Canada-United States Law Journal

Volume 18 | Issue

Article 11

January 1992

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QUESTION, *Professor King*: Bill, you mentioned 189 substances that are considered offensive. Does this particularization of U.S. legislation and regulation create a continuing need for review of these regulations? Are there dangers in the U.S. approach?

ANSWER, *Mr. Falsgraf*: This is the first time of which I'm aware that Congress has gotten into the micromanagement of the environmental system. The answer to your question is "yes"; you have a great danger when you list 189 substances. Maybe there are 189 more that ought to be there, and Congress just didn't know about them. What they tried to do is say that these are the minimum — the 189 that must be addressed — and then leave it up to the EPA to study the situation and add as many more as its thinks are appropriate. Typically, in an administrative system, it is up to the Agency to identify the items to be controlled.

QUESTION, *Professor King*: Could you discuss the common law — the trespass, nuisance and other actions that were mentioned — versus the statutory approach to environmental suits?

ANSWER, *Mr. Cotton*: I would say that statutory law has somewhat overtaken the common law. If you look back fifteen years, we had more environmental suits using those common law principles than we do today. That's due, I think, to the fact that the government has taken on many of the actions that citizens were earlier forced to prosecute. We have, in Ontario, over 2,000 charges a year actively proceeding against corporate officers and directors, as well as companies. We recently had a fine of $300,000 against a battery company. That was unheard of ten to fifteen years ago. If you had a $5,000 fine, that was significant in those days.

I remember very well a case where there was a $1 fine, and there was a fine splitting provision in the legislation, so the people who brought the prosecution only got fifty cents. We've come a long way from that. In a sense, the environmentalists' governments of the day have taken over the need for the use of these common law actions. It will be interesting to see whether bills of rights, new rights to citizens and removing some of the barriers to citizen lawsuits will change.

COMMENT, *Mr. Falsgraf*: When you have private contribution actions and so forth in the U.S., you always see a laundry list of common

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* The questions, answers and comments presented herein have been edited by the *Canada-United States Law Journal* for the purpose of clarity, and have not been edited or reviewed by the respective speakers.

law actions. Rarely do those take over the conduct of the litigation. The litigation is almost always resolved in the context of the statutory provisions, because they give a lot more power to the plaintiff. It's easier to bring a case under Superfund than it is under the traditional concepts of nuisance and trespass.

QUESTION, *Mr. Erdilek*: The way I understand it, pollution allowances or credits are allocated, and these become bankable or tradeable among companies, subject to maximum limits. Is there a tradeoff among different types of substances or emissions for a given plant? Is there a tradeoff among the regions in which a given company operates, supposing that it has multiple plants? Finally, do these credits or limits apply to new plants and to old plants equally?

ANSWER, *Mr. Falsgraf*: First of all, the system only applies to SO_2, with some minor exceptions; there was some trading of emissions limits in connection with PSD permits, but put that aside. The SO_2 credits are assigned on the basis of existing plants and what those plants would be allowed to emit, given the amount of BTU input based historically in a given time frame, at a given rate of emission. The idea is that if they do better than that — if, for example, they can reduce their SO_2 emissions to 1.2 pounds per million BTU of input when they're only required to be at 2.5 pounds per million BTU of input — then that incremental amount is what they can either bank for their own use or sell. It doesn't apply to toxins.

As to your second question, tradeoffs between multiple plants in different regions, the system is set up so that you can trade the credits around and use them wherever you like.

QUESTION, *Mr. Erdilek*: What do you think of the system?

ANSWER, *Mr. Falsgraf*: It's too early. The supposition is that it will put a constraint on the building of new plants, because they won't have any allowable emission limits at all. The idea was to allow these credits to be traded back and forth, and if somebody wants to get into the business, they can buy these things. If credits are not available to buy, that's going to be a real problem.

QUESTION, *Ms. H. Campbell*: Can you comment on the equivalent experience in the U.S. with regard to the environmental Bill of Rights, if there is such a thing in the United States? Also, can you comment on the experience of citizen suits brought against enforcement agencies in the United States?

ANSWER, *Mr. Falsgraf*: It's been argued whether there is a kind of constitutional right to a clean environment. The answer is "no". The idea is that the government has taken over the regulation of environmental contamination, so you don't have a private constitutional right.

There have been a number of efforts, both litigation and private efforts, to persuade or coerce — whatever word you want to use — companies to adopt a set of principles which include subscribing to, basically, a

bill of environmental rights. My experience has been that the companies are very reluctant to undertake that, not that they disagree with the philosophy, but they disagree with the particularity of the laundry list. It's the old tort theory. You're not required to undertake an activity, but once you undertake it, you have to do it properly, and you are held to a standard of care. I think there's concern that these lists of initiatives are so particular that they would impose a new unquantifiable level of liability, and companies are unwilling to undertake that.

With regard to your second question, until very recently, most of the citizen suits have been actions to force the Agency to do a number of things, specifically promulgate regulations, and they've been generally successful holding it to a time limit. Congress, almost without exception, poses time limits on the Agency within which it has to produce a certain type of regulation. Invariably, it misses the deadline and gets sued.

More recently, the citizen suits have been expanded to include things like suing a specific polluter. I haven't seen quite so many of those, but I think you're going to see much more of them. The controlling factor is finances. Little by little, Congress has been adding provisions whereby citizen groups can get limited funding for technical help to pursue these suits, and ultimately attorneys' fees, so the cost of litigation can be reimbursed. That is a powerful incentive for the proliferation of those suits.