

# New Dimensions of Corporate Counseling in Environmental Law

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Amid today's sometimes frenzied government action to cure environmental degradation, and amid the defensive posturing of corporate managers and their public relations staffs, and the vigorous, if occasionally strident, protests by conservationists to protect endangered Nature, few have stopped to examine the role of the attorney as anything other than litigator.<sup>1</sup>

Legal counseling has largely ignored the many environmental laws which have recently been enacted. Headlines have fixed on dramatic government prosecutions or conservation law suits; legal counsel in some specialized fields, such as electrical utilities or oil and other natural resource exploitation, have begun to cope with new environmental law requirements.<sup>2</sup> However, most lawyers as counselors are not yet involved in the struggle for environmentally sound development. Few practicing attorneys have taken the time to fully examine those environmental laws which affect their clients.<sup>3</sup>

This article's thesis is that attorneys cannot wait any longer to begin practicing environmental law. The bar has a responsibility

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1. A review of environmental law articles in both leading law reviews and specialist journals such as the *ECOLOGY LAW QUARTERLY* confirms this.

2. This evolution is apparent in, for instance, the Natural Resources Section of the American Bar Association. Initially concerned with laws governing exploitation of resources, the section now has an Environmental Quality Committee and has addressed special environmental protection issues such as offshore oil spills. See issues of *THE NATURAL RESOURCES LAWYER*, the Section's law review, for this evolution.

3. See, e.g., this author's essays calling upon the corporate and business law bar to bring issues of environmental liability and compliance to the attention of their existing clients. Robinson, *Environmental Law: Disposal of Liquid Pollutants Into Municipal Sewers Curbed*, 170 N.Y.L.J. No. 101, at 1, col. 1 (Nov. 27, 1973).

to insure that our laws are obeyed and implemented. In advising a client regarding compliance with environmental laws, the legal counselor has unique opportunities to advance not only the client's interests, but also the public's interest in environmental protection.

### THE CORPORATE COUNSELOR

Although legal counseling is available to all types of "persons," the counseling of corporations involves clients whose activities are most subject to environmental regulation. Individual land owners may also be affected, but their compliance problems are not dissimilar to those of corporations.

Does protection of the environment have a place in corporate counseling? Its role in the public sector,<sup>4</sup> through government prosecution or public interest litigation,<sup>5</sup> has burgeoned since Earth Year six years ago. Aside from defending clients, does the corporate lawyer have a positive responsibility to help preserve and enhance environmental quality?

The response to this question has been slow in coming. Enough experience has accumulated, however, to establish an affirmative answer. Indeed, it may be both unprofessional and unethical for corporate counsel not to assume their new responsibility of providing the knowledge and skill necessary to aid environmental protection.

This essay will survey the indices of corporate environmental counseling. The evaluation here is not meant to be exhaustive, but rather suggestive. While an attorney's normative decision to serve the public interest in halting environmental degradation permeates much of this discussion, at the same time it should be noted that every corporate practice has in it an entirely new dimension of potential legal services with the accompanying addition of work load and income. Happily, the attorney's public, professional and business interests can coincide in the area of counseling for environmental protection.

4. Chief Judge Bazelon wrote in *Wellford v. Ruckelshaus*, 439 F.2d 598, 603 (D.C. Cir. 1971):

A new public sensitivity to issues of environmental protection has imposed new responsibilities on the courts, the legislatures, and the administrative agencies.

5. *E.g.*, cases brought by the Environmental Defense Fund or the Natural Resources Defense Council.

## A NEW FIELD OF LAW

Most corporate counsel have never studied environmental law as such. For the most part, this new field is built upon subjects which are familiar: public health law, administrative law, property law, natural resource use regulation, conservation law and the like. Existing rules of evidence are applicable in many areas. The bar need not shrink from environmental law, therefore, for much of it is both predictable and traditional.

What has been added, however, is an overlay of further federal, state and local laws addressed to specific environmental problems. The "umbrella" laws which govern noise emissions, water pollution, air pollution and occupational health at the federal level<sup>6</sup> prescribe uniform rules or guidelines for regional and local regulation-making. These are the new laws and rules with which counsel must become familiar in order to properly function in the field of environmental law.

What incentives are there to undertake this continuing legal education? The greatest incentives are the potential liability and business disruption which are apt to result from continuing to ignore new environmental laws.

Every industrial enterprise should seek legal counsel for its environmental problems. Already, major corporations have taken steps to retain full-time, in-house specialists in environmental law to guide compliance with pollution abatement and land use laws.<sup>7</sup> Middle-tier and small corporations, especially those without in-house law departments, plus some divisions of larger corporate enterprises, have not yet taken such steps. Executives of these corporations, occupied with existing business demands, have not found it necessary to explore their potential liability. Similarly, lawyers for all but the major companies have had little time to examine

6. The Clean Air Act of 1967, 42 U.S.C. § 1857 *et seq.* (1970); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (Supp. 1972); Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (1970) [hereafter cited as "OSHA"]; Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (Supp. 1972).

7. The programs of the 3M Company are a good example. See *generally* papers delivered at the International Pollution Engineering Congress, Cleveland, Ohio, December 1972: Joseph T. Ling, "Balancing Environmental Objectives with Available Resources—What Are the Realities?"; L. Jones and S. Lathrop, "Designing a New Plant with Pollution Control as a Major Program Objective—The Gardner-Denver Casting Center at Pryor, Oklahoma"; and E. Simons and W. Marx, "Government Agency and Company Relations."

their clients' possible pollution or environmental liability. Advice on environmental law is sought only when legal action has been commenced against a company. By this time, the greatest opportunities for sound corporate counseling have passed.

Why should corporate clients attend to the environmental law consequences of their acts? Why should their attorneys examine the potential for environmental liability, and what directions should their research and counseling take? Not surprisingly, the answers to these questions are traditional. Paul N. Cheremisinoff, Environmental Control Engineer with Engelhard Minerals and Chemicals Corporation stated a typical corporate pollution control policy thus:

It is the responsibility of the manufacturing enterprise to meet all governmental regulations, avoid the threat of shut-downs and fines, and improve public relations; it is equally important to avoid hasty decisions and to prevent disruption of normal plant operations.<sup>8</sup>

Legal advice is necessary to help a client avoid suit or prosecution and conduct its affairs without unnecessary disruption.

If the practical incentive for adherence to environmental laws is the desire to avoid business disruptions and civil or criminal liability, how likely is the client to be so disrupted or to be held liable? The record indicates that the likelihood of both is increasing. While private suits and public prosecution increase, they do not reach all regions or commercial activity with equal vigor. The impact when suit hits the unwary, however, is acute. No client can rest safely by refusing to comply with environmental laws and then hoping to fit into that percentage of companies which escape suit.

#### RECENT CASE LAW ON ENVIRONMENTAL LIABILITIES

Violation of environmental law subjects a corporation to suit not only by governmental agencies, but also by various private parties including adjacent property owners, public interest groups, business competitors and even its own shareholders.

In addition to liability flowing from suits directly against a corporation by government or private party, there is the equally

8. P. Cheremisinoff, "Establishing a Central Corporate Department for Company-Wide Pollution Control," *supra* note 7.

serious threat of a company finding its government license or permit nullified because of a suit by a private party, such as a conservation society, against the unit of government responsible for granting the license or permit. Recent suits by the Natural Resources Defense Fund, Environmental Defense Fund, or Sierra Club Legal Defense Fund are representative of these actions.<sup>9</sup> Often the private corporation, which is after all the real economic party in interest, will intervene.<sup>10</sup> Whether the company intervenes or not, it incurs often significant business disruption when needed permits are voided in court.

This expansive array of potential plaintiffs increases the likelihood of litigation involving a company's environmental liability. The following illustrative suits from each of these three areas—government, private, and indirect conservation suits—establish both that the threat of suit is real and that the consequences are frequently costly and disruptive of a company's business endeavors.

### *Governmental Prosecutions*

Governmental prosecution cases exhibit a wide variety of idiosyncrasy. On the one extreme, they range from a Carteret, New Jersey, patrolman arresting a plant superintendent and taking him in handcuffs to the police station where criminal nuisance charges were lodged,<sup>11</sup> to the misdemeanor conviction of White Fuel Corporation for unknowing discharge of oil into Boston Harbor's Reserved Channel.<sup>12</sup>

9. See the newsletters issued by these public interest law firms for examples of their litigation: NRDC, 15 W. 44th Street, New York, New York 10035; EDF, 162 Old Town Road, East Setauket, Long Island, New York 11733; SCLDF, 311 California Street, Suite 311, San Francisco, California 94104.

10. See, e.g., *Sierra Club v. AEC*, Civ. No. 1867-73 (D.D.C., August 3, 1974), where the court noted:

Plaintiffs are four environment and conservation organizations—the Sierra Club, the National Parks and Conservation Association, and the National Resources Defense Council—which contend that they are 'actively engaged in developing and disseminating information to the public with respect to environmental issues, particularly those relating to energy use and development.' Defendants are three agencies of the United States and their directors; defendant-intervenors are four companies who fabricate nuclear power generating systems and/or enriched nuclear fuel.

11. *New Jersey ex rel. Borough of Carteret v. Spano & International BAKERAGE*, Complaint No. 585639 (Mun. Ct., Carteret, N.J., June 26, 1974).

12. *United States v. White Fuel Corp.*, 6 E.R.C. 1794 (1st Cir., June 13, 1974),

At the opposite extreme, *U.S. v. Reserve Mining Co.*<sup>13</sup> evidences how a private company can defy extensive government enforcement of new environmental standards. Because that case is probably the last of its kind, it is useful to examine it at length before reviewing the more common trend in prosecutions.

Reserve Mining Company mines a low grade iron ore, called taconite, in Minnesota. It ships the ore to Silver Bay, on Lake Superior, for processing and flushes the waste residue into the lake. Some 67,000 tons of tailings are discharged daily. This practice has existed since 1955. In 1969, after fruitless administrative and state court proceedings to abate Reserve's pollution,<sup>14</sup> federal and state pollution control action was commenced to abate the discharges under the 1899 Refuse Act,<sup>15</sup> the Water Pollution Control Act,<sup>16</sup> and the federal common law of public nuisance. In mid-1973 a public health issue was raised with respect to the effects of asbestos fiber particles in the discharged tailings. On January 22, 1974, the Eighth Circuit Court of Appeals reversed the District Court's order joining Reserve's owners, Armco Steel Corporation and Republic Steel Corporation, as defendants under the Federal Rules of Civil Procedure, Rule 19(a)(1). Until the health hazard and liability issues were resolved, joinder was held to be premature and would delay the asbestos-health claims.<sup>17</sup> On March 6, 1974, U.S. District Judge Miles Lord announced after thirty-one weeks of trial that he would order cessation of tailings discharges. He asked Reserve to submit a timetable and a plan for an alternative disposal site.<sup>18</sup>

Judge Lord's opinion was filed on April 20, 1974. He found after 139 trial days, 100 witnesses, 1621 exhibits and 18,000 pages of transcripts that the tailing amphibole fibers were a threat to public health either when airborne or when ingested along with lake water. At the end of the public health evidence Judge Lord

under the Rivers & Harbors Refuse Act of 1899. Maximum fines of \$2500 were assessed on each of several counts.

13. 6 E.R.C. 1449 (D. Minn., April 20, 1974).

14. See *Reserve Mining Co. v. Minn. Pollution Control Agency*, 294 Minn. 300, 200 N.W.2d 142, 2 E.R.C. 1135 (1972).

15. Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1970).

16. 33 U.S.C. § 1160 (1970).

17. *Armco Steel v. U.S.*, 490 F.2d 688, 6 E.R.C. 1222 (8th Cir. 1974).

18. 4 B.N.A. ENVIRONMENTAL REPORTER, CURRENT DEVELOPMENTS, at 1888-89 (March 15, 1974).

again joined Armco and Republic Steel as defendants. He found that no water discharge permit had been granted and that a common law nuisance existed.<sup>19</sup> He reserved decision on liability under the Refuse Act and on the issues of fines.

He also noted that:

In that Reserve is a mere instrumentality or agent of its parents who have used Reserve as a shield to protect themselves from the consequences of Reserve's illegal pollution of Lake Superior, Armco and Republic must bear legal responsibility for Reserve's actions. Furthermore, since Reserve's profits are siphoned off by its parents, in order to insure an effective remedy if civil fines or other monetary relief are called for, the independent corporate entity of Reserve must be disregarded.<sup>20</sup>

Judge Lord enjoined any further discharge, beginning noon the next day, of all air and water pollutants until Reserve should come into compliance with applicable Minnesota regulations.

On May 11, 1974, Judge Lord filed 109 pages of findings of fact and law. Meanwhile, Reserve and its two parent companies took their appeal.<sup>21</sup> Reserve sought and obtained from the Eighth Circuit Court of Appeals a 70-day stay of the injunction issued by Judge Lord.<sup>22</sup> The court balanced the equities and found that the "concededly enormous economic impact that an immediate plant closure would have upon Reserve"<sup>23</sup> was not outweighed by the likelihood of a health hazard from continued operation.

The Circuit Court independently reviewed the evidence and concluded that "Reserve appears likely to succeed on the merits of its appeal on the health issue."<sup>24</sup> The Appeals Court concluded that "Judge Lord apparently took the position that all uncertainties should be resolved in favor of health safety."<sup>25</sup> The Eighth Circuit, on the other hand, concluded that because of uncertainties in the evidence, a substantial health risk had not been proven. The

19. *United States v. Reserve Mining Corp.*, 6 E.R.C. 1449 (D. Minn., April 20, 1974).

20. *Id.* at 1452.

21. *United States v. Reserve Mining Corp.*, 6 E.R.C. 1657 (D. Minn., May 11, 1974).

22. *Reserve Mining Co. v. U.S.*, 498 F.2d 1073, 6 E.R.C. 1609 (8th Cir. 1974).

23. *Id.* at 1611.

24. *Id.* at 1612.

25. *Id.* at 1616.

case was remanded for trial court recommendation as to Reserve's abatement plan which the Circuit Court ordered filed as a condition to the stay. On June 11, 1974, the U.S. Environmental Protection Agency asked the Justice Department to seek Supreme Court review of the 70-day circuit stay of Judge Lord's injunction. The EPA protested the "overly restrictive" burden of proof employed by the Circuit Court.<sup>26</sup>

Wherever the suit goes from here, Reserve ultimately must abate. Reserve and its parents may well be fined in substantial amounts. Since the Refuse Act is violated when there is a mere likelihood that polluting emissions reach navigable waters,<sup>27</sup> Reserve's ultimate liability appears probable. Moreover, if Judge Lord reads the evidence fairly, private damage suits may well follow, stimulated by all the publicity against Reserve.

However unpredictably successful any one polluter's defense might be, most prosecutions have resulted in convictions, fines and increasingly numerous consent decrees. A former Assistant Attorney General in Illinois has aptly remarked that

the responsible environmental prosecutor cannot avoid attending at least to some of the major sources of pollution in his area.<sup>28</sup>

Moreover, the history of cases to date reveals that prosecution has not been directed only at larger industries and corporations. In fact, the middle-tier and small corporations, which are least likely to have proper environmental counseling and most likely to be hit by punitive fines and compensatory damages, have also been the targets of such governmental prosecutions. The following sample of recent cases establishes that these prosecutions can result in heavy civil penalties as well as criminal sanctions.

A General Motors automobile assembly plant in Tarrytown, New York, was sued by the United States Attorney to abate pollution of the Hudson caused by effluent dumping, and was ordered to accelerate abatement by means of a costly cleanup.<sup>29</sup>

26. 5 B.N.A. ENVIRONMENTAL REPORTER, CURRENT DEVELOPMENTS, at 184 (June 14, 1974).

27. U.S. v. American Cyanamid Corp., 354 F. Supp. 1202, 5 E.R.C. 1542 (2d Cir. 1973).

28. L. Manaster, *Perspective, Early Thoughts on Prosecuting Polluters*, 2 ECOLOGY LAW QUARTERLY 471, 479 (1972).

29. United States v. General Motors Corp., 194 F. Supp. 754 (S.D.N.Y. 1970).



Ford Motor Company was fined 7 million dollars for tampering with automobile systems before tests monitoring compliance with federal rules.<sup>30</sup> The Federal Government and the State of Illinois sued U.S. Steel as joint plaintiffs on a nuisance theory to enjoin the corporation's waste water discharge into Lake Michigan at its Waukegan, Illinois works. The court determined that the Federal Government had a proprietary interest in the navigable waters and therefore that it had standing to sue on behalf of its citizens.<sup>31</sup> The Clairton Works of U.S. Steel outside of Pittsburgh, Pennsylvania was cited in November 1973 by EPA for 63 violations of the Clean Air Act of 1970. The steel plant was given 30 days in which to correct the deficiencies which caused the air pollution, or if this was impossible, to formulate an enforceable plan for abatement. Should they fail to do so, fines of up to \$25,000 a day for each violation, or in this case, \$1,575,000 per day, could be levied by the government so long as the violations continued.<sup>32</sup>

Small corporations have not been spared from the prosecution and penalties which often follow violations of environmental laws. Q.C. Circuits Corporation in Suffolk County, New York, was fined \$1000 for emitting air pollutants, and was put under a \$25,000 bond to clean up its system in three months' time.<sup>33</sup> In April 1973, Lion Brand Products was fined \$3500 and put under a \$10,000 compliance bond for illegal sanitary and industrial discharges into Claverack Creek, Columbia County, New York.<sup>34</sup> In 1971, a Georgia county solicitor general suing on behalf of area residents sought to enjoin the Atlanta Processing Company from further emitting odors from their bone meal and tallow processing operation. The fumes were allegedly noxious enough to constitute a public nuisance. The court, in declaring that a nuisance did exist, ordered Atlanta Processing Company to abate its noxious emissions forthwith by procuring and installing pollution control devices.<sup>35</sup>

The government has been equally attentive to non-industrial con-

30. *United States v. Ford Motor Co.*, 315 F. Supp. 372 (E.D. Mich. 1973) (final judgment entered on consent).

31. *United States v. U.S. Steel Co.*, 356 F. Supp. 556, 5 E.R.C. 1125 (D. Ill. 1973).

32. *United States v. U.S. Steel Co.*, 4 E.R.C. 1641 (W.D. Pa., Sept. 29, 1972).

33. "Pollution Abatement Chart," *NEW YORK STATE ENVIRONMENT*, May 1, 1973 [hereafter cited as "*N.Y.S. Chart*"].

34. *Id.*

35. *Atlanta Processing v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971).

cerns whose activities threaten the environment. The John Borak Duck Farm on Long Island, New York, was fined \$5,000 in February, 1973, for solid waste violations.<sup>36</sup> In another case, an importer of the hides of endangered species was sentenced to prison by a federal court in North Carolina.<sup>37</sup>

It appears that neither public administrators nor the court will excuse violations even when arguably valid excuses for noncompliance are given. In *Department of Health v. Concrete Specialists*,<sup>38</sup> a New Jersey court held that emissions caused by the malfunctioning of a concrete plant's pollution control equipment violated state law, and levied a fine against the company. On appeal, the court compared the applicable civil rule to "strict liability penal statutes," but did reduce the fine from \$2500 to \$200. This strict standard has been mitigated somewhat where personal criminal liability is involved, as long as abatement is subsequently undertaken. Thus, in a New York federal court contempt hearing for the deliberate failure of an industrial park to obey a court order on river fill, the court fined the defendant corporation but stopped short of holding the individual who was in charge in contempt of court, since his superior had been ill and had not properly instructed him on the nature of the court order.<sup>39</sup>

Prosecutors are also persistent even when a statute ostensibly protects the corporation involved if the corporation reports the accident which has caused the violation. *United States v. U.S. Steel*<sup>40</sup> involved a criminal prosecution under provisions of the Refuse Act of 1899. The Federal Water Pollution Control Act<sup>41</sup> required U.S. Steel to report a 1971 oil spill on the Monongahela River. U.S. Steel filed its report under a provision of the act stating that such a report "shall not be used" against any person reporting "in any criminal case except a prosecution for perjury."<sup>42</sup> The

36. *N.Y.S. Chart*, at 12 (Feb. 1, 1973).

37. *United States v. Plott*, 345 F. Supp. 1229 (S.D.N.Y. 1972) (transferred to the United States District Court for the District of North Carolina for trial, conviction and sentence).

38. 112 Su. 407, 271 A.2d 595 (Super. Ct., App. Div., N.J. 1970).

39. *United States v. Hunts Point Industrial Park*, 4 E.R.C. 1261 (S.D.N.Y., May 18, 1972).

40. 4 E.R.C. 1641 (W.D. Pa., Sept. 29, 1972). See discussion in text at note 32 *supra*.

41. Federal Water Pollution Control Act of 1967, 33 U.S.C. § 1151 *et seq.* (1970).

42. 33 U.S.C. § 1161(b)(4) (1970).

Government nonetheless filed criminal charges against the corporation. The Court refused to dismiss the charges although it required the Government to produce evidence that its prosecution could be grounded on evidence other than the report. See also *U.S. v. Mobil Oil*,<sup>43</sup> where a conviction based solely on a report was reversed on appeal.

As indicated by the foregoing cases, the various states' agencies have a mixed record of fines. Some states are aggressive; others are still reluctant. Where injury is involved, suit can clearly be expected.

A few cases from last year alone suggest the diversity. One case which concluded in part last spring affords a good example of the money costs which accompany environmental liability. Private individuals and the State of Michigan brought suit against Amoco Production Company and Cactus Drilling Corporation for damages from a "blowout," in April 1973 of a natural gas well. On May 7, 1974, Michigan Attorney General Frank J. Kelley settled the State's claims for \$160,000 and both defendants agreed to contribute \$10,000 to clean up the natural harm to two creeks.<sup>44</sup> Add to these sums the substantial legal fees, and out-of-pocket costs amounted to about \$250,000. The Illinois Pollution Control Board continues to fine polluters heavily. Last winter Del Monte Corporation vegetable cannery was fined \$10,000 for discharges of waste which killed 26,000 fish.<sup>45</sup> Similarly, Allied Chemical Corporation was fined \$10,000 for failure to abate sulfur dioxide and other air pollutant emissions, following repeated complaints over previous years.<sup>46</sup>

Despite a tough enforcement record in some jurisdictions, however, many state agencies granted variances or extensions of deadlines to enable plants to continue operation while abating their pollution. Missouri's Air Conservation Commission granted eleven industries variances to burn sulfur fuels last winter.<sup>47</sup> Pennsylvania's Departments of Environmental Resources set extended deadlines

43. 464 F.2d 1124, 4 E.R.C. 1405 (5th Cir. 1972).

44. 5 B.N.A. ENVIRONMENTAL REPORTER, CURRENT DEVELOPMENTS, at 78 (May 17, 1974).

45. 4 B.N.A. ENVIRONMENTAL REPORTER, CURRENT DEVELOPMENTS, at 1711 (February 11, 1974).

46. *Id.* at 1531 (January 11, 1974).

47. *Id.* at 1532.

for air pollution abatement and gave variances through those dates for ten firms early last fall.<sup>48</sup>

In general, the more diffuse the harm, the likelier it appears that an agency will grant the variance and gradual compliance schedule. The more immediate the harm, the more probable the imposition of a penalty and injunction. Thus the Ohio Department of Natural Resources demanded \$44,449 from the Toledo Steel Tube Company for fish kills in July of 1973 in Ten Mile Creek,<sup>49</sup> while the U.S. District Court N.D.N.Y., fined the Tobin Packing Company a mere \$2750 following its *nolo contendere* plea for discharge of waste into Patroon Creek in violation of the Refuse Act of 1899.<sup>50</sup> No fish kills or pronounced evidence of damage were reported.

Willful failure to comply with new environmental regulations may lead to federal action. On March 12, 1974, the Volkswagen Mfg. Company settled a federal civil suit charging failure to comply with emission control device requirements in some of its 1973 Volkswagen automobiles. It agreed to pay \$120,000 and to use improved management control of emission certification testing.<sup>51</sup> In an analogous situation, an automobile dealer, Haney Chevrolet Company, was convicted on February 22, 1974, for unlawful removal of automobile emission control devices from a 1972 Corvette.<sup>52</sup> This was the first conviction under the Clean Air Act's provisions prohibiting removal of pollution control devices and imposing a maximum \$10,000 fine.<sup>53</sup>

However, it may not always lead to action by state governments. In February 1974, the Commonwealth Court in Pennsylvania ruled that a power company would not be held in contempt of court for failure to comply with a court order establishing emission limits when substantial evidence revealed an absence of existing technology to meet certain air standards and the company had made good faith efforts to comply.<sup>54</sup>

48. *Id.* at 936 (October 12, 1973).

49. *Id.*

50. *Id.* at 1416 (December 28, 1973).

51. *Id.* at 1928 (March 22, 1974) (case pending in United States District Court for the District of New Jersey).

52. *Id.* at 1889 (March 15, 1974).

53. 42 U.S.C. § 1857c-8(c)(2) (Supp. 1972).

54. *Pennsylvania v. Pa. Power Co.*, 4 B.N.A. ENVIRONMENTAL REPORTER, CURRENT DEVELOPMENTS, at 1843 (March 8, 1974).

It is significant to note the stiff penalties prescribed by the Clean Air Act<sup>55</sup> and the Federal Water Pollution Control Act Amendments of 1972.<sup>56</sup> These penalties portend substantial corporate liability since both acts allow the imposition of fines up to \$25,000 per day for the first violation, and up to \$50,000 for subsequent violations, with prison terms of up to two years in each case.<sup>57</sup> Injunctive relief is also available under both acts.<sup>58</sup>

Prosecution under both acts has been delayed pending approval of state implementation plans for the Clean Air Act, and implementation of the National Pollution Discharge Elimination System under the Federal Water Pollution Control Act Amendments of 1972. However, once the machinery is established, vigorous enforcement of their tough provisions can be expected by state and federal governments.

### *Private Law Suits*

Corporate liability may be just as severe in private lawsuits as it is in government actions, as evidenced by the following cases involving various types of private complainants.

### *Adjacent Property Owners*

Neighbors or property owners adjacent to a plant will frequently bring suit if that plant offends them with its effluents. In *Moody v. Flintkote Co.*,<sup>59</sup> an individual complained of daily, heavy asphalt fumes and particles in his work environment. He complained to the government and simultaneously commenced suit. By so acting, he caused the Attorney General for the State of Illinois to intervene as co-complainant on behalf of the State Environmental Protection Agency. Not only did his suit prompt governmental action, but it also caused another nearby asphalt saturating company to install the type of control device which the court found most effective to prevent pollution by Flintkote.<sup>60</sup>

"Neighbors" includes both business and residential plaintiffs. In

55. 42 U.S.C. § 1857 *et seq.* (1970).

56. 33 U.S.C. § 1251 *et seq.* (Supp. 1974).

57. 42 U.S.C. § 1857c-8(c)(1) (Supp. 1972); 33 U.S.C. § 1319(c) (Supp. 1972).

58. 42 U.S.C. § 1857c-8(b) (Supp. 1974); 33 U.S.C. § 1317(b) (Supp. 1972).

59. 1970 Ill. P.C.B. No. 36, 1971 Ill. P.C.B. No. 67 (Sept. 2, 1971).

60. Manaster, *supra* note 28, at 479, n.24.

*Schatz v. Abbott Laboratories*,<sup>61</sup> suits for damages were filed by a resident couple and a theatre. Damages resulted from nauseous odors coming from the fermentation process which the laboratory used to produce the antibiotic Erythromycin. The court entered judgments of \$3750 for the residents and \$15,000 for the theatre.

In *Reter v. Talent Irrigation District*,<sup>62</sup> a pear orchard owner sued a quasi-municipal corporation in Oregon for trespass and nuisance damages after water seeping out from the defendant's irrigation canals caused a rise in the water table on the plaintiff's land. The Oregon Supreme Court reversed the trial court's judgment on a verdict for the defendant, holding that although the defendant had no knowledge of the damage or its cause, the defendant was nevertheless liable. Lakefront property owners on Lake Champlain sued International Paper Company for damages caused by wastes from a pulp and paper mill, although the plant had been shut down. The court reduced a class of 200 riparian owners to only the four named plaintiffs. Nonetheless, the damage claims of those four plaintiffs, up to the date the plant was closed, exceeded \$40,000.<sup>63</sup> In *Walsh v. Spadaccia*,<sup>64</sup> the plaintiffs, local individuals and home-owner associations, secured a court ruling that the town board of Yorktown, New York, acted arbitrarily in approving a site for apartments on a lake. The court held that the board did not evaluate the project's polluting effect upon the lake. Even though the builder intervened to defend its approval to build, it lost.

Notwithstanding specific compliance with federal, state and local regulations, the corporation may still be liable to local property owners under more general tort theories. A corporation must therefore also consider this more traditional liability as it formulates its environmental management program. Five years after the infamous Santa Barbara Oil Spill of 1969, the United States Court of Appeals for the Ninth Circuit ruled that commercial fishermen have a right

61. The trial court, Circuit Court of Lake County, gave judgment for plaintiffs. The judgment was reversed in *Schatz v. Abbott Laboratories*, 131 Ill. App. 2d 1091, 269 N.E.2d 308, 3 E.R.C. 1323 (1971); the trial court was affirmed and the appellate court reversed in 51 Ill. 2d 143, 281 N.E.2d 323, 3 E.R.C. 1989 (1972).

62. 258 Or. 140, 482 P.2d 170 (1971).

63. *Zahn v. International Paper*, 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033, 4 E.R.C. 1619 (2d Cir. 1972), *aff'd*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973).

64. 73 Misc. 2d 866, 343 N.Y.S.2d 45, 5 E.R.C. 1344 (Sup. Ct., Westchester Cty., 1973).

of action against oil companies for reduction in the "fishing potential" of the Santa Barbara Channel, holding further that oil companies owed a duty of care to the fishermen to refrain from negligent action which reasonably could have been anticipated to diminish aquatic life and thus cause injury to the fishermen's business.<sup>65</sup> Not only are findings of liability and assessments of damages now more likely; the court also held that this private recovery is additional to, and not a limitation on, the authority of the State of California to declare the same negligence a public nuisance. While the ruling was limited to a plaintiff class consisting of commercial fishermen, its broader application is obvious. A case from Maine further reflects the private challenges which an unwary natural resource user may face. A federal court there, in a case not unlike the Santa Barbara Channel ruling, held that commercial fishermen and clam diggers, alleging interference with their public right to fish and dig clams because of an oil tanker's discharges into Casco Bay, had a cause of action for damages. At the same time, actions by businessmen for loss of tourism were dismissed as not related to a public right to gather fish or clams.<sup>66</sup>

This last case points out the necessity of evaluating the effects of private actions in light of the possibility of separate governmental civil and criminal suits. Shortly before the ruling cited above, a federal district court in Maine had ruled that the State of Maine's independent interest in preserving water quality and natural resources on behalf of its citizens permits it to sue as *parens patriae* to recover money damages for harm caused by oil discharges from M/V Tamano.<sup>67</sup> Since a government suit often brings out facts which give private persons substantial grounds for complaints which they might not theretofore have been able to prove, it is not surprising to find an increasing number of private suits commenced closely upon the heels of government suits. The potential collateral estoppel effect of the first judgments may also encourage subsequent suits grounded in similar facts.

65. *Union Oil v. Oppen*, 6 E.R.C. 1748 (9th Cir., June 7, 1974). Private pleasure boat owners had been previously denied a right of action, *Oppen v. Aetna Insurance*, 5 E.R.C. 1858 (9th Cir., Sept. 20, 1973).

66. *Burgess v. M/V Tamano*, 370 F. Supp. 247, 5 E.R.C. 1914 (D. Me. 1973).

67. *State of Maine v. M/V Tamano*, 357 F. Supp. 1097, 5 E.R.C. 1379 (D. Me. 1973).

## Derivative Shareholder Actions

Beyond these most common categories of legal action, there remains a real likelihood of shareholder actions for corporate waste and mismanagement. The number of class actions filed is increasing;<sup>68</sup> and the shareholder derivative suit may well break into the environmental field. SEC disclosure rules may inadvertently encourage such suits, since air and water laws require that extensive reports on environmental matters be made by each corporation to the EPA. If reports filed with the SEC are found to be at all inconsistent with those filed with the EPA, a classic SEC case might be framed.<sup>69</sup>

## Business Competitors

To date, suits by direct competitors have been uncommon. However, the recently proposed New York City Convention Center along the Hudson River was attacked by the existing New York Coliseum on the ground that air and noise pollution would increase, causing avoidable damage to the city. Although the Convention Center suit was dismissed on the ground that the environmental harm alleged was "futuristic," the prospect of environmental litigation was very real in that case, as it will be wherever scarce resources are the subject of intense competition.<sup>70</sup>

## Conservation Society Suits

Conservation suits attacking a governmental agency's failure to enforce environmental laws also pose a substantial economic threat to private industry. The number of public interest suits in the environmental field has increased in the last seven years, primarily because of cases holding that aesthetic, conservational and recreational interests are sufficient to give a plaintiff standing to sue.<sup>71</sup>

68. See Vivian O. Adler, *The Viability of Class Actions in Environmental Litigation*, 2 *ECOLOGY LAW QUARTERLY* 533 (1972).

69. See generally Nicholas A. Robinson, *Environmental Disclosures Under New SEC Rules*, 169 *N.Y.L.J.*, No. 99, at 1, col. 1 (May 22, 1973).

70. See Editorial, "Convention Center," *New York Times*, at 46, col. 2 (Sept. 12, 1973).

71. The first case to so hold was *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965). This expanded notion of standing has since been modified so as to require more than an adverse interest. See generally Note,



Public interest suits may have several purposes. One may be to enjoin the challenged activity altogether. Another may be to delay a project pending reconsideration of its environmental impact. Delay or complete abandonment of a project, and the resulting expenses involved, can thus be very real concerns for any business whose activities may adversely affect the environment. In *Izaak Walton League v. St. Clair*,<sup>72</sup> a conservation society sued the lessees of certain mineral rights in the federally controlled Boundary Waters Canoe Area. The League secured a court order that, despite the validity of the leases, the Federal Wilderness Act did not permit mineral exploitation in the region. In *Sierra Club v. Leslie Salt*,<sup>73</sup> a federal district court held that conservationists could sue the salt company for building dikes necessary to harvest salt in San Francisco Bay. This suit, if successful, threatens to disrupt the company, if not destroy it altogether.

Perhaps the best known "public interest" case is *The Wilderness Society v. Morton*,<sup>74</sup> better known as the "Alaska Pipeline Case," typical of cases in which conservationists sue a government agency even though a private corporation has the primary economic interest. In the Alaska Pipeline Case, which involved oil companies, the United States Supreme Court affirmed a judgment barring government action which would permit the pipeline's construction. In such cases, legislative support may even be unavailing: recent congressional action to authorize the pipeline is likely to face judicial tests causing further delay. On August 5, 1974, five conservation societies sued the Department of Defense under NEPA to halt the Trident Advanced Submarine-Based Missile Defense System until an environmental impact review could be undertaken.<sup>75</sup> Clearly, the immediate economic consequences of an injunction in that suit will fall upon the contractors involved.

Public interest groups also ultimately affect corporate liability

*Standing and Environmental Litigation: Sierra Club v. Morton*, 6 LOYOLA U.L. REV. 128 (1973), and Comment, *Conservationists' Standing to Challenge the Actions of Federal Agencies*, 1 ECOLOGY LAW QUARTERLY 305 (1971).

72. 313 F. Supp. 1312, 4 E.R.C. 1864 (D. Minn. 1973).

73. 354 F. Supp. 1099, 4 E.R.C. 1663 (N.D. Cal. 1972).

74. 479 F.2d 842, 5 E.R.C. 1208 (D.C. Cir. 1973), *aff'd* 4 E.R.C. 1977 (D.D.C., Feb. 9, 1973).

75. Concerned About Trident v. Schlesinger, 74 Civ. 1184 (D.D.C., Hart, J.) (complaint filed August 5, 1974).

by their direct participation in the rulemaking process of regulatory agencies. In *Fri v. Sierra Club*,<sup>76</sup> the Club secured a ruling that the Clean Air Act bars any degradation of clean air regions.

The reach of such conservation suits continues to broaden. The non-degradation rule of *Fri* found another application when, on May 23, 1974, the Sierra Club and New Mexico Citizens for Clean Air and Water sued Phelps Dodge for building a new 325-ton-a-day copper smelter in Hidalgo. Even with 90-92% effective emission controls for sulfur dioxide, the new plant would emit some 90 tons of sulfur dioxide per day. Japanese controls can reportedly eliminate 99% of such pollutants, and the plaintiffs seek to compel the use of those controls. This would result in discharges of 10 tons of sulfur dioxide a day, rather than the present daily rate of 90 tons.<sup>77</sup> The Sierra Club Rio Grande Chapter has stated:

Our purpose is neither to shut down the smelter nor to drive it from the State. Shuffling pollution onto somebody else solves no problems . . . We seek to force the use of modern, proven antipollution equipment.<sup>78</sup>

The likelihood that a public interest group will sue has been increased substantially by provisions, both in the Clean Air Act<sup>79</sup> and in the Federal Water Pollution Control Act Amendments of 1972,<sup>80</sup> for the award of plaintiffs' attorneys fees in citizen suits.<sup>81</sup> Moreover, the recent decision of a federal district court in Texas, *Sierra Club v. Lynn*,<sup>82</sup> substantiates this possibility. In that case the plaintiffs alleged that defendants San Antonio Ranch, Ltd., and HUD had inadequately prepared their environmental impact analysis as required under NEPA.<sup>83</sup> The court found no inadequacy; however, it commended the Sierra Club for having served as a "private attorney general" and awarded it \$20,000 in attorneys fees, to be assessed equally against both defendants.

76. 412 U.S. 541, 93 S. Ct. 2270, 37 L. Ed. 2d 140 (1973).

77. *New Mexico Citizens for Clean Air & Water v. Phelps Dodge Corp.*, 6 E.R.C. 2061 (D.N.M., May 23, 1974).

78. *Law of the Land*, 11 RIO GRANDE SIERRAN No. 4, at 1 (July/August 1974).

79. 42 U.S.C. § 1857h-2(d) (Supp. 1972).

80. 33 U.S.C. § 1365(d) (Supp. 1972).

81. The first circuit court decision awarding attorney's fees under these provisions was *NRDC v. EPA*, 484 F.2d 1331, 5 E.R.C. 1891 (1st Cir. 1973).

82. 364 F. Supp. 834, 5 E.R.C. 1745 (W.D. Tex. 1973).

83. 42 U.S.C. § 4321 *et seq.* (Supp. 1972).

Thus, like the threat of suit from local property owners, the possibility of suit by public interest groups cannot be avoided by mere compliance with statutory requirements. The corporation should at least be aware of the broader ramifications of its activities and should learn the views of the larger public interest groups before embarking on any project. But although these cases make the dangers of neglecting environmental rules quite clear, not so clearly perceived is what a lawyer should do to protect a client from such dangers. To fully understand the requirements of environmental law counseling, it is necessary to look at examples of actual confrontations between business and the various local, state and national enforcement agencies.

### RECENT CORPORATE EXPERIENCE

#### *Local Regulations and Their Enforcement*

For business enterprises whose activities are affected by environmental laws, the patchwork pattern of regulations engenders legal, technical and economic difficulties. Moreover, the problem is not limited merely to businesses operating in interstate commerce. Since counties within the same state may impose different regulations, intrastate businesses must also grapple with the problem of varying production specifications. Interstate business operation results in a more complex matrix of regulations.

Just as Congress has relied upon the Commerce Clause<sup>84</sup> to justify federal regulation of interstate air pollution,<sup>85</sup> and to justify national laws on fish and wildlife,<sup>86</sup> so also has business invoked the Clause to attack local laws ranging from a Florida requirement that ships use "containment gear" to prevent oil spill pollution,<sup>87</sup> to New York's Harris Act banning the importation or sale of hides from endangered species.<sup>88</sup> The substance of these challenges is

84. United States Constitution, Article I, § 8, cl. 3.

85. See, e.g., *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

86. See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), and statutes cited therein.

87. Florida Oil Spill Prevention and Pollution Control Act, FLA. LAWS 1970, c. 70-244, § 7(2)(a), supported in *dicta* as consistent with the Commerce Clause in *Askew v. Am Waterways Operators*, 411 U.S. 325, 93 S. Ct. 1590, 36 L. Ed. 2d 380, *reh. denied*, 412 U.S. 933, 93 S. Ct. 2746, 37 L. Ed. 2d 162 (1973).

88. New York Conservation Law, CONS. LAWS c. 65, § 187, sustained under the

generally that the ordinance discriminates against out-of-state actors, that it burdens the instrumentalities of interstate commerce, or that it causes economic hardship not justified by local need. However, the courts have upheld the local laws in almost every case.

This judicial trend has developed in two directions. The first involves cases under ordinances and statutes regulating phosphate levels in detergents. The second involves local laws curbing the use of disposable beverage containers. A review of these authorities gives rise to several observations regarding their legal and commercial implications.

Phosphorous is a nutrient believed to contribute to the eutrophication both of lakes, and of rivers with reservoirs and flood control dams. In eutrophication, algae growth accelerates while fish life and the water's fitness for other uses deteriorate. On a per capita yearly basis, detergents add 1.5 to 2 pounds of phosphorous to lakes and rivers, as opposed to 1.4 pounds from human sources other than agricultural run-off.<sup>89</sup> Since several years ago, federal agencies have concluded that the flow of phosphorous from municipal sources must be curbed and that the control of detergent phosphates alone could eliminate 50% of this problem.<sup>90</sup> Shortly after the federal call for phosphate control, New York State enacted a law empowering its agencies to limit the content of phosphate in detergents and to require labeling on all such detergents sold.<sup>91</sup> Other states, counties and cities have laws establishing limits for maximum phosphate weight levels ranging from 8.7% to 3% on the narrow side, to 12% to 2.2% on the broader side.<sup>92</sup>

Detergent manufacturers were understandably alarmed at this "patchwork pattern." Through their trade association—the Soap and Detergent Association, which has 115 members—they repeatedly argued that such laws created an impermissible burden on inter-

Commerce Clause in *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 983 (1971).

89. For a good introduction and bibliography, see Kathleen F. Doyle, *Phosphates—An Unresolved Water Quality Problem*, 2 ENVIRONMENTAL REPORTER, Monograph No. 9 (April 20, 1971).

90. *Environmental Quality*, The First Annual Report of the Council on Environmental Quality, at 30-31, 51-52, 57 (1970).

91. New York Environmental Conservation Law, Art. 35.

92. 2 ENVIRONMENTAL REPORTER 16, Monograph No. 9, at 8-9 (August 20, 1971).

state commerce. Repeatedly, the Association lost.<sup>93</sup> In the Association's only reported victory, a court invalidated the City of Chicago's ban on the sale of phosphate detergents.<sup>94</sup> It did so because the City had failed to make findings adequate to support its exercise of the police power and, more importantly, because the City primarily sought to curb phosphate pollution of waters which lay outside the City. The court found that the City's contribution to the phosphate pollution of those waters was not sufficient to justify the burden on interstate commerce.<sup>95</sup> However, just as the exception proves the rule, the court observed that its decision as to Chicago's ordinance

does not necessarily mean that similar ordinances in other jurisdictions cannot be sustained, where the effects of discharging phosphates into the public water supply may outweigh the interference with interstate commerce.<sup>96</sup>

The second arm of this judicial trend involves cases sustaining local laws that sharply regulate or ban the use of beverage containers. A decade ago, Vermont's law barring the sale of beverages in non-returnable containers<sup>97</sup> was upheld.<sup>98</sup> Most recently, Oregon's Minimum Deposit Act<sup>99</sup> has stimulated many jurisdictions to pass laws encouraging recycling of reusable beer and soft drink bottles.<sup>100</sup> The Oregon law requires a 5¢ refund on all beer and soft drink containers, but if a standard size bottle is used only a 2¢ refund is required. The Act, despite its name, is silent on deposits, leaving that to the market place. In January of 1972, a collection of can

93. See Local Law No. 8, Erie County, New York, approved in *Colgate-Palmolive Co. v. Erie County*, 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct., Erie Cty., 1971); Indiana's statute ultimately setting 3% limit on phosphates in detergent sales, approved in *Soap and Detergent Assoc. v. Offut*, 1 E.L.R. 20590 (S.D. Ind., Aug. 31, 1971); CODE OF METROPOLITAN DADE COUNTY, Florida, § 24-44 (Ord. No. 71-31), setting 8.7% limit, approved in *Soap and Detergent Assoc. v. Clark*, 330 F. Supp. 1218 (S.D. Fla. 1971).

94. CHICAGO ORD. § 17-7.3(b), enacted October 14, 1970.

95. *Soap and Detergent Assoc. v. City of Chicago*, 357 F. Supp. 44, 5 E.R.C. 1119 (N.D. Ill., March 6, 1973).

96. *Id.* at 1124.

97. Vt. Acts of 1953, No. 33.

98. *Anchor Hocking Glass Corp. v. Barber*, 118 Vt. 207, 105 A.2d 271 (1954).

99. OREGON LAWS, ch. 745, commonly called the "Bottle Bill."

100. See Note, *Oregon's "Bottle Bill" Survives Challenges, Produces Results*, 2 E.L.R. 10112, 10114 (July 1973).

manufacturers, brewers, contract canners and the Oregon Soft Drink Association attacked the Act, arguing principally that it unduly burdened interstate commerce. The Court sustained the Act, partly on the authority of the phosphate detergent rulings.<sup>101</sup>

In a like vein, the City of Bowie, Maryland, has seen its similar ordinance sustained,<sup>102</sup> as has Howard County, Maryland.<sup>103</sup> Oberlin, Ohio, now bans all sales of beverages in cans;<sup>104</sup> and Vermont has enacted another law substantially like Oregon's.<sup>105</sup> London County, Virginia, requires a refund according to values set by each manufacturer; its ordinance is now before the courts.<sup>106</sup> Similar legislation is pending in local governments around the nation.

While the Oregon statute has hurt the beverage canning industry, it has reduced roadside litter 20-25%.<sup>107</sup> The Oregon Act's effectiveness in achieving its goal doubtlessly reinforces the finding that it is a proper exercise of Oregon's police power. In contrast, New York City's plastic container tax never could be tested in practice, since it was held to be violative of the 14th Amendment.<sup>108</sup> Significantly, although it struck down the inartfully drafted local law, the New York Court observed that the tax scheme itself and its record-keeping requirements did not impose an undue burden on interstate commerce.

These two lines of cases show that courts will not tamper lightly with local laws that strive for honest solutions to environmental problems. Such decisions reveal the reluctance of courts to substitute their judgment for that of the legislatures.<sup>109</sup> In sustaining New

101. *American Can Co. v. Oregon Liquor Control Comm'n.*, 2 E.L.R. 20643 (Cir. Ct., Marion Cty., 1972), *aff'd*, 517 P.2d 691 (Or. App. 1973).

102. *BOWIE, MD. ORD. No. 0-4-71*, *sustained in* *Bowie Inn, Inc. v. City of Bowie*, 2 E.L.R. 20056 (Cir. Ct., Prince Georges Cty., Md., 1971).

103. *Bill No. 7, Leg. Day No. 3, 1971 Leg. Sess. of Howard County Council*, *sustained in* *Allview Inn, Inc. v. Howard County*, 3 E.L.R. 1863 (Cir. Ct., Howard Cty., Jan. 24, 1972).

104. 804 A.C.C.M.S., Oberlin, Ohio.

105. VT. STATS., T. 10, ch. 53, § 1521 *et seq.*

106. *Ord. of London Cty., Va., Bd. of Supervisors*, May 17, 1971, 2 E.L.R. 10112, 10114 (July 1973).

107. *Id.*

108. *Society of Plastics Industries v. City of New York*, 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct., N.Y. Cty., 1971).

109. *See, e.g.*, the court's observations in *Soap and Detergent Assoc. v. Offut*, 3 E.R.C. 1117, 1120 (S.D. Ind., Aug. 31, 1971):

[I]f the people of Indiana prefer to wear gray shirts and have a little

York's laws preserving the beaver many years before, Judge Andrews noted how much latitude is actually given:

The 'police power' is not to be limited to guarding merely the physical or material aspects of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved not for its use but for its beauty.<sup>110</sup>

Similarly, in an important ruling over a decade ago the U.S. Supreme Court sustained Detroit's Smoke Abatement Code as a legitimate exercise of local police power not violative of interstate commerce.<sup>111</sup>

It remains to be seen whether the rules and rationales of the phosphate and beverage container cases will be applied in other types of cases. Perhaps legitimate distinctions can be made as to other products or their contribution to pollution. Pending litigation involving New York City's Ordinance limiting lead in gasoline<sup>112</sup> may test whether such distinctions can be drawn. Distinctions did not appear when the Court denied a motion by plaintiffs, five oil companies, for a preliminary injunction against the law's application to their products.<sup>113</sup> Nonetheless, since lead limits in gasoline are also sanctioned under the federally approved New York State Air Quality Implementation Plan for New York City,<sup>114</sup> the ordinance may well survive its present challenge and be deemed a legitimate, though economically pressing, local response to local environmental hazards.

The adverse economic effect of such legitimate regulation may be unfortunate; however, it must be borne where it falls. As U.S.

hardness distilled on their glasses . . . as a price for obtaining cleaner water . . . that is a choice which we feel the people of Indiana should make through the Indiana legislature.

110. *Barrett v. State of New York*, 220 N.Y. 423, 428 (1917).

111. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852, 78 A.L.R.2d 1294 (1960).

112. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK, § 1403.2-13:11.

113. *Exxon Corp. v. City of New York*, 356 F. Supp. 660, 5 E.R.C. 1180, 3 E.L.R. 20493 (S.D.N.Y. 1973).

114. See New York State Dept. of Environmental Conservation, "New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls," Strategy A-10, at 5-3 *et passim* (April 1973).

District Judge Stevens said in sustaining the Indiana phosphate statute,

We don't think the economies of scale which are involved to a certain extent here really rise to the dignity of a constitutionally protected right.<sup>115</sup>

The extension of uniform federal standards, as under the Occupational Safety and Health Act,<sup>116</sup> may ease those economic burdens which accompany varying environmental conditions. However, where regional differences exist, as between metropolitan transportation control areas under the Federal Clean Air Act,<sup>117</sup> the variety of local pollution conditions will often mean that standards will be uneven.

Business in interstate commerce would be well advised to anticipate economic dislocation from local environmental laws. Rather than challenge the constitutionality of such ordinances in the face of countervailing case law, counsel could be provided to a client, both to help advance its business interests and to help ensure its compliance with environmental laws.

#### THE ELEMENTS OF ENVIRONMENTAL CORPORATE COUNSELING

Elements of corporate environmental counseling to be discussed here fall into four categories: (A) *pollution control counseling* has immediate visibility; (B) less well known, and therefore worth exploring independently in lieu of discussing air or water pollution laws, is the realm of *occupational health and worker safety*; (C) important in most corporate practices is *securities law counseling* and services, where environmental factors may well come into play; (D) finally, *land use regulation*, which is bursting onto the nation's legal scene with remarkable alacrity, imposes both traditional and novel demands on a lawyer's skills.

Obviously other topics could be added. In the specialties related to timber, oil and gas, mineral and other resources exploitation, highway construction, utility plant siting, or land development,

115. Soap and Detergent Assoc. v. Offut, 1 E.L.R. 20590 (S.D. Ind., Aug. 31, 1971).

116. 29 U.S.C. § 651 *et seq.* (1970).

117. Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970).



whole subtopics could be developed at length. Many of these topics have been treated in other articles.<sup>118</sup>

### *Pollution Counseling*

It is only a matter of time and circumstance until most corporations are confronted with enforcement of environmental laws similar to that which has been outlined above. Not enough corporate planning is underway. Estimated investment in water pollution control for the baking industry will be \$11.8 to \$21.3 million between now and 1976; \$122 million in this period will be required of cement manufacturers; \$120 million will be required by fruit and vegetable canning and freezing; and \$89 million will be needed for leather tanning and finishing.<sup>119</sup>

Brokerage houses have recognized the need for these investments, but corporations have been reluctant to undertake them. This reluctance must be attributed, in part, to a corporate belief that environmental liability is not immediate and will not be a disruptive factor in business operations, at least in the short run. The large investment of capital in non-productive pollution control equipment has not, therefore, been thought to be justified by the risk of environmental liability. As the Merrill Lynch securities research division wrote in 1970,

Although industry is increasingly accepting pollution-control efforts as a cost of doing business, a major problem is that pollution-abatement facilities can be very expensive and unproductive in the usual sense and this can affect profits.<sup>120</sup>

Tax benefits for investing in pollution control hardware, such as accelerated depreciation, are not alone sufficient to stimulate in-

118. See, e.g., articles in the *NATURAL RESOURCES LAWYER* issued by the Natural Resources Section of the American Bar Association.

119. Council on Environmental Quality, *Environmental Quality*, Third Annual Report (1972), at 290-95. See also G. Hill, "Impact of Pollution Control Cost Less Than Had Been Feared," *New York Times*, at 16, col. 4 (Feb. 17, 1973). Twenty-nine plants have been shut down to comply with environmental laws; the Council on Environmental Quality cut these predictions back slightly in its Fourth Annual Report, *Environmental Quality* (1973).

120. Merrill, Lynch, Pierce, Fenner & Smith, Inc., "Investing in Pollution Control for the Seventies" (January 1970).

vestment.<sup>121</sup> Tax incentives are mere sugar coating once the decision to take the pill has been made.<sup>122</sup> Nonetheless, those tax incentives which are available do enable a corporation to reduce cuts in net profits and help make it "a more willing partner" in the public-private effort to combat pollution.<sup>123</sup>

Procrastination in assessing a corporation's pollution problems will be harmful in the long run. Compliance costs will rise annually and may be forced on a corporation by legal action before the corporation acts voluntarily; conversely, if voluntary compliance with environmental laws is undertaken, the corporation is able to phase its investment, maintain profits, and avoid becoming a defendant. Sound legal counsel would not advocate avoidance, and certainly not the evasion of environmental laws and rules. Competent conservative professional counsel must require immediate compliance.

What legal services are needed to guide corporate compliance with environmental laws? To avoid enmeshing a client in the treadmill of competing interstate pollution abatement laws and enforcement, prudence in legal counseling for commercial clients compels recommending (1) a survey of all laws affecting the client; (2) scientific and technical studies to frame the problems; (3) participation in agency regulation-making; (4) reporting and inspection; and (5) preparation of a voluntary abatement plan where the hazard is most acute, and shifts to uniform production patterns accommodating the most stringent environmental protection economically and technically viable.

### Survey and Synthesis of Governing Environmental Laws

Every business operation, regardless of its size, should know what agencies and rules now govern it or will come to govern it. Management and technical experts must have available the entire set of existing federal, state and local regulations which affect the company's business operations. Trade associations often provide

121. Reitze and Reitze, *Tax Incentives Don't Stop Pollution*, 57 A.B.A.J. 127 (1971).

122. This is so, despite congressional intent to give real incentives, acknowledging that the public should subsidize, since, "In effect, private industry is being asked to make an investment which in part is for the benefit of the general public." Senate Report 91-552, 91st Cong., 1st Sess. (1969), at 248.

123. H. Hentz & Co., *Pollution Control—A Growth Industry for the Coming Decade*, THE WALL STREET TRANSCRIPT, at 1 (Nov. 17, 1969).

these, but if not, or if those available are not tailored to a particular operation, legal counsel should be asked to compile a set. Local statutes and special state requirements on topics such as noise or transportation of wastes, will have to be prepared separately. Only when management knows what regulations do or will govern it, can it evaluate corporate conduct in terms of environmental liability, and initiate an optimal compliance program.

### Scientific and Technical Studies

An equally important first step in evaluation of pollution liability for either new or existing clients is to identify the range of corporate activity subject to environmental regulation. This must be done for each state in which a facility is located. The attorney and clients must then discuss retaining experts to assess what effluents are being discharged, what their components are, and what engineering hardware exists for their abatement. The use of different experts varies considerably depending on the problem. The attorney should review the range of expert services available, fees, retainers, and like issues. In this context, it is important to consider the issue of attorney-client privilege in using experts to assess the extent of pollution.

As the short review of government and private suits above reveals, legal attacks on pollution are continuing apace. Under some environmental laws, the government has the right to inspect a corporation's plants, books and records in appropriate circumstances without a search warrant.<sup>124</sup> Additionally, new laws protect from reprisals a corporation's employees who turn over pollution data to the federal government.<sup>125</sup> If there is reason to believe that a client's activities produce pollution and some liability, and that the client's books are open to inspection, it may be in the client's interest to make the assessment of its pollution as confidential as possible until abatement can be achieved.

Accordingly, the attorney may wish to hire the experts to aid him directly in identifying pollution liability. This procedure is akin to retaining an accountant to aid an attorney in counseling

124. See, e.g., OSHA, 29 U.S.C. § 651 *et seq.* (1970); Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (Supp. 1972).

125. See, e.g., 33 U.S.C. § 1367(a) (Supp. 1972).

his client on tax liability.<sup>126</sup> The attorney-client privilege is available to corporations.<sup>127</sup> To use it effectively, the attorney should retain the expert directly, although consultations with a corporation's own engineers and scientists should fall within the privilege as well.<sup>128</sup> Of course,

the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.<sup>129</sup>

Firms with house counsel face additional complications.<sup>130</sup> In its place, the privilege may be useful in assessing pollution liability.

### Participation in Agency Rule Making

The federal Environmental Protection Agency (EPA) regularly publishes prospective rules in the Federal Register. Most states give the same sort of notice. Comments on proposed rule-making should be made by a company's technical staff whenever it believes that the company's operations will be affected and that specialized data usually only available to the company through its own experts would be of use to the agency involved.

A typical example of rule-making was the August 31, 1973, notice published in the September 7, 1973, Federal Register on draft "Effluent Limitation Guidelines for Existing Sources and Standards of Performance and Pretreatment Standards for New Sources" in the phosphate manufacturing point source category.<sup>131</sup> Controls for phosphorous emissions from smelting, air pollution abatement operations, livestock feed run-off and other activity were

126. See, e.g., *U.S. v. Cote*, 456 F.2d 142 (8th Cir. 1972), and Advisory Committee Notes to Rule 503, Federal Rules of Evidence, approved by the Judicial Conference, October 1971, promulgated by the United States Supreme Court, 34 L. Ed. 2d at lxx-ccviii (Nov. 20, 1972). Ratification by Congress, pursuant to 28 U.S.C. § 2071 (Supp. 1973), is still pending.

127. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963).

128. See D. Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956).

129. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir.), cert. denied, 375 U.S. 929 (1963).

130. See generally James T. Haight, *Keeping the Privilege Inside the Corporation*, 18 THE BUSINESS LAWYER 551 (January 1963).

131. 38 Fed. Reg. 24470 (Sept. 7, 1973), amending 40 C.F.R. 422 (1973).

set forth. Public comments were invited before October 9, 1973—some 21 working days from the earliest possible receipt of public notice. Without advance preparation, a company would not be able to take advantage of its opportunity to comment within such a short period of time. Counsel should determine what rule-making is contemplated, and advise the corporation to begin immediate assessment of the technical and economic feasibility of complying with these rules.

Law suits are necessary to challenge a rule as being arbitrary, as in the case of Kennecott Copper Company's attack on the EPA secondary air quality standard limiting the annual arithmetic mean amount of sulfur oxides (sulfur dioxide) to 60 micrograms per cubic meter.<sup>132</sup> The court remanded the record for the Administrator to supply "an implementing statement" disclosing the scientific basis for the challenged standard.<sup>133</sup> Since failure to make timely challenges to regulations may foreclose the possibility of judicial review at a later date,<sup>134</sup> the Getty Oil Corporation was denied judicial review of certain portions of the Delaware state implementation plan because the corporation did not appeal the approval of the plan by the EPA Administrator within the 30-day limit prescribed by section 307(b)(1) of the Clean Air Act.<sup>135</sup> By following the proper procedural requirements of section 307, other petitioners have been able to obtain judicial review of state implementation plan approval.<sup>136</sup>

132. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). See also *National Helium v. Morton*, 326 F. Supp. 151, 5 E.R.C. 1545 (D. Kan.), *aff'd*, 455 F.2d 650 (1971).

133. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).

134. 42 U.S.C. §§ 1857h-5(b)(1) & (2) prescribe procedures for judicial review of acts of the Administrator. The Federal Water Pollution Control Act Amendments of 1972 contain provisions, 33 U.S.C. §§ 1369(b)(1) & (2), which are identical except for their allowance of ninety days for the filing of a petition.

135. *Getty Oil Company v. Ruckelshaus*, 467 F.2d 349, 358 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The court concluded, n.14, that:

Having failed to seek review of the Administrator's approval [of the state implementing plan] in a 307 proceeding, [Getty] is foreclosed from doing so by the clear language of 42 U.S.C. § 1857h-5(b)(1). It would likewise be foreclosed from raising these objections in a civil and criminal proceeding for enforcement. 42 U.S.C. § 1857h-5(b)(2).

136. See *Duquesne Light Company v. EPA*, 481 F.2d 1 (3d Cir. 1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (3d Cir. 1973); *Appalachian Power Co. v. Ruckelshaus*, 477 F.2d 495 (4th Cir. 1973).

Some laws, such as OSHA, permit companies to help prepare special rules to meet special situations. Unless management has its compilation of applicable rules and rule-making, it misses every chance to have a hand in shaping the rules which govern it. Unwanted consequences, including liability for violation of the rules, are more likely to fall upon the uninformed.

### Reporting and Inspection

Another category of rules which are essential for both management and technical experts to understand are those governing reports which its company must file with the government. Timothy Atkeson, formerly General Counsel to the President's Council on Environmental Quality, sums up the requirements of these reports as "truth in pollution."<sup>137</sup> The "umbrella" acts governing occupational health and water and air emissions all require reporting.<sup>138</sup> The Securities and Exchange Commission now requires disclosures in reports to it as to pollution which can result in costly abatement, litigation, or other business dislocation.<sup>139</sup> Many of these reports are available to the public. The extent to which the results of an investigation or inspection are available in private liability litigation remains uncertain. One court has held that OSHA inspection results are not available;<sup>140</sup> nevertheless, attempts to subpoena such reports can be expected. Of course, the government has access to all such reports.

Management should know what reports exist and where they are to be filed. Uniform recording procedures and cross-reference tools should facilitate the compilation and comparison of reports required under different laws. Such reports can help establish the legal and factual basis of any liability. An attorney can render a great service to management by outlining the interrelationship of such reports under different laws.

137. Council on Environmental Quality, Final Report of the First U.S.-U.S.S.R. Meeting of Specialists Considering Legal and Administrative Measures for Environmental Protection According to the U.S.-U.S.S.R. Agreement of May 23, 1972 (May 9, 1973).

138. See 42 U.S.C. § 1857c-9 (1970); 33 U.S.C. §§ 1251(c), 1314, 1318, 1341, 1342 (Supp. 1972); 42 U.S.C. § 4332 (1970).

139. SEC Release No. 33-5386; SEC Release No. 34-10116 (April 20, 1973). See discussion, *infra*, text at notes 204-40.

140. *Pilar v. S.S. Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972).

## Voluntary Abatement

Once a corporate client understands the extent of its liability, it can act in several ways to remove the sources of liability. It can hire expert services to cart off waste effluent or to treat it on the spot, both as interim measures. It can then review the alternative methods for long term pollution control. It is necessary to move a client at least to this point as quickly as possible.

Government would prefer even more positive action. Maurice R. Eastin, a consultant to William Ruckelshaus when he was head of the federal Environmental Protection Agency, sympathetically served as "a catalyst between industry and government to first reduce emotion to reason and then to environmental action." From this unique role, he observed that "industry seems never to be prepared until they go to court." He argued that "inept business relations with government—overreaction—defensive rather than open attitudes to public intrusion in 'your' [business] affairs—is an industry weakness." He advocated "industrial leadership" to achieve a "total commitment" to implementing environmental laws.<sup>141</sup>

Several advantages would accrue from such preparation. In the first place, once a corporation launches a comprehensive plan of environmental management, it is unlikely that suit from either government or private sources will seriously disrupt business operations. Even in the event of suit, factors such as the good faith actions of a defendant in minimizing pollution, the availability of technology for minimizing it, and the impact of abatement on important factors such as employment and overall economy can tend to limit liability. For example, in *Turza v. Elliot Coal Mining Co.*,<sup>142</sup> the defendant had done everything presently known and economically feasible to eliminate air pollution from its coal processing plants. The adjacent land owners were denied damages for injuries from the remaining pollution. In *Department of Health v. Concrete Specialties, Inc.*,<sup>143</sup> fines were reduced to a nominal sum. In *Boomer v. Atlantic Cement Co.*,<sup>144</sup> the economic value of the plant to the

141. Text of address by Maurice R. Eastin, Special Consultant to the Administrator, Environmental Protection Agency, "Bureaucracy and Industry Leadership," before the Minnesota Association of Commerce and Industry, November 1972.

142. 441 Pa. 592, 272 A.2d 910, 2 E.R.C. 1183 (1971).

143. 112 N.J. Super. 407, 271 A.2d 595 (App. Div. 1970).

144. 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3d 590, 1 E.R.C. 1175 (1970).

local area, both in terms of employment and the town's economy, were held by the court to be of such importance that plaintiff's petition for an injunction was denied. The court levied damages against the company for past injury to neighboring property from its particulate fallout, and in lieu of closing the plant entirely, ordered that it pay permanent damages in the nature of an easement to satisfy all future claims resulting from the pollution.

In the second place, even in the event of suit, the possibility of reaching an out-of-court settlement is greatly enhanced by demonstrating good faith efforts to comply with all applicable regulations. Besides saving litigation costs, settlements permit a planned and gradual, rather than a forced and rapid, abatement schedule. For example, the Fairless Hill Works of U.S. Steel in Pennsylvania polluted Bordentown, New Jersey, a neighboring town across the Delaware River, with red-colored particulates. Citizen protest was intense and resulted in accelerated installation of effective emission control equipment.<sup>145</sup> Similarly, the Sierra Club agreed to cease its opposition to the Columbia L.N.G. Corporation's construction of a liquid natural gas terminal and pipeline facility at Cove Point, Maryland, on Chesapeake Bay, after securing from the company land use restrictions at the terminal site to protect the environment.<sup>146</sup> The company agreed to designate large parts of the site for use as a wildlife refuge, as a scenic easement given to the State of Maryland, and for recreational use while the plant is in operation. Upon discontinuance of the facility, the total 1100 acre site is to be given to Maryland for use as a parkland, open space, or wildlife refuge.

In the third place, the corporation which is fully apprised of its environmental liabilities is in the best position to optimize its

145. President's Council on Environmental Quality, Report, *Environmental Quality* (1971), at 91.

146. The agreement of December 5, 1972, between the Sierra Club and the Maryland Conservation Council culminated three weeks of complex negotiations between Columbia L.N.G., which owns the land, and the conservationists, who got assurances that environmental interests would be protected by significant land use restrictions at the terminal site. Agreement was announced simultaneously in San Francisco by Sierra Club President Judge Raymond J. Sherwin and in Washington by Columbia Gas System Chairman John W. Partridge. Sierra Club President Sherwin termed the agreement "a significant example of the Club's recently adopted energy policy urging that environmental constraints be observed in energy development. It's an example of how this policy can work out in practice."



environmental management program. Substantial cost savings can be realized by a systems approach to the solution of interrelated pollution problems. Proper counseling is essential to ensure that all potentially harmful discharges are considered in such a comprehensive plan.

In a field evolving as quickly as pollution abatement technology, this year's solution to one pollutant may be obsolete three years from now. This is especially true in the field of water pollution control where effluent limitations are defined by the evolving standards of "best practicable" and "best available" control technologies.<sup>147</sup> In view of this uncertainty, the client may wish to lease equipment or hire services for pollution control, until the applicable laws and/or technology evolve further. Where hardware for pollution control is well developed and the applicable regulations are stable, the client may wish to purchase the control equipment. Choice of the method of financing these purchases is another area where counsel can assist corporate management. As an alternative to the corporation's own financing arrangements, it may be possible to utilize special loans from the Small Business Administration.<sup>148</sup> Tax exempt municipal bonds might be used where local government has authority and interest in using this technique.<sup>149</sup> Roles for corporate counsel vary with each alternative financing method. These roles are quite traditional and need no further development here. What is important to remember, however, is that environmental laws triggered such roles.

As corporate counseling in environmental law expands, these preliminary suggestions as to types of legal services will be refined. In themselves, however, they suggest the wealth of counseling which should be a part of each firm's practice.

### *Occupational Health and Safety*

What water and air emission regulations have done for corporate counseling regarding pollution liability, the Williams-Steiger Occupational Safety and Health Act<sup>150</sup> (OSHA) has done for coun-

147. 33 U.S.C. § 1311 (Supp. 1972).

148. 15 U.S.C. § 636 (Supp. 1972).

149. Address by Robert H. Aldrich and Neil A. Eisen, "Industrial Pollution Control Facilities—Availability of Federal and Other Public Funds," International Pollution Engineering Congress, Philadelphia, October 22-26, 1973.

150. 29 U.S.C. § 651 *et seq.* (1970).

selling as to employee safety and the environment of the working place. Although literature about pollution legislation and liability is growing,<sup>151</sup> few environmental discussions have focused on OSHA.<sup>152</sup> For this reason, it may be more useful here to suggest the role OSHA is coming to have in corporate legal counseling, labor law, and related fields.

Until April 28, 1971, the states were primarily responsible for the setting of standards to protect and regulate workers' occupational safety and health. In providing for federal standards, record keeping and reporting requirements, inspection and enforcement, OSHA preempted this responsibility and fundamentally recast the laws for protecting the environment of the working place. More generally, OSHA is important because it greatly extends the reach of federal law in aiding environmental protection. As Richard P. Carter, counsel to the Johns-Manville Corporation in Denver has noted, OSHA

is the most extensive and massive intervention of government thus far into industry in the United States. . . . [T]ime will probably prove this point all too well.<sup>153</sup>

### OSHA and Joint Efforts by Environmental and Labor Organizations

Congress passed OSHA as a result of intensive lobbying by organized labor. Industrial lobbying in support of Administration proposals succeeded only in modifying the proposed legislation in two respects: (a) creating an administrative tribunal, independent of the Department of Labor, to review complaints of violations; and (b) requiring that plants may be shut down by a United States district court order only upon a showing of imminent danger.

While the environmental conservation lobby did not follow OSHA through enactment, it is now very well aware of the law's potentialities. An *ad hoc* coalition of some ten environmental groups, including such leaders of the environmental public interest bar as

151. See generally the collection of state and federal laws in B.N.A. ENVIRONMENTAL REPORTER. See also bibliography, 10 THE PUBLIC LAND AND RESOURCES LAW DIGEST 120 (Spring 1973).

152. See citations, *infra*, notes 153-203.

153. Richard P. Carter, *Advising Employers Under OSHA*, OCCUPATIONAL SAFETY AND HEALTH ACT 9, Practising Law Institute (1972) [hereafter cited as "OCCUPATIONAL"].

the Environmental Defense Fund and Natural Resources Defense Council formed to endorse the Oil, Chemical and Atomic Workers International Union (OCAW) in its recent strike against the Shell Oil Company and Shell Chemical Company at refineries and chemical plants in five states.<sup>154</sup> The coalition supported OCAW in its demands that new contracts provide for joint labor-management procedures for promoting health and safety in the working place. OSHA's congressional findings call for such joint action.<sup>155</sup> OCAW wants employers to survey plants for health hazards, provide physical examinations for workers, and give the union all information on morbidity and mortality experiences of employees.<sup>156</sup> Several major corporations, including Atlantic Richfield, Gulf, and Texaco have agreed to perform such activities through a joint committee.

Scientist Barry Commoner has articulated the environmentalists' interest in supporting labor union demands related to OSHA. He states that OSHA

can go a long way toward reducing environmental pollution —because it requires that industrial plants maintain healthy and safe conditions for their workers. This means that plants must control the release of poisonous materials and so prevent them not only from contaminating the work place, but also from polluting the environment outside the factory gates.<sup>157</sup>

Environmentalist David Brower applauded the coalition in support of the Shell strike:

Through cooperation between diverse groups with mutual aims we can combat the reluctance of corporations to acknowledge responsibilities.<sup>158</sup>

In short, OSHA will feature increasingly in the development of environmental law because the Act embodies mutual aims of labor

154. Editorial, "Support the Strike," *Not Man Apart*, March 1973.

155. 29 U.S.C. §§ 652(1), (2) & (13).

156. Oil, Chemical and Atomic Workers International Union, Report, *To Eliminate Industrial Health Hazards*, February 15, 1973.

157. Barry Commoner, Foreword, *To Eliminate Industrial Health Hazards*, Oil, Chemical and Atomic Workers International Union, February 15, 1973.

158. David Brower, Letter to the Editor, *San Francisco Chronicle*, March 13, 1973.

and conservation. The Act will have as great or even greater an impact nationally than the National Environmental Policy Act of 1969.<sup>159</sup> It covers almost 60 million workers in about 5 million working places.<sup>160</sup> OSHA is only now being vigorously enforced, owing to the unavoidable start-up period.

### OSHA Outlined

Before discussing OSHA's implementation and some of its problems, it will be useful to highlight those key elements of the Act which are of interest to the practicing bar.<sup>161</sup>

At the outset, the Act, with its extensive regulations,<sup>162</sup> and *Compliance Operations Manual*,<sup>163</sup> represents a legal maze through which business managers have sought guidance. Despite massive efforts by the OSHA Administration to provide both general and specific advice, many employers are still unclear as to their obligations under OSHA.<sup>164</sup> A skeletal outline of OSHA provisions should highlight the following elements:

*Coverage.* The Act is as expansive as the Commerce Clause: all employers "engaged in a business affecting commerce" are covered.<sup>165</sup> The Act exempts federal, state and municipal employees. By Executive Order, federal employees receive similar protection;<sup>166</sup> however, similar coverage has not been extended to municipal and state employees, a gap which has been criticized.<sup>167</sup>

159. NEPA, 42 U.S.C. § 4321 *et seq.* (Supp. 1972).

160. *The President's Report on Occupational Safety and Health*, No. 3, U.S. Gov't Printing Office, December 1973 [hereafter cited as "Report #3"].

161. No single article has outlined OSHA and its practice elements fully. The PLI text cited, *supra* note 153, is a useful introduction. For legislative history, see 3 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 5177 (1970).

162. 29 C.F.R. ch. 17 (1974).

163. OSHA Publication 2006, U.S. Gov't Printing Office.

164. See Interview with George C. Cuenther, *OSHA—How Will It Affect R and D?*, 23 RESEARCH/DEVELOPMENT 24, 27 (November 1972). See also Gordon M. Betz, *Focus—On OSHA: Management's New Challenge to Improve Safety*, 119 WATER & SEWAGE WORKS 58 (No. 11, 1972).

165. 29 U.S.C. § 652(5) (1970).

166. Executive Order No. 11612, "Occupational Safety & Health Programs for Federal Employees," July 26, 1971.

167. Editorial, *Responsibility for Safety*, 119 WATER & SEWAGE WORKS 57 (November 1972). Howard Pyle, president of the National Safety Council, wrote each state governor on February 9, 1972, that "The public employee has been seriously neglected with respect to occupational safety and health programming." Betz, *supra* note 164, at 61.

*General duty clause.* Section 5 of OSHA provides that

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm. . . .<sup>168</sup>

While this clause was intended primarily as a backdrop for the more specific OSHA standards, it has also been used as an independent source of substantive law. In one case, an employer was held liable for failing to remain on the work scene to supervise his employee's bracing of a dangerous wall prior to the commencement of work near it, even though the employer had twice warned the worker, and had ordered him not to work near the wall until it was braced. The man worked in contravention of these orders, and died of injuries suffered in the wall's collapse. Liability was expressly grounded upon a breach of the general duty prescribed in section 5.<sup>169</sup>

*Standards.* OSHA provides<sup>170</sup> for (a) "consensus standards,"<sup>171</sup> which could be adopted prior to April 28, 1973 without regard to the requirements of the Administrative Procedure Act,<sup>172</sup> (b) federal minimal standards promulgated after a thorough review, comment and hearing procedure,<sup>173</sup> and (c) temporary emergency standards,<sup>174</sup> effective upon publication in The Federal Register, for emergency situations involving grave danger from exposure to particular hazards, e.g. asbestos dust.<sup>175</sup>

*Variations.* Where an employer is unable to comply with a given standard,<sup>176</sup> variance rulings will specify what environmental protections the employer must provide in lieu of meeting the standards. One hundred eight variance applications were filed in 1971.<sup>177</sup> In

168. 29 U.S.C. § 654 (1970).

169. This case and others are abstracted in Betz, *supra* note 164, at 65-67.

170. 29 U.S.C. § 655(a) (1970).

171. Entire list is in *Report #3*, *supra* note 160, at 11-12.

172. 5 U.S.C. § 5 (1970).

173. 29 U.S.C. § 655(b) (1970).

174. 29 U.S.C. § 655(c) (1970).

175. *The President's Report on Occupational Safety and Health*, Report No. 2, U.S. Gov't Printing Office, May 1972 [hereafter cited as "*Report #2*"].

176. 29 U.S.C. § 655(d) (1970).

177. *Report #2*, *supra* note 175, at 18. See also P.I. Weiner, *Variations Under the Occupational Safety and Health Act of 1970*, OCCUPATIONAL, *supra* note 153, at 188.

1972, 182 applications were filed, of which 4 were approved and 84 were pending in December 1973.<sup>178</sup>

*Record-Keeping.* Records of occupational injuries and illnesses must be kept regularly and must be current. They are open to inspection by the OSHA Administration and a summary must be posted.<sup>179</sup>

*Inspection Without Warning.* OSHA inspectors may visit a work place at any reasonable time. They are entitled to inspect and investigate, in a reasonable way, all equipment and conditions, and "to question privately any such employer, owner, operator, agent or employee."<sup>180</sup> Special inspections are triggered by reports of accidents or fatalities or by employee complaints. It should be noted that complaining employees are immune from discipline by their employer, even if their complaints are found to lack substance.<sup>181</sup>

*Enforcement.* In connection with inspections, the OSHA agent must first confer with the employer. Citations for violations of standards are issued 4 to 6 weeks later;<sup>182</sup> an employer has only 15 days thereafter to decide whether or not to contest the citation.<sup>183</sup> In 1971, the Commission issued 9875 citations for a total number of 57,527 violations disclosed in 16,756 investigations. In 1972, the Commission issued 23,900 for 125,400 violations arising out of 36,100 inspections.<sup>184</sup> The citation is heard before the OSHA Commission, an administrative court, with provision for appeal to the Court of Appeals for the circuit in which the violation is alleged to have occurred.<sup>185</sup>

*Penalties.* Civil penalties of up to \$10,000 per violation are prescribed.<sup>186</sup> During 1972, in the New York Region alone (New York and New Jersey), \$421,000 in penalties were imposed on 3600 citations, following 7200 inspections.<sup>187</sup> In contrast, the pre-

178. *Report #3, supra* note 160, at 15.

179. 29 U.S.C. § 657(c) (1970).

180. 29 U.S.C. § 657(a) (1970).

181. 29 U.S.C. §§ 660(c) & 657(f) (1970).

182. 29 U.S.C. § 658 (1970).

183. 29 U.S.C. § 659(a) (1970).

184. *Report #3, supra* note 160, at 36, Table 7.

185. 29 U.S.C. § 660 (1970).

186. 29 U.S.C. § 666 (1970).

187. *Report #3, supra* note 160, at 39, Table 12.

vious year had seen only \$103,123 in penalties resulting from 1524 citations following 3369 inspections.<sup>188</sup>

OSHA's constitutionality has been accepted by labor and environmental interests. At least one attorney for employer interests who has reviewed OSHA has concluded not only that its expansive reach is constitutional but also that it will be constitutionally implemented.<sup>189</sup> Nevertheless, questions have been raised in debate, though not yet in court, as to whether parts of the Act violate the 4th, 5th, and 6th amendments to the Constitution.<sup>190</sup>

### Administration

The OSHA administration's small size necessarily restrains its operating style, the depth of its investigation and the scope of enforcement. Institutional restraints also emerge from the lack of medical and scientific knowledge regarding various types of environmental health hazards. OSHA creates a National Institute on Occupational Safety and Health (NIOSH) in The Department of Health, Education and Welfare, which is to undertake empirical studies to provide a factual basis for the setting of standards related to new and suspected hazards.<sup>191</sup>

To relieve some of this burden, OSHA contemplates shifting some responsibility for protecting the working environment back to the states.<sup>192</sup> States are encouraged to prepare occupational safety and health plans in areas where no federal standards have emerged. Once a state plan is approved, the state retains jurisdiction over those matters contained in the plan, thereby avoiding creeping federal preemption. By the spring of 1973, forty-seven states had agreed upon interim joint plans involving dual jurisdiction, and were beginning to prepare state plans.<sup>193</sup> By that same date, 44 of those states had submitted plans.<sup>194</sup> Three state

188. *Report #2, supra* note 175, at 88.

189. Edward P. Weber, Jr., Law Dept, Republic Steel Corp., Address at First International Pollution Engineering Congress, Cleveland, Ohio, December 5, 1972.

190. McNeill Stokes, *Legal Considerations of the OSHA of 1970*, OCCUPATIONAL, *supra* note 153, at 142-52.

191. 29 U.S.C. § 671 (1970).

192. 29 U.S.C. §§ 651(B)(11) & 667 (1970).

193. District of Columbia, Guam, Puerto Rico and the Virgin Islands have also filed. South Dakota, Nevada and Ohio had not yet acted as of May 1972. *Report #2, supra* note 175, at 36.

194. *Report #3, supra* note 160, at 25. Four territories and the District of Columbia had also submitted plans.

plans—those of Montana, Oregon and South Carolina, had been approved as of December 1973.<sup>195</sup> Beginning in fiscal 1971, continuing through 1973, the Federal Government is to fund 90% of the cost of developing new plans. After the plans have been implemented, 50% of their operational costs will be subsidized by federal grants.<sup>196</sup>

### Aspects of Legal Counseling Under OSHA

Not surprisingly, counseling under OSHA parallels, to some extent, the sort of pollution control counseling which was described earlier in this article:<sup>197</sup>

(a) Counsel should examine the OSHA plans enacted by each state in which their clients have operations, as well as the federal OSHA standards which affect such operations. Where federal authorities have established "priorities," thorough inspections can be anticipated and clients must be prepared for such inspections. Priorities have been set for five "target industries" and five "target health hazards."<sup>198</sup>

(b) Counsel should review how each client keeps its files and reports. OSHA reports and data should be physically separated from other files, since they are subject to inspection. Where trade secrets are involved, a qualified privilege is given under the Act,<sup>199</sup> and clients should be prepared to avail themselves of this protection.

(c) Clients should employ private experts to test for environmental hazards at all of their working places. They should have experts on call for conducting tests to parallel those made by OSHA inspectors if a serious OSHA liability issue arises. Where problems of liability are acute, tests under the direction and control of counsel should be used to secure the insulation of the attorney-client privilege.<sup>200</sup>

(d) Counsel should prepare their clients for OSHA inspections and decide in advance upon plant procedures to be followed during

195. *Id.*

196. *Id.* at 28-29.

197. See text accompanying notes 119 through 141 *supra*.

198. These are: marine cargo handling; roofing and sheet metal; meat and meat products; transportation equipment; lumber and wood products—for the industry targets. The health hazards are: asbestos, cotton dust, silica, lead, carbon monoxide.

199. 29 U.S.C. § 664 (1970).

200. See text accompanying notes 126 through 130 *supra*.



such inspections. Since no notice is given, advance preparation is vital. Such preparation becomes even more important in light of the possibility of private negligence actions grounded on the same conditions which give rise to the alleged violation. Although OSHA inspectors' reports are probably immune from subpoena in such suits,<sup>201</sup> attempts to subpoena those reports can be expected as this article noted above.

(e) Where a plant is not in compliance with OSHA regulations, counsel should advise plant managers that they must conform to standards, seek variances, or risk citation and mandatory abatement. Since a company has only 15 days from the date of a citation to decide to contest it,<sup>202</sup> prompt attorney-client consultations are needed.

(f) Collateral issues warranting scrutiny by counsel include a client's dealings with third parties. A client's customers may seek indemnification agreements covering possible OSHA violations and counsel should require that any such agreements be narrowly tailored to fit the type of product or employment involved. This is especially important since, while workmen's compensation laws preclude suits against employers, employees may sue third parties for injuries. Indemnification under "hold harmless" clauses must be reviewed for sufficiency in this new context.

(g) As OSHA inspections, citations and prosecutions increase, the need for prophylactic legal advice will become more apparent. And it is apparent that enforcement activities will increase. As George Guenther, Assistant Secretary of Labor for OSHA Administration, has observed, Congress "made the judgment that we have had permissive enforcement for too long."<sup>203</sup> Prudent counsel should not wait for this development, but should advise clients to comply now.

### *Securities Act Practice: Disclosures Relating to Environmental Liability*

Securities regulation has been a staple of corporate legal practice for four decades. In the next four decades, as environmental counseling assumes a place in such practice, it is only natural that it

201. *Pilar v. S.S. Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972).

202. 29 U.S.C. § 659(o) (Supp. 1972).

203. Interview with George Guenther, *supra* note 164.

will also become prominent in the securities field. The precursors of this development are already apparent. The Securities and Exchange Commission has taken a cautious but important step toward requiring that reports and registration statements disclose facts relating both to corporate compliance with environmental laws and to steps taken to protect the environment. All filings after July 3, 1973 have been required to make new disclosures on forms S-1, S-7, S-9, 10, 10-K and 8-K.<sup>204</sup>

Reporting requirements reflect that growing legal trend which, as noted above,<sup>205</sup> in Timothy Atkeson's words, can also be referred to as "truth in pollution." In the public sector, the NEPA<sup>206</sup> mandates similar disclosure regarding all agency comments on environmental impact statements under provisions of the Freedom of Information Act.<sup>207</sup> As mentioned above, the umbrella laws have like provisions: the Clean Air Act Amendments of 1970 provide for public access to EPA policies and positions;<sup>208</sup> and the Water Quality Amendments of 1972 similarly assure a wide disclosure of facts on water pollution issues.<sup>209</sup>

### SEC Rules

The SEC promulgated its new environmental disclosure rules "pursuant to the provisions" of both the 1933 and 1934 Acts and NEPA.<sup>210</sup> NEPA requires that all federal policies, regulations and laws be interpreted in accordance with NEPA's design for assuring environmental quality. It further requires each agency of the Federal Government to review its legislative authority to determine if it is sufficient to permit compliance with NEPA.<sup>211</sup> The SEC has decided that its rule-making powers provide sufficient authority to comply with the SEC's new statutory duties.<sup>212</sup>

204. SEC Securities Act Release No. 33-5386; Exchange Act Release No. 34-10116 (April 20, 1973), reproduced in Commerce Clearing House, *FEDERAL SECURITIES, CURRENT*, 79,342, 83,029 [hereafter cited as "*Disclosure Releases*"].

205. Note 137 *supra*.

206. 42 U.S.C. § 4332 (1970). See also Executive Order 11514 (March 5, 1970).

207. 5 U.S.C. § 552 (1970).

208. 42 U.S.C. § 1857h-7 (1970).

209. 33 U.S.C. §§ 1361, 1363, 1371, 1374, 1375 (Supp. 1972).

210. *Disclosure Releases*, *supra* note 204, at 83,029.

211. 42 U.S.C. §§ 4332(1) & 4333 (1970).

212. Letter, April 1, 1971, from Philip A. Loomis, Jr., General Counsel, SEC, to Timothy B. Atkeson, General Counsel, CEQ, filed in *NRDC v. SEC*, Civil Action No. 409-73 (D.D.C.) (complaint filed March 2, 1973).

Despite its apparent authority, the SEC has moved gingerly toward compliance. Initially, the then SEC Chairman William J. Casey opposed SEC's assuming responsibility for disclosures on environmental issues.<sup>213</sup> It is true that on July 19, 1971, the SEC had advised that disclosures must include, "where material," information relating to any legal proceedings under environmental laws, plus supplemental information justifying any failure to make certain other disclosures.<sup>214</sup> Yet while the July 19, 1971, ruling was responsive to new environmental concerns, and in part had been prodded by a citizen petition for rules on environmental disclosures,<sup>215</sup> it was evident "that little more [was] required under the new release than was already necessary under prior laws and regulations."<sup>216</sup>

The SEC's reluctance to acknowledge what NEPA's principal author termed "a statutory enlargement . . . of all instrumentalities of the Federal Government,"<sup>217</sup> resulted in considerable pressure for compliance. Chairman Casey on February 17, 1972, at the House of Representatives overview hearings on NEPA which were conducted by Representative John Dingell, finally agreed that NEPA had indeed augmented the SEC's earlier mandate under the 1933 and 1934 Acts.<sup>218</sup>

Casey's testimony pointed to SEC releases of February 16, 1972, whose purpose was to "specify more precisely the disclosure referred to in Securities Act Release 5170 (July 19, 1971) in regard to environmental matters."<sup>219</sup> The 1972 amendments were essential-

213. See Casey, Address, "Corporate Responsibility in the 70's," delivered to the American Society of Corporate Secretaries, Los Angeles, June 14, 1971. The same address was delivered again, slightly revised, to the ABA National Institute on Officers' and Directors' Responsibilities and Liabilities, New York City, October 21, 1971, published in 27 BUSINESS LAWYER, *Special Issue: Proceedings of the ABA National Institute*, at 51 (February 1972).

214. SEC Releases Nos. 33-5170 & 34-9252 (July 19, 1971).

215. Petition, Project for Corporate Responsibility and NRDC *et al.* (June 7, 1971).

216. Schoenbaum, *The Relationship Between Corporate Disclosure and Corporate Responsibility*, 40 FORDHAM L. REV. 565, 572 (1972).

217. Senator Jackson, Floor debate on S.1075, 115 CONG. REC. 19009 (July 10, 1969).

218. Casey, Statement, Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries (Feb. 17, 1972) [hereafter cited as "Statement"].

219. SEC Releases Nos. 33-5235 & 34-9498 (Feb. 16, 1972).

ly the same as those which became effective July 3, 1973. Casey further stated that:

After the implementation of these proposed rule changes the Commission will continue to monitor the various reports it receives under the federal securities laws to determine whether additional specific disclosure requirements may be appropriate.<sup>220</sup>

Even at the time of these hearings, however, it was unclear how far the SEC would move. Casey testified that the SEC was continuing to review what further steps should be taken "to initiate or improve the goals set forth" in NEPA.<sup>221</sup>

### What SEC Rules Now Require

With this background, we can examine how far the new disclosures rules go, and can offer comment on their scope. Essentially three new requirements emerge:

(a) Under the description of business items, disclosures are required of the present and possible future effects that compliance with environmental laws may have on capital expenditures, earnings and the competitive position of the registrant and its subsidiaries.<sup>222</sup>

(b) Disclosures of legal proceedings involving environmental claims are required (i) if the claim for damages exceeds 10% of the registrant's current assets, including the assets of its subsidiaries, or (ii) if the proceedings are by a governmental authority regardless of damage claims, or (iii) if the proceeding by a private claimant is "material" notwithstanding the 10% test.<sup>223</sup>

(c) Disclosures of legal proceedings by governmental authorities under environmental laws are also required if they may have "a substantial effect upon the earnings or financial condition of the registrant," whether such proceedings are pending or are simply known to be contemplated.<sup>224</sup>

The disclosure amendments described in "(a)" above do not

220. *Statement, supra* note 218, at 11.

221. *Id.* at 149.

222. *Disclosure Releases, supra* note 204. Such disclosure is required on Forms S-1, S-7, S-9, 10 and 10-K.

223. *Id.* Disclosure is required on Forms S-1, S-9, 10 and 8-K.

224. *Id.* Disclosure is required on Form S-7.

specify the minimum or maximum future time periods for which descriptions are required. Realizing that compliance programs for different industries may involve substantially different lead times, the Commission felt that it was best not to specify the time period. The only guidance provided to management in this regard is that, whenever management has a reasonable basis to believe that future environmental compliance may have a material effect on its expenditure, earnings or competitive position, then such matter should be disclosed.<sup>225</sup> Former Chairman Casey had noted that new rules for specific industries would be promulgated if the need arose.<sup>226</sup>

The Commission limits these disclosures *solely* to material expenditures necessary to comply with environmental provisions. Where expenditures for compliance with environmental laws involve or are combined with replacement, modification or additions of equipment or facilities motivated by *other* than environmental reasons, management must estimate the cost due to environmental compliance, provided that there is a reasonable basis to segregate these costs. Management may not calculate and state such expenditures on an annual basis when this would diminish the apparent materiality of the expenditures or would result in nondisclosure.<sup>227</sup> The test for "materiality," as noted last October by Commissioner Phillip A. Loomis, Jr., remains that of which "a reasonable, prudent investor should be informed, in connection with an investment decision to buy, to sell, to hold, or to vote."<sup>228</sup>

Although an environmentally related administrative or judicial proceeding by governmental authorities is material regardless of the amount of damage involved, a detailed disclosure of each such proceeding need not be made. The reporting of a number of similar cases in generic groupings is permitted. If such proceedings in the aggregate are "material," a statement describing their effect on the financial condition of the company is required.<sup>229</sup> Regarding any

225. *Id.* at 83,029.

226. *Statement, supra* note 218, at 10:

One of the matters which the Commission will be exploring is the extent to which it appears necessary to require specific disclosures for various industry groups.

227. *Disclosure Releases, supra* note 204, at 83,036.

228. Corporate Social Responsibility Panel, *The Role of the SEC*, 28 BUSINESS LAWYER 215, 232 (March 1973).

229. *Disclosure Releases, supra* note 204, at 83,031.

single public or private proceeding, the Commission requires individual full description whenever such proceeding involves damages in excess of 10% of the corporation's assets and consolidated basis or a claim which "otherwise may be material."<sup>230</sup> This latter provision may well include claims for injunctive relief. It is also significant to note that the new rules prohibit the classification of environmental suits as "ordinary routine litigation incidental to business," thereby foreclosing that exemption from the present rules concerning disclosure of legal proceedings.<sup>231</sup>

### The Rules' Effect

The new disclosure requirements go beyond the traditional. They recognize that pollution abatement is costly and affects companies accordingly. More expansive SEC rules probably can be expected. Former Chairman Casey stated that the SEC is "engaged in what is essentially a learning process . . . a continuing action of new methods to measure and fulfill our environmental responsibilities" under NEPA.<sup>232</sup> Commissioner Loomis recently has expressed his doubt that much more is needed, but acknowledges that others disagree with him.<sup>233</sup> Although G. Bradford Cook, the SEC Chairman succeeding Casey, appeared to be in agreement with most of Casey's views presumably on environmental issues as well as others,<sup>234</sup> it is probable that the views of subsequent chairmen will evolve to the point of requiring further disclosures.

Major critics of the new rules are testing their demands for more extensive environmental disclosures in federal court.<sup>235</sup> The Environmental Protection Agency, in commenting to the SEC on the proposed rules noted how they could better serve NEPA and aid EPA's work.<sup>236</sup> Moreover, although the rules purport to follow

230. *Id.* at 83,030.

231. *Id.*

232. *Statement, supra* note 218, at 1.

233. Corporate Social Responsibility Panel, *The Role of the SEC*, 28 BUSINESS LAWYER 215, 231 & 233 (March 1973).

234. S. James Rosenfeld, *SEC Update—Policies Unchanged Under New Chief*, 169 N.Y.L.J., No. 58, at 29, col. 3 (March 26, 1973).

235. NRDC v. SEC, Civil Action No. 409-73 (D.D.C.) (complaint filed March 2, 1973). *See also* ruling dismissing a prior action to permit initial determination by a district court, NRDC v. SEC, Docket No. 72-1148 (D.C. Cir. Feb. 8, 1973).

236. Letter, May 30, 1972, from Sheldon Meyers, EPA, to Charles J. Shepp, SEC, filed in NRDC v. SEC, Civil Action No. 409-73 (D.D.C.) (complaint filed March 2, 1973).

NEPA, there is no indication that the SEC sought and encouraged the aid of the Council on Environmental Quality in their preparation.<sup>237</sup>

The inadequacies of the new rules are evident. Why require the disclosure of legal proceedings alone? Public protests over pollution have resulted in abatement action with major economic impact; yet the effects of such protests of abatement are ignored. The rules also omit any requirement that a corporation disclose any revaluation of assets which results from or is affected by environmental regulation. The significant impact which environmental regulations may have on real estate interests are neglected entirely.

Among the best indicators of how much further the draft rules could have gone—and may well yet go—is the thorough and provocative *Howard Law Journal* article by two attorneys from the SEC General Counsel's Office.<sup>238</sup> See also the excellent essay by Bevis Longstreth, delivered in October 1972, concluding that the SEC could do more to require disclosure of company activity having social impact.<sup>239</sup>

In sum, the new SEC rules are barely a beginning. Requirements for additional disclosures under NEPA and the securities laws can be expected. Any additional disclosure requirements will help advance the salutary trend toward truth in pollution. An oft-quoted maxim of Mr. Justice Brandeis is appropriate in this context:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants, electric light the most efficient policeman.<sup>240</sup>

Before too long, legal counsel will be required to help dress a company's naked environmental facts and prepare them to meet the light of public scrutiny.

237. Under NEPA, 42 U.S.C. § 4332 (1970), the CEQ is charged with overseeing the Act's implementation.

238. Theodore Sonde and Harvey L. Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"* 16 HOWARD LAW JOURNAL 831 (Summer 1971).

239. Corporate Social Responsibility Panel, *The Role of the SEC*, 28 BUSINESS LAWYER 215, 216 (March 1973).

240. BRANDEIS, *OTHER PEOPLE'S MONEY* (1914), at 92.

*Land Use: The Fastest Growing Area  
of Environmental Regulation*

Just as pollution laws were born and multiplied prolifically between the late 1950's and the early 1970's, so the next score of years will witness a blooming of state laws regulating land use. Emergent laws already regulate (i) changes in the use of marshes, flood plains, agricultural lands, forests; and (ii) land developments such as the siting of electrical power plants, the construction of resorts and second homes, the development of shopping centers and suburban residences, and the planning of new industrial complexes. The rapid introduction of governmental regulation into land use has been aptly called "revolutionary."<sup>241</sup> Any attorney with a real estate practice, or with clients undertaking new or expanded land use, must keep up with these new laws. A review of one new type of state legislation common to most coastal states will suggest the new roles required for attorneys.

**New York's Tidal Wetlands Act**

In its 1972-73 legislative session, New York debated and adopted several major laws regulating private land use in that state. We will discuss here one of those enactments, the New York Tidal Wetlands Act.<sup>242</sup> The passage of this new legislation, supplementing the weak Long Island Wetlands Act of 1959, culminated three years of intensive lobbying by conservationists.<sup>243</sup>

241. F. BOSSELMAN and D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL*, Council on Environmental Quality, Washington, D.C. (1971).

242. New York State Environmental Conservation Law, §§ 25-0101 through 25-0602.

243. Its legislative history begins in 1959. In that year, New York's legislature found that the state's tidal wetlands were fast becoming the "last frontier" for some natural resources. The Long Island Wetlands Act then provided for cooperative agreements for state and local maintenance of marsh and estuarine preserves. Ten years later, in 1969, the Environmental Planning Lobby drafted a bill which concluded in its proposed findings that New York's wetlands had *already* become a "last frontier." S.5364, A.5369, 1970-1972 Session. The EPL bill, as slightly re-written by the State Attorney General, finally passed into law, but was vetoed by Governor Rockefeller. Veto Memorandum, June 8, 1972, released by Executive Chamber June 9, 1972. A year later, however, the same bill was enacted, with but one significant change: it would not be applicable "to any lands now or hereafter appropriated by the state or any agency or department thereof under the power of eminent domain . . ." Environmental Conservation Law, § 25-0602. It was not vetoed.



New York has long needed comprehensive and stringent statutory regulation of its wetlands. During New York's legislative hiatus between 1959 and 1973, Massachusetts, Connecticut, Maryland, New Jersey, California and other states adopted vigorous protection for their salt marshes and estuaries. These valuable resources were everywhere being filled with such rapidity that the loss was becoming vast and irreparable. Laws such as New York's old dredge and fill provision<sup>244</sup> were not successful in terminating the destruction, and New Yorkers lost wetlands at alarming rates.<sup>245</sup> Estuarine-dependent commercial and recreational fish catches off the Atlantic dropped from 393 million pounds to 291 million in one decade. These and other warning signs persisted. Although New York was slow to act, it now has done so. Wetlands, as New York now recognizes, are essential to fish and shellfish life chains and production, to storm and flood control, to recreation, as a natural oxidation basis to pollution treatment and to aesthetics, open space, education and research.<sup>246</sup>

Under the terms of a moratorium spelled out in the Tidal Wetlands Act, all developments on wetlands not appropriated by the state or any agency under eminent domain were to cease September 1, 1973.<sup>247</sup> The moratorium continues until an inventory of all wetlands has been completed (it is now largely complete) and a map of wetlands has been issued. All wetlands so mapped will be regulated and development on them will be prohibited unless a state permit has been obtained.<sup>248</sup>

Regulations for the acquisition of a permit have not yet been promulgated. The Act, however, is quite specific as to (1) the criteria which will be relevant for ruling on the permit application; (2) the right vested in the N.Y.S. Commissioner of the Department of Environmental Conservation to grant permits subject to conditions; and (3) the fact that the applicant will bear the burden of proving that his activity is in accord with the Act. Rul-

244. Environmental Conservation Law, § 429B.

245. Between 1955 and 1964, 90% of Bronx County (1810 acres), 60% of Queens County (1348 acres), 50% of Kings County (1260 acres), some 3500 acres in Suffolk County, and some 4600 acres in Nassau County. See ELIZABETH BARLOW, *THE FORESTS AND WETLANDS OF NEW YORK CITY*, Little, Brown & Co., Boston, 1971.

246. See PETER L. JOHNSON, *WETLANDS PRESERVATION*, Open Space Institute, New York City, 1969.

247. Environmental Conservation Law, § 25-0202.

248. *Id.*, § 25-0201.

ings or permit applications follow notice and a hearing.<sup>249</sup> Judicial review is permitted pursuant to Article 78.<sup>250</sup> Variances from the Act's requirements may be secured where hardships are demonstrated, upon petition to the Commissioner.<sup>251</sup>

The Act's one loophole favors New York State agencies rather than private parties. Section 25-0602 exempts application of the Act to lands acquired by eminent domain. Since some quasi-public corporations, such as utilities, have the power of eminent domain, this exception may reach further than intended. Even as applied to the State, however, the exemption is inartfully drawn. It applies only to lands taken by condemnation. State lands already in state hands from colonial days, and lands acquired by donation or otherwise than by eminent domain, *are* governed by the Act. Also, the loophole creates a logical inconsistency in the Act. Under Section 24-0404 if applications of restriction of the Act to a given wetland area are deemed by a court to be confiscatory, the State has the option of either purchasing that parcel of wetlands or voiding the Act's application to that land. If the purchase is accomplished by eminent domain, the parcel suddenly is exempt from the Act under the loophole, although that very purchase was intended to preserve the parcel under the Act. Of course, this inconsistency could be excused if purchased wetlands were immediately put into a park designation.

### Legal Counsel in Land Use

The roles for private counsel under New York's Tidal Wetlands Act are immediately apparent. A complex permit system with broad standing provisions for aggrieved parties will produce a new array of administrative and judicial proceedings. The enforcement elements make early counseling and study important to avoid dislocations. The environmental impact analyses require new employment of scientific and engineering experts. Since the Act does not pre-empt local laws which would regulate other wetlands uses, the local laws must be integrated with the state-wide statute. Furthermore, U.S. Army Corps of Engineers permits and regulations must be scrutinized.

249. *Id.*, §§ 25-0402 & 25-0403.

250. *Id.*, § 25-0404.

251. *Id.*, § 25-0202.

The New York Act is both substantively and procedurally similar to many other state statutes which mandate wetlands protection. Environmental factors are subject to more extensive reconsideration upon judicial review of administrative zoning decisions.<sup>252</sup> Time-zoning, to permit municipal services to keep pace with private development, has its environmental uses and will increase in frequency.<sup>253</sup> Such zoning may markedly reduce a property's value, but it is likely to remain constitutional.<sup>254</sup> A lawyer may need a regional planner and an architect in order to help a client participate in defining a jurisdiction's "master plan" in ways which will also enhance the client's real estate investment. Increasingly, to attack a particular zoning regulation or decision as either unconstitutional or arbitrary and capricious without regard to the "master plan" is to invite failure.

Counsel cannot avoid these land use developments without jeopardizing both the interests of their clients and the professional competence of their services. Here, as in pollution abatement, a whole new realm of legal services emerges.

### *Counseling Clients*

The attorney's belief that a client should adhere to new environmental laws is often far removed from the client's own perceptions. How to bring the need to comply to a client's attention raises sensitive ethical and practical problems. The most general and yet thorough threshold method of initiating counseling may be to provide a client with a general memorandum on new laws affecting its operations. Tailoring the memorandum to the principal effluent or manufacturing process may draw the client's attention. More generally, a checklist or "tickler" to prompt a reassessment of environmental liability exposure and compliance can be used. A model for such a checklist is appended to this article. It can be used, *mutatis mutandis*, in varying state jurisdictions with appropriate state and local emendations.

252. See, e.g., *Matter of Nattin Realty v. Ludwig*, 67 Misc. 2d 828, 831, 324 N.Y.S.2d 668, 672, 3 E.R.C. 1121, 1123 (Sup. Ct., Sept. 27, 1971):

Respecting ecology as a new factor, it appears that the time has come-- if indeed, it has not already irretrievably passed--for the courts, as it were, to take 'ecological notice' in zoning matters.

253. *Golden v. Planning Bd. of the Town of Ramapo*, 2 E.R.C. 1156 (May 3, 1972).

254. *Steel Hill Sev., Inc. v. Town of Sanbornton*, 3 E.L.R. 20018 (Nov. 24, 1972).

Every compliance with environmental laws together with active participation in federal and state rule-making can avoid business disruption and liability as well as enhance the national effort to use the environment wisely. Consequently, both government and conservationists will praise and cooperate with companies that successfully avoid environmental liability. The National Audubon Society, for instance, has a Citation To Industry program. Under it, one Society chapter has honored the Weirton Division of National Steel for installation of a biological water-treatment facility of a new design at its coke plant in West Virginia. Another chapter in Milwaukee honored the Federal Malleable Company for "voluntary environmental improvement" in the area of air quality.<sup>255</sup>

Regrettably, trade association publications are often the only source of information a client has regarding his fellow tradesmen's voluntary compliance with environmental laws. As Albert W. Wilson, Senior Editor of *Pulp and Paper* magazine, reported in July 1974,<sup>256</sup> industry faces a choice between Scylla and Charybdis: to avoid the destructive effects of an environmental lawsuit, it must either sue offensively or come up with a comprehensive plan of cooperation with conservationists.

The posture corporate counsel take with respect to environmental compliance can avoid suit early-on. Clearly, as between suit and accommodation, the latter involves less risk and permits business to continue with least dislocation. Corporate counseling must necessarily spell out the desirability of the latter choice.

### CONCLUSIONS

By conservative estimate, environmental laws on the local, state and federal levels will remain confused for the next twenty years. Coordination among jurisdictions is poor, as exemplified by the multiple hearings and permits that are required for one project. Aside from the legal confusion, the final technical and scientific answers to many environmental problems remain uncertain. In months to come, as public agencies, the legislatures and the courts tinker with environmental laws to find the best solutions, corporate manage-

255. See generally Audubon Society News Release, "Audubon Society 'Citations to Industry' Program Balances Brickbats With Bouquets" (July 12, 1974).

256. A.W. Wilson, *Environment Laws to be Fixed by Courts—Washington View*, PULP & PAPER, July 1974, at 54-60.

ment may feel it is running the gauntlet. In a sense, it is. But adequate legal counseling can help avoid or pad the blows.

Management must recognize that compliance with laws will require expenditures reducing profits. Early voluntary compliance can minimize such costs and thereby maximize profits. In some instances, however, environmental control will markedly reduce what the law deems a "reasonable" profit. The land use cases exemplify this reality. Thus, from a client's priority point of view, legal services will be needed to protect the uninterrupted earning capacity of a company. From the attorney's perspective, compliance with the spirit, intent and letter of environmental laws must be assured.

Many legal services which are required in the environmental field are traditional. For instance, the requirements of dealing with administrative and regulating agencies are already known; the legal aspects of financing pollution control, and the tax consequences thereof, are also well defined. Other services, however, will require new techniques. A land developer can no longer be concerned only with its own land holdings. It must also participate actively in the preparation of a region's master plan. Only by stimulating and structuring the rules which govern it can a landowner be assured a hand in maximizing the return on its land. Counsel must also monitor reporting and the possible impact of all disclosures of environmental data. Until the law settles out, this is a crucial function. New plaintiffs are emerging constantly; in jurisdictions which have enacted no-fault insurance laws, lawyers who formerly specialized in automobile negligence litigation have been preparing to serve environmental plaintiffs.<sup>257</sup> Under many laws, counsel fees may now be awarded in such cases.<sup>258</sup> Company counsel should also prepare not merely to win those suits which are filed, but also to help a company stay so far within the law that it will never be sued.

Careful environmental planning and, where reasonable, the inclusion of public interest groups in the decision-making process will reduce the likelihood of litigation or business disruption. The OSHA management-employee committees organized by Atlantic-Richfield and other oil companies are a good example. In Con-

257. TRIAL Magazine, September 1969.

258. See Nicholas Robinson, *Court-Awarded Counsel Fees In Environmental Litigation*, 169 N.Y.L.J., Nos. 16 & 39, at 1, col. 1 (Jan. 23 & Feb. 27, 1973).

necticut, Northeast Utilities has formed a management-conservationist committee to review all possible sites for new power plants and decide together where to site new facilities and what environmental safeguards to impose. The liquified natural gas compromise between the Sierra Club and the Columbia LNG Corporation in Maryland, discussed *supra*, is another good example.<sup>259</sup> The attorney can play an intermediary role in defining ground rules for joint management-and-public decision making. By educating joint participants as to the law, compromise can begin within the framework of public policy.

At the outset, however, lawyers face ethical problems in introducing their clients to the need for environmental legal counseling. It would be unethical to solicit new business outside of a pre-existing lawyer-client relation. Counsel may, however, draft a series of short, objective memoranda on environmental law trends and make them available to their clients for their education. An introduction in this careful manner will enhance a company's knowledge of the laws governing it and will hopefully stimulate an interest in compliance. At this point, the company may request the necessary legal services. Whether it does or not, counsel will have served the public interest in promoting compliance with environmental laws.

The suggestions set forth here are necessarily preliminary. There is not enough corporate counseling in environmental law to permit further generalization, although enough evidence has surfaced to reveal some of the dimensions of this new field. What form it eventually takes remains to be seen. It may aid further defensive posturing by business; or it may, as urged here, stimulate environmentally sound operations and developments. Either way, the Bar will be intimately involved—whether to its degradation or its lasting credit. In this involvement lies most of our hope for success in securing environmental quality.

259. Note 146 and accompanying text *supra*.

## APPENDIX

### ENVIRONMENTAL LIABILITY REVIEW CHECKLIST

This checklist suggests the more fundamental steps which prudent management should review in order to comply reasonably with new environmental laws and avoid liability or business interruptions. Since each company's impact on the environment differs depending on its operations, specific application of these basic steps cannot be generalized.

#### I. *Framework for Liability*

- A. *Laws.* Do you know which federal and state and local laws govern each company operation which affects natural resources or the environment?
- B. *Regulations.* Do your plant managers have the pertinent regulations which implement the environmental laws relevant to your operations? Do you know what new rules or regulations are being promulgated which affect your operations? Do you know procedures for making your position known to the appropriate authorities and to have some voice in shaping new rules? Is your technical staff ready to testify in favor of reasonable regulations and standards? Do you monitor administrative rulings for regulations directly related to your operations?
- C. *Reports.* Do you know what reports are made or required to be made to governmental agencies about your company's environmental impact? Are these cross-referenced and available to you?
- D. *Files.* Do you separate your environmental files from other business records? Have you assembled your records which are subject to OSHA inspection? Are you aware how to protect your trade secrets, confidential commercial information or security records?
- E. *Experts.* Have you studied your company's exact impact on the environment—the composition, frequency, and volume of its effluents, the effects of its land de-

velopments, its occupational safety and health compliance? Have you an inventory of all plant effluents? Do you suspect your operations may have compliance problems? Have you retained legal counsel to assess your liability, and to hire scientific or technical experts to do in confidence the environmental audit of your operations necessary to determine liability?

- F. *Maintenance*. Do you periodically monitor your operations to assure compliance with environmental laws?

## II. *Operations*

- A. *Permits*. Do you know what new permits are required for your operations (*e.g.* most jurisdictions have permit requirements for liquid discharges into lakes, streams, coastal waters and rivers)? Do you know which states where you operate now require environmental impact analysis?
- B. *Federal Tie-In*.
- (1) Do your operations require a federal permit or are they financed in any part by federal funds? What preparations have you made for an environmental impact study of your entire project?
  - (2) Are you a contractor for a portion of a project with a federal tie-in? Have you any contractual arrangement to assure adequate impact study as to work or to protect you from delay in performing your work because of environmental legal problems?
- C. *Occupational Safety and Health*. Are you fully assured that your operations comply with OSHA regulations? Do you regularly monitor your compliance? If you are a contractor, have you appropriate "hold-harmless" or other indemnification agreements as to OSHA-related liability?
- D. *Expansion*. In any new operations or land use, have you assured expert determination of all environmental impact and secured a review of applicable local, state or federal law?



- E. *Product Quality Control.* While assuring product quality, do you also monitor and assure production means in compliance with applicable laws?
- F. *Inspections.* Have you established procedures for use in an inspection of your compliance with environmental laws by different governmental agencies? Are your OSHA inspection procedures known by plant supervisors?

### III. *Environmental Quality Control*

- A. *Pollution Abatement.* Have you a schedule or plan for abatement of any existing effluents (even the existence of a plan alone may avoid or blunt the effect of prosecution)? Have your experts reviewed the alternative abatement methods, the costs and utility of each? Has counsel reviewed financing alternatives within your outstanding debt covenants; has counsel discussed with you leasing, installment sale, mortgage, industrial revenue bonds or relevant combinations to suit your situation? Does your project qualify as an IRS pollution control project?
- B. *Solid Waste.* Do you know what happens to your operation's solid waste? Do you have plans for solid waste disposal and treatment in five years' time?
- C. *Land Use.* Have you identified incidental consequences of new land use on transportation, water runoff, new effluents and their treatment? Have all local as well as state or federal laws been reviewed as to land use, including master plans and zoning?
- D. *Noise.* Do your operations comply with new noise standards? Have you determined what noise standards are applicable? Should you help structure local governments' regulations which may bind you?
- E. *Energy.* Have you reviewed the energy sources which you use in respect to their environmental impact, the supply and alternatives and their respective impact? Have you analyzed the costs and legal or other consequences of different energy sources available to your company?

- F. *Policy Coordination.* Have you established a company policy or guidelines on environmental quality? Do your key staff and management review company operations for environmental protection regularly? Are recent changes in environmental laws or regulations reflected in company guidelines? Is there some person in your organization who has been assigned to over-all responsibility in this area or has someone been designated in each plant to inform management as to problems which may be expected to arise or as to problems which are at hand and demand immediate attention?
- G. *Planning.* In budget preparation, facility development, product innovation or all other plans for future activity, have you factored in applicability of new environmental laws? Do you know what legislative proposals are pending and may become law by the time your plans are ready for implementation?