.

Regulation 7 prohibits all open burning except in certain limited instances. Regulation 8 requires that the construction of new incinerators, including municipal incinerators, be approved by the Department of Public Health in writing, and that on July 1, 1971, and thereafter, all existing incinerators must be "of a design . . . approved by the Department" (effective July 1, 1972, for municipal incinerators). Regulation 9 generally prohibits the emission of dust or odor which causes or contributes to a condition of air pollution.

Regulation 10 deals with noise. Regulation 10.1 suffers from the same lack of precision which characterizes Regulation 1.1:

> No person owning, leasing, or controlling a source of noise shall willfully, negligently, or through failure to provide necessary equipment, service, or maintenance or to take necessary precautions cause, suffer, allow, or permit unnecessary emissions from said source of noise.

The rest of Regulation 10 does little to improve upon the general language of Regulation 10.1. Until more specific noise regulations are adopted, therefore, Regulation 10 will *permit* enforcement action against almost all unpleasant sources of noise but will not seem to *require* such action.

Regulation 11 deals with "transportation media." It requires all motor vehicles to comply with pertinent regulations of the Registry of Motor Vehicles.[3] Regulation 11.1.2 provides that no person may permit "the unnecessary operation" of a motor vehicle engine while the vehicle is stopped for "a foreseeable period of time in excess of five minutes," except for repair of the vehicle, or where engine power is necessary for an "associated power" such as a conveyor belt. Enforcement of this regulation, while undoubtedly beneficial, seems an ambitious undertaking indeed, especially on a cold morning at 9 A.M. on the Southeast Expressway. Regulation 11 also prohibits, in general terms, the operation of diesel trains, aircraft or marine vessels (in those districts where applicable) in a manner that will cause or contribute to a condition of air pollution.

Enforcement of the state air pollution control regulations is largely in the hands of the Department of Public Health, although Regulation 52.2 permits any local police department, fire department, or board of health official "acting within his jurisdiction" to enforce the regulations dealing with open burning, dust and odors, noise, and emissions from motor vehicles and trains. The DPU, or any person authorized by the department, may enforce its regulations by a suit in equity in the Supreme Judicial Court or in the Superior Court.[4] As far as criminal penalties are concerned, violation of the state air pollution regulations results first in a notice to the offender, after which continued violation is a misdemeanor. A first conviction is punishable by a $10 to $50 fine, while subsequent violations may bring a $200 to $500 fine.[5] As is the case with most Massachusetts regulations, there is no authority for a private citizen to enforce the regulations, except perhaps the rather awkward remedy of a petition for writ of mandamus to compel action by the public authorities. At present, therefore, the effectiveness of the state regulations depends entirely upon the efforts of administrative personnel.

In addition to the regulations at the state level concerning air pollution, cities and towns are also empowered to adopt regulations in this area either through their respective boards of health or through a specially created authority. These regulations must be approved by the Department of Public Health.[6] Boston, for example, by a resolution of the City Council, has created its own Air Pollution Control Commis-

[3] The Registry of Motor Vehicles may prohibit the emission of excessive noise or smoke from an automobile muffler or exhaust system. G.L., c. 90, §§16, 20.

[4] Id. c. 111, §142A.

[5] Id. §§142A, 31C.

[6] Id. §31C.

sion which has adopted fairly extensive regulations governing various types of air-polluting activity within the city. Thus in a city or town with its own regulations, a source of air pollution must conform to dual sets of regulatory schemes and administrative processes. Direct inconsistency between the regulations is unlikely due to the requirement that the state agency approve local regulations before they are effective. Nonetheless, there are bound to be differences in application of the two systems to a given situation, which will almost certainly result in some confusion and complication in the enforcement mechanism and in efforts at compliance. The justification for dual regulation is that particular locations may have special problems requiring more stringent standards than those generally applicable within an air pollution control district, or they may have problems that are not covered at all by the state regulations. Whether this justification will prove satisfactory is a question which will probably take several years to answer. In any event, a lawyer confronted with an air pollution problem must determine the effect of any local regulations which may exist in addition to that of the state regulations.

§26.4. Massachusetts decisions. It is likely that for some time to come the existence of regulations concerning air pollution will not eliminate lawsuits against alleged polluters based upon common law concepts. This is true, first, because specific regulations presently do not cover all possible sources of air pollution and, second, because a person damaged by air pollution may well consider that the air quality standards and enforcement provisions contained in the regulations are not adequate to protect his rights. There is also the possibility that a private citizen may seek to have existing laws and regulations enforced himself in the face of administrative inaction. The primary theory for a potential plaintiff to use against a polluter, aside from seeking enforcement of existing regulations, is the common law of action for nuisance. There are, however, at least three major hurdles to be overcome by a plaintiff who seeks to prevent air-polluting activity through a nuisance action.

First, the plaintiff must show that he has been injured in some special way not suffered by the rest of the public.[1] Unless the plaintiff can show particular injury to his person or property from a condition of air pollution, he cannot maintain a nuisance action. This rule

§26.4. [1] A *public* nuisance may only be prosecuted by government authorities. Shaw v. Cummiskey, 24 Mass. 76 (1828); Jones v. Town of Great Barrington, 273 Mass. 483, 174 N.E. 118 (1930). Actually, there is no express statutory authority for a nuisance action. General Laws, c. 111, §130, provides for injunctive relief from a nuisance while prosecution is pending against the source. Section 140 of the same chapter allows the Superior Court to enjoin a nuisance that has developed at a site assigned by the city or town for "noisome trades" (§143). The concept and elements of a "nuisance," however, are still derived from case law, since "nuisance" is not a defined term. In this sense, the action of "nuisance" is still, for all practical purposes, a common law remedy.

generally will not be a problem for persons attacking a neighboring source of pollution, such as a town dump, a manufacturing plant, or other isolated locations. However, it clearly would be a problem for a plaintiff who alleged, for example, that a large utility in a metropolitan area was producing sulfur dioxide in sufficient quantities to impair the health of all those who breathed the air in that city. The line between special damage, which will support a private action in such a situation, and mere "public" injury is unclear. Compare *Borden v. Vincent,*[2] which held that a bridge across a navigable river was a public nuisance but no member of the public could sue in his individual capacity to remove it, with *Flynn v. Butler,*[3] holding that a person injured by the explosion of a powder magazine which had become a public nuisance could enforce its removal in an individual action. Presumably a plaintiff who could show that his own health had been impaired could overcome the standing hurdle in a suit against a large utility.

The second hurdle for a plaintiff in a nuisance suit against an air polluter is proving that the injury alleged has occurred as a proximate result of the defendant's activities. The defendant must have caused the injury in order to be liable for the nuisance.[4] In *Downing v. Elliott,*[5] the plaintiffs sought an injunction restraining the defendant from using soft coal in the steam-heating plant of his greenhouse, since the soot and cinders from the plant were rendering the plaintiff's "ice crop" unfit for use. An injunction was denied on the ground that, since the soot and cinders deposited from the defendant's chimney were "insignificant" compared with those coming from many other chimneys, the defendant had not caused the plaintiff's damage. This is a familiar application of the "but for" rule in tort law, that is, plaintiff cannot recover unless his injury would not have resulted but for the defendant's conduct. Returning again to the hypothetical case of the large urban utility, the barrier erected by this rule is usually considered insurmountable. Even where the utility was the largest single user in the area, it would seldom be possible to show that a general air pollution condition, or even one chemical element of such a condition, would not have resulted but for the utility's emissions.[6] It may be argued that the use of the nuisance doctrine against a polluter such as a large utility in a metropolitan area is not an effective, or even a fair, weapon to control air pollution. Certainly a com-

2 41 Mass. 301 (1836).

3 189 Mass. 377, 75 N.E. 730 (1905).

4 McDonald v. Dundon, 242 Mass. 229, 136 N.E. 264, 26 A.L.R. 1243 (1922); Downing v. Elliott, 182 Mass. 28, 64 N.E. 201 (1902).

5 182 Mass. 28, 64 N.E. 201 (1902).

6 E.g., a study conducted by the Boston Edison Company itself showed that approximately 15 percent of the ground level sulfur dioxide concentration in the city of Boston at several different testing locations was caused by emissions from Boston Edison's fuel-burning locations.

munity needs products such as electricity, which cause emission of pollutants; and if air quality standards have been set and enforcing regulations adopted, all of which the alleged polluter complies with, one might ask why a plaintiff should have any additional rights to hold the utility liable for damages on a nuisance theory. Under the present state of medical knowledge, it would be very difficult to show that a particular person suffering from a respiratory disease had contracted it, or had been made substantially worse, as a result of air pollution. Suppose, however, that such proof were forthcoming, as it may be when more knowledge about the effects of air pollution is acquired. If a plaintiff can show that he has contracted lung cancer, or that his lung cancer has been seriously aggravated, as a result of the polluted air which he has breathed for many years, should he not be allowed to recover damages against the air-polluter whose activities caused or aggravated his illness? In a real sense, the air-polluter and the consumers of its products have benefited from the fact that they were allowed to use the air without cost except to the health of the plaintiff. Surely it seems equitable for this cost, once it has been recognized, to be passed on to the consumers of the products, the production of which caused the injurious emissions. And if, as some fear, the regulatory scheme does not in fact reduce air pollution to harmless levels in the future, what other means but an action for damages can redress the resulting loss?

The third hurdle in a nuisance action is the standard against which the defendant's conduct is to be judged. Although negligence need not be shown to constitute a nuisance,[7] a defendant's use of its premises must be at least "unreasonable" with respect to the persons injured by such use. This frequently brings about application of the so-called balancing test. In *De Blois v. Bowers*,[8] plaintiffs owning residences located near a steelworks sought to enjoin the works from maintaining a nuisance by the emission of obnoxious fumes and odors. Although the court found that the plant did produce offensive odors, and that these may have caused some illness, it refused to enjoin its operation based upon findings that (1) its operation could not be significantly improved so as to reduce or eliminate the odors; and (2) the harm to the community from shutting down the plant, including the loss of jobs and the reduction in steel production capacity, was greater than the possible injury to the plaintiffs if the operation continued. In *Pendoley v. Ferreira*,[9] a piggery was enjoined from further operation because its obnoxious odors unreasonably interfered with the interests of a group of neighboring residential plaintiffs. The plaintiffs were also awarded damages for the interference with their interests during the period when the piggery was to be gradually elim-

7 United Electric Light Co. v. Deliso Constr. Co., 315 Mass. 313, 52 N.E.2d 553 (1943).

8 44 F.2d 621 (1st Cir. 1930).

9 345 Mass. 309, 187 N.E.2d 142 (1963).

inated. A recent decision of the New York Court of Appeals, however, illustrates the opposite result where the defendant's conduct was considered more valuable to society than was the operation of a piggery. In *Boomer v. Atlantic Cement Co.*,[10] the court refused to enjoin the operation of a cement plant on the ground that the damage to the plaintiffs, who were neighboring homeowners, from dust and other air contaminants was less than the damage which the defendant corporation and its 300 employees would suffer if the plant were closed by an injunction. The plaintiffs were awarded damages, however, to be computed for both past and anticipated injury and paid only once. The balancing-test approach to a nuisance suit thus presently seems to make it much easier to get rid of minor causes of air pollution, such as piggeries, than to eliminate major air pollution sources such as cement factories or steel plants. Perhaps as scientific knowledge about the effect of air pollution on health and property improves, it will be possible to supply a piece of the balancing equation now missing: the long-term cost to society of a general air pollution condition. So long as the "harm" to the plaintiffs in weighing the balance is viewed only as the immediate, demonstrable effect on residents neighboring the polluting activity, it seems unlikely that injunctive relief will be granted against many substantial businesses even where a group or class of plaintiffs can show that the defendant's pollution is a proximate cause of their injury. A plaintiff who has overcome the hurdles of special injury and causation, however, can at least recover damages if he proves that the defendant's conduct was unreasonable, even if he cannot obtain injunctive relief.

It will be interesting to note the effect on cases subject to the balancing test of the new air pollution control regulations. Presumably, a defendant who was violating the regulations would be acting unreasonably. But query whether the plaintiff is thereby entitled to an injunction (assuming the administrative authorities for some reason do not take action), or whether the defendant is still entitled, as against a private plaintiff, to the application of the balancing test. By virtue of a "savings clause" in G.L., c. 111, §142C, par. 6, it appears that a defendant who complies with all applicable air pollution control regulations is not thereby relieved of any common law liability for creating a nuisance. It is questionable, however, whether a judge will be likely to hold that a defendant is acting unreasonably where the polluting source is maintained in strict compliance with specifically applicable regulations, for example, an incinerator constructed in accordance with plans approved by the Department of Public Health.

Because of the problems inherent in asserting a nuisance action against an air-polluter, such an action has at present very limited efficacy as an overall solution to the air pollution problem. In the 1969-

[10] 287 N.Y.S.2d 112, *aff'd*, 294 N.Y.S.2d 452, *rev'd*, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970).

1970 session of the Massachusetts legislature, an interesting proposal was submitted which would have created a private right of action for air pollution damage in a manner designed to overcome the traditional hurdles for a plaintiff in the common law of nuisance. This proposal is worth examining as a method of attack on the air pollution problem wholly different from the setting of air quality standards and enforcement regulations.

§26.5. A legislative proposal. In Senate Bill 907 of 1970, the three hurdles of standing, causation, and the balancing test standard would all be substantially reduced for a prospective plaintiff.[1] Standing would be handled by permitting "any person located within an air pollution control district" to bring an action in Superior Court against "any other person located within said district."[2] Proof of air pollution by the defendant conclusively establishes injury to the plaintiff.[3] For this purpose, "air pollution" is defined to mean "the emission into the atmosphere of air contaminants in such quantities, from any single source or combination of sources, as is or tends to be injurious to human health or welfare, animal or plant life, or property, or which would unreasonably interfere with the comfortable enjoyment of life or property." (It will be recalled that this is essentially the same definition as appeared in the state regulations.)

Causation is handled by Senate Bill 907 through the following provision:

> . . . [P]roof that a given air contaminant has injured plaintiff and that the defendant's enterprise or activity emits a given portion of the sum total of all of said air contaminant emitted within the air pollution control district where the parties are located shall establish a conclusive presumption that defendant is liable for an equivalent portion of plaintiff's injury from said air contaminant.[4]

Thus, in our hypothetical situation involving the large metropolitan utility which produces X percent of a given air contaminant, a plaintiff who could prove that his respiratory illness had been caused or aggravated by this contaminant would be able to recover damages in an amount proportionate to the percentage of total emissions of the particular contaminant produced by the defendant. The plaintiff still faces the difficult problem of proving which contaminant injured him, but at least his problem is not insurmountable.

With respect to equitable relief, if the plaintiff can prove that the defendant is emitting air contaminants, and that there is at least one

§26.5. 1 An equivalent proposal has been submitted in the 1971 session as House Bill 1177.

2 Senate Bill 907, §2 (1970 Sess.).

3 Ibid.

4 Id. §2(c).

method of abatement available, the defendant *must* abate pursuant to this method unless he can prove by a preponderance of the evidence that it would be "prohibitive" for him to abate.[5] "Prohibitive" is defined to mean a cost "so great as to threaten seriously the continuation of the enterprise or activity under consideration."[6] Even if abatement is not allowed, either because no method of abatement is technically available or because the cost of it would be "prohibitive," a plaintiff may still seek an injunction against continuation of the business, or any part thereof that causes air pollution, under the old balancing-test principle. In applying the balancing test, however, the court must weigh the social value of the defendant's enterprise against "the social cost of air pollution by defendant." For this purpose, "social cost of air pollution" means the "injurious effects of air pollution on all those affected by it." This would thus shift the focus of the old balancing test away from the plaintiffs in the action at hand and require a more comprehensive examination by the court of the cost of pollution.

There are obviously many problems and questions left unanswered by a proposal such as Senate Bill 907. It is unclear, for example, whether a plaintiff can recover damages based upon emissions by the defendant if such damage has been sustained by the plaintiff over a long period of time prior to enactment of the statute. Although the plaintiff's task is made considerably easier by Senate Bill 907, plaintiff is still presented with formidable problems of proof, establishing either that there is a technical method of abatement available to the defendant which he has not used or that the plaintiff has suffered a particular injury from a given air contaminant. (Since the typical air pollution condition consists of many contaminants mixed together, it may be extremely difficult even under the provisions of a statute such as Senate 907 for plaintiff to succeed in proving damages.)

Senate Bill 907 can also be attacked on the ground that it permits suits even if the defendant is in compliance with applicable regulations. The bill specifically provides that compliance with a statute or regulation does not constitute a defense. Thus, even a defendant who complies in good faith with regulations adopted by the appropriate authorities cannot be sure that he will not be exposed to suits by private plaintiffs seeking to force him to abate, to recover damages, or to put him out of business entirely. It was perhaps largely because of this potential threat to business activity that Senate Bill 907 met an untimely death in the 1970 legislative session.

On the other hand, if our society is serious about eliminating air pollution and preserving the quality of our air as a natural resource, there is much to be said for a proposal such as Senate Bill 907. The requirement that a defendant must abate to the greatest extent pos-

[5] Id. §2(a).
[6] Id. §1(f).

sible short of going out of business seems a desirable social policy. Even though it may result in a lessening of business activity in some instances, the principle of treating the cost of maximum air protection as a necessary cost of doing business may be the only way to achieve an effective clean air program. Although the same "built-in-cost" approach can perhaps be achieved through specific regulations, regulations are not likely to require all polluters to achieve the highest state of the art in air protection at all times. There are bound to be gaps in coverage and failures to keep the regulations up to date. The private abatement action can thus serve as a useful supplement to the regulatory approach.

With respect to the damages allowed by Senate Bill 907, those who can prove illness caused by air pollution have truly borne the cost of such pollution and have conferred a corresponding benefit upon all those who actively contribute to such pollution, including not only institutional polluters but all individuals who produce garbage and consume electricity, heat, and the other products which result in air pollution. Assuming appropriate medical proof of injury, division of the cost among the polluters involved (who will pass it on eventually to the ultimate consumers of their products) seems a desirable result which would probably not occur under existing case law. One aspect of Senate Bill 907 which seems particularly sound is the provision which requires abatement at least to the level of existing laws or regulations. There would seem to be little harm, and a great deal of benefit, in permitting private citizens to enforce air pollution regulations where the government authorities have failed to act. As already noted, federal law now permits a private citizen to enforce federal and state regulations in certain situations, and whether or not a private right of action statute similar to Senate Bill 907 is enacted, a bill which simply permitted enforcement of existing law clearly should be passed.

§26.6. Control and regulation of excessive noise. Noise has been defined as "any sound that is undesired" by the receiver or which is "noticeably loud, harsh or discordant."[1] It has been the source of annoyance ever since man began living communally. While, at the height of the machine age, we are presently being subjected to more noise than at any other time in history, noise has long been the subject of legal controversy. Some of the earliest cases of the common law were concerned with the right to peaceful enjoyment of property, and today the number of such cases continues to grow.

There are essentially three categories of actionable noise: actions between private individuals, actions between private individuals and

§26.6. [1] Landry v. Daley, 280 F. Supp. 968, 970 (N.D. Ill. 1968), quoting from Webster's Third New International Dictionary 1533 (1961). See Handbook of Noise Control 1-11 (Harris ed. 1957). As to noise and actionable nuisance in Massachusetts, see Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914).

government, and actions between governments and governmental agencies. Before proceeding to a discussion of these three categories, however, it is first necessary to discuss the nature of noise — how it is defined, measured, categorized and compared.

As the aforementioned definition of noise suggests, noise is almost entirely subjective; whether a particular sound is annoying lies in the ear of the listener. What may be music to one may be noise to another. Because of its subjective nature, noise, of all the pollutants, is probably the most difficult to measure objectively. There are, of course, devices which measure all aspects of sound: decibel level, intensity, frequency, pitch and duration. Generally, insofar as the law has been concerned with noise, in the absence of specific standards the question of whether a particular sound is noise has been determined by the test of whether a person of ordinary sensibilities would consider the sound annoying.[2] Some courts have recognized that the test is entirely subjective and inadequate for a fair determination of all cases, and have attempted to devise more objective tests. In attempting to make standards for recovery as objective as possible, however, courts, in many instances, have stretched existing objective tests devised for subjects of a more tangible nature, depending upon the legal theory asserted and applied. In actions brought under a theory of trespass for damage to property caused by noise pollution resulting from overflying aircraft, most courts require a physical invasion of the airspace directly over the property by the aircraft from which the sound emits.[3] The test is certainly objective, but it is hardly adequate. The landowner whose property lies adjacent to an airport, yet not directly under a flight path, cannot recover damages for the injury to his property resulting from sideline noise which may be just as annoying and damaging, because the aircraft does not actually invade the airspace above his property.[4] The inquiry should

2 See, e.g., Godard v. Babson-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303 (1943); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930); Davis v. Sawyer, 133 Mass. 289 (1882).

3 See Causby v. United States, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84, *petition for rehearing denied,* 369 U.S. 857 (1962); Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932). See also Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63.

4 See, e.g., Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964); United States v. 3276.21 Acres of Land, 222 F. Supp. 887 (S.D. Cal. 1963); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963), *rehearing denied,* 372 U.S. 925 (1963) (note dissent of Chief Judge Murrah on the overflight requirement); Moore v. United States, 185 F. Supp. 399 (N.D. Tex. 1960); Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958); Nunally v. United States, 239 F.2d 521 (4th Cir. 1956). But cf. United States v. Certain Parcels of Land in Kent County, Mich., 252 F. Supp. 319 (W.D. Mich. 1966); Henthorn v. Oklahoma City, 453 P.2d 1013 (Okla. 1969); Board of Educ. of Town of Morristown v. Palmer, 88 N.J. Super. 378, 212 A.2d 564 (Sup. Ct. App. Div. 1965); Martin v. Port of Seattle, 64 Wash. 324, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989

not be whether the source of the noise invades the property, but whether the noise itself invades the property. A visual test should not be applied to an audible problem; a more proper test would be to determine a trespass on the basis of the sound emission. If this test were applied, the landowner whose property lies adjacent to the airport would recover damages in an action brought in trespass on the same terms as his neighbor whose property lies under a flight path. Courts first must recognize that noise is a unique pollutant and then devise new tests based on current technology which can be applied to insure the fair and uniform determination of all cases.

In the first category, actions between private individuals, the common law theories of trespass and nuisance obtain in Massachusetts. The remedies available are damages and/or injunctive relief. Not surprisingly, in most noise cases wherein trespass has been the theory of recovery, the matter in controversy has been noise emanating from aircraft operation. In *Smith v. New England Aircraft Co.*,[5] the Supreme Judicial Court, in finding for the defendant, discussed at length the theory of trespass. The Court stated that a portion of the airspace above the land of the plaintiffs was navigable airspace and could be regulated "in the interest of the public welfare."[6] Moreover, that portion of the airspace not actually in the effective possession of the landowner and not actually utilized by him could be invaded by aircraft without giving rise to a compensable legal action. The Court essentially divided the airspace above the landowner's property into two segments, the lower segment, actually utilized by the landowner, to which he had the exclusive right of possession, and the upper segment subject to invasion by aircraft without compensation to the landowner. The division was made on the basis of weighing the right to exclusive possession versus the public necessity of navigation. Even though overflights had occurred, the Court held that the invasion was not compensable.

In a similar case, *Burnham v. Beverly Airways, Inc.*,[7] the Supreme Judicial Court reiterated the prior reasoning of the *Smith* case regarding the division of the airspace above a landowner's property in granting an injunction and nominal damages. The Court stated that even though an invasion of airspace might be a technical trespass,

> . . . such passage is a trespass unless substantially harmless and unless justified upon striking a reasonable balance between the landowner's right to exclusive possession free from intrusion and the public interest in necessary and convenient travel by air.[8]

(1965); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962), noted in 41 Texas L. Rev. 827 (1963). As to noise pollution and railroads, see Richards v. Washington Terminal Co., 233 U.S. 546, 551-552 (1914).

5 270 Mass. 511, 170 N.E. 385 (1930).

6 Id. at 521, 170 N.E. at 389.

7 311 Mass. 628, 42 N.E.2d 575 (1942).

8 Id. at 636-637, 42 N.E.2d at 579.

Massachusetts has never done away with the overflight requirement in cases brought for compensation for harm caused by aircraft noise on a trespass theory.

Generally, in the case of a continuing trespass in Massachusetts, injunctive relief is granted as the most effective means of abating the problem. In *Fenton v. Quaboag Country Club, Inc.*,[9] for instance, injunctive relief was granted and damages were confined to the loss of rental value of the property during the term of the trespass rather than the diminution of the value of the property. The Supreme Judicial Court weighed the public benefit and the private harm resulting from the activity in determining whether injunctive relief should be granted. There have been no recent cases in Massachusetts in which injunctive relief has been granted as a means of abating airplane noise in suits brought upon a trespass theory. This is undoubtedly due to the fact that travel by air has become so essential that the benefit to the public far outweighs any and all harm to the individuals who may live beneath the flight paths of aircraft.

The most common basis of suits brought for injuries caused by noise is nuisance. Nuisance can be divided into two categories: public and private.[10] In the case of a public nuisance in Massachusetts, the plaintiff, in order to prevail, must show that a special injury resulted to him alone, not suffered in common with all others.[11] Actions for private nuisances in Massachusetts are governed by G.L., c. 243. The plaintiff must allege in his complaint that the conduct of the defendant out of which the nuisance arises is either intentional, wanton or reckless, or negligent.[12] In the absence of such an allegation, Massachusetts courts will construe an allegation of nonfeasance rather than malfeasance.[13] In the case of *Mills v. Keeler*,[14] the Supreme Judicial Court stated: "The single word 'nuisance' by itself does not supply a case good against demurrer."[15] Nuisance is concerned with the use and enjoyment of property rather than the exclusive possession of it, and the test utilized in determining cases based upon a nuisance theory is whether a person of "ordinary sensibilities" was prevented from the full use and enjoyment of his property.[16] Moreover, the Massachusetts courts weigh all of the circumstances in determining, as a matter of fact, whether the nuisance existed[17] and whether an

9 353 Mass. 534, 233 N.E.2d 216 (1968).

10 In Massachusetts, actions for private nuisances are governed by G.L., c. 243.

11 Brown v. Perkins, 78 Mass. 89 (1858); Jones v. Inhabitants of Town of Great Barrington, 273 Mass. 483, 179 N.E. 118 (1930). See Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966).

12 Mills v. Keeler, 351 Mass. 502, 222 N.E.2d 749 (1967).

13 Ibid.

14 Ibid.

15 Id. at 504, 222 N.E.2d at 751.

16 Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914).

17 Flynn v. Town of Seekonk, 352 Mass. 71, 72, 223 N.E.2d 690, 691 (1967), citing

action will lie.[18] In *Stevens v. Rockport Granite Co.*,[19] in which an action was brought by a resident of a summer vacation colony against the operator of noisy equipment, the Supreme Judicial Court weighed the general character and use of the neighborhood against the benefit to the public in having the granite company operate. In addition, the Court considered the expense of having the noise abated and whether the company should have adopted noise abatement procedures.

In an action for nuisance, it lies with the plaintiff to show substantial damage to either health or property in order to prevail. In *Cohen v. Cohen*,[20] in which the plaintiff alleged mental anguish due to the noisy operation of a nearby dance hall, the Supreme Judicial Court, in a rescript opinion, found for the defendant on the basis that the alleged harm was not sufficient for a remedy of either damages or injunctive relief. In *Proulx v. Basbanes*,[21] in which the plaintiffs showed actual physical damage to health and property as the result of the vibrations and noise emanating from an adjoining laundry, the Court held that the plaintiffs were entitled to injunctive relief and damages. Where ultra-hazardous activity is the cause of the nuisance, as in *Reppucci v. Poleari*,[22] in which the defendant was maintaining blasting operations, negligence on the part of the defendant need not be shown in order for the plaintiff to prevail. However, an individual acting under a license from a governmental agency and complying with those terms may use the license as a defense to an action in nuisance. In *Strachan v. Beacon Oil Co.*,[23] for instance, the Supreme Judicial Court stated that acts which ordinarily would constitute a nuisance in the absence of a license would not be considered a nuisance where the activity is performed by a licensee in conformity with the terms of the license. The activity must be performed in accordance with the terms of the license and a reasonableness test is applied by the courts in considering this defense.

Massachusetts courts are using traditional common law standards to determine whether the noise annoyance complained of constitutes a nuisance and whether the plaintiff should accordingly prevail. The test of whether the noise constitutes a nuisance involves an inquiry into whether a person of "ordinary sensibilities" would be deprived of the use and enjoyment of his property because of that noise.[24] Such a test is very subjective. The Supreme Judicial Court has not

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Loosian v. Goudreault, 335 Mass. 253, 255, 139 N.E.2d 403, 405 (1957), and Senctore v. Blinn, 342 Mass. 778, 174 N.E.2d 437 (1961).

18 See Lloyd, Noise as a Nuisance, 82 U. Pa. L. Rev. 567, 569 (1934).

19 216 Mass. 486, 104 N.E. 371 (1914).

20 352 Mass. 783, 227 N.E.2d 700 (1967).

21 354 Mass. 559, 238 N.E.2d 531 (1968), noted in 1968 Ann. Surv. Mass. Law §3.4.

22 291 Mass. 424, 197 N.E. 56 (1935).

23 251 Mass. 479, 146 N.E. 787 (1925).

24 Malm v. Dubrey, 325 Mass. 63, 88 N.E.2d 900 (1949); Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1934).

yet determined private actions for nuisances on the bases of decibel, pitch, frequency, or intensity standards, although sufficient technology is available to successfully apply such criteria. While a bill providing for a private right of action, as discussed earlier in this chapter, could be utilized in noise cases by grounding such right upon technical regulations of various governmental agencies charged with abating noise, it need not be left to the legislature to introduce objective standards into the courts. During the 1970 SURVEY year, in *Aaron v. Los Angeles*,[25] a California court determined that all residents living within certain defined areas adjacent to a municipal airport were entitled to recover damages for noise pollution. Those areas were delineated on the basis of Noise Exposure Forecast contour levels which take into account decibel levels, intensity, and frequency of noise occurrence.[26] The test for recovery was whether the individual's property lay within particular NEF contour levels. Similar standards could be utilized in determining the rights between parties in cases involving noise other than that caused by aircraft operation. In light of the technology available to the courts today, there is no reason to rely solely upon subjective tests formulated at a time when noise could not be measured objectively.

The second category of actionable noise to be discussed — suits between private individuals and the government — can be divided into two distinct classes: first, suits by individuals against the government, and second, suits by the government against individuals. In the first class, the common law theories of trespass and nuisance are delimited by the doctrine of sovereign immunity. Essentially, the doctrine of sovereign immunity implies that private individuals must bear without compensation the damaging results of those actions which the government has deemed to be in the common interest.[27]

[25] Aaron v. Los Angeles, Civil No. 387779 (Sup. Ct. County of Los Angeles, Feb. 5, 1970), reported in Environmental Law Digest 7 (1st ed., Sept. 1970). As to municipal legislative efforts to prescribe and enforce altitude and antinoise levels, see Huard, The Roar, the Whine, the Boom, and the Law: Some Legal Concerns About the SST, 9 Santa Clara L. Rev. 189 (1969), 1 Environment L. Rev. 68, 84-90 (1970). See also American Airlines v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968); Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956), noted in 54 Mich. L. Rev. 998 (1956).

[26] Noise Exposure Forecast (NEF) contour levels are standards of noise measurement developed by the acoustical engineering firm of Bolt, Beranek & Newman and are presently accepted by the United States Department of Transportation and the United States Department of Housing and Urban Development. See 2 Bolt, Beranek & Newman, Acoustic Noise Control 148 (1952); Peterson & Gross, Handbook of Noise Measurement (5th ed. 1963); Richards, The Control of Aircraft Noise Perceived at Ground Level — Technical Aspects, 68 Royal Aeronautical Socy. 45 (1964); Burns, Noise and Man 10-51 (1968). On the legal aspects of aircraft noise, see generally Hill, Liability for Aircraft Noise — The Aftermath of Causby and Griggs, 19 U. Miami L. Rev. 1 (1964); Note, Jet Noise in Airport Areas: A National Solution Required, 51 Minn. L. Rev. 1087 (1967).

[27] See Fuller & Casner, Municipal Tort Liability in Operation, 54 Harv. L.

Certain limitations of the doctrine are considered by the courts in determining the respective rights of the individual and the government: the activity must be sanctioned by law and the facility generating the noise must be designed and operated properly.[28] Aside from trespass and nuisance, there is a third theory of action available to a private individual against the government, that is, an action for a "taking" of property. Although a particular noise sanctioned by the government may cause damage that is noncompensable because of the doctrine of sovereign immunity, where a taking by the government has occurred as the result of that noise, compensation may be granted since the Fifth and Fourteenth Amendments of the United States Constitution require that a landowner be compensated for property that is taken for the public use by the government. Courts have applied the theory of a taking in cases involving noise pollution, especially where the noise has been the result of the operation of aircraft.[29] In attempting to distinguish between a noncompensable "damaging" and a compensable "taking," courts have been forced to distinguish between "property" and "property rights." In considering the ownership of property, factors other than possessory are taken into account in order to make the necessary distinction. A substantial interference with property rights is sufficient to constitute a taking for which compensation is due, and the landowner need not be displaced from his property in order to recover.[30] Even though the property owner retains actual physical possession of his land, he can recover where government-sanctioned activity substantially interferes with his property rights.[31] In *Causby v. United States*,[32] where noise emanating from military aircraft was involved, the United States Supreme Court held that the low flights over the plaintiff's chicken farm constituted a taking for which the plaintiff should be compensated. In *Griggs v. Allegheny County*,[33] the Court, in finding for the plaintiff against a municipal airport authority, extended the *Causby* doctrine to include the owner and operator of the airport on the basis that, in its decision to locate the airport and plan the runways, the authority did not acquire sufficient property for the approach areas, thereby causing the substantial interference

Rev. 437 (1941). See also Richards v. Washington Terminal Co., 233 U.S. 546 (1914), and cases cited *supra* note 4.

28 Spater, Noise and the Law, 63 Mich. L. Rev. 1373, 1383 (1965).

29 See note 3. It should be noted that in neither Causby nor Griggs was the taking based squarely upon the emission of objectionable and damaging noise; in both Supreme Court cases, effective displacements of the plaintiffs from their land were found. See also Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

30 See United States v. Certain Parcels of Land in Kent County, Mich., 252 F. Supp. 319 (W.D. Mich. 1966), and cases cited therein.

31 Ibid.

32 328 U.S. 256 (1946).

33 369 U.S. 84 (1962).

with the plaintiff's property rights. In both cases, the Supreme Court found a physical invasion of the plaintiff's property; subsequently, a physical invasion of the landowner's property was required in most jurisdictions in order to recover in an action brought upon a taking theory. In *Bennett v. United States,*[34] for instance, the United States District Court for the Western District of Oklahoma found that the physical invasion of sonic shock waves of jet aircraft — the result of a test program designed to determine the potential effect of sonic booms caused by supersonic transport flights on ground structures and population centers beneath such flightpaths — was not sufficient to constitute a taking. In *Bennett,* the aircraft creating the sonic waves were flying within navigable air space six to nine miles above the ground when the sonic booms occurred. Citing *Avery v. United States,*[35] the district court stated that "[p]hysical invasion of sound and shock waves of jet aircraft do not constitute a physical taking of property as opposed to a mere nuisance and trespass" and then held:

> There has been no taking of plaintiff's property in this case, and furthermore, the United States, in the absence of its consent, is immune from suit. All the flights involved in this case which caused the sonic booms were in navigable air space, and although the plaintiffs may have suffered because of the alleged nuisance and some inconvenience, such nuisance and inconvenience are incidental and unavoidably attendant to use of airways.[36]

The defendant's motion for summary judgment was accordingly sustained.

The requirement of a physical invasion in taking cases is slowly being dispensed with in some jurisdictions. In at least four states having provisions in their constitutions similar to the Fifth Amendment of the United States Constitution, the courts have eliminated the overflight requirement.[37] Moreover, in *United States v. Certain Parcels of Land in Kent County, Michigan,*[38] a condemnation proceeding, the United States District Court for the Western District of Michigan reasoned that the precedents of *Causby* and *Griggs* did not absolutely require physical invasion for recovery, and stated that

> . . . if [the interference] is so great as to constitute a wholly unreasonable and substantially destructive interference with the property involved, a taking will be found.[39]

34 266 F. Supp. 627 (W.D. Okla. 1965).

35 330 F.2d 640, 643 (Ct. Cl. 1964).

36 266 F. Supp. 627, 630 (W.D. Okla. 1965).

37 Henthorn v. Oklahoma City, 453 P.2d 1013 (Okla. 1969); Board of Educ. of Town of Morristown v. Palmer, 88 N.J. Super. 378, 212 A.2d 564 (Sup. Ct. App. Div. 1965); Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540 (1964); Thornburg v. Port of Oregon, 233 Ore. 178, 376 P.2d 100 (1962).

38 252 F. Supp. 319 (W.D. Mich. 1966).

39 Id. at 323.

In Massachusetts, however, the courts require a physical invasion and displacement in cases in which a taking is alleged.[40] Although the physical invasion test is objective, it does not adequately deal with the problem of compensation for noise damage. There are other tests which, when used in combination, deal with the problem more equitably: diminution of value, balancing social gains against private losses, and private "harm-prevention" versus public "benefit-extraction."[41]

The second class of suits involving private and governmental interests — suits by the government against individuals — includes cases which the government brings against individuals either in a parens patriae capacity or as an enforcer of legislation. There has been no case in Massachusetts in which the state has brought an action in a parens patriae capacity for injuries caused by noise. Furthermore, existing legislation concerning the regulation of noise in the Commonwealth is plainly inadequate. What legislation there is deals mainly with motor vehicle noise emission,[42] and those statutes are enforced infrequently. For the past two years, the Massachusetts legislature has rejected legislation which would include noise as an element of "atmospheric pollution" as inclusively described in G.L., c. 111, §31C. Although the Massachusetts Department of Public Health has adopted several vague noise regulations, the Commonwealth has not attempted to enforce these regulations through the courts at this writing. The city of Boston has given the Boston Air Pollution Control Commission the authority to regulate noise in the city[43] and, pending the enactment of noise regulations by that commission, has adopted a noise abatement ordinance.[44] The commission has dealt with problems of noise pollution administratively, but as it is presently in the process of formulating regulations, it has not proceeded in court. Because its authority emanates from the city and not the state, as far as noise regulation is concerned, the commission is limited to imposing a fine of up to $50 a day for each violation of proposed noise regulations, whereas it can impose a $500 fine and seek injunctive relief for air pollution violations.[45]

The Federal Government has enacted noise abatement legislation in recent years which, if properly enforced, promises to be effective. Probably the most effective federal legislation is Title IV of the Clean Air Amendments,[46] otherwise known as the Noise Pollution

40 Sullivan v. Commonwealth, 335 Mass. 619, 142 N.E.2d 347 (1957).

41 Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 Harv. L. Rev. 1165 (1967).

42 G.L., c. 40, §21; id. c. 90, §§16-20.

43 Boston, Mass., Ordinances c. 3 (1970).

44 Ibid.

45 G.L., c. 111, §31C.

46 Pub. L. No. 91-604, 84 Stat. 1676 et seq. (1970), amending Clean Air Act, 42 U.S.C. §§1857 et seq. (Supp. V, 1970).

and Abatement Act of 1970. The act essentially places noise pollution on an equal footing with air pollution. It gives the Environmental Protection Agency, established pursuant to Executive Reorganization Plan No. 3 of 1970,[47] the authority to establish an Office of Noise Abatement and Control to study the problem of noise on a national level. The National Environmental Policy Act of 1969[48] established the Council on Environmental Quality and called for the participation of all federal agencies in promoting efforts to control pollution and to protect and enhance the environment. The act also provides for the submission of environmental impact statements on proposed projects which require federal action to the appropriate federal agencies; and public hearings are required, in certain circumstances, by guidelines promulgated pursuant to the act. The federal agencies, however, are not required to set final procedures for the implementation of the act until July, 1971, and there remains the question of when, namely, at what stage in the development of a particular project the environmental statement should be submitted and hearings be held. The Clean Air Amendments of 1970[49] also provide for a private right of action in the federal district courts based on emission standards or limitations under the act. It appears that, upon the completion of the study of the noise problem by the Office of Noise Abatement and Control, appropriate standards for noise emission will be adopted and a private right of action based on those standards will be available. A person will then be able to institute a suit against any individual, including the United States or any governmental instrumentality or agency to the extent permitted by the Eleventh Amendment of the United States Constitution, for violation of prescribed noise emission standards, and against the administrator for not enforcing those standards.

47 1970 Reorg. Plan No. 3, 35 Fed. Reg. 15623-15626 (1970).

48 42 U.S.C. §§4321 et seq. (1964). In Hildebrand, Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research, 70 Colum. L. Rev. 652, 674, 675 (1970), the author writes that "the new National Environmental Policy Act of 1969 may have a revolutionary effect on projects affecting the environment . . . . This landmark legislation attempts to establish a national environmental policy and an independent body of environmental advisors within the executive office of the President. Besides the important declaration of a national policy for a better environment, the Act requires agencies of the federal government to consider environmental impact in deciding on project development, and gives the Council of Environmental Advisors surveillance over proposals. Oscar S. Gray, acting director of the Department of Transportation's Office of Environmental and Urban Systems Research, has stated recently that among the factors to be evaluated in the early stages of highway planning will be such environmental concerns as recreation, parks, aesthetics, neighborhood character, erosion, wildlife, noise, and air and water pollution [Boston Globe, Jan. 22, 1970, at 4, cols. 3-4]. It remains to be seen, however, if these federal guidelines will be followed on the state level."

49 Pub. L. No. 91-604, 84 Stat. 1676 (1970), amending Clean Air Act, 42 U.S.C. §§1857 et seq. (Supp. V, 1970).

Insofar as aircraft noise emission is concerned, the Clean Air Amendments of 1970 vest the Department of Transportation with the authority to prescribe and enforce regulations in this area, and in fact, the Department has adopted noise standards for new aircraft.[50] The Department is also in the rule-making process of setting standards for retrofitting of existing aircraft and Vertical Short Take-off and Landing (VSTOL) aircraft. However, the secretary of that Department has repeatedly spoken in favor of the development of the supersonic transport (SST), probably the noisiest aircraft yet conceived.[51] The Department has filed an environmental statement of the project in compliance with the National Environmental Policy Act of 1969, but the statement appears inadequate in that it fails to consider all of the implications of the project. Assuming that the SST becomes operative and violates future noise emission standards and that appropriate legislative action is taken to implement the Noise Pollution and Abatement Act of 1970, it is possible that a private right of action may lie for injuries resulting from the excessive noise emissions of that aircraft. The Federal Government has already undertaken to regulate some types of noise emissions, and its authority appears to be extending to all types of noise pollution. One can only hope that the legislation needed to implement already existing legislation will be forthcoming to insure the proper regulation of noise pollution in our environment on a national level.

The third and final category to be considered in discussing noise as it relates to the law is that which includes actions between governments and governmental agencies. On the federal level, the Clean Air Amendments of 1970 to the Clean Air Act,[52] in addition to providing a federal right of action against individual violators of emission standards, also provide for the compliance of the Federal Government with all emission standards of Federal, state, and local governments, except where an exemption has been granted by the President. Since the Federal Government cannot sue itself, and since Section 112(d)(1) of the 1970 act specifically provides that states can-

50 F.A.R. 36: Standards for New Aircraft.

51 For a useful compilation of technical and nontechnical resources on the SST and the environmental problems which it promises, see Hildebrand, Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research, 70 Colum. L. Rev. 652, 679-682. In view of recent developments, one might be tempted to use the past tense in considering problems posed by the SST. On March 24, 1971, the United States Senate followed similar House action of the previous week by voting 51-46 to terminate government funding of the SST development program. While those apprehensive of the SST's potential damage to the environment have reason to be encouraged by the Congressional cut-off of direct appropriations, it should be noted that alternative means of private financing are being explored. As of this writing, it may be premature to sound the death knell of the SST. See Newsweek, Mar. 29, 1971, at 23-24; Boston Globe, Mar. 25, 1971, at 1, cols. 6-7 (morning ed.).

52 Pub. L. No. 91-604, 84 Stat. 1676 (1970), amending Clean Air Act, 42 U.S.C. §§1857 et seq. (Supp. V, 1970).

not enforce standards adopted pursuant to the act against stationary sources owned or operated by the United States, the power of enforcement of local standards against the Federal Government remains with the individual citizens of each state through the courts. Once noise standards are formulated under the act, the same prohibition against states suing the Federal Government will undoubtedly apply to individuals although it is assumed that the private right of action section will allow private suits to abate noise against the Federal Government. The prohibition will, of course, apply to the political subdivisions of a state, including municipalities.

On the state and local level, there is currently pending in the United States Court of Appeals for the First Circuit an appeal of a suit based on noise pollution brought by the city of Boston against the Massachusetts Port Authority and nineteen airlines.[53] The city maintains that the excessive noise emanating from the operation of Logan International Airport and low-flying aircraft has amounted to a nuisance, trespass, and taking as to fifteen schools owned and operated by the city in the East Boston section. The procedural issue of federal jurisdiction is still being litigated. The port authority has maintained that it is a state agency and therefore immune from suit under the Eleventh Amendment prohibition against a citizen's suing his own state, or subdivision of that state, in the federal courts. The city maintains that the authority is a quasi-public corporation so independent from the state that it is not entitled to Eleventh Amendment protection. In its complaint, the city alleged a violation of Fifth and Fourteenth Amendment rights and of 42 U.S.C. §1983, and jurisdiction was invoked pursuant to 28 U.S.C. §§1331, 1343(3) and 1343(4). The case was dismissed on jurisdictional grounds, and that decision is currently being appealed by the city of Boston. The case contains all of the problems involved in governments suing other governmental units in their own behalf on the federal level.

Not only is there a problem of sovereign immunity but also the question of whether municipal governments enjoy constitutional protections which apply to citizens. Governments may sue other governments on common law theories such as trespass and nuisance where sovereign immunity does not apply, but whether a government can assert certain constitutional rights is still an issue. These problems will have to be resolved by specific legislation giving governments and governmental agencies the right to bring actions to enforce environmental standards against both the Federal Government and the state and local governments. Unless this is done, there can be no truly effective control of noise in our environment.

53 City of Boston v. Massachusetts Port Authority, — F. Supp. — (D. Mass. 1971).