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CALIFORNIA LEGISLATION ON AIR CONTAMINANT EMISSIONS FROM STATIONARY SOURCES

Stationary source air contaminant emissions, primarily industrial, have been and continue to be major contributors to air pollution. Congress and the California Legislature have created various regulatory agencies to control these emissions. This Comment discusses the legislation creating these agencies and the authority currently delegated to them. It encompasses all legislation through the 90th Congress and the 1970 California legislative session. The author points out weaknesses in the administrative structure and suggests specific ways in which it could be improved.

In 1273, King Edward I of England signed the first air pollution abatement law directed at limiting emissions from coal burning, a stationary source. At that time, the problem was fairly simple: one easily detected contaminant—black smoke—and one source—coal. Today with the increasing complexity of industrial processes, stationary sources present a far more complex air pollution problem. There are many contaminants: carbon monoxide, hydrocarbons, nitrogen oxides, sulphur oxides, and various forms of particulate matter. Some of these are very hard to detect, yet are extremely toxic. Also, both technical and legislative control of stationary source emissions are more difficult than the control of mobile source (automobile) emissions. Control techniques compatible with all the various industrial processes are required to limit stationary source emissions. Thus, Legislatures must prescribe a variety of regulations and methods compatible with the multitude of processes. In contrast, devices functioning solely in automobiles can control emissions from that source. To reduce emissions legislatures can require that basically similar devices be installed in new

2. See note 10 infra.
3. For example, sulphur dioxide, a stationary source contaminant, when combined with water forms sulphuric acid. This reaction may take place within human eyes or lungs.
4. Possible control techniques for particulate matter emissions’ elimination are scrubbers, filters, electronic charges, or devices that utilize the inertial properties of the particle one is trying to eliminate. Possible control approaches to limit sulphur oxide emissions are removing the sulphur from coal or fuel oils before combustion, adding sorbent materials to the combustion process, or removing the sulphur oxide from the flue gases before they leave the smoke stack. Ludwig, Air Pollution Control Technology: Research and Development in New Improved Systems, 33 Law & Contemp. Prob. 217, 219 (1968).
and used cars. This Comment describes and evaluates the statutory scheme of air pollution control regulations for stationary sources in California at the federal, state, and local levels.

California agencies charged with controlling stationary source emissions claim that these sources contribute only ten to thirty percent of all air contaminants. These figures do not, however, accurately reflect the enormity of the stationary source pollution problem. They are calculated by simply combining the quantity of emissions of various contaminants from both mobile and stationary sources. Since


6. The common law treated injurious smoke emissions as nuisances, the traditional tool for balancing conflicting and competing property interests. Pollack, Legal Boundaries of Air Pollution Control—State and Local Legislative Purpose and Techniques, 33 LAW & CONTEMP. PROB. 331, 333 (1968). This theory is of limited usefulness because of the need to prove damage to the plaintiff and unreasonable activities by the defendant (private nuisance) or damage to the community from a particular defendant (public nuisance). To overcome these restrictions, modern air pollution legislation is an exercise of the legislative police powers independent of the law of nuisance. Id. at 333-35. The police power is used to restrain and regulate dangerous practices to protect the safety, health and welfare of the general public. Police power regulations are limited by the requirements of due process and equal protection. They must not be arbitrary or go beyond what is necessary to achieve the legislative purpose; any standard set must be definite, certain and possible; and all classifications used must have a reasonable relationship to a legitimate state purpose. Kennedy, Introduction—Some Legal Ramifications of Air Pollution Control and A Review of Current Control of Automotive Emissions, 10 ARIZ. L. REV. 1, 3-5 (1968); Pollack, supra at 335-58.


10. Stationary sources account for over 50 percent of the emissions of particulate matter, sulphur oxides, and nitrogen oxides. They emit approximately nine million tons per year of particulate matter; motor vehicles emit one million tons per year. Id. Particulate matter is liquid droplets or solids small enough to be suspended in the atmosphere, or larger pieces which settle out of the air onto property. They include smoke, fumes, dusts, and mists; [Air Pollution Control District—County of Los Angeles, Smog & Its Effects 6, 1970 (prelim. draft) [hereinafter cited as Smog & Its Effects]] and are emitted by construction operations, mechanical processes (grinding and pulverizing), and chemical production and application. AIR POLLUTION IN THE BAY AREA, at 4.

Stationary sources emit approximately 23 million tons per year of sulphur oxides and motor vehicles one million tons per year. Middleton & Ott, supra note 9, at 184-85. Sulphur oxides are emitted during the combustion of coal and fuel oils primarily by oil refineries, ore smelting processes, chemical plants, and utility power plants. AIR POLLUTION AND THE BAY AREA 14; SMOG & ITS EFFECTS, supra at 9.

Stationary sources and motor vehicles each emit approximately six million tons per year of nitrogen oxide. Middleton & Ott, supra note 9, at 184-85. They are
the effects on health, visibility, and property vary depending on the nature of the contaminant, a calculation of the percentage of all contaminants is misleading.

Air pollution also distorts the competitive process. Theoretically in a capitalist society, the price paid by the consumer reflects the total cost to society of the product. However, when an industry is allowed to discharge its wastes into the atmosphere without charge, the cost of the use of this resource—the air—is not reflected in the price of the product. The result is a misallocation of resources. For example, steel is underpriced because the use of the atmosphere in the steel producing process is not reflected in the price of steel, while some agricultural products may be overpriced due to crop shortages because of damage caused by air pollution. The ideal solution is to require pollution dischargers to internalize the cost of the use of the atmosphere, thus increasing the cost of their products. The air pollution control programs discussed in this Comment should be evaluated in terms of how successfully they achieve this internalization.

I
THE FEDERAL FRAMEWORK

A. The Federal v. State Control Controversy

Commentators concerned with air pollution control differ as to the appropriate degree of the federal government's participation in air pollution control. Those proposing the larger and more detailed federal involvement argue that, as the problem is national in scope, the solution should be uniform federal regulation. If regulation is not uniform, emitted by the combustion processes of all industries including the petroleum industry, chemical and manufacturing operations, and utility power plants. AIR POLLUTION AND THE BAY AREA 14; Smog & Its Effects, supra at 8.

11. Air pollutants cause or aggravate acute respiratory infections, chronic bronchitis, chronic constructive ventilatory disease, pulmonary emphysema, bronchial asthma, lung cancer, and eye irritation. Visibility is reduced by the high density of dust and smoke particulates and the darkening effect of nitrogen oxide. Air contaminants can cause paint to darken, rubber to crack, metal to corrode, and flowers to discolor or fail to bloom. AIR POLLUTION AND THE BAY AREA 10-17; THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—1970, at 66-71 (1970) [hereinafter cited as ENVIRONMENTAL QUALITY].

12. It is impossible to isolate specific effects from specific contaminants. The various contaminants combine to aggravate or produce a variety of malfunctions. Cassell, The Health Effects of Air Pollution and Their Implications for Control, 33 LAW & CONTEMP. PROB. 197 (1968).

13. To internalize a cost is to require the manufacturer to bear it as a part of the production costs of his product. External costs are those born by the entire society and not solely by those who benefit—the manufacturer and the consumers of his product.

14. See Muskie, Role of the Federal Government in Air Pollution Control, 10
industrial emitters located in areas with more moderate regulation will have a competitive advantage over emitters in areas of severe regulation. This can increase the latter manufacturers' resistance to air pollution controls or force them to relocate, rather than induce reductions of harmful emissions. Also, multi-state manufacturers may find it difficult to implement up to 50 different standards and regulations. Furthermore, a large federal role is desirable in research because the federal government has greater financial resources and a reserve of expertise necessary to attack the problem. Finally, because air pollution does not respect state boundaries, one state's permissiveness affects another's air quality.

State control will allow experimentation with various regulatory and enforcement programs which will ultimately lead to the best administrative solutions to air pollution problems. Varied control approaches will also allow for differing industrial responses, increasing the possibility that manufacturers will find innovative technological solutions to reduce the cost and increase the effectiveness of air pollution control. Under a varied system, control approaches would not be eliminated simply because they did not conform to a federal system of regulation. However, using federal standards as maximum emission levels could reduce the inflexibility inherent in uniform federal regulation. States and industries could experiment with controls more strict than these federal maximums. The proponents of state control fear that states will expediently accept these maximums and not strive beyond the uniform federal standards through experimentation and innovation.

Differing approaches to the problem are desirable not only to arrive at improved technology, but also because the degree and quality of the air pollution problem vary from place to place, depending on the degree of urban-industrial concentration, the kind of manufacturing activities, meteorological conditions, and topographical factors. Pro-

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18. See id.

19. ENVIR. REP.—CURRENT 61.

ponents of a larger state involvement also argue that initially the federal government should concern itself only with the metropolitan areas where the problem is most acute. Another reason for state control is that the states may be more aware of local problems and thus pass more severe legislation to deal with them specifically.

Congress, through the Air Quality Act of 1967, resolved this controversy in favor of state control of air pollution from stationary sources. Under this Act, the federal government's role is limited to setting national air quality criteria, providing a framework for state, regional, and local institutions to create and implement air quality control programs, including emission standards, and enforcing state programs if they fail to do so. This leaves the primary responsibility with the states where it has traditionally been.

B. Provisions of the Air Quality Act of 1967

The Department of Health, Education, and Welfare (HEW) ad-

21. Muskie, supra note 14, at 21. Congress has found that a predominant part of the nation's population lives in metropolitan areas and that major air pollution problems exist in these areas. 42 U.S.C. § 1857(a) (Supp. V, 1970).


24. Id. § 1857(a)(3). While the states have primary responsibility for controlling air pollution from stationary sources, the federal government has the responsibility for controlling air pollution from new motor vehicles. Id. § 1857f-6a(a).

25. See text accompanying notes 57-59 infra.

26. See text accompanying notes 29-71 infra.

27. See text accompanying notes 76-86 infra.

28. The amendments to the Act, currently under consideration, if passed, would increase the federal government’s role by providing national ambient air quality standards and some national emissions standards. See note 29 infra.

29. For a critical analysis of the Act, see O’Fallon, supra note 22.

Currently a Congressional conference committee is debating the changes to the Air Quality Act embodied in H.R. 17255 and S.4358, 91st Cong., 2d Sess. (1970). These bills propose, inter alia, national ambient air quality standards (goals), air quality control regions encompassing all areas of the United States, national emissions standards for extremely hazardous contaminants, private citizen enforcement action, and mandatory licensing. ENVIR. REP.—CURRENT 249, 276 (statements by Congressman Udall, the United Auto Workers, and environmental groups).

Under the proposed amendment, a private citizen would be able to sue a polluter
ministers the federal air pollution control program. It has primary responsibility for researching the causes, effects, and extent of air pollution, and seeking methods of control and prevention. Based on its research, HEW designates air quality control regions, and issues reports on control techniques and on air quality criteria for specific contaminants. After the federal criteria and control reports on a contaminant are issued, the states must establish ambient air quality standards consistent with the criteria for that contaminant and adopt an implementation plan for achieving those standards. If a state fails to adopt appropriate standards, HEW can promulgate its own and institute abatement proceedings, if necessary, to stop pollutant emissions.

1. Regions

The Air Quality Act of 1967 requires HEW to designate air quality control regions in areas with significant air pollution problems, primarily in major metropolitan areas. HEW defines these regions on the basis of meteorological and topographical factors, urban-industrial considerations, and political boundaries. Regional controls are necessary because air contaminants do not heed local political boundaries: pollutants emitted in one place can cause harm to people living in another. Within each region, states must establish ambient air quality standards who violated an emission control requirement or provision of an implementation plan and the governmental agency charged with enforcing these requirements and plans failed to do so. The citizen would also be able to sue HEW for failure to exercise its duties. If the litigation was found to be frivolous, the court could award litigation costs to the defendant. Because of the disparity in technical capabilities of various polluters, the proposed amendment establishes a procedure for mandatory licensing of necessary patents or trade secrets by those developers who have the necessary information. The desired information would be obtained with a payment of a reasonable royalty.  


31. See text accompanying notes 44-55 infra.  
32. See text accompanying notes 44-54 infra.  
33. See text accompanying notes 39-43 infra.  
34. See text accompanying notes 60-61 infra.  
35. See text accompanying notes 56-59 infra.  
36. See text accompanying notes 62-66 infra.  
37. See text accompanying notes 67-75 infra.  
38. See text accompanying notes 76-86 infra.  
39. 42 U.S.C. § 1857c-2(a)(2) (Supp. V, 1970); HEW, THIRD REPORT 14-16. For a discussion of the proposed amendments to the Federal Air Quality Act which would require all areas in the United States to be within a control region see note 29, supra.  
41. See Coons, supra note 20, at 60.
and adopt implementation plans,\textsuperscript{42} thus providing a flexible approach to meet differing atmospheric and industrial conditions in the federally designated regions. In California, HEW has designated the Los Angeles and San Francisco metropolitan areas as air quality control regions.\textsuperscript{43}

2. Federal Research

Research on air pollution technology could conceivably be conducted by the federal or state governments, individual corporations,\textsuperscript{44} the governments in cooperation with industry,\textsuperscript{45} or individual corporations in cooperation with each other. The latter combination may be hampered by present antitrust laws\textsuperscript{46} but the other three sources currently exist. Government research results are readily available to the public as published reports\textsuperscript{47} or as part of the national air data bank.\textsuperscript{48} The results of private industrial research, not done in cooperation with the government, usually\textsuperscript{49} need not be made available to the public.\textsuperscript{50}


\textsuperscript{43} HEW, THIRD REPORT 15.

\textsuperscript{44} The federal government encourages industry to undertake air pollution control research. 42 U.S.C. § 1857b(a)(2) (Supp. V, 1970); HEW, THIRD REPORT 26.


\textsuperscript{48} HEW, THIRD REPORT 9.

\textsuperscript{49} California requires that if only one device for automobile emissions control of a particular contaminant is available, the manufacturer of that device must cross-license it or agree to the Air Resources Board's suggested retail price before installation of that device on used vehicles becomes mandatory. CAL. HEALTH & SAFETY CODE § 39131 (West Supp. 1971). This cross-licensing requirement is designed to insure competition. It protects the small manufacturers while giving some of the benefit of technology to the innovator. The innovator receives the royalties and the other manufacturers are able to sell the product.

\textsuperscript{50} In fact, industry is opposed to making the results of their research available to the public. See J. ESPOSITO, supra note 45, at 75-81.
On the one hand, this secrecy encourages research in those areas where innovation can lead to a competitive advantage, with a monopoly or oligopoly situation arising if competing manufacturers cannot comply as inexpensively with the controls required by law. Only those manufacturers who succeed in discovering an equally cost-cutting method could successfully compete. Other manufacturers, primarily small businesses who cannot afford large expenditures on research and development, may be forced out by the high costs of penalties or compliance. Even with this prospective advantage, a manufacturer may not be willing to invest money in research because he may not want to take the risk that the device he discovers may become obsolete in a short time. On the other hand, forcing manufacturers to divulge the results of their research would decrease their incentive to invest in achieving a competitive advantage that they cannot exploit. Perhaps because of this dilemma the federal government maintains an active role in the research and development of air pollution technology. In fact, prior to the Air Quality Act of 1967, the federal government’s main role in the control of air pollution was that of researcher. The 1967 Act expands this function by providing for a national research and development program to conduct government research, experiments, and studies relating to the causes, effects, extent, prevention, and control of air pollution; and to encourage and cooperate with public and private agencies, institutions, and individuals in these activities. The Secretary of HEW is authorized to make grants to public and nonprofit private agencies, and to contract with public and private agencies, institutions and individuals for research purposes.

52. Symposium, supra note 16, at 283-87.
54. Id. § 1857b(a).
55. Id. § 1857b(b). The National Air Pollution Control Administration (NAPCA) within HEW conducts and supports the research authorized by the Air Quality Act of 1967. Under this Act NAPCA has conducted and supported research pertaining to the risk to health resulting from exposure to the major pollutants; the economic and aesthetic hazards of air pollution, including damage to man-made materials, injury to vegetation, and the occurrence of odors; the development of joint federal, state, and local surveillance programs of air quality to determine the extent of air pollution and to assess the impact of air pollution control measures; industrial emissions to provide information to guide in the development of control techniques and to estimate interrelationships between air pollutant emissions and air quality; the development of less costly instrumentation for measuring air pollution; and the various methods for controlling pollutant emissions. HEW, THIRD REPORT 1-11, 25-33.
3. Air Quality Criteria and Technical Control Reports

Based on the research findings, HEW publishes air quality criteria and technical control reports. Air quality criteria describe the effects to be expected at various air levels of particular pollutants and reflect the latest available scientific knowledge on hazards to health and damage to materials and vegetation from major air contaminants. HEW has published criteria for sulphur oxides, particulate matter, carbon monoxide, hydrocarbons, and photochemical oxides. For each of these contaminants, HEW has published technical control reports analyzing the various techniques for preventing and controlling air pollution at its source, the latest available technology and the economic feasibility of the alternative techniques.

4. Ambient Air Quality Standards and Implementation Plans

After HEW publishes air quality criteria and technical control reports for a particular contaminant, those states containing air quality control regions must promulgate ambient air quality standards and implementation plans. The goal is an ambient air quality standard, defined as that level of a specific contaminant which should not be exceeded in the air of a region. The standards must be consistent with

57. Muskie, supra note 14, at 22.
60. Id. at 31:2501, 31:2541, 31:2561, 31:2581, 31:2601. The control reports were published on the same dates as the corresponding criteria. See note 59 supra.
62. Id. § 1857d(c)(1). After HEW publishes these reports, the states, within 90 days, must file a letter of intent stating that within 180 days they will adopt ambient air quality standards applicable to air quality control regions within their boundaries. Id.
63. Id. § 1857d(c)(1); U.S. DEP’T OF HEALTH, EDUCATION AND WELFARE, GUIDELINES FOR THE DEVELOPMENT OF AIR QUALITY STANDARDS AND IMPLEMENTATION PLANS 8 (1969) [hereinafter cited as HEW, GUIDELINES]. These plans must be adopted within 180 days of the adoption of ambient air quality standards. 42 U.S.C. § 1857d (c)(1) (Supp. V, 1970). See text accompanying notes 95-102 infra for a discussion of California's compliance with the Act's standards and implementation plan requirements.
64. HEW, GUIDELINES 6. During the Congressional debates on the Air Quality Act of 1967, the Administration urged that national emission standards, specific limits on certain contaminant emissions, be set for those industries that contribute heavily to air pollution. They argued that nationwide standards were necessary to eliminate the competitive advantage given to industries located in states with less severe anti-pollution requirements. With federal emissions standards, states could not pass less severe laws to attract industry. They also argued that ambient air quality stand-
the air quality criteria: to achieve this consistency the states must consider only the contaminant's effect on health and the environment and must disregard the technological and economic feasibility of their achievement.

Implementation plans designate the steps to be taken to achieve the ambient goal by abating existing air pollution sources and to prevent the creation of new sources. These plans must provide for achieving the ambient air quality standards within a reasonable time, considering the economic and technological feasibility of the various control techniques. In these plans the state may adopt any regulatory method it chooses to achieve the desired results, including financial incentives to encourage innovation and the use of control devices, charges on

ards are not as effective in eliminating air pollution as emission standards because they do not determine who the polluters are, and they do not provide pollution-reduction guidelines for these polluters. Instead, ambient standards state only that a given contaminant should not exceed a certain percentage of the air's composition, are hard to measure, and make it difficult to determine who the violator is when the ambient standards are exceeded. See Muskie, supra note 14, at 21; O'Fallon, supra note 22, at 278-80.

Proponents of ambient air standards argued that as national emissions standards would be set at minimal levels, allowing states to promulgate more severe ones, the problems created by state variations would still exist. They also argued that there is not yet enough scientific data available to determine which industries contribute most heavily to air pollution and what optimum emissions standards should be. Furthermore, the states would probably include emissions standards in the implementation plans. These state experimentations would be useful in determining desirable national emissions standards in the future. Muskie, supra note 14, at 21.


65. 42 U.S.C. § 1857d(c)(1) (Supp. V, 1970). The criteria do not require minimum levels of contaminant emissions and the meaning of "consistent" is far from clear. Thus it is difficult to determine if a three percent level of contamination is "consistent" with a criteria finding that a certain pollutant is fatal at an ambient air concentration of four percent and causes mild respiratory discomfort at an ambient air level of two percent. Perhaps only a standard of less than two percent will be "consistent" with these hypothetical criteria.

66. HEW, GUIDELINES 6.


69. For a detailed discussion of the various legal techniques to control air pollution, see H. KENNEDY, THE MECHANICS OF LEGISLATIVE AND REGULATORY ACTION 9-10 (1962); Gerhardt, Incentives to Air Pollution Control, 33 LAW & CONTEMP. PROB. 358 (1968); Hagevik, Legislating for Air Quality Management: Reducing Theory to Practice, 33 LAW & CONTEMP. PROB. 369, 375-77 (1968); Pollack, supra note 6, at 342-56.

70. Incentives are not currently used as a legislative method of air pollution con-
industrial emissions to promote manufacturer self-limitation, or direct governmental regulation.

Regulatory methods include limitations on the quantity and quality of specific emissions, limitations on the kind and nature of fuels used, requirements pertaining to the installation of specific air pollution control devices, and complete prohibition of certain polluting activities, such as open burning. From industry's point of view, limitations on specific emissions is the most flexible method as it allows the individual emitter to use any means possible to achieve the desired emission levels. Manufacturers will be encouraged to innovate because the discovery of a new, less costly method of limiting harmful emissions will lead to a competitive advantage. However, this method poses enforcement problems as it is often technologically impossible to measure emissions exactly, making it difficult to provide evidence of violation. The other methods, while easier to enforce, due to the exact statements as to what

trol. See Gerhardt, supra note 69. Incentives can take the form of tax credits or accelerated depreciation on the purchase of control devices, or award payments for the discovery of innovative control techniques, such as, new devices or changes in a production process. Id. at 361, 364. However, while incentives designed to encourage the purchase of control devices may reduce the cost of acquiring these devices, there is still some absolute increase in the emitter's cost of operation, so without a corresponding increase in revenues, installation of such devices is still unprofitable. Hagevik, supra note 69, at 375. The most these incentives can do is reduce resistance to regulation or charges. Id. Also, these incentives tend to stress treating emissions once they are produced and not changing the production process itself or the products manufactured. Id. at 375-76. On the other hand, award payments which encourage a change in the production process or products manufactured may increase the profitability of an operation. However, only those corporations with sufficient funds for research and development are likely to achieve these innovations. If the new techniques are not made readily available destroying the potential to achieve a competitive advantage those corporations unable to afford such research may be forced out of business.

71. Emissions charges which reflect the cost that a specific emitter imposes on society are good in theory costs are paid by the source. Those emitters who could reduce emissions for less than the charge would do so. The others would pay the fine levied on their emissions which would provide a continuing incentive to limit them. However, charges are difficult to implement in practice due to the unsolved technological problems involved in measuring emissions in order to allocate the share of damage caused by a particular source. Hagevik, supra note 69, at 371-74. See text accompanying note 13 supra for a discussion of the misallocation of resources due to the free use of the air for waste discharge.

72. These limits are the same as emission standards. See note 64 supra for a discussion of national emission standards vs. ambient air quality standards.

73. H. KENNEDY, supra note 69, at 10; Pollack, supra note 6, at 342-55. The San Francisco Bay Area Regional Air Pollution Control District relies primarily on emissions standards while the Los Angeles Air Pollution Control District requires approved device installation. See text accompanying notes 140-55 (Los Angeles), 156-69 (San Francisco) infra.

74. Walker, Enforcement of Performance Requirements with Injunctive Procedure, 10 ARIZ. L. REV. 81, 82-86 (1968).
constitutes compliance, limit the polluter's ability to experiment and decrease his incentive to find a better way.\textsuperscript{75} For example, requiring the installation of a specific pollution control device discourages discovery of new control devices.

5. Federal Enforcement\textsuperscript{76}

When HEW enforcement is permissible, the procedures are designed to control air pollution with the cooperation of the states involved before resorting to unilateral federal action.\textsuperscript{77} Within an air quality control region, HEW will promulgate an ambient air quality standard if the state fails to do so.\textsuperscript{78} Where apparent violations are causing air quality to fall below this or the state promulgated standard, HEW must notify the affected state or states, the alleged violators, and other interested parties.\textsuperscript{79} If the violation is endangering the health and welfare in states other than the state in which the violation is occurring—interstate pollution—and the violation does not cease within 180 days, HEW may seek abatement in federal court.\textsuperscript{80} For discharges affecting only one state—intrastate pollution—HEW can seek abatement in federal court only when requested to do so by the governor of the affected state, and then HEW action is mandatory.\textsuperscript{81} The court must give due consideration to the practicability and technological feasibility of complying with ambient air quality standards in any abatement order issued.\textsuperscript{82}

In areas outside of air quality control regions,\textsuperscript{83} HEW may take ac-

\textsuperscript{75} Id.; see Hagevik, supra note 69, at 376-77; Pollack, supra note 6, at 344-55.  
\textsuperscript{76} For a more detailed analysis of federal enforcement, see Symposium, supra note 16, at 301-13. For a general outline of the enforcement program, see Martin & Symington, A Guide to the Air Quality Act of 1967, 33 LAW & CONTEMP. PROB. 239, 246-47 (1968). For a critique of this procedure, see J. Esposito, supra note 45, at 112-51.  
\textsuperscript{77} Symposium, supra note 16, at 308, 311-12. To date, only ten enforcement actions have occurred under the Air Quality Act of 1967 and its predecessor, the Clean Air Act of 1963, 42 U.S.C. §§ 1857-57l (1964). Of these, eight were cases of interstate pollution, one intrastate and one the District of Columbia. State governors initiated three of these actions, HEW the others. Only one has gone past the hearing stage and into the courts. ENVIRONMENTAL QUALITY, supra note 11, at 75-76; ENVIR. REP.—FED’L 41:201-41:1204. For a good description of the lengthy process of federal enforcement, see J. Esposito, supra note 45, at 114-18.  
\textsuperscript{78} 42 U.S.C. § 1857d(c)(2) (Supp. V, 1970). In no event can this be done prior to six months after the state's failure to act. Id. For a discussion of ambient air quality standards, see text accompanying notes 64-66 supra.  
\textsuperscript{80} Id. § 1857d(c)(4)(i).  
\textsuperscript{81} Id. § 1857d(c)(4)(ii).  
\textsuperscript{82} Id. § 1857d(c)(4).  
\textsuperscript{83} In California, all areas outside of the San Francisco Bay Area and the Los Angeles metropolitan area are not within air quality control regions. For a discussion of air quality control regions see text accompanying notes 39-43 supra.
tion only: where the discharge is endangering the health and welfare of persons in more than one state;\textsuperscript{84} where a governor of a state requests aid,\textsuperscript{85} or in emergencies.\textsuperscript{86}

II

CALIFORNIA'S AIR POLLUTION CONTROL PROGRAM

California's comprehensive air pollution control legislation, the Mulford-Carrell Air Resources Act of 1967,\textsuperscript{87} concentrates all state air resource activities into one state agency, the Air Resources Board (ARB).\textsuperscript{88} The ARB promulgates the standards and plans required by the Federal Air Quality Act for the federal air quality control regions,\textsuperscript{89} supports local control agencies,\textsuperscript{90} and retains secondary enforcement powers.\textsuperscript{91} Within the federal air quality control regions, state-created local agencies,\textsuperscript{92} designated as regional or county air pollution control districts, enforce the ARB promulgated standards and plans for those contaminants regulated by the Federal Act.\textsuperscript{93} For other contaminants

\begin{itemize}
\item \textsuperscript{85} \textit{Id.} §§ 1857d(d)(1)(A)-(B).
\item \textsuperscript{86} \textit{Id.} § 1857d(k). In the first two situations, after HEW makes a report on the problem, a conference is called of all interested parties. After this conference, if no progress towards abatement is made and health and welfare is endangered, HEW must recommend necessary abatement measures. If after six months, no remedial action is taken, HEW must convene a public hearing. The hearing board must recommend abatement measures if it finds that pollution is occurring and that there is no progress towards abatement. Within six months after the hearing, if action reasonably calculated to secure abatement is not taken, HEW may seek abatement in a federal court on its own initiative in interstate pollution cases, or must seek abatement at the request of the governor in intrastate situations. In cases "presenting an imminent and substantial endangerment to health of persons" and when local authorities have not acted, HEW may seek immediate federal court action without first holding a conference and a hearing. \textit{Id.} § 1857d.
\item \textsuperscript{87} \textsc{cal. health & safety code} §§ 39000-570 (West Supp. 1971).
\item \textsuperscript{88} \textit{Id.} §§ 39013, 39020, 39052. The Board consists of 14 members: nine appointed by the Governor with the consent of the Senate, the Director of Public Health, the Director of Motor Vehicles, the Director of Agriculture, the Director of Conservation, and the Commissioner of the California Highway Patrol. \textit{Id.} § 39020. Before the Mulford Carrell Act of 1967, State activities relating to air pollution from stationary sources were conducted by the Bureau of Air Sanitation within the State Department of Public Health. Interview with Edward Menuez, Associate Air Sanitation Engineer of the ARB, in Sacramento, California, Aug. 26, 1970 [hereinafter cited as Interview with Edward Menuez].
\item \textsuperscript{89} Interview with Edward Menuez. See text accompanying notes 29-75 supra for a discussion of the federal requirements.
\item \textsuperscript{90} See text accompanying notes 103-08 infra.
\item \textsuperscript{91} See text accompanying notes 109-11 infra.
\item \textsuperscript{92} See text accompanying notes 95-102 infra.
\item \textsuperscript{93} California has gone beyond the federal program by setting ambient standards for areas throughout the state and for contaminants other than those designated by HEW. \textsc{california air resources board, ambient air quality standards} 1 (1970) [hereinafter cited as \textsc{ambient air quality standards}].
\end{itemize}
and for areas outside of the federal regions, state-created county and regional agencies have primary responsibility for stationary source control.\footnote{94}

\textbf{A. ARB Responsibility and Authority}

\textbf{1. Within Federal Regions}

Federal air quality control regions are geographical areas, not control agencies; therefore, states with designated regions must implement the requirements imposed by the Federal Act.\footnote{95} California's implementing agency, the ARB, has developed,\footnote{96} and HEW has approved,\footnote{97} ambient air quality standards for sulphur dioxide and particulate matter for the two federal air quality control regions in California.\footnote{98} The ARB has also developed the required implementation plans\footnote{99} for these contaminants and submitted them to HEW for approval.\footnote{100} After HEW approval, these plans will be applicable in, and enforced by, various county districts within the Los Angeles metropolitan region\footnote{101} and by the Bay Area Air Pollution Control District within the San Francisco Bay Area Region. If the respective districts fail to enforce these plans, the ARB can do so.\footnote{102}

\textbf{2. ARB Support Functions and Enforcement Powers}

The state support functions include adopting ambient air quality standards for areas and pollutants which are not yet covered under the Federal Act,\footnote{103} studying the effects of air pollution on human, plant,

\begin{footnotesize}
\begin{enumerate}
\item \textbf{CAL. HEALTH & SAFETY CODE} § 39012 (West Supp. 1971). See text accompanying notes 112-39 \textit{infra}.
\item See text accompanying notes 62-75 \textit{supra} for a discussion of federal requirements.
\item AMBIENT AIR QUALITY STANDARDS I.
\item Interview with Edward Menuez.
\item See text accompanying notes 39-43 \textit{supra} for a discussion of federal air quality control regions.
\item See text accompanying notes 67-71 \textit{supra} for a discussion of implementation plans.
\item These plans were submitted to HEW in July, 1970. Interview with Edward Menuez. At the time of this writing HEW had not yet approved them. Possible reasons for this delay are that many plans for the various regions were submitted at the same time and that there are many factors that HEW must consider before approval. For example, the state's method of translating ambient air standards to specific emission control, the timetable for enforcement, regulations regarding fuel use, regulations dealing with emergencies, and plant location rules must all be evaluated. See J. ESPOSITO, \textit{supra} note 45, at 169.
\item The Los Angeles federal region comprises more than one county, each with its own district. A state-regional district has not yet been formed. See text accompanying note 120 \textit{infra}.
\item See text accompanying notes 109-11 \textit{infra}.
\item \textbf{CAL. HEALTH & SAFETY CODE} § 39051(b) (West Supp. 1971). The ARB
\end{enumerate}
\end{footnotesize}
EMISSION LEGISLATION

and animal life, encouraging a cooperative state-wide effort in combatting air pollution, inventorying sources of air pollution, monitoring air pollutants, and adopting test procedures to measure compliance with federal, state and local rules and regulations.

The ARB's enforcement powers consist primarily of the authority to review regional and county district rules and regulations to assure that reasonable provisions are made for controlling stationary source emissions and achieving the state ambient air quality standards applicable in their area. The review procedure allows the ARB, after a public hearing, to repeal any local rule or regulation and promulgate its own rule in its place. In addition, if the local districts fail to enforce state promulgated rules or their own rules and regulations, the ARB may take any enforcement action available to the local district.

B. Local Agencies (Regional and County Districts)

The Mulford-Carrell Air Resources Act of 1967 encourages a regional approach to air pollution control. The original version of the

has adopted standards for carbon monoxide, hydrogen sulfide, nitrogen dioxide, and oxidants besides sulfur dioxide and particulate matter as required by the Federal Act. These standards, except particulate matter, are applicable throughout the state. The particulate matter standard is only applicable within the federal regions.

104. CAL. HEALTH & SAFETY CODE § 39052(a) (West Supp. 1971).
105. Id. § 39052(b). The ARB has no power to require the local districts to cooperate. It does, however, try to persuade them to do so. Interview with Edward Menuez.
106. CAL. HEALTH & SAFETY CODE § 39052(c) (West Supp. 1971).
107. Id. § 39052(d).
108. Id. § 39051.
109. Id. § 39052(f).
110. Id. § 39052.
111. CAL. HEALTH & SAFETY CODE § 39054 (West Supp. 1970). See text accompanying notes 123-39 infra for a discussion of local enforcement powers. The state enforcement procedure of locally adopted rules begins with an ARB investigation to discover any non-compliance with state air quality standards or any lack of reasonable local action to control emissions. The ARB may then request a report from the regional or county district which must describe any actions taken by that authority to control the emission. If the report is unsatisfactory, the ARB may hold public hearings. If the Board is still unsatisfied after these hearings, it may issue a statement of findings and may direct the local district to take Board-specified action. If the district fails to act within 30 days, the ARB may enforce state or locally adopted rules or regulations, resorting to legal action if necessary. CAL. HEALTH & SAFETY CODE § 39054 (West Supp. 1971). The ARB has begun three enforcement proceedings under this section. Two were settled satisfactorily prior to a public hearing and the other has a hearing scheduled. Interview with Edward Menuez.
Act directed the ARB to divide the state into air basins on the basis of geographical, meteorological, and topographical factors, but coordinated air pollution control programs in each basin, though encouraged, were difficult to achieve. Counties were not required to form air pollution control districts and if formed, they were not required to merge or coordinate their efforts with other districts in the same basin.

To make basin-wide coordination a reality, the 1970 Legislature required that every county create a district, and that either basin-wide regional districts or coordinating councils be formed by July 1, 1971.

Thirty-one of California’s 58 counties, including 50 percent of California’s land area and 90 percent of its population, had created county air pollution control districts prior to the enactment of the new law. At present, the Bay Area Air Pollution Control District (BAAPCD), created by a special enactment of the Legislature in 1955 and not under the Mulford-Carrell Air Resources Act of 1967, is the only regional district. The county districts within the Los Angeles metropolitan area have attempted, without much success, to formulate a plan for uniform regulation and enforcement. Most counties in the San Joaquin Valley basin are presently members of a coordinating council. Regional districts, other than BAAPCD, and

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114. Counties desiring to activate an air pollution control district had to enact resolutions declaring that the air within the county was so polluted as to be injurious to health or property. Cal. Health & Safety Code § 24205 (West 1967).
115. County boards of supervisors can, by resolutions declaring the need for a regional district, create that district and enable it to function. All county districts within the regional district area are dissolved upon creation of the regional district. The regional district board consists of one supervisor and one mayor or city councilman from each participating county. Id. §§ 39301, 39312, 39360 (West Supp. 1971). These provisions have not been used by any counties. See text accompanying notes 118-19 infra.
116. Cal. Health & Safety Code §§ 39270-75 (West Supp. 1971). Regional control districts or councils must establish basin-wide air pollution control plans including emissions standards and enforcement procedures by July 1, 1972. The regional districts or councils must submit these plans to the ARB for approval. Id.
119. See ARB, 1969 Report 39-41. The boundaries of the Bay Area District coincide with the area included in the federal air quality control region. The state regional districts differ from the federal air quality control regions. They are functioning control agencies and not just geographically designated areas.
120. Interview with Edward Menuez.
121. Id.
county districts have the same regulatory and enforcement authority.¹²²

1. Regulatory and Enforcement Authority of Regional and County Districts

The regional and county districts must enforce the minimal state-wide prohibitions contained in the Mulford-Carrell Air Resources Act.¹²³ These prohibitions are minimums, and the regional and county districts may adopt more severe limitations on emissions.¹²⁴ Because the statewide prohibitions are vague and difficult to enforce,¹²⁵ the more active districts have passed their own, more specific rules and regulations.¹²⁶ The least active districts have not gone beyond prosecuting as public nuisances those emitters who violate the state prohibitions.¹²⁷

The California Legislature specifically granted power to county districts to implement permit systems.¹²⁸ Regional districts are not granted this power.¹²⁹ Under a permit system an emitter must obtain a permit before building, altering, selling, renting, or using any article or machine which may cause the issuance of air contaminants.¹³⁰


¹²³. CAL. HEALTH & SAFETY CODE §§ 39077-77.7 (West Supp. 1971). The Act provides that no person shall discharge contaminants in quantities which cause injury to or endanger the health and safety of the public; and that no person shall discharge any air contaminant for a period of more than three minutes in any one hour if such contaminant is either as dark or darker than No. 2 on the Ringelmann Chart, or of such opacity as to obscure an observer's view to the same degree as the smoke described above. Id. Smoke density is commonly measured according to the Ringelmann Smoke Chart, published by the U.S. Bureau of Mines. Pollack, supra note 6, at 336 & n.26.

¹²⁴. Id. § 39057.

¹²⁵. The first provision of the statewide prohibitions [see note 123 supra] does not state the degree of injury or danger that is necessary to declare a discharge illegal. To determine if emitters are violating the Ringelmann Chart provision of the statewide prohibitions [see note 123 supra], inspectors would have to be on hand at all times. Also, these provisions are unenforceable for invisible gases and at night when the discharges cannot be viewed. See Kennedy, The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles, 27 S. CAL. L. REV. 373, 374 (1954).

¹²⁶. See notes 152, 162 infra.

¹²⁷. Interview with Edward Menuez.


¹²⁹. The Legislature has granted regional districts broad rule-making powers similar to those granted the Bay Area Air Pollution Control District. Compare CAL. HEALTH & SAFETY CODE §§ 39460-67 (West Supp. 1971) with id. §§ 24362-62.7 (West 1967). However the BAAPCD has interpreted their authority as not including the ability to implement a permit system and presumably other regional districts will do the same. Interview with Edward Menuez.

¹³⁰. CAL. HEALTH & SAFETY CODE § 24263 (West 1967).
obtain a permit, the emitter must demonstrate that he will use only approved control devices.\textsuperscript{131} Operating without a permit or while it is suspended, or violating permit provisions is a misdemeanor.\textsuperscript{132} A county hearing board, or a court after a hearing, may grant variances to the permit provisions if compliance with them will result in an arbitrary and unreasonable taking of property or in the practical closing of any lawful business without a sufficient corresponding benefit in the reduction of air contamination.\textsuperscript{133} The hearing board has wide discretion in weighing the equities in these situations.\textsuperscript{134} One-third of the county districts functioning prior to June 1969, had implemented permit systems.\textsuperscript{135}

Violators of regional or county district rules or regulations are subject to criminal and civil sanctions. With the exception of the BAAPCD under certain circumstances,\textsuperscript{136} the districts may request the district attorney to prosecute violators on misdemeanor charges,\textsuperscript{137} may seek court injunctions to enjoin violations,\textsuperscript{138} or may request a court to levy civil penalties on violators.\textsuperscript{139}

\footnotesize
\begin{itemize}
\item \textsuperscript{131} Id. § 24264.
\item \textsuperscript{132} Id. §§ 24278-79.
\item \textsuperscript{133} Id. § 24296.
\item \textsuperscript{134} Id. § 24297.
\item \textsuperscript{135} Interview with Edward Menuez.
\item \textsuperscript{136} See text accompanying notes 158-60, 163-67 infra for a discussion of BAAPCD enforcement powers.
\item \textsuperscript{137} Violations of district rules and regulations are misdemeanors, each day constituting a separate offense. Cal. Health & Safety Code § 39438 (West Supp. 1970) (regions); id. § 24253 (West 1967) (counties). Misdemeanors are punishable by not more than six months in a county jail, or not more than 500 dollars, or both. Cal. Penal Code § 19 (West 1970). Misdemeanor sanctions only punish past actions. While they can make the polluter's operation more costly, they will only force him to change his operation if the fines are high. Usually, however, the fines are low and the violator is willing to pay them and continue operating. Walker, supra note 74, at 87; see Mix, The Misdemeanor Approach to Pollution, 10 Ariz. L. Rev. 90 (1968). The Los Angeles County Air Pollution Control District primarily relies on criminal penalties. See text accompanying notes 153-55 infra.
\item \textsuperscript{138} Cal. Health & Safety Code § 39437 (West Supp. 1971) (regions; id. §§ 24252, 24360.7 (West 1967) (counties and BAAPCD). The complex and lengthy civil injunction process usually begins with an administrative hearing to determine if any air pollution control rules have been violated. This hearing can consider not only whether or not a violation has occurred but also the seriousness of the violation and any extenuating circumstances. The hearing board may issue an order specifying what must be done to correct any violation. If this order is not obeyed, the board will then seek a court injunction, placing the polluter in contempt if the injunction is violated by continued emissions. Walker, supra note 74, at 87-89. The BAAPCD primarily relies on civil injunctions. See text accompanying notes 167-69 infra.
\item \textsuperscript{139} A court may impose civil penalties for any violation of an order of abatement issued by regional or county districts, or the ARB (not to exceed 6,000 dollars per day); or for any violation of a rule or regulation prohibiting discharge of an air contaminant (not to exceed 500 dollars per day). Cal. Health & Safety Code §§ 39260-61 (West Supp. 1971). In imposing such civil fines, the court must consider
\end{itemize}
2. **Los Angeles County Air Pollution Control District**

Los Angeles County Air Pollution Control District, the oldest,\(^{140}\) and most active county district relies primarily on the permit system of regulation.\(^{142}\) A permit from the District is required for equipment that may cause air pollution, or for equipment which is intended to control air pollution.\(^{143}\) The District gives authority to construct or install such equipment if it approves the plans and specifications submitted by the potential emitter\(^{144}\) and then issues permits to operate the equipment after its construction or installation.\(^{145}\) If the District refuses to grant or revoke a permit, the emitter may appeal to the district air pollution control hearing board.\(^{146}\) If the hearing board finds that because of conditions beyond the control of the applicant, compliance with any rule, regulation, or order will result in an arbitrary and unreasonable taking of property or in the practical closing of any lawful business or activity, without a corresponding benefit or advantage to the people in the reduction of air contaminants, it may issue a variance.\(^{147}\) The variance may be granted for not more than one year in all relevant circumstances, including the extent of the harm caused, nature and persistence of the violation, and any corrective action taken. \(\textsc{id.}\)

140. Smog & Its Effects, \textit{supra} note 10, at 11. The district was activated on Oct. 14, 1947 by a Los Angeles County Board of Supervisors resolution. \(\textsc{id.}\)

141. The following is a list of the annual budgets for the fiscal year 1968-69 of the major county districts.

<table>
<thead>
<tr>
<th>County</th>
<th>Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Los Angeles</td>
<td>$4,630,000</td>
</tr>
<tr>
<td>Bay Area (six counties)</td>
<td>1,500,000</td>
</tr>
<tr>
<td>San Bernadino</td>
<td>265,000</td>
</tr>
<tr>
<td>Orange</td>
<td>212,000</td>
</tr>
<tr>
<td>Riverside</td>
<td>110,000</td>
</tr>
<tr>
<td>San Diego</td>
<td>80,000</td>
</tr>
</tbody>
</table>

Interview with Edward Menuez.

142. \(\textsc{id.}\)

143. County of Los Angeles—Air Pollution Control District, The Air Pollution Control District Permit System 1, 1970 \[hereinafter cited as The Permit System\].

144. \(\textsc{id.}\)

145. \(\textsc{id.}\) From the District's inception in 1947 through the end of fiscal 1968, 110,141 permits to operate were granted and 6,075 were denied. Los Angeles County—Air Pollution Control District, Biennial Report, Fiscal 1967-68, 1968-69, at 11. Permit fees cover the operating costs of the system, \textsc{CAL. HEALTH \\& SAFETY CODE \S 24267 (West 1967)}, and vary depending on the size of the equipment. Los Angeles County—Air Pollution Control District, Rules and Regulations 25-31 (1970). The fees vary from 40 dollars to 800 dollars. \(\textsc{id.}\) From the District's inception in 1947 through the end of fiscal 1968, 3,862,464 dollars was collected in permit fees. Los Angeles County—Air Pollution Control District, Biennial Report, Fiscal 1967-68, 1968-69, at 11.

146. The Permit System 1. This Board consists of three members—two lawyers and one engineer—appointed for three year terms by the County Board of Supervisors. \(\textsc{id.}\) at 1-2. The District's enforcement is only as strong as the enforcement agency. See text accompanying notes 182-84 \textit{infra} for an analysis of possible weaknesses in enforcement agencies.

147. The Permit System 2.
but it may be continued from year to year.\textsuperscript{148} The emitter may appeal any ruling of the hearing board to the courts for a trial \textit{de novo}.\textsuperscript{149} Violations of permit provisions are misdemeanors.\textsuperscript{150}

The District also enforces the statewide\textsuperscript{151} and more detailed and severe District promulgated prohibitions.\textsuperscript{152} The District first seeks to stop violations by misdemeanor prosecutions.\textsuperscript{153} However, if the misdemeanor prosecution is not sufficient to deter a violator, the District will not hesitate to file injunctive proceedings against him, and to shut him down, if necessary.\textsuperscript{154} In August 1970, the injunctive process was used for the first time.\textsuperscript{155}

3. \textit{The Bay Area Air Pollution Control District (BAAPCD)}

The only regional air pollution control district in California, the BAAPCD, comprises all nine San Francisco Bay Area counties,\textsuperscript{156} and

\begin{itemize}
\item \textsuperscript{148} \textit{Id}. From 1955 through the end of fiscal 1969, the Hearing Board granted 2,706 variances and denied 249. Los Angeles County—Air Pollution Control District, Biennial Report, Fiscal 1967-68, 1968-69, at 16.
\item \textsuperscript{149} The Permit System 2.
\item \textsuperscript{150} \textit{CAL. HEALTH \& SAFETY CODE} § 24280 (West 1967).
\item \textsuperscript{151} See text accompanying notes 123-24 \textit{supra} for details of the statewide prohibitions.
\item \textsuperscript{152} \textit{LOS ANGELES COUNTY AIR POLLUTION CONTROL DISTRICT, RULES AND REGULATIONS} 35-52 (1970). These rules include limitations on emissions of particulate matter (not in excess of 0.3 grams per cubic foot of gas from any one source) (Rule 52), sulphur compounds (not in excess of 0.2 per cent, by volume from any single source) (Rule 53), and organic solvents (quantities allowed vary depending on the circumstances) (Rule 66). \textit{Id}.
\item \textsuperscript{153} Between fiscal 1955-68, the District filed 8,833 notices of violations of stationary source prohibitions. Los Angeles County—Air Pollution Control District, Biennial Report, Fiscal 1967-68, 1968-69, at 15. In that same period 41,846 misdemeanor cases were filed and 39,872 were prosecuted resulting in the assessment of 969,028 dollars in fines. \textit{Id}. However the misdemeanor prosecution figure includes prosecutions for both stationary source and motor vehicle violations. \textit{Id}. As the stationary source violation notices were approximately 21 percent of the total violation notices, the stationary source prosecutions were also probably around 21 percent of 41,846 or 8,787. \textit{Id}. The conviction rate was 97 percent. \textit{Id}. Approximating the amount of fines assessed on stationary sources violators in this manner is not meaningful, as it is unlikely that the fines assessed for motor vehicle violations were the same as those assessed for stationary source violations.
\item \textsuperscript{154} Robert L. Chass, Los Angeles County Air Pollution Control Officer, \textit{quoted in} Air Pollution Control District—County of Los Angeles, APCD News, Aug. 18, 1970 (press release). This press release announced that the county was seeking injunctions to close down Allied Chemical Corp. in El Segundo, Precision Coating Division of Teledyne Corp. in Norwalk, and Philadelphia Quartz Co. in South Gate. Precision Coating has announced that they will move from Los Angeles County and Philadelphia Quartz has voluntarily shut down before the issuance of an injunction. Interview with William Faulkner, Public Information Assistant, Los Angeles County Air Pollution Control District, in Los Angeles, Oct. 13, 1970.
\item \textsuperscript{155} Interview with William Faulkner, \textit{supra} note 154.
\item \textsuperscript{156} When the Legislature originally created the District in 1955, it included only six counties: Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa
\end{itemize}
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coincides in area with the federally designated control region.\textsuperscript{157} The District operates on a performance standard basis, setting limits on the types of contaminants that may be emitted, rather than the permit system.\textsuperscript{158} The Legislature did not grant to BAAPCD the power to require permits that it granted to the county districts.\textsuperscript{159} Thus BAAPCD inspectors must seek out sources and ascertain their compliance with the limits instead of requiring the emitters to apply to the District for permits to operate.\textsuperscript{160}

The BAAPCD is administered by a Board of Directors, a Hearing Board, and advisory, enforcement, technical and clerical divisions.\textsuperscript{161} The District's emissions limitations are more severe than the state's minimal prohibitions.\textsuperscript{162} The enforcement division inspects known sources and investigates public complaints to determine whether emitters are in compliance with district, state, and federally imposed regulations. If the inspectors discover a violation, they bring the violators before the Hearing Board.\textsuperscript{163} If the Hearing Board determines that a violation has occurred, it is empowered to order abatement\textsuperscript{164} or grant a variance if it finds that, because of conditions beyond the source's control, compliance will result in an "arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business . . . without a sufficient corresponding benefit or advantage to the people in the reduction of air contamination."\textsuperscript{165} A variance may be issued for not more than one year, but it is renewable by the

\textsuperscript{157} See ARB 1969 REPORT, supra note 117, at 31.
\textsuperscript{158} AIR POLLUTION AND THE BAY AREA, supra note 8, at 25. See text accompanying notes 130-34 supra for a discussion of permit systems.
\textsuperscript{159} AIR POLLUTION AND THE BAY AREA 25.
\textsuperscript{160} See CAL. HEALTH & SAFETY CODE §§ 24345-74 (West 1967).
\textsuperscript{161} AIR POLLUTION AND THE BAY AREA 23-28.
\textsuperscript{162} Regulation One, adopted in 1957, bans open burning except for agricultural purposes, fire hazard control, fire training and recreational uses. BAAPCD, Reg. 1 (1957). Regulation Two adopted originally in 1961 and recently strengthened, controls emissions of particulate matter, hydrocarbons, and sulphur dioxides. The new rule reduces the allowable opacity of smoke emissions from two to one on the Ringelmann scale; reduces allowable sulphur dioxide emissions from 2000 parts per million (ppm) to 300 ppm, and from an average of 0.5 ppm for five and one-half hours to 0.5 ppm for three minutes; and reduces allowable emissions of hydrocarbons and carbonyls from 50 ppm to 25 ppm. The new regulation also establishes emissions standards for hydrogen sulfide. AIR POLLUTION AND THE BAY AREA 24; S.F. CHRONICLE, Nov. 6, 1970, at 1, col. 5. Regulation Three, adopted in 1967, controls the emissions of reactive organic gases by setting various emissions limitations. BAAPCD, Reg. 3 (1967).
\textsuperscript{163} AIR POLLUTION AND THE BAY AREA 24-25.
\textsuperscript{164} CAL. HEALTH & SAFETY CODE § 24368 (West 1967).
\textsuperscript{165} Id. § 24365.5.
Hearing Board. To enforce an abatement order, the Hearing Board may request a state court to issue an injunction, bringing the violator under the court's contempt powers if the violation continues. The District may also request a court to levy civil penalties on violators, or, if the violation is of Regulation One, the District may seek prosecution of the violators on misdemeanor charges.

III

CRITIQUE OF ENFORCEMENT LEGISLATION

The present federal and California regulatory scheme is only partially successful in requiring emitters to internalize the cost of past and present air pollution. Emitters may continue discharging some wastes into the air. As long as they remain within the prescribed emission levels, the public at large, rather than the consumers of the polluting product, will bear the costs of the lowered level of air pollution. The public also bears many of the costs of air pollution control; for example, salaries of control agency administrators, engineers, inspectors, researchers.

The emitter does internalize and pass on to the consumer of his product the costs of eliminating emissions above the prescribed levels. Examples of these internalized costs are the price of purchasing and installing control devices, the extra cost involved in a production process change to lessen emissions, permit fees, and the amount paid in damages or fines due to continuing use of the air above prescribed emissions levels.

A potential problem with the current enforcement structure is the high level of administrative discretion. Congress and the California Legislature have given the various enforcement agencies broad author-

166. Id. § 24365.10. Fifteen variances were in effect as of September 30, 1970. BAAPCD, Variances in Effect as of Sept. 30, 1970.
167. CAL. HEALTH & SAFETY CODE § 24368.6 (West 1967). During fiscal 1969-70, three injunctions were sought. BAAPCD, Annual Report of Activities of Legal Division for Fiscal Year 1969-70, at 1.
168. CAL. HEALTH & SAFETY CODE §§ 24369-69.1 (West Supp. 1971). Fifty-seven cases were filed in fiscal 1969-70 under this section, 48 concerning ship emissions and 9 fixed source emissions, resulting in the collection of 7,100 dollars in penalties. BAAPCD, Annual Report of Activities of Legal Division for Fiscal Year 1969-70 at 1-3.
169. CAL. HEALTH & SAFETY CODE § 24361.5 (West 1967). The District refers approximately six to eight cases per year to the district attorney's office for misdemeanor prosecution. Interview with Mathew S. Walker, General Counsel, BAAPCD, in San Francisco, October 29, 1970.
170. See text accompanying note 13 supra.
171. Ambient air standards by nature allow a certain amount of free use of the air as a waste receptacle.
ity to control emissions from stationary sources;\textsuperscript{172} many phases of these control programs are mandatory, for example, setting ambient air quality standards,\textsuperscript{173} promulgating implementation plans,\textsuperscript{174} creating county districts,\textsuperscript{175} but the latter stages of enforcement, when the polluter is actually required to cease emitting air contaminants, are usually discretionary. Thus HEW must seek abatement only in the case where a single affected state requests aid.\textsuperscript{176} In California, ARB enforcement is mandatory only if it orders a local agency to take abatement action and the agency fails to act within 30 days.\textsuperscript{177} There are no mandatory requirements forcing the regional or county districts to use the civil and criminal sanctions available to them;\textsuperscript{178} and while local agencies have the authority to enact rules and regulations more severe than the statewide minimal prohibitions,\textsuperscript{179} they need not exercise it.\textsuperscript{180}

It is too soon to evaluate whether or not the control agencies have wisely exercised their discretion. There is historical evidence, however, to indicate that administrative agencies have not always acted in the public interest, because of bureaucratic inertia and industry orientation. Professor Davis states that "[o]ne of the greatest dangers of the administrative process is that an agency through lethargy or through immoderate yielding to the influence of the regulated groups may thwart the democratic will by acting only when prodded by private interests."\textsuperscript{181} This is reiterated by Professor Sax who states that self-centered and powerful minorities often exert undue influence on public resource decisions of administrative bodies.\textsuperscript{182} After the creation of the

\textsuperscript{172} See text accompanying notes 62-75, 95-139 supra.
\textsuperscript{173} See text accompanying notes 62-66 supra.
\textsuperscript{174} See text accompanying notes 67-75 supra.
\textsuperscript{175} See text accompanying note 116 supra.
\textsuperscript{176} See text accompanying note 81 supra. Federal enforcement power has not been used extensively. See note 77 supra. HEW cannot take enforcement action if the emission is endangering the health and welfare of persons in a single state, unless there is an emergency or the affected state requests aid. HEW's action is discretionary if the air quality falls below regional ambient air quality standards. See text accompanying notes 80-81, 84-86 supra.
\textsuperscript{177} See note 111 supra. If the ARB finds that ambient air quality standards are not being met, it may request a report from the local agency describing the actions taken to control emissions in that area; it may hold a hearing if the report is unsatisfactory; and after the hearing it may order the local agency to take abatement action.
\textsuperscript{178} See text accompanying notes 136-39 supra. Note that penalties are stated in terms of maximums; no minimums are stated. Also, prosecutors have complete discretion not to prosecute. K. DAVIS, ADMINISTRATIVE LAW TEXT 77 (1959).
\textsuperscript{179} See note 123 supra.
\textsuperscript{180} See text accompanying notes 125-27 supra.
\textsuperscript{181} K. DAVIS, supra note 178, at 77.
administrative body the initial enthusiasm for reform subsides, a new status quo evolves, and private industry again becomes the dominant influence on the use of administrative power.\textsuperscript{183}

Other problems are that the control agencies are not required to publicize the exact amounts and types of contaminants emitted by specific polluters,\textsuperscript{184} citizens may have difficulty obtaining standing to challenge administrative actions,\textsuperscript{185} and the scope of review is limited to non-discretionary decisions.\textsuperscript{186}

**CONCLUSION**

To increase the effectiveness of the enforcement process, Congress and the California Legislature should eliminate the control agency discretion in the latter phases of the enforcement process. In addition, to enable an active, informed citizenry to protect the public interest by scrutinizing the administrative decision-making process,\textsuperscript{187} these legis-

\textsuperscript{183} L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 12-13 (1965); see K. DAVIS, supra note 178, at 77.

\textsuperscript{184} The control agencies argue that this non-disclosure is necessary because, without it, industry will not make this information available to them. The legislature can eliminate this obstacle by requiring industrial disclosure with appropriate legal sanctions available to the control agencies if the industries fail to cooperate.

The People's Lobby, Inc. attempted, but failed, to get an initiative measure on the November 1970 ballot in California which, if passed, would have required each industrial polluter to publish the exact nature and amount of each contaminant emitted. Pollution Initiative on file with the *California Law Review* and the *Ecology Law Quarterly*. Local citizen's groups are also trying to obtain this information from the control agencies. See, e.g., Citizens Against Air Pollution v. Bay Area Air Pollution Control Dist., Civil No. 616-372 (S.F. County Super. Ct., filed Apr. 24, 1970).

\textsuperscript{185} To have standing to sue in California a plaintiff must show a direct beneficial interest in the outcome of the litigation independent of the interest he has in common with the public at large. Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953); Fuller v. San Bernadino Valley Muni. Water Dist., 242 Cal. App. 2d 52, 56, 51 Cal. Rptr. 120, 124 (4th Dist. 1966). The Legislature can expand this by a specific grant of standing to enable citizens to challenge actions of air pollution control agencies. See, e.g., Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1970).

\textsuperscript{186} See CAL. CODE CIV. PRO. § 1085 (West 1955). During the 1970 legislative session in California, Assemblyman Crandall attempted to expand a citizen's right to compel action on the part of air pollution control agencies. The original bill read in part as follows:

> Authorize the use of writs of mandate (mandamus) to compel appropriate public officials to enforce the provisions of the Mulford Carrell Air Resources Act and any orders or regulations thereunder, and provides for class actions by members of the public of a county against violators of such provisions, orders, or regulations in such county.


\textsuperscript{187} Congressman Udall (D. Ariz.) has expressed the view that the public must be able to oversee the regulation process. Before the Senate Subcommittee on Commerce, he stated that an alternative is needed to the agency system of pollution control and that the courts are the only forum that can provide that alternative. ENVIR.
EMISSION LEGISLATION

Legislative bodies should require the control agencies to release the detailed information that they have acquired on the quantity and quality of emissions from specific polluters. Finally, the legislative bodies should expand the judicial remedies available to the citizen. If Congress and the California Legislature are serious in their desire to clean up the air, they must allow the public to take effective action when and if the administrative agencies fail to correct the problem. Delegating broad authority to these agencies without demanding enforcement action will not clean our air.

Ellyn Adrienne Hershman

\[\text{Ref.-Current 249-50. Professor Sax also feels that the courts should be used by the public to protect the public interest in the environment. Sax, supra note 182, at 471-74. Congress is currently considering a proposal which would allow private citizens to enforce federal and state air pollution control laws. See note 29 supra. In Pennsylvania, citizen action was effective in obtaining stronger ambient air quality standards than those originally proposed by the control agency. J. Esposito, supra note 45, at 168.}\]