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A Not-So-Hot Ticket: Orders for Abatement From Air Quality Management Districts and Their Implications

By Christian F. Kemos*

I. Introduction

For the enforcement of air quality regulations, orders for abatement are the strongest administrative sanction available in the arsenal of an air pollution control district¹ — and they are becoming more commonly used by regional air pollution control districts. The regulated community is finding itself subject to orders for abatement ranging from requiring mitigation of sources contributing to high cumulative air pollution impacts to odor abatement programs for existing facilities.² The increasingly strong measures taken by air pollution districts, the

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1. Kenneth A. Manaster, *Administrative Adjudication of Air Pollution Disputes: The Work of Air Pollution Control District Hearing Boards in California*, 17 U.C. Davis L. Rev. 1117, 1136 (1984) [hereinafter *Administrative Adjudication*]. An order for abatement will direct compliance with the statute or rule being violated and may include provisions for the installation of control equipment, a schedule for completion or achieving compliance, or a directive to take other action determined appropriate to accomplish the necessary abatement. SCAQMD Reg. VIII, Rule 805 (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r805.pdf> (last visited Oct. 14, 2004). Instead of issuing an abatement order, the Hearing Board may also grant a variance, which functions to temporarily protect the polluter from air district rules and regulations. CAL. HEALTH & SAFETY CODE § 42350 (West, WESTLAW through 2004) ("Any person may apply to the hearing board for a variance from Section 41701 or from the rules and regulations of the district."); *Administrative Adjudication, supra*, at 1123-1124.

size of the fines associated with air pollution violations, and the resulting pressures on industry have resulted in intense legal battles.³ As orders for abatement become more prevalent as an enforcement tool, the regulated community must discern what avenues of relief are available when a local air quality management district issues an order of abatement.

The following discussion clarifies the various regulatory layers from which orders for abatement arise, and presents avenues of relief for the regulated community faced with an order for abatement from an air quality management district. To further illustrate the mechanisms used for air pollution orders of abatement, this discussion focuses primarily on California's South Coast Air Quality Management District (SCAQMD), summarizes the applicable rules and statutes of orders for abatement, discusses avenues for appeal, and recommends approaches to dealing with an issued order for abatement. This article examines the federal context in which the SCAQMD operates and the implications for federal enforcement by the United States Environmental Protection Agency (USEPA), the rules and codes which govern the order for abatement process, the rules and codes by which the orders are issued, and the practical implications of the use of orders for abatement for regulated entities.

II. The South Coast Air Quality Management District

To get a perspective on how particular air quality management districts deal with orders for abatement, this study focuses on California's South Coast Air Quality Management District (SCAQMD). The SCAQMD is the air pollution control agency encompassing all of Orange County and the urban portions of Los Angeles, Riverside, and San Bernardino counties.⁴ This area is about 10,000 square miles and is home to nearly 16 million people — about half the population of the state of California.⁵ Due to its geographic location as both an urban center and as a closed air basin, the district is the second most populated urban area in the United States and one of the smoggiest.⁶

The SCAQMD is the exclusive local agency for comprehensive control over air pollution in the South Coast Air Basin.⁷ The SCAQMD is primarily responsible for controlling emissions from stationary sources of air pollution, and has very limited jurisdiction over mobile sources.⁸ Therefore, its rules and regulations are predominantly geared toward stationary and area sources.⁹ Facilities controlled by the SCAQMD range in size from large facilities (like power plants and refineries) to smaller ones (like corner gas stations).¹⁰ The SCAQMD estimates that 28,000 businesses are operating under

2. TRACY A. GOSS & AMY KROEGER, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, WHITE PAPER ON POTENTIAL CONTROL STRATEGIES TO ADDRESS CUMULATIVE IMPACTS FROM AIR POLLUTION (Aug. 2003), available at http://www.aqmd.gov/rules/ciwg/final_white_paper.pdf (last visited Oct. 14, 2004). Hereinafter, the South Coast Air Quality Management District will be footnoted as SCAQMD.

3. See, e.g., *The Sherwin Williams Co. v. South Coast Air Quality Management District*, 86 Cal. App. 4th 1258 (2001); *Dunn-Edwards Corp. v. South Coast Air Quality Management District*, 19 Cal. App. 4th 519 (1993); *Dunn-Edwards Corp. v. South Coast Air Quality Management District*, 19 Cal. App. 4th 536 (1993). See also SCAQMD, AQMD's Enforcement Authority, at [http://www.aqmd.gov/](http://www.aqmd.gov/legal/enfauth.html)

[legal/enfauth.html](http://www.aqmd.gov/legal/enfauth.html) (last updated Mar. 19, 2004) [hereinafter AQMD's Enforcement Authority].

4. SCAQMD, *Introducing AQMD*, at <http://www.aqmd.gov/aqmd/intraqmd.html> (last updated Apr. 28, 2004) [hereinafter *Introducing AQMD*].

5. *Id.*

6. *Id.*

7. *People v. A-1 Roofing Service, Inc.*, 87 Cal. App. 3d Supp. 1, 12 (1978).

8. GOSS & KROEGER, *supra* note 2, at 8.

9. *Id.*

10. *Introducing AQMD*, *supra* note 4. See also AQMD's Enforcement Authority, *supra* note 3.

SCAQMD permits.¹¹ The SCAQMD also regulates the manufacture and sale of certain types of products that are also considered stationary sources of air pollution, such as house paint, furniture varnish, and thousands of other products containing solvents that evaporate into the air.¹² Stationary sources, including both businesses and residences, contribute significantly to ozone-forming air pollution and about 23 percent of such ozone pollution comes from these sources in the South Coast Air Basin.¹³

The SCAQMD is the largest air quality management district in California.¹⁴ It is also particularly active because the South Coast Air Basin is a non-attainment area under the federal Clean Air Act, which subjects the district to stricter regulation and increased scrutiny by the state and federal governments.¹⁵ Consequently, the SCAQMD has regularly used orders for abatement in its enforcement arsenal¹⁶ for more than a decade. Since it is part of a nation-wide federal program, how the SCAQMD has applied orders for abatements presents a good illustration of how the order for abatement process works, how it is enforced, and what options are available to the regulated community.

III. Regulatory Context and Federal Authority

The USEPA and the states have concurrent authority to enforce Clean Air Act permit conditions and State Implementation Plan (SIP) provisions.¹⁷ SIPs are required by federal clean air laws in areas with unhealthy levels of ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, and inhalable particulate matter, and describing how they will attain national ambient air quality standards.¹⁸ "SIPs are not single documents, rather they are a compilation of new and previously submitted plans, programs (such as monitoring, modeling, permitting, etc.), district rules, state regulations, and federal controls."¹⁹ If the USEPA "finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit," the administrator must notify the person by issuing a Notice of Violation (NOV) and must notify the state in which the plan applies.²⁰ When initiating a federal enforcement action, the USEPA is required to determine a source's compliance with SIP requirements by using the test procedures set forth in 40 C.F.R. § 52.12(c).²¹ If the SIP does not prescribe a test method, the USEPA must

11. *Introducing AQMD*, *supra* note 4.

12. *Id.*

13. *Id.* The remaining 77 percent comes from mobile sources, which include mainly cars, trucks, and buses, but also includes construction equipment, ships, trains, and airplanes. *Id.* Mobile sources, therefore, contribute to the bulk of the overall air pollution in the Orange County area. Mobile sources, however, are primarily regulated by the state and federal governments rather than the SCAQMD. *Id.* For example, emission standards for mobile sources are established by the California Air Resources Board (CARB) and the USEPA. *Id.* However, the SCAQMD and the state and federal agencies work together to control air pollution emissions from several sources, both mobile and stationary. GOSS & KROEGER, *supra* note 2, at 8.

14. *Introducing AQMD*, *supra* note 4.

15. *Id.*

16. Christian Kemos, *Survey of SCAQMD Orders and Variances from 1998-2003* (2004) (unpublished survey of board minutes of the SCAQMD from 1998 to 2003, on file with author).

17. 2 MANASTER & SELMI, *CAL. ENVTL. L. & LAND USE PRAC.* § 40.17(3)(c) (1989) [hereinafter *CAL. ENVTL. L.*].

18. California Air Resources Board (CARB), *California's State Implementation Plan*, at <http://www.arb.ca.gov/planning/sip/sip.htm> (last updated Oct. 28, 2004).

19. *Id.*

20. 42 U.S.C. § 7413(a)(1) (2000).

21. *CAL. ENVTL. L.*, *supra* note 17, § 40.19(2).

use the test procedures listed in 40 C.F.R. § 60.²² Although this implies that federal test methods are necessary for federal enforcement, 40 C.F.R. § 52.12(c) specifies that any credible evidence or information that is relevant to whether a source would have been in compliance with applicable requirements is allowed in determining federal compliance.²³

Further, the California SIP provisions are embodied both in local air pollution control district rules and regulations (the SCAQMD rules) and state statutes and regulations (the California Health and Safety Code). Since state and local statutes and regulations make up the SIP provisions in California, those laws are enforceable both under California law and under the federal authority available pursuant to the SIP.²⁴

The USEPA has independent authority to enforce any state or local requirements that have been approved by USEPA as part of the SIP.²⁵ If the state authorities issue a variance granting relief from compliance with the state or local district rule, the state's action is independent of federal action, and offers no protection against federal enforcement of a state or local rule that has been incorporated into the state SIP unless and until the USEPA also approves the variance.²⁶ Since the USEPA must approve a variance in order to offer polluters protection from federal enforcement, logically one would conclude that the USEPA would likewise have to approve a stipulated order for abatement to avoid federal enforcement where the state has already acted. However, bringing a federal enforcement action in the face of the state's rational determination of whether to grant a variance usurps

the role meant to belong to the states in enforcing air pollution control. Therefore, it is unlikely that USEPA would act against a state or locally issued order for abatement, variance, or stipulated abatement order.²⁷

In that light, the actions of a local air quality district carry significant weight.

IV. Application of State and Local Requirements

A. California Health and Safety Code

The California Health and Safety Code provides the state statutory authority for orders for abatement and discusses the relationship between orders for abatement and variances. Under the Code, the Hearing Board may, after public notice and a hearing, issue an order for abatement whenever it finds that any person is in violation of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants.²⁸ Further, on its own motion or upon the motion of the Hearing Board or the air pollution control officer, the Hearing Board may, after public notice and a hearing, issue an order for abatement whenever it finds that any person is in violation of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants.²⁹

Alternatively, the air pollution control officer and the regulated business or person can stipulate to particular terms and conditions and the Hearing Board will issue an order for abatement as stipulated without making the finding required under Section 42451(a).³⁰ This does not, however, avoid the requirement under SCAQMD Rule 806(b) that the Hearing Board include a written explanation of its action in the order for abatement.³¹

22. *Id.*

23. 40 C.F.R. § 52.12(c) (2003).

24. CAL. ENVTL. L., *supra* note 17, § 40.19(3).

25. CAL. ENVTL. L., *supra* note 17, § 40.19(1).

26. CAL. ENVTL. L., *supra* note 17, § 40.19(3).

27. *Id.*

28. CAL. HEALTH & SAFETY CODE § 42450.

29. *Id.* § 42451(a).

30. *Id.* § 42451(b).

31. *Id.*

The order for abatement is framed in the form of a writ of injunction, requiring the polluter to refrain from a particular act, and may also be conditional, requiring the polluter to refrain from a particular activity unless certain conditions are met.³² In practice, this can have the effect of allowing a violation to continue as long as measures are being undertaken by the polluter to achieve compliance by a certain date.

A key provision of the Code states that an order for abatement shall not have the effect of permitting a variance.³³ However, an exception is made if all the conditions for a variance are met, including timely action by the polluter to comply or seek a variance that is reasonable under the circumstances.³⁴

Should an order for abatement be violated, Section 42452 requires that a proceeding for mandatory injunction be held.³⁵ When an order for abatement is made and the polluter has not been given a stay to continue operations, a preliminary injunction will be issued.³⁶ If the polluter continues, or threatens to continue, to violate an order for abatement, it is sufficient proof to warrant the immediate granting of a temporary restraining order.³⁷

B. SCAQMD Rules

The South Coast Air Quality Management District enacted Regulation VIII to provide rules governing the scope, procedure, and content of orders for abatement issued

by the SCAQMD. Notwithstanding Rule 501, which governs all other hearings (and particularly variances), Regulation VIII applies to all hearings on orders for abatement before the hearing board ("Hearing Board") of the SCAQMD.³⁸ The Hearing Board is a quasi-judicial panel and is authorized to provide relief from Air Quality Management District ("AQMD") regulations under certain circumstances.³⁹ As required under state law, Hearing Board members are appointed by, but act independently of, the AQMD Governing Board.⁴⁰ The Hearing Board is authorized to address a variety of issues: petitions by companies for variances; petitions for abatement orders; appeals by companies from the granting of permits, permit conditions, permit denials and suspensions; denials of emission reduction credits and denials of pollution control plans; and appeals by third parties.⁴¹ On the other hand, the Hearing Board is not authorized to do the following: modify rules; exempt a business from complying with a rule; grant a variance from a violation of the public nuisance law (such as one that creates an odor problem or threatens public health or property); or review a violation notice in any way.⁴² As discussed later, though there are limitations on the Hearing Board's jurisdiction that seem to indicate that the Board is relatively limited in its ability to grant variances, the Hearing Board has many opportunities to choose among the enforcement

32. *Id.* § 42452.

33. *Id.*

34. SCAQMD Reg. VIII, Rule 515(b)(1)(A) (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r815.pdf> (last visited Oct. 14, 2004).

35. CAL. HEALTH & SAFETY CODE § 42453.

36. *Id.* § 42454.

37. *Id.*

38. SCAQMD Reg. VIII, Rule 801 (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r801.pdf> (last visited Oct. 14, 2004).

39. SCAQMD, *What You Need to Know About the Hearing Board and Variances*, at <http://ozone.aqmd.gov/hearbd/hearbd.html> (last updated Nov. 26, 2003) [hereinafter *What You Need to Know About the Hearing Board*].

40. *Id.*

41. See, e.g., *What You Need to Know About the Hearing Board*, *supra* note 39. See also AQMD's *Enforcement Authority*, *supra* note 3.

42. *What You Need to Know About the Hearing Board*, *supra* note 39.

options. The Hearing Board weighs the evidence and reaches a decision after holding an administrative hearing in which individuals or companies that have come into conflict with AQMD rules and regulations are allowed to present their arguments.⁴³

i. Order for Abatement Process

Unlike variances, where the regulated business or person initiates the proceedings by filing a petition or application for a variance, orders for abatement are initiated by the ordering agency — in this case, the SCAQMD.⁴⁴

In accordance with Health and Safety Code Section 42451, the Hearing Board sends notice and holds hearings for the purpose of issuing orders for abatement.⁴⁵ Filing of the notice and service upon the polluter is discussed in SCAQMD Rule 803.⁴⁶ The content and format of the petition is outlined in SCAQMD Rule 804. A proposed order for abatement may also be included.⁴⁷ Any person may file a written answer or other responsive pleading, memorandum, or brief until five days before the hearing.⁴⁸ Rules governing evidence, including oral evidence, rights of the parties, and the rights of interested members

of the public to testify, are outlined in SCAQMD Rule 808.⁴⁹ The petition must comply with these Rules relating to the form, filing, and service of petitions unless the chair or any three members of the Hearing Board direct otherwise and confirm such direction in writing.⁵⁰

Preliminary rulings not determinative of the merits of the case, such as setting dates for hearings, granting continuances, approving petitions for filing, and allowing amendments, do not require notice or a hearing, and may be made by the chair or any three members of the Hearing Board without a formal meeting.⁵¹ The Hearing Board also has the discretionary power to grant continuances for up to fifteen days.⁵²

A decision so made must be reduced to writing, served, and filed within 30 days after submission of cause by the parties, and must include factual findings, make a determination on the issues presented, and state the order of the Hearing Board.⁵³ Unless stipulated otherwise, a decision by the Hearing Board becomes effective upon a concurring vote of three or more of its members, which typically occurs at the public hearing on the petition.⁵⁴

43. *Id.*

44. *Administrative Adjudication*, *supra* note 1, at 1138.

45. SCAQMD Reg. VIII, Rule 802 (1975), *available at* <http://www.aqmd.gov/rules/reg/reg08/r802.pdf> (last visited Oct. 14, 2004).

46. SCAQMD Reg. VIII, Rule 803 (1988), *available at* <http://www.aqmd.gov/rules/reg/reg08/r803.pdf> (last visited Oct. 14, 2004).

47. SCAQMD Reg. VIII, Rule 804 (1988), *available at* <http://www.aqmd.gov/rules/reg/reg08/r804.pdf> (last visited Oct. 14, 2004).

48. SCAQMD Reg. VIII, Rule 807 (1975), *available at* <http://www.aqmd.gov/rules/reg/reg08/r807.pdf> (last visited Oct. 14, 2004).

49. SCAQMD Reg. VIII, Rule 808 (1988), *available at* <http://www.aqmd.gov/rules/reg/reg08/r808.pdf> (last visited Oct. 14, 2004).

50. SCAQMD Reg. VIII, Rule 809 (1975), *available at* <http://www.aqmd.gov/rules/reg/reg08/r809.pdf> (last visited Oct. 14, 2004).

51. SCAQMD Reg. VIII, Rule 813 (1975), *available at* <http://www.aqmd.gov/rules/reg/reg08/r813.pdf> (last visited Oct. 14, 2004).

52. SCAQMD Reg. VIII, Rule 815 (1975), *available at* <http://www.aqmd.gov/rules/reg/reg08/r815.pdf> (last visited Oct. 14, 2004).

53. SCAQMD Reg. VIII, Rule 816 (1988), *available at* <http://www.aqmd.gov/rules/reg/reg08/r816.pdf> (last visited Oct. 14, 2004).

54. SCAQMD Reg. VIII, Rule 817 (1975), *available at* <http://www.aqmd.gov/rules/reg/reg08/r817.pdf> (last visited Oct. 14, 2004).

ii. Abatement Orders and Variances

An order for abatement will direct compliance with the statute or rule being violated and may include provisions for the installation of control equipment, a schedule for completion or achieving compliance, or a directive to take other action determined appropriate to accomplish the necessary abatement.⁵⁵ Alternatively, the Hearing Board may order the shutdown of any source creating emissions in violation of the law.⁵⁶ This suggests that in cases where a product is found to be in violation, the Hearing Board is likely to require cessation of sale. Usually an air district will frame orders for abatement such that the polluters will be required to refrain from a particular activity unless they comply with certain conditions.⁵⁷

An order for abatement will not be granted unless the Hearing Board makes all of the following findings under Rule 806(a):

- 1) That the polluter is in violation of Section 41700⁵⁸ or 41701, Health and Safety Code, or any SCAQMD Board rule or regulation;
- 2) That the order for abatement will not constitute a taking of property without due process of law; and
- 3) That if the order for abatement results in the closing or elimination of an otherwise lawful business,

such closing would not be without a corresponding benefit in reducing air contaminants.⁵⁹

Instead of issuing an abatement order, the Hearing Board may grant a variance.⁶⁰ A variance functions to temporarily protect the polluter from air district rules and regulations, designed by the legislature to benefit polluters who need time to operate without being subject to enforcement penalties.⁶¹ Though variances cannot grant relief for all types of statutory air pollution control violations, they are applicable to violations of permits to operate, under which many abatement orders arise.⁶²

The findings required to grant a variance are very similar to the findings required for an abatement order. For a variance, the Board must make the following findings:

- 1) That the polluter applying for a variance is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district;
- 2) That due to conditions beyond the reasonable control of the polluter, requiring compliance would result in either (A) an arbitrary or unreasonable taking of property, or (B) the practical closing and elimination of a lawful business; and
- 3) That such closing or taking would

55. SCAQMD Reg. VIII, Rule 805 (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r805.pdf> (last visited Oct. 14, 2004).

56. *Id.*

57. *Administrative Adjudication*, *supra* note 1, at 1140.

58. CAL. HEALTH & SAFETY CODE § 41700 ("Except as otherwise provided in Section 41705, no person shall discharge from any source whatsoever such quantities of air contaminants or other material which 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.")

59. SCAQMD Reg. VII, Rule 806(a) (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r806.pdf> (last visited Oct. 14, 2004).

60. CAL. HEALTH & SAFETY CODE § 42350 ("Any person may apply to the hearing board for a variance from Section 41701 or from the rules and regulations of the district.")

61. *Administrative Adjudication*, *supra* note 1, at 1123-1124.

62. *Id.*

be without a corresponding benefit in reducing air contaminants.⁶³

Next, I will examine the requirements and elements of these parallel findings for abatement orders and variances.

a. Finding Number One

For the Board to either issue an abatement order or grant a variance, first there must be a violation of particular sections of the Health and Safety codes or District regulations. The polluter receives notice from the Board that he is in violation, or becomes aware on his own initiative (possibly through his own testing), that he is not in full compliance or will not be in the foreseeable future.⁶⁴ This step is usually the easiest to prove and often the least debatable.

However, for a variance, there are some additional considerations to keep in mind. The polluter plays a key role in advising the Hearing Board as to the scope of which rules have been violated. If a variance is to be granted from the order for abatement, the Hearing Board should draw the variance narrowly, based on the particular rules that the polluter has violated.⁶⁵ As the modern regulatory climate has become one of overlapping jurisdictions and regulations, it is essential for the polluter to determine which rules have been violated so the polluter can form a strategy in applying for a variance or defending the order. If the polluter is unfamiliar with the regulations affecting his violation, the staff of the SCAQMD can assist in delineating which rules have been violated and for what reasons.⁶⁶ Determining which rule has been violated can also be critical in the ability of the polluter to get a

variance, as certain rules have differing criteria and standards, some of which have yet to be properly clarified.

b. Finding Number Two

The second finding in the abatement order and variance procedure is whether the order for abatement will constitute a taking of property without due process of law. There are two distinct elements to this finding, and both must be addressed. First, the Board looks at the level of hardship that will be placed on the polluter by the abatement order to determine if there will be a taking of property or the practical closing and elimination of a lawful business.⁶⁷ In evaluating the hardship and the impact on the polluter, the Board will look to a variety of factors, such as the nature of the business, the importance of the product which is affected under the order, the ability to modify the activity or product to bring it into compliance, the size of the labor force and payroll, the amount of capital investment in the facility or product, and the polluter's ability to remain in business if the order is granted.⁶⁸

Second, the Board must determine the level of control that the polluter has over the condition that is creating the violation. If the situation is due to something outside of the control of the polluter a variance may be more warranted. In the order for abatement process, the Board must find that the order for abatement will not constitute a taking of property without due process of law.⁶⁹ There is no mention of a specific requirement regarding the level of control the polluter has over the situation. However, in practice, the order for abatement issuance

63. See, e.g., CAL. HEALTH & SAFETY CODE § 42352.

64. *Administrative Adjudication*, *supra* note 1, at 1124.

65. *Id.*

66. *Id.*

67. *Administrative Adjudication*, *supra* note 1, at 1125.

68. *Id.*

69. SCAQMD Reg. VIII, Rule 806(a) (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r806.pdf> (last visited Oct. 14, 2004).

process essentially covers the same analysis as that of a variance, which requires consideration of the polluters control over the situation.⁷⁰ Thus, when a Board is deciding to issue an order for abatement, it proceeds through an evaluation of the effects of the order on the operations of the polluter and looks at the level of control the polluter has over the harm that is occurring.⁷¹

While this second factor can be important, the impacts of an order for abatement are often key in determining whether the regional board will issue an order for abatement. The impacts of orders for abatement can be severe since they can require the cessation of the operation of an entire facility or effectively preclude the sale of a particular product. The different penalties can have significantly different impacts depending on the polluter's individual circumstances, as noted by the SCAQMD:

As a matter of state law, a judge or jury is obligated to evaluate each violation individually and with reference to all relevant facts and circumstances. . . . This policy recognizes that what might be a fair penalty for a large refinery might not be for a three-person metal stamping operation, despite the fact that the same rule was violated. Under such a policy, AQMD considers such factors as the financial burden to the violator or the action taken to correct the violation, thus allowing a "sliding scale" in negotiating the appropriate penalty. . . . The California Health and Safety Code requires that the following factors be considered in assessing civil penalties:

- (a) The extent of harm caused by the violation.
- (b) The nature and persistence of the violation.
- (c) The length of time over which the violation occurs.
- (d) The frequency of past violations.
- (e) The record of maintenance.
- (f) The unproven or innovative nature of the control equipment.
- (g) Any action taken by the defendant to mitigate the violation.
- (h) The financial burden to the defendant.

The legislative policy of individualized attention to air pollution violations allows AQMD to pursue its legal obligations and mandates while carefully and fairly judging all of the circumstances of each air pollution violation.⁷²

If a company is dependent on one or two key products for its survival, the removal of one product due to an order for abatement could severely impact it or shut it down. Polluters can present substantial information regarding the impact that an order for abatement will have on their company and employees, and thus obtain a variance. However, in cases where polluters have been in violation before, and choose to wait until the regional board enforcement efforts focus on it, and the polluter cannot immediately comply due to the need for modification of its facility or product, the Hearing Board will most likely issue the order for abatement and not grant a variance.⁷³

70. CAL. HEALTH & SAFETY CODE § 42451.

71. *Administrative Adjudication*, *supra* note 1, at 1126.

72. AQMD's *Enforcement Authority*, *supra* note 3.

73. *Administrative Adjudication*, *supra* note 1, at 1127.

c. Finding Number Three

The third finding the Board makes in both order of abatements and variance proceedings is whether the order for abatement will result in the closing or elimination of an otherwise lawful business without a corresponding benefit in reducing air contaminants.⁷⁴ Here, the Board balances the hardship to the polluter, if the order is issued, with the benefit that the public will receive from the application of the order. As the hardship evaluation already occurs primarily under the second step of the order for abatement evaluation process, this step focuses largely on the actual air pollution that is involved in the case at hand.⁷⁵

This step provides a second opportunity for the polluter to deliver information to the Board, showing that the type of pollution being created by the polluter should not be regulated because it will result in minimal benefit to the public at large. A variety of information can be presented at this step to help inform the Board. For example, health risk assessments could be used to show that the chemicals at issue do not have a strong toxicological effect, and can be used to show alternatives to the product will in fact produce far more harmful effects. In addition, stationary facilities may use air modeling to show that their emissions are not impacting neighboring communities.

iii. Stipulated Orders of Abatement: An Alternative to Abatement Orders and Variances

Once the Board evaluates these three statutory provisions, it may rule on whether

or not the order for abatement may be issued or whether a variance is appropriate.⁷⁶ However, there are alternatives to issuing the order for abatement.⁷⁷ The Hearing Board may also issue a stipulated order for abatement, which bypasses the necessity of making the three findings under SCAQMD Rule 806(a).⁷⁸ As an alternative to Rule 806(a), and without making the findings required above, the Hearing Board may issue an order for abatement pursuant to the stipulation of the Executive Officer of the air district and the polluter, upon the terms and conditions set forth in the stipulation.⁷⁹ Under 806(b), the Hearing Board must include a written explanation for its action in the order for abatement.⁸⁰ It should be noted, though, that a stipulated order for abatement “shall not have the effect of permitting a variance unless all the conditions for a variance, including limitation of time, are met.”⁸¹ This means that although the stipulated order for abatement allows the polluter time to remedy the violation, the polluter is not granted a variance from the violations that are ongoing during the time of abatement.⁸² Particularly, the monetary penalties that are associated with the air quality violations may continue to accrue while the polluter attempts to reach compliance.⁸³

If an order for abatement is issued without enjoining the polluter, it is likely that the order is a *stipulated* order for abatement. In a stipulated order of abatement the polluter agrees to take steps to bring the air quality violation into compliance and the Board allows an interim period of time for the polluter to reach compliance, rather

74. Rule 806(a); CAL. HEALTH & SAFETY CODE § 42352(c).

75. *Administrative Adjudication*, *supra* note 1, at 1129.

76. Rule 806(a).

77. SCAQMD Reg. VIII, Rule 806(b) (1988), available at <http://www.aqmd.gov/rules/reg/r806.pdf> (last visited Oct. 14, 2004).

78. *Id.*

79. *Id.*

80. *Id.*

81. CAL. HEALTH & SAFETY CODE § 42452.

82. *Id.*

83. *Administrative Adjudication*, *supra* note 1, at 1138.

than issuing an order for abatement which would require immediate cessation of the polluting activity. Stipulated orders for abatement can require that corrective action be taken on a particular schedule.⁸⁴ Conformity with a stipulated order may still subject the polluter to the ordinary enforcement penalties associated with its violation; however, the stipulated order does not ensure that the polluting activity will no longer continue.⁸⁵ For example, in the case of one scheduled order for abatement, a regional board required that an operation shut down eventually, but allowed operations to continue.⁸⁶ A polluter has the opportunity to work with the Board to set the parameters of the stipulation.

V. Practical Implications of Orders for Abatement and Potential Responses

An order for abatement can bring with it severe penalties. Though SCAQMD does not have the authority to criminally prosecute an air pollution violation, such violations may result in either criminal or civil liability.⁸⁷ The SCAQMD decides when to refer a case for criminal prosecution, and state or local government attorneys handle the case.⁸⁸ SCAQMD considers a variety of factors in deciding whether to refer a case for criminal prosecution, including the type and severity of the violation, the state of mind of the polluter, and the risk and degree of harm to the public created by the violation.⁸⁹

SCAQMD's civil enforcement authority can also result in severe monetary penalties.⁹⁰ If an order is issued, a polluter can be held liable for damages for each day that the violation continues.⁹¹ Penalties can range from \$1000 per day to \$1 million per day for willful and intentional emission of air contaminants resulting in great bodily injury or death.⁹² These monetary penalties are applied every day that the violation exists, and in cases of a continuous violation (for example, applying products containing harmful emissions like paints), these penalties can quickly add up to substantial sums.

Unilateral modification by SCAQMD is another concern of a polluter against whom an order for abatement is filed. An order for abatement can be issued unilaterally by the Hearing Board if, based on the evidence, the Board believes it is warranted.⁹³ Additionally, the Hearing Board can unilaterally modify a stipulated order for abatement before the order is entered.⁹⁴ This poses a potential problem for the regulated business or person because there is no guarantee to the polluter that the stipulated order from the Board will be the same as the order negotiated with the Board. Unilateral modifications may be made when additional information regarding the case has come to light prior to issuance.⁹⁵ Unilateral modification can also occur when the polluter fails to comply with the stipulated terms.⁹⁶

The issuance of a stipulated order for abatement is not an uncommon occurrence

84. CAL. HEALTH & SAFETY CODE § 42452.

85. *Crown Tire Co.*, 579, Bay Area APCD (1977) (abatement consent order).

86. *Id.*

87. AQMD's *Enforcement Authority*, *supra* note 3. See also CAL. HEALTH & SAFETY CODE §§ 42400-42400.4.

88. *Id.*

89. *Id.*

90. See CAL. HEALTH & SAFETY CODE §§ 42402-42402.5.

91. AQMD's *Enforcement Authority*, *supra* note 3.

92. See CAL. HEALTH & SAFETY CODE §§ 42402(a), 42402.3.

93. *Id.* § 42451.

94. *Administrative Adjudication*, *supra* note 1, at 1141.

95. *Kemos*, *supra* note 16.

96. *Id.*

under the SCAQMD.⁹⁷ This could be because the regional board is able to sidestep having to make the findings otherwise required by statute to issue an order for abatement, which gives the polluter time to make modifications to come into compliance. In a sense, the stipulated order for abatement can be viewed as a regulatory tool less severe than an order for abatement. Issues of liability associated with noncompliance, however, make stipulated orders a somewhat more stringent regulatory tool than a variance. Under the stipulated order for abatement, the polluter can be given an opportunity by the Board to remedy the violation before an order for abatement is made.⁹⁸ These stipulated orders are advantageous both for the regional board and for the polluter because they present an intermediate step and avoid immediately entering into to a full-blown order for abatement.

Stipulated agreements are a potential tool for polluters who do not function in continuing violation and have the ability to change their operations or facilities to come into compliance.⁹⁹ In these cases, if the polluters show their willingness and efforts to come into compliance and negotiate with the regional board to determine the terms of the agreements, the polluters may buy enough time to come into compliance.¹⁰⁰ However, in cases where the polluters do not have the ability to change their functions to come into compliance, for example,

where the formulation of a particular product violates emissions standards, a stipulated order may not be a suitable option.

Where the problem causing the violation is amenable, however, stipulated orders for abatement have proven to be an effective tool of regulation for the SCAQMD in allowing polluters to remedy the situation without going through the formal enforcement process.¹⁰¹ In one case, for example, a refining company acquired a refinery that had been shut down, in part, for emissions violations; the new management planned to restart the refinery in late 1999.¹⁰² SCAQMD staff wanted to ensure that, upon restart, violations of SCAQMD rules, particularly those that protect against public nuisance, would not occur.¹⁰³ The SCAQMD Hearing Board issued a stipulated order for abatement to the refining company and imposed a requirement that the refinery demonstrate compliance to the Executive Officer and the Hearing Board prior to restarting the refinery.¹⁰⁴ The order for abatement further required the refinery to execute a contract to reimburse the SCAQMD for all costs incurred by the Executive Officer and Hearing Board in reviewing and analyzing such compliance demonstrations, which required the consultation of outside engineers.¹⁰⁵

Polluters also have the opportunity to modify a stipulated order for abatement.¹⁰⁶ A survey of the number and types of vari-

97. Kemos, *supra* note 16. See, e.g., SCAQMD, *Agenda No. 19*, Mar. 12, 1999, available at <http://www.aqmd.gov/hb/1999/990319a.html> (last updated Mar. 5, 1999); SCAQMD, *Agenda No. 40*, Jan. 8, 1999, available at <http://www.aqmd.gov/hb/1999/990140a.html> (last updated Jan. 8, 1999).

98. Kemos, *supra* note 16.

99. *Id.*

100. *Id.*

101. Kemos, *supra* note 16. See, e.g., SCAQMD, *Agenda No. 19*, *supra* note 97; SCAQMD, *Agenda No. 40*, *supra* note 97.

102. *Id.*

103. *Id.*

104. SCAQMD, *Agenda No. 19*, *supra* note 97.

105. *Id.*

106. See e.g. SCAQMD, *Report of February 2002 Hearing Board Cases*, available at <http://www.aqmd.gov/hb/attachments/2002/020418b.doc> (last visited Oct. 14, 2004) (listing three cases where polluters sought modification of stipulated order for abatement to extend final compliance or to take specific measures to reach compliance).

ances and orders for abatement issued by the SCAQMD reveals that a number of modifications to orders for abatement are issued by the SCAQMD each year.¹⁰⁷ For example, the SCAQMD issued stipulated orders to various power plant operations in California to allow continued operation while enforcing the deadline by which control systems are installed and operating to bring the power plants into compliance.¹⁰⁸ These stipulated orders for abatement also contained provisions that limited certain financial benefits that the polluter may have received while operating in noncompliance.¹⁰⁹

As shown in the above examples, the stipulated order can be advantageous to both the polluter and the SCAQMD by allowing operations to continue so long as progress towards compliance is being made. Additionally, a stipulated order for abatement provides an opportunity for the polluter and the SCAQMD to have positive relations with each other, since the polluter is trying to achieve compliance and the SCAQMD is allowing some leeway for the polluter to act.¹¹⁰ The SCAQMD does not yet have a formal process posted as to how to obtain a stipulated order for abatement, but, in practice, it is usually negotiated prior to the issuance of an order for abatement.¹¹¹

In addition to stipulated orders for abatement, the SCAQMD also regularly issues variances.¹¹² Since an order for abate-

ment is usually a more severe measure, a polluter should inquire as to whether a variance could be applicable to its circumstances.¹¹³ If that option is available, a variance is generally preferable to a stipulated or regular order for abatement because it allows the polluter to continue operations, for the most part, as is.¹¹⁴ However, in cases in which a variance is unlikely to be granted, full efforts should be made towards structuring the remedy that the regional board will impose.¹¹⁵

There can also be situations where a notice of violation is given even though the information on which the enforcement action is based is questionable. Particularly where products are being noticed as violating air quality standards, a detailed analysis of what methods are being used to test the product should be made. Since there are problems with uncertainty and reproducibility in testing methods, results should be strictly scrutinized to ensure that the analysis is correct. For example, various types of paints can be suspect as potential violators of air quality standards due to their content of volatile organic carbons (VOCs), which can violate SCAQMD's regulations.¹¹⁶ Some of these products, however, have been specifically formulated not to violate such standards, and, in such cases, rigorous analysis of the analytical methods used by the SCAQMD are warranted.

107. Kemos, *supra* note 16.

108. SIERRA NEVADA AIR QUALITY GROUP, ANALYSIS OF NEW PEAKING PLANTS APPROVED UNDER THE CALIFORNIA EMERGENCY 21-DAY AND 4-MONTH EXPEDITED APPROVAL PROCESSES, 12 (2002), available at http://www.ef.org/documents/Analysis_CA_Exp.pdf (last visited Oct. 14, 2004).

109. *Id.* ("The abatement order also required the surrender of emission reduction credits (ERCs) to mitigate the 'excess emissions' from temporary operation without [Selective Catalytic Reduction] SCR." *Id.*)

110. *Administrative Adjudication*, *supra* note 1, at 1142.

111. Kemos, *supra* note 16.

112. *Administrative Adjudication*, *supra* note 1, at 1142.

113. *Id.*

114. *Id.*

115. *Id.*

116. See *The Sherwin Williams Co. v. South Coast Air Quality Management District*, 86 Cal. App. 4th 1258 (2001).

In addition to the short-term questions regarding the application of orders for abatement, the long-term implications can vary. Under a full order for abatement, the polluter may have no other alternative than to shut down his operation or cease production of the offending product. However, as previously discussed, stipulated orders for abatement may add more time to the normal compliance deadlines. As a whole, however, since orders for abatement are premised on achieving eventual compliance, if the polluter cannot attain compliance, he is simply buying time until he is eventually required to shut down operations. Thus, stipulated orders for abatement should not be viewed by polluters as a long-term solution to incurable ongoing violations. Other options, such as a variance, may need to be sought in order for operations to continue.

VI. Conclusion

This survey looks to clarify the various regulatory layers from which orders for abatement arise, and presents avenues of relief for the regulated community faced with an order for abatement from air quality management districts. Through this summary of the rules and codes, the potential federal implications, and the South Coast Air Quality Management District's use of orders for abatement, those facing a potential order for abatement should realize that options may be available to them which may allow for continued operation while in noncompliance. Variances, stipulated orders of abatement, and a thoughtful presentation of the circumstances surrounding noncompliance may all provide for greater input by the regulated community and may provide for a more cooperative experience in dealing with regulators. As such, the order of abatement process, though a strong sanction by the AQMD, does not have to result in unreasonable burdens on the regulated community.