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

HENRY E. POOLE*

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 fifty 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 there-

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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. Gen. Stat. § 143-211.

³ Stream Sanitation Law Session Laws 1951, c. 606.

⁴ N.C. Gen. Stat. § 143-215.

⁵ N.C. Gen. Stat. § 77-1.

to;⁶ and to build public landings.⁷ This statute declares that an individual may not obstruct the free passage of boats along any river or creek.⁸

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 get prior permission for construction of a well.¹²

Chapter 90A: Establishes that there shall be classifications 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 It also provides that operators of water treatment facilities must be certified¹⁴ and that there shall be classifications for all waste-water treatment facilities.¹⁵

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, industrial waste, or other polluting materials.¹⁶ It also allows amortization by individuals for 60 months under the same conditions as for corporations.¹⁷ It 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 habitat.¹⁸ This provision is also applicable for waste disposal or water pollution abatement plants, provided the Board of Water and Air Resources authorizes the disposal or abatement as genuine.¹⁹ The chapter also exempts real and personal property used exclusively for waste disposal or water pollution abatement facilities.²⁰

⁶ N.C. Gen. Stat. § 77-4.

⁷ N.C. Gen. Stat. § 77-11.

⁸ N.C. Gen. Stat. § 77-12.

⁹ N.C. Gen. Stat. § 87-68.

¹⁰ N.C. Gen. Stat. § 87-69.

¹¹ N.C. Gen. Stat. § 87-68.

¹² N.C. Gen. Stat. § 87-88.

¹³ N.C. Gen. Stat. § 90A-22.

¹⁴ N.C. Gen. Stat. § 90A-25.

¹⁵ N.C. Gen. Stat. § 90A-37.

¹⁶ N.C. Gen. Stat. § 105-130.10.

¹⁷ N.C. Gen. Stat. § 105-147.

¹⁸ N.C. Gen. Stat. § 105-294.

¹⁹ *Id.*

²⁰ N.C. Gen. Stat. § 105-296.

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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, or hurricane protection.²¹

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 It also declares 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 system of sewage disposal.²⁴

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

Part 1: Gives definitions and establishes the Board with administrative details.²⁵ It 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 It 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 The law allows the Board to adopt regulations to implement this article;³¹ conduct public hearings³² and investigations;³³

²¹ N.C. Gen. Stat. § 113-14.1.

²² N.C. Gen. Stat. § 130-157.

²³ N.C. Gen. Stat. § 130-158.

²⁴ N.C. Gen. Stat. § 130-160.

²⁵ N.C. Gen. Stat. § 143-211 through § 143-213.

²⁶ N.C. Gen. Stat. § 143-214.1.

²⁷ N.C. Gen. Stat. § 143-215.1.

²⁸ N.C. Gen. Stat. § 143-215.2.

²⁹ *Id.*

³⁰ *Id.*

³¹ N.C. Gen. Stat. § 143-215.3(a)(1).

³² N.C. Gen. Stat. § 143-215.3(a)(3).

³³ N.C. Gen. Stat. § 143-215.3(a)(2).

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 administrative provisions covering mailing lists, publications of regulations and rules, notices and hearings.⁴² In concluding, 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 It establishes regulation for capacity use areas and 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 regulations for dam con-

³⁴ N.C. Gen. Stat. § 143-215.3(a)(5).

³⁵ N.C. Gen. Stat. § 143-215.3(a)(6).

³⁶ N.C. Gen. Stat. § 143-215.3(a)(9).

³⁷ N.C. Gen. Stat. § 143-215.3(a)(7).

³⁸ *Id.*

³⁹ N.C. Gen. Stat. § 143-215.3(b).

⁴⁰ N.C. Gen. Stat. § 143-215.3(c).

⁴¹ N.C. Gen. Stat. § 143-215.3(d).

⁴² N.C. Gen. Stat. § 143-215.4.

⁴³ N.C. Gen. Stat. § 143-215.5.

⁴⁴ N.C. Gen. Stat. § 143-215.6.

⁴⁵ N.C. Gen. Stat. § 143-215.13.

⁴⁶ N.C. Gen. Stat. § 143-215.14.

⁴⁷ *Black's Law Dictionary* defines *riparian owner* as "One who owns land on the bank of a river." This means a person owning land adjacent to any watercourse, whether navigable or nonnavigable.

⁴⁸ N.C. Gen. Stat. § 143-215.22.

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struction,⁴⁹ repair, alteration, or removal, including applications to be filed with the Department of Water and Air Resources.⁵⁰ It also requires final dam certification⁵¹ and dam inspection.⁵²

Part 4: Federal Water Resources Development Projects: Allows counties, municipalities, and local governments to cooperate and adopt resolutions in accordance with the federal government programs for river, harbor, and flood control, and other civil works projects.⁵³ It sets out items of cooperation to which state and local governments may bind themselves,⁵⁴ and authorizes local government to acquire land for complying with the terms of the local cooperation.⁵⁵

Chapter 143: Article 33A: Establishes rules of evidence for administrative hearings before state agencies, including the Department of Water and Air Resources.⁵⁶

Chapter 143: Article 38: Establishes the Department of Water and Air Resources.⁵⁷ It gives the Board power to adopt rules and regulations necessary to carry out the purposes of this article.⁵⁸ In addition, it transfers certain powers from The Department of Conservation and Development to the Department of Water and Air Resources.⁵⁹

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.⁶⁰

Under the authority of Article 21, Chapter 143, the Board has established classifications and standards.⁶¹ 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

⁴⁹ N.C. Gen. Stat. § 143-215.26.

⁵⁰ N.C. Gen. Stat. § 143-215.27.

⁵¹ N.C. Gen. Stat. § 143-215.30.

⁵² N.C. Gen. Stat. § 143-215.32.

⁵³ N.C. Gen. Stat. § 143-215.40.

⁵⁴ N.C. Gen. Stat. § 143-215.41.

⁵⁵ N.C. Gen. Stat. § 143-215.42.

⁵⁶ N.C. Gen. Stat. § 143-318.

⁵⁷ N.C. Gen. Stat. § 143-352.

⁵⁸ N.C. Gen. Stat. § 143-354.

⁵⁹ N.C. Gen. Stat. § 143-355.

⁶⁰ N.C. Gen. Stat. § 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.

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 It also allows amortization by individuals for 60 months under the same conditions as for corporations.⁶³ It 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 to 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 It forbids

⁶² N.C. Gen. Stat. § 105-130.10.

⁶³ N.C. Gen. Stat. § 105-147.

⁶⁴ N.C. Gen. Stat. § 105-294.

⁶⁵ *Id.*

⁶⁶ N.C. Gen. Stat. § 105-296.

⁶⁷ N.C. Gen. Stat. § 143-215.

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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 consult with the person controlling the pollution source.⁷⁷ 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 statutes.⁷⁹ 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 guidelines.⁸¹ This part of Article 21 also establishes general administrative provisions covering mailing lists, publications of regulations and rules, notices and hearings.⁸² In concluding, the right of judicial review is established⁸³ along with penalties for violations.⁸⁴

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

Other North Carolina Statutes which have an effect on the abate-

⁶⁸ N.C. Gen. Stat. § 143-215.1.

⁶⁹ N.C. Gen. Stat. § 143-215.2.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² N.C. Gen. Stat. § 143-215.3(a)(1).

⁷³ N.C. Gen. Stat. § 143-215.3(a)(3).

⁷⁴ N.C. Gen. Stat. § 143-215.3(a)(2).

⁷⁵ N.C. Gen. Stat. § 143-215.3(a)(5).

⁷⁶ N.C. Gen. Stat. § 143-215.3(a)(6).

⁷⁷ N.C. Gen. Stat. § 143-215.3(a)(9).

⁷⁸ N.C. Gen. Stat. § 143-215.3(b).

⁷⁹ N.C. Gen. Stat. § 143-215.3(c).

⁸⁰ N.C. Gen. Stat. § 143-215.3(d).

⁸¹ N.C. Gen. Stat. § 143-215.3(a)(11).

⁸² N.C. Gen. Stat. § 143-214.4.

⁸³ N.C. Gen. Stat. § 143-215.5.

⁸⁴ N.C. Gen. Stat. § 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.

ment 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, he shall be guilty of a misdemeanor.⁸⁶

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 is dangerous or prejudicial to the public health; . . ." ⁸⁷ Cities are also given the power to abate all nuisances and the causes thereof,⁸⁸ and to prevent and abate nuisances, whether on public or private property.⁸⁹

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*.⁹⁰

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.⁹¹

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 basin⁹² involved and

⁸⁶ N.C. Gen. Stat. § 130-20.

⁸⁷ N.C. Gen. Stat. § 160-234.

⁸⁸ N.C. Gen. Stat. § 160-200(b).

⁸⁹ N.C. Gen. Stat. § 160-200(26).

⁹⁰ 9 Wheaton 1 (1824).

⁹¹ National Association of Attorneys General, *supra*.

⁹² For definition of "water basin" see 33 U.S.C.A. § 466a(c)(3).

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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. It 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 inter-municipal 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.⁹⁸ 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 United States 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 which the Federal government will do so in interstate waters.⁹⁶

⁹⁸ 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).

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 pollution⁹⁸

§ 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 Governors of the state or states affected.¹⁰⁰

§ 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 and as a rule shall not be displaced by Federal enforcement.¹⁰³ 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 to such air quality control region or portions

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).

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thereof.¹⁰⁵ 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 pollution¹⁰⁶ 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 procedures for conferences of air pollution agencies,¹⁰⁸ stipulations under which the Secretary of HEW recommends to state air pollution agencies remedial action against certain polluters,¹⁰⁹ procedures for Federal public hearings for failure to abate pollution,¹¹⁰ procedures for Federal judicial proceedings to secure abatement,¹¹¹ and circumstances under which Federal injunctions will issue in cases of imminent and substantial endangerment.¹¹²

§ 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 uniform 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 assistance, increased programs of study, stronger judicial powers with respect to the abatement of interstate problems and intrastate problems as a result of 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 influence can have no effect at all. Eight of these regions

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).

¹¹² 42 U.S.C.A. § 1857d(k).

¹¹³ 42 U.S.C.A. § 1857.

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have thus far been established throughout the United States 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 injunction against the pollution of a public water supply.¹²⁰

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

¹¹⁴ O'Fallon, "Deficiencies in the Air Quality Act of 1967," 33 *Law and Contemporary Problems* p. 277 (1968).

¹¹⁵ *Little v. Martin Furniture Company*, 200 N.C. 731 (1931).

¹¹⁶ *Stowe v. Gastonia*, 231 N.C. 157 (1949).

¹¹⁷ *Nance v. Merchant's Fertilizer and Phosphate Company*, 200 N.C. 702 (1931).

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).

¹²² 19 N.C. 50.

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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.¹²⁷ 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 *Bayer v. Nello Teer Co.*,¹²⁸ 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,

¹²³ Aycock, "Introduction to Water Use Law in North Carolina," 46 *North Carolina Law Review* p. 1 (1967) [hereinafter cited as Aycock].

¹²⁴ *Miller v. Coppage*, 261 N.C. 430 (1964).

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).

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 lawful and notwithstanding the absence of negligence.¹³⁵ For example, the operation of a sewage disposal plant,¹³⁶ an oil refinery,¹³⁷ and an animal by-products plant, may constitute a private nuisance.¹³⁸

¹²⁹ *Young v. City of Asheville*, 241 N.C. 618 (1955); *Miller v. Coppage*, 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).

¹³⁴ *Smith v. Town of Morganton*, 187 N.C. 801 (1924).

¹³⁵ *Causby v. High Penn Oil Co.*, 93 S.E.2d 79 (1956).

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).

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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 state to protect the public health.¹⁴⁰

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 was 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 intrastate.¹⁴⁴

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 of the United States.¹⁴⁵

The *Yale Law Journal* reports as of November, 1969, no Federal cases had reached court under the Federal Water Pollution Control Act.

¹³⁹ Dickey v. Alverson, 225 N.C. 29 (1945).

¹⁴⁰ Ghent, "Validity and Construction of Anti-Water Pollution Statutes or Ordinances," cited from 56 *Am. Jur. Waters* (1st ed. §§ 388, 412).

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.

¹⁴⁴ Edelman, "Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution," 33 *George Washington Law Review* p. 1067 (1965).

¹⁴⁵ *The Raleigh Times*, July 16, 1970, at page 3, col. 5.

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 preempt such action.¹⁴⁶

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 enjoyment by persons of ordinary sensibilities.¹⁴⁹

Every person has the right to have air diffused over his premises in its natural state, free from artificial impurities.¹⁵⁰ 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 manner.¹⁵¹ 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.¹⁵²

As of this date, the Secretary of HEW has brought only one case specifically under the 1963 Clean Air Act. This was *United States v. Bishop*¹⁵³ and was brought because of the defendant's animal reduction

¹⁴⁶ National Association of Attorneys General, *supra*.

¹⁴⁷ Berger, "Air Pollution As a Private Nuisance," 24 *Washington and Lee Law Review* p. 314 (1967).

¹⁴⁸ 66 C.J.S. Nuisances § 23.

¹⁴⁹ *Id.*

¹⁵⁰ 39 Am. Jur. Nuisances § 53.

¹⁵¹ *Id.*

¹⁵² *Bostick v. Smoot Sand and Gravel Corporation*, 154 F. Supp. 744, reversed 260 F.2d 534 (1958).

¹⁵³ 287 F. Supp. 624 (1968).

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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. They 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.¹⁵⁵

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. v. 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,

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).

¹⁵⁶ Carter, "Scientists Go To Court," *Science*, Vol. CLVIII, p. 1552 (1967) [hereinafter cited as Carter].

¹⁵⁷ 357 U.S. 449 (1958).

¹⁵⁸ Carter, *supra*.

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 require 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 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

¹⁵⁹ 66 C.J.S. Nuisances § 1.

¹⁶⁰ Prosser, *Handbook of the Law of Torts*, p. 389 (Second Edition 1955).

¹⁶¹ *Id.*

¹⁶² 66 C.J.S. Nuisances § 7.

¹⁶³ Porter, "The Role of Private Nuisance Law in the Control of Air Pollution," 10 *Arizona Law Review* p. 107 (1968) [hereinafter cited as Porter].

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are incapable of administering standards uniformly, they are also usually incapable of rendering quick action in the cases they do handle.¹⁶⁴

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 discharge of industrial wastes into a stream¹⁶⁵ or the discharge into a stream by a municipal corporation¹⁶⁶ 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 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

¹⁶⁴ National Association of Attorneys General, *supra*.

¹⁶⁵ *Stowe v. Gastonia*, 231 N.C. 157 (1949).

¹⁶⁶ *Id.*

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.

¹⁷¹ *Id.*

¹⁷² 65 C.J.S. Navigable Waters § 39.

¹⁷³ 93 C.J.S. Waters § 15.

¹⁷⁴ 56 Am. Jur. Waters § 432.

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 *Fairview Farms, Inc. v. Reynolds Metals Co.*,¹⁷⁷ 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 possibly find greater success.¹⁷⁸

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 defendants' activity was of an ultrahazardous nature. This is a very tough concept to use in that the complainer of the pollution will have formidable odds against recovery 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

¹⁷⁵ William Aldred's Case, 77 Eng. Rep. 816, K.B. 1611.

¹⁷⁶ Juergensmeyer, "Control of Air Pollution Through the Assertion of Private Rights. *Duke Law Journal* p. 1126 (1967) [hereinafter cited as Juergensmeyer].

¹⁷⁷ 342 P.2d 790 (1959).

¹⁷⁸ Juergensmeyer, *supra*.

¹⁷⁹ *Id.*

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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.

ATTORNEYS GENERAL'S 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 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.

¹⁸⁰ *Id.*

¹⁸¹ Porter, *supra*.

¹⁸² 7 Am. Jur. Attorney General § 7.

¹⁸³ N.C. Gen. Stat. § 4-1.

¹⁸⁴ N.C. Gen. Stat. § 114-6.

¹⁸⁵ McLean v. Towensend, 227 N.C. 642 (1947).

¹⁸⁶ Barnes v. Baker, 1 Amb. 158, 27 Eng. Rep. 105 (1752).

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, their 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.