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## ANOTHER LOOK AT THE AIR POLLUTION CRISIS IN BIRMINGHAM

*By James R. Walpole\**

In mid-November, 1971, the air pollution level in the area of Birmingham, Alabama rose so high as a result of an air inversion that it directly threatened the health of persons in that vicinity. The United States Environmental Protection Agency, recognizing the extent of the danger, requested the Department of Justice to take the appropriate legal steps immediately to reduce harmful emissions into the air by the industries causing the major portion of the air pollution. For the first time, and as yet the only time, the "Emergency Powers" section of the Clean Air Act was utilized.<sup>1</sup> This section provides:

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary.

A recent issue of *Environmental Affairs*<sup>2</sup> contains an article entitled "Legal Anatomy of an Air Pollution Emergency," by Doug Rendleman, Assistant Professor of Law at the University of Alabama. This article will first describe the Birmingham air emergency and then take issue with certain of Mr. Rendleman's conclusions in his *Environmental Affairs* article.

### I. THE BIRMINGHAM EMERGENCY

In order to appreciate the significance of the air pollution levels which occurred in Birmingham, it is necessary to discuss the meth-

ods of measuring air pollution which were used to obtain the Birmingham readings. Particulate matter<sup>3</sup> in the air can, under certain conditions, have an adverse effect on health at levels as low as 100 micrograms per cubic meter.<sup>4</sup> The national primary and secondary ambient air quality standards for particulate matter, which are designed to protect the public health and welfare, are 260 micrograms per cubic meter (maximum 24-hour concentration not to be exceeded more than once per year) and 150 micrograms per cubic meter<sup>5</sup> (maximum 24-hour concentration not to be exceeded more than once per year), respectively.<sup>6</sup> The federal regulations dealing with particulate levels provide that control action should be taken when the particulate level reaches 375 at any monitoring site. This is known as the "Alert" stage.<sup>7</sup> More drastic action should be taken if the particulate count climbs as high as 625—the "Warning" level.<sup>8</sup> The most stringent action should be taken at the "Emergency" level—when the particulate count reaches 875 and can be expected to remain there for 12 or more hours.<sup>9</sup> The actions taken at the Alert and Warning levels are intended to prevent the particulate count from ever reaching the actual Emergency level.

In mid-November, 1971, a weather inversion settled over the Birmingham area so that there was little or no dispersion of the particulate matter emitted into the air by the factories located there. As a result, the amount of particulates in the air continued to increase and, on November 16, both the Alert level and the Warning level were exceeded. Two measurements were taken that day, one showing a particulate count of 722 and the other a count of 771. The weather forecast indicated that the inversion would probably remain the same for at least two more days and that dispersion would be poor for some time thereafter. The Jefferson County Department of Health, realizing the danger that these pollution levels presented, contacted the industries in the area which emitted the highest level of particulates, according to its own records. The Department requested each industry to voluntarily reduce its emission levels because of the serious air pollution problem. In writing, it urged 23 companies to reduce their emissions drastically and suggested that "due to the seriousness of the situation, this office feels that an overall particulate emission reduction on the order of 60% is justified."<sup>10</sup> The replies which were solicited and received by the Department showed minimal overall reductions in emissions, and some of the largest industries did not even estimate their reductions. On November 17, 1972, the inversion, as expected, did not disperse. The particulate level was measured that day at 758, well above the

Warning level of 625.

Although it became apparent to the Jefferson County Department of Health that immediate action was essential to reduce the pollution level, county regulations did not authorize any immediate action in this type of situation nor had the newly enacted Alabama air pollution control statute been fully implemented because the air pollution control commission authorized by the statute had not yet been appointed. Thus, the local and state agencies were fully aware of the danger but were not in a position to deal effectively with an emergency situation.

The United States Environmental Protection Agency, which had been in communication with the state and local agencies, met and discussed the matter with those agencies on November 17,<sup>11</sup> at which time all authorities agreed that immediate action should be taken to protect the health of area residents. Early that evening, the Environmental Protection Agency referred the matter to the Department of Justice and requested that immediate action be taken pursuant to Section 303 of the Clean Air Act. Within five or six hours the Department of Justice, working through the United States Attorney's office in Birmingham, prepared a motion for a temporary restraining order seeking to reduce the emissions of those industries which the Jefferson County Department of Health had listed as the largest sources of particulate matter in the area. The motion was accompanied by three affidavits: the first, by a doctor of medicine with a specialty in general preventive medicine, stating that particulate levels of greater than 700 for two consecutive days would constitute an imminent and substantial endangerment to a significant portion of the general population in the area; the second, by the Assistant Director of the Jefferson County Bureau of Environmental Health, stating that the particulate level on November 16, 1971, in the Birmingham area was measured at 722 and 771 and that particulate levels were 728, 758 and 725 micrograms per cubic meter on November 17, 1971; and the third, by a meteorologist, stating that there was currently an inversion in the Birmingham area which was expected to continue for at least one more day, after which dispersion would be very slow. In addition to the motion and the affidavits, a complaint and a proposed order requesting specific relief as to each of the 23 industries were prepared. Because of the urgency of the situation and because the Department of Justice did not have on hand the names of the attorneys representing all of the 23 companies, the motion requested the court to issue the temporary restraining order *ex parte* since "the discharges constitute an immi-

ment and substantial endangerment to the health of persons." Federal District Judge Sam Pointer was contacted by telephone and arrangements were made to present the papers to him when they were completed. The papers were completed—at approximately midnight and presented to Judge Pointer at his home—at approximately 1:00 a.m. on November 18. After reading the pleadings and discussing the matter with the attorney from the Department of Justice, an Assistant United States Attorney, and representatives from the Environmental Protection Agency, the Judge granted the temporary restraining order. The order was designed to require virtual elimination of emissions from each source, but it was couched in language which would allow gradual reduction of production over a period of several hours in order to avoid damaging any equipment.<sup>12</sup> The government attorneys then called each of the 23 industry defendants, between 2:30 a.m. and 5:00 a.m., and described the contents of the order to them.<sup>13</sup>

A hearing on the temporary restraining order was scheduled for November 19, at 9:00 a.m., in the Federal District Court in Birmingham. Before that time, however, two fortunate events occurred: (1) the inversion began to shift from the area, and (2) it rained in Birmingham. These two occurrences reduced the particulate level to 217, well below the Alert level of 325, and thus eliminated any further need for the temporary restraining order. At the hearing on November 19, the Government indicated to Judge Pointer that the particulate count no longer constituted an immediate threat to the health of persons in the area. Since the emergency conditions had ceased to exist, the Government moved that the order be dissolved and the complaint be dismissed, and the Judge granted the motion.

## II. PROFESSOR RENDLEMAN'S ANALYSIS

The first portion of the Rendleman article in *Environmental Affairs* describes the air pollution situation in Birmingham, while the remainder discusses the "hardships which flow from the nature of the adjudication" and deals with "possible remedies."<sup>14</sup> The following comments concern the latter portion of the article.

The apparent focal point of the article is that "[t]he major legal difficulty [of the *ex parte* Temporary Restraining Order], was the lack of notice to the defendants."<sup>15</sup> The basis for the complaint concerning lack of notice, however, appears to be that notice should have been given as a courtesy rather than as a legal necessity. For example, Professor Rendleman states:

The substantive provisions of the November 18th order, although unprecedented, *were authorized by law*. Attorneys for the industries were outraged. Some of the outrage should have been anticipated because of the drastic change in enforcement policy. Some of the outrage, however, could have been prevented by sedulous procedural fairness. Failure to extend procedural protection to the defendants exacerbated rather than ameliorated the shock and outrage which was due to the change in the application of the substantive law.<sup>16</sup> [emphasis added]

He also notes that:

Other reasons for notice relate to precision in the litigation process. If the defendant is given notice and is present at a hearing, he can participate in the process of finding facts, applying the law and, in equitable cases, formulating the decree.<sup>17</sup>

The article, then, apparently advocates providing each potential defendant with formal notice that certain action is being considered by the Government. Applying this point of view to the Birmingham situation, the Government would have been required to provide an attorney for each of the 23 companies with notice. Each company would doubtless have wished to discuss the matter prior to the filing of any action, since such a procedure is common and often eliminates minor difficulties before a matter is presented to a judge. This approach, however, is not required in every situation involving temporary restraining orders. To the contrary, Rule 65(b) of the Federal Rules of Civil Procedure specifically authorizes the issuance of *ex parte* temporary restraining orders. The Government's motion for the November 18 order requested that the order issue without notice to the defendants on the ground that, unless the discharges of particulate matter were *immediately* restrained, the health of people in the area would continue to suffer immediate and irreparable harm. Judge Pointer obviously felt that this reason was sufficient grounds for an *ex parte* order.<sup>18</sup>

Providing formal notice to each of the 23 defendants would have been inconsistent with the critical nature of the situation in Birmingham. The particulate level had far exceeded the Alert level of 375 and the Warning level of 625, and had reached the level where continued exposure to the pollution would cause widespread harm to persons in the area. As mentioned above, the Jefferson County Health Department had attempted without success to obtain voluntary cooperation from the local industries. The emergency nature of the situation demanded that action be taken as swiftly as possible; and the Federal Government acted swiftly by obtaining the temporary restraining order, the provisions of which, "although unprece-

dented, were authorized by law."<sup>19</sup>

Professor Rendleman's next theme is the "hardships" imposed upon the industries as the result of the temporary restraining order:

The effects of the order in *United States v. United States Steel* could have been severe. In addition to loss of production and profits, possible damage to equipment<sup>20</sup> and lost wages, *corporate images were tarnished. . . . Few would disagree with enjoining the uncooperative polluters in an emergency* and most would agree that it is better to do too much than too little to end the pollution episode. Most would also agree that it is better to move with celerity than circumspection. Haste may, however, create injustice.<sup>21</sup> [emphasis added]

It is unfortunate that "corporate images were tarnished," but, lest there be any misunderstanding, the 23 companies that were enjoined on November 18 were the same 23 companies which earlier in the week had been requested in writing to reduce their emissions voluntarily. The statement regarding uncooperative polluters in an emergency would appear to be more germane.

The next portion of the Rendleman article discusses the remedies available to an "incorrectly enjoined defendant" in a situation where a private individual is a plaintiff. After discussing the theory of inverse condemnation, Professor Rendleman notes that:

There is an impressive body of medical evidence for the proposition that extended exposure to high level particulates in the atmosphere is a definite health hazard; and, although the precise point where particulate count, weather forecast, and health emergency became congruent is somewhat a matter of individual choice, *the evidence supports the assertion that a particulate count of 700 for 48 consecutive hours will cause serious problems for vulnerable segments of the population and will even cause some deaths.*<sup>22</sup> [emphasis added]

He concludes, however, that "[T]he emergency . . . was grave, and the measures had a reasonable relation to the emergency. Inverse condemnation does not seem to provide redress."<sup>23</sup>

After stating that a particulate count of 700 for two consecutive days will cause serious health problems and even deaths, the author contends that:

Several aspects of the lawsuit are subject to criticisms. The particulate count was high, but Birmingham had come to expect that . . . . The order in *United States v. United States Steel* can be seen as a dragnet, obtained at midnight by arbitrary government bureaucrats.<sup>24</sup>

In his summary, Professor Rendleman concedes the possibility that the Government's action was necessary to convince the indus-

tries that it meant business. In his view the entire case was cloaked with overwhelmingly opaque ambiance as the result of "the Environmental Protection Agency's unfortunate failure to act in the open." Curiously, the author then states:

If the Environmental Protection Agency had not acted, no one could have. In this sense the action taken was exactly what Congress intended. State emergency plans should, in the future, eliminate the need for federal emergency actions.<sup>25</sup>

The author concedes that the action taken by the Government was specifically what Congress intended in enacting the Clean Air Act. An underlying theme of the article is also seen here: that state implementation plans should make federal emergency actions unnecessary and that the plans should so provide. This position has two basic weaknesses. First, it is immaterial whether state implementation plans<sup>26</sup> include provisions for federal intervention in emergency situations because the Clean Air Act specifically authorizes federal action in emergency situations.<sup>27</sup> Thus, action may be taken by the Federal Government regardless of the provisions of state plans.<sup>28</sup> Second, such a position totally ignores the philosophy behind the Emergency Powers section of the Act. The purpose of the section is to assure protection for the health of persons in a situation where the local and state agencies have not acted to eliminate the pollution. Federal action should not be taken under the Clean Air Act where the emergency is being eliminated by the state or local officials. The Birmingham situation was actually quite unique because neither the state nor local agencies, at the time, were able to act to abate the pollution. As mentioned above, all the members of the state air pollution control commission had not yet been appointed, and the Department of Health's regulations did not authorize the immediate action required by the situation.

### III. CONCLUSION

When lives are actually in danger, action must be taken, whether by a federal agency or a state agency, and it must be swift and decisive. Such action can be accomplished through the cooperation and coordination of state and local agencies as well as by federal intervention. The Birmingham situation, where the local agencies willingly cooperated with and provided assistance to both the Environmental Protection Agency and the Department of Justice, was an excellent example of how such agencies can work together to solve a pollution crisis.



With these things in mind, the action taken in Birmingham should be viewed not as a dragnet obtained at midnight by arbitrary government bureaucrats, but rather as action which was authorized by federal law and was necessary to prevent an emergency from becoming a tragedy.



## FOOTNOTES

\*Attorney, Pollution Control Section, Department of Justice, Washington, D.C. The author represented the Justice Department during the Birmingham crisis.

<sup>1</sup>42 U.S.C. §1857(h)(i) (1970).

<sup>2</sup>ENVIRONMENTAL AFFAIRS 90, (Spring, 1972). Hereinafter this shall be referred to as the *Environmental Affairs* article.

<sup>3</sup>Particulate matter refers to those particles of material discharged into the air which finally settle back to the ground. It has been defined as "any material, except water in uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions." 40 C.F.R. §51, Appendix B, 1.0.

<sup>4</sup>See, *Air Quality Criteria for Particulate Matter, Summary and Conclusions*, United States Department of Health, Education and Welfare, at 18-9.

<sup>5</sup>Hereinafter micrograms per cubic meter will be referred to as the particulate count or the particulate level.

<sup>6</sup>40 C.F.R. §§ 50.6, 50.7.

<sup>7</sup>40 C.F.R. §51, Appendix L, 1.1(b).

<sup>8</sup>40 C.F.R. §51, Appendix L, 1.1(c).

<sup>9</sup>40 C.F.R. §51, Appendix L, 1.1(d).

<sup>10</sup>ENVIRONMENTAL AFFAIRS, *supra* n. 2, at 97.

<sup>11</sup>A representative from the Department of Justice and from the local United States Attorney's office also attended the meeting.

<sup>12</sup>For example, the order required U.S. Pipe and Foundry Company to "eliminate emissions of particulate matter from all copolas adding no new charges and shutting down copolas after present heat is finished," and it required U.S. Steel Corporation to "reduce emissions of particulate matter from all open hearth furnaces by ceasing feed to the open hearth and maintaining the heat."

<sup>13</sup>The Jefferson County Department of Health provided the names and phone numbers of persons to call at many of the plants; the remainder of the phone numbers were merely obtained from the telephone directory.

<sup>14</sup>ENVIRONMENTAL AFFAIRS, *supra* n. 2, at 101.

<sup>15</sup>*Id.* at 101-2.

<sup>16</sup>*Id.* at 103.

<sup>17</sup>*Id.* at 104.

<sup>18</sup>The *Environmental Affairs* article (at 107) refers to a “separate certificate” which must be filed with a motion for an *ex parte* temporary restraining order. However, Federal Rule 65(b) nowhere requires that a “separate certificate” be filed regarding the notice provision of the Rule. Also, although the motion itself does not specifically state that the Government was not then aware of the names of all the attorneys representing the defendants, the Judge was informed of this state of affairs prior to his issuance of the order.

<sup>19</sup>ENVIRONMENTAL AFFAIRS, *supra* n. 2, at 103.

<sup>20</sup>There was no indication whatsoever at the hearings on November 19 that any equipment was actually damaged in any respect.

<sup>21</sup>ENVIRONMENTAL AFFAIRS, *supra* n. 2, at 108.

<sup>22</sup>*Id.* at 113.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 114-5.

<sup>25</sup>*Id.* at 115.

<sup>26</sup>Section 110 of the Clean Air Act, 42 U.S.C. §1857(c)(5) requires each State to submit a plan to the Environmental Protection Agency which provides for the “implementation, maintenance and enforcement” of the national ambient air quality standards.

<sup>27</sup>The Federal Water Pollution Control Act Amendments of 1972 contain an emergency powers provision almost identical to that in the Clean Air Act; *see* 33 U.S.C. §1364.

<sup>28</sup>In all likelihood, the Environmental Protection Agency would not approve a state implementation plan which attempted to exclude federal emergency action.