

## History of the Clean Air Act

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To understand the purposes of and methods behind regulation under the Clean Air Act, one must look at its origins in the common law of nuisance and its direct precursors in municipal ordinances. And any discussion of the common law must begin in England.

The first effort to control air pollution occurred in 14<sup>th</sup> century England. At that time, sea coal was used to fuel lime kilns. Combustion of sea coal produced a noxious brew of sulfur dioxide, carbon dioxide, and particulate matter emissions. Not coincidentally, as sea coal use increased, England's air quality became intolerable. To remedy this problem, King Edward I banned the use of sea coal in 1306, declaring that "all but smiths [shall] eschew the obnoxious material." He also urged his subjects to return to wood ("the fuel they used of old"). But the king's edict was ignored, and sea coal use continued unabated.

Air pollution continued to bedevil England in the ensuing centuries. As the country's population increased, so too did coal combustion. And with increased combustion, the air quality became even more degraded. Yet there were no air pollution laws to enforce. Instead, people had to sue responsible parties for injuries to themselves, their families, or their property. These "nuisance" claims enabled people to seek damages for their injuries and, in some cases, even an order enjoining the pollution.

The seminal nuisance case was *Aldred v. Benton* ("Aldred's Case"). Aldred sued his neighbor, a pig farmer, alleging that the "fetid and unwholesome stink" made his land unfit for occupation. Aldred was awarded damages, but Benton appealed, arguing that "it is lawful for anyone to make a hog-sty, even in a market town, for one cannot be so tendernosed." After losing his appeal, Benton went to the King's Bench. There, he argued that his right to earn a

living trumped Aldred's aversion to noxious odors. But the King's Bench was not persuaded. It found that Benton had a duty to use his land in a manner that would not harm his neighbor.

Because Benton violated this duty, he was liable for damages. Thus, the court adopted an absolute liability approach to nuisance claims. It was an auspicious start for plaintiffs.

But the use of nuisance claims to control air pollution was short-lived. During the industrial revolution, nuisance claims became increasingly difficult to win. This was so for two reasons. First, plaintiffs had to prove that the defendant's noxious vapors caused their injuries and that the pollutant came from defendant's chimney. In the 1800's, there was only circumstantial evidence that noxious vapors caused illness (in fact, some doctors even opined that pollution was beneficial, since it might be used to fight cholera). And second, as industry spread, it became almost impossible to trace a pollutant to its source. Consequently, plaintiffs often faced insurmountable evidentiary obstacles in nuisance cases.

Plaintiffs also had to contend with less sympathetic courts. Unlike the court in *Aldred's Case*, which seemed to hold that a plaintiff's right to clean air was sacrosanct, 18<sup>th</sup> century courts were reluctant to award damages or injunctions to urban plaintiffs. Most courts believed that plaintiffs impliedly consented to noxious vapors when they lived in an industrial area. And if plaintiffs consented to this exposure, then they could not seek redress for their injuries.

Even more ominously for plaintiffs, courts in the 1850's began dismissing nuisance complaints as "trifling inconveniences." To overcome this bias, plaintiffs had to demonstrate that their alleged injuries were more than just irritations or annoyances. In most cases, plaintiffs could not show the requisite harm.

In America, nuisance claims arose in the heart of coal country, western Pennsylvania. From the beginning, these claims were difficult to prosecute. *Richard's Appeal* was illustrative of nuisance claims at this time. Richards, a cotton cloth manufacturer, sued an adjacent iron company that had built a smelting plant in the area. Richards claimed that smoke had "sulphurous, unwholesome, and noxious" effect on his family and property. He sought an

injunction to order the company to build taller stacks or to use cleaner-burning coal. The trial court ruled for defendant, and Richards appealed. The Pennsylvania Supreme Court affirmed, finding that Richards failed to prove “feasible means of abatement” but suggested that Richards might be entitled to common law damages.

Four years later, in *Huckenstine’s Appeal*, plaintiff sued a brickyard, alleging that noxious vapors from the brickyard harmed his orchards and that the conditions made the “land and the houses on it very inconvenient and uncomfortable as a residence.” The trial court found for plaintiff and issued an injunction. But the Pennsylvania Supreme Court reversed. It held that plaintiff was not entitled to redress for injury to his “comfort.” The court also found that plaintiff had consented to the vapors/odors of the area where he lived. It stated that “the people who live in such a city or within its sphere of influence do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts, for the greater benefit they think they derive from their residence or their business there.” Thus, implied consent to pollution exposure would bar nuisance claims in America, too.

But under the right circumstances, courts were willing to award damages and even injunctions. In *Pennsylvania Lead Company*, plaintiff sued lead smelter for emitting “offensive, noxious and poisonous gases, fumes and vapors.” The Pennsylvania Supreme Court upheld the injunction, stating that “all intelligent persons are aware that lead vapors are poisonous, and this the more so as they are often, as in the case in had, accompanied with arsenic. In this matter we need not chemists and experts to teach us, for common experience is sufficient.” The court also noted the importance of the lead smelter’s location, which was “in the midst of a rich suburban valley, occupied by farms and country residences.”

In many cases, however, courts were unwilling to enforce injunctions. Instead, courts chose to award money damages. But this was hardly fair compensation. Without an order to

abate emissions, companies would continue to fill the atmosphere with noxious fumes that damaged property and caused illness. And even when courts upheld injunctions, companies could satisfy the injunction by investigating the problem without making any changes. In *Sullivan v. Jones & Loughlin Steel Co.*, for example, the Pennsylvania Supreme Court refused to uphold an injunction regarding pollution abatement technologies. Under the injunction, Jones & Loughlin was required to “investigate” available technologies to deal with its dust emissions. Several years later, with no change in emissions, Sullivan sought enforcement of the injunction. The lower court held that Jones & Loughlin was in contempt, but the Pennsylvania Supreme Court reversed. It found that the injunction only required Jones & Loughlin to consider measures to abate pollution. Because it did this, the court found that it had complied with the injunction. But without regulation, dust emissions continued unabated.

Because nuisance claims failed to remedy the pollution dilemma, many cities in the late 19<sup>th</sup> century began implementing ordinances to combat smoke emissions. These ordinances were the first “statutory” attempts to solve the intractable emissions problem. St. Louis implemented its smoke abatement ordinance in 1867. It required companies to build chimneys that were at least “twenty feet” above surrounding buildings and habitations. In 1869, Pittsburgh adopted a similar ordinance, prohibiting trains from using dirty (i.e. bituminous) coal. One reporter described Pittsburgh as “just visible through the mingled smoke and mist, and every object in it is black. Smoke, smoke, smoke—everywhere smoke!” These ordinances were designed to force companies to adopt new technology to reduce emissions. Although this approach would prove effective and be codified in the Clean Air Act and state legislation in the 20<sup>th</sup> century, it was largely ineffectual at the time. For without adequate enforcement, these ordinances failed to improve air quality and were largely symbolic.

Ten years later, Chicago passed an ordinance that made smoke “negligence per se.” This obviated the need for plaintiffs to prove causation and trace the pollutant to its source. But there were still challenges. First, the ordinance only banned “dense smoke.” Thus, plaintiffs had to prove that defendant’s smoke was sufficiently thick. And second, the burden of enforcement was on a small group of inspectors. In many cities, smoke-emitting factories were too numerous to regulate with a few city workers. This meant that the ordinance was only as effective as its public support.

And public support was notoriously fickle. One writer described this period as one of “perpetual mobilization.” Activists—mostly women—would galvanize the public and, for a time, convince people that anti-smoke ordinances were the answer. But over time, people lost interest. Moreover, some companies were able to invalidate these ordinances through the courts, since many courts considered such ordinances beyond the municipality’s authority. In short, without adequate enforcement, municipal ordinances could never solve the nation’s growing pollution problem.

During the early 20<sup>th</sup> century, sporadic pollution efforts continued. But a series of pollution disasters, both in the United States and abroad, changed public perception about emissions and were the impetus for federal legislation. In 1930, a deadly “fog” killed 60 people in Belgium. London had two smog incidents—one in 1948 and the second in 1952—that killed more than 4,000 people. And in 1950, “fog-bound fumes” from an oil refinery in Poza Rica, Mexico killed 22 people.

But for Americans, the most significant event occurred in 1948 in Donora, Pennsylvania. Donora was located on the Monongahela River in western Pennsylvania. In the 1940’s, it was sandwiched between a zinc smelter and U.S. Steel’s massive steel mills. During one week in October 1948, there was a temperature inversion, which kept the polluted air close to the surface.

The pollutant cloud was so dense that people could not see the sun at noon. By the time the cloud dissipated, 20 people were dead and thousands more had been hospitalized with serious respiratory illnesses.

Because of Donora and other smog-related incidents, the federal government intervened in 1955 and passed the Air Pollution Control Research and Technical Assistance Act. Although the act did not regulate air pollution, it directed the Department of Health, Education, and Welfare, with the help of the Surgeon General, to administer a funding program for state and local governments. This program kept pollution control at the state level but provided incentives for local governments to use new technologies to control pollution.

In 1963, Congress passed the Clean Air Act. The act gave Congress a greater role in air pollution control in two respects. First, the act authorized federal investigation if there was interstate air pollution. And second, the act authorized Congress to pass interstate compacts regarding air pollution. Still, pollution control was left largely to the states and local governments.

Four years later, Congress passed the Air Quality Act of 1967. The act focused on “stationary” sources of pollution and had four goals: 1) protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population; 2) initiate and accelerate a national research and development program to achieve prevention and control of air pollution; 3) provide technical and financial assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs; and 4) encourage and assist in the development and operation of regional air pollution control programs. To achieve these goals, Congress ordered the creation of “criteria” to protect public health. The act also provided for the eventual creation of ambient air quality standards.

In 1970, Congress amended the Clean Air Act in the Clean Air Act Amendments of 1970. These amendments are collectively known as “The Clean Air Act.” To facilitate air quality improvements, Congress vested what had traditionally been state power in the Environmental Protection Agency (EPA). Now, EPA had the responsibility of establishing air quality standards for the nation. Each state, in turn, would implement these national standards through its State Implementation Plan (SIP).

Since 1970, the Clean Air Act has been amended twice. In 1977, Congress addressed “nonattainment” areas (i.e., areas that were still not in compliance, or attainment, with air quality standards). In addition to requiring states to designate “nonattainment” areas, Congress directed states to assess their SIPs regularly to ensure effectiveness.

In 1990, Congress amended the Clean Air Act to require states to designate areas as “attainment,” “nonattainment,” or “unclassifiable.” The ’90 amendments also set deadlines for state compliance with National Ambient Air Quality Standards (NAAQS) and committed EPA assistance on tropospheric ozone compliance.

Since the 14<sup>th</sup> century, people have been trying to deal with air pollution. Over the intervening centuries, states and countries have adopted many ways to regulate noxious vapors, some effective and others not. The Clean Air Act is an amalgamation of these approaches. It recognizes that air pollutants are a “nuisance” and, thus, must be regulated. But it also emphasizes fairness in encouraging companies to adopt the best available technology, which harkens back to municipal ordinances in the 19<sup>th</sup> and 20<sup>th</sup> centuries. Problems remain, to be sure. But by adopting the time-tested approaches to pollution regulation, Congress has equipped EPA and the states to deal with our air pollution in a fair and effective way.