ENVIRONMENT

Taking polluters to the courts

Citizen action is proving effective, and a proposed law may clear up questions

by Richard Gilluly

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."—Ninth Amendment to the Constitution.

". . . Nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."—Fourteenth Amendment to the Constitution.

Air and water pollution and other forms of environmental degradation, it has been argued, at least in a nonlegal sense deny or disparage the rights of the people harmed. And when a Government agency, in its role as a regulator of a polluting industry, does not protect the public, then it would seem the state is in the position of depriving citizens of their rights.

Thus, the two amendments to the Constitution, as cited above, could be construed as a protection for the public against environmental degradation. Whether the courts will agree is open to serious question.

But, say advocates of the judicial approach to environmental cleanup, the most effective action against pollution to date has been in the courts. In effect, they say, the courts must take over the role, nominally held by the executive, of protecting the public against polluters, because of the nonfeasance or malfeasance of local, state and Federal executive agencies. They cite a number of cases, including one brought by the Environmental Defense Fund and others against the Agriculture Department to ban DDT (SN: 11/22, p. 473) or another brought by various private groups against the Interior Department in its administration of the proposed Trans-Alaska Pipeline System (SN: 4/18, p. 389).

The regulatory agencies themselves, formerly reluctant to go to court, have begun to take a somewhat more aggressive role, however, especially the Interior Department under Secretary Walter J. Hickel. Cases are pending against various polluters of Lake Michigan, as well as against the Florida Power and Light Co. for its alleged damage to the ecology of Florida's Card Sound should the company build a proposed canal to carry heated effluents to the sound (SN: 8/1, p. 98).

But the advocates of citizen court action against polluters insist that these Federal actions are not enough. They note that the National Air Pollution Control Administration, during its entire existence, has won only one court case against a polluter, and this a very minor polluter at that.

These advocates include Sens. George McGovern (D-S.D.) and Philip Hart (D-Mich.) and Rep. Morris Udall (D-Ariz.). They have introduced bills which the sponsors say would clarify legal issues that are now cloudy.

McGovern, for example, points to what happened to a group of Santa Barbara citizens who believed the Interior Department was lax in its administration of offshore oil leases—a point, says McGovern, which was amply proven after last year's notorious blowout (SN: 6/20, p. 599). Before the blowout, the citizens were unable to get public hearings on the offshore leases (because, said an Interior official in a letter, such hearings would "stir up the natives"). A suit brought against Interior by the citizens was thrown out of court because the judge held that Interior was the citizens' protector and thus they did not need the protection of the courts. Other courts, however, have held that such suits could be brought.

The McGovern-Hart-Udall bill would clarify this issue—by eliminating the concept of "sovereign immunity," the immunity of the Government to suits by citizens in environmental matters. Another issue on which no firm precedent exists is that of "standing"—the determination of just who can bring a suit; the bill would clearly give standing to any citizen with an environmental grievance.

A third issue the bill would clarify concerns damages. Now a plaintiff must often prove specific economic damages to himself instead of the more general kind of damage pollution causes. The bill would eliminate the requirement for proof of specific damage; in the same connection, it would allow courts to close down an offending industrial operation on behalf of all the citizens, instead of merely awarding money to a plaintiff. If it becomes law, the bill would be subsumed under the commerce clause of the Constitution, which regulates interstate commerce. "In effect, it would cover virtually every business operation," says Fred Palmer, a lawyer on Udall's staff.

But despite the present lack of clarity on the matter of environmental suits, plaintiffs are not hesitating to use the courts for environmental grievances. Perhaps one of the most significant trends is one involving suits brought by local and state governments.

On Oct. 5, for example, a Federal court will begin hearing the case of the Northern States Power Co. versus the State of Minnesota (SN: 4/4, p. 341), a case that will have consequences far beyond the specific issue to be resolved: whether the state can set standards for radiation from a Northern States nuclear power plant. The Atomic Energy Commission now sets these standards—much too low, claims a Minnesota pollution control agency. If the judge decides in favor of the state, it would give to states in general a broad role in pollution control.

Such a decision would be a major blow against the AEC, an agency that has been much criticized for its alleged conflict of interest in both promoting and regulating nuclear power. Eight states have filed briefs in support of Minnesota, and five others have appended their names to briefs filed by

other states. Fifteen Midwestern states recently adopted a resolution calling for a nuclear compact to the atomic plants under state control.

Citizens, counties and municipalities are also pressing criminal charges against polluting industrial operations. The charges are usually brought under long-existing ordinances that have rarely been used in the past but are now being dusted off. Municipal and county governments formerly were hesitant to bring actions against firms important to the local economy. But now citizen pressure is making the governments more responsive.

The organization most active in attempting to use the courts to redress environmental grievances is the Environmental Defense Fund of Stony Brook, N.Y. Originally interested in the local issue of DDT in Suffolk County, N.Y., EDF, along with other organizations as co-plaintiffs, has now moved into the national arena. It has registered both victories and defeats in its court actions so far, with many cases still pending. But EDF has established beyond a doubt the defacto power of citizens organizations to fight in the courts for a clean environment.

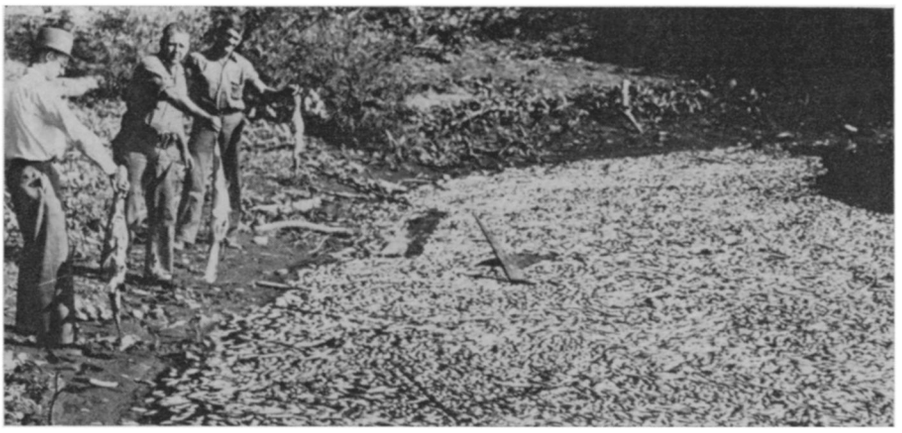
The most celebrated case EDF has been involved in has been its suit against the Departments of Agriculture and Health, Education and Welfare to suspend all uses of DDT and to establish a zero tolerance for DDT in food for human consumption. HEW yielded and is now asking for proposals on how the zero tolerance might be achieved. Agriculture, however, denied that present uses of DDT are an imminent hazard to the public, and the case is scheduled to go back to a Federal Court of Appeals this month.

The first case in which the Ninth Amendment argument (as well as other constitutional arguments) was specifically made was EDF's suit against a Missoula, Mont., pulp mill, heard in a Federal District Court in Montana.

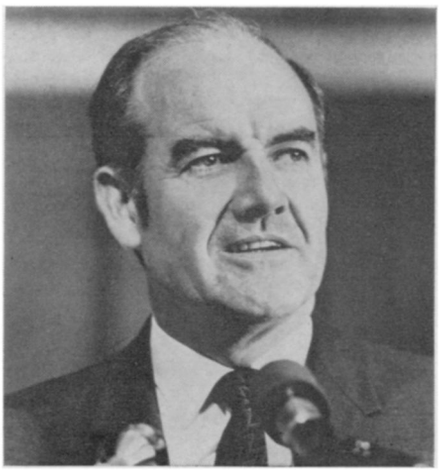
Federal Judge W. D. Murray dismissed the case on procedural grounds before it reached trial, ruling that the complex questions of fact in the EDF suit against Missoula's Hoerner Waldorf Co. should first be decided by a regulatory agency. But he did not foreclose the possibility that if the regulatory agency failed to act, citizens once again might make the Constitutional argument.

In fact, the company now has agreed to clean up its emissions in compliance with Montana's relatively stringent clean air act. Local environmentalists believe that the suit is the main reason for this action.

The environmentalists say the case is thus a classic in citizen action against a polluter. EDF handled the actual legal work, but a Missoula citizens group raised more than $13,000 for the costs involved. Hoerner Waldorf officials insist that the suit had no bearing on its decision to go ahead with an emission-control project, but they do acknowledge that community pressure and the tough new state law were inducements. And the Ninth Amendment argument will undoubtedly be increasingly made. "To put it bluntly," says Cornell University law professor E. F. Roberts, "there exists a constitutional right to a decent environment, which mandates that every government agency—be it Federal, state or local—cast its decisions so as not to contribute further to the decline of today's environmental status quo." Adds Roberts: Such an application of the Ninth Amendment would probably not be retroactive, and cleanup of existing pollution will depend on other approaches.



The effects of pollution have been grim . . . further delay is deadening.



McGovern: Close down offenders.

It is difficult to generalize at this point about the attitudes of the courts. The trend is more and more toward giving standing to citizens groups that have special expertise in environmental matters. But many cases are still pending, and the outcome is uncertain. Chief Justice Warren Burger recently was quoted to the effect that he did not want the overloaded court system to be cluttered with citizens' suits, including environmental ones. But Burger is the author of an opinion, written when he was a Court of Appeals judge, which clearly provided a precedent for citizens groups to bring suit in Federal courts.

And, says Palmer, it is scarcely appropriate to reform the court system by keeping people with legitimate grievances out. Rather, he says, reform must come in improving court procedures—and in extending rather than restricting citizen access to the courts.

An important trend arising from citizen court action is the mobilization of expertise. Scientists frustrated by their inability to move regulatory agencies with their expert knowledge—often because the agencies themselves possessed so few personnel sophisticated enough to evaluate the knowledge—find they have both a sounding board and an entity for effective action in organizations such as the EDF or local citizens groups.

The argument has been made that the adversary system puts a defendant so on the defensive, that corrective action becomes even more unlikely when the harsh accusatory language of a suit or indictment is used. Those who make the argument say that cooperative action and gentle discussion are the means to reform. But these methods have not always been effective in the past. Many instances of past cooperative action, often by the regulatory agencies, are considered by environmentalists to be cooperation with the polluters, usually corporations having great economic power. Until these corporations begin to see their social role in a broader perspective than they have so far, say these advocates of strong pollution controls, court action may be the most effective route to environmental cleanup. □