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Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances

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Watching the Candy Store:
EPA Overfiling of Local Air Pollution Variances*

Marc Melnick**
Elizabeth Willes***

CONTENTS

Introduction ................................................... 208
I. The Clean Air Act ........................................ 211
   A. State Implementation Plans .......................... 212
   B. SIP Revisions ........................................ 213
   C. Federal Enforcement Authority .................... 214
II. State Air Quality Law and Enforcement ............. 215
   A. Obtaining a Variance ................................. 218
   B. Variance Characteristics ............................ 222
   C. Post-Variance Activity ............................... 225
III. EPA Enforcement in Practice ....................... 227
   A. Finding the Variance .................................. 228
   B. Using Discretion ...................................... 228
   C. Assessing Penalties ................................... 233
IV. Two Case Studies ......................................... 235
   A. United Airlines ........................................ 236
      1. BAAQMD Enforcement ................................. 236
      2. EPA Enforcement ..................................... 239
   B. Mobil Oil .................................................. 241
      1. KCAPCD Enforcement ................................. 241
      2. EPA Enforcement ..................................... 242

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V. EPA's Options .......................................................... 243
   A. Strict Enforcement Against Variances ...................... 244
      1. How to Implement a Strict Policy ...................... 244
      2. Are Variances Good or Bad? ............................. 247
   B. Local Autonomy Without EPA Oversight .................... 250
      1. Finality and Fairness .................................... 251
      2. Efficiency .................................................. 252
      3. Empowerment ................................................. 252
      4. Local Interests ............................................. 252
      5. Why Complete Local Autonomy Fails ...................... 253
      6. An Alternative: A Variance Bank ....................... 254
   C. Finding the Proper Oversight Role .......................... 255
      1. The Alternative of Programmatic Oversight ............ 256
Conclusion .......................................................... 264

INTRODUCTION

Alexis de Tocqueville aptly described our federal system of government as "the great experiment."1 For much of its history, the United States has been unique in dividing basic powers of government between the national and state levels.

This experiment in federalism has not been without significant controversy. Perhaps appropriately, our nation has continually debated how to fashion this division of power.2 For example, the Constitution was created in large part to remedy the ineffectiveness of the national government under the Articles of Confederation. The Civil War was as much a battle to preserve a strong Union as it was a dispute over slavery. During the New Deal, President Roosevelt injected the national government into unprecedented areas, often to be rebuffed by the courts. The reign of Ronald Reagan brought a retrenchment of the federal government's powers and a corresponding increase in the power of state governments. Today, our politicians, bureaucrats, and academics still argue about and experiment with various divisions of power—and doubtless will for a long time to come.

Yet to describe this debate as simply "who should have what powers" denies the reality of modern American federalism. Although the division of power is often clearly demarcated, the national (or federal) and state governments frequently exercise power concurrently. They may demand different requirements, or they may work together. Or the

federal government may delegate its powers to the state governments. When the federal government delegates its power, it frequently retains some oversight power: the ability to withdraw power or money, or the ability to conduct independent enforcement.

This Comment examines one area in which the federal government exercises oversight over state and local government agencies. Under the Clean Air Act (CAA), which requires national standards for ambient air quality, the federal government delegates to state governments the power to set and enforce site-specific emissions standards. The states, in turn, often delegate these responsibilities to local air pollution control districts. This Comment explores the relationship between the United States Environmental Protection Agency (EPA) and air pollution control districts in California.

Specifically, the Comment examines EPA's response to variances. Variances are orders granted by air district hearing boards that immunize a source not complying with local rules or regulations from state or local enforcement. Often, however, EPA takes independent enforcement action against the source, a practice called "overfiling." While overfiling is entirely within the bounds of the law, it creates significant conflict between EPA and the local districts—the intended partners in Clean Air Act enforcement. EPA often believes local districts are granting variances inappropriately, and districts often believe EPA is unnecessarily intruding on their day-to-day regulatory affairs.

It is important to note how we conducted our research. Unlike much legal scholarship, this Comment is a case study. We do not focus upon laws or political theory. Rather, this Comment seeks to explore the realities of enforcement. It attempts to uncover the motives of the agencies and the people in the field. Therefore, instead of relying on tradi-

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4. The focus on California is appropriate for a number of reasons: (1) California has an extensive and fully developed regulatory program; (2) California has a significant problem with air pollution; and (3) air districts throughout California grant more variances than do districts in other states, due mostly to the extensive number of sources in California. Telephone Interview with Mary Boyer, Manager, Evaluation and Training Branch, Compliance Division, California Air Resources Board (CARB) (Apr. 23, 1992).
5. Overfiling can occur under most federal environmental statutes whenever federal authorities feel a local enforcement action is insufficient in its outcome—in either requirements or penalties. See infra part I.C.
6. The topic of enforcement "discretion" has long been ignored by scholars. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY v-vi (1969); see also R. Shep Melnick, Administrative Law and Bureaucratic Reality, 44 ADMIN. L. REV. 245 (1992) (It is "puzzling . . . how little [literature on administrative law] has to say about administrators and administration.").
tional legal research (i.e., statutes, cases, books, and articles), we interviewed the men and women who made strategic decisions in the cases we studied and who set overall enforcement policy. We talked to government lawyers, agency enforcement directors, and industry lawyers, and we examined official and unofficial documents.\(^7\)

Through this kind of research we came to perceive the reasons for, and the effects of, agency decisions. While we acknowledge the importance of each agency employee's personality and personal viewpoint, we believe that each individual's institutional role also played a major part in shaping his or her perspective on the federal and local conflict and his or her enforcement actions.\(^8\)

We begin our discussion by outlining, in Part I, the Clean Air Act and the provisions particularly relevant to our discussion. In Part II, we discuss the California law and state and local procedures for the granting of variances and, in Part III, how EPA Region IX\(^9\) can and does respond to variances.

In Part IV, we examine two specific cases in which EPA invoked its overfiling powers to dispute the granting of a variance; we attempt to point out the differences between EPA and local districts, the contrasts among local districts, and the varying attitudes of the regulated companies. In the first case study, United Airlines received a variance from the Bay Area Air Quality Management District (BAAQMD), which exempted United's operations facility from the local district's emissions requirements. EPA disagreed with the terms of the variance and took a federal enforcement action against United. We look at the reasons why EPA overfiled and describe the conflict between the federal and local enforcers. In the second case study, Mobil Oil received a series of variances from the Kern County Air Pollution Control District for its polystyrene plant. EPA overfiled and had a strong case for doing so.

Informed by both the broad picture and two contrasting examples, Part V presents our analysis of the various options that EPA can choose from in responding to local variances. We conclude that EPA should not ban variances, nor allow local districts to grant them without oversight. We recommend specific oversight procedures to give EPA a more fo-

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7. Our discussion of the cases here is limited somewhat by assurances of confidentiality.
8. The institutional nature of this problem is confirmed by the fact that overfiling actions have been a consistent problem for at least the last 15 years, despite federal and local government personnel turnover. See Boyer Telephone Interview, supra note 4.

Regional offices do much of the local enforcement work at EPA. Throughout this paper we distinguish Region IX from EPA headquarters when appropriate.
cused deterrence approach. We believe that this will enhance the overall attainment of environmental protection.

We hope this Comment will not only outline the procedures and issues in the variance process, but will also contribute to the debate concerning the division of power in a federal system. In the coming decades, our regulatory needs will undoubtedly expand and our governments' financial resources will diminish. We therefore need to have more efficient efforts by federal, state, and local governments. The analysis and solutions offered in this Comment may suggest a means of achieving this efficiency.

I

THE CLEAN AIR ACT

With the passage of the Clean Air Act Amendments of 1970,11 Congress ushered in the modern era of air pollution regulation. Gone was the time when states held all standard-setting and enforcement responsibilities and the federal government simply gave financial and technical assistance and guidance. The 1970 amendments required the federal government, through the newly created EPA,13 to establish standards for specific pollutants in ambient air.14 The amendments termed these standards the primary and secondary National Ambient Air Quality Standards (NAAQS).15 EPA has since promulgated NAAQS for six pollutants: sulfur oxides, lead, ozone, nitrogen oxides, carbon monoxide, and particulates.16

Congress originally set ambitious deadlines for reaching the NAAQS,17 which many states could not meet.18 In some areas, air qual-

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15. Primary NAAQS are those "requisite to protect the public health." Secondary NAAQS are those "requisite to protect the public welfare" from the adverse effects of air pollution. 42 U.S.C. § 7409.
16. The numerical standards for each criteria pollutant are given in 40 C.F.R. § 50 (1992). For ozone, the principal concern of this paper, the primary and secondary standard is 0.12 parts per million. 40 C.F.R. § 50.9 (1992); 44 Fed. Reg. 8220 (1979).
17. The Clean Air Act Amendments of 1970 required the Administrator to promulgate the NAAQS within 30 days after the Act went into effect. Within nine months of promulga-
ity actually declined.\textsuperscript{19} Congress amended the Act in 1977\textsuperscript{20} and again in 1990. The 1990 amendments extended the deadlines and added significant provisions regulating those areas which have not attained the NAAQS.\textsuperscript{21} The current deadlines for attainment vary depending on the air pollutant and the degree of nonattainment. For example, air pollution control districts in California face deadlines for attaining compliance with the ozone NAAQS that range from November 15, 1993, to November 15, 2010.\textsuperscript{22}

A. State Implementation Plans

To achieve the NAAQS within the established time limits, the CAA requires each state to adopt and submit for EPA approval a State Implementation Plan (SIP).\textsuperscript{23} Each SIP must specify the state and local procedures and regulations that will enable all areas within the state to achieve

\textsuperscript{19} See \textit{Melnick}, supra note 12, at 50. See also \textit{Council on Environmental Quality, Environmental Quality} 213-55 (Seventh Annual Report, 1976) (noting that many regions had not met primary ambient air quality standards in the preceding year).

\textsuperscript{20} Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977). The 1977 amendments removed the 1975 and 1977 deadlines but required that states not in attainment for carbon monoxide and ozone revise their implementation plans by 1982 in order to provide for attainment by 1987. The 1977 amendments also gave EPA new enforcement powers and created the Prevention of Significant Deterioration program (PSD), which brought areas already in compliance with the NAAQS into the Act's regulatory scheme. See \textit{Melnick}, supra note 12, at 96-103 (describing the adoption of PSD).


\textsuperscript{23} 42 U.S.C. § 7410(a) (1988 & Supp. III 1991). In California, the local air pollution control districts submit individual plans to the California Air Resources Board. CARB then compiles the plans and sends them to EPA as California's State Implementation Plan. Telephone Interview with Catherine Witherspoon, Assistant Executive Officer, CARB (Apr. 23, 1992). EPA promulgates the list of district rules comprising the SIP as a federal regulation. \textit{See, e.g.}, 40 C.F.R. § 52.220-.281 (1992) (the California SIP). This SIP is regularly revised, and revisions must also be published in the Federal Register. \textit{See, e.g.}, Approval and Promulgation of Implementation Plans: California State Implementation Plan Revision for Madera County Air Pollution Control District, 56 Fed. Reg. 15,286 (1991) (codified at 40 C.F.R. § 52.220(c)(177)(D) (1992)) (EPA approval of changes to California SIP).
and maintain the primary and secondary NAAQS.\textsuperscript{24} The SIP must also include emission limitations, a program for enforcement, and provisions prohibiting emissions that prevent attainment of the NAAQS.\textsuperscript{25} For nonattainment areas, the SIP must require the sources to use "reasonably available control measures" and must provide for "reasonable further progress" toward attainment.\textsuperscript{26} Furthermore, the SIP must comply with extensive provisions applicable law only to ozone nonattainment areas.\textsuperscript{27}

The CAA requires EPA to review the SIP within a tight time frame and ensure that the plan meets all requirements under the CAA—including noninterference with attainment of the NAAQS.\textsuperscript{28} Once approved by EPA, the SIP becomes applicable law for the state.\textsuperscript{29} Its terms may be enforced by both the federal and state governments.\textsuperscript{30}

\section*{B. SIP Revisions}

To incorporate changing technology, times, or priorities, states may change the requirements of their SIP's. States may only revise their SIP's, however, in accordance with strict CAA procedures that mirror

\begin{itemize}
  \item \textsuperscript{25} 42 U.S.C. § 7410(a)(2) (1988 & Supp. III 1991). For a complete picture of the SIP requirements, see 40 C.F.R. § 51.40-.341 (1992). For states or districts already in attainment of the NAAQS, PSD areas, the plan must include emission limitations and such other measures as necessary to prevent significant deterioration of air quality. 42 U.S.C. § 7471.
  \item \textsuperscript{26} 42 U.S.C. § 7502(c).
  \item \textsuperscript{27} 42 U.S.C. §§ 7511-7511d. These provisions vary in stringency, depending on the degree of nonattainment and increasing from classification to classification. The requirements build on each other. Thus, for example, the SIP for a "serious" nonattainment area must include all the requirements applicable to a "moderate" area plus a clean fuel vehicle program and an enhanced vehicle inspection program. \textit{Id.} § 7511a.
  \item \textsuperscript{28} \textit{Id.} §§ 7410(k)(3), 7410(l), 7502(c)(4).
  \item \textsuperscript{29} 40 C.F.R. § 51.105 (1992). EPA may disapprove of the entire SIP or any portion thereof. See, e.g., Approval and Promotion of Implementation Plans: California, 53 Fed. Reg. 1780 (1988) (EPA's final disapproval of the California SIP for ozone and carbon monoxide for the South Coast); Approval and Promotion of Implementation Plans; California Plan Revisions for the South Coast, 51 Fed. Reg. 8495 (1986) (final disapproval of certain new source review rules). If disapproved, the state may revise the SIP, or in special cases, EPA may submit a "Federal Implementation Plan" (FIP). 42 U.S.C. § 7410(c)(1). In California, for example, EPA proposed a FIP for the South Coast for ozone and carbon monoxide. Approval and Promotion of Implementation Plans: California (South Coast Air Basin), Plans for Ozone and Carbon Monoxide, 55 Fed. Reg. 36,458 (1990) (to be codified at 40 C.F.R. pts. 51 & 52).
  \item \textsuperscript{30} 42 U.S.C. §§ 7413(b), 7604 (1988 & Supp. III 1991). See \textsc{Union Elec. Co. v. EPA}, 427 U.S. 246, 267 (1976) (a state has "virtually absolute power in allocating emission limitation," although EPA will still ensure compliance with national standards.); \textsc{United States v. Continental Group, USA}, 595 F. Supp. 1021, 1022 (E.D. Wis. 1984) ("Once a SIP is in effect, its terms can be enforced by the federal government or the states.").
\end{itemize}
the procedures and substantive requirements necessary for approval of the original SIP’s.  

Furthermore, EPA must approve a SIP revision before the revision becomes part of the federally recognized SIP. EPA cannot approve any proposed revision that would cause a SIP to fail to ensure maintenance of the NAAQS or interfere with any applicable requirement concerning attainment and reasonable further progress. Variances from SIP provisions are considered SIP revisions. EPA cannot approve a variance that allows increased emissions in nonattainment areas because that variance would adversely affect attainment of the NAAQS. 

Until EPA approves a SIP revision, the existing SIP remains the applicable federal law. Therefore, although variances given to sources by local districts may prevent enforcement against those sources by state and local authorities, federal authorities may still take an enforcement action based on requirements in the original SIP. Until federal approval, a source must meet the requirements of both the existing and revised SIP’s to be completely insulated from enforcement action.

C. Federal Enforcement Authority

Section 113 of the CAA provides the cornerstone for federal enforcement of SIP provisions: “Whenever, on the basis of any information

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31. 42 U.S.C. § 7410(k), (l) (1988 & Supp. III 1991). The CAA states that each SIP shall include provisions for revision of the plan to take account of changes in the NAAQS or the availability of improved or more expeditious methods of attaining the standards. Id. § 7410(a)(2)(H). The regulations provide that a state may revise the plan from time to time as long as the revision is consistent with the SIP requirements set forth in the CAA and the regulations. 40 C.F.R. § 51.104 (1992).


34. “In order for a variance to be considered as a revision to the State implementation plan, the State must submit it in accordance with the requirements of this section.” 40 C.F.R. § 51.104(g) (1992) “Variance means the temporary deferral of a final compliance date for an individual source subject to an approved regulation, or a temporary change to an approved regulation as it applies to an individual source.” Id. § 100(y). See generally MELNICK, supra note 12, at 155-92; DAVID P. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS § 5.03 (1981 & Supp. 1991).


36. See General Motors, 496 U.S. at 540; Commonwealth Edison Co., 490 F.Supp. at 1153 (“It, therefore, appears well established that until the variance is sanctioned by the Administrator, any source operating in contravention of a federally approved implementation plan . . . . is subject to an enforcement proceeding.”).
available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State [of such a finding]." EPA may use the information from a source's variance application as a basis for a federal enforcement action. After notifying the offending source, EPA may issue a compliance order, issue an administrative penalty order, or bring a civil action. EPA may assess civil or administrative penalties of up to $25,000 per day per violation against a source. The CAA also authorizes injunctive relief in civil cases. If a source knowingly violates specified provisions, EPA may take the more drastic measure of criminal prosecution. Section 113 also gives EPA the authority to recover any economic benefits the source received from being in noncompliance.

II
STATE AIR QUALITY LAW AND ENFORCEMENT

The CAA delegates the enforcement authority for most federal air pollution requirements to the states. Most states, however, have delegated their powers to county- or region-based air pollution control districts. Local government entities are the primary actors in

38. Variance applications are filed as public documents and are therefore widely available to the general public, as well as to EPA. See CAL. GOV'T CODE §§ 6250-68 (West 1983 & Supp. 1993) (the Public Records Act). In addition, EPA has a wide range of ways to obtain variance information. See infra part III.
40. Id. § 7413(b), (d)(1). Administrative penalties are limited to a total of $200,000. Id. § 7413(d)(1). The 1990 Amendments also introduced the field citation program, under which EPA staff may assess $5,000 penalties on the spot. Id. § 7413(d)(3). These field citations are reversible by a federal district court only if they constitute an abuse of discretion. Id. § 7413(d)(4).
41. Id. § 7413(b).
42. Id. § 7413(c)(1), (2).
43. Id. § 7413(e)(1); U.S. Env'tl. Protection Agency, Clean Air Act Stationary Source Civil Penalty Policy 4 (1991) [hereinafter EPA Civil Penalty Policy].
45. See, e.g., CAL. HEALTH & SAFETY CODE § 40000 (West 1986) (stating that local and regional authorities possess primary responsibility for air pollution control of stationary sources). For commentary on California's air pollution control districts, see Manaster, supra note 44; Lisa Trankley, Comment, Stationary Source Air Pollution Control in California: A Proposed Jurisdictional Reorganization, 26 UCLA L. REV. 893 (1979); Thomas H. Crawford,
promulgating and enforcing air pollution regulations. The districts are bound by the three-fold mandate of federal law, state law, and local rules and regulations.

In California, state law establishes the general guidelines and procedures under which the air pollution districts operate. State law creates an air pollution control district in each county, except where state law or the counties themselves combine county districts to create regional districts. Two particularly important regional districts are the South Coast Air Quality Management District (the South Coast) in the Los Angeles-Orange County area and the Bay Area Air Quality Management District (BAAQMD) in the San Francisco Bay Area. Currently, there are thirty-four districts in California. Each district is managed by

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The Bay Area Air Quality Management District: Air Pollution Control at the Local Level, 19 SANTA CLARA L. REV. 619 (1979); Daniel H. Willick & Timothy J. Windle, Rule Enforcement by the Los Angeles County Air Pollution Control District, 3 ECOLOGY L.Q. 507 (1973); Jan Stevens, Air Pollution and the Federal System: Response to Felt Necessities, 22 HASTINGS L.J. 661 (1971); Ellyn A. Hershman, California Legislation on Air Contaminant Emissions from Stationary Sources, 58 CAL. L. REV. 1474 (1970); Doug Haydel, Regional Control of Air and Water Pollution in the San Francisco Bay Area, 55 CALIF. L. REV. 702 (1967); Herbert V. Walker, The Air Pollution Control Hearing Board—Function and Jurisdictions, 27 S. CAL. L. REV. 399 (1954).

46. See, e.g., Manaster, supra note 44, at 1117 (stating that in California, regulation of "air pollution from stationary sources... is primarily a function of local government."). See cf. OFFICE OF ENFORCEMENT, EPA, ENFORCEMENT FOUR-YEAR STRATEGIC PLAN: ENHANCED ENVIRONMENTAL ENFORCEMENT FOR THE 1990's 23 (1991) [hereinafter EPA FOUR YEAR PLAN] (noting the importance of states in air stationary source enforcement); OFFICE OF ENFORCEMENT, EPA, ENFORCEMENT IN THE 1990'S PROJECT: RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS 6-2 to 6-4 (1991) [hereinafter EPA ENFORCEMENT PROJECT] (explaining how local entities can augment federal and state environmental efforts); GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS (1991) [hereinafter GAO, PENALTIES] (noting that state and local authorities conduct 70% of all environmental enforcement actions); GENERAL ACCOUNTING OFFICE, AIR POLLUTION: IMPROVEMENTS NEEDED IN DETECTING AND PREVENTING VIOLATIONS 12 (1990) [hereinafter GAO, IMPROVEMENTS] (noting that EPA relies on state and local programs to deter and detect violations).


48. See id. §§ 40400-40540 (West 1986 & Supp. 1993). The South Coast is a large organization, with almost 1,000 employees, that oversees a complex and varied jurisdiction. It is generally more difficult for sources to obtain variances in the South Coast than in other California districts. Interviews with Allan Zabel, Chief, Air & Toxics Section II, Office of Regional Counsel, Region IX, EPA, in San Francisco, CA (a series of interviews conducted between January and May 1992); Telephone Interview with Meg Rosegay, Attorney, Pillsbury, Madison & Sutro (Apr. 9, 1992).

49. See CAL. HEALTH & SAFETY CODE §§ 40200-76 (West 1986 & Supp. 1993). BAAQMD includes the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, and Santa Clara; and parts of Sonoma and Solano counties. This includes the major cities of San Francisco, Oakland, and San Jose. Other important districts created by statute are the Sacramento Metropolitan Air Quality Management District and the San Joaquin Valley Air Quality Management District. Id. §§ 40950-41082, 41100-13 (West 1986 & Supp. 1993).

50. See Telephone Interview with James Morgester, Director of Enforcement, CARB (Apr. 14, 1992).
a board of directors and an air pollution control officer, who acts as the district’s executive.

The districts have general local rule police powers. Specifically, the districts are charged to “adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards . . . and . . . enforce all applicable provisions of state and federal law.” Each district promulgates regulations which limit and control air pollution emissions from all varieties of sources. The district submits these regulations to the California Air Resources Board (CARB) for review. California law also requires districts in nonattainment areas, such as BAAQMD and the South Coast, to submit a plan to reach attainment. CARB incorporates these individual plans, along with most of the local district rules and regulations, into the SIP that it submits for EPA approval under the CAA. However, California’s SIP does not include state statutory provisions.

To adjudicate the inevitable disputes that arise as districts implement and enforce their requirements, each district has one or more hearing boards appointed by the board of directors. Hearing boards also address abatement order requests and hear applications for variances.

51. For county air pollution control districts, the county board of supervisors acts as the board of directors. CAL. HEALTH & SAFETY CODE § 40100 (West 1986 & 1993). The BAAQMD board of directors is appointed by the cities and counties within the district. Id. §§ 40220.5-40222 (West 1986).
52. Id. §§ 40750-52.
53. Id. §§ 40700-02 (West 1986 & Supp. 1993). This can include the power to tax. See, e.g., id. § 40272.
54. Id. § 40001 (a). The inclusion of federal standards was added in 1988. 1988 Cal. Stat. c.1568, § 7, at 5634, 5638.
55. CAL. HEALTH & SAFETY CODE §§ 40704, 41500 (West 1986 & Supp. 1993). CARB is the state agency responsible for cleaning up the state’s air. Id. §§ 39500-39912.
56. Id. §§ 40910-26.
57. See id. §§ 41650-52. Witherspoon Telephone Interview, supra note 23. In addition to source-specific requirements, the SIP also includes industry-specific emission limitations.
58. Witherspoon Telephone Interview, supra note 23. This is important because state law includes the variance provisions. If the state statutory variance provisions were incorporated into the SIP, then a variance might interfere with attainment, but not violate the SIP. See infra part V.B.6. The state may not have included these provisions for fear that EPA would hold the variance provisions invalid. See, e.g., Approval and Promulgation of State Implementation Plans: South Dakota, PM-10 New Source Review and Emergency Episode Plans, 57 Fed. Reg. 49,437 (proposed Nov. 2, 1992) (“EPA determined that the only approvable variance provision is one that prohibits the granting of any variance which is inconsistent with the CAA.”).
59. CAL. HEALTH & SAFETY CODE § 40800 (West 1986 & Supp. III 1991). State law stipulates the qualifications of the five members of these hearing boards: there shall be a lawyer, a medical professional, a professional engineer and two members of the public. Id. § 40801.
60. Manaster, supra note 44, at 1118-19.
The hearing boards are bound by general procedural requirements, though these are followed to varying degrees of formality.

A. Obtaining a Variance

Most of a hearing board's time is consumed with evaluating the merits of variance applications. Stationary air pollution sources apply for variances because variances allow the sources to legally violate a particular local air quality rule or regulation or the source's operating permit.

California law allows the hearing boards to grant such variances under the prescribed circumstances discussed below, so long as the allowed activities or emissions do not cause injury, cause a nuisance, or endanger the health or safety of a "considerable number of persons."

Yet California law limits the discretion of a hearing board evaluating a variance application. The statute requires the hearing board to make six specific findings: (1) a violation exists, (2) the costs of compliance with the rule or regulation would result in a "taking" of property or closing of the facility, (3) air pollution reductions are not comparable to compliance costs, (4) the source considered ceasing operations, (5) the

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62. See Manaster, supra note 44, at 1121; Telephone Interview with Creighton Smith, Manager of Enforcement, Kern County Air Pollution Control District (Jan. 5, 1993) (attorneys are rarely present at hearing board meetings). In most districts, the hearing boards are part-time positions held by retired or otherwise experienced individuals. However, in the South Coast, the hearing board is a full-time position.

63. See Manaster, supra note 44, at 1118; Crawford, supra note 45, at 632. Sources interested in applying for a variance will receive a packet of information from the district staff. For example, the BAAQMD package includes a general pamphlet on variances, copies of various provisions of state law, a "suggested form for variance application," and the hearing board rules. Sources generally file a document similar to a legal brief when they apply to the hearing board.

64. See CAL. HEALTH & SAFETY CODE § 42350 (West 1986 & Supp. 1993). A source may also apply for a variance from section 41701 of the Health and Safety Code, which severely restricts the discharge of visible air contaminants. Id. § 41701.

65. The CAA requires nonattainment areas to institute permit programs that ensure that major sources obtain offsets and that sources' operation will not contribute to pollution in excess of the NAAQS. 42 U.S.C. §§ 7502(c)(5), 7503 (1988 & Supp. III 1991). The 1990 amendments greatly expanded the scope of the Act's permit requirements. Id. §§ 7661-7661f.

66. CAL. HEALTH & SAFETY CODE §§ 41700, 42353 (West 1986 & Supp. 1993). In some sense, this standard approximates the NAAQS, in that the NAAQS are in theory those air quality levels necessary to protect the public health. See 42 U.S.C. § 7409(b)(1) (1988). This prohibition provokes an interesting scientific-legal question of whether variances are legal under state law. If the NAAQS is a standard under which health is endangered, then any variance which adds to nonattainment theoretically endangers public health.
source will make efforts to minimize emissions, and (6) the source will, if requested, monitor and report emissions. The first three requirements form the heart of the variance inquiry.

First, the source must be violating a district rule or regulation. The source generally finds this requirement easy to prove by simply admitting a violation, be it exceeding an emissions standard or failure to meet a procedural requirement. A source that is not in violation does not need a variance and should not be before the hearing board.

Second, the hearing board must find that "due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (1) an arbitrary or unreasonable taking of property or (2) the practical closing and elimination of a lawful business." Assuming that the source has taken reasonable steps to come into compliance, the law allows for noncompliance if compliance would prove too burdensome.

In practice, hearing boards interpret this provision broadly, expanding it beyond the literal wording of the statute. Rather than deciding whether a "taking" or closing would occur, as the statutory language requires, hearing boards generally require a demonstration of "serious hardship." Economic factors are important in this analysis: the greater the economic dependence of the source on the process that is creating the violation, the greater the hardship. Hearing boards will thus allow variances for a greater range of cases than is contemplated by the statute, because the source may be experiencing hardship (i.e., having to slow production, reduce efficiency, or lessen profits) without necessarily suffering a regulatory taking or a closing of the facility.

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69. See Manaster, supra note 44, at 1124.
71. Manaster, supra note 44, at 1125-26. Examples of criteria involved in determinations of "hardship" include: "the nature of the applicant's goods or services, the extent to which others could provide those goods or services if the applicant temporarily could not do so, the size of the applicant's labor force and payroll, the amount of the applicant's capital investment in the facility in question, and the ability of the applicant to stay in business even if compliance would require a period of curtailed operations." Id.
72. Id.
Working from its second finding, the hearing board must then make the third finding, that "the closing or taking would be without a corresponding benefit in reducing air contaminants." Hearing boards "take a hard look at the actual air pollution involved in the case." In essence, boards engage in a case-by-case balancing test, weighing the benefits of eliminating the pollution against the costs of preventing the source's operation. As the benefits from compliance with district rules and regulations increase, the likelihood of a variance decreases. To a certain extent, of course, the hearing board is comparing apples and oranges (money and increments of air pollution). In the end, it makes an essentially political judgment.

The last three statutory requirements, although relevant to minimizing the adverse environmental effects of a variance, are substantially less important than the first three in the hearing board's decision to grant the variance. The fourth requirement mandates that the applicant has considered stopping operations instead of obtaining a variance. This is something of an empty requirement, since presumably neither the source nor the district wants to shut down operations. The fifth requirement provides that the applicant, if given a variance, will reduce the emissions as much as possible. Typically, the source will work out a compliance and minimization agreement with the district staff. Lastly, the sixth requirement simply allows the district to ask the source to monitor and report emissions to the district while the variance is in effect.

Past and present hearing board members and district staff believe that hearing boards generally enforce the requirements discussed above. The hearing boards certainly ask for this kind of information from sources. For example, BAAQMD's suggested variance application form asks the applicant to provide a careful demonstration of each of these statutory requirements. The application requests specific infor-

75. Manaster, supra note 44, at 1129. Manaster notes that this finding requires much of the same information that EPA uses when determining noninterference with "attainment and maintenance" of the NAAQS under the CAA. Id. However, with variances the decision is still a balancing test and thus differs from the determination of noninterference.
76. The last three requirements were not part of the original statutory scheme, but were added by the legislature in 1988. 1988 Cal. Stat. c.1568, § 30, at 5634, 5654.
78. Interview with Laurence G. Chaset, Senior Assistant Counsel, BAAQMD, in San Francisco, CA (Mar. 12, 1992); Interview with Thomas J. Ferillo, Chair, BAAQMD Hearing Board in San Francisco (Mar. 12, 1992); Telephone Interview with Ken Manaster, Professor of Law, Santa Clara University (Feb. 24, 1992); Morgester Telephone Interview, supra note 50 (noting that every variance application is reviewed to ensure six necessary findings exist). The districts vary significantly. Kern County's hearing board appears to make findings in form only; the South Coast has thorough hearing procedures before a full-time board.
79. BAAQMD, Suggested Form for Variance Application (Jan. 9, 1992). Section Two, for example, is the lengthiest portion of the application, with a separate subsection for each statutory requirement. Id. at 2-4.
mation about the emissions and the costs involved, the source's motivations for asking for the variance, and the actions taken by the source to avoid the variance or mitigate its consequences.

However, the hearing boards find certain overarching factors more important than the specific statutory requirements. Specifically, hearing boards look closely at the source’s diligence and the cost-effectiveness of compliance.

Diligence is of primary importance. Diligence, to hearing board members, means (1) timely submission of a variance application and (2) attempts by the source to minimize the pollution. Essentially, the hearing board wants to see good faith, which may be evident from the source’s overall compliance history or from the source’s conduct surrounding the violation in question. Most importantly, the hearing board wants to see that the source is committed to environmental compliance and to working within the district’s regulatory system.

Secondly, the hearing boards look at the cost-effectiveness of having the source comply with the local rule or regulation. Local districts and hearing boards generally see themselves as regulating legitimate businesses. Considering the generally small emissions allowed by the variances, the district and the hearing board members find it illogical to force companies to spend large quantities of money, or to shut down.

In addition, the districts are well aware that because state law provides for extremely small penalties, sources may have a financial incentive to

80. See Cal. Health & Safety Code § 42354 (West 1986 & Supp. 1993). See also Willick & Windle, supra note 45, at 529 (noting that the hearing board has wide discretion to weigh equities when deciding whether to grant a variance).

81. Chaset Interview, supra note 78. Prof. Manaster argues that this is similar to the second statutory requirement of hardship. See Manaster, supra note 44, at 1126-27.

82. Chaset Interview, supra note 78; Interview with James R. Guthrie, Director of Enforcement, BAAQMD, in San Francisco, CA (Mar. 6, 1991).


85. See infra part II.B.

86. Chaset Interview, supra note 78; Manaster Telephone Interview, supra note 78.

87. State law allows for $1,000 penalties per day of violation. Cal. Health & Safety Code § 42400(a) (West 1986 & Supp. 1991). Recently, extra penalties have been added: if the violation is negligent, the penalty can be up to $15,000 per day; if there is a willful violation, the maximum is $25,000 per day. Id. § 42400.1-42400.2 (West 1986 & Supp. 1993). Additionally, districts may assess administrative civil penalties of up to $500 per violation. Id. § 42402.5. These fines and penalties are per violation, while the CAA provides for fines of amounts per day per violation. Cf. 42 U.S.C. § 7413 (1986 & Supp. III 1991) (“[a] penalty may be assessed for each day of violation.”); Cal. Health & Safety Code § 42400.1 (West 1986 & Supp. 1993) (“Each day during any portion of which a violation occurs is a separate offense.”).

State penalties are dramatically different from EPA penalties because they do not include the economic benefit derived from the violation. Chaset Interview, supra note 78; Interview
violate the rules or regulations and pay the fine, rather than complying. By issuing a variance, the district brings the source into the regulatory system so that the district can work with it to minimize, and eventually eliminate, the excess emissions.

After the hearing board determines that the source has satisfied the board's requirements and that a variance is appropriate, it issues an order officially granting the variance. While the variance order usually spells out the statutory findings, the hearing board retains wide discretion in imposing conditions on the source. As long as these conditions are met, the source is protected from state and local enforcement. However, unless EPA approves the variance as a SIP revision, the source is not protected from federal enforcement and is subject to overfilling.

A source that does not receive the variance must either meet the requirements of the local regulation or risk district enforcement. If the source does not comply with the regulation, the district may attempt to gain an abatement order, civil penalties, or criminal sanctions. EPA may also take enforcement action against such a violator.

B. Variance Characteristics

In assessing the environmental impacts of actual variance activity, several characteristics are important. These include the number of variances, the amount of excess emissions, and the reasons why sources apply for variances.

Across California, districts grant approximately 1,200 variances each year. Most variances allow emissions of volatile organic compounds (VOC's), although districts grant variances for other pollutants, with Charles Seeley, Chief, Enforcement Section, Air Compliance Branch, Air & Toxics Division, Region IX, EPA, in San Francisco, CA (Feb. 7, 1992).

89. Chaset Interview, supra note 78; Smith Telephone Interview, supra note 62. CARB puts pressure on the districts to be explicit in stating the statutory findings, so that it can evaluate the variances. See also infra part II.C.
91. See supra part I.B. and infra part III.
93. See supra part I.C. and infra part III.
94. Boyer Telephone Interview, supra note 4. CARB's computerized list shows that across the state there about 120 to 160 hearings per month. At any time there may be anywhere between 150 and 225 variances outstanding.

The CARB list shows striking differences around the state. In October 1992, there were 195 current variances. In the South Coast, there were 42; BAAQMD, 12; Monterey County APCD, 8; San Diego County APCD, 84; Ventura County APCD, 10. The remaining 39 were scattered in 17 county APCD's. In March 1992, there were 222 outstanding variances. In the South Coast, there were 53; BAAQMD, 17; KCAPCD, 9; San Diego County APCD, 102; Ventura County APCD, 7. Seventeen county APCD's accounted for the 33 others.

While the vast majority of variance applications are approved by the hearing boards, a very small percentage are either denied or withdrawn. Second Telephone Interview with Mary Boyer, CARB (May 21, 1992). For example, in October 1992, of 155 hearings across the state,
such as nitrogen oxides, carbon monoxide, and particulates. Variances average about six months in duration, with one or two percent exceeding a year. In recent years, BAAQMD has issued approximately 300 variances annually; Kern County has issued about 180 variances; and San Diego County has issued a large number of variances as well. Although a majority of the state’s pollution and pollution problems is found in the industrial South Coast, less than half of all variances are granted there.

Although some people contend that some districts award variances “like candy canes at Christmas-time,” the actual amount of excess emissions can be quite small. Illustratively, in March 1992, BAAQMD had eighteen outstanding variances. These 1992 variances allowed for approximately 100 pounds of extra VOC emissions per day, as compared to 677 tons per day of total emissions of VOC’s from all sources in the Bay Area in 1987. Even if total emissions stayed constant, variance emissions still only accounted for 0.0066% of the total.

No agency in California keeps or tabulates statistical summary information (either numbers of variances or emission amounts) on air pollution variances. Second Boyer Telephone Interview, supra; Zabel Interviews, supra note 48. The only source of comprehensive information is CARB’s computerized data base.

95. Guthrie Interview, supra note 82; Smith Telephone Interview, supra note 62.
96. Boyer Telephone Interview, supra note 4. Smith Telephone Interview, supra note 62 (variance average six to seven months); see also Guthrie Interview, supra note 82 (variances are for short periods of time). The distribution of variance duration appears to vary from district to district though most variances are for either less than one month or around one year.
97. Boyer Telephone Interview, supra note 4.
98. Smith Telephone Interview, supra note 62. See also supra note 94.
99. For example, in October 1992, of the 195 current variances, 84 were for the San Diego County APCD. See supra note 94.
100. See supra note 94.
101. Zabel Interviews, supra note 48. It is probably true that air districts in California give out more variances than elsewhere in the country. But this is probably because of the large number of sources in California, and the state’s strict emissions standards. See Boyer Telephone Interview, supra note 4.
102. Guthrie Interview, supra note 82; Smith Telephone Interview, supra note 62. For the large majority of variances, CARB’s computerized list does not provide information on the amount of excess emissions or even the identity of the pollutants. The extent of information varies from district to district; for example, Monterey County and Ventura County generally provide the information, but San Diego County never does.

Among the sources for which this information is given, the excess emissions for VOC’s are generally less than five tons over the length of the variance. Of course, there are exceptions: in March 1992, the South Coast had a variance allowing 96.36 tons of excess emissions. Also, variances can be industry-wide; for example, in 1992, BAAQMD gave out a variance for service stations in the Bay Area, to give them time to install vapor recovery systems. Guthrie Interview, supra note 82; Zabel Interviews, supra note 48.
103. Boyer Telephone Interview, supra note 4; Guthrie Interview, supra note 82.
104. Guthrie Interview, supra note 82.
105. BAY AREA AIR QUALITY MANAGEMENT DIST., BAY AREA '91 CLEAN AIR PLAN 2 (1992); Guthrie Interview, supra note 82.
emissions for the month. Moreover, some variances concern only procedural requirements, and therefore contribute no excess emissions.  

Sources seek variances for a wide variety of reasons. Equipment may have broken down. The source may be unable to acquire the control technology to meet new district requirements. Other, more troubling reasons include a source’s desire to increase output over a short period of time or to delay compliance with a new regulation. Perhaps the most disturbing reason, however, is that sources may know that the hearing board has been “captured” by industry and thus grants variances so sources can completely avoid regulation.  

Quite expectedly, the district staffs throughout California feel they are “tough when it comes to variances.” However, precise perceptions vary according to the person one talks to and the particular district. Furthermore, the districts are distinct from the hearing boards, and the relative reputations of the two do not necessarily correlate. Generally, the BAAQMD staff is highly reputable. Most observers believe BAAQMD has a competent staff that is less dominated by economic pressures than are the staffs of other districts. The South Coast, due to its large staff and full-time hearing board, also has a good reputation. KCAPCD, in contrast, is viewed as being more susceptible to the economic interests of industry and the community.

106. Smith Telephone Interview, supra note 62.  
107. Sources across California include a mix of both large industrial and small business sources. Some are repeat players. Second Boyer Telephone Interview, supra note 94. This varies from district to district, and affects both the reasons for which sources apply for a variance and the districts grant them. For example, in Kern County, 75-80% of the air pollution and pollutants are caused by the oil production and refining industry. Smith Telephone Interview, supra note 62.  
109. Id.  
110. Smith Interviews, supra note 48.  
111. Smith Interviews, supra note 62; see also MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? 10-11, 63-77 (1988) (discussing the “capture” theory at the federal level).  
112. Guthrie Interview, supra note 82; Smith Telephone Interview, supra note 62. But see Zabel Interviews, supra note 48 (stating that variances are given out freely).  
113. Seeley Interview, supra note 87. See Telephone Interview with Rebecca Anderson, Attorney, Pillsbury, Madison & Sutro (Apr. 21, 1992); Morgester Telephone Interview, supra note 50. But see Zabel Interviews, supra note 48 (BAAQMD is good at getting compliance from sources but not at exacting penalties).  
114. See, e.g., Seeley Interview, supra note 87; Zabel Interviews, supra note 48. BAAQMD has sixty-three inspectors in the Bay Area; it also has a special enforcement group assigned just to variances. Guthrie Interview, supra note 82. The competence of BAAQMD staff, though not necessarily the hearing boards, is evidenced by the Bay Area’s coming into attainment. See Elliot Diringer, Bay Area Air is Getting Easier to Breathe, S.F. CHRON., Feb. 25, 1993, at A15. The improvement in air quality was mostly due to the use of oxygenated fuels, however. Id.  
115. Rosegay Telephone Interview, supra note 48; Zabel Interviews, supra note 48.  
116. Smith Telephone Interview, supra note 62; Zabel Interviews, supra note 48.
C. Post-Variance Activity

The work does not stop when a hearing board grants a variance. The district continues to monitor and inspect the source. The variance order also usually requires the source to provide the district with periodic reports that summarize the actual emissions. Should the source stray beyond the limits of its variance order, the district will often take enforcement action.

Although a variance becomes effective upon granting, California law requires that it also be submitted to CARB. CARB collects data for the entire state and compiles a monthly computerized report listing all variances. CARB also conducts its own review of each variance. A staff person at CARB ensures that the hearing board has made each of the six statutory findings. Variance orders that do not satisfy the requirements are returned to the district for revision of the variance order. If the variance order, as revised by the local district, still does not meet CARB's requirements, CARB requests that the district hold another hearing. Although CARB holds the ultimate power to revoke a variance after its review, it rarely does so.

After CARB reviews a variance order, it must decide whether to submit the variance to the federal government as a formal SIP revision. If approved as a SIP revision, the variance is incorporated into the SIP. If the variance is not approved as a SIP revision—as is often the case for reasons discussed below—the federal government may legally take enforcement action, if the source is in violation of the SIP.

117. See Guthrie Interview, supra note 82.
119. See Guthrie Interview, supra note 82.
120. See id.
122. Morgester Telephone Interview, supra note 50. See also Trankley, supra note 45, at 906-08 (describing CARB's oversight of districts' air pollution control plans, variance decisions, and enforcement practices). If CARB receives public criticism of a particular variance, they will view the variance with greater scrutiny. Morgester Telephone Interview, supra note 50. However, in general, the CARB review is a formality.

CARB also attempts to bolster the professionalism of local hearing boards. CARB staff conduct training exercises, at the request of the districts, for the hearing boards. Telephone Interview with W. Thomas Jennings, Attorney, CARB (Mar. 19, 1992). These exercises familiarize the hearing board members with the statute and its requirements. The exercises also act to socialize the hearing board members with an environmental creed. Id.
123. Morgester Telephone Interview, supra note 50.
124. CAL. HEALTH & SAFETY CODE § 42362 (West 1986 & Supp. 1993). This is similar to CARB's power to revise a district's clean air plan. See id. § 41652.
125. The last time CARB invoked this section was in the mid-1970's. Morgester Telephone Interview, supra note 50. See also Jennings Telephone Interview, supra note 122 (much of CARB's function involves assistance to districts as opposed to oversight).
126. See supra part I.B., C.
In the initial years of the SIP program, CARB routinely sent variances to Region IX for approval as formal SIP revisions. This pattern changed, however, due to a combination of two factors: the Supreme Court's decision in *Train v. Natural Resources Defense Council* and the increasing time lag in evaluating SIP revisions. *Train* announced that EPA could not approve a SIP revision past the attainment date if the revision would interfere with attainment. Generally, this showing requires a demonstration of no net increase in emissions. Yet such a showing is nearly impossible in California, where most urban areas are in nonattainment for several NAAQS and where variances are usually sought precisely to increase the source's emissions. Furthermore, Region IX often was unable to review variance applications before they expired. Region IX's time lag often exceeded the one-year maximum variance period allowed under state law.

Because of these problems, an informal procedure evolved, whereby CARB would send Region IX the information on variances, but would not ask Region IX to evaluate the variances as SIP revisions. This "informal advice" procedure was never described in writing or directly explained to the districts, although the districts received copies of the correspondence between CARB and Region IX. This informal proce-

127. United States v. Mobil Oil Corp., No. Civ. S-87-627 LKK, at 13 (E.D. Cal., Apr 19, 1990) (order by Judge Karlton disposing of the legal claims regarding variances) [hereinafter Mobil Order]. For a discussion of this case in general, see infra section IV.B.


130. 421 U.S. at 99 (agency may approve variances as long as the grant of any given variance will not interfere with statutorily mandated deadlines for clean air attainment). See also 40 C.F.R. § 51.112 (1992) ("Each plan must demonstrate that the measures, rules, and regulations ... are adequate to provide for the timely attainment of the national standard that it implements.").


133. Zabel Interviews, supra note 48; Memorandum from James D. Boyd, Executive Director, CARB, to All Air Pollution Control Officers 2 (Sept. 14, 1989) [hereinafter Boyd Memo]. This might also be true in attainment areas, where the district usually has a PSD rule in place. Zabel Interviews, supra note 48.


136. Mobil Order, supra note 127, at 14. Lawrence Straw, counsel for Mobil Oil, alleges that this was "a clandestine procedure" that was not made known to the local districts or sources. Straw, supra note 108, at 206. But see Jennings, *Variances*, supra note 129, at 114-15 (arguing that sources were not "adversely affected" by the procedure). Mr. Straw attempted to have Mr. Seeley and Mr. Morgester prosecuted for conspiracy because of this informal agreement. Seeley Interview, supra note 87. This controversy contributed further to the problems of overfiling in the Mobil case.
dure tended to confuse and frustrate districts and sources, because neither was aware of the procedure's informality, and both believed EPA would evaluate, as SIP revisions, the variances it received.\textsuperscript{137}

Responding to the friction caused by this informal procedure, CARB has since delineated a formal policy for submitting variances to Region IX.\textsuperscript{138} This policy explains the procedures and the steps local districts must take to meet federal requirements.\textsuperscript{139} The district must specifically request that CARB ask EPA to evaluate the variance as a SIP revision, and the district must make a \textit{prima facie} showing that the variance will not interfere with NAAQS attainment.\textsuperscript{140} This formal policy also outlines the federal enforcement possibility for variances which are not approved as SIP revisions.\textsuperscript{141} In practice, however, CARB rarely submits variance orders to Region IX to be evaluated as SIP revisions.\textsuperscript{142}

\section*{III
\hphantom{III}EPA ENFORCEMENT IN PRACTICE}

EPA Regional Offices perform the vast majority of EPA’s enforcement activity.\textsuperscript{143} The technical enforcement and the regional counsel staffs work together in taking enforcement actions. The Department of Justice (DOJ), on the other hand, handles the litigation, both civil and criminal, once a formal complaint is filed in court.\textsuperscript{144} Although EPA and DOJ staff work together closely, the two agencies have different perspectives on how to achieve effective enforcement. These differences can produce disagreements about how to approach a particular violation\textsuperscript{145} and inconsistencies in enforcement across the country. All of these viewpoints shape the image of EPA overfiling practices.

It has become quite clear that many of the variances that have not been approved as SIP revisions are violations of the CAA.\textsuperscript{146} Yet, the Act itself, EPA regulations, and EPA official policies do not provide EPA with particularized guidance on variance enforcement actions. EPA staff therefore approach variances as they do other violations of the

\textsuperscript{138} See Boyd Memo, supra note 133. This memo also addressed Delayed Compliance Orders (DCO’s), another option for federal acknowledgement of local variances. \textit{Id.} The 1990 Amendments, however, eliminated DCO’s. Pub. L. No. 101-549, 104 Stat. 2399 (1990).
\textsuperscript{139} See Boyd Memo, supra note 133.
\textsuperscript{140} \textit{Id.} at 2.
\textsuperscript{141} Boyd Memo, supra note 133, at 5-6. See also supra part I and infra part III.
\textsuperscript{142} Witherspoon Telephone Interview, supra note 23.
\textsuperscript{143} See GAO, Penalities, supra note 46.
\textsuperscript{144} 42 U.S.C. § 7605(a) (1988 & Supp. III 1991). With the 1990 Amendments, EPA has authority to pursue more violations as administrative actions, instead of civil actions, thereby keeping more enforcement actions in house. See 42 U.S.C. § 7413(a), (d), (e).
\textsuperscript{145} See U.S. Comptroller General, Gains and Shortcomings in Resolving Regulatory Conflicts and Overlaps 24 (1981) [hereinafter GAO, Gains].
\textsuperscript{146} See supra part II.C.
CAA. An EPA enforcement action has three stages: (1) finding the variance, (2) using discretion to decide whether to take enforcement action, and (3) deciding what relief or penalties to ask for. In the following section, we discuss how EPA finds variances, how it decides upon enforcement targets, and the important role of penalty policy differences between EPA and the districts.

A. Finding the Variance

In order to take an enforcement action against a variance, EPA must first know of the variance and the corresponding breach of the SIP. Region IX generally gains such knowledge of California variances in one of four ways:147

(1) The rules of most districts require that the district provide EPA, CARB and neighboring districts with notice of proposed variances.

(2) Districts often send EPA notice of the order granting a variance.

(3) CAA grant provisions require CARB to send EPA a list of all variances.148 And

(4) EPA sends section 114 inquiry letters as part of routine compliance investigation.149

Region IX’s most significant tool is, however, CARB’s list, which is computerized and sent monthly to Region IX.150

B. Using Discretion

EPA enforcement officials make discretionary judgments regarding enforcement against a granted variance on at least two levels: they screen

147. Seeley Interview, supra note 87. This differs from other enforcement areas, where the primary methods for detecting violations are on-site inspections and emission monitoring. GAO, IMPROVEMENTS, supra note 46, at 2.

148. See infra note 150.

149. Section 114 of the CAA gives EPA the authority to require a source to keep records, monitor emissions, and provide EPA with any information that it may reasonably require. 42 U.S.C. § 7414(a) (1988 & Supp. III 1991). EPA usually invokes this section by sending a source a letter requesting the information.

150. Seeley Interview, supra note 87. The computerized list has fields for the following information: the district, the variance docket number, the source’s name and address, the type of pollutant, the total amount of excess emissions allowed, the dates of the hearing and full compliance, and the type of variance (regular, interim or emergency). The list often does not specify the amount of excess emissions allowed, or even the type of pollutant. See supra note 102.

out investigation targets, and they decide whether to take enforcement action.

First, EPA officials scan the computerized CARB list to isolate variances as targets for EPA investigation. Due to the lack of information on the CARB list, an EPA response is usually triggered by something quite striking. This could include excessive emissions, repeat violations, or a lengthy variance term. Targeted variance holders receive section 114 letters asking for more information about the excess emissions and the circumstances of the variance.

Once EPA is convinced that a source is holding a variance worthy of attention, it must make a second discretionary judgment: whether and how to take enforcement action. After issuing the source a notice of violation, EPA may issue an compliance order, an administrative order, or file a complaint, depending on what seems appropriate in the circumstances. In only a small number of cases does Region IX actually overfile—that is, take formal action—against a source that obtains a variance. Region IX officials estimate that it overfiles against less than one in every two hundred variances.

In general, EPA simply cannot administratively or judicially address all of its enforcement responsibilities. This problem also applies to variances. EPA's heavy workload and resource deficiencies force it to choose among many different enforcement opportunities. Such

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151. See supra note 102. While the CARB list is not comprehensive, it is the best single source of information. In part V, we propose several improvements to the list.

152. Seeley Interview, supra note 87.

153. CAA § 113(a) gives EPA the authority to issue a compliance order. 42 U.S.C. § 7413(a)(1) (1988 & Supp. III 1991). EPA is most likely to issue a compliance order without penalties where a source has violated a record keeping requirement or the violation is small and the source is a first time offender.

154. Jennings, Variances, supra note 129, at 115; see GAO, IMPROVEMENTS, supra note 46 at 39.

155. Zabel Interviews, supra note 48 (stating that the number may be as low as one in a thousand). The General Accounting Office estimates that each EPA region only takes 12 to 15 overfiling actions in each year—in all areas of environmental enforcement. GAO, IMPROVEMENTS, supra note 46, at 39.

156. See infra part V.C.2.

157. GAO, IMPROVEMENTS, supra note 46, at 38 (EPA's costs for overfiling actions can vary from $50,000 to $400,000).
choices are generally made using simple prosecutorial discretion. EPA relies on its intuition, rather than regulations or formal policies.

However, the agency recognizes that the importance of providing guidance to EPA staff, and has issued several documents to aid staff in prioritizing potential enforcement targets. In its strategic enforcement plan, for example, EPA has listed the criteria by which all environmental enforcement choices should be made. These criteria are:

- The amount of environmental improvement or risk involved (e.g., the amount of pollutant to be removed as a result of the enforcement action);
- The size of the potential penalty amount;
- The facility's compliance history (e.g., whether the violator's past record warrants a civil or criminal referral);
- The potential for waste minimization or pollution prevention;
- The potential for developing a multi-media case;
- The deterrence value (i.e., the extent to which a case "sends a message" to the regulated community);
- The potential for developing a regional, multistate, or national case (i.e., whether the noncompliance is part of a pattern of noncompliance by subsidiaries of a parent corporation).

The Strategic Plan provides further broad enforcement criteria to air pollution program staff. These include: "[T]he contribution to ozone nonattainment of a particular source or source category; the potential for reduction of emissions; the history of the source's compliance; its ability to comply; whether the source is violating more than one statute; and the

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158. Martin Shapiro, Administrative Discretion: The Next Stage, 92 YALE L.J. 1487 (1983); Ruth Colker, Administrative Prosecutorial Discretion, 63 TUL. L. REV. 877 (1989); See also Zabel Interviews, supra note 48 (stating that agencies should prosecute to obtain "more bang for the buck"); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 36-38, 57 (1982) (discussing the USDA's need for discretion when enforcing meat-inspection regulations). Keith Hawkins eloquently explained the importance of discretion in his seminal book on environmental enforcement:

Discretion is the stuff of the law. It is the means by which in everyday life legal mandates are interpreted and given purpose and form. It is the means by which judgments are made about the application, reach, and impact of the law. And it is the means by which the conflicting imperatives of consistency and diversity are reconciled. Through discretion, the law takes on substance and life.


159. DAVIS, supra note 6, at 5. See also Daniel J. Gifford, Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework, 57 S. CAL. L. REV. 101, 104-05 (1983) (emphasizing the "factual" component of agency decision making over reliance upon rules and precedents).


161. See EPA FOUR YEAR PLAN, supra note 46, at 14.
deterrent value of enforcement within the industry." While there are some differences between these two lists, they provide EPA enforcement officials with useful general criteria.

To further assist EPA staff in prioritizing potential actions, EPA’s top enforcement officials have issued a guidance document on timely and appropriate enforcement. This document provides a table of “weighting factors” which assigns points for various criteria. Totalling up the points, EPA staff can assess which actions to pursue first. The factors

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162. *Id.* at 24-25.
164. The lead agency “shall first prioritize all of the [significant violators] as outlined in Appendix A prior to initiating action against the highest priority SV.” *Id.* at 2. The regions apply these factors to a collection of possible enforcement targets. The facilities with the highest scores are generally then the highest enforcement priorities.

**TABLE OF CRITERIA AND ENVIRONMENTAL WEIGHTING FACTORS***

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<thead>
<tr>
<th>Criteria</th>
<th>Environmental Weight Factor per Violation</th>
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<tbody>
<tr>
<td>1) At least one unit at a source is (or has been) in violation of a SIP, New Source Standard, or air toxic emission, monitoring, or procedural requirement, except for asbestos standard</td>
<td>10/unit</td>
</tr>
<tr>
<td>2) Violation of permitting requirements (PSD, part D, or synthetic minor)</td>
<td>10</td>
</tr>
<tr>
<td>3) Violation of a Federal Consent Decree of Administrative Order, or of State Order w/emission violation</td>
<td>10</td>
</tr>
<tr>
<td>4) Emission violation (1 time based on reference method or &gt;5% of quarter based on ‘indicator’ monitoring; or &gt;5% no data; except for opacity, use weight of 5)</td>
<td>5</td>
</tr>
<tr>
<td>Add:</td>
<td></td>
</tr>
<tr>
<td>a) Amount of excess emission (known):</td>
<td></td>
</tr>
<tr>
<td>• over 250 TPY</td>
<td>10</td>
</tr>
<tr>
<td>• 100 - 250 TPY</td>
<td>6</td>
</tr>
<tr>
<td>• 25 - 100 TPY</td>
<td>4</td>
</tr>
<tr>
<td>• 10 - 25 TPY</td>
<td>2</td>
</tr>
<tr>
<td>b) If excess emissions are not known, use size of emission point:</td>
<td></td>
</tr>
<tr>
<td>• over 250 TPY</td>
<td>10</td>
</tr>
<tr>
<td>• 100 - 250 TPY</td>
<td>6</td>
</tr>
<tr>
<td>• 25 - 100 TPY</td>
<td>4</td>
</tr>
<tr>
<td>• 10 - 25 TPY</td>
<td>2</td>
</tr>
<tr>
<td>c) Source is in a non-attainment area</td>
<td>5</td>
</tr>
<tr>
<td>d) Source is a repeat violator:</td>
<td></td>
</tr>
<tr>
<td>• same emission unit or cause</td>
<td>7</td>
</tr>
<tr>
<td>• unrelated repeat violator</td>
<td>3</td>
</tr>
<tr>
<td>e) Hazardous emissions under Title III</td>
<td>10</td>
</tr>
<tr>
<td>f) Multi-media violator</td>
<td>10</td>
</tr>
<tr>
<td>g) Source is part of national initiative</td>
<td>5</td>
</tr>
<tr>
<td>5) Source is in violation of minor procedural requirement</td>
<td>(-)5</td>
</tr>
<tr>
<td>6) Problem source (as determined by State/EPA)**</td>
<td>1 to 10</td>
</tr>
<tr>
<td>7) Emissions violations which occur on a one-time or infrequent basis, AND &lt;10 lbs/day or &lt;2% of allowable emissions of total</td>
<td>(-)50% of total</td>
</tr>
</tbody>
</table>

* Regardless of a Significant Violator’s relative priority, if the agency desires to use a preferred remedy (e.g., Federal Administrative Penalty authority with its one year ‘look-back’ provision), and the time to do so is running out, the agency may move it up to the “head of the line”.

** A ‘problem source’ may include such actions as a source which fails to test, report, or install a monitoring system at all, or one which is totally unresponsive.”
include the amount of the excess emissions, whether the source is a repeat violator, and whether the source is a “problem source.”

However, these official documents may not help enforcement staff with individual decisions, where guidance is most critical. EPA’s Strategic Plan criteria do not provide any method for comparing the relative culpability of sources or the inadequacies of variances, which would assist EPA enforcement officials in evaluating enforcement options. Although the Timely and Appropriate Guidance’s weighting factors attempt to solve this problem, they do not include several of the factors mentioned in the Strategic Plan, such as deterrence value and penalty amounts. It also provides a relatively large discretionary lump of points for “problem sources,” in an otherwise objective system assigning measuring points for specific violations. In the end, it is clear that EPA staff and attorneys rely on their own discretion in deciding upon the most effective and environmentally significant enforcement targets.

Region IX maintains that it only overfiles in cases where there is a serious air quality problem or where the variance will not solve the problem it purports to address. Yet its own enforcement history indicates that Region IX does not look solely at the amount of excess emissions allowed by the variance, when deciding whether to pursue the variance holder. In fact, Region IX may pursue the violation even if the incremental amount of pollution allowed is relatively small. Additionally, Region IX officials state that they often pursue cases because the district has not collected adequately high penalties. EPA is also more likely to overfile in “precedent setting cases.” Finally, EPA may overfile in a given case because of the personalities involved, because staffing in-

165. Considering the weight given “problem sources,” and that few variances are overfiled against, these “problem source” points can be decisive.

166. Zabel Interviews, supra note 48. See also Heckler v. Chaney, 470 U.S. 821 (1985) (holding that an agency decision not to take enforcement action is not subject to judicial review).

167. Zabel Interviews, supra note 48; Seeley Interview, supra note 87. Variances that will not “solve the problem [they] purport[] to address” include variances with unrealistic compliance schedules and ineffective technical remedies. Seeley noted that sources which obtain variances are less likely to be subject to federal enforcement actions, and that EPA is more likely to enforce against a source that has taken no steps to comply. Id.

168. The United Airlines case shows this, in that the excess emissions were two pounds per day. Guthrie Interview, supra note 82. See also infra part IV.A.

169. See infra part III.C.

170. Zabel Interviews, supra note 48; see also EPA T & A Guidance, supra note 160, at 9; infra part III.C. There may be significant pressure on EPA to pursue such cases. See GAO, PENALTIES, supra note 46, at 9.

171. GAO, IMPROVEMENTS, supra note 46, at 39.

172. Anderson Telephone Interview, supra note 113; Boyer Telephone Interview, supra note 4. See also Kagan, Inspectorates, supra note 84, at 42 (suggesting that attitudes of enforcers may be important in determining enforcement style). For example, some individuals at EPA may have a greater dislike for variances, more distrust for the districts, or feel more pressure to minimize emissions.
creased or improved at EPA, or because EPA was under pressure from the media, Congress, or the White House to increase its effectiveness. Despite the important roles that each of these factors plays at EPA, the small number of variances granted and the even smaller number of overfilings prevent any empirical assessment of a clear pattern of enforcement.

C. Assessing Penalties

One of the important factors in EPA overfiling is the discrepancy between local penalties and EPA penalties. State penalty amounts are dramatically lower than federal penalties. For example, while the CAA authorizes EPA to impose penalties of up to $25,000 per day, California penalty limits are $1,000 per day, unless the conduct is negligent ($15,000 per day) or willful ($25,000 per day).

Furthermore, districts in California and throughout the nation are reluctant to impose economic benefit penalties. Economic benefit pen-

173. Boyer Telephone Interview, supra note 4. Greater numbers of staff would alleviate some of EPA's resource problems, and therefore allow more overfiling.

174. Anderson Telephone Interview, supra note 113; Boyer Telephone Interview, supra note 4; Rosegay Telephone Interview, supra note 48; see also Kagan, Inspectorates, supra note 48, at 42. The recent GAO reports criticizing EPA's enforcement and penalties have added to the pressure. Anderson Telephone Interview, supra note 113.


EPA has attempted to cajole states and local districts into including economic benefit in their penalty policies. See EPA T & A Guidance, supra note 160, at 9-10. In fact, in 1991, EPA's Office of General Counsel offered the Administrator the legal opinion that EPA may require states to take economic benefit into account in imposing penalties for violations under SIP's if EPA finds that such penalties are necessary to have a "program to provide for the enforcement" of SIP measures under CAA § 110(a)(2)(C), or to meet other requirements applicable to SIP's. Memorandum from Raymond Ludwiszewski, Acting General Counsel, to the Administrator (Nov. 8, 1991). However, EPA has not done so. GAO, IMPROVEMENTS, supra note 46, at 4, 33.

In fact, BAAQMD recently passed a resolution encouraging its staff to recover economic benefit. In re Amending Regulations 1 and 2 Relating to Hearing Board Proceedings and CEQA Requirements and of Adopting a Policy Concerning Penalty Assessments, Res. No. 2114 (BAAQMD Oct. 21, 1992). However, it seems that BAAQMD has something different in mind than EPA's penalty policy. BAAQMD intends to apply economic penalties to particularly recalcitrant sources. Telephone Interview with Laurence G. Chaset, Senior Assistant Counsel, BAAQMD (Dec. 22, 1992).

BAAQMD had been opposed to assessing economic benefit penalties. It believed that the economic benefit continually sought by EPA did not help enforcement, created undue friction, and prevented cooperative enforcement efforts. Chaset Interview, supra note 78. Aside from whether EPA should be assessing economic benefit penalties at all, many criticize EPA's economic benefit calculation computer program—called the BEN model—for exaggerating the true economic benefit. See, e.g., Robert H. Fuhrman, Penalty Assessment at the Environmental Protection Agency: A View From Outside, 22 [Current Developments] Env't Rep. (BNA) 1574
alties are those fines which remove the economic benefit of the violation. They correspond to the time value of delayed compliance costs (i.e., the interest gained). Examples of violations which trigger economic benefit penalties, are: (1) not purchasing pollution control equipment or maintaining equipment already in use, (2) using less expensive but higher polluting raw materials, (3) not changing production processes, and (4) not applying for a required operating permit.\textsuperscript{178}

Economic benefit penalties are a fundamental component of EPA's enforcement strategy.\textsuperscript{179} EPA policy, and the common viewpoint of EPA staff, is that in all cases the source should not be allowed to profit or benefit from noncompliance.\textsuperscript{180} EPA believes that economic benefit penalties are a powerful tool for increasing deterrence and encouraging compliance.\textsuperscript{181} A source that can keep the profits that it made while in noncompliance will have no incentive to comply. On the other hand, a source that knows that it must give up its profits has less incentive to violate the law.\textsuperscript{182} The difference between EPA and local districts in ap-

\textsuperscript{178} GAO, IMPROVEMENTS, supra note 46, at 32.

\textsuperscript{179} See EPA Civil Penalty Policy, supra note 43. See also EPA T & A Guidance, supra note 160, at 2 ("EPA expects that agencies will obtain an 'appropriate' penalty (including one to offset the source's economic gain)"). But see GAO, PENALTIES, supra note 46, at 1 (in two-thirds of federal environmental enforcement actions, economic benefit penalties were not collected). GAO, IMPROVEMENTS, supra note 46, at 31.

The CAA states several factors to be used in assessing the penalties:

[T]he size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.


These factors are very different from the Civil Penalty Policy used by EPA staff, which includes two basic components: economic benefit and the gravity of the violation. EPA Civil Penalty Policy, supra note 43. The gravity component includes many of the factors listed in the CAA. \textit{Id.} at 8-19. Nonetheless, setting economic benefit as a separate component, emphasizes the importance of economic benefit as part of the penalty.

\textsuperscript{180} See Zabel Interviews, supra note 48 ("Even the most innocent of polluters cannot be allowed to profit from noncompliance.").


\textsuperscript{182} Zabel Interviews, supra note 48.
plying economic benefit policies—and the strength of their opinions—creates the greatest point of conflict with regard to variances.183

IV
TWO CASE STUDIES

In theory, the Clean Air Act sets up an enforcement partnership between the states and EPA. However, their different statutory mandates and enforcement strategies create routine conflict.184 EPA Region IX takes a legalistic approach both to enforcement and to oversight of state and local agencies. It is acutely aware of the CAA mandate for achieving attainment regardless of economic or technological constraint and of the chronic nonattainment of the NAAQS throughout California.185 California law allows a much more cooperative approach towards environmental enforcement.186 In practice, local districts and hearing boards attempt to accommodate local industries they see as legitimate as well as local political pressure.187

To a great extent, the enforcement strategies of the districts and EPA parallel the classic enforcement paradigms of compliance and deterrence, respectively. "A compliance system is primarily concerned with preventing violations and remedying underlying problems; a deterrence system with detecting offenses and punishing violators."188 This Comment offers possibilities for reconciling the contrasting styles and goals of EPA and local districts in order to maximize environmental protection and compliance.189 We examine two contrasting examples to see the effects of these differing perspectives.

183. EPA ENFORCEMENT PROJECT, supra note 46, at 2-12 to 2-13; Seeley Interview, supra note 87.

184. See EPA ENFORCEMENT PROJECT, supra note 46, at 2-12 to 2-13.

185. For discussion of the strictness of the CAA, see Union Elec. Co. v. EPA, 427 U.S. 246 (1976). EPA's strict approach occurs even though the Timely and Appropriate Guidance encourages the Regions to work with the local districts in enforcement. It speaks of "teambuilding" and cooperation. EPA T & A Guidance, supra note 160, at 45. However, it provides that EPA maintain independent enforcement authority in all cases—basically the power to override the local agency. Id. at 6. The guidance encourages the states to adopt EPA's enforcement and penalty guidelines and then requires the Regions to implement the policy if the states do not. Id. at 4-6. So while the Agency speaks of cooperation and teams, it holds back authority.

186. See supra part II.A.; see also GAO, IMPROVEMENTS, supra note 46, at 35-36; GAO, PENALTIES, supra note 46, at 8; Neil Gunningham, Negotiated Non-Compliance: A Case Study of Regulatory Failure, 9 LAW & Pol'y 69 (1987).

187. Chaset Interview, supra note 78.


189. See infra part V. Some commentators argue that a combination of these two is best. See, e.g., Scholz, Ecology, supra note 188; John T. Scholz, Discretion and Enforcement Effi-
A. United Airlines

United Airlines is one of the world's largest airlines. At the San Francisco International Airport, United operates a Maintenance Operation Center (MOC), which services its entire world-wide fleet of over 400 aircraft. The MOC employs over 11,000 people, making United one of the largest employers in the Bay Area.

At the MOC, maintenance crews clean, strip, refurbish, and paint aircraft body and engine parts. In the course of these processes, United utilizes approximately 100 different aerospace coatings which contain volatile organic compounds (VOC's). Some of the coatings are applied for safety purposes, some for aesthetic purposes, and some for both. Maintenance workers apply these coatings in painting booths, docks, hangers, and other "back shops" located throughout the MOC. As the maintenance crews apply and strip the coatings, the VOC's enter the air.

1. BAAQMD Enforcement

The emissions produced by the MOC fall within BAAQMD's regulatory jurisdiction. Because the Bay Area is a nonattainment area for ozone, the CAA mandates strict controls and reductions in emissions which produce ozone, including VOC's.

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190. Second Amended and Restated Application for Variance at 2, In re Application of United Airlines for a Variance from Regulation 8, Rule 29, Section 302 (BAAQMD, filed May 1, 1989) [hereinafter United Variance Application].

191. United Variance Application, supra note 190, at 2.

192. Id. at 3.

193. Id. at 4 n.1.

194. Id.


Ozone pollution causes serious adverse health effects, including coughing, wheezing, reduced lung capacity, respiratory infection, and possibly permanent lung damage. Id. at 7-9, 39-75. See generally Clean Air Act Standards, Hearing Before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989). Further evidence shows that the young, the elderly, and those persons with respiratory ail-
BAAQMD has promulgated specific, uniform rules to regulate VOC emissions from the aerospace industry. In particular, Rule 29 prohibits all aerospace primer coatings which contain more than 350 grams of VOC's per liter. Four of the coatings used at the MOC exceeded the VOC limitation by a factor of two. However, United could not dispense with using these coatings, because each is principally used to prevent metal corrosion, and thus structural failure, at high altitudes. Furthermore, United believed that no “suitable, commercially available, complying coatings” could be substituted for these four coatings.

ments (such as asthma) are among those who are particularly susceptible to the adverse effects of ozone. See id. at 83 (statement of Dr. Thomas Godar, President, American Lung Association).

Ozone also causes significant damage to the environment. OTA REPORT, supra at 79-93. Clear evidence shows that ozone damages vegetation of economic, ecologic, and aesthetic importance. Id.

196. See BAAQMD, Rule 8-29-302 (1993). Although the Bay Area has no other aerospace operations centers as large as United's, the Rule also applies to smaller operations centers and military air force bases. Zabel Interviews, supra note 48.


198. United Variance Application, supra note 190, at 3; Letter from John T. Hansen, Pillsbury, Madison & Sutro to Dave Howekamp, Director, Air & Toxics Division, Region IX, EPA, at 2 (May 26, 1989) (on file with the authors) [hereinafter Pillsbury Letter]; Notice of Violation, In re United Airlines, No. 9-89-20, at 3 (EPA Region IX, Apr. 28, 1989). The VOC content ranged from 647 to 787 grams per liter. Id.

They were an impact and fluid resistant primer, two urethane compatible primers and an adhesive bonding primer. The four coatings were used to prevent metal corrosion, and ultimately “catastrophic structural fatigue.” United Variance Application, supra note 190, at 12. The coatings are specified and approved by the aircraft manufacturers. Id.

United provided, in its variance application, descriptions of the coatings and United's attempts to find complying coatings. Id. at 13-21. The first coating consists of the following:

[A] green, amine-cured nonstrippable primer manufactured by DeSoto, Inc. This coating is applied with conventional spray equipment, brushes and roller to aircraft landing gear, lower wing surfaces, wheel wells, interior fuselage skin, airframe interior construction and other places to provide corrosion protection and impact and fluid resistance.

Id. at 13. The second and third coatings:

[Y]ellow, amine-cured, strippable urethane compatible primers manufactured by DeSoto. [The second] is applied with conventional spray equipment, brushes (for touch-up) and rollers. [The third] is applied with electrostatic spray equipment. Both coatings are applied to upper and lower fuselage and upper wing surfaces to protect against filiform and exfoliation corrosion and provide resistance to various aircraft fluids such as Skydrol, lube oil and jet fuel.

Id. at 15. The last coating:

[A] 250F curing, epoxy film adhesive bonding primer manufactures by American Cyanamid Company . . . . It is used in connection with all aluminum honeycomb structure repair and parts exposed to service temperatures below 225F. Its essential property is that it provides long-term corrosion protection and maintains adhesive bond strength necessary for reliable aircraft flight structure.

Id. at 18.


In order to comply with the BAAQMD regulations, United invoked Rule 29’s “small facility” exemption. United, at the time of United’s variance application, defined a small facility as “any aerospace coating line which emits less than 9 kilograms (20 pounds) of VOC per day.” United characterized the MOC as a series of small facilities, claiming that each paint shop dock and hangar within the MOC was a separate line. To meet the small facility emission limit, United measured VOC emissions by “average emissions per day,” rather than the actual emissions per day. Relying on calculations of actual emissions per day would have prevented United from claiming that the docks and hangars met the small facility exemption.

Until December 22, 1988, United operated under the belief that BAAQMD engineers and staff approved of United’s method of averaging daily emissions in order to qualify for the exemption. However, in 1989, BAAQMD informed United that it had never approved of this method of calculation. United, therefore, could no longer claim that it fell within the exemption and was violating Rule 29. Moreover, United could not change coatings because no alternate coatings were available that met the grams per liter limitation of Rule 29.

United investigated several alternative methods to achieve compliance with the emissions limitations. United employed an engineering firm which found that compliance achieved by add-on controls would cost tens of millions of dollars, would require one-and-one-half to two years of construction, and would entail a complete disruption and costly reorganization of the maintenance and repair process at the MOC.

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201. See id. at 3-6. United Airlines relied on Rule 8-29-113, which was deleted Feb. 3, 1993. See BAAQMD, Rule 8-29 (1993).
203. In fact, BAAQMD permitted each dock and hangar to be considered separately. United Variance Application, supra note 190, at 3-4.
204. Id. at 3.
205. United calculated the emissions from each booth by adding up the total amount of VOC's used during the year and dividing that the number of working days in the year in order to "average" out a daily usage number. Id. at 3. See infra note 223 (describing EPA objections to this method).
207. United Variance Application, supra note 190, at 3; Pillsbury Letter, supra note 198, at 3.
208. EPA contested United’s allegation that BAAQMD engineers or staff actually told United it could use the averaging method. The issue was not resolved prior to settlement. Zabel Interviews, supra note 48.
211. See, e.g., KJC Report, supra note 210.
212. KJC Report, supra note 210, at 16-18. Apparently United had the alternative of
United also considered moving the operation elsewhere and hiring contractors in other districts to carry out the maintenance responsibilities. United’s most controversial alternative was to shut down the MOC. Clearly, this action would have eliminated many jobs and created a great adverse economic impact on the area; it would have also disrupted United’s air service by prohibiting or limiting the application of safety coatings. United rejected each of these options.

After issuing several notices of violations (NOV’s) to United, BAAQMD suggested that United apply for a variance in order to “comply.” United did so. The hearing board granted the variance based on United’s inability to find suitable coatings and the high costs of alternative methods of compliance. The variance provided United with a schedule for phasing in coatings that complied with Rule 29 as soon as they were available. The variance did not provide for penalties.

2. EPA Enforcement

Prior to the variance hearing, Region IX, as part of a rule effectiveness study, had sent United a customary Section 114 letter. This letter asked United to supply information on its aerospace coating record keeping at the MOC. Although United had not historically kept such records, it responded to EPA’s letter by agreeing to maintain daily records of the application of aerospace coatings. In addition, United sent Region IX a copy of its BAAQMD variance application. All of this occurred before the BAAQMD variance hearing.

After reviewing the variance application and supporting documents, Region IX agreed with BAAQMD that United was not in compliance with Rule 29.223 Region IX also believed that United should not be given a variance without penalties.224 Specifically, Region IX believed that, consistent with EPA's nationwide policy, United should pay a penalty consisting of the economic benefit of noncompliance.225 However, BAAQMD was under no obligation to collect any penalties and did not view the United case as proper for economic benefit penalties.226 BAAQMD and Region IX held several meetings before BAAQMD's variance hearing to attempt to reach a mutually agreeable solution to the conflict.227 In the end, Region IX and BAAQMD only agreed to disagree.228

Several Region IX personnel attended BAAQMD's variance hearing to protest approval of United's application, but a member of the hearing board "chewed [them] out" for interfering.229 Region IX clearly disapproved of the variance. Since United's variance insulated it from state, but not federal enforcement,230 and since EPA is not required to obtain BAAQMD's approval before taking enforcement actions,231 Region IX went ahead and took independent enforcement action against United to recover penalties. Region IX filed a notice of violation only twenty-three days after the hearing board issued its order granting the variance.232

The situation caught United in the middle—it had consistently been working with BAAQMD to come into "compliance"233 with the local air requirements when EPA issued its NOV. United and Region IX ultimately settled their differences, without consulting BAAQMD.234

223. Zabel Interviews, supra note 48. In part, this was because EPA considered United's averaging method improper. EPA's position is that a grams per liter per day limit means that the source has to record the use on a day to day basis. An excess of emissions on any one day constitutes a violation. Id.

224. Id. Zabel reasons that BAAQMD should have issued an abatement order, so the district could recover penalties, instead of a variance which gives a source a blessing to continue a violation or noncompliance. Id.

225. See United Consent Decree, supra note 212, at 3-4, 6-8.

226. Chaset Interview, supra note 78; Guthrie Interview, supra note 82.


228. Id.

229. Chaset Interview, supra note 78.

230. See supra part I.B.


232. See Notice of Violation, supra note 198; United Order, supra note 217, at 1.

233. United continually referred to maintaining an exemption or obtaining a variance as "compliance." See Pillsbury Letter, supra note 198. EPA reads the rule more strictly—that to comply, United must obtain coatings that meet the VOC's grams per liter requirement. Zabel Interviews, supra note 48.

235 United paid a penalty of $234,500 and committed itself to taking measures to achieve compliance. In this case, the principal source of conflict between BAAQMD and Region IX was the recovery of economic benefit penalties. Region IX saw this as a violation warranting significant penalties because United was profiting at the expense of noncompliance with air regulations. In contrast, BAAQMD did not believe that penalties served a valid purpose in this case. Instead, BAAQMD pursued—and indeed, achieved—its goal of phasing out the coatings as rapidly as possible.

B. Mobil Oil

Since 1965, Mobil Oil Corporation has operated a polystyrene foam manufacturing plant in Bakersfield, California, the major industrial and commercial center of the southern Central Valley. The plant manufactures such products as egg cartons and fast food containers. It uses “blowing agents,” including isopentane, at various stages of the process to facilitate foaming of the polystyrene. Because isopentane is a VOC, the plant releases large amounts of VOC’s into the atmosphere.

I. KCAPCD Enforcement

The Mobil plant is located in the former Kern County Air Pollution Control District (KCAPCD), a nonattainment area for ozone. On June 29, 1981, the KCAPCD adopted Rule 414.4, regulating polystyrene foam manufacturing. The Rule required that Mobil, the only plant


235. Id.
236. See supra part III.B.
237. Mobil Order, supra note 127, at 8.
238. Id. at 8.
239. Id.
240. Judge Karlton found the total emissions from the Bakersfield plant (isopentane and other VOC’s together) were almost 1000 tons per year. Id. at 3. By comparison, the total reactive organic gas emissions from stationary sources throughout the San Joaquin Valley in 1987 amounted to 517 tons per day; thus the Bakersfield plant accounted for two full emissions days. See SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT, 1991 AIR QUALITY ATTAINMENT PLAN 5-3 (1992).
241. KCAPCD has recently joined a new unified district, the San Joaquin Valley Unified Air Quality Management District. This change has probably changed the regulatory climate in Kern County by bringing in a wider range of perspectives toward air pollution. The hearing board will be drawn from a more diverse area and will likely be less susceptible to local pressure. Telephone Smith Interview, supra note 62.
243. The rule was then approved by CARB and submitted to EPA as a SIP revision. 48 Fed. Reg. 46046-47 (1983); Mobil Order, supra note 127, at 9. The rule was not subject to
covered by the Rule, operate technologies to control 95% of the emissions from the plant. In effect, the Rule required Mobil to reduce emissions of isopentane to an output equivalent to less than 235 tons per year. The Rule was to be phased in by December 31, 1982.

Mobil did not make good faith efforts to comply with the Rule. Instead, the company applied for and obtained a series of six variances over a three-year period paid a civil penalty of just $1,000. Mobil alleged that it was attempting to comply with the Rule through a variety of process changes and control technology changes, including the installation of a blower system that would substitute carbon dioxide for VOC’s. Over this period of time, however, isopentane emissions actually increased because the system was less effective than anticipated. When the last variance was given, Mobil itself estimated excess emissions at 810 pounds per day, over 50% more than allowed by the Rule.

2. EPA Enforcement

Region IX became aware of Mobil’s variance through routine review of the CARB variance list. Region IX decided to take action primarily because of the lack of diligence on the part of both Mobil and the KCAPCD, but also because of Mobil’s history of variances, the huge excess emissions, the amount of Mobil’s economic benefit, and the small penalty imposed by the district. Before issuing a notice of violation, Region IX met with KCAPCD officials to discuss the problem, but the District backed the validity of the variances and supported Mobil’s position that it could not comply.

In October 1985, Region IX issued a NOV against Mobil. The NOV alleged that Mobil was only controlling 34% of its annual 963 tons

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federal enforcement until approved by EPA. See supra part I.B.

244. Mobil Order, supra note 127, at 8.
246. See Kern County Air Pollution Control District, Compliance History of Mobil Chemical (1985) [hereinafter Mobil Compliance History] (on file with authors).
247. Id.
248. Mobil Order, supra note 127, at 10. It appears that these variances were given summarily, in that very cursory and conclusory findings of fact were given in the variance order. See In re Mobil Chemical Co. Petition for Variance From Rule 414.4, No. 85-07, at 3 (KCAPCD Hearing Bd. Mar. 14, 1985) [hereinafter KCAPCD Order]. It also appears that Mobil attempted to exert economic pressure on the District.
249. See KCAPCD Order, supra note 248, at 1.
250. In September 1983, the excess emissions were 51 tons per year; in May 1984 they were between 121 and 162 tons per year; in March 1985 they were 148 tons per year. KCAPCD Order, supra note 248; Mobil Compliance History, supra note 246.
251. KCAPCD Order, supra note 248, at 2.
252. Zabel Interviews, supra note 48.
253. Id.
254. Id.
of VOC emissions.\textsuperscript{256} Sixty-four days following receipt of Region IX’s NOV, Mobil achieved compliance with all the District’s rules and regulations.\textsuperscript{257} EPA later filed a civil suit against Mobil for injunctive relief and to recover penalties.\textsuperscript{258} A settlement was reached providing for a $950,000 penalty. Injunctive relief was unnecessary because the technology to bring Mobil into compliance was already in place.\textsuperscript{259}

Clearly, the Mobil case presents a much stronger case for federal oversight and Region IX overfiling than does the United case. In the Mobil case, the KCAPCD failed in its role of enforcer and regulator. Without federal enforcement, it is unclear whether Mobil would have ever complied with the rules limiting VOC emissions.

These two case studies illustrate the different kinds of sources and districts that EPA must oversee every day. Local districts have differing levels of enforcement capabilities and enthusiasm; sources exercise varying political influence. EPA’s policy and actions must be viewed in light of the differences in the districts that it regulates.

\section*{V EPA’S OPTIONS}

To address variances in nonattainment areas, EPA has several policy alternatives along a continuum of increasing interference with local discretion.\textsuperscript{260} At one end of the continuum, EPA could strictly enforce the CAA by enforcing against every variance granted in nonattainment areas. At the opposite extreme, EPA could allow local districts complete autonomy in granting variances and never overfile against a variance. Neither option would be particularly helpful in achieving environmental protection, however, and each is fraught with practical problems. Between these extremes are more appropriate degrees of federal oversight, allowing for overfiling in certain situations. In this section, we first examine the two extreme positions to flesh out the positive and negative aspects of each. In light of this analysis, we then present a model for overfiling that EPA could use to maximize environmental protection and compliance. Our recommendations center around providing for more

\begin{footnotesize}
\textsuperscript{256} Id. at 3.

\textsuperscript{257} Zabel Interviews, supra note 48. Later, KCAPCD revoked Rule 414.4, though CARB and EPA formally disapproved of this action. Mobil Order, supra note 127, at 18.


\textsuperscript{259} Id.

\textsuperscript{260} See Frank J. Thompson & Michael Scicchitano, Federal Regulatory Policy and State Discretion: The Case of Occupational Safety and Health, in ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION 174, 177 (Douglas H. Shumavon & H. Kenneth Hibbeln eds., 1986). Thompson and Scicchitano call these extremes “preemptive” and “permissive” enforcement, anything in between is considered “aggressive” enforcement. Id.
\end{footnotesize}
communication between federal and local agencies and focusing EPA's discretion in making overfilling decisions.

A. Strict Enforcement Against Variances

The CAA requires that sources in nonattainment areas reduce their emissions so that each area achieves the NAAQS by a certain date.\textsuperscript{261} In contrast to other environmental regulation,\textsuperscript{262} the CAA does not allow exceptions to its requirements.\textsuperscript{263} Health-based air quality standards must be met regardless of compliance costs or technological availability.\textsuperscript{264} These standards are intentionally ambitious and create tremendous pressure to lower emissions.\textsuperscript{265} Thus, a strict prohibition on variances seems consistent with the spirit of the law because variances contribute to increased emissions. As discussed earlier, such prevention would also follow the letter of the law.\textsuperscript{266}

1. How To Implement a Strict Policy

A system of strict enforcement which prohibits all variances in nonattainment areas could be implemented by enacting either formal rules or informal policies.

a. Enacting a Formal Rule

First, Congress could amend the CAA to specifically forbid the districts from granting variances in nonattainment areas.\textsuperscript{267} Yet, considering the difficulty it faced in creating the CAA amendments of 1990, Congress is unlikely to enact any new amendments in the near future.\textsuperscript{268}

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\textsuperscript{261} See 42 U.S.C. §§ 7410, 7503 (1988 & Supp. III 1991). For example, the Act prohibits new sources in nonattainment areas unless accompanied by offsets from another source in the same area. \textit{Id.} § 7503(c)(1). See also supra part I.


\textsuperscript{263} But see Jeffrey M. Sellers, Comment, \textit{Regulatory Values and the Exceptions Process}, 93 \textit{Yale L.J.} 938, 956-57 (1984) (arguing for a general rule of statutory interpretation that holds that an exceptions process is implicitly part of every statute).


\textsuperscript{266} See supra part II.C.

\textsuperscript{267} For EPA, this is already the law. See Train v. NRDC, 421 U.S. 60, 94 n.28 (1975) ("Variances under § 110(a)(3) cannot be granted until first the state and then the Agency have determined that they will not jeopardize the standards."); 42 U.S.C. § 7410(i), (l) (1988 & Supp. 1993). Some states incorporate this requirement into their SIP's. See, e.g., Washington, Discretionary Authority, 40 C.F.R. § 52.2476 (1992) (stating that any variance must be submitted to EPA for approval as part of the SIP review process); Approval and Promulgation of State Implementation Plans: South Dakota, PM-10 New Source Review and Emergency Episode Plans, 57 Fed. Reg. 49,437 (proposed Sept. 25, 1992) (stating that the only valid variance provision in a SIP is one that is consistent with the Clean Air Act).

\textsuperscript{268} See GARY C. BRYNER, \textit{BLUE SKIES, GREEN POLITICS} 79-115 (1993); Jennings, \textit{Vari-
States and industry, which for obvious reasons favor variances, would likely fight any statutory proposals. Furthermore, to those on Capitol Hill, the issue of variances may appear insignificant in comparison to the greater problems of air pollution and environmental enforcement.\textsuperscript{269}

Alternatively, EPA could promulgate regulations that would interpret the nonattainment provisions to prohibit variances in nonattainment areas.\textsuperscript{270} Clearly, the federal regulations would supersede any state laws authorizing variances.\textsuperscript{271} Formal rulemaking would provide EPA with more explicit leverage over local districts to prevent variances in nonattainment areas. However, formal rulemaking, like a statutory amendment, would meet resistance from states, industry, and anti-regulators in the government. It has been argued that regulations are in fact more difficult to finalize than statutes.\textsuperscript{272} Political pressure would delay, and probably prevent, the adoption of such a formal interpretation.

Even if a statutory amendment or a regulation establishing the illegality of variances were adopted, such formal pronouncements might not be a realistic solution for EPA. The formality of an official rule largely assures compliance from conscientious companies—"good apples"\textsuperscript{273}—who generally comply with little enforcement effort. Yet official rules may not yield such results from the "bad apples."\textsuperscript{274} Furthermore, our political system purports to provide equity across differing circumstances;\textsuperscript{275} rigid legislation interferes with this basic guideline.\textsuperscript{276} In fact, in California, variance provisions are almost always added to proposed environmental statutes.\textsuperscript{277} Even if never used, they allow the legislation to appear reasonable. Politically, rules which do not allow for some exceptions are difficult to enact—even if rigid legislation is arguably the

\begin{footnotesize}
\textsuperscript{269} Environmental groups may view variances similarly. Chaset Interview, supra note 78.
\textsuperscript{270} This would simply reiterate the pronouncement of Train. See supra note 267.
\textsuperscript{271} See GAO, IMPROVEMENTS, supra note 46, at 37. EPA is uncertain whether it could forbid the states from giving variances or invalidate state law because of possible infringement on states rights. Id. However, the authors believe such federal influence on state decision making would probably not be an unconstitutional infringement on states' rights. See A. Marice Ashe, The Low-Level Radioactive Waste Policy Act and the Tenth Amendment: A "Paragon of Legislative Success" or a Failure of Accountability, 20 ECOLOGY L.Q. 267, 286-95 (1993) (describing Tenth Amendment limitations on congressional action).
\textsuperscript{272} See, e.g., Thomas O. McGanty, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385 (1992) (discussing the causes of delays in promulgating regulations).
\textsuperscript{273} See BARDACH & KAGAN, supra note 158, at 64-65.
\textsuperscript{274} Id.
\textsuperscript{275} Sellers, supra note 263, at 944-45.
\textsuperscript{276} See infra part V.A.2.b.
\textsuperscript{277} Jennings Telephone Interview, supra note 122.
\end{footnotesize}
best policy. Lastly, local districts are unlikely to stop issuing variances, even if EPA promulgates such a regulation, because districts want to retain enforcement flexibility and the ability to respond to local conditions.

b. Adopting an Informal EPA Policy

Even without a formal regulatory pronouncement establishing the illegality of variances, EPA could informally promote a no-variance policy by putting administrative pressure on districts or by taking a total enforcement approach.

Administratively, there are a variety of ways EPA could force districts to comply with a "no-variance" rule. EPA could revoke or threaten to revoke a state's enforcement power under the CAA because the state fails to "effectively enforce" its SIP.\(^{278}\) In nonattainment areas, EPA could sanction a state for failing to implement SIP provisions\(^{279}\) by either blocking transportation funds\(^{280}\) or by requiring greater emission reductions.\(^{281}\) To justify a sanction, EPA would argue that variances that are not SIP revisions are state-authorized violations of the SIP. However, revocation of state enforcement authority would not be wise because states do perhaps seventy to ninety percent of all enforcement of the CAA.\(^{282}\) Furthermore, either approach might cause serious political repercussions. For these reasons, seizure of enforcement authority and imposition of sanctions based on variances, which generally allow minor amounts of excess emissions,\(^{283}\) are highly unlikely options.\(^{284}\)

Alternatively, EPA could seek consistency with the letter and spirit of the CAA by issuing notices of violation for all variances in nonattainment areas. However, the time and resources required to take legal action against all variances preclude this option as well.\(^{285}\) From a practical perspective, EPA's budgetary constraints render enforcement against all variances virtually impossible.\(^{286}\)

Thus, all of the strict enforcement and implementation options have significant problems, even ignoring the efficacy of creating a strict en-

\(^{279.}\) Id. § 7509(a).
\(^{280.}\) Id. § 7509(b)(1).
\(^{281.}\) Id. § 7509(b)(2) (allowing Administrator to increase offset ratios).
\(^{282.}\) GAO, IMPROVEMENTS, supra note 46, at 12, 18; GAO, PENALTIES, supra note 46, at 1.
\(^{283.}\) See supra part II.B.
\(^{284.}\) The difficulty of these options is shown by the fact that they have never been done in Region IX. Zabel Interviews, supra note 48.
\(^{285.}\) See Thompson & Scicchitano, supra note 260, at 180 (suggesting that as the federal government depends on state resources, federal oversight should be less vigorous). See also supra part III.B.
\(^{286.}\) See GAO, IMPROVEMENTS, supra note 46, at 38 (stating that civil actions for overfilling cost EPA between $50,000 and $400,000 each). See also supra part III.B.
enforcement policy. None are practically feasible in either execution or effect.

2. Are Variances Good or Bad?

Even supposing that EPA could maintain a strict enforcement scheme, it is not clear that such a policy is desirable. A strict enforcement policy would improve air quality only marginally. Moreover, there are other public values that variances promote, values that would be sacrificed by a strict enforcement policy.

a. Limited Air Quality Benefits From Eliminating Variances

Eliminating variances would theoretically decrease emissions because most variances allow additional increments of pollution. Without the variance, the source is required to meet the standards, obtain offsets, or stop operating. Of course, it is not quite so simple. Incomplete enforcement, evasive sources, the pervasiveness of district discretion, the inability of districts to shut down sources, and judicial discretion would each reduce the benefits of a no-variance policy.

A source that does not obtain a variance would not necessarily come into compliance with the district's rules and regulations. Complete compliance requires either constant monitoring of all sources by districts or unwavering commitment to full compliance by the sources themselves.287 Realistically, neither occurs. A lack of enforcement resources prevents local districts from implementing comprehensive inspection systems.288 Even when sources self-report violations, regulators do not learn of every violation.

Without the variance option, many sources would have a greater incentive to hide violations from inspection and regulation.289 Sources gain little benefit from working with a regulatory agency whose only options are fines and abatement orders. Considering the resources of inspectors and the small fines imposed by local districts,290 sources would see little risk in hiding their excess emissions. Thus, eliminating variances might lead sources to be more evasive.

Local districts, if faced with rigid legislation that eliminates variances, might use their enforcement discretion to circumvent such legislation. Local air districts find variances, and the flexibility they allow, to be effective regulatory tools.291 Agency personnel regularly make excep-

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287. BARDACH & KAGAN, supra note 158, at 65.
289. See Scholz, Ecology, supra note 188, at 185-86.
290. See supra part II.C.
291. Chaset Interview, supra note 78; Guthrie Interview, supra note 82; Jennings Telephone Interview, supra note 122.
tions, even under the "exceptionless" CAA; agency personnel tend not to address violations which are too minor or too difficult to detect and prove,\textsuperscript{292} or they allow extended periods for compliance, or impose only minimal penalties. Financial constraints and limited personnel and time circumscribe the enforcement efforts of the agency. Denying the variance option would only increase these exceptions.

It is also difficult to imagine that a cooperation-oriented agency would take the drastic step of shutting down a source. While some variances are granted for economic reasons (i.e., compliance would cost too much), some are given because of accidents or technological problems.\textsuperscript{293} In these cases, the source cannot prevent the emissions except by shutting down. Yet, for political reasons, it is rarely an option for EPA or the district to shut down a source.\textsuperscript{294}

Even in a world without variances, agencies would have discretion once litigation began. The parties might settle upon a compromise, allowing technologies or emissions levels less stringent than those required by the standards.\textsuperscript{295} If the case goes to trial, the judge might use principles of equity to reach a compromise.\textsuperscript{296} Courts often make the same discretionary judgments as regulators, ignoring some violations, assessing minimal penalties, or providing for an extended period of compliance.\textsuperscript{297} Courts rarely assess the full penalties requested by the agencies. In these ways, courts would mitigate the harshness of strict enforcement.

We may be overstating the adverse effects of a policy of strict EPA oversight. First, the "good apples" in the industrial world work diligently to find ways to prevent excess emissions.\textsuperscript{298} Second, some sources comply with even the strictest enforcement scheme out of fear of criminal penalties for "knowing" violations.\textsuperscript{299}

\textit{b. The Value of Allowing Exceptions}

In addition to allowing industry economic hardship exceptions, variances promote values that foster long-term environmental protection. Variances do so by creating a cooperative regulatory environment, al-

\textsuperscript{292} See MELNICK, supra note 12, at 169.

\textsuperscript{293} Straw, supra note 108, at 205.

\textsuperscript{294} See DAVID VOGEL, NATIONAL STYLES OF REGULATION 166 (1986); cf. BARDACH & KAGAN, supra note 158, at 57 (suggesting that courts are also reluctant to shut down sources).

\textsuperscript{295} See MELNICK, supra note 12, at 174-75 (discussing states' grants of variances in the early and mid-1970's). But see Zabel Interviews, supra note 48 (EPA cannot settle for less than the law).

\textsuperscript{296} See MELNICK, supra note 12, at 217-18.

\textsuperscript{297} See id. at 193-238 (suggesting that district courts have an "inclination towards leniency" and "insist on balancing equities rather than requiring strict compliance.").

\textsuperscript{298} BARDACH & KAGAN, supra note 158, at 64-65.

lowing standards to be ratcheted up for most sources, and giving credibil-
itly to the regulations.

Variances can bring sources into the regulatory process and allow regulators to influence renegade source behavior. Less flexible policies are more likely to encourage renegade polluters—who will only be caught or controlled by chance. Variances promote a more cooperative environment, which, commentators suggest, leads to more effective enforcement. In a cooperative regulatory environment, laws are enforced flexibly and selectively. The regulator may work with the source, avoiding problems of delay and the costs of disagreement. Sources are more likely to work towards reducing their emissions, rather than continuously resisting regulatory prodding. The regulator and regulated may engage in give and take, providing opportunities for the regulator to bargain present concessions for future gains.

Variances may also promote long-term environmental protection because they allow districts to adopt tougher overall standards while permitting exceptions in a small number of cases. Without variances, political pressure from industry might force the districts to relax their standards in order to provide industry with an ample margin of safety. This relaxation could have a greater adverse impact on air quality than do variances, because all sources would be allowed more emissions, rather than just those that apply for variances.

Variances are also important on a symbolic level. They let sources know that the process is fair. Variances, like other exception processes, provide concrete indications that a rule is reasonable, in contrast to the vague, undefined, and unreliable enforcement discretion used by regulators. Aside from economics or politics, societal interests of fairness and reasonableness dictate that a regulatory regime provide some flexibility for individual hardship. Variances from SIP nonattainment provisions offer this flexibility.

300. Seeley Interview, supra note 87.
301. For discussions of cooperative or flexible enforcement, see Robert A. Kagan & John T. Scholz, The "Criminology of the Corporation" and Regulatory Enforcement Strategies, in ENFORCING REGULATION, supra note 84, at 67, 75; BARDACH & KAGAN, supra note 158, at 123-62; Scholz, Ecology, supra note 188, at 179-80; Hawkins & Thomas, supra note 188, at 13-15; HAWKINS, supra note 158, at 105-55.
302. Gunningham, supra note 186, at 70; Hawkins & Thomas, supra note 188, at 122-23.
303. BARDACH & KAGAN, supra note 158, at 144-49.
304. Id. at 130-33.
305. Hawkins & Thomas, supra note 188, at 123.
307. See BARDACH & KAGAN, supra note 158, at 7; Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. REV. 925, 936-37 (1960) ("The power of adjusting the operation of legal precepts to the exigencies of special circumstances is unavoidable if there is to be a complete system of justice according to law.").
In addition to environmental benefits, variances serve important citizenship values. Because district hearing boards are designed to represent the public, variances preserve public input in air pollution regulation. Through public hearings and appointed hearing boards, variances make local discretionary enforcement decisions open to public scrutiny. Although the decisions regarding variances are unquestionably discretionary, they are made in full view. Other discretionary decisions, the kind that would replace variances, are made in regulators' offices, where the public has no access. There is societal value in allowing the public to witness these decisions because the agencies supposedly act in the public interest.

In summary, variance provisions should be maintained. Variances provide a degree of reasonableness for otherwise strict rules and regulations. They can lead to a cooperative enforcement environment. The emissions they allow are usually not significant. Considering these concerns, and the difficulty in implementing a strict enforcement scheme, EPA should avoid strict enforcement against variances.

B. Local Autonomy Without EPA Oversight

The policy option at the other end of the continuum from strict enforcement would prevent EPA from exercising its enforcement authority and would provide the districts with exclusive jurisdiction to enforce against variances. Under this system, the local districts would be free to issue the variances they deem appropriate without oversight. Several compelling arguments support increasing the autonomy of local districts. These include arguments for finality and fairness, efficiency, empowerment, and local interests. Furthermore, local districts already carry out nearly ninety percent of inspection and enforcement. In California, like other states, the state and federal governments conduct minimal for-

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308. See Sellers, supra note 263, at 947-48. Of course, some of this is limited in reality, because hearing boards can make decisions in private and simply announce the decisions in public; also, few people actually attend hearings.

309. See supra part II.A.

310. CURRIE, supra note 34, at § 5.04 (“The most likely result of a ban on variances would be to drive the process underground. Instead of publicly announced and explained variance decisions . . . there would be unilateral, secret, nonrecord, unreviewable decisions not to prosecute.”). Professor Currie feels that this change of process would actually result in more pollution. Id.

311. We do not mean to imply that under such a system, local districts would grant variances indiscriminately. Some might do so for “illegitimate” reasons, but we assume that most local districts do believe in, and act upon, their mandate to preserve and improve air quality. They simply do so with differing rationales, priorities, and contexts.

mal air pollution enforcement. However, granting local districts further autonomy may cripple the CAA: local districts may be too susceptible to competing interests.

1. Finality and Fairness

A system entrusting local agencies with exclusive enforcement authority would accomplish two important objectives. First, it would allow for finality in decisions. A source which had been granted a variance could be assured that its actions were authorized and would have no reason to fear federal enforcement. Such a system also would present the source with a single regulator, a single responsibility to fill, and a single agency to contact should any problems develop. Businesses would benefit from more definitive planning. As one might expect, attorneys who have represented industry in overfiling actions consider such certainty very important.

Sole enforcement authority might also be more fair. Currently, sources deal exclusively with local districts and have little contact with federal laws or regulators. The minimal contact between sources and federal laws is manifest. For example, BAAQMD’s sample variance application makes no reference to the threat of federal enforcement, and at hearings the hearing board never informs variance applicants of the possibility of federal enforcement. In fact, some sources in the Bay Area claim not to know about the federal requirements. A source that fulfills the local requirements feels whiplashed when it suddenly finds itself subject to a federal enforcement action. While regulators may not be overly sensitive to this issue, the fairness argument has merit in the equitable realms of courts and politicians. Furthermore, fairness creates a better atmosphere for cooperation between the regulated and the regulators, which produces better compliance.

313. GAO, IMPROVEMENTS, supra note 46, at 12; Zabel Interviews, supra note 48; see also supra parts II.C., III.
314. Anderson Telephone Interview, supra note 113; Manaster Telephone Interview, supra note 78.
315. BAAQMD Suggested Form for Variance Applications (Jan. 9, 1992); Chaset Interview, supra note 78.
316. Anderson Telephone Interview, supra note 113 (suggesting that lawyers and industry do not know about overfiling); see also Straw, supra note 108, at 203, 206 (claiming that sources are not aware that EPA may still bring an enforcement action after they have obtained variances and are therefore unfairly targeted).
317. Straw, supra note 108, at 206; Anderson Telephone Interview, supra note 113. EPA, however, believes that it is the source’s responsibility to know the law. Zabel Interviews, supra note 48. For an analysis of double jeopardy and preclusion doctrines in the overfiling context, see William D. Benton, Application of Res Judicata and Collateral Estoppel to EPA Overfiling, 16 B.C. ENVTL. AFF. L. REV. 199 (1988).
318. See supra part V.A.2.a.
319. See BARDACH & KAGAN, supra note 158, at 127-28; MELNICK, supra note 12, at 173.
2. **Efficiency**

Fragmented enforcement authority can lead to duplication of effort, to delay, and to underenforcement.\(^{320}\) Currently, variance applications are reviewed by local hearing boards, CARB, and EPA.\(^{321}\) Multiple review consumes precious time and resources.\(^{322}\) Moreover, these agencies frequently review the same information; by definition, overfiling occurs only after at least one other enforcement effort has run its course. Entrusting local agencies with sole enforcement authority would create a more efficient system than the one that exists today.

3. **Empowerment**

Giving autonomy to local districts vests in them greater responsibility for the overall enforcement scheme of the CAA. If exclusive autonomy existed at the local level, neither the district nor the source would speculate about EPA overfiling; such speculation tends to undermine district credibility.\(^{323}\) Sources would have increased respect for the staff of autonomous districts, and very likely would be more cooperative. Such cooperation would further the goals of environmental protection.\(^{324}\)

Giving local districts more enforcement power would foster the districts’ self-respect, increase morale, and bolster their sense of power and authority. Assuming that districts are committed to enforcement,\(^{325}\) this increased morale would improve local enforcement by increasing the productivity and confidence of inspectors and enforcement personnel.

4. **Local Interests**

Local autonomy helps local districts put their gloss on enforcement, taking into account local conditions and preferences.\(^{326}\) For example, BAAQMD considers economic and cost factors important in variance


\(^{321}\) See supra parts II & III.

\(^{322}\) When determining whether to overfile on a variance, both CARB and EPA first look at the variance order and the variance quantities. Often they rely on the information from BAAQMD in taking further action. Morgester Telephone Interview, supra note 50; Seeley Interview, supra note 87. Therefore, a decision based on the same information is made several times.


\(^{324}\) See BARDACH & KAGAN, supra note 158, at 370.

\(^{325}\) If, conversely, districts oppose strict enforcement, and are allied with industry, then empowerment would be harmful.

\(^{326}\) Trankley, supra note 45, at 916. In areas with county APCD’s, spillover effects on communities outside the district may be a particular problem. *Id.* at 909 n.6.
proceedings.\textsuperscript{327} The resulting decision making is more responsive to local needs than it would be under a strict interpretation of the CAA. In contrast, federal enforcers are necessarily more removed from the local area and presumably give local economic factors less consideration. While EPA may look only at environmental effects,\textsuperscript{328} local agencies are more likely to consider the whole picture, which allows for better political representation.\textsuperscript{329}

5. \textit{Why Complete Local Autonomy Fails}

Although the reasons discussed above weigh against federal oversight, they also indicate why a policy of complete local autonomy fails. The CAA itself illustrates Congressional distrust of local districts’ ability to enforce the national vision of air pollution control.

The basic theme of the “health-based,” “technology-forcing” CAA is that economic considerations are secondary to the goal of attaining clean air.\textsuperscript{330} Congress was well aware that states and local districts, concerned about the local economy,\textsuperscript{331} might be reluctant to enact stringent environmental regulation.\textsuperscript{332} To keep the pressure on states and local districts to make sacrifices, Congress provided for federal enforcement authority.\textsuperscript{333} Congress evidently continues to value federal authority, for it recently rejected a proposal to eliminate the federal oversight power over individual permit decisions.\textsuperscript{334} Reflecting this Congressional perspective, EPA believes that each variance potentially hampers the attainment or preservation of cleaner air by allowing the local districts to “give away the store.”\textsuperscript{335}

The fear of local underenforcement is well-justified. In some cases states and local districts simply can not or do not adequately implement national environmental goals.\textsuperscript{336} For example, the discretion inherent in

\textsuperscript{327} Chaset Interview, supra note 78. \textit{But see} GAO, Penalties, supra note 46, at 8-9 (suggesting that recognition of local considerations could undermine EPA's enforcement efforts).

\textsuperscript{328} Seeley Interview, supra note 87 (suggesting that the only other factor in EPA's enforcement penalty policy is the economic benefit the source derives from noncompliance).

\textsuperscript{329} \textit{But see} Regan J.R. Smith, \textit{Playing the Acid Rain Game: A State's Remedies}, 16 ENVTL. L. 255, 268 (1986) (arguing that too much local autonomy caused acid rain problems).

\textsuperscript{330} Union Elec. Co. v. EPA, 427 U.S. 246 (1976). As expressed by the Senate Committee that enacted the original air quality standards provision in 1967: “[C]onsiderations of technology and economic feasibility, while important in helping to develop alternative plans and schedules for achieving goals of air quality, should not be used to mitigate against protection of the public health and welfare.” S. REP. No. 403, 90th Cong., 1st Sess. 2 (1967).

\textsuperscript{331} Seeley Interview, supra note 87.


\textsuperscript{333} \textit{See id.}; supra part I.C.

\textsuperscript{334} Elliott, supra note 312, at 10,012 & n.3.

\textsuperscript{335} Jennings Telephone Interview, supra note 122; \textit{cf.} Massaro, supra note 306, at 2120; Colker, supra note 158, at 880.

\textsuperscript{336} Richard B. Stewart, \textit{Pyramids of Sacrifice? Problems of Federalism in Mandating
variance authority allows a hearing board to grant variances whenever it believes justice dictates. Yet a local hearing board’s “good reason” for granting a variance may not be one that the greater society accepts. In general, regulation is less effective when the regulatory regime allows individualized decision making, because the overarching goals of the program are lost by looking at the equities of each individual case.\textsuperscript{337} Powerful sources also may be encouraged to prolong the process by quibbling with every decision.\textsuperscript{338} If local discretion becomes indiscriminate, as it did in the Mobil Oil case,\textsuperscript{339} the system designed to achieve the NAAQS would likely collapse.\textsuperscript{340} Inadequate districts—those that do not competently perform their job and those that are coopted by the sources they purport to regulate—eviscerate the effectiveness of the CAA.\textsuperscript{341}

By overfiling, EPA can put pressure on local district enforcement efforts. EPA’s actions not only demonstrate the correct CAA standards, but they can embarrass the district before the local media and community. District staff, reminded of the possibility of federal enforcement, perhaps will be deterred from giving marginal variances.

The possibility of overfiling thus constrains indiscriminate district decisions and induces district enforcement. Given the strong theme of the CAA, these mitigation efforts are appropriate. Given the history of local boards, checks on their discretion are needed. Thus, EPA should retain its federal oversight power.

6. An Alternative: A Variance Bank

One practical alternative which would preserve the autonomy of local districts, without undermining the CAA goals, would be a “variance bank.” A variance bank would consist of a specific amount of emissions, set aside in the SIP. These emissions could be taken or purchased from other sources, to the extent that the selling sources were below their emissions limits.\textsuperscript{342} The state would allocate emissions from the bank as


\textsuperscript{338} \textit{Id.} at 1297.

\textsuperscript{339} \textit{See infra} part IV.B.

\textsuperscript{340} \textit{See Hawkins & Thomas, supra} note 188, at 16.

\textsuperscript{341} This inadequacy may reflect political pressure, lack of resources, or complacency. \textit{See supra} note 45, at 911-13. In terms of air quality, all are equally unsatisfactory.

\textsuperscript{342} If the emissions for the variance bank were not taken from existing sources, but rather were in addition to existing emissions, the program would probably violate CAA section 110 because it would aggravate nonattainment. \textit{See supra} part II.B. But in the Bay Area, if attainment is actually reached, this program could be undertaken without taking emissions from existing sources. \textit{See supra} note 114 (describing improved air quality in Bay
variances were granted.\textsuperscript{343} Once the state exhausted the emissions in the variance bank, no more variances would be given. The variance bank would eliminate the districts’ and sources’ obligation to obtain a SIP revision for each variance.\textsuperscript{344} Including variance excess emissions in the SIP would thus allow a source to be in compliance with federal law.

On the other hand, a variance bank has two significant weaknesses. First, some year-end variances might be important; so that a first-come, first-served approach would not necessarily be equitable or effective, and would run counter to the fairness and cooperative enforcement arguments outlined above. Second, a variance bank would not address the problems of bad districts and bad variances. Such a district might hand out variances on a first-come, first-served basis without any merit-based judgment. Indiscriminate local actions would continue and federal or state oversight would still be needed.

\section*{C. Finding the Proper Oversight Role}

Between the two extremes of strict federal enforcement and total local autonomy lie varying degrees of federal intervention or oversight. Since neither extreme appears to alleviate the tension of overfiling without creating other problems, a compromise position appears more feasible and desirable.\textsuperscript{345}

The current system actually falls somewhere in the middle of the continuum between local autonomy and strict federal enforcement. However, both the quantity and method of oversight are determined \textit{ad hoc}. EPA learns of variances through various means, and acting with broad prosecutorial discretion, overfiles against a handful of them.\textsuperscript{346} While criteria and guidance are available to EPA, it appears that EPA’s enforcement against variances has little focus. The case studies of United Airlines and Mobil Oil illustrate the resulting discrepancies. BAAQMD and United worked diligently to address the problem caused by United’s


\textsuperscript{344} See supra part I.B. See also United States v. General Motors Corp., 702 F.Supp. 133, 138 (N.D. Tex. 1988) (holding that Texas’ approval of substantially equivalent “alternate methods of control” was not reviewable by EPA as a SIP revision). An alternative method for obtaining a legal solution to sources’ problems would be to include in the SIP the California statutes allowing for variances. See supra note 58. This solution would have problems similar to those of a variance bank without eliminating emissions. See supra note 342.

\textsuperscript{345} In fact, the parties concur that neither extreme is appropriate. Guthrie Interview, supra note 82; Seeley Interview, supra note 87. Compare a district’s opinion that overfiling is not necessary for good, well staffed districts, Chaset Interview, supra note 78, with EPA’s view that variances violate federal law, Zabel Interviews, supra note 48.

\textsuperscript{346} See supra part III.
safety coatings. In contrast, KCAPCD and Mobil Oil were each less than diligent. Yet EPA overfiled in both situations.

We attempt here to develop a means to focus EPA enforcement. Focussed enforcement will enable EPA to improve compliance and air quality. We hope the lessons of the enforcement environment, the case studies, and the extreme enforcement options will help answer a basic question: how should EPA exercise its oversight power?

1. The Alternative of Programmatic Oversight

One option for improving relations among EPA, sources, and districts would shift EPA’s emphasis from the present case-by-case approach to a scheme of programmatic oversight. Under a programmatic system, EPA would not disapprove individual variances or enforcement practices. Instead, the agency would review only the procedures and substantive criteria of local districts.347 The CAA already provides for this kind of oversight in the mandatory EPA review of SIP’s.348 Clearly, however, some provisions slip through the cracks. Economic benefit penalties are a prime example.349 Also, the variance provisions in the California law are not part of the SIP that California submitted to EPA.350 EPA would need to adopt a much more rigorous review of SIP’s to achieve effective programmatic oversight.

In any case, a more rigorous programmatic enforcement scheme would not necessarily halt the discretionary nature of site-specific regulation, such as the granting of variances. As discussed above, without variances, districts may simply shift their discretion to other areas, such as enforcement and imposition of penalties.351 Therefore, changes in the substantive or procedural law establishing programmatic review of variance authority may not prevent site-specific exceptions. For these reasons, EPA needs to retain its present focus on case-by-case overfiling.

2. How Should EPA Exercise its Oversight Power for Maximum Benefit?

EPA’s current overfiling practice, which is directed only at individual cases, rather than at the scheme of local enforcement, appears to only marginally improve air quality. EPA’s oversight role should focus on the districts, rather than the sources. Districts do the vast majority of en-

347. Other alternative strategies for programmatic oversight of local air districts include allowing variances only if they are granted on the basis of strict, quantifiable standards and restricting overfiling to those situations where there is a consistent pattern of inadequate enforcement.


349. See supra part III.C.

350. Witherspoon Telephone Interview, supra note 23.

351. See supra part V.A.2.a.
Overfiling carries the danger of disrupting this enforcement effort, either by hindering sources' respect for the district or by damaging the morale of district staff. Conversely, if EPA oversight improves the efforts of district staffs and hearing boards in their management of emissions, prevention of violations, and enforcement against violators, it will have a decisive impact on air quality. To accomplish this, EPA should consider the following recommendations.

a. Increased Communication and Cooperation with Districts

No matter how carefully executed, overfiling may create animosity on the part of the districts.\(^{352}\) Each agency believes that it is doing a good job. EPA, by overfiling, not only suggests but declares that the district is not.

These problems have been exacerbated in California by the traditionally poor communication amongst the local districts, CARB, and EPA.\(^{353}\) The absence of communication has been part of the problem in overfiling. Moreover, EPA disregards the districts' justifications for variances, and local districts are apparently ignorant of the factors that influence EPA in overfiling decisions.\(^{354}\)

In fact, EPA admits that it needs to do a better job of communicating with state and local governments.\(^{355}\) EPA wants to work cooperatively, not disharmoniously, with local districts.\(^{356}\) The advantages of an amiable partnership are obvious. For one, EPA and local districts can use each other to gain negotiation leverage.\(^{357}\) To foster more of a partnership, EPA should give the districts a better sense of EPA's enforcement priorities. Currently, many districts, including BAAQMD, view EPA enforcement as inconsistent and heavy handed.\(^{358}\) With a more complete picture of EPA's enforcement criteria and standards, districts will consider EPA enforcement to be more reliable and helpful. Consequently, EPA needs to inform districts of EPA's enforcement priorities in more detail than is suggested by the Timely and Appropriate Guidance.\(^{359}\)

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352. See Bardach & Kagan, supra note 158, at 6; see GAO, Improvements, supra note 46, at 42. BAAQMD officials certainly feel this is the case. Chaset Interview, supra note 78; Guthrie Interview, supra note 82. Indeed, almost all the people we interviewed had strong feelings about overfiling.

353. See Straw, supra note 108, at 206; Jennings, Variance, supra note 129.

354. Some think that the lack of communication has been the major problem. Manaster Telephone Interview, supra note 78; see also Straw, supra note 108, at 206.

355. EPA Enforcement Project, supra note 46, at 2-5, 2-13; Elliott, supra note 312, at 10,013.

356. See Elliott, supra note 312, at 10,010.

357. See infra Conclusion.

358. See, e.g., Chaset Interview, supra note 82 ("[CARB] is enough of a 'gorilla in the closet.'").

359. EPA Enforcement Project, supra note 46, at 2-17 to 2-18. See EPA T & A
EPA will benefit from more communication in other ways. Local districts stay in closer contact with the sources than does EPA. Generally, local districts are the first to discover violations. They are generally familiar with the resources and practices of the sources and the specifics of the variances. This kind of information can be valuable to EPA in an enforcement action. The more that the sources and regulators know their options, and the consequences of those options, the more likely they are to achieve an amenable solution.

An important addition to EPA's protocol for enforcing against variance holders would be a meeting between EPA officials and district officials. Held after EPA has selected a variance for investigation, this meeting would provide a forum for district officials to justify the variance and for EPA officials to explain why the variance may be inappropriate. Both agencies should closely listen to the opposing arguments; they also should attempt to compromise. The terms of the compromise could be proposed to the source as an alternative to subsequent EPA action. Even if EPA and the district agree to disagree, an informed—and hopefully respectful—understanding of each other's conclusions would minimize the animosity between the enforcement agencies and any future conflicts.

b. Communication and Deterrence for Sources

In the case studies of United and Mobil, the regulated sources contended that they did not know that EPA had oversight authority over variances. Similarly, other sources may not know about EPA's enforcement authority. While sources may grow increasingly aware of EPA authority as overfilling continues, the fact that sources do not

Guidance, supra note 160.

360. EPA ENFORCEMENT PROJECT, supra note 46, at 6-2 to 6-4, 6-7 to 6-9.

361. In fact, the Chief of Compliance for BAAQMD believes that the EPA will not overfile if it talks to the district before taking action—he believes he can convince them that the district's action was equitable. He believes communication is the main problem in overfilling. Guthrie Interview, supra note 82. Of course, EPA did consult with the district in the United case, without any effect. See supra part IV.A.2.

362. The Timely and Appropriate Guidance provides that all enforcement decisions should be made jointly by the local districts and EPA. EPA T & A Guidance, supra note 160, at 1-2, 4 n.2, 5. But this does not happen often. Although EPA and BAAQMD met to discuss the situation in the United case, this type of meeting has not taken place lately. Zabel Interviews, supra note 48.

363. See EPA ENFORCEMENT PROJECT, supra note 46, at 2-4.

364. Manaster, supra note 78.

365. See e.g., Mobil Order, supra note 127, at 16 ("[CARB's Director of Compliance] testified that he did not understand the federal requirements for shielding sources from enforcement actions.").

366. Lawyers are becoming more aware, but industry is not. See Anderson Telephone Interview, supra note 113. However, one CARB attorney suggests that it is reasonable for regulators to believe sources are aware. See Jennings Telephone Interview, supra note 122. Part of this movement towards awareness may be because of reaction to the increase in air
work with EPA on a regular basis means that sources may also forget. Sources work with the local district staff and tend to ignore the possibility that another agency is involved. Even if the sources are aware of EPA enforcement, EPA's wide discretion and the relatively small number of overfiling actions create an impression of unpredictable and arbitrary federal enforcement.

To improve this situation, sources must become more educated about EPA's role in air quality regulation and its requirements. While EPA could take on this responsibility, it is more realistic to expect the districts to do a better job of educating sources. District staffs should inform sources about federal enforcement policies in the course of reviewing permit and variance applications. Sources need to know EPA's perspective on compliance and emissions limits and EPA's criteria for evaluating violations (i.e., the Timely and Appropriate Guidance). In particular, sources need to know the differences between EPA standards and local standards. They need to know the differences in penalties and legal procedures.

However, there is a limit to the information on EPA overfiling criteria that can be provided to sources. EPA has not articulated a specific policy on overfiling. The guidance documents and empirical observations do not fully explain EPA's actions. Because discretion is an inevitable part of prosecution and because most overfiling decisions depend on unique, unforeseeable circumstances, it may be difficult for EPA or the districts to fully articulate EPA enforcement policies. Technical staff, attorneys, and political priorities all influence the enforcement environment. Even more important, confining EPA to strict enforcement criteria would deprive the agency of case-by-case judgment—the foundation of reasonable regulatory enforcement.

Finally, there is a limit to the amount of information EPA or the districts should provide to sources. Sources number in the thousands and enforcement by Region IX in the mid-1980's. Zabel Interviews, supra note 48.

367. See supra part II.B.

368. Anderson Telephone Interview, supra note 113. In part, this impression may be due to the small number of overfiling cases, which does not allow for a pattern to emerge. Vogel, supra note 294, at 180.

369. This kind of role fits in well with the "good cop, bad cop" model. See infra Conclusion. When advising sources on compliance, the districts can discuss EPA's policies and make themselves seem more reasonable to the sources.

370. Industry feels strongly that it needs more information on EPA criteria for overfiling. Anderson Telephone Interview, supra note 113. See also Straw, supra note 108, at 206 (noting that sources acting in good faith may still face a federal enforcement action).

371. There are rumblings in Region IX that a policy on overfiling will be produced. Zabel speculates that any such policy will essentially echo the Timely and Appropriate Guidance already in place. Zabel Interviews, supra note 48.


are adversarial to EPA. A clearly articulated policy would undermine federal enforcement efforts by enabling sources to see the infrequency of overfilling and to judge when they can violate the law without the risk of enforcement.374 Because EPA has limited resources, many sources can violate the law without danger of sanctions. Discretionary enforcement allows EPA to deter many more sources than it could possibly sanction.375 Broad deterrence and a few prominent cases send a signal to all sources and thus increase the effectiveness of EPA enforcement.

c. When Should EPA Overfile?

Deciding when EPA should overfile is not easy. It requires clarifying environmental priorities and predicting the deterrent effect of enforcement action. It also requires giving some meaningful contours to discretion.376

At the outset, it is important to remember that due to resource constraints, EPA can overfile in only a limited number of cases.377 Indeed, EPA should overfile in only a limited number of cases. Deterring improper district conduct requires a minimal number of well-publicized378 cases, especially with improved communication among EPA and districts. Overfilling in more cases has marginal benefit because the message has already been released. Tension and expenses, the negative effects of overfilling, increase as the number of overfillings increases. While EPA should be perceived as a credible threat, a small number of overfilings will serve to spread the word about federal enforcement.

In each case, the question should be: given this particular variance, should EPA overfile? EPA must create a policy which balances the positive effects of overfilling (improved district enforcement and deterrence) and the negative effects (contention between the district and EPA and depletion of EPA resources). We believe EPA should focus on those instances in which it can provide the greatest deterrence to both districts and sources.379 This means that EPA should focus its regulatory attention on variances that allow large amounts of excess emissions and on variances granted by “bad” districts.

374. A clearly articulated policy might also have legal problems—because EPA would be explicitly allowing violations.
375. See BARDACH & KAGAN, supra note 158, at 123.
376. See supra note 158.
377. GAO, PENALTIES, supra note 46, at 12-14.
378. By “well-publicized” we do not here refer to the mainstream press. What is more important is to reach the law firm and industry networks of information.
379. See Hawkins & Thomas, supra note 188, at 11.
We thus propose a series of "gatekeeping devices"\(^{380}\) to limit and focus EPA's discretion.\(^{381}\) EPA will inevitably use its judgment in evaluating the available relevant factors. However, providing a framework for evaluating these factors and creating a procedural bias toward selected factors will allow an effective policy to emerge. First, EPA should help create a modified version of the CARB list that adequately reflects excess emissions caused by variances. Second, EPA should analyze the list with an eye on the effectiveness of the relevant district. Lastly, EPA should internally use an "abuse of discretion" standard in evaluating the districts' orders granting variances.

\textit{i. Creating a Better CARB List}

EPA's guiding goal in general and in overfiling should be to reduce excess emissions. This focus would appropriately limit the number of overfiling actions. It would be unreasonable, for example, to commit resources to overfiling on a variance for two pounds per day, a minuscule fraction of the total pollution emissions. When a variance allows emissions of hundreds of pounds of pollutants, EPA clearly should step in.\(^{382}\) This focus will also help prevent the animosity between EPA and districts over whether overfiling actually creates significant air quality improvement.

Focusing on excess emissions must start with EPA's initial screening tool, the list of variances received from CARB.\(^{383}\) EPA needs to work with, or if necessary require, CARB to improve the list. CARB and EPA must charge the districts with providing accurate estimates of excess emissions for each and every variance. This will only work if districts take this responsibility seriously and do not accept the sources' own emission estimates. A clear delineation of the worst pollutant emissions\(^{384}\) will effectively focus EPA officials on variances which most harm the environment.

\(^{380}\) We borrow this term from F. David Levenbach, \textit{Gatekeeping and Administrative Discretion in a Categorical Grants Agency}, in \textit{ADMINISTRATIVE DISCRETION}, supra note 158, at 248, 251-52.

\(^{381}\) For a powerful argument that regulatory agencies' discretion should be limited, see \textit{DAVIS}, supra note 6, at 3. "Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." \textit{Id.} at 3. \textit{See also} Hawkins & Thomas, supra note 188, at 11 (discussing agencies' use of self-imposed priorities to control the discretion of officials working in the field).

\(^{382}\) Deciding on a numerical limit would be difficult considering the importance of deterrence and discretion. Such calculations are well beyond the scope of this Comment.

\(^{383}\) \textit{See supra} part III.

\(^{384}\) A CARB list providing accurate estimates of pollution should also be reformatted to list the variances in descending order of total excess emissions, by pollutant. EPA should not necessarily compare individual variances, however. Some enforcement actions can have a ripple effect on many sources. Zabel Interviews, supra note 48. EPA should take this into consideration.
ii. Focusing on "Bad" Districts

While EPA should focus on the largest excess emissions in nonattainment areas, it should not overfile only in those circumstances. EPA should also focus on those districts that do a poor job of enforcement. The disparity between good and bad districts can be quite great. Since districts do most of the enforcement of the CAA, a poor district can create widespread problems—problems which are much more comprehensive than one variance. Bad districts should receive the vast majority of overfiling actions. Hopefully, this would demonstrate effective enforcement to those districts. Furthermore, sources will be informed that they can no longer take advantage of bad districts. Thus, focusing on bad districts would encourage both districts and sources to act in good faith. It would help build effective state programs.

In deciding which districts are "bad apples," EPA will need to exercise its discretion. To do so, it can obtain helpful information from CARB. Furthermore, EPA can evaluate districts on the basis of reputation, attitudes of district management, and specific instances of district behavior. EPA can also examine more specific criteria such as the number of inspectors, inspections and NOV’s, and amounts of penalties (both total and average).

iii. Evaluating Abuses of District Discretion

In evaluating whether to overfile in each case, we propose that EPA use an "abuse of discretion" standard. An abuse of discretion standard prevents review of a decision unless that decision disregards clear directions from judicial, legislative, or regulatory decisions. In effect, an abuse of discretion standard would mean that the district can be reversed (overfiled against) when it fails to follow the mandates of a rule or when its enforcement judgments are arbitrary or capricious. An abuse of

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385. This may be analogous to a deterrence system which focuses on violators rather than violations. See Hawkins & Thomas, supra note 188, at 13.

386. Morgester Telephone Interview, supra note 50.

387. See EPA ENFORCEMENT PROJECT, supra note 46, at 2-18 (recommending that "weak" states receive more oversight than "stronger" states); Scholz, Efficiency, supra note 189, at 147-50 (explaining that enforcement agencies do and should have differing strategies for good and bad firms).

388. Cf. Scholz, Efficiency, supra note 189, at 147 (discussing how agencies can focus on bad firms to produce desired behavior).

389. EPA ENFORCEMENT PROJECT, supra note 46, at 2-15 to 2-16.

390. Scholz, Efficiency, supra note 189, at 153.


392. This is more stringent than the "laugh test" currently used. See GAO, PENALTIES supra note 46, at 12 (describing the standard, if there is one, as so low as to lack credibility).

discretion standard is appropriate because it would allow districts a cer-
tain amount of autonomy, and it would permit EPA to set the rules.

To implement this strategy, EPA must ensure that districts adopt
the CAA mandate, for in an important way, districts act as the surrogate
for the federal government. Thus, EPA must take seriously its responsi-
bility to review and approve SIP’s. The actual district rules, as in the
SIP, provide the baseline for the abuse of discretion standard. In addition,
EPA should establish model rules to provide a blueprint for dis-

394. See Trankley, supra note 45, at 907, 914-15. These model rules would not specify
emissions limitations, which should be determined at the local level, but reviewed by EPA.
395. GAO, IMPROVEMENTS, supra note 46, at 40. GAO, PENALTIES, supra note 46, at 15.
396. Although variances technically violate the CAA in this sense, we see variances more
as explicit discretionary enforcement.
397. We do not suggest the EPA actually be a formal appeal board or review board.
EPA’s decisions are an internal mechanism for focusing review. They should not be subject to
judicial review.
398. GAO, PENALTIES, supra note 46, at 15.
posal will force EPA and districts to compromise by moving toward middle ground.

CONCLUSION

We have argued that effective oversight falls between the extremes on the enforcement continuum—variances should be allowed, but they should be monitored by EPA. EPA clearly has the power to prohibit variances, either in toto or individually. And certain variances and districts demand oversight. However, EPA’s limited resources force it to rely on the goodwill, cooperation, and effectiveness of local districts for most of its enforcement.

EPA’s current ad hoc approach must be refined. Between the extreme enforcement possibilities are a variety of degrees of oversight. Each degree of oversight is important, because each degree creates a different outcome, with different environmental and governmental impacts. This Comment has attempted to analyze how to achieve an optimal balance between strict enforcement and local autonomy. We suggest that EPA narrow its choices, effectively limiting its overfiling discretion. EPA should focus on variances from “bad” districts and on variances allowing large amounts of excess emissions. These strategies will ensure fewer excess emissions over the long-term.

We expect that local districts and EPA will be able to use their different approaches to advance their interests. They can play the “good cop, bad cop” game. Local district officials can use the existence of federal enforcement as a negotiation tool in their bargaining with a source which has applied for a variance. The threat of EPA overfiling gives the district leverage to push the source to act quickly and deliberately. Yet, the local district will still be seen as the helpful and reasonable regulator that wants to work with the source and help the source meet the requirements of the “big bad EPA.” This “good cop, bad cop” scenario may help achieve compliance and improve the cooperative relationship between the agencies. In fact, these kinds of advantages might, in themselves, justify the excess emissions granted in variances.

In developing the interplay between regulators in a federal system, we must keep in mind the substantive goals of air quality. And we must remember the most effective means of reaching those goals. For the fed-

399. Chaset Interview, supra note 78; Guthrie Interview, supra note 82. In 1983, EPA Administrator Ruckelshaus pleaded with EPA officials to upgrade their enforcement and become “gorillas in the closet” that local officials could use to pressure sources. Clifford S. Russell, Monitoring and Enforcement, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 263 (Paul R. Portney ed., 1990). See also EPA FOUR YEAR PLAN, supra note 46, at 23 (the federal air enforcement program has concentrated on “bolstering State enforcement efforts by conducting selective Federal enforcement”).

400. EPA ENFORCEMENT PROJECT, supra note 46, at 2-12.
eral government, the means are state and local governments. While the federal government should hold local enforcement efforts to high standards, local districts should be lifted up, not beaten down. EPA should not automatically view local discretion as detrimental to the overall goal of improving air quality. Minimal lapses may sometimes be necessary to enhance local enforcement efforts. We must recognize that an effective machinery with slightly weaker standards will reach our substantive goals more quickly and with more certainty than will a divisive machinery with strict standards. In the end, cooperation rather than conflict will lead to better enforcement and improved air quality.