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The Supreme Court of California 1970-1971: Administrative Law

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I

ADMINISTRATIVE LAW

A. Overlapping Jurisdictions of State and Local Agencies

Orange County Air Pollution Control District v. Public Utilities Commission. The court held that air pollution control districts and the Public Utilities Commission have concurrent jurisdiction over the construction of electric generating units and that a utility must comply with the rules of both. Consequently, when a district refuses to issue a construction permit to a utility the commission may not order the utility to disregard the refusal and begin construction.

In the fall of 1969, Southern California Edison sought permission to construct two new steam electric generating units at its Huntington Beach plant. It applied first to the Public Utilities Commission for a certificate of public convenience and necessity and soon after to the Orange County Air Pollution Control District for a permit. The district acted first. Its control officer denied Edison’s application and the district’s hearing board upheld the decision. A week after the

1. 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971) (Peters, J.) (unanimous decision).
2. Id. at 947, 484 P.2d at 1362, 95 Cal. Rptr. at 18.
3. Id. at 954, 484 P.2d at 1367, 95 Cal. Rptr. at 23.
4. Id. at 949, 484 P.2d at 1363, 95 Cal. Rptr. at 19.
5. Privately owned public utilities are required to obtain this certificate before constructing electric generating units or plants. CAL. PUB. UTIL. CODE ANN. § 1001 (West 1956).
6. 4 Cal. 3d at 949, 484 P.2d at 1363, 95 Cal. Rptr. at 19. Districts may require that a permit be obtained before any building is constructed or equipment erected or operated and may condition the permit upon a showing that the proposed facility will comply with applicable emission controls. CAL. HEALTH & SAFETY CODE ANN. §§ 24263-64 (West 1967).
7. The officer based his denial on two grounds: First, Edison’s units would violate section 24243 of the Health and Safety Code. 4 Cal. 3d at 949, 484 P.2d at 1363, 95 Cal. Rptr. at 19. This section prohibits discharges that “cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or property.” CAL. HEALTH & SAFETY CODE ANN. § 24243 (West 1967). The district’s rule 20 provides that all facilities must comply with this section and with section 24242. 4 Cal. 3d at 949 n.3, 484 P.2d at 1363 n.3, 95 Cal. Rptr. at 19 n.3. Second, Edison failed to meet the specific emission standards of rule 67, adopted by the district’s governing board after Edison submitted its application and after the control officer handed down his first decision. 4 Cal. 3d at 949-50, 484 P.2d at 1364, 95 Cal. Rptr. at 20. Edison did not raise the issue of the rule’s retroactive application.
8. 4 Cal. 3d at 949-50, 484 P.2d at 1364, 95 Cal. Rptr. at 20. Edison declined to seek review in the courts, although Health and Safety Code sections 24322 and 24323 provide for such review. CAL. HEALTH & SAFETY CODE ANN. §§ 24322-23 (West 1967).
hearing board's decision, and aware of the district's refusal to issue a permit, the commission granted Edison's application and ordered it to begin construction immediately.

The commission asserted paramount jurisdiction, citing two decisions holding that in cases of conflict over matters of statewide concern the commission's orders supersede local ordinances. The court agreed that those cases were correctly decided, but it refused to accept the commission's characterization of the district as a local agency. The court then held that in this type of conflict the utility had to comply with the orders of both bodies. There was very little authority on this question, however, and although the court cited several negligence cases and an opinion of the attorney general, it relied most heavily on its determination of the legislature's intent.

I. THE CONSTITUTIONAL AND STATUTORY LANGUAGE AND STRUCTURE

Sections 22 and 23 of article XII of the California constitution give the Public Utilities Commission jurisdiction to regulate and supervise privately owned public utilities. Although the constitution grants certain powers directly, others must be legislatively created. Con-
sequently, the legislature enacted comprehensive utilities legislation, codified in 1951.\textsuperscript{18} This legislation gives the commission the power to require utilities to obtain a certificate of public convenience and necessity before constructing generating units or plants\textsuperscript{19} and to order their construction.\textsuperscript{20} Air pollution control districts, however, also have statutory power to require utilities to obtain a permit before beginning construction.\textsuperscript{21}

When conflicts in jurisdiction arise, the controlling section of the constitution is article XII, section 23.\textsuperscript{22} Section 23 provides that after the passage of legislation vesting regulation of public utilities in the Public Utilities Commission, all conflicting powers exercised by local governing bodies or commissions in existence when the enabling legislation passed shall cease.\textsuperscript{23} However, the laws vesting regulation in the commission were passed for the most part in 1911 or 1915;\textsuperscript{24} the air pollution districts were created in 1947.\textsuperscript{25} Consequently, even if the districts are "commissions" in the sense of that term as it is used in section 23, they were not in existence when the Public Utilities Commission began regulating utilities, and therefore that part of the section does not limit their jurisdiction.\textsuperscript{26} Thus, the decisive constitutional question is whether the districts are "governing bodies of the... counties."\textsuperscript{27}

The court held they are not.\textsuperscript{28} Both the commission\textsuperscript{29} and the

\textsuperscript{19.} CAL. PUB. UTIL. CODE ANN. § 1001 (West 1956).
\textsuperscript{20.} Id. § 761. See also id. §§ 701, 702, 762, 768, 770.
\textsuperscript{21.} CAL. HEALTH & SAFETY CODE ANN. §§ 24263-64 (West 1967). These sections give the districts power to require persons to obtain a permit before undertaking construction. Utilities are not exempted from this requirement.
\textsuperscript{22.} CAL. CONST. art. XII, § 23:
From and after the passage by the Legislature of laws conferring powers upon the ... Commission respecting public utilities, all powers respecting such public utilities vested in ... governing bodies of the several counties, ... or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the ... Commission ... .
\textsuperscript{23.} Id.
\textsuperscript{24.} See, e.g., CAL. PUB. UTIL. CODE ANN. § 701 (West 1956) (giving commission power to supervise and regulate public utilities), derived from ch. 20, §§ 9, 15, [1911] Cal. Stat. 17; id. § 762 (power to order modifications), derived from ch. 91, § 36, [1915] Cal. Stat. 134.
\textsuperscript{25.} Ch. 632, § 1, [1947] Cal. Stat. 1640.
\textsuperscript{26.} The court did not discuss whether by negative implication commissions created after the passage of such laws exercise at least concurrent jurisdiction with the Public Utilities Commission.
\textsuperscript{27.} CAL. CONST. art. XII, § 23. See note 22 supra.
\textsuperscript{28.} 4 Cal. 3d at 950-51, 484 P.2d at 1364-65, 95 Cal. Rptr. at 20-21.
court concluded that the control of air pollution is not a purely local concern. Air does not respect county boundaries; if one county fails to control its pollution, there is no way for more responsible counties to prevent their neighbor's polluted air from drifting into their territory. Significantly, the legislature seems to have felt the same way. It enacted a statute authorizing the establishment of separate air pollution control districts, and in the first section of that act noted “the people of the State of California have a primary interest in atmospheric purity...”

If air pollution is more than a local concern, it would be logical for the legislature to control it on a nonlocal basis. The legislature found explicitly that it was not feasible to reduce air contaminants by local county and city ordinances. The most plausible explanation for this finding is that local ordinances would be ineffective unless they could be enforced against bodies over which counties and cities ordinarily do not have jurisdiction, and the court concluded that the legis-

30. 4 Cal. 3d at 952, 484 P.2d at 1365, 95 Cal. Rptr. at 21.
31. California recently reemphasized its awareness that air pollution is a statewide matter. In 1967 it passed a bill that set up basinwide air pollution control districts. See note 35 infra.
33. CAL. HEALTH & SAFETY CODE ANN. § 24198 (West 1967) (emphasis added).
34. CAL. HEALTH & SAFETY CODE ANN. § 24199(d) (West 1967). The legislature's intent to make the districts more than local agencies might also be inferred, although somewhat tenuously, from the legislative history. Subsection (c) of section 24199 states that “in other portions of the State the air is not so polluted.” Id. § 24199(c). In an earlier version of the bill, the word “polluted” was followed by “and that, therefore, state-wide regulations are not practical and feasible.” ASSEMBLY JOUR., 57th Session, Vol. 2, at 3983. This language may have been deleted from the final bill because the legislature did not want to suggest that air pollution regulations were anything other than state regulations.
35. Another explanation for the finding is that local pollution control efforts can easily be thwarted by the drift of pollutants from counties or cities that do not adequately control pollution; to prevent this some sort of state control is necessary. However, the subsequent legislation still permits this situation since the statute does not require but only authorizes counties to set up pollution districts. CAL. HEALTH & SAFETY CODE ANN. §§ 24202-06 (West 1967). Apathetic or unwilling counties can still endanger neighboring efforts. In fact, this has been a problem. In 1967 the Assembly Interim Committee on Transportation and Commerce reported with concern that control districts had been formed in areas where pollution problems existed and that many districts were not adequately controlling the smog problem or preparing for the future. The committee recommended a statewide approach to air pollution control. FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON TRANSPORTATION AND COMMERCE, Vol. 3, No. 13, in the Appendix to the ASSEMBLY JOUR., Vol. 1, 1967 Regular Session, at 11 (Appendix). It suggested that the State Health Department set minimum standards for all types of pollutants; that a board be established within the Health Department to adopt statewide regulations, with the authority to supersede those of any districts that were not adequately enforcing the state standards; and that districts should be formed on an air basin basis, empowered to adopt regulations stricter than the state's. Id. at 13. The legislature acted on these recom-
islature was surely aware of such jurisdictional limitations on local governments. In fact, 8 years later, the legislature specified that district orders, rules, and regulations were enforceable against state and local governmental agencies and public districts and that violations could be enjoined.

There are several other indications that the legislature intended pollution districts to be more than local agencies. First, they enforce a state statute that no state agency is empowered to implement. They are authorized to make and enforce all rules and to perform all other acts necessary to accomplish the purposes of the statute. District control officers are required to enforce the provisions of the Act, the provisions of the Vehicle Code relating to the emission or control of air contaminants, and all orders, regulations, and rules prescribed by the district's air pollution control board. It is true that a district comes into existence only with the approval of the county board of supervisors, its boundaries are coextensive with the county’s, and the entire board of supervisors sit as ex officio officers; however, the court attached greater significance to the legislature’s careful legal separation of the district and the county. These arguments demonstrating that the districts are more than local agencies also indicate that they were intended to share jurisdiction over utilities with the commission. In some instances the legislature has foreseen conflicts of jurisdiction with the commission and has explicitly provided that the commission's juris-

mendations by passing the Mulford-Carrell Air Resources Act, ch. 1545, § 5, [1967] Cal. Stat. 3680. This Act provides for the division of the state into air basins [CAL. HEALTH & SAFETY CODE ANN. §§ 39011, 39051 (West 1967)]; for state intervention when local or regional authorities fail to meet their responsibilities [id. §§ 39012, 39054]; for the repeal of rules of a local or regional authority if they will not achieve applicable air quality standards and the promulgation of new ones [id. § 39052(f)]; for civil fines [id. §§ 39260-61]; and for the creation of regional districts [id. §§ 39300, 39310].

The committee's recommendation that the legislature adopt a statewide approach to air pollution control might seem to refute the argument that the districts authorized by the 1947 Act were something other than local agencies. But the better inference is that the legislature intended in 1947 to clothe the districts with some of the trappings of state power and that the 1967 committee recommendation was meant solely to solve a problem that had been belatedly recognized: that in spite of the authorization to create districts with greater than local powers, the air pollution problem could not be controlled unless all counties were required to establish functioning and effective districts.

36. 4 Cal. 3d at 952, 484 P.2d at 1365, 95 Cal. Rptr. at 21.
37. CAL. HEALTH & SAFETY CODE ANN. § 24254 (West 1967). Violations by other individuals or bodies may be similarly enjoined [id. § 24252], and violations by persons other than governmental agencies or public districts are misdemeanors [id. § 24253].
38. CAL. HEALTH & SAFETY CODE ANN. §§ 24260, 24262 (West 1967).
39. Id. § 24224(a), (b).
40. 4 Cal. 3d at 952, 484 P.2d at 1366, 95 Cal. Rptr. 22. See the decision for examples of this separation.
diction is paramount. For example, Health and Safety Code section 24246 allows a district's air pollution control officer to stop and inspect any vehicle that does not run on rails. If this and similar provisions prevent the districts from encroaching on the commission's jurisdiction in certain areas, it can be inferred that the districts share jurisdiction with the commission in all other areas. Similarly, both the Water Code and the Mulford-Carrell Air Resources Act, but not the 1947 Act, provide that no order, rule, or regulation of the respective regional boards is a limitation on the "power of a state agency in the enforcement or administration of any law which it is specifically permitted or required to enforce or administer." Lastly, Health and Safety Code section 24251 provides for limited agricultural exemptions from the 1947 statute's requirements but does not provide for an exemption for public utilities.

II. POLICY CONSIDERATIONS IN FAVOR OF CONCURRENT JURISDICTION

To discover the legislature's intent, the court looked beyond the structure and language of the Act to the nature and extent of the problem that the legislature was trying to solve. The court cited statistics showing that power plants contribute a large percentage of the total nonvehicular emissions of nitrogen oxides. Such statistics, although not compelling proof of the legislature's intent in 1947, do show that power plants are prodigious polluters requiring strict regulation by a vigilant agency.

41. See the examples in footnote 18 of Cassidy, Public Utility Regulation in California, in the first volume of the Public Utilities Code.
42. CAL. HEALTH & SAFETY CODE ANN. § 24246 (West 1967). The constitution includes railroads in the list of businesses that it declares to be public utilities subject to regulation by the Public Utilities Commission as provided by the legislature. CAL. CONST. art. XII, § 23.
43. CAL. WATER CODE ANN. § 13001(c) (West 1956); CAL. HEALTH & SAFETY CODE ANN. § 39054.1(c) (West 1967). These sections have not been interpreted.
44. CAL. HEALTH & SAFETY CODE ANN. §§ 24251-51.1 (West 1967). There is also an exemption from criminal sanctions for governmental agencies, public districts, and their officers and employees, but these bodies and people can be civilly enjoined. Id. § 24254.
45. In a 1970 Los Angeles superior court case, the judge found that 44% of the nitrogen oxides discharged from nonvehicular sources in the county came from power plants, and in the instant case the court said it was estimated that 63% of such emissions in Orange County came from Edison's plants. 4 Cal. 3d at 953, 484 P.2d at 1366-67, 95 Cal. Rptr. at 22-23. The commission, as well as the court, appears to have accepted the representations of the Orange County Air Pollution Control District and the State Air Resources Board that the amount of emissions of nitrogen oxides is the "appropriate measure of contribution to the air pollution problem." In re Southern California Edison Co., 86 P.U.R.3d 482, 486 (Cal. Pub. Util. Comm'n 1970).
46. The statistics are not persuasive because they are very recent ones. See note 45 supra.
The remaining question is which agency this should be. A second argument the court advanced as an indication of the legislature's intent helps provide the answer. The court said that without evidence that the legislature intended to create a "patchwork structure" for the regulation of utilities, it would not impute that intent to it.\textsuperscript{47} Such a patchwork structure would emerge if the commission were given exclusive jurisdiction over privately owned utilities, while municipally owned utilities, over which the commission has no authority unless expressly provided by statute,\textsuperscript{48} were regulated by pollution districts. Regardless of the legislature's intent, it makes sense to have one agency regulate both privately and municipally owned utilities. If they were regulated by different agencies, the salutary effect of strict controls over one type of utility could be severely diluted by lax regulation of the other.

Moreover, the commission, with apparent jurisdiction to regulate private utility emissions,\textsuperscript{49} has in fact given very little attention to the matter.\textsuperscript{50} The commission issued General Order 131 requiring that it

\textsuperscript{47} 4 Cal. 3d at 953, 484 P.2d at 1366-67, 95 Cal. Rptr. at 22-23.
\textsuperscript{48} 4 Cal. 3d at 953, 484 P.2d at 1366-67, 95 Cal. Rptr. at 22-23.
\textsuperscript{49} 52 Cal. 2d 655, 661, 343 P.2d 913, 917 (1959).
\textsuperscript{50} 52 Cal. 2d 655, 661, 343 P.2d 913, 917 (1959).
consider the impact of generating plants on "the air, water, land, and other aesthetic, environmental and ecological requirements" only after hearings had begun on the proposed Huntington Beach generating units. Instead, the commission has been concerned primarily with the provision of abundant, low-cost electrical energy. However, both the passage of the 1947 Act and the tremendous current interest in pollution control suggest that the public may be willing to pay the cost—at least more of the cost than the commission is ready to pay—of reducing air pollution. Bodies specifically set up either to control air pollution or to protect the environment generally should be allowed to share in decisions that require striking a balance between the provision of electricity and the control of air pollution.

There are problems with the court's decision to vest this jurisdiction in a body that is not responsible for providing adequate electrical power at a reasonable cost. A pollution agency has neither the duty to strike a balance between the provision of power and the protection of the environment nor the expertise to weigh the two intelligently. This problem can be acute when the authority to make such decisions is placed in county districts rather than in a state agency. In order to avoid pollution and unsightliness within their boundaries, counties might restrict the construction of additional plants or units, especially nuclear ones, hoping that other counties will permit construction and allow them to import the needed power. A solution to this problem would be to carry the logic of the 1947 Act one step further and vest ultimate authority in a state air pollution control board, as the Assembly's Interim Committee on Transportation and Commerce recommended. In answer to these objections, the court pointed out that concluded that adding new generating units would result in less pollution than generating electricity with the existing less efficient units. 86 P.U.R.3d at 486.

51. Brief for Petitioner at 19, Orange County Air Pollution Control Dist. v. Public Utilities Comm'n, 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).

52. This has been the traditional concern of public utilities. See, e.g., Smith, Electricity and the Environment—The Generating Plant Siting Problem, 26 BUS. LAW. 169, 171 (1970). The author argues that in the past utilities have primarily considered engineering and economic factors and have overlooked environmental questions and the possibilities of alternative sites and methods of generation.

53. Id. at 188.

54. On the other hand, the governing boards of California's districts are made up of the county board of supervisors sitting ex officio. CAL. HEALTH & SAFETY CODE ANN. § 24220 (West 1967). Consequently, even while sitting as pollution controllers, the boards cannot help remembering their more general responsibilities to their constituencies, such as the provision of adequate electricity and the creation of more jobs. Although the hearing boards are composed of three independent individuals [id. § 24225], they should be at least partially responsive to the governing board's feelings.

55. The Mulford-Carrell Air Resources Act is a step in this direction. See note 35 supra.
there is provision in the statute for superior court review of a district ruling and for a court order permitting discharges in excess of that permitted by the district's rules and regulations.\textsuperscript{56} These provisions make it highly unlikely that "the horrific nightmare envisioned by the commission—inadequate electrical service—will become a reality."\textsuperscript{57} At least one commentator has suggested that utility siting decisions should not be made by a unified environmental agency or a statewide or regional land use planning agency.\textsuperscript{58} Such a scheme splits the responsibility for supplying adequate power and the authority for making important decisions affecting that supply between two bodies.\textsuperscript{69} He also rejected a separate siting agency. If the members are representatives of other governmental agencies, which is true in the state of Washington, they may vote to further the interests of their own agencies. If members are chosen because of relevant special interests or professional qualifications,\textsuperscript{60} the same sort of partisan voting is possible.\textsuperscript{61} A more fundamental complaint is that this solution requires the creation of a new body, whose members may or may not have the required expertise, when existing agencies could do the job as well or better.

A third alternative, leaving the decision to the Public Utilities Commission, may be the best way to handle the problem.\textsuperscript{62} Its greatest advantage is the concentration of authority and responsibility in one body, but an additional advantage is that the commission is already in existence and has developed the necessary expertise. Since public utilities commissions are often insufficiently concerned with environmental protection, the legislature may have to require the commission to "base its determinations on a statutory formula defining relevant environmental factors, require that comments by existing environmental agencies or by a separate environmental review board be 'considered,' allow broad citizen participation, and provide for substantial judicial review. . . ."\textsuperscript{63} Finally, the state can impose greater controls on the commission's power, making the siting decision "subject to mandatory environmental constraints imposed by other state agencies . . . ."\textsuperscript{64}

As a result of the supreme court's decision, the scheme existing today in California approximates this last alternative. First, the major

\textsuperscript{56} CAL. HEALTH & SAFETY CODE ANN. §§ 24322-23,24291 (West 1967).
\textsuperscript{57} 4 Cal. 3d at 954, 484 P.2d at 1367, 95 Cal. Rptr. at 23.
\textsuperscript{58} See Smith, supra note 52, at 188-90.
\textsuperscript{59} See text accompanying notes 53-55 supra.
\textsuperscript{60} Maryland was considering this method of choosing members to sit on a proposed siting agency. There would be three members: a doctor, a member of the public, and a representative of industry. \textit{Id.} at 189 n.93.
\textsuperscript{61} \textit{Id.} at 189.
\textsuperscript{62} \textit{Id.} at 188-89.
\textsuperscript{63} \textit{Id.} at 188.
\textsuperscript{64} \textit{Id.}
siting responsibility and authority rest with the commission. Second, the commission has promulgated its General Order 131, requiring it to consider environmental factors, and the legislature recently enacted a similar requirement. When making an order relating to the location of structures, the commission must give consideration to, and include in its orders findings upon, community values, recreational and park areas, historical and aesthetic values, and the influence on the environment. Third, whether or not the commission is required to allow conservation-oriented groups to be heard at its hearings, it has in fact permitted several such groups to participate. Fourth, the commission's decisions are “subject to mandatory environmental constraints imposed by” the air pollution control districts. And, finally, since the districts now have an effective veto over certain commission decisions, the real need in California is for review of district rather than commission decisions, and ample provision has been made for such review.

CONCLUSION

In Orange County Air Pollution Control District v. Public Utilities Commission, the court answered a question that had never been addressed directly: In the case of a conflict between the Public Utilities Commission and a body that is something other than a local agency—in this case an air pollution control district—who prevails? It is not clear whether its decision giving the districts concurrent jurisdiction will be extended to conflicts between the commission and other agencies. There are several other bodies that, like air pollution control districts, are something other than local agencies and could be treated similarly. First of all, there are reclamation, irrigation, and school districts; districts of this sort have been held to be “state agencies for carrying out state purposes,” precluding county property taxation. In addition, regional water resources control boards have the authority to issue cease and desist orders against “discharge[s] of waste . . .

65. Ch. 68, § 2, [1971] Cal. Stat. —. This section was enacted before the court's decision, hence before the possibility of jurisdictional conflict was apparent; therefore, it seems unlikely that it was an attempt to deprive the districts of jurisdiction by specifically granting jurisdiction to the commission.
66. See Smith, supra note 52, at 188.
69. See, e.g., People v. Richards, 86 Cal. App. 86, 260 P. 582 (2d Dist. 1927); Reclamation District No. 551 v. County of Sacramento, 134 Cal. 477, 66 P. 668 (1901). See also Brooks, The Metropolis, Home Rule, and the Special District, 11 HAST. L.J. 245, 261 (1959). Brooks recognized that bodies of this sort have been held to be state agencies; but he thought that finding a state system was necessary to this holding, and that there was no state air pollution control system but merely "local district[s] enforcing state law." Id.