A Veteran Views the Pollution Fight

by Victor John Yannacone, Jr.

Victor John Yannacone, Jr. has been active in environmental litigation ever since he filed suit, in 1966, against the Suffolk County, Long Island, Mosquito Control Commission to stop it from spreading DDT. He lost that immediate battle, but the publicity of the case occasioned the formation of one of the country's most litigious conservation organizations, the Environmental Defense Fund, where Yannacone is still a trustee. He has since represented his wife in her $30 billion suit (still pending) against eight DDT manufacturers on behalf of all present and future Americans, among other cases.

We asked Mr. Yannacone, as one of the veterans of the environmental movement, to share some of his observations on the future of environmental law with us. The Editor.

Today, no matter whether the complaint alleges serious, permanent and irreparable damage to a unique national, natural resource treasure or damage to a single ornamental flower, the defense moves against the complaint raising the narrow technical issues of standing, jurisdiction and existence of a cause of action. Timid counsel anticipate these defenses and seek to classify environmental wrongs resulting from the misapplication of 20th century technology in the pigeonholes of 19th century torts.

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Appellate Courts are cluttered with appeals from this kind of litigation. The fundamental environmental issues are becoming lost in a maze of procedural legal formalisms reminiscent of the kind of obfuscation that led the diverse wits and pens of Swift, Shakespeare, Dickens and Gilbert to taunt the law and mock the lawyer.

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No matter who the nominal winner of any particular lawsuit is, the general public will be the loser if present trends in environmental litigation continue.

The National Environmental Policy Act, even when considered with the Air Quality Act, the Clean Air Amendments, the Federal Water Pollution Control Act, the Fish & Wildlife Coordination Act, the Rivers and Harbors Act (the Refuse Act of 1899), the Submerged Lands Act and the Federal Environmental Pesticide Control Act, cannot assure environmental quality.

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In fact, when we look to the law for answers to many of our social and environmental problems we often find that the "law" is the cause of many of the problems.

. . . It is the "law" which encourages construction of too many highways for too many automobiles.

. . . It is the "law" which expropriates public property—the air we breathe and the water we drink—for private profit.

. . . It is the "law" which established and now sanctifies the housing patterns which are responsible for urban decay and ghettoes.

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While 1972 marked the year of NEPA in the calendar of environmental law, it also marked the beginning of an environmental backlash. Litigation which merely delayed a public works project or utility company expansion, such as the Scenic Hudson Preservation case, has been blamed for all the social ills which should be attributed to the failure of the public agency or utility company to take advantage of recent advances in environmental systems science.

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As more and more medical evidence establishes the damaging effects of environmental degradation on life and health, the volume of environmental personal injury actions can be expected to approach that of automobile personal injury actions.

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While, during the early days of environmental litigation, class actions were traditionally reserved for equity and constitutional litigation seeking declaratory judgments and injunctive relief, class actions seeking money damages for injury to persons and property will become more common.

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In class actions seeking declaratory judgments, the environmental lawyers of the 1970s, like their predecessors, the civil rights lawyers of the 1960s, will obtain judicial recognition that environmental rights are constitutionally-protected.

In the field of environmental law, interdisciplinary cooperation between law and science is the keystone of success. Cases will be tried and many will be lost because of the failure of attorneys, young and old, to master the complex scientific background of the issues to be tried.

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At the present time, and probably during the balance of this decade, the vast bulk of environmental litigation will concern administrative action.

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Even under the National Environmental Policy Act (NEPA), the narrow statutory jurisdiction and mission-oriented motivation of many administrative agencies, particularly those charged with the promotion as well as the regulation of particular sectors of the economy, make such agencies inherently incapable of considering environmental matters with the requisite degree of ecological sophistication.

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From now on, the goal of all attorneys concerned with the environment should be the drafting and enforcement of ecologically sophisticated, environmentally responsible, socially relevant and politically feasible legislation.