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Pollution Control Practice in South Carolina--An Overview

Adam Fisher Jr.

Clark Gaston Jr.

POLLUTION CONTROL PRACTICE IN SOUTH CARLINA—AN OVERVIEW

ADAM FISHER, JR. AND CLARK GASTON, JR.*

INTRODUCTION

President Richard M. Nixon speaking on the occasion of the 50th Anniversary of the United States Junior Chamber of Commerce in St. Louis, Missouri, on June 25, 1970, made the following comments concerning our environment:

> Consider the problem that has been so much on the minds of many of our young people, and older people who have any sense of the perspective of history and what could happen in the years ahead—the problems of the environment.
>
> I remember that in my time when you had smoke coming from factories that was a good sign, a sign of progress, a sign of jobs, a sign of production.
>
> But times have changed. If I can put it in symbolic terms, as far as the factory is concerned what we need to do is increase and improve the jobs, increase the production, and eliminate the smoke.
>
> My friends, that is why, as we look ahead ten, fifteen, twenty years from now, we can have the most productive economy in the world, but we will have cities that are choked with traffic, suffocated with smog, poisoned by water, and terrorized by crime—unless we act *now*.[1]

Today it is in vogue to be an environmentalist. Not only have politicians discovered that paying homage to a clean environment can substitute for baby kissing, but the news media has recognized that an oil leak off the shores of California can be of as much interest to readers as a sensational murder case. Pollution is a severe and increasing problem of which the courts and other branches of government have become acutely conscious.[2] It is rapidly becoming a daily topic of conversation. This article will present the various legal aspects of this

* Both authors: LL.B., University of South Carolina School of Law; currently with Mann, Foster & Brissey, Greenville, South Carolina.

1. President Richard M. Nixon speaking at the 50th Anniversary of the United States Chamber of Commerce in St. Louis, Missouri, on June 25, 1970.

2. United States v. Bishop Processing Co., 423 F.2d 469 (4th Cir. 1970).

topic.[3] Such discussion will treat only briefly federal legislation and foreign states' approaches to the problem.[4] Emphasis will be placed on the South Carolina Pollution Control Act.[5] It is to be noted at the outset that the body of law known as pollution control law is still in its infancy and as such is developing rapidly. Consequently, it may be difficult to successfully apply the principles of stare decisis, and there will be occasions when newly promulgated law and regulations must be tested against the yardstick of the Constitution.

TYPES OF POLLUTION

Included in any comprehensive approach to a pollution problem is consideration of the three basic mediums: air, water and land. Air pollution would include pollution from solids, vapor, gases, noise and odor. Water pollution encompasses solid, liquid, and gas entrainment, along with a heat differential factor. Land pollution would occur primarily with respect to waste disposal and vibration.[6] While there are several ways of organizing an approach to the subject of pollution, it is felt that primary delineation by medium, *i.e.*, air, land, and water would be of most benefit to the average practitioner when confronted with a situation involving actual or potential pollution. However, further subclassifications can be made, as between statutory and non-statutory remedies.

NON-STATUTORY RIGHTS AND REMEDIES

There are several common law actions used to provide relief from the pollution of the environment. These actions should be available for cases involving pollution of either air, water or land.

3. Considered as being beyond the scope of this article are municipal and county ordinances. There is at the outset a practical problem with respect to the enforcement of these ordinances due to limited funds to allocate the complex instruments required to properly classify the potential pollution, qualitatively and quantitatively. Nevertheless, such ordinances do exist and are a factor to consider in any approach to a client's case involving defense or attack of potential pollution.

4. Every state has enacted some form of pollution control statute.

5. S.C. CODE ANN. §§ 63-195 *et seq.* (Supp. 1970).

6. An example of the latter is found in the case of *Davis v. Palmetto Quarries*, 212 S.C. 496, 48 S.E.2d 329 (1948). Here the plaintiff alleged that the defendant's stone quarry was operated in such a manner as to cause unreasonable vibration of the earth to take place, and that consequently it constituted a nuisance.

A. Negligence

The application of theories of negligence to pollution problems in South Carolina is illustrated by the case of *Conestee Mills v. City of Greenville*.[7] In this case the plaintiff was engaged in the manufacturing of cotton goods with its principal place of business below the city of Greenville on the Reedy River. The defendant, City of Greenville, discharged its raw sewage into the same river some distance upstream. The court permitted the suit stating:

> The action in the instant case is grounded, not upon the construction of the sewerage system, which was authorized by the legislature, but upon the negligence of defendant in the operation of that system—for which a cause of action clearly lies. It follows, therefore, that successive injuries arising from the negligent operation of the defendant's sewerage system give right to successive actions, and that the plaintiff can recover for injuries occuring after its purchase of the property in question.[8]

Continued negligent acts after repeated complaints give rise to both actual and punitive damages.[9] The defendant may further be enjoined from future acts.[10]

B. Nuisance

Prior to the advent of the pollution control statutes, an oft-used basis for relief against pollution was the nuisance doctrine. In South Carolina, nuisances have been divided into two categories, nuisance *per se* and nuisance *per accidens*. The court in *Woods v. Rock Hill Fertilizer Co.*,[11] differentiated between the two as follows:

> Now, clearly, a fertilizer mixing plant is not a "nuisance *per se*," that is, a thing which is a nuisance anywhere and under all circumstances. If it is a nuisance at all, it is what is called a "nuisance *per accidens*," that is, by reason of its location and other circumstances, such as the community in which it is located, or the manner in which it is constructed or conducted.[12]

7. 160 S.C. 10, 158 S.E. 113 (1931).
8. *Id.* at 19, 158 S.E. at 116 (citations omitted).
9. *See* Jackson v. Atlantic Coast Line R.R., 317 F.2d 95 (4th Cir. 1963).
10. *See* Griffin v. National Light & Thorium Co., 79 S.C. 351, 60 S.E. 702 (1908).
11. 102 S.C. 442, 86 S.E. 817 (1915).
12. *Id.* at 451, 86 S.E. at 820.

Negligence on the part of the defendant is not a requisite to a cause of action founded on a nuisance theory.[13] This absence substantially lessens the plaintiff's burden of proof.[14] Further, injunctive relief is available as a matter of right in the nuisance case,[15] except where a monetary award for future damages is given.[16]

In pollution suits under the nuisance doctrine, attempts have been made by defendants to obtain samples for analysis of the damaged property of a plaintiff. The South Carolina courts have heretofore denied these requests, stating:

> There is no provision in our statutes authorizing the Court to require a party in a pending case to produce and permit his adversary to inspect an article or chattel in his possession or under his control. . . . The omission in these statutes of any reference to the power now under consideration is quite significant. That the lack of such power may, in certain cases, result in an injustice may be conceded.[17]

This problem has been somewhat alleviated by the state's new liberal discovery rules, patterned similarly to the Federal Rules of Civil Procedure,[18] which now permit inspection of objects.[19]

Several defenses are available in nuisance cases, including those of laches, equitable estoppel, and prescriptive right. The elements of the defense of laches are delay in the assertion of a right and material prejudice to the defendant as a result of said delay.[20] The elements of the defense of equitable estoppel are lack of knowledge and the means of knowledge of the truth as to the facts in question, reliance on the conduct, acts, language or silence of the party estopped amounting to a misrepresentation, and action based thereon of such a character as to change prejudicially the position of the party claiming the estoppel.[21] The prescriptive right is a successful defense in a nuisance case. To

13. Frost v. Berkeley Phosphate Co., 42 S.C. 402, 20 S.E. 280 (1894).
14. *See* J. D. Jewell, Inc. v. Hancock, 226 Ga. 480, 175 S.E.2d 847 (1970).
15. Williams v. Haile Gold Mining Co., 85 S.C. 1, 66 S.E. 117 (1909).
16. Mason v. Apalache Mills, 81 S.C. 554, 62 S.E. 399 (1908).
17. Welsh v. Gibbons, 211 S.C. 516, 521-22, 46 S.E.2d 147, 149-50 (1948).
18. 28 U.S.C.A. Rule 34 (1968).
19. S.C. CODE ANN. Cir. Ct. Rule 88 (Supp. 1970).
20. *See* Bailey v. Lyman Printing and Finishing Co., 245 S.C. 13, 138 S.E.2d 410 (1964).
21. In Re Nettle's Estate, 231 S.C. 214, 97 S.E.2d 897 (1957).

acquire an easement by prescription, the stream or land subject to the easement must have been used for a full period of twenty years and all adversely to the rights of the owner.[22]

Considerable thought has been given to the applicability of the doctrine of balance of convenience, but the South Carolina Supreme Court to date has refused to accept it.[23]

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22. Williams v. Haile Gold Mining Co., 85 S.C. 1, 66 S.E. 117 (1909). In this case the defendant engaged in gold mining on a stream which flowed through the plaintiff's lands located below the mine. In 1888 the defendant commenced a new mining process which was known as the chlorination process. This process produced refuse matter which was discharged into the stream. When the stream overflowed, the refuse was deposited onto plaintiff's land which destroyed the ability of the land to support plant life. After ten years of this, the plaintiff brought suit alleging a nuisance and seeking to recover damages and an injunction against such practice. He was successful on both counts in the lower court and affirmed on appeal. The court stated as to the defense of prescriptive easement, "the time does not begin to run until there is some injury done which would support the action. The plaintiff's testimony was to the effect that no injury resulted to her land from the use of the stream by the defendant before the installation of the 'chlorination process'." Thus, it appears that not only must there be an injection into the stream, but further, some particular injury to the defendant must occur in order to trigger the 20 year prescriptive period.

23. The balance of convenience doctrine has been stated in *Johnson v. Williams*, 238 S.C. 623, 121 S.E.2d 223 (1961):

> In cases where a mandatory injunction is sought, the general rule in this country is that the court will balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damages as seem most consistent with justice and equity under the circumstances of the case. (Citations omitted.) *Id.* at 639, 121 S.E.2d at 231.

In this jurisdiction the leading case of *Williams v. Haile Gold Mining Co.*, 85 S.C. 1, 66 S.E. 117 (1909) in response to this proposition said:

> It has been too frequently held by this court to require further discussion that, when the existence of a nuisance has been established by the verdict of the jury, the party injured is entitled as a matter of right to an injunction to prevent its continuance. Whatever may be the doctrine in other states, under the provisions of the Constitution of this state, that private property shall not be taken for private use without the consent of the owner, the court could not have considered, in deciding whether to grant or refuse the injunction, the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream. That question would be pertinent only in an application addressed to the legislature to give such corporations the power of condemnation. *Id.* at 6-7, 66 S.E. at 118. (Citations omitted.)

Accord Dill v. Dance Freight Lines, 247 S.C. 159, 146 S.E.2d 574 (1966). *See also* Boyd v. Granite Co., 66 S.C. 433, 45 S.E. 10 (1903). For a discussion of the balance of convenience doctrine, see Malone, *The Balance of Convenience Doctrine In the Southeastern States*, 5 S.C.L.Q. 159 (1952).

C. Riparian Rights

The common law of South Carolina vests certain rights in proprietors of land which is in actual contact with stream water. These rights, known as riparian rights, are as follows:

> Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. No proprietor has the right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment.[24]

Land, to be riparian, must be in actual contact with the water; proximity without contact is insufficient.[25] As to the aspect of pollution, the doctrine has been expressed as follows:

> Owners of land on the banks of a stream are entitled to the reasonable use of the stream; that they can use the stream for their own purposes to a reasonable extent; that while it is true that a stream must not be polluted, still this does not mean that nothing can be put in the stream; but that nothing can be put therein that will deprive the landowners below to the reasonable use of the stream.[26]

The reasonableness of use is a question of fact, to be determined by the jury from the circumstances of each particular case, from a consideration of the capacity of the stream, the adaptation of machinery to it, and the general usage of the country in similar cases.[27]

Relief is available in the form of damages for past infringements and an injunction against future violations.[28] It would also be permissible for the aggrieved party if he so elects, to recover future damages for a continuing violation. In this instance, however, he would forego the right to an injunction.[29]

24. White v. Whitney Mfg. Co., 60 S.C. 254, 265, 38 S.E. 456, 460 (1901).

25. 56 AM. JUR. *Waters* § 277 (1947).

26. Duncan v. Union-Buffalo Mills Co., 110 S.C. 302, 306, 96 S.E. 522, 524 (1918).

27. Mason v. Apalache Mills, 81 S.C. 554, 62 S.E. 399 (1908).

28. *See* White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456 (1901).

29. Mason v. Apalache Mills, 81 S.C. 554, 62 S.E. 399 (1908). For an excellent discussion of riparian rights, see Agnor, *Riparian Rights In the Southeastern States*, 5 S.C.L.Q. 141 (1952). It is noted on page 144 in this article that "any pollution of the water seems to violate the rights of all lower riparian owners. The cases are in agreement that a pollution of the stream is an actionable infringement of such right."

FEDERAL LEGISLATION

The federal government has been active in enacting laws controlling pollution. As to noise, there is the Walsh-Healy Act;[30] for radiation, the Atomic Energy Act of 1954;[31] for pollution in air, the Air Quality Act of 1967 which amended the Clean Air Act, which was further amended in 1970 to include considerations of aircraft, vehicles, fuel and new plant construction.[32] Water pollution is addressed in the Water Quality Improvement Act of 1970,[33] and the 1899 Refuse Act.[34] Solid waste has been addressed in the Solid Waste Disposal Act.[35] The federal government is taking further positive steps, exhibited by, among other things, the recent creation of the Environmental Protection Agency.[36]

STATE LEGISLATION

The South Carolina Legislature has enacted statutes separate and additional to those pre-existing common law remedies founded upon negligence, nuisance, and riparian rights. The Pollution Control Act[37] addresses itself to the mediums of air and water. Radiation is covered in the South Carolina Atomic Energy and Radiation Control Act.[38] However, only cursory treatment is given by state statutes to the problems of solid wastes or landfill, and there is no state legislation which regulates noises or vibration.

SOUTH CAROLINA POLLUTION CONTROL ACT

A. Scope of State Statute

South Carolina has recently enacted the Pollution Control Act which covers the pollution of air and water. Added to the Act are regulations, some of which are filed with the Secretary of State as

30. 41 U.S.C.A. §§ 35 *et seq.* (1965).
31. 42 U.S.C.A. §§ 35 *et seq.* (1970).
32. 42 U.S.C.A. §§ 1857 *et seq.* (1969).
33. 33 U.S.C.A. §§ 1151 *et seq.* (1970).
34. 33 U.S.C.A. § 407 (1970).
35. 42 U.S.C.A. §§ 3251 *et seq.* (1970).
36. 42 U.S.C.A. §§ 4321 *et seq.* (Supp. 1971).
37. S.C. CODE ANN. §§ 63-195 *et seq.* (Supp. 1970).
38. S.C. CODE ANN. §§ 1-400.11 *et seq.* (Supp. 1970).

recently as April 20, 1971. These regulations define the specific quantitative levels of undesirable solids, liquids and gases which represent maximum acceptable levels of air and water pollution.

The key provisions of the statute are:

> It shall be unlawful for any person, directly or indirectly, negligently or willfully, to throw, drain, run, allow to seep or otherwise discharge into any of the waters of the State organic or inorganic matter that shall cause or tend to cause a condition of pollution.[39]
>
> . . . .
>
> It shall be unlawful for any person, directly or indirectly, negligently or willfully, to discharge any air contaminant or other substance in the ambient air that shall cause an undesirable level.[40]

As can be seen, both sections consider virtually the same elements, to wit, person, negligence or willfulness, contaminant introduced into the atmosphere or matter into the waters, and water pollution or undesirable level of contaminants in air.

In the event of litigation, actions may be brought by the Pollution Control Authority or the governing body of the county affected by the violation.[41] However, it would appear that, prior to suit, the Pollution Control Authority would attempt to cope with the problem on an administrative, quasi-judicial basis.[42] The Attorney General shall be the legal advisor to the Authority and is to assist in the bringing of any action by the Authority.[43] The defendant, as contemplated by this act, includes "any individual, public or private corporation, political subdivision, government agency, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever."[44] The standard of care prescribed by this act, as characterized by South Carolina cases, is that inadvertent failure to observe due care indicates mere negligence, and an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness or willfullness.[45]

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39. S.C. CODE ANN. § 63-195.12(a) (Supp. 1970).
40. S.C. CODE ANN. § 63-195.14 (Supp. 1970).
41. S.C. CODE ANN. § 63-195.25 (Supp. 1970).
42. *Id.*
43. S.C. CODE ANN. § 63-195.24 (Supp. 1970).
44. S.C. CODE ANN. § 63-195(1) (Supp. 1970).
45. The definitions of negligence and willfulness and their distinction was aptly illustrated in the case of *Talbert v. Charleston & W.C. Ry.*, 75 S.C. 136, 55 S.E. 138

(1.) Water Pollution

South Carolina has adopted by regulation a tiered approach to water control. The tiers of use of water in South Carolina are as follows:

> AA
>
> Waters suitable for use for domestic and food processing purposes with disinfection and PH adjustment as only treatment required. Suitable also for trout survival where so specified and for uses requiring waters of lesser quality.
>
> A
>
> Waters suitable for use as swimming waters. Suitable also for other uses requiring waters of lesser quality.
>
> B
>
> Waters suitable for domestic supply after complete treatment in accordance with requirements of the South Carolina State Board of Health. Suitable also for propagation of fish, industrial and agricultural uses and other uses requiring water of lesser quality.
>
> C
>
> Waters suitable for fish survival, industrial and agricultural uses and other uses requiring water of lesser quality.

And as to salt water:

> SA
>
> Waters suitable for shellfishing for market purposes and any other usages. Suitable also for uses requiring water of lesser quality.
>
> SB Waters suitable for bathing and any other usages except shellfishing for market purposes. Suitable also for uses requiring water of less quality.
>
> SC
>
> Waters suitable for crabbing, commercial fishing and any

(1906) in which the court approved the trial judge's charge, a portion of which was as follows:

> If you send your little boy, Mr. Foreman, on an errand for you, and tell him to feed your horse, and he returns to you, and you say to him, 'Did you feed my horse?' He says, 'No'. You say, 'Why?' He says, 'I forgot it'. This in inadvertance. But suppose he said to you, 'No; I did not feed your horse. I recalled the fact you told me to feed your horse, but I did not want to feed him'. That is willfulness. You know the difference between a negligent child and a willful child. Id. at 140, 55 S.E. at 139.

> other usages except bathing or other shellfishing for market purposes. Suitable also for uses requiring water of lesser quality.[46]

These standards are defined by technical parameters and should a lawyer be faced with a suit, the consultation of a competent professional engineer, chemist, ecologist, botanist, or other suitable expert would be of value inasmuch as the technical aspects of the facts involved are extremely important. Maintenance of these standards is achieved by requiring that all persons subject to the Act who desire either to operate a new waste outlet, or to increase the discharge from an existing outlet, shall first obtain from the Authority a permit to construct, and a permit to discharge from such outlet.[47] In order for a permit to issue, the Authority must be able to determine that any proposed discharge will not lower the classification of the waters receiving the waste. The primary concern in this matter is effect of the new discharge upon the recipient waters, rather than the content of the discharge itself. Hence, it is possible that the same type and quantity of wastes could be acceptably discharged into one body of water, and yet be completely unacceptable if discharged into another.

(2.) Air Pollution

Unlike water controls, the air pollution regulations do not establish tiered classification standards. In this area, the primary classifications are "ambient" and "source" standards.

"Ambient air" is defined as that portion of the atmosphere outside of buildings and other enclosures, stacks or ducts, which surround human, plant, or animal life, water or property.[48] "Source" is defined as any and all points of origin of air contaminants whether privately or publicly owned or operated.[49] Thus sources release air contaminants to yield pollution of ambient air.

It is significant to differentiate between "ambient" and "source" standards because different classification parameters are used for each. Permissable ambient air levels are measured in terms of quantities of

46. Section IV of Water Classification—Standards System adopted by the S. C. Pollution Control Authority and filed with the Secretary of State on April 20, 1971.

47. S.C. CODE ANN. § 63-195.13 (Supp. 1970).

48. P.C.A. Reg. 1A § I, filed February 11, 1971.

49. *Id.*

sulfur dioxide, suspended particles, carbon monoxide, photochemical oxidants, non-methane hydrocarbons, and gaseous flourides. Source levels, on the other hand, are measured only in terms of smoke shade and rate of dust emission.

Control of air pollution is effected in the same fashion as is control of water pollution, to wit, by requiring operators of new or increased yield air contaminant "sources" to obtain permits to construct and operate such sources. Besides having to comply with dust emission rates and smoke shade requirements as measured by the Ringleman Scale,[50] a source will not be allowed to operate until the Authority is satisfied that it will not cause violation of ambient air standards. And once granted, permits to operate either outlets of water contaminants or sources of air contaminants vest no property rights and may be constrained or revoked if at a later date it is determined that water quality or ambient air standards are being violated.[51] It is not evident, however, from the Pollution Control Act, or from the Authority's regulations, how individual liability may be ascertained in situations where there are several operators of outlets or sources who are all in compliance with their permits, but where nevertheless a violation of air or water standards has occurred.

Measurement of a "source" for compliance with source standards is effected at the point of origin of the air contaminants.[52] Measurements for determinations of water quality are made around and about the "outlet" which is the terminus of a sewer system or the point of emergence of any water-borne sewage or other wastes into the waters of the state.[53] Ambient air standards are the same throughout the state.

(3.) Noise and Radiation Pollution

South Carolina has at this point enacted no restrictions concern-

50. The Ringelmann Smoke Chart is designed primarily for the detection of combustion produced black soot particles. It measures coloration and not opacity. The Ringelmann Smoke Chart has been widely accepted throughout the United States as a measurement of air pollution by both legislatures and courts. Sittner v. City of Seattle, 62 Wash.2d 834, 384 P.2d 859 (1963).

51. S.C. CODE ANN. § 195.16 (Supp. 1970).

52. *See* S.C. CODE ANN. § 63-195(17) (Supp. 1970); P.C.A. Standard 1A, filed February 11, 1971.

53. *See* S.C. CODE ANN. § 63-195(13) (Supp. 1970).

ing noise pollution.[54] However, regulation of radiation is effected by the South Carolina Atomic Energy and Radiation Control Act.[55] This Act establishes a Technical Advisory Radiation Control Council which establishes radiation standards under supervision of the State Board of Health.[56] These standards are filed with the Secretary of State. The Pollution Control Act deals with neither of these topics.

(4.) Solid Waste Disposal on Land

Solid waste disposal on land is not covered in the Pollution Control Act, but instead is regulated by the individual counties. Further, there are criminal sanctions for unauthorized dumping of garbage on the lands of another.[57]

(5.) Odor

Pollution is defined in the Act to include "discharge . . . of substances . . . which unreasonably interferes with enjoyment of life or use of property."[58] Similar wording is used in the definition of undesirable level.[59] This would apparently include the presence of odors.[60]

B. Statutory Procedures

(1.) The Hearing

The Authority is vested with the power to conduct a hearing with

54. For an example of noise litigation, see *Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852 (Iowa 1967).

55. S.C. CODE ANN. §§ 1-400.11 *et seq.* (Supp. 1970).

56. S.C. CODE ANN. § 1-400.14 (Supp. 1970).

57. S.C. CODE ANN. § 16-396 (Supp. 1970).

58. S.C. CODE ANN. § 63-195(7) (Supp. 1970).

59. S.C. CODE ANN. § 63-195(18) (Supp. 1970).

60. The word "odor" has been defined with respect to pollution in the following manner:

> An odor is a substance of gaseous character or a liquid of high vaporizing quality. The odor of perfume, for example, is an emission of vapor into the air, caused by evaporation of the liquid vehicle carrying the odoriferous element. The familiar odor of rotten eggs is the gas hydrogen suflide. The odor of formaldehyde or acetone is the air-borne vapor of these chemicals. All are clearly 'substances' within the definition of the word. Department of Health v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 392, 242 A.2d 21, 34 (1968).

It is to be noted that odors may be barred under common law nuisance theory. J. D. Jewell, Inc. v. Hancock, 226 Ga. 480, 175 S.E.2d 847 (1970).

respect to actual or potential pollution.[61] Pursuant to the Act, the Authority may subpoena witnesses and require the production of evidence.[62] A decision made shall be based solely on the record of the hearing. Such a decision is to include a statement of the facts in controversy, the ruling of the Authority, and the law or regulation upon which the ruling is based.[63] These decisions are to be published promptly and numbered chronologically with a compilation similar to the annual reports of the South Carolina Supreme Court,[64] and are to be made available to the public.[65] Any refusal to obey notice of hearing or subpoena may result in the Court of Common Pleas issuing an order requiring compliance, thus permitting contempt proceedings should the party refuse to honor the dictate of the court.[66] There is no set requirement in the state that a hearing *must* be held prior to issuing an order,[67] but excepting an emergency situation,[68] it would appear that such a procedure is required by the constitutional dictates of due process, where the ruling is of judicial nature as opposed to legislative edict.[69] The statute is silent as to the rules of evidence in the hearing. However, an interested party on request may require a complete transcript of the proceedings to be filed.[70] The Authority may settle or compromise any action or cause of action for the recovery of a penalty or damages.[71]

(2.) Criminal Liability

The Act places criminal sanction on the "knowing" offender in the form of a fine of not less than one hundred ($100.00) dollars nor more than five thousand ($5,000.00) dollars and/or imprisonment for not more than two years. Each day's violation is considered a separate misdemeanor.[72]

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61. S.C. CODE ANN. § 63-195.18 (Supp. 1970).
62. S.C. CODE ANN. § 63-195.21 (Supp. 1970).
63. S.C. CODE ANN. § 63-195.20 (Supp. 1970).
64. *Id.*
65. *Id.*
66. S.C. CODE ANN. § 63-195.22 (Supp. 1970).
67. *See* S.C. CODE ANN. § 63-195.18 (Supp. 1970).
68. S.C. CODE ANN. § 63-195.32 (Supp. 1970).
69. As to necessity of a hearing, *see Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U.S. 463 (1905). As to an emergency condition as an exception, *see The Apollon*, 9 Wheat (U.S.) 362 (1824). *Accord*, 16 AM. JUR. 2d *Constitutional Law* § 569 (1964).
70. S.C. CODE ANN. § 63-195.20 (Supp. 1970).
71. S.C. CODE ANN. § 63-195.8(7) (Supp. 1970).
72. S.C. CODE ANN. § 63-195.35 (Supp. 1970).

There is some buffer present in that prosecutions for violations of a final determination or order shall not be instituted until after appeal or review or the expiration of a period of time permitting this.[73] As to these, prosecutions are initiated only by the Authority or the county governing body. One-half of any penalty money recovered is given to the county involved.[74]

(3.) Appeal

Any appeal from the Authority may be taken to the Court of Common Pleas in the county of the occurrence of the offense within thirty days of the decision.[75] In such event, the court will treat the matter as if it were an appeal of a case in equity.[76] As is established in this state, matters of equity on appeal are conducted to permit the appellate court to inquire into the facts of the matter as opposed to being bound to only an inquiry into matters of law.[77]

Further appeal is, as in any civil case, to the state supreme court.[78]

C. Relief from Statutory Liability

(1.) Force Majeure

A force majeure is defined as a superior or irresistible force.[79] Relief from liability in the presence of such a force is available in the Act as a barrier to both civil and criminal liability for pollution "caused by an act of God, war, strike, riot, or other catastrophe as to which negligence on the part of such person was not the proximate cause."[80]

(2.) Conditions Within Boundaries of Industry

The Act denies the Authority the right to affect "air conditions existing solely within the industrial boundaries of commercial and in-

73. *See* S.C. CODE ANN. § 63-195.25 (Supp. 1970).
74. S.C. CODE ANN. § 63-195.36 (Supp. 1970).
75. S.C. CODE ANN. § 63-195.23 (Supp. 1970).
76. *Id.*
77. Twitty v. Harrison, 230 S.C. 174, 94 S.E.2d 879 (1956).
78. S.C. CONST. art. V § 4.
79. BLACK'S LAW DICTIONARY 774 (4th ed. 1968).
80. S.C. CODE ANN. § 63-195.33 (Supp. 1970).

dustrial plants, works or shops."[81] The physical extent of the boundaries would appear to be in a vertical direction to the "stack height" and horizontally to the situs property limits. It would appear further that any water pollution within the confines of the plant would be beyond the purview of the Act.

(3.) Variances

Additional time is permitted to comply with the order of the Authority by way of variance, if after considering the following items, the Authority deems such time reasonable:

> (a) The character and degree of injury to, or interference with, the health and physical property of the peoples;
>
> (b) The social and economic value of the source of the undesirable levels;
>
> (c) The question of priorty of location in the area involved; and
>
> (d) The technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from such source.[82]

(4.) Impossibility

The defense of impossibility of compliance has been successful in another jurisdiction where there was an inability to reduce the pollution.[83] South Carolina's Act is silent on this point.

(5.) Electric Utilities

Electric utilities are exempt from liability if a permit had been issued to such utility and upon this permit the "utility acted in good faith and constructed its plant in accordance with these requirements."[84]

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81. S.C. CODE ANN. § 63-195.29 (Supp. 1970).

82. S.C. CODE ANN. § 63-195.15 (Supp. 1970). An added factor of relief is provided in the event that any action by the Pollution Control Authority will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, without sufficient corresponding benefit or advantage to the people. Such relief must be limited in time and conditioned upon periodic reports to the Authority. S.C. CODE ANN. § 63-195.17 (1967).

83. *See* City of Kankakee v. New York Cent. R.R., 387 Ill. 109, 55 N.E.2d 87 (1944). *Contra,* Consolidated Coal Co. v. Kandle, 105 N.J. Super. 104, 251 A.2d 295 (1969).

84. *See* S.C. CODE ANN. § 63-195.17(a) (Supp. 1970).

D. Other Matters

(1.) Emergency Procedures

The Act permits the Governor and the Authority collectively, in the presence of an emergency, to "issue an order reciting the existence of such an emergency and require that such action be taken as the Authority deems necessary to meet the emergency."[85] Such action may, be the statute, be taken without notice or hearing, and the protection of "public health" is used to justify such ex parte proceedings.[86] The affected party has the right to a hearing within forty-eight hours of application for same, but the length of time of such order is until such time as "an emergency no longer exists."[87]

(2.) New and Existing Construction

By the device of the permit, the South Carolina Pollution Control Authority imposes controls on the construction of any and all alterations of existing sources, disposal systems and outlets and new construction concerning the same.[88] This permit requirement addresses itself to both air and water controls. Presently, certain items are excluded from this restriction, including space heating systems of less than 500,000 BTU/hr., dwellings of four families or less, and motor vehicles.[89] It is possible for the Authority to later revise permit requirements based on availability of personnel and monitering equipment.

(3.) Traffic Hazards

The regulations additionally affect traffic hazards and place the burden on a party emitting smoke from open burning causing a reduction of visibility to 2,400 feet or less, to contact the South Carolina Highway Department and immediately attempt to reduce the problem.[90]

85. S.C. CODE ANN. § 63-195.32 (Supp. 1970).
86. *Id.*
87. *Id.*
88. S.C. CODE ANN. § 63-195.14 (Supp. 1970). However, the State Board of Health is responsible for issuing construction permits for septic tanks for all private residences and for subdivisions of 250 units or less. S.C. CODE ANN. § 32-8(11) (Supp. 1970).
89. P.C.A. Reg. 1A § II, filed February 11, 1971.
90. P.C.A. Reg. 2A § II, filed February 11, 1971.

Presently, direct source emission control for vehicles is still unregulated, although the ambient air standards for photochemicals and carbon monoxide appear to be aimed at the control of auto emission.

(4.) Open Burning

Open burning has received considerable attention at the regulation level in the Pollution Control Authority operations.[91] The regulations prohibit open burning except in certain instances, among which are the open burning of leaves, tree branches, yard trimmings, rubbish and garbage on the premises of private residences or dwellings of four families or less.

(5.) Private Suit

The Act provides for a private cause of action arising from any violation of the statute. The damaged party, however, may not rely on any finding of the Pollution Control Authority to create any presumption in law or fact. However, it would seem that the person damaged could benefit by being able to subpoena the investigative work product of the Authority, assuming it is not related to industrial secrets.[92]

E. Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction requires a complainant in court first to seek relief in an administrative proceeding before a remedy will be supplied by the courts, even though the matter is properly presented to the court as a matter within its jurisdiction.[93]

The application of this doctrine yields uniformity and consistency in the regulation of business entrusted to a particular agency,[94] and further gives expertise in the determination of extremely technical,

91. P.C.A. Reg. 2A § I, filed February 11, 1971.

92. S.C. CODE ANN. §§ 63-195.28 & .30 (Supp. 1970).

93. 2 AM. JUR. 2d *Admin. Law* § 788 (1962). Some jurisdictions have adopted this doctrine. *See* Larwood Co. v. San Diego Fed. Sav. and Loan Assn., 8 Cal. Rptr. 362 (4th Cir. Ct. App. 1960); Northeast Airlines, Inc. v. Weiss, 113 So.2d 884 (Fla. 1959); Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189, 184 A.2d 4 (1962); Schmidt v. Old Union Stockyards Co., 58 Wash. 478, 364 P.2d 23 (1961). Others have rejected it. *See* Nielson v. Lindstrom, 68 Idaho 226, 191 P.2d 1009 (1948).

94. Far East Conference v. United States, 342 U.S. 570 (1952).

complicated and scientific problems.[95] Court jurisdiction is not ousted, but only postponed.[96] In a recent action in Michigan,[97] it appears that the city of Whitehall and the Whitehall Leather Company were discharging improperly treated wastes into White Lake. A local organization brought a court action to abate the nuisance. The appellate court affirmed the lower court's ruling that the doctrine of primary jurisdiction applied and further affirmed the dismissal of the complaint. The court stated:

> It is well established that a proper party may sue for damages or seek injunctive relief to abate a nuisance such as water pollution. Both before and after the enactment of the Water Resources Commission Act, such actions have been brought. The act itself contemplates that existing common law remedies are not abolished. But it is in just such a case, one of concurrent jurisdiction of the courts (to enjoin a nuisance) and of an administrative agency (to regulate and prohibit pollution) that the doctrine of primary jurisdiction operates.[98]

The court continued by stating that the aggrieved party could challenge the administrative body's finding by appeal or could later initiate an action in equity to abate the nuisance if it still felt aggrieved.

An analysis of the case and the statutes involved reveal some degree of similarity between the South Carolina Pollution Control Act and the Water Resources Commission Act of Michigan.[99] Both permit private action,[100] create a regulatory agency, and deal with pollution.

No pollution case before the South Carolina Supreme Court to date has addressed itself to the question of the applicability of the doctrine of primary jurisdiction. However, in *Ex Parte Jones*[101] the court cast some doubt on the application of the doctrine in any case in South Carolina. In that case, the defendants had been engaged in trucking operations between Charleston and Conway, and other cities, without a permit from the Railroad Commission of South Carolina. The

95. Ellison v. Rayonier Inc., 156 F. Supp. 214 (W.D. Wash. 1957).

96. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

97. White Lake Improvement Assn. v. City of Whitehall, 22 Mich. App. 262, 177 N.W.2d 473 (1970).

98. 177 N.W.2d at 481.

99. M.C.L.A. §§ 323.1 *et seq.* (1969).

100. M.C.L.A. § 323.12 (1969); S.C. CODE ANN. § 63-195.28 (Supp. 1970).

101. 160 S.C. 63, 158 S.E. 134 (1931).

plaintiff brought action in court to restrain the defendants from so operating. The defendants then petitioned the supreme court for a writ of prohibition to prevent further circuit court action, basing the application for the writ on the theory that the commission, rather than the court, had jurisdiction over the subject matter and the parties. The court dismissed the application for the writ and allowed the action to proceed dispite the defendant's argument that the plaintiffs' should have initially sought redress before the Railroad Commission. The pertinent act, however, provided that it should not be construed "to deprive any person or persons of any right of action to which he is entitled to under the law, but shall be construed as cumulative."[102] The court seized on this language to permit the lower court proceedings to continue. Arguably this is a refusal to adopt the doctrine of primary jurisdiction.

In the more recent case of *South Carolina Public Service Authority v. Carolina Power and Light Co.*,[103] the plaintiff Authority alleged that it had entered into a contract to provide electrical power to a new plant in Georgetown County and that thereafter, the defendant, without having obtained a certificate of public convenience and necessity from the Public Service Commission, began construction of a low voltage line for the purpose of supplying power to the same plant. The plaintiff sought an injunction against the defendant on the ground that the defendant had failed to obtain the required certification from the Commission. The court agreed that certification was the next step; however, it dismissed the action on the ground that the commission was vested with exclusive original jurisdiction for determination of the regulatory matter. The court thus appeared to give weight to the doctrine of exhaustion of administrative remedies.[104] In its opinion, the court discussed *Ex Parte Jones* and stated that the determination of that

102. 1925 S.C. STATUTES AT LARGE, Act No. 170.

103. 244 S.C. 466, 137 S.E.2d 507 (1964).

104. The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. 2 AM.JUR. 2d *Admin. Law* § 595 (1962). The doctrine of primary jurisdiction is like the doctrine of exhaustion of administrative remedies in that each is concerned with promoting proper relationships between the courts and administrative agencies, permitting the courts to obtain expert aid in the solution of technical problems, and preventing premature action in court. The net result of the application of either doctrine is practically the same in many cases. The doctrine of primary jurisdiction is distinguished from the doctrine of exhaustion of administrative

matter was not within the jurisdiction of the administrative agency. The court said that where, as here, the question of whether or not the defendant is required to have a certificate of convenience and necessity is in issue, jurisdiction to determine such question has been conferred solely upon the Public Service Commission.

It remains to be seen whether the court intended this result to apply only to situations wherein an agency has exclusive jurisdiction or whether in cases of concurrent jurisdiction a similar result may be reached.

ATTACKS ON THE CONSTITUTIONALITY OF POLLUTION CONTROL STATUTES AND PROCEDURES

As yet no case has been decided by the South Carolina Supreme Court directly considering the constitutionality of the Pollution Control Act. There is a strong presumption in favor of the validity of a statute, and the burden of proving its unconstitutionality is an extremely formidable one.[105] Other jurisdictions have dealt with pollution acts with respect to vagueness, equal protection, due process, search and seizure, the interstate commerce clause, and the preemption doctrine.

A. Vagueness

Attacks have been made on the basis that a statute which imposes civil and criminal penalties must specify the prohibited conduct in terms that are clear, precise, definite and certain, or prescribe some comprehensible guide, rule or information as to what must be done or what must be avoided.[106]

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remedies in that the latter applies where a claim is cognizable in the first instance by an administrative agency alone, judicial interferance being withheld until the administrative process has run its course and the agency action is ripe for review. The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, the judicial process being suspended pending referral of certain issues to the administrative agency. 2 AM. JUR. 2d *Admin. Law* § 790 (1962).

105. Department of Health v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 242 A.2d 21 (1968).

106. Oriental Boulevard Co. v. Heller, 58 Misc. 2d 920, 297 N.Y.S.2d 431 (Sup. Ct. 1969). It is not clear from the case as to whether or not specific pollution standards were established by the statute that was challenged. It would appear that, in any event,

The courts' response to this argument has been that the statute affords prior notice and an opportunity to file plans,[107] or that the defendant knew of the nature and origin of his violation.[108]

B. Equal Protection

It has been unsuccessfully asserted that pollution statutes violate the equal protection clause. The court in *Oriental Boulevard Co. v. Heller*[109] in response to this argument stated:

> A class may lawfully be restrictive, if the lines defining the restriction are not arbitrary altogether, and the rule to be applied within them is uniform and even; and a classification, though discriminatory, is not arbitrary so as to constitute a denial of the equal protection of the laws if any state of facts reasonably can be conceived that would sustain it.[110]

C. Deprivation of Property Without Due Process

Another attack commonly used against statutory enactments is that such statutes deprive the owner of his property without due process of law. This argument has yielded in the past to the right of the state to safeguard the public health.[111] In this same vein, an attempt was made to overturn a pollution statute on the basis that the additional

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the trial court would permit a hearing prior to imposing any sanction. The S.C. Pollution Control Act, on the other hand, sets forth certain quantitative standards by chemical compound and rate of emission.

As to the S.C. position on vagueness, in the recent case of *Town of Honea Path v. Flynn*, 255 S.C. 32, 176 S.E.2d 564 (1970), the court said:

> It is a general principle of Statutory Law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Id.* at 39, 176 S.E.2d at 567.

107. Oriental Boulevard Co. v. Heller, 58 Misc. 2d 920, 297 N.Y.S.2d 431 (Sup. Ct. 1969).

108. Department of Health v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 242 A.2d 21 (1968).

109. Oriental Boulevard Co. v. Heller, 58 Misc. 2d 920, 297 N.Y.S.2d 431 (Sup. Ct. 1969) (citations omitted). *See also* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959).

110. 297 N.Y.S.2d at 440.

111. *See generally* Van Oster v. Kansas, 272 U.S. 465 (1926); Pacific Gas and Elec. Co. v. Police Court, 251 U.S. 22 (1919); Shealy v. Southern Ry. Co., 127 S.C. 15, 120 S.E. 561 (1924).

new restrictions constituted a deprivation of property without due process. The court in *Oriental Boulevard* rejected this argument, stating:

> The rule is that an owner of property who has constructed or maintained his property in compliance with laws then in existence acquires no vested right or immunity against an exercise of the police power which imposes additional or new requirements with respect to the maintenance or use of such property.[112]

D. Illegal Search and Seizure

Another approach taken argues that a pollution statute is unconstitutional in that it authorizes unlawful searches and seizures of property without a warrant. This argument was held without merit in *Oriental Boulevard*. The court said:

> The fact that some of the Air Control Pollution Department's personnel may have made searches of owners' premises in certain case without obtaining a warrant, does not render the law itself unconstitutional though it may be that a property owner would have a sufficient defense or right of redress in court against any such searches.[113]

The court seemed to distinguish the United States Supreme Court decisions of *Camara v. Municipal Court*[114] and *See v. City of Seatle*[115] on the basis that they hold invalid the searches but not the statute authorizing the search. These landmark cases expressly provide that searches of private residences and commercial business establishments by public inspectors must be either with consent of the proprietor or

112. 297 N.Y.S.2d 431, 441 (Sup. Ct. 1969).

113. 297 N.Y.S.2d 431, 442 (Sup. Ct. 1969).

114. *Camara v. Municipal Court*, 387 U.S. 523 (1967), held that administrative searches by municipal health and safety inspectors require either consent or the element of a search warrant in order to satisfy the provisions of the Fourth Amendment. The Court further held that probable cause to issue the warrant for the inspection of a dwelling by municipal health and safety officials must exist if reasonable legislative or administrative standards for conducting area inspections are to be satisfied. Such standards may vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building, or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

115. *See v. City of Seattle*, 387 U.S. 541 (1967), held that under the Fourth and Fourteenth Amendments, a fire inspector must obtain either consent or a warrant authorizing entry into a business establishment, and thus extended the *Camara* holding to businesses as well. *See* 20 S.C.L. REV. 363 (1968).

else under color of a valid search warrant. The South Carolina Pollution Control Act provides:

> [The Authority may] enter at all reasonable times in or upon any property, public or private, for the purpose of inspecting and investigating conditions relating to pollution or the possible pollution of the air or the waters of the State and its authorized agent may examine any records or memoranda pertaining to the operation of a disposal system or source. *Provided*, that the Authority shall not enter private residences or dwellings of four families or less, to inspect and investigate any conditions which the Authority shall have reasonable cause to believe to be a source of air contaminant unless authorized. The results of any such inspection shall be reduced to writing and a copy shall be furnished to the owner or operator of the source or disposal system.[116]

It would appear, however, that in light of the present search and seizure doctrine, to wit, *Camara* and *See*, any search of residential or business property of any nature, made under authority of this Act, must be either with the proprietors' consent or else by authority of a proper search warrant.

E. Interstate Commerce

The question of the right of a state to affect matters of interstate commerce in respect to pollution control was squarely raised in *Huron Portland Cement Co. v. Detroit*[117] where the Court held that the states had the right to regulate air quality through the vehicle of police power, notwithstanding the question of interstate commerce. The Court reasoned that legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of the most traditional concept of the states' police power.[118]

F. The Preemption Doctrine

An attempt was made in *Houston Compressed Steel Corp. v. State*[119] to deny the validity of a state pollution statute, arguing that

116. S.C. CODE ANN. § 63-195.8(23) (Supp. 1970).

117. 362 U.S. 440 (1960).

118. It should be noted, however, that the South Carolina Pollution Control Regulations expressly exclude from its provisions all interstate motor vehicles and rolling stock. S.C. CODE ANN. Vol. 17 at 341 (Supp. 1970).

119. 456 S.W.2d 768 (Tex. 1970).

the federal legislation on the subject preempted and voided the state statute. The court rejected this argument by citing numerous references to federal acts which give the states the right to control pollution and further stated that, "Congress finds that the prevention and control of air pollution at its source is the primary responsibility of States and local governments."[120]

CONCLUSION

As can be seen, common law doctrines as supplemented by the Pollution Control Act present a comprhensive array of remedies applicable to the problems of air and water pollution. The Pollution Control Act does not, on its face, attempt to interfere with existing nonstatutory remedies; yet any imposition of the doctrine of primary jurisdiction would certainly have this effect. A South Carolina defense attorney, when handling a pollution suit, may well attempt to invoke the doctrine of primary jurisdiction for temporary relief, and when faced with a statutory offense resort to attacks on the statute's constitutional validity.

On the other hand, a plaintiff's attorney should note that the Pollution Control Act clearly gives a damaged party a right upon which to found a private cause of action for violation of pollution standards. This private right may also be used to argue that the legislature did not intend that the doctrine of primary jurisdiction should apply, if faced with this defense.

In any event, during the development of the law in this area, a proper perspective should be maintained similar to the reasoning of the court in the recent Florida case of *St. Regis Paper Co. v. State*:[121]

> Ecology is the in subject of today's citizenry. Man, of all animals, pollutes his habitat the greatest. What we have defiled over a period of 100 years cannot be sanitized in one day, one month, one year, or by one law. Now is not the time to discard the concepts of due process, fair play and substitute 'quick justice' in the name of 'kill the pollutants.'
>
> . . . .
>
> An essential mandate to this agency [Florida Air and Water

120. *Id.* at 772.
121. 237 So. 2d 797 (Fla. 1970).

> Pollution Control Commission] is the seeking out of pollutants and presenting to he violator an opportunity to abate the unlawful practice. The emphasis is upon prevention and abatement; not upon enriching the coffers of the State treasury or its prison population. The legislative scheme is primarily directed towards re-establishing a livable habitat for man; not the abatement or elimination of the industries and governmental units which are guilty of polluting our environment.[122]

These statements seem to present the preferred balance and mood of today's society along with an indication of the discretiont that the new South Carolina Pollution Control Authority will hopefully use as it attempts to cope with the problems of abatement and control of pollution throughout the State.

122. *Id.* at 798, 800.