

THE LAWS RELATING TO ABATEMENT AND CONTROL
OF
WATER AND AIR POLLUTION IN NORTH CAROLINA

By
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Summer 1970
Department of Justice

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Man has grossly defiled his natural surroundings for only a fraction of his time on earth, but in that small fraction of all time we have come perilously close to ecological disaster. In the past 50 years there has been more pollution than in all previous times - and yet we have tolerated this. We have reached the point where we can tolerate little more.¹ Realizing this, it has become necessary to investigate the various ways of combating pollution in North Carolina. That is the purpose of this paper. This paper is a non-definitive reference work covering the various routes available to control and abate water and air pollution. The scope of this article runs the gamut of methods for handling pollution. This includes a look at North Carolina statutory law, federal statutory law affecting North Carolina, pertinent North Carolina and federal case law, the use of common law remedies to abate pollution, and a look at the Attorney General's common law powers to combat polluters.

N. C. STATUTORY LAW

"It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources."² North Carolina passed its first water

pollution statute in 1951³ and its first air pollution
act in 1967.⁴ A summary of these statutes follows:

Water Pollution:

Chapter 77: County commissioners have authority to clear
rivers and streams in their jurisdiction;⁵ to lay off
gates, with slopes attached thereto;⁶ and to build public
landings.⁷ Declares that an individual may not obstruct⁸
the free passage of boats along any river or creek.

Chapter 87: Requires a contractor to secure a license
as a water well contractor before he can drill a water
well.⁹ In addition this requirement applies to a water
well drilling rig.¹⁰ This chapter also keeps individuals
from constructing, repairing, or abandoning any well
contrary to provisions of this article and chapter.¹¹
An individual must bet prior permission for construction¹²
of a well.

Chapter 90A: Establishes that there shall be classifica-
tions for all surface water treatment facilities and all
ground water treatment facilities where the water is to
be used as part of the public water supply.¹³ Also that
operators of water treatment facilities must be certified¹⁴

and that there shall be classifications for all waste-
15
water treatment facilities.

Chapter 105: Allows amortization over a period of 60
months by a corporation of any sewage or waste treatment
plant and pollution abatement equipment which reduces
water pollution resulting from the discharge of sewage,
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industrial waste, or other polluting materials.

Also allows amortization by individuals for 60 months
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under the same conditions as for corporations.

Encourages conservation of natural resources by not
including in the assessment of real estate a number of
beautification and conservation endeavors including
impoundment of water on marshland to preserve the natural
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habitat. This provision is also applicable for waste
disposal or water pollution abatement plants, provided the
Board of Water and Air Resources authorizes the disposal
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or abatement as genuine. The chapter also exempts
real and personal property used exclusively for waste
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disposal or water pollution abatement facilities.

This determination requires certification by the Board
of Water and Air Resources of the genuineness of the
pollution abatement endeavor.

Chapter 113: The Department of Conservation and Development is authorized to promote seashore industry and recreation provided it does not affect the authority of the Department of Water and Air Resources concerning shore-erosion control or prevention, beach protection,²¹ or hurricane protection.

Chapter 130: Generally, this article of Chapter 130 deals with the topic of water and sewer sanitation. It declares that the State Board of Health shall maintain appropriate units of sanitary engineering and sanitation.²²

Also that everyone supplying drinking water shall be sure to protect it from contamination and generally assure the healthfulness of the water.²³ In addition all owners of property shall provide a sanitary system²⁴ of sewage disposal.

Chapter 143: Article 21 - The Department of Water and Air Resources.

Part 1. Gives definitions and establishes the Board with administrative details.²⁵ Indicates that the Board is authorized to adopt water classifications, to survey all State waters and identify those to be classified and

assign classifications following specified administrative procedures.²⁶ Sets criteria for the control of new sources of water pollution, requiring the issuance of permits for these new sources.²⁷ The Board can also issue special orders to polluters requiring them to correct their pollution as the Board directs within a specified time.²⁸ This article encourages voluntary action with the use of these powers only when voluntary action has not been effective.²⁹ The Board is directed to proceed against all polluters equitably.³⁰ Allows the Board to adopt regulations to implement this article;³¹ Conduct public hearings³² and investigations;³³ institute actions in Superior Court;³⁴ enter settlements or compromises;³⁵ and consult with the person controlling the pollution source.³⁶ The State is declared to be the owner of all fish and wildlife in the State and is therefore the proper party to bring actions resulting from fish and wildlife deaths.³⁷ When fish are killed the measure of damages is to be determined by the Board and the Wildlife Resources Commission or the Department of Conservation and Development.³⁸ The Board is empowered to conduct scientific experiments, research, and investigations.³⁹ The Board is to act in the local administration of all matters under federal statutes.⁴⁰ The Board with

the approval of the Governor may consult with adjoining
states concerning water pollution abatement and control.⁴¹
This part of Article 21 also establishes general administra-
tive provisions covering mailing lists, publications of
regulations and rules, notices and hearings.⁴² In conclud-
ing, the right of judicial review is established⁴³ along
with penalties for violations.⁴⁴

Part 2. Authorizes the Board to declare capacity use
areas to protect interests and rights of residents or
property owners in such areas where the aggregate use of
ground water or surface water or both require regulation.⁴⁵
Establishes regulations for capacity use areas. Establishes
procedures for securing a permit for water use within
capacity use areas.⁴⁶ Also included in Part 2. is the
statement "Nothing contained in this part shall change
or modify existing common law or statutory law with respect
to the relative rights of riparian owners⁴⁷ concerning the
use of surface water in this State."⁴⁸

Part 3. Deals with dam safety and provides regulations⁴⁹
for dam construction, repair, alteration, or removal,
including applications to be filed with the Department of
Water and Air Resources.⁵⁰ Also requires final dam

Chapter 146: Requires registration with the Department of Water and Air Resources of all earth moving equipment to be operated on tidelands, beaches, marsh lands or navigable waters.

Under the authority of Article 21, Chapter 143, the Board has established classifications and standards. Classifications are designated A-1 (fresh water for drinking and public water supply where the water requires only settling and disinfection), A-2 (fresh water for drinking and public water supply where the water requires treatment), B (fresh water for bathing), C (fresh water for fishing, boating and wading), D (fresh water for agriculture, industrial cooling, navigation), SA (salt water for shell fishing for market), SB (salt water for bathing), SC (salt water for fishing, boating, and wading). In addition, rules for establishing and assigning classifications and standards are included.

Generally, under the authority of North Carolina's water pollution statutes, the State has adopted standards for the highest use of a stream, comprehensive pollution abatement plans for each river basin, a classification system for receiving waters, and statements of the quality of receiving water that is to be maintained for each classification.

Air Pollution:

Chapter 105: Allows amortization over a period of 60 months by a corporation of any air cleaning device which reduces the amount of air pollution from the emission of air contaminants into the outdoor atmosphere.⁶² Also allows amortization by individuals for 60 months under the same conditions as for corporations.⁶³ Encourages conservation of natural resources by not including in assessment of real estate a number of beautification and conservation endeavors including the planting and care of lawns, shade trees, shrubs and flowers for noncommercial purposes; repainting buildings, terracing, or other methods of soil conservation; protection of forests against fires; and planting of forest trees on vacant land for reforestation purposes.⁶⁴ This provision is also applicable for installing or constructing and installing air-cleaning devices provided the Board of Water and Air Resources authorizes the disposal or abatement as genuine.⁶⁵ In addition, this chapter exempts real and personal property used exclusively for air cleaning designed to abate, reduce, or prevent pollution of the air.⁶⁶ This determination requires certification by the Board of Water and Air Resources of the genuineness of the pollution abatement endeavor.

Chapter 143: Article 21 - The Department of Water
and Air Resources.

Part 1. The Board is directed to prepare plans for the prevention, abatement and control of air pollution; to develop classifications for air contaminant sources; and to develop emission control standards.⁶⁷ Forbids the establishment of new air contaminant sources or the alteration of any existing equipment from which air contaminants are emitted.⁶⁸ The Board can also issue special orders to polluters requiring them to correct the pollution as the Board directs within a specified time.⁶⁹ This article encourages voluntary action and the use of these powers only later after voluntary action has not been effective.⁷⁰ The Board is directed to proceed against all polluters equitably.⁷¹ This article allows the Board to adopt regulations to implement this article;⁷² conduct public hearings⁷³ and investigations;⁷⁴ institute actions in Superior Court;⁷⁵ enter settlements or compromises;⁷⁶ and consult⁷⁷ with the person controlling the pollution source. The Board is empowered to conduct scientific experiments, research, and investigations.⁷⁸ The Board is to act in the local administration of all matters under federal

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statutes. The Board with the approval of the Governor
may consult with adjoining states concerning air pollution
abatement and control. 80 Encourages the establishment of
local air pollution control programs with proper guide-
81 lines. This part of Article 21 also establishes general
administrative provisions covering mailing lists, publica-
82 tions of regulations and rules, notices and hearings.
83 In concluding, the right of judicial review is established
84 along with penalties for violations.

Under the authority of Article 21, Chapter 143, the
Board has established regulations and ambient air quality
85 standards governing the control of air pollution.

Other North Carolina Statutes which have an effect
on the abatement and control of pollution deal with
nuisances. These statutes are as follows:

Chapter 130: It is the duty of the local health
director to notify persons responsible for the continuance
of any nuisance which is dangerous to the public health.
If the person responsible does not abate the nuisance,
86 he shall be guilty of a misdemeanor.

Chapter 160: The local governing body shall have
the power to "remove, abate, or remedy, ... everything
in the city limits, or within a mile of such limits, which
87 is dangerous or prejudicial to the public health; ...".
Cities are also given the power to abate all nuisances

and the causes thereof, and to prevent and abate nuisances, whether on public or private property.

PERTINENT FEDERAL STATUTORY LAW

The authority for the Federal Government to legislate and work in the pollution control and abatement area is found in the commerce clause of the U. S. Constitution, Article I, §8, as defined and interpreted in the early case of GIBBONS v OGDEN.

Federal involvement in the regulation of pollution became necessary because of the interstate nature of the problems. Contaminants of the air and water did not respect political boundaries and often a state which was endeavoring to maintain a quality environment found that there was no remedy for pollution originating in another jurisdiction.

The primary Federal statutory laws on water and air pollution which affect the states are 33 USCA, §466, dealing with Water Pollution Control, and 42 USCA, §1857, dealing with Air Pollution Prevention and Control. A summary of the pertinent features of these statutes follows:

Water Pollution:

§466a(c). The Secretary of the Interior can, at the request of a state Governor, make a grant to pay up to 50% of the administrative expenses of a planning agency for a period not to exceed three years, if such agency

provides for adequate representation in the water basin involved and is capable of developing an effective, comprehensive water quality control and abatement plan for the basin.

§466b. Encourages cooperation between states for the prevention and control of water pollution. Recognizes that the prevention and control of water pollution is the primary responsibility of the states.

§466c-1. Authorizes grants to individual states for improvements in disposal methods into waters of untreated or inadequately treated sewage or improvements in waste treatment and water purification.

§466d. Authorizes grants to the states and to interstate agencies to assist them in meeting the costs of establishing and maintaining adequate measures for the prevention and control of water pollution, including the training of personnel of public agencies.

§466e. Authorizes grants to the States, municipalities, or intermunicipal or interstate agencies for the construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage or other waste into any waters.

§466g. Establishes that pollution of interstate or navigable waters in or adjacent to any state or states which endangers the health or welfare of any persons shall be

subject to abatement as set forth in Sections 466-466g and 466h - 466k of this Title. State and interstate action to abate the pollution is encouraged and will not be displaced by Federal enforcement action.⁹³ The States are encouraged to establish water quality criteria for their interstate waters.⁹⁴ These water quality standards must be approved,⁹⁵

§466g(g). As part of the abatement of water pollution, the Secretary of the Interior can, with the written consent of the Governor of the state involved, request the Attorney General to bring a suit on behalf of the U. S. to secure abatement where the pollutant is in the same state as the persons whose health and welfare are endangered.

Generally in the area of pertinent Federal statutory laws dealing with water pollution, it can be said that the Federal statutes provide grants to assist states, municipalities, and interstate agencies in local water pollution control activities and for the states to establish their own water quality criteria and standards, failing which⁹⁶ the Federal government will do so in interstate waters.

Air Pollution

§1857a. The Secretary of Health, Education and Welfare (HEW) is to encourage cooperative activities by the states and local governments for the prevention and control of air pollution.⁹⁷ The consent of Congress is explicitly given to the states to enter compacts for

cooperative efforts to prevent and control air pollution.⁹⁸

§1857c. The Secretary of HEW is authorized to make grants to air pollution control agencies in an amount up to two-thirds of the cost of planning, developing, establishing or improving, and grants to such agencies in an amount up to one-half the cost of maintaining programs for the implementation of air quality standards authorized by this subchapter. These percentages are raised to three-fourths and three-fifths respectively for the cost of regional air quality control programs.⁹⁹ These grants may not be made until the Secretary of HEW has consulted with the appropriate official as designated by the Governor or Governors¹⁰⁰ of the state or states affected.

§1857c-1. The Secretary of HEW is authorized to pay up to 100% to interstate air quality control regions when these regions are being set up. The region must be designated by the Governors of the affected states. After the initial two year period, the Secretary of HEW is authorized to make grants to such an agency in an amount up to three-fourths of the air quality planning program costs of such agency.¹⁰¹

§1857d. Air pollution of a state is the subject of abatement under this Title.¹⁰² Municipal, state and interstate action is encouraged and¹⁰³ as a rule shall not be displaced by Federal enforcement. States may adopt their

own ambient air quality standards applicable to any designated air quality control region or portions thereof within such state. ¹⁰⁴

If a state does not establish its own ambient air quality standards with respect to any air quality control region or portion thereof, the Secretary of HEW may, after certain procedural stipulations have been met, prepare regulations setting forth standards of air quality consistent with the air quality criteria applicable ¹⁰⁵ to such air quality control region or portions thereof.

If a state has lower standards within its applicable air quality control region than the Secretary of HEW feels are necessary because it will not enforce the higher standards, the Secretary of HEW will notify the state and the polluter involved and ask for abatement. If the abatement is not forthcoming, the Secretary of HEW can ask the Attorney General to bring suit on behalf of the U. S. to abate the ¹⁰⁶ pollution where the pollution is endangering persons in a state other than that in which the discharge or discharges originate or the Governor of the state involved can ask the Secretary of HEW for technical assistance in abatement where the persons endangered are in the same state as the source of the discharge or discharges causing the air pollution. ¹⁰⁷

Also provided for in this section are the pro-¹⁰⁸ cedures for conferences of air pollution agencies,

stipulations under which the Secretary of HEW recommends
to state air pollution agencies remedial action against
certain polluters,¹⁰⁹ procedures for Federal public hear-
ings for failure to abate pollution,¹¹⁰ procedures for
Federal judicial proceedings to secure abatement,¹¹¹ and
circumstances under which Federal injunctions will issue¹¹²
in cases of imminent and substantial endangerment.

§1857d-1. The states are allowed to adopt higher
standards for ambient air quality than those approved by
the Secretary of HEW.

Generally it can be said that the Secretary of HEW
under the mandate of 42 USCA §1857, is to encourage uni-
form State and local laws for the prevention and control
of air pollution, and in addition, is to encourage the
formation of agreements and compacts between states for
these same ends. To accomplish these goals, the Air
Quality Act of 1967¹¹³ provides greater financial assist-
ance, increased programs of study, stronger judicial powers
with respect to the abatement of interstate problems and
intrastate problems at the petitions of the state involved.
However, the states are still not required to set air
standards. The federal government establishes air basins
or regions and until a region is established, federal in-
fluence can have no effect at all. Eight of these regions
have thus far been established throughout the U. S. but
none in North Carolina. The 1967 Act, as passed by Congress,

calls for ambient air standards rather than emission standards. Many scientists and ecologists feel the use of ambient air standards is extremely inaccurate and not nearly so effective as emission standards.¹¹⁴

NORTH CAROLINA CASE LAW

Water Pollution:

There have not been many cases in North Carolina dealing with water pollution per se. In the cases which have dealt with this problem specifically, it has been held that lower proprietors are entitled to recover of each defendant the substantial damages resulting from the defendant's wrongful act where an upper proprietor's septic tank overflowed,¹¹⁵ or where a city discharges sewage,¹¹⁶ or where a manufacturing company discharges industrial wastes.¹¹⁷

It has also been held that a corporation using the local city sewage system is not a proper co-defendant where lower proprietors are harmed because the inhabitants of a city are not individually liable for the operation of the municipal sewage system.¹¹⁸ In allowing a lower proprietor to recover from a municipality that pollutes one's property, the Court has found that such an injury is a taking or appropriation of the property for which compensation must be paid.¹¹⁹ The 1903 General Assembly enacted a statute authorizing any person to seek an injunction¹²⁰ against the pollution of a public water supply.

It has been held that a polluted stream is not a nuisance as to one not a riparian owner, unless his rights are invaded by the pollution.¹²¹ North Carolina adopted the reasonable use rule permitting a riparian owner to use water for "purposes of profit", in addition to his domestic needs, in the case of PUGH v WHEELER.¹²² This necessarily implies that these additional uses might impair the original purity of the water. Thus the law must strike a balance between the reasonable use by an upper riparian owner and the right of the lower riparian owner to receive the water without excessive diminution in quality.¹²³

In order to more fully understand the problems of water pollution abatement and control, a knowledge of water use law generally is necessary. The State owns lands covered by navigable waters within its territorial limits, subject to the control of the Federal government over commerce.¹²⁴ Navigable waters have been defined in North Carolina as those waters that are navigable in fact.¹²⁵ The test for this navigability is the water's capacity for trade and travel in the usual and ordinary modes and not the extent or manner of its use.¹²⁶

There are generally considered to be three types of water. (1) Water flowing in streams on the surface,

(2) Diffused surface water or surface drainage water, and
(3) Underground - or ground - water. The law of the riparian owner is used with the first type and will be discussed below. In the second type of diffused surface water, the common law rule followed in North Carolina is that absolute ownership of diffused surface water belongs to the landowner on whose land the surface water is located. The law of riparian rights is not applicable to diffused surface water. The third type, underground water, is the principal source of domestic water in North Carolina. Underground waters are classified as either (1) percolating, or (2) flowing in definite underground channels. The presumption is that underground water is percolating, with the burden of proof being on the one asserting that a definite underground stream exists. Percolating waters are generally considered to belong to the owner of the land from which they are found. Waters flowing in definite underground channels are very rare in North Carolina so we are more concerned with the percolating waters. In the case of ¹²⁸ BAYER v NELLO TEER CO., it was held that percolating waters follow a "reasonable" use rule.

The riparian doctrine is applicable to all water flowing in streams on the surface. This is the type water most often polluted and, therefore, that with which the most concern is shown. In order for an owner to have riparian

rights in land, the land must be in actual contact with a stream, mere proximity without contact being insufficient.¹²⁹ A riparian proprietor along the course of a stream has no property in the flowing water itself but only certain rights with respect to the water.¹³⁰

As for what rights a riparian proprietor has, North Carolina follows the American rule or rule of reasonable use. "A riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors."¹³¹ It has been determined that what is "reasonable" use depends on the attendant facts and circumstances and is usually a question for the jury.¹³² While a riparian owner has the right to a reasonable use of the water, this is provided he does not by his use materially damage any other proprietor above or below him on the stream.¹³³

It should be noted that riparian rights are not rights as an easement or appurtenant but are inseparable rights annexed to the soil and pass with it as part and parcel of it.¹³⁴

Air Pollution:

There have been no North Carolina cases to date on air pollution which have been based on municipal ordinances or State statutes. All cases thus far dealing with the

abatement and control of air pollution have relied on common law remedies and most notably nuisance laws. It has been held that the emission of noxious and nauseating odors into the air may constitute a private nuisance, notwithstanding that the use occasioning the odors is lawful¹³⁵ and notwithstanding the absence of negligence. For example, the operation of a sewage disposal plant,¹³⁶ an oil refinery,¹³⁷ and an animal by-products plant,¹³⁸ may constitute a private nuisance.

The maintenance of a public nuisance has been determined to be an offense against the State.¹³⁹

PERTINENT FEDERAL CASE LAW

Water Pollution:

Generally it can be said that most of the decisions involving anti-water pollution measures have stated, implied, or assumed, and none have denied, that the subject of water pollution is within the police power of the state¹⁴⁰ to protect the public health.

Federal courts have held that each riparian owner is entitled to the reasonable use of the water of a river, including any use of the water which does not essentially or materially diminish the quantity, corrupt the quality, or so detain it as to deprive other proprietors or the public of a fair and reasonable participation in its benefits.¹⁴¹ It has also been held that no riparian proprietor has the right to use the waters of a natural stream for

such purposes or in such manner as will materially corrupt it, to the substantial injury of a lower proprietor.¹⁴² Therefore, it can be seen that the Federal courts follow the reasonable use rule when dealing with riparian owners and their rights in their adjacent waters.

The Federal Water Pollution Control Act¹⁴³ extended to cover pollution of interstate waters without regard to their navigability and even to cover such waters if they were not navigable and the pollution was entirely intra-¹⁴⁴ state.

The Justice Department has recently given the go-ahead to six anti-pollution suits with the U. S. Attorneys authorized to invoke the Refuse Act of 1899 against the polluters. This law, which was enacted to prevent impediments in navigation, made it a criminal offense to deposit any refuse matter of any kind into any navigable water of¹⁴⁵ the United States.

The Yale Law Journal reports as of November, 1969, no Federal cases had reached court under the Federal Water Pollution Control Act. The Yale report, however, credits the Act with establishing standards throughout the Nation (only Iowa had yet to adopt approved standards), upon which state action could proceed, and upon which private parties could prosecute successful nuisance actions. It also indicated that as a part of the substantive law of a state, the common law nuisance actions survived. A clause

specifically indicates that the Federal law will not
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preempt such action.

Air Pollution:

The problem of air pollution has been recognized since the year 1306 when the burning of sea coal was forbidden in England under the penalty of death. 147 As a general rule, pollution of the atmosphere with offensive matter is a nuisance where the contamination substantially impairs the use of property, or interferes with the comfort or enjoyment of a person of ordinary sensibilities. 148 This can include dust, fumes, gases, vapors, smells, smoke, soot, smudge, and even ashes, cinders, chaff, dirt, burning particles, refuse, and sand which may not constitute a nuisance per se but can be a nuisance in fact where they injure neighboring property or interfere with its use and 149 enjoyment by persons of ordinary sensibilities.

Every person has the right to have air diffused over his premises in its natural state, free from artificial 150 impurities. But air pollution so far as is reasonably necessary to enjoyment of life and is indispensable to progress of society is not actionable; however, this pollution right must not be exercised in an unreasonable 151 manner. Noise alone may even constitute a nuisance if the noise be of such a character as to be productive of

actual physical discomfort and annoyance to persons of ordinary sensibilities, even though such noise may result from the carrying on of a trade or business in a town or city.
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As of this date, the Secretary of HEW has brought only one case specifically under the 1963 Clean Air Act.
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This was U. S. v BISHOP and was brought because of the defendant's animal reduction business which was spreading foul-smelling pollutants into the atmosphere. This amounted to interstate air pollution because the smell crossed state lines. The Court upheld the contentions of the United States.

USE OF COMMON LAW GROUNDS TO ABATE POLLUTION

Although North Carolina and the Federal government both have statutes for the abatement and control of pollution, the common law continues to offer bases for acting against polluters where the State statutes are not available and the Federal laws not applicable. There are primarily four common law grounds for actions against polluters. There are, (1) nuisance, (2) trespass, (3) negligence, and (4) strict liability. Many authorities feel that the efforts to deal effectively with pollution must involve the private assertion of rights in litigation.
154
However, there are other authorities who feel these common law

actions to abate pollution are not very effective and that the average citizen is generally dependent on the administrative processes of the State and Federal government for pollution abatement.

Another possible method of pollution control and abatement which is actually based on constitutional grounds, has recently been used by a New York lawyer, Victor J. Yannocone.¹⁵⁶ Using the class action under the principles set forth in N.A.A.C.P. vs. ALABAMA,¹⁵⁷ which held that if constitutional rights of a group or class could not be preserved except by a designated representative or where the group was too large to come before the court jurisdiction would be accepted, Mr. Yannocone proceeds with his somewhat nebulous constitutional argument. He employs the Ninth Amendment which states "the enumeration of certain rights shall not be construed to deny or disparage others (in this case the right to clean air and water) retained by the people ...". Mr. Yannocone also puts forth due process and equal protection arguments. Through the use of this tactic in fighting pollution, Mr. Yannocone is seeking to establish important precedents through the class action and its protection of a "citizen's right to an uncontaminated environment."¹⁵⁸

Of the more traditional four common law remedies, nuisance, trespass, negligence, and strict liability,

nuisance is the one most often used and the one which more nearly meets the requirements of pollution abatement and control. Nuisance is generally defined as "That class of wrongs which arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing material annoyance, inconvenience, discomfort, or hurt."¹⁵⁹ Nuisances apply to two types of interests, public and private. A public nuisance is a miscellaneous group of minor criminal offenses, which obstruct or cause inconvenience or damage to the public in the exercise of rights common to the public.¹⁶⁰ A private nuisance is an unreasonable interference with the interest of an individual in the use or enjoyment of land. This requires substantial harm, as distinguished from a trespass, which may consist of a mere technical invasion.¹⁶¹ Both public and private nuisance requires substantial interference with the interest involved. It is generally considered that the police power extends to the prevention and abatement of nuisances and the legislature may prescribe what shall constitute a nuisance and the method for abatement.¹⁶²

As far as nuisance law is concerned for the abatement and control of pollution, many authorities feel it is not a very good avenue to success. This is because

the public air pollution nuisance law has slowly been evolving toward the modern air pollution statutory regulation¹⁶³ and because the private nuisance law is a very limited weapon due to inherent disadvantages in its application. These disadvantages have been enumerated as follows: (1) litigation is an expensive process for the private citizen; (2) common law remedies were designed for a rural population; (3) nuisance remedies were designed for local application at a time when the source of pollution could be readily determined; (4) one of the costs of the litigation process today revolves about the difficulty of investigation and properly proving among all possible pollution sources, the source or sources responsible for a given injury; (5) objective and uniform standards for a quality environment have not and will not arise from court decisions, but may flow from legislative mandates; and (6) as the courts are incapable of administering standards uniformly, they are also usually incapable of rendering quick¹⁶⁴ action in the cases they do handle.

Water Pollution:

Following are some instances of the common law remedies being used to abate and control water pollution. Specific North Carolina cases have held that the discharge¹⁶⁵ of industrial wastes into a stream or the discharge¹⁶⁶ into a stream by a municipal corporation may constitute

a private nuisance as to a lower proprietor along the stream. North Carolina cases have also held that one whose property is injured by a harmful substance discharged into the water can use a common law cause of action on the theory of nuisance,¹⁶⁷ trespass,¹⁶⁸ or that the injury is an appropriation of property rights for which the owner must have compensation.¹⁶⁹

More generally, it has been held that any material unauthorized obstruction to navigability is unlawful.¹⁷⁰ No right to maintain or continue a material obstruction in navigable waters can be acquired by prescription.¹⁷¹ In addition, a dam which materially obstructs navigation and its erection or maintenance is without, or in excess of, statutory authority, is a nuisance.¹⁷² Any unreasonable obstruction of a watercourse is a nuisance.¹⁷³ This couples with the fact that every riparian owner is entitled to have the stream flow in its accustomed channel with natural volume and without any obstruction except as that occasioned by the reasonable use of the stream by other like riparian proprietors. Broadly speaking, any unsanitary, disagreeable, harmful, or dangerous condition caused by an accumulation of water or by the pollution thereof, may constitute a nuisance.¹⁷⁴

Air Pollution:

Common law remedies have also been used to abate air pollution, particularly the nuisance remedy. Air pollution was labeled a nuisance as early as 1611.¹⁷⁵ In using the

nuisance remedy, the courts, while paying lip service to the landowner's right to pollution free air, have nevertheless recognized a right to do at least some polluting of the air. This has come about due to the concept of "balancing the equities." The majority of courts in "balancing the equities" forget to balance, especially if the plaintiff seeks an injunction, and therefore allow air pollution as long as not unreasonable or unnecessary.¹⁷⁶ Another concept which is used that usually mitigates against abating the air polluter is that of "coming to the nuisance." Many times this concept is used in conjunction with "balancing the equities" and the combination usually mitigates against the party seeking to abate the pollution.

In using the trespass theory to abate air pollution, it is not necessary to show damage, as required in nuisance, and in addition there is usually a longer statute of limitations. An example of a trespass theory case is ¹⁷⁷ FAIRVIEW FARMS, INC. v REYNOLDS METALS CO., which held that air-borne liquids and solids deposited upon the plaintiff's land constituted a trespass. Therefore, in some instances the private pollution controllers who ground their cases in trespass rather than nuisance may ¹⁷⁸ possibly find greater success.

In negligence there must be a showing of the defendant's negligence and causal relation between the negligence and the plaintiff's injury. This theory is used primarily for

an injury to a person from air pollution whereas trespass is usually used for an injury to property. For an interesting case using the negligence theory in the abatement of air pollution see Greyhound Corporation v. Blakley, 262 F. 2d 401 (1958).

The theory of strict liability has been asserted in a few cases where the defendant's activity was of an ultra-hazardous nature. This is a very tough concept to use in that the complainer of the pollution will have formidable odds against recover unless in addition to an ultrahazardous activity he can talk nuisance, trespass, and perhaps res ipsa loquitur as well. Successful cases under this theory are so sparse as to have a negligible effect on pollution control and abatement.¹⁷⁹

The most that can be expected from air pollution control through assertion of private rights is the handling of some instances of air pollution which cannot or are not yet controlled by public regulation.¹⁸⁰ Add to this the sentiment that the problem of air pollution has grown too large and complex for a case by case approach using the traditional public nuisance abatement procedures¹⁸¹ and it is obvious that air pollution control and abatement is going to require more than the assertion of long-standing common law rights.

ATTORNEY GENERALS COMMON LAW POWERS

As a rule the Attorney General of a state retains the common law powers of that office except where they are expressly modified by statute.¹⁸² North Carolina has by statute¹⁸³ declared the common law to be in full force except where repealed, obsolete, abrogated or repugnant to freedom and independence. In 1939, the Attorney General was given the duty of performing "all duties now required of his office by law."¹⁸⁴ The Supreme Court of North Carolina has clearly adopted the view, without expressly stating it, that the phrase "all duties now required of his office by law" includes the Attorney General's common law powers. The Court has stated that "In the absence of statute and barring those instances where an individual may take action because of his special damage..., 'The State is the proper party of wrongs done to its citizens by a public nuisance';...and we are of the opinion that this must be done, as heretofore, on the relation of its Attorney General."¹⁸⁵

It must therefore be assumed that the Attorney General of North Carolina has had his full common law powers retained. Common law actions for nuisance, purpresture or any other matter affecting the people generally in the same manner as individual complainants, could only be maintained by the Attorney General.¹⁸⁶ Current problems of pollution and abuse of estuaries may well result in public demand for reassertion may well result in public demand for reassertion of these powers over the physical environment.

CONCLUSIONS

The pollution of our environment is a serious problem and one which will undoubtedly cause greater concern as its effects become more apparent. The citizens of North Carolina presently have state and federal statutory laws regulating and controlling pollution. For the most part these are good laws and while they may not be the total statutory solutions for abating pollution, they are at the least a large step in the right direction. This is particularly the case with the North Carolina statutory laws. Some authorities feel the Board of Water and Air Resources needs to adopt more stringent standards and that possibly the Department of Water and Air Resources needs greater staffing and financial support to insure better enforcement of the statutory laws. However, on a whole the necessary laws are there, with the only possible changes needed in the enactment of these laws.

It is obvious that the Attorney General possesses the requisite common law powers to bring public actions for the abatement and control of pollution. Specific common law remedies have been pointed out which could

be used by the private citizen and the Attorney General in an effort to control pollution.

However, it is also obvious that while these common law remedies are available there effectiveness in an overall effort to totally control pollution is, at the very least, questionable.

More stringent standards and more stringent enforcement at the State level and more financial and technical assistance at the federal level seem to be the best means of assuring a truly successful pollution control program.

FOOTNOTES

- 1 National Association of Attorneys General, 6.5 Environmental Control (Preliminary Draft), June, 1970. [hereinafter cited as National Association of Attorneys General].
- 2 N.C.G.S. §143-211
- 3 Stream Sanitation Law Session Laws 1951, c.606
- 4 N.C.G.S. §143-215
- 5 N.C.G.S. §77-1
- 6 N.C.G.S. §77-4
- 7 N.C.G.S. §77-11
- 8 N.C.G.S. §77-12
- 9 N.C.G.S. §87-68
- 10 N.C.G.S. §87-69
- 11 N.C.G.S. §87-68
- 12 N.C.G.S. §87-88
- 13 N.C.G.S. §90A-22
- 14 N.C.G.S. §90A-25
- 15 N.C.G.S. §90A-37
- 16 N.C.G.S. §105-130.10
- 17 N.C.G.S. §105-147
- 18 N.C.G.S. §105-294
- 19 Id.
- 20 N.C.G.S. §105-296
- 21 N.C.G.S. §113-14.1

- 22 N.C.G.S. §130-157
- 23 N.C.G.S. §130-158
- 24 N.C.G.S. §130-160
- 25 N.C.G.S. §143-211 through §143-213
- 26 N.C.G.S. §143-214.1
- 27 N.C.G.S. §143-215.1
- 28 N.C.G.S. §143-215.2
- 29 Id.
- 30 Id.
- 31 N.C.G.S. §143-215.3(a)(1)
- 32 N.C.G.S. §143-215.3(a)(3)
- 33 N.C.G.S. §143-215.3(a)(2)
- 34 N.C.G.S. §143-215.3(a)(5)
- 35 N.C.G.S. §143-215.3(a)(6)
- 36 N.C.G.S. §143-215.3(a)(9)
- 37 N.C.G.S. §143-215.3(a)(7)
- 38 Id.
- 39 N.C.G.S. §143-215.3(b)
- 40 N.C.G.S. §143-215.3(c)
- 41 N.C.G.S. §143-215.3(d)
- 42 N.C.G.S. §143-215.4
- 43 N.C.G.S. §143-215.5
- 44 N.C.G.S. §143-215.6
- 45 N.C.G.S. §143-215.13
- 46 N.C.G.S. §143-215.14

- 47 Blacks Law Dictionary defines reparian owner as "One who owns land on the bank of a river." This means a person owning land adjacent to any water-course, whether navigable or nonnavigable.
- 48 N.C.G.S. §143-215.22
- 49 N.C.G.S. §143-215.26
- 50 N.C.G.S. §143-215.27
- 51 N.C.G.S. §143-215.30
- 52 N.C.G.S. §143-215.32
- 53 N.C.G.S. §143-215.40
- 54 N.C.G.S. §143-215.41
- 55 N.C.G.S. §143-215.42
- 56 N.C.G.S. §143-318
- 57 N.C.G.S. §143-352
- 58 N.C.G.S. §143-354
- 59 N.C.G.S. §143-355
- 60 N.C.G.S. §143-6.1
- 61 Classifications and Water Quality Standards Applicable to the Surface Waters of North Carolina. Adopted by the Water and Air Resources, Department of Water and Air Resources, Raleigh, North Carolina
- 62 N.C.G.S. §105-130.10
- 63 N.C.G.S. §105-147
- 64 N.C.G.S. §105-294
- 65 Id.
- 66 N.C.G.S. §105-296
- 67 N.C.G.S. §143-215
- 68 N.C.G.S. §143-215.1

- 69 N.C.G.S. §143-215.2
- 70 Id.
- 71 Id.
- 72 N.C.G.S. §143-215.3(a) (1)
- 73 N.C.G.S. §143-215.3(a) (3)
- 74 N.C.G.S. §143-215.3(a) (2)
- 75 N.C.G.S. §143-215.3(a) (5)
- 76 N.C.G.S. §143-215.3(a) (6)
- 77 N.C.G.S. §143-215.3(a) (9)
- 78 N.C.G.S. §143-215.3(b)
- 79 N.C.G.S. §143-215.3(c)
- 80 N.C.G.S. §143-215.3(d)
- 81 N.C.G.S. §143-215.3(a) (11)
- 82 N.C.G.S. §143-214.4
- 83 N.C.G.S. §143-215.5
- 84 N.C.G.S. §143-215.6
- 85 Rules and Regulations Governing the Control of Air Pollution. Adopted by the Board of Water and Air Resources, Department of Water and Air Resources, Raleigh, North Carolina
- 86 N.C.G.S. §130-20
- 87 N.C.G.S. §160-234
- 88 N.C.G.S. §160-200(b)
- 89 N.C.G.S. §160-200(26)
- 90 National Association of Attorneys General, supra.
- 91 9 Wheaton 1 (1824)
- 92 For definition of "water basin" see 33 U.S.C.A. §466a(c) (3)

- 93 33 U.S.C.A. §466g(b)
- 94 33 U.S.C.A. §466g(c) (1)
- 95 33 U.S.C.A. §466g(c) (3)
- 96 Bermingham, "The Federal Government and Air and Water Pollution," 23 Business Lawyer p. 467 (1968)
- 97 42 U.S.C.A. §1857a(a)
- 98 42 U.S.C.A. §1857a(c)
- 99 For definition of "regional air quality control program" see 42 U.S.C.A. §1857c(a) (1)
- 100 42 U.S.C.A §1857c(b)
- 101 42 U.S.C.A. §1857c-1(a)
- 102 42 U.S.C.A. §1857d(a)
- 103 42 U.S.C.A. §1857d(b)
- 104 42 U.S.C.A. §1857d(c) (1)
- 105 42 U.S.C.A. §1857d(c) (2)
- 106 42 U.S.C.A. §1857d(c) (4) (i)
- 107 42 U.S.C.A. §1857d(c) (4) (ii)
- 108 42 U.S.C.A. §1857d(d) (1) (A)
- 109 42 U.S.C.A. §1857d(e)
- 110 42 U.S.C.A. §1857d(f) (1)
- 111 42 U.S.C.A. §1857d(g)
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- 113 42 U.S.C.A. §1857
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- 115 Little v. Martin Furniture Company, 200 N.C. 731 (1931)

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- 117 Nance v. Merchant's Fertilizer and Phosphate Company, 200 N.C. 702
- 118 Young v. City of Asheville, 241 N.C. 618 (1955)
- 119 Donnell v. City of Greensboro, 164 N.C. 330 (1913)
- 120 Session Laws 1903, c.159, s.13
- 121 Young v. City of Asheville, 241 N.C. 618 (1955)
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- 125 State v. Baum, 128 N.C. 600 (1901)
- 126 Taylor v. West Virginia Pulp and Paper Company, 262 N.C. 452 (1964)
- 127 Aycock, supra.
- 128 256 N.C. 509 (1962)
- 129 Young v. City of Asheville, 241 N.C. 618 (1955)
Miller v. Copping, 261 N.C. 430 (1964)
- 130 Durham v. Cotton Mills, 141 N.C. 615 (1906)
- 131 Smith v. Town of Morganton, 187 N.C. 801 (1924)
Harris v. Norfolk and Western Railway Company, 153 N.C. 542 (1910)
- 132 Dunlap v. Carolina Power and Light Company, 212 N.C. 814 (1937)
- 133 Williamson v. Lock's Creek Canal Company, 78 N.C. 156 (1878)
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- 135 6 North Carolina Index 2d, Nuisance §3
- 136 Gray v. High Point, 203 N.C. 756 (1932)

- 137 Morgan v. High Pen Oil Company, 238 N.C. 185 (1955)
- 138 Aydlett v. Carolina By-Products Company, 215 N.C. 700 (1939)
- 139 Dickey v. Alverson, 225 N.C. 29 (1945)
- 140 Ghent, "Validity and Construction of Anti-Water Pollution Statutes or Ordinances," 32 A.L.R.3d p. 215
- 141 Sandusky Portland Cement Company v. Dixon Pure Ice Company, 221 F. 200 (1915)
- 142 Collins Manufacturing Company v. Wickwire Spencer Steel Company, 14 F.2d 871 (1926)
- 143 33 U.S.C.A. §466
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- 145 The Raleigh Times, July 16, 1970, at page 3, col. 5
- 146 National Association of Attorneys General, supra.
- 147 Berger, "Air Pollution As a Private Nuisance," 24 Washington and Lee Law Review p. 314 (1967)
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- 149 Id.
- 150 39 Am. Jur. Nuisances §53
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- 153 287 F. Supp 624 (1968)
- 154 National Association of Attorneys General, supra.
- 155 Schoenbaum, "A Working Paper on Water Pollution Control in North Carolina." Law Center, University of North Carolina in School of Law (May, 1970)

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- 159 66 C.J.S. Nuisances §1
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- 161 Id.
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- 164 National Association of Attorneys General, supra.
- 165 Stowe v. Gastonia, 231 N.C. 157 (1949)
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- 167 Pernell v. City of Henderson, 220 N.C. 79 (1941)
- 168 Phillips v. Hassett Mining Company, 244 N.C. 17 (1956)
- 169 Donnell v. City of Greensboro, 164 N.C. 330 (1913)
- 170 65 C.J.S. Navigable Waters §27
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178 Juergensmeyer, supra.
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