1-1-1972

Early Thoughts on Prosecuting Polluters

Kenneth A. Manaster
Santa Clara University School of Law, kmanaster@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
2 Ecology L.Q. 471
Perspective

EARLY THOUGHTS ON PROSECUTING POLLUTERS

Kenneth A. Manaster*

Prosecution of polluters by officials of the various levels of government has not kept pace with the increasingly felt need for environmental protection. This Perspective presents reflections of a former prosecutor who represented the people of Illinois in the beginning stages of enforcing the new environmental laws of that State through government-sponsored litigation. The author does not attempt an exhaustive analysis of the various subjects discussed, rather he presents his views of the general principles and policies involved and indicates the concerns that prosecutors should bear in mind.

In most areas of the United States prosecution of polluters of the environment is only beginning. At the state and local levels, as well as at the federal level, only within the past few years have substantial numbers of government-initiated lawsuits been filed to halt or punish pollution-causing activities. Significant and substantial litigation of this sort has already begun in Illinois, particularly at the state level. The purpose of this paper is, drawing from recent litigation experience in Illinois, to offer some thoughts and questions concerning those prosecution policies and procedures which, in the long run, will be most effective in abating pollution.

In a sense this paper is intended as a partial how-to-do-it manual for a pollution prosecution office at any level of government. The emphasis is upon the principal tools identified in Illinois thus far for use by government lawyers in combating pollution. No systematic

* Assistant Professor of Law, University of Santa Clara; A.B. 1962, LL.B. 1966, Harvard University. Former Assistant Attorney General and Chief of the Northern Region, Environmental Control Division, Office of the Attorney General of the State of Illinois.

1. Indications of the large number of suits recently filed in Illinois may be found in the first, second, and third reports of the Illinois Pollution Control Board, dated Jan. 6, 1971, June 28, 1971, and Aug. 1972, respectively. To be compared to this is the fact that only three reported cases are found under the terms of the public nuisance statute on the books in Illinois since 1874. ILL. ANN. STAT. ch. 100 1/2, § 26.8 (Smith-Hurd Supp. 1972).

Indications of the tremendous increase in federal water pollution suits may be found at ENVIRONMENTAL QUALITY: THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 121 (1972).
philosophy or structural scheme will be offered. The author's intention is merely to raise questions and offer a variety of insights which should be considered by pollution officials at any level who wish to make full use of the skills of lawyers and of powers exercised by courts and other institutions in which lawyers function.

"Prosecution" is used here to refer less to criminal cases, as it is usually defined, than to official civil or administrative suits against polluters seeking injunctive relief, monetary or other penalties, or combinations of such relief. Litigation of this latter sort has been more frequent thus far than strictly criminal cases. For reasons which will be discussed below, this predominance is both sensible and likely to continue.

At the outset it should be noted that an environmental prosecutor, when he seeks any sort of judicial or administrative relief, must give careful attention to what he may realistically expect from such litigation and to what he should be prepared to justify to the affected public. He must depend primarily upon the statutory and judicial statements of his power existing in his jurisdiction. In a state such as Illinois where considerable and specific statutory powers are granted to the Attorney General to pursue such litigation, there is no question as to either common law or explicit statutory bases for seeking injunctions and monetary penalties against polluters. At other levels of government, however, authority to act is somewhat less clear. Entities such as counties, municipalities, park districts, sanitary districts, drainage districts, forest preserve districts and mosquito abatement districts must rely upon less direct indications in statutes and ordinances that arguably


3. Examples of non-criminal prosecutions are discussed throughout the text of this paper. As of March 1972, only two criminal cases had been initiated under the criminal provisions of the Illinois Environmental Protection Act, ILL. ANN. STAT. ch. 111½, §§ 1044-45 (Smith-Hurd 1971)—People v. Fry Roofing Co., No. 72-324 (Cook County, Ill., Cir. Ct., Crim. Div., filed Feb. 18, 1972). [2 ENV. REPTR.—CURR. DEV. 1356 (1972)] and People v. Steelco Chemical Corp., No. 71-2059 (Cook County, Ill., Cir. Ct., Crim. Div., filed July 27, 1971). As noted at note 1 supra, considerably more civil proceedings under the Act had been brought by that time, including civil litigation related to the two criminal cases cited supra—Pollution Control Bd. v. Fry Roofing Co., 4 Ill. App. 3d 675, 281 N.E.2d 757 (1972) and People ex rel. Scott v. Steelco Chemical Corp., No. 71 CH 3517 (Cook County, Ill., Cir. Ct., preliminary injunction ordered per stipulation, June 8, 1971).

justify imposition of administrative cease-and-desist orders or permit the entity itself to seek injunctive relief from the courts.\(^5\)

Suffice it to say that a prosecutor acting for any agency of government must give careful attention to all possible bases for seeking relief, whether his support be grounded in explicit legislative enactments or inferred from the language of statutes or judicial decisions. Undoubtedly many jurisdictions do not have adequate prosecutory legislation at present. Of the statutory provisions which have been enacted, many, such as certain provisions of the Illinois statutes, are just now beginning to undergo judicial scrutiny at the appellate level.\(^6\) Thus, development of the clearest and most effective (and constitutional) statements of injunctive authority has by no means been completed. As part of this development, and in the absence of explicit legislative grants of authority, it is necessary for prosecutors to employ imaginatively whatever plausible grounds for action they can find.\(^7\)

The discussion which follows will focus on three major questions: First, what substantive policy choices is environmental prosecution intended to promote? Second, what resources should be mustered in order to pursue the desired policies? Third, what procedural routes should be taken and what types of procedural problems should be expected in environmental prosecution? These three questions are closely interrelated, and cannot readily be separated from one another. As a way of approaching the overall question of why and how polluters should be sued by government, however, this breakdown provides a useful means for raising a number of important issues, as well as presenting a few answers that the Illinois experience already offers.\(^8\)

---


8. A good summary of recent actions of the Illinois Attorney General in this field is found in [1969-1970] ILL. ATT'Y GEN. BIENNIAL REP. xix-xxix. Further information regarding official environmental activities and policies in Illinois is available through the office of the Attorney General, the Illinois Pollution Control Board.
WHAT SUBSTANTIVE POLICY CHOICES IS ENVIRONMENTAL PROSECUTION INTENDED TO PROMOTE?

The overriding general policy which the environmental prosecutor serves is to stop pollution where it presently exists and to prevent it from continuing or commencing in the future. His responsibility within this general policy is to bring to light, through adjudicatory processes, all the proof available to him regarding what he believes to be violations of environmental protection laws and principles. It is then for the adjudicatory body to determine whether or not the violation shall be considered proven, bearing in mind that a balancing of various private and public interests is often necessary.

As operational guidelines, however, these broad statements certainly are not very helpful. The prosecutor who wishes to be most effective, and the public official who wishes to establish an effective prosecution office, must consider in greater detail how the tools of the lawyer can best be used to further the goal of the overall policy. To the extent that he thinks out in advance some of the questions he will face and choices he must make, the greater the likelihood that he will make a useful, rational contribution to pollution control.

The first question the environmental prosecutor faces is the practical determination of which polluters and which pollution will be the focus of his efforts. The limitations of his staff and resources make such choices inevitable, and a number of factors usually will influence these decisions. It is not realistic to expect agencies of government to be reliable, frequent litigators in opposition to proposed public construction projects or other governmental acts which may have adverse environmental effects. The reason for this is that the government lawyer not only often works with the officials directly responsible for public projects, but would most likely be called upon to defend those officials if they were sued by other parties even on environmental grounds. This is true of the Justice Department at the national level, of the attorney general's office of any state, or of the attorney for a given county or municipality. Therefore, prospective suits seeking to halt such

---

9. This problem arose in Farmers Opposed to Extension of the Illinois Tollway v. Illinois State Toll Highway Authority, 1971 Illinois Pollution Control Board [hereinafter Ill. P.C.B.] No. 159 (dismissed for lack of jurisdiction, Sept. 16, 1971). There, counsel for the farmers requested the Attorney General of Illinois to intervene on the complaining side, despite the fact that the Attorney General was bound to represent the respondents, official agencies of the state government.
projects or to force disclosure of environmental impact information must, as a general rule, be initiated by citizens and citizen groups.\textsuperscript{10}

This is not to say, however, that the attorney for one level of government will never sue for injunctive relief against a project proposed under the auspices of a different level of government.\textsuperscript{11} To put the matter in a slightly different way, a government lawyer is unlikely to sue his own client, but may not hesitate to sue institutions at another level of government. He may be reluctant to do this, however, if he feels that such action might backfire by setting a precedent which other officials might later use against his own clients.\textsuperscript{12}

Environmental prosecutions thus will take place most frequently against polluters other than agencies of government. This does not mean that a concerned prosecution office cannot serve a useful function by acting as the conscience for other agencies of government which it represents. In many instances, without getting to the level of litigation against his own client, the government lawyer can bring some enlightenment and a fuller awareness of its responsibilities to a polluting arm of government.\textsuperscript{13}

When the prosecutor turns his attention to non-governmental polluters, his usual targets are individual offenders. It is also very useful, or even essential, to focus at times on categories of polluters in coordinated prosecution efforts. Categories may be selected on the basis of various criteria. For example, the prosecutor may find reason to concentrate upon air pollution cases, in preference to water or land pollution problems. He may wish to take a geographic perspective and concentrate upon elimination of pollution in a particularly troublesome area, perhaps zeroing in on all the air pollution problems in a specific locale or even on air, water, land, noise and other pollution

\textsuperscript{10} See, e.g., NRDC v. Morton, 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972); Conservation Council v. Froehlke, — F.2d —, 4 ERC 1044 (4th Cir. 1972); Concerned Citizens of Marlboro v. Volpe, 459 F.2d 332, 4 ERC 1042 (3rd Cir. 1972); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 4 ERC 1329 (D. Conn. 1972); EDF v. Coastside County Water Dist., 27 Cal. App. 3d 695, 703, 104 Cal. Rptr. 197, 201, 4 ERC 1573, 1576 (1st Dist. 1972).


\textsuperscript{12} One can imagine the hesitancy of an environmental prosecutor at the county or state level to undertake an attack on a municipal project such as the unwise expansion or placement of a municipal airport if the county or state itself were contemplating similar activity elsewhere. This hesitancy would seem to be greatest if the prosecutor is the political appointee of the officials in charge of such activity.

\textsuperscript{13} The Attorney General's office in Illinois in a few instances has called to the attention of specific arms of the state government their duties to comply with the state's environmental laws. See, e.g., ILL. ANN. STAT. ch. 111 1/2, § 1047 (Smith-Hurd Supp. 1971). One such instance related to air pollution caused by antiquated heating equipment in state penal institutions.
problems there. As a third category, efforts may be coordinated into sets of prosecutions against a particular industry identified as causing a specific type of pollution in a number of areas from basically the same equipment or process. Such a group approach is helpful for inducing a particular industry to develop or put into operation a new form of control technology. This is true especially if the technology is so costly as to call for considerable investment and risk if only one member of the industry were forced to consider it alone.

Prospective or anticipatory lawsuits against private polluters are not as likely to occur as are suits with respect to existing pollution or past incidents. This is so presently because there are so many existing problems to contend with that it is difficult to deal with these and simultaneously to venture into areas of potential pollution. This is not to say that such foresight would not be tremendously valuable. At times litigation of this sort has been instituted with highly useful effects. It should be encouraged, and the technical backup necessary for it should be provided whenever possible. Until the present problems which are just not being seriously attacked have been dealt with, however, it remains unlikely that time will be taken by prosecutors to contemplate incipient pollution problems which have not yet surfaced.

Generally, then, the major objective of government prosecutors is to control existing pollution problems being created by non-governmental entities. Once this is accepted, a few other questions must be immediately considered. First, it must be decided whether, as a general rule, immediate cessation of pollution is desired, or gradual cessation is favored so as to minimize disruptive effects on the pollution-producing activities themselves, many if not most of which will have some definite social value. This question, of course, could be taken


15. If the prosecutor is an elected official, his natural inclination will be to deal with obvious, existing problems rather than with future harm about which the voting public is not yet complaining. However, in a jurisdiction in which there is considerable public concern over the adverse environmental effects of land development projects, public officials should be expected to be responsive to such concern. This is particularly true for planning agencies and legislative bodies, and perhaps also for prosecutors.


17. The question of disrupting socially important but pollution-causing activities
up on a case-by-case basis without any general policy preference in advance, but the question is important enough to be worthy of overall, preliminary consideration. This would provide a basis, or at least some criteria, for the particular decisions called for in specific cases.

A second important question to be considered is the extent to which litigation completely through to judgment is to be aimed for as distinguished from conciliation or settlement either prior to filing of suit or subsequent to filing. As will be discussed in greater detail below, the expression of concern to a polluter by an agency of government very often brings about the desired, corrective action. There is then no practical need to go forward and file suit, except in the instance in which it is considered useful to embody control methods in an enforceable court decree. The value of such a decree is often considerable, inasmuch as it makes the polluter's new plan to correct his problem into an obligation backed up by the powers of the court. This is not always a benefit worth the time and effort required to obtain it, as in the case of small or easily correctable problems in which the good faith or enlightened intentions of the polluter are clear. It may often be found, furthermore, that voluntary, albeit delayed, compliance of this sort can be achieved by investigative, non-legal personnel working under the general supervision of lawyers. Such "field-settlements" are often a valuable method of obtaining quick solutions to pollution complaints voiced by citizens regarding small, specific pollution sources.

Assuming that conciliation and negotiation will not bring about the desired result in all instances, and will not even be pursued in some instances, the value of litigation itself must be carefully assessed. For many types of pollution the most effective weapon of government


18. See text accompanying notes 51-53 infra.

19. See, e.g., People ex rel. Scott v. The Penn Central Co., No. 70 CH 5157 (Cook County, Ill., Cir. Ct., consent decree entered, Mar. 15, 1971) (cessation of alleged public nuisance from refuse at pilings of railroad trestle in Little Calumet River).

20. In numerous cases the investigators for the Environmental Control Division, Office of the Attorney General of Illinois, obtained such results with respect to a wide variety of problems, e.g., a brick factory's dust emissions, a pig farm's odor, a municipality's improper pesticide spraying, and a construction firm's open burning of waste materials.
is a court injunction requiring the cessation of the pollution-causing activity—a negative injunction. A plausible threat of the imposition of such relief is often sufficient in itself to bring about “voluntary” compliance.21

If this threat is to be made by the act of filing suit for such relief, however, the prosecutor should only proceed if in fact he is prepared to carry the case through trial with sufficient proof to justify this severe remedy. This usually means that the prosecutor has available to him reliable and credible citizen witnesses who can testify as to the basic problem; that he is aware of all applicable laws, regulations, and precedents which set out the standards of conduct that the defendant appears to have violated; that he has interviewed and obtained the services of all expert witnesses necessary to prove the violations and rebut predictable technical defenses; that he has obtained any necessary photographs or laboratory and field tests so as to be able to prove the conditions of pollution caused by the defendant, as well as their effects on life and property; and that he has a firm grasp of all of the facts, with the help of a first-hand view of the situation, and an awareness of what further information is needed that can only be obtained through discovery. If negative injunction suits are filed lightly and without sufficient preparation, the plausibility of the injunction threat will be lost. Both polluters and the complaining public will soon become aware that suits are being filed, but are not being pursued to trial, or are being lost there.

Thorough preparation, such as that required for negative injunction suits, is also essential if the relief aimed at is mandatory injunctive relief, that is, an order on the polluter to take certain steps to modify or improve his activities so as to eliminate or reduce the pollution. Clearly the prosecutor must be prepared to put on proof of the technical feasibility and effectiveness of the particular steps he would like to have taken.22 As a general rule it may be said that mandatory relief is always preferable to negative injunctive relief because the effect of

21. See, e.g., People ex rel. Scott v. Steelco Chemical Corp., No. 71 CH 3517 (Cook County, Ill., Cir. Ct., preliminary injunction ordered by agreement, June 8, 1971) (operation of ferric chloride production equipment) [2 ENV. RPTR.—CURR. DEV. 181 (1971)]; see also People v. Chicago Magnet Wire Corp., No. 71 CH 1410 (Cook County, Ill., Cir. Ct., stipulation entered, Mar. 22, 1972) (abatement plan for phenolic air emissions); People v. United States Steel Corp., No. 69 CH 3334 (Cook County, Ill., Cir. Ct., consent decree entered, Jan. 18, 1971) (requiring recycled process water system at steel mill).

22. An outstanding example of such preparation was the extensive and sophisticated technical expertise brought to bear by the Attorney General in People v. United States Steel Corp., No. 69 CH 3334 (Cook County, Ill., Cir. Ct., consent decree entered, Jan. 18, 1971) in order to establish for the first time the feasibility of a closed system for water wastes at a major steel plant. See also discussion of this case in [1969-1970] ILL. ATTY GEN. BIENNIAL REP. xxi-xxii.
the former is to continue the activity, with its benefits to society, while reducing the polluting by-products, whereas the latter does eliminate the pollution but may well eliminate other useful products or services as well. Obviously, negative relief is difficult to justify, and realistically the courts cannot be expected to impose it, with respect to basic services such as transportation, sewage treatment, electric power, and the production of basic commodities such as steel and oil.\(^2\)

The deterrent effect of pollution prosecutions does seem to be considerable. That is, it is highly likely that vigorous prosecution of a certain type of polluter will be noticed by other polluters of the same type. The polluter on the sidelines quickly begins to envision and assess his posture in similar litigation. Often the result is either a quiet but prompt cleanup or an inquiry to the prosecuting authorities as to just what he must do in order to avoid being next.\(^2\)\(^4\) This logical tendency on the part of polluters, whether they be business concerns or public entities, such as municipalities and sanitary districts, brings us to the question of whether prosecution efforts are best directed at a smaller number of larger cases or at a large, random number of small or medium-sized cases. There is no easy answer to this question, and it would seem that a blend is probably inevitable. The responsible environmental prosecutor cannot avoid attending at least to some of the major sources of pollution in his area.\(^2\)\(^5\) At the same time, especially if he holds an elective office or has been appointed by an elected official, he cannot afford to ignore the large number of citizen complaints concerning relatively small sources of pollution.\(^2\)\(^6\)

\(^{23}\) See note 17 supra.

\(^{24}\) During the trial of Moody v. Flintkote Co., 1970 Ill. P.C.B. No. 36, 1971 Ill. P.C.B. No. 67 (Sept. 2, 1971), it was reported to the office of the Attorney General by personnel of the state Environmental Protection Agency that another asphalt saturating company in the immediate vicinity of Flintkote’s plant had quickly ordered and begun to install control equipment of the type being proven most effective during the course of the trial. In this case the attorney general had intervened on behalf of the Agency as a co-complainant with the citizen Moody.


\(^{26}\) See note 15 supra.
Mention has already been made above of the need for the prosecutor carefully to consider whether he really would wish to have the polluter's activities stopped by a negative injunction. Looked at in a slightly different way, it must be asked what the prosecutor's duty is when it comes to evaluating the hardship the polluter may suffer if he is required to cease his activities altogether or is required to correct them. When speaking of a manufacturing concern, for example, it is logical to consider that any changes in operation which either curtail production or increase costs can have adverse effects on the owner, the employees and the customers. The responsible prosecutor cannot be unmindful of these effects. However, in all but the clearest cases it would seem that balancing of hardship to the polluter against detriment to the citizenry from the pollution is a process which rests with the adjudicating body, and not with the prosecutor.  

The prosecutor generally should not be dissuaded from action by virtue of the fact that he knows that claims of hardship will be heard by way of defense or mitigation for the polluter. In some instances it undoubtedly will be apparent to the prosecutor that certain types of relief will not be granted by the court in view of obvious hardship or detriment to significant numbers of employees, to the provision of basic public services, or to the survival of a marginally profitable but socially useful enterprise. In such situations the prosecutor either must decide that action in court is realistically out of the question, or he must seek to develop a conception of other, suitable relief which might be obtained in court or elsewhere. In any event, the responsible prosecutor must be sensitive to these questions. In part this sensitivity will include a sharp ability to assess the credibility of polluters' claims of hardship and impending economic disaster if compliance with the law is required.

Related to the question of hardship is the issue of monetary penalties or other sanctions. One does not have to be involved in many

---


28. Village of Bensenville v. City of Chicago, No. 70 CH 3184 (Cook County, Ill., Cir. Ct., motion to dismiss granted per curiam, Oct. 28, 1971). In commenting upon the plaintiff municipalities' prayer for injunctive relief against the expansion of runway facilities at O'Hare International Airport, the court stated:

Thus the Count I [injunctive relief] issue places the rights of the plaintiff municipalities in direct conflict with the interests of (a) air transportation; (b) the further development of the world's busiest airport; (c) economic progress; and, (d) the handmaiden of both, national defense.

_id. (emphasis in original).

29. At present the principal monetary penalty provisions in Illinois are found in Illinois Environmental Protection Act, ILL. ANN. STAT. ch. 111½, § 1042 (Smith-Hurd 1971). This section provides a $10,000 maximum initial penalty for violation
Pollution cases before one hears the plea that it is ludicrous to impose a monetary penalty upon a polluter when the money could be more sensibly spent directly for pollution control equipment or process changes. There is undoubtedly validity to this claim in some instances, but the deterrent effect of penalties nevertheless should not be overlooked. It would seem that many or most polluters are probably not morally any less sensitive or responsible than was the majority of the public a few short years ago as it collectively ignored the developing environmental crisis. Nevertheless, imposition of a monetary penalty on a polluter can serve as an instructive example to another polluter who might be tempted to avoid correcting his pollution problem until he is sued or is about to be sued. This is only true, however, if the penalty is substantial enough to be felt by the polluter and would have a similar impact on the next potential defendant.

The magnitude of penalties, however, should not be such as to be counterproductive in a particular case where they are imposed. That is, in a case in which the polluter is ordered or allowed to make necessary corrections to solve his pollution problem, and is not ordered to shut down, it would be foolish to impose a penalty so great as to make it economically impossible to continue in business. Such an indirect result might be justifiable only in the case of an exceptionally dilatory and contemptuous polluter. Such a polluter would also seem to present the most appropriate case for criminal penalties, that is, for proceedings in the criminal courts which may result in the stigma of a criminal conviction and even imprisonment. Other than in instances such as those, it would seem society’s purposes will be best served by civil or quasi-criminal proceedings under statutes, ordinances, and the common law for injunctive relief and limited monetary penalties. Environmental prosecutions of this sort, after careful attention to the types of policy questions just considered, will make a definite, substantial, and cumulative contribution to the abatement and prevention of pollution.
WHAT RESOURCES SHOULD BE MUSTERED IN ORDER TO PURSUE THE DESIRED POLICIES?

The principal resources necessary for effective environmental prosecution are qualified legal and technical personnel, and money. The number of attorneys required in a given prosecution office obviously is related to the nature of the caseload and the policy choices which have been made concerning how that office will function. The relative newness of the field of environmental law carries with it a certain benefit for the staffing of a prosecution office. That is, there is no one particular area of expertise or experience which an attorney is likely to have gained elsewhere that is a clear prerequisite for environmental prosecution work. Accordingly, attorneys with one or two years of general practice or general litigation and many recent law school graduates with no prior professional experience have proved to be quick learners and imaginative pioneers in serving in environmental prosecution offices.

The problem of technical personnel is somewhat more complicated. Ideally a prosecutor should have a background in engineering, particularly in those fields of engineering most often involved in pollution control questions, or in chemistry or biology. Since there are not many attorneys with this type of training, the attorney without a technical education must rely upon trained engineers, chemists, biologists, and other qualified persons who can make available to him the information and evaluations he will need in assessing pollution problems and solutions. In this connection, two questions must be considered: First, what technical input, if any, is really necessary? Second, if such input is necessary, how can it best be obtained?

With regard to the first question, one view is that the only prerequisite for a case against a polluter is a citizen who can present plausible testimony on the unpleasant or harmful effects of a specific source. In this approach it is unnecessary to introduce into a prosecution the skills and expert opinions of technical experts in such fields as control technology, chemical analysis, and medicine and biology. There is some logic to this, inasmuch as the essence of a pollution complaint based on nuisance law, whether filed by an individual or by an agency of government, usually is that someone's activities are harming or annoying someone else in the same vicinity. The fact re-
mains, nevertheless, that technically qualified investigative and advisory personnel are essential to the development and presentation of an effective prosecution in almost all regulation violation cases and in all but the simplest of nuisance cases.

It is true that a determined, reasonably articulate and persistent citizen can usually induce a government agency to take notice of his complaint. He also may be able to provide the prosecuting agency with considerable evidence, perhaps even enough to see the case through from beginning to end. As a general rule, however, individual citizens do not have the persistence or the familiarity with evidence-gathering techniques that are necessary in order to develop a case. For this purpose it is of tremendous value to the prosecutor to have available his own staff of investigators, both to assist in the development of cases before filing and to follow up needs for additional evidence after filing. It is not essential that such investigative personnel have any particular scientific or technical background, although obviously this would be desirable. Basically all that is required is a careful introduction to proper methods of identifying and questioning witnesses, taking air and water samples, handling physical evidence in general, taking photographs, and presenting testimony.

With respect to almost any complicated manufacturing process or public utility, the attorney will find invaluable the explanation of processes which can be provided by technical advisory personnel. This allows the attorney to have a better understanding of the equipment and activities which form the basis of the suit. Obviously, understanding of this sort is essential in order to identify clearly the exact source of the pollution. At a minimum it allows the prosecutor to avoid focusing on the wrong discharge source during trial, meeting consequently a wholly effective technical defense. It is also essential in a case in which violations of technical statutes and regulations—e.g., air or water quality standards, allowable air contaminant emission rates, effluent regulations, ground water pollution standards, and monitoring and reporting requirements—are alleged.

In the course of trial it is even more imperative that the attorney have access to advisors to explain esoteric aspects of defenses raised and to serve as expert witnesses in rebuttal. The necessity for having such

32. Moody v. Flintkote Co., 1970 Ill. P.C.B. No. 36, 1971 Ill. P.C.B. No. 67 (Sept. 2, 1971), is a striking instance of the effectiveness of an individual's complaining to the government firmly, repeatedly, and clearly enough to obtain results. The complainant refused to accept the daily interference of heavy asphalt fumes and particles in his work environment. He bolstered his complaints to the government with a complaint filed in his own name against the offending company with the Illinois Pollution Control Board. See also note 24 supra.

33. Id.
expert witnesses available can usually be predicted in advance of trial with a high degree of accuracy. An additional reason contributing to the value of technical personnel is that in many cases it is only by a thorough understanding of technical processes involved and the raw materials used that a case can be made out as to the full range and severity of adverse effects of the pollution involved upon life and property. The technical assistance necessary for this purpose includes expertise regarding the processes in question and regarding the biological and physical effects of the pollutants emitted.  

In addition to the use of his own investigative and advisory staff, the prosecutor frequently must consider obtaining his technical input from other sources. He then faces the question of the relationship of the prosecutorial arm of government to other investigative or enforcement agencies in the pollution field. It is imperative that the relationship of the prosecuting office to investigative, licensing, permit-issuing, and other regulatory or enforcement agencies with related or overlapping jurisdiction be clarified as early and fully as possible. There are a number of reasons for this. First, such an agency can provide needed technical assistance of many types, depending upon the range of its own authority and the size of its budget. Such experts hopefully can be available not only in cases in which the prosecutor represents that agency, but also in cases the prosecutor may pursue under other authority available to him. Second, if the prosecutor is to act as the attorney for such an agency, obviously he will represent his client well only if communications with that client are smooth and clear. Third, the prosecutor must coordinate closely his litigation with related administrative actions, such as the granting or revoking of operational permits for pollution-producing or pollution-controlling equipment. In the absence of such coordination, the prosecutor will invite the embarrassment and wasted time and effort of filing a suit against a polluter only to find that the polluter's activities have already been, or are about to be, approved by another agency of government, perhaps even in such a manner as to provide a substantial or complete defense to the lawsuit. Fourth, it is only sensible that there be as much coordination as possible between agencies of government acting in the same field, simply so as to avoid needless duplication of effort and expenditure of resources.  

There are undoubtedly other good reasons that might be cited to

34. Id.
show the wisdom of close coordination between environmental prosecutors and other environmental arms of government. Those just mentioned would seem to be most significant as contributing to efficient and effective prosecution. It should also be noted that the environmental lawyer in government, in dealing with other environmental agencies, often finds himself serving a coordinating function. The attorney frequently serves as an intermediary between an investigative or licensing agency and a polluter who is actually attempting to solve his problems, but who has for some reason or another established an ineffective pattern of communication with the agency. Similarly, the attorney at the state or county level may be able to help find an effective solution to a pollution problem which has become the subject of heated emotions and ineffective communication between a polluter and a local government entity.36

Another useful function can be performed by the attorney in directing the well-intentioned or belatedly enlightened polluter to available sources of technical expertise and pollution control advice and equipment. This last function raises the interesting question of whether or not the attorney can fulfill a proper and useful role by assisting the polluter to remedy its operational problems directly. There have been notable instances in which a prosecuting agency, when faced with a polluter seeking to solve its problems but unable to come up with a sound technical approach, has commissioned the services of an outside consultant to study the problem and recommend a solution.37 When such a solution is ultimately accepted, the result is that the government, in effect, has paid for some part of the cost of the polluter's corrective program. This result is sensible, however, inasmuch as the prosecutor without such assistance available to him is unable to act with equal status in settlement discussions and, if the case were to proceed to trial, would be unable to rebut technical defenses raised. Accordingly, instances will arise in which the prosecutor will be found to have suggested, and, in a sense, paid for, the ideas which ultimately solved the problem. Expenditures of this sort may also be necessary when categories of prosecutions are conceived and developed with respect to particular industries, geographic areas, or types of pollution problems, as discussed above.38 A systematic approach to the analysis of such categories of problems and to their solution is a cost usefully borne by the public through the office of the prosecutor. This is not to suggest, however, that efforts should not be exerted whenever

36. See People v. Chicago Magnet Wire Corp., No. 71 CH 1410 (Cook County, Ill., Cir. Ct., stipulation entered, Mar. 22, 1972).
37. See note 22 supra.
38. See text accompanying note 14 supra.
possible to compel the polluters themselves ultimately to bear such expenses.

To the extent that needed technical personnel are available within government agencies, it is desirable to use them, rather than to incur additional costs for outside consultants. An additional reason for adopting this approach may develop from the fact that, as environmental correction programs and litigation increase, it becomes more profitable for consultants to make their services available to polluters for assisting in abatement programs and litigation defense. Such consultants may be unwilling to cross the line and risk the "taint" of having an association with a prosecutorial agency at any time. Some highly qualified pollution control engineers, chemists, and other experts are available, however, both as individuals and through consulting and research concerns and universities. Thus, when the needed personnel are not available within government, or when the services of a particular type of private expert on a specific subject are essential, outside assistance can be and should be sought.

The heavy costs of acquiring technical assistance compel attention to the best allocation of what ordinarily are limited funds. At this stage in the development of environmental prosecution, expenditures on technical personnel are much more useful than expenditures on technical equipment for the measurement, monitoring, and analysis of pollution phenomena. Given the burgeoning caseloads of prosecutors, emphasis is better placed on people and the ideas they can bring to this work, rather than on expensive hardware, which may not be very frequently used or even fully understood. The most desirable situation would allow sufficient funds for the employment, training, and active utilization of full-time legal and technical personnel of high quality, and at the same time for the acquisition of expert assistance and technical equipment to buttress the prosecution effort when necessary.

III

WHAT PROCEDURAL ROUTES SHOULD BE TAKEN AND WHAT TYPES OF PROCEDURAL PROBLEMS SHOULD BE EXPECTED IN ENVIRONMENTAL PROSECUTION?

Much of what has already been discussed, particularly with regard to policy choices, relates closely to the question of what procedural paths environmental prosecutors will follow. The available routes will depend principally upon the delineation of powers of prosecution in statutory law and judicial decisions. One basic question

39. See note 4 supra.
which must be confronted is whether proceedings should be pursued in
court or before an administrative tribunal, if that option is available.
In many jurisdictions, environmental boards with adjudicatory powers
have recently been established, or existing boards have been vested
with new powers or have acquired new enthusiasm.  

The prosecutor faces a complex range of considerations once he
has the option of proceeding in courts of law and equity or before an
administrative board. One exceptionally strong consideration is the
degree of expertise and familiarity with pollution problems and solutions
that the administrative tribunal, or specialized "pollution court," can
develop. This specialization is to be contrasted with the considerably
broader range of ordinary judicial duties, even if only the chancery
courts are considered. On the opposite side of the coin are questions
of enforcement and timing. In some instances the fact that enforce-
ment of administrative orders may ultimately have to proceed in court
may dictate acting in court at the outset, so as to minimize total time
in bringing a recalcitrant polluter to account. And in certain instances,
the need for immediate injunctive relief will require action in court if, as
is most likely, the administrative tribunal does not possess preliminary
restraining powers which can be quickly enforced.  

Related to the issue of administrative action is the effect to be
given to permits, licenses, variances and other forms of administrative
approval. This area of concern is important if for no other reason than
to avoid possible embarrassment when agencies of government take in-
consistent positions. As an added consideration, the prosecutor
must decide whether he wishes to raise in a judicial forum questions of
the validity or effect of administrative licenses, when the option exists
to raise such questions before the licensing administrative entity or a
related quasi-judicial board. For example, if installation or operating
permits for pollution-related equipment are issued or refused by an ad-
ministrative agency, it may well be that the integrity and coherence of
the permit system will be best protected by hearing complaints before
the administrative tribunal whenever possible.  

41. One example of such specialization is the so-called "smoke court" es-
blished within the Circuit Court of Cook County, Illinois, to sit on specified days to
hear alleged violations of the City of Chicago Environmental Control Ordinance,
43. See Hemmerich v. Fry Roofing Co., 1971 Ill. P.C.B. No. 33 (May 12,
1971); EPA v. Steelco Chemical Corp., 1971 Ill. P.C.B. Nos. 137, 139 (Sept. 16,
1971).
44. See text accompanying note 35 supra.
(Sept. 2, 1971).
sumably has a deeper understanding of the purposes and details of such a system. Even if a permit system's validity or effects in a particular case, or in general, are subsequently raised at the appellate level, the administrative tribunal itself can make the clearest record on these points. This also holds true for a polluter's compliance or non-compliance with the terms of a variance or other exemption obtained through administrative means.46

Returning to the problems of evidence in litigation, the necessity for technical evidence and advice has already been discussed.47 It should be added, however, that through the discovery tools available to the prosecutor, he can obtain considerable information regarding technical defenses he is likely to meet.48 Discovery also affords the prosecutor an opportunity to develop more information regarding effects of pollution, especially presently unseen or unnoticed effects which seem merely annoying, but which may in fact cause serious long-range harm. Such inquiries through discovery cannot, however, substitute for the basic evidence required for a pollution complaint.

Basic complaint information may be provided by citizen testimony or by the observations of investigative personnel of the prosecutor or his client agency. With regard to localized pollution problems, or sources not so major as to be familiar to the prosecutor and the public generally, it is only through the voicing of concern by a citizen or a citizens' group that the matter will come to the attention of officials. Just how many citizen complainants will be necessary in order to make out the basic cause of action in a particular suit cannot be stated in a general rule. A single, clear and persuasive witness with sound observations over a sustained period of time may be sufficient, although obviously corroboration is tremendously helpful.49

46. Id. See Ingersoll, City Claims U.S. Steel Is Biggest Polluter By Far, Chicago Sun-Times, July 28, 1971, at 4. See also Appeal Bd. of the Dep't of Environmental Control v. United States Steel Corp., 2 ERC 1706 (Ill. 1971).
47. See text accompanying notes 33, 34 supra.
48. Discovery. (a) The following discovery procedures shall be ordered by the Hearing Officer upon the written request of any party where necessary to expedite the proceedings, to ensure a clear or concise record, to ensure a fair opportunity to prepare for the hearing, or to avoid surprise at the hearing:
(i) production of documents or things;
(ii) depositions;
(iii) interrogatories.
The Hearing Officer shall restrict such discovery where necessary to prevent undue delay or harassment.
(b) The Hearing Officer shall order the following discovery upon written request of any party:
(i) list of witnesses who may be called at the hearing;
(ii) reasonable inspection of premises by experts.
49. See Giovka v. North Shore Sanitary Dist., 1971 Ill. P.C.B. No. 269 (Feb. 17,
It is a useful fact of life to be kept in mind by the environmental prosecutor that over a sustained period of time neighbors of a polluter invariably become intensely familiar with operations at the polluting source and the patterns and characteristics of its pollution. Of course, the prosecutor should be aware of tendencies to exaggerate adverse effects, or to confuse mingled effects from a number of sources in a single area, but generally it will be found that citizens do not put themselves through the inconvenience of involvement in pollution litigation unless and until they have become quite clear in their own minds as to what the problem is. The testimony of such witnesses should be limited to their actual observations and the identifiable effects of the pollution on themselves and their property.

As a practical matter a prosecutor will do much more to eliminate pollution sources if he is receptive to settlement of appropriate cases than he will by pursuing all or substantially all of his cases through trial. The reason for this should be evident, in light of the previous comments regarding the relative readiness of many polluters to correct their problems quickly. Settlement initiatives should, however, always originate with the polluter, inasmuch as it is his primary responsibility to eliminate the pollution, and presumably he knows the actual cause of the problem better than does the prosecutor. The prosecutor, having filed suit and being prepared to see the matter through, should indicate, if asked, that he is willing to evaluate abatement programs proposed by the polluter. Often this approach, with good technical input guiding the prosecutor, results in an abatement schedule, and either the dismissal of the suit or the entry of an agreed order setting forth the schedule. Whether a monetary penalty or some other sanction

---

1972). See also notes 31-33 and accompanying text supra. At one point, environmental officials in Illinois urged that a maximum limit on citizen witnesses in all cases be set. The suggestion was, however, quickly deemed unworkable, in view of the varying demands of proof in different cases.


51. See People v. Chicago Magnet & Wire Corp., No. 71 CH 1410 (Cook County, Ill., Cir. Ct., stipulation entered, Mar. 22, 1972); People ex rel. Scott v. Steelco Chemical Corp., No. 71 CH 3517 (Cook County, Ill., Cir. Ct., preliminary injunction ordered by agreement, June 8, 1971); People ex rel. Scott v. The Penn Central Co., No. 70 CH 5157 (Cook County, Ill., Cir. Ct., consent decree entered, Mar. 15, 1971); People v. United States Steel Corp., No. 69 CH 3334 (Cook County, Ill., Cir. Ct., consent decree entered, Jan. 18, 1971). See also People v. Wells Mfg. Co., No. 70 CH 1794 (Cook County, Ill., Cir. Ct., dismissed per stipulation, Nov. 16, 1971).

52. See text accompanying notes 18-21 supra.

53. See People v. Chicago Magnet & Wire Corp., No. 71 CH 1410 (Cook County, Ill., Cir. Ct., stipulation entered, Mar. 22, 1972); People ex rel. Scott v. Steelco Chemical Corp., No. 71 CH 3517 (Cook County, Ill., Cir. Ct., preliminary injunction ordered by agreement, June 8, 1971); People ex rel. Scott v. The Penn
or limitation on the polluter's activities will be incorporated in such a settlement is dependent upon the particular circumstances of the case and upon the general enforcement policy of the prosecutor.

Two interesting sidelights should be mentioned with respect to settlements, both related to the fact that pollution cases at present are very much in the public eye. First, if the polluter has not already been informed that he is likely to be sued, it is advisable that he be given direct notification by telephone or telegram immediately prior to filing suit. If this is done as a courtesy, without any implied invitation for the prosecutor to be talked out of filing, it will serve a valuable, if limited, purpose—avoiding the embarrassment and resentment which easily arises if the polluter first learns through the local press that he is a defendant.

A second potential difficulty arises when a settlement is reached which, as is often the case, is subject to conflicting technical opinions. When this occurs, it is not unusual for voices to be raised saying that the prosecutor has done less than he might or has given in to the defendant's wishes or false claims of technological incapability. Such charges have an added potency when directed at a prosecutor having the same political affiliation, or some other area of common interest, or friendship, with the polluter whom he has seen fit to sue and with whom he then has seen fit to settle. There is no easy way of avoiding accusations of this sort. The prosecutor is best advised to concentrate upon identifying a solution which the best experts available say will work. If they are right, it should not be too long before actual abatement results undermine any "sellout" charges.

Finally, the prosecutor must be prepared in advance for the frequently offered defense that the polluter for some period of time has been unable to ascertain with any certainty the exact nature of the regulations and laws to which he is subject. It is true that there has been considerable change in applicable standards in recent years, and it is certainly conceivable that a polluter may in fact have ended up with an incomplete or ineffective control program as a result of trying to keep up with standards which have been changed frequently, and not necessarily consistently. The good faith of such a polluter, however, is likely to be clear. Presumably he will have had some sort of communication with the standard-setting agency whose rules he has tried

Central Co., No. 70 CH 5157 (Cook County, Ill., Cir. Ct., consent decree entered, Mar. 15, 1971); People v. United States Steel Corp., No. 69 CH 3334 (Cook County, Ill., Cir. Ct., consent decree entered, Jan. 18, 1971). One problem deserving considerable further attention by prosecutors and other interested lawyers is the necessity to develop guidelines or criteria for settlement of pollution cases. Much more thinking is needed on the policies served by settlements, with respect to penalties, cessation of pollution, timing of abatement schedules, and many other factors.
to meet. Furthermore, his real effort at installing control equipment or modifying his activities should be readily apparent.

More commonly and unfortunately, however, this claim is raised as a smoke-screen for the fact that the polluter has not made an attempt to comply with regulations, whether because of knowledge that the standards might subsequently change or for other, even less laudable reasons.\textsuperscript{54} It appears to be true that in most areas in which pollution standards have been subject to numerous changes, the changes have more or less represented a progression of increasing control. If that is in fact the case, the polluter who presents the defense that he was aware that the standards were changing will either be well on the track toward meeting the present standards, or will clearly expose the fact that he is seeking only a belated justification for delay and inaction.

The problem of fluctuating standards is one which the prosecutor must consider if he is attempting to fashion a mandatory remedy or to arrive at an abatement schedule with the polluter by agreement. He must be aware of the possibility that an order that the polluter take certain steps to comply with present law may make it difficult or impossible to require the polluter to meet more stringent, new requirements at some time in the near future.\textsuperscript{55} To the extent that this risk can be avoided by providing for review or revision of such orders, or by requiring the polluter regularly to keep up with advancing technology, the problem can be minimized, although it remains a difficult one. As the environmental prosecutor becomes increasingly familiar with basic control techniques for various types of pollution problems, he will realize the considerable extent to which certain basic pollution control equipment which polluters are now turning to, whether by choice or under compulsion, has been known and available for many years, often with a very high degree of effectiveness. With this awareness the prosecutor can make a realistic appraisal of the likelihood that the sound abatement program of today will be found obsolete tomorrow.

CONCLUSION

This discussion of the environmental prosecutor's role has at-


\textsuperscript{55} This point was urged most strongly with respect to the possible effects of the Refuse Act Permit Program of the U.S. Army Corps of Engineers and federal Environmental Protection Agency. Allegations that permits issued on the basis of compliance with present water quality standards would protect polluters from later having to avail themselves of more effective technological developments for reducing discharges of pollutants were embodied in litigation at the time the Program was initially to go into effect. See 3 CLEAN AIR \& WATER NEWS 217-18, 230 (1971); 2 ENV. RPTR.—CURR. DEV. 722 (1971).
tempted to illuminate some of the problem areas that must be con-
sidered if his role is to be an effective one. There is still a tremendous
amount of experimentation and thought which must take place before
official litigation will be a reliable and efficient tool for protecting the
environment. It is hoped that the ideas and suggestions offered here
will be useful to some as this new field of prosecution matures. It is
also hoped that the initial thoughts and efforts of those working in
government and elsewhere to restore and preserve our environment
will ultimately prove not to have been too late.