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A Many Layered Wonder: Nonvehicular Air Pollution Control Law In California

By William Simmons* and Robert H. Cutting, Jr.**

If a survey were taken to determine which state is best known for smog, the dubious distinction would likely belong to California. Yet California has also experienced a high level of development in both legal and technological strategies for the control of its air pollution problems. The purpose of this article is to explore the existing legal structure of air pollution regulation in California, and to analyze certain problems therein.

We propose first to describe the various theoretical approaches to air pollution control and to contrast them with California's basic strategy for such regulation. We will then examine the components of air pollution control in the state through an analysis of the Air Pollution Control Districts (APCDs), the Air Resources Board (ARB), and other entities having legal effect on the process. Next we will study the functioning of these components through discussion of the policy making process, some specific programs, and the enforcement system. Last we will explore some of the problems with, and tensions in, the existing scheme. Throughout, particularly in the footnotes, we will point out anomalies in the complex air pollution control laws.

We will not discuss vehicular emissions regulation; this is a subject worthy of separate examination.

California's Basic Strategy for Air Quality Management

There are a number of theories available on which to ground any particular program of air pollution control. In this section, we will ex-
amine the California approach, and then, in order to provide a background for understanding the particular methods utilized in California, we will turn to the various alternative strategies.

The Current California Approach

California's basic strategy for air pollution regulation is a program of direct control over what goes into the air. This is achieved in numerous ways, but the fundamental framework is very simple: statewide criteria for the quality of the air are set, and then either emissions or performance standards are implemented to reach the targeted levels.

The first criterion, which specifies levels of atmospheric concentration for each of several pollutants, is called the "ambient air quality" standard. California has required these measures since 1967, and the federal government since 1970.

Both emissions and performance standards have been implemented to meet these regulations. The former specify what quantity of specific materials may be released into the air, and complicated formulae are sometimes used to impose the limitations on various types of pollutants. The federal government has also promulgated emissions standards for certain sources.

Performance standards, on the other hand, specify the type of air pollution equipent or process thought best able to control emissions, thereby indirectly limiting such emissions themselves.

1. CAL. HEALTH & S. CODE § 39051(b) (West 1973); CAL. ADMIN. CODE tit. 17, § 70200.
3. "'Ambient air quality standards' means specified concentrations and durations of pollutants which reflect the relationship between the intensity and composition of pollution to the undesirable effects." Id. § 39008.5.
6. See, e.g., Bay Area Air Pollution Control District (BAAPCD) Regulation 2, as amended, 1969.
8. This approach was adopted by the Air Resources Board on August 15, 1974, with respect to sandblasting operations in California. CAL. ADMIN. CODE tit. 17, §§ 92000-520. A variation of the performance standards concept is sometimes utilized by the Los Angeles APCD, which may specify certain types of equipment to be used as a method of enforcing emissions standards through the permit system used in that district. See generally Chass & Feldman, Tears for John Doe, 27 S. CAL. L. REV. 349 (1954); Mix, The Misdemeanor Approach to Pollution Control, 10 ARIZ. L. REV. 90 (1968); See also Walker, Enforcement of Performance Requirements with Injunctive
Alternative Strategies

The regulatory approach characterized by emissions and performance standards has been the subject of certain criticism. Economist Robert U. Ayres points out, for example, that since industry almost always cushions its internal economics, its estimates of “feasibility” tend to result in the promulgation of standards which are less stringent than existing technology would actually permit. Although it may be argued that such cushioning is taken into account in the development of standards, it is clear that the opportunity for such industry influence does exist.

Unequal Standards

J.H. Dales, a Canadian economist, notes that it may be economically inefficient to have equal standards for all industries emitting the same pollutant: it may cost one substantially more to control a particular pollutant than it would cost another. Hence, the industry which can regulate the greatest amount of such emissions for the least relative expense should have the most stringent standards for that pollutant, while others whose cost of controlling the same emissions would be significantly higher should have comparatively lax standards. Thus, Dales argues, the average would equal the same total emissions at reduced overall expense; he concedes, however, that the cost of administering source-by-source standards is relatively high.

Procedure, 10 Ariz. L. Rev. 81 (1968) [hereinafter cited as Walker]. Walker argues that a specifications approach impedes creativity in design, to the detriment of air pollution technology.

9. Without embarking on an extended economic analysis, it seems essential to briefly elucidate a theory which underpins much of the ensuing discussion of alternatives to the regulatory approach to air pollution control.

"Externalities," or more properly "external diseconomies," when taken in the context of pollution can best be illustrated by means of an example. Assume that a factory is discharging quantities of smoke which drift onto neighboring lands. From the perspective of economic analysis, when the factory manager decides to emit air contaminants, he is probably avoiding the cost of some other method of disposing of the wastes, or at least escaping the cost of controlling the quantity or quality of the effluents. Thus, the ultimate expense of production is less than it would be if the factory were not using the atmosphere as a "free disposal system."

These discharges may well be imposing costs on the recipients of the pollution, however. This may include (1) actual money damages, (2) damage avoidance costs, and (3) "general welfare" damages (such as the perhaps unquantifiable injury to vegetation caused by certain air pollutants).

10. Ayres, Air Pollution in Cities, 9 Natural Res. J. 1, 20 (1969) [hereinafter cited as Ayres].

11. J. Dales, Pollution, Property, and Prices 85 (1968) [hereinafter cited as Dales].

12. Id.
Several problems appear in this system. First, it ignores, in contemplating an "averaging" effect, the possibility (or likelihood) that the sources of a given pollutant will be located in widely scattered areas without a common impact there or downwind. Further, it would require not only the fairly complex calculations of emissions standards, but also the rather elaborate determinations of relative efficiencies of the various industries in meeting the standards. The effect of possible industry "cushioning" of internal economies must also be considered; moreover, industry generally objects strenuously to compelled disclosure of production costs and schedules. The potential result of such an approach is the discovery that industries are suddenly much less efficient than previously thought. It would seem preferable to insist upon equality of standards to insure overall air quality control at the risk of some "inefficiency" than to open the Pandora's box suggested by this theory.

Various other alternatives to the emissions limits performance standards method have been suggested. All recognize that air can no longer be considered the classic "free good," but they approach the questions of who shall pay for externally imposed costs and how payment for use of the atmosphere shall be calculated in slightly different manners.

The Outright Subsidy

Under this approach, someone—undoubtedly the government—would pay a polluter not to pollute. The cost for the amounts of pollution thus inhibited would therefore be shared by the general population, the theory being that all will benefit from the overall economy of such waste disposal by industry and from the cleaner environment obtained thereby.13

Criticism of this theory is based on the proposition that each industry should internalize its own costs, so that only the consumers of such a pollution source would pay for the emissions control. Cost of the product would, theoretically, vary according to amount and type of effluent, and the market would adjust demand in favor of goods and industries producing less pollutants. Moreover, with a system of subsidies based solely on a measure of reduced pollution, industries whose cost of such reduction was small would collect disproportionately large shares of the funds, and vice-versa for those whose ex-

13. Cf. id. at 81.
expenses were relatively high. Such an approach would also require huge expenditures by government and high administrative costs.  

**Tax Incentives**

This system includes all manner of tax-reducing devices, from accelerated depreciation of equipment used in pollution control to outright tax credits for money expended in anti-pollution efforts. The general theory is similar to that of subsidies: everyone benefits from environmental improvement, so everyone should pay for it.

However, in addition to certain economic criticisms of this system, it must be noted that tax incentive proposals are often aimed only at equipment; they generally make no provision for process changes, which are sometimes the more rational solution. Tax devices may also tend to encourage development of individual facilities so that each polluter can maximize his tax savings, whereas cooperative arrangements between industries in proximity with one another might be more efficient.

**The Effluent Charge**

This theory would impose a tariff on the polluter for every unit of effluent discharged, presumably scaled by class of pollutant. This has a certain appeal, as it clearly internalizes control costs; moreover, the charges would ideally be adjusted to make it economically unwise for polluters to discharge more effluent than that calculated to achieve the desired degree of air quality.

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14. *Id.* at 87.
16. See generally Wilson, *Tax Assistance and Environmental Pollution*, in **TAX INSTITUTE OF AMERICA, TAX INCENTIVES** 251-52 (1971); Ayres, *supra* note 10, at 20-21. These writers point out that most industries with relatively inelastic demand curves can pass their pollution control costs on to their own consumers, thus internalizing the external diseconomies directly and efficiently. Moreover, assistance with capital costs is partly illusory, as only one-third of expenses are generally capital costs; yet total write-offs would amount to an even greater revenue loss. In addition, some pollution control measures actually produce profitable by-products, so a tax break becomes a payment for an already profitable investment.
The advantage of this system would seem to be that each source could calculate the point at which it becomes less expensive to control than to pollute; thus, the burden of air pollution control would theoretically be shifted to the industries which can do so most efficiently. As a collateral asset, this approach would obviously produce a potentially significant revenue increase.

Such a system would, however, require some complex overall calculations and administration, with costs likely to be at least as great as that of the regulatory approach. Thus, at the present time, the efficiency of the direct regulatory system appears to outweigh the speculative economic benefits of the effluent charge program for air pollution control; a bill which would have implemented the latter type of plan for sulfur dioxide compounds was defeated by the California legislature in 1972 in part for these practical reasons.18

The "Pollution Rights" Theory19

This last approach calls for a determination of the maximum number of units of any given pollutant permissible in a particular air basin. That figure would then be translated into "pollution rights," each unit of which would entitle the possessor thereof to discharge a unit of effluent. These "rights" might then be traded on an open market, and the price allowed to float above a predetermined floor.20

However, some agency would have to monitor sources to insure both that only those with rights were discharging and they were only discharging the amounts of pollutants for which they had rights. Moreover, it would still be necessary to calculate standards and number of units for each effluent. Thus, it appears that administrative costs would not be significantly decreased by such a program, if at all, and again it seems that the speculative economic benefits of the system do not yet justify a change from the direct, essentially equitable regulatory approach.

19. See Dales, supra note 11, at 93-97; Krier, supra note 17, at 472-73.
20. The theory holds that the resulting price will reflect the true value of air pollution, and force internalization of costs: an industry must either develop an alternative to emission or buy the right to pollute. J.H. Dales argues that other actors, such as environmental groups, might also purchase rights on the market, thereby removing those units from the hands of industry and discouraging some prospective buyers with the resulting increase in price. Further, he asserts that a properly functioning market would require a minimum of regulation, thus decreasing administrative costs (relative to either regulatory or effluent charge systems). Dales, supra note 11, at 94-95. See also Krier, supra note 17, at 472-73.
This is not to say that these theories do not merit consideration for future utilization; rather, a great deal more study is needed to determine the feasibility of implementing such programs in a manner which will result both in desirable levels of air quality and in greater economic efficiency. Insofar as the purported objective of air pollution control primarily concerns health and welfare, however, it is probable that the direct regulatory approach will be found preferable to the relatively complex economic parameters proposed as alternatives, and the interaction with the unpredictable economic markets inherent therein.

The Components of Air Pollution Control

The County Air Pollution Control District

The county air pollution control district was the first state legislative system designed exclusively to attack the problem of air pollution. By 1945 it was apparent that traditional tools, such as the nuisance doctrine, were insufficient in themselves to control air contaminants, especially in areas where sources were numerous and diverse in nature.21

Nowhere was this clearer than in the Los Angeles metropolitan area. In 1945 the city of Los Angeles established a Bureau of Smoke Control in its Health Department; Los Angeles County created the Office of Air Pollution Control the following year.22 To achieve enforcement inside cities within the county, the cities were asked to adopt municipal ordinances similar to those of the county. By 1947, however, only twenty-two of forty-four cities had done so, and it was apparent that administration of existing regulations was not consistently good throughout the area. In that year the county pushed for and obtained special legislation empowering a separate agency to control the growing air pollution problem.23 The policy statement of the new act reflected the Los Angeles experience: “[i]t is not practical or fea-

21. Limitations inherent in traditional nuisance doctrine include the following: difficulty in prosecuting multiple sources; difficulty in establishing causal links between source and injury; conflicts with other laws, such as zoning regulations; and difficulty in preventing the creation of a nuisance. See Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 1126; Kennedy, The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles, 27 S. CAL. L. REV. 373 (1954) [hereinafter cited as Kennedy]; Note, California Code of Civil Procedure § 731(a): Denial of Private Injunctive Relief from Air Pollution, 22 HASTINGS L.J. 1401 (1971).
sible to prevent or reduce such air contaminants by local county and city ordinances."\(^{24}\)

A special district was created in each county, the boundaries of which were to be coterminous with those of the county.\(^{25}\) Originally a district was to become functional in a county only upon a resolution by its board of supervisors that such a district was actually needed.\(^{28}\) In 1970, however, since only twenty-five counties had so resolved\(^{27}\) and air pollution continued to increase statewide, the legislature mandated activation in the remaining counties.\(^{28}\)

"Every air pollution control district is a body corporate and politic,"\(^{29}\) endowed with standard powers, such as perpetual succession, and the ability to sue and be sued, and to buy, hold, lease and sell property.\(^{30}\) The jurisdictional authority of a district, and the relationship between that power and the powers of other governmental units will be more fully explored below.\(^{31}\)

Each district essentially consists of three parts: the legislative body, called the air pollution control board;\(^{32}\) the executive, entitled the air pollution control officer;\(^{33}\) and the judiciary, labeled the hearing board.\(^{34}\) Nothing in the structure itself is really unique; it merely reflects the traditional tripartite division of American governmental entities.

The air pollution control board is composed of the members of the board of supervisors of the county, who serve ex officio.\(^{35}\) In addition to the general powers noted previously, the board (1) may make and enforce orders, rules, and regulations "necessary or proper" to carry out its responsibilities under the enabling acts;\(^{36}\) (2) may require that sources of air pollution obtain a permit from the district before building or operating;\(^{37}\) and (3) could require, at least until 1967, the in-

\(^{24}\) CAL. HEALTH & S. CODE § 24199(b) (West 1967).
\(^{25}\) Id. § 24201.
\(^{26}\) Id. §§ 24205-07.
\(^{27}\) Unpublished Table of Air Resources Board [hereinafter cited as Unpublished Table], showing dates all APCDs were activated. There are 58 counties in California.
\(^{28}\) CAL. HEALTH & S. CODE § 39270 (West 1973).
\(^{29}\) Id. § 24211 (West 1967).
\(^{30}\) Id. § 24212 (West Supp. 1974).
\(^{31}\) See notes 308-25 & accompanying text infra.
\(^{32}\) CAL. HEALTH & S. CODE § 24220 (West 1967).
\(^{33}\) Id. §§ 24222, 24228.
\(^{34}\) Id. § 24225 (West Supp. 1974).
\(^{35}\) Id. § 25220 (West 1967).
\(^{36}\) Id. § 24260.
\(^{37}\) Id. § 24263.
stallation of air pollution control devices upon motor vehicles. Moreover, the board is endowed with a number of powers for enforcement of emission standards, such as the ability to issue orders for abatement and to recommend prosecution in certain cases. Perhaps even more significantly, this same body, acting as the board of supervisors, controls the purse strings of the district. This can, of course, have a great impact within the district, since the effectiveness of an air pollution control program can be related to the funding which the district receives.

The air pollution control officer's (APCO) primary duty is to enforce the standards and prohibitions contained in both state law and district rules and regulations, and in certain provisions of the Vehicle Code which relate to air contaminants. In order to carry out his responsibilities the APCO may conduct investigations into the emission of air pollutants, including searches of buildings. The APCO is also given peace officer status so that he may make arrests and issue citations. Further, the APCO is empowered to administer the permit system in those counties which establish such a procedure; and, correlative to that power, he may require a source operator to furnish him with various data.

The hearing board, or variance board as it is sometimes called, is appointed by the control board. The hearing board was initially

38. Id. § 24263.7. The 1967 Mulford-Carrell Act, Cal. Stat. 1967, ch. 1545, at 3679, gave exclusive authority over vehicular emissions to the State Air Resources Board. See particularly section 39012 and chapter 4, part I of the act. Section 24263.7 was probably impliedly repealed by the Mulford-Carrell Act.


40. Either civil or criminal sanctions may lie; see text accompanying notes 186-93 infra.


42. Interview with Harmon Wong-Woo, ARB Chief, Division of Implementation and Enforcement, ARB, in Sacramento, California, May 22, 1974 [hereinafter cited as Wong-Woo Interview].


44. Id. § 24246 (West 1967). For constitutional questions raised by this section, see notes 225-32 & accompanying text infra.


47. Id. § 24269. Note that failure to comply with an order to produce such information is a misdemeanor (id. § 24282) and may result in a suspended permit. Id. at § 24270. All data obtained by the APCD except trade secrets are public records.

composed of two lawyers and one engineer, but in 1972 this structure was altered so that it now consists of five members: one attorney, one engineer, one doctor, and two lay persons, none of whom is otherwise employed by the district or the county. The rationale for this change was to obtain a broad nontechnical input into the board's decisionmaking process.

The board has three major functions: to grant variances from certain state law prohibitions and from district rules and regulations; to review certain actions of the ACPO, and, when authorized by the air pollution control board, to issue orders for abatement. Of these, the powers to grant variances and to issue orders of abatement are probably the most important; hence they are treated separately below. The review function involves the authority to revoke a permit or to reinstate permits suspended by the APCO.

The procedure at hearings is much the same as that at any other administrative hearing. The board may subpoena witnesses and records, and judicial review is available from any decision. It is interesting to note that few decisions of the hearing board are appealed.

The Unified Air Pollution Control District

Two years after the enactment of the enabling legislation for county APCDs, the legislature provided a mechanism whereby two or more contiguous counties with functioning air pollution control districts could merge their districts into one. Santa Cruz and Monterey Counties so combined in 1968, and Yolo and northeastern Solano

49. Id. § 24225. Specifically, a board must consist of: one member admitted to practice law in California; one chemical or mechanical engineer; one from the medical profession with special skills, training, or interest in environmental medicine, community medicine, or occupational/toxicologic medicine; and two members from the general public. If any of the above criteria cannot be met by residents of that county, the air pollution control board may appoint any person. Id. § 24225(b).
50. Id. § 24291.
52. Id. § 24260.5 (West Supp. 1974).
53. See notes 166-76, 198-217 & accompanying text infra.
55. Id. §§ 24322-23.
58. Unpublished Table, supra note 27.
Counties unified in 1971. Originally each county within a unified district was to be a zone, and the combined boards of supervisors of each county were to comprise the governing board of such districts. However, it became evident that zones should be based on air pollution control parameters, and that requiring all five members of each board of supervisors to attend often distant meetings placed an undue burden on them and limited the possibilities that multi-county districts would be formed:

A five-county unified district would have had a board composed of twenty-five persons. In 1972 the legislature amended the enabling act so that the counties involved could provide by agreement for the number of supervisors to sit on the unified board, as well as for the relative weight of each member's vote.

The new law also provides that zones, if drawn at all, do not have to be along county lines.

Each county contributes to the fisc of the unified district in the proportion that its population bears to that of the unified district at the date of merger.

The Regional Air Pollution Control Districts

Two basic forms of regional district exist: the Bay Area Air Pollution Control District (BAAPCD), and those regional districts provided for in the Mulford-Carrell Act. BAAPCD is not included in the latter (as it is not within the definition of "regional district") and is operated under an entirely different set of laws.

59. The remainder of Solano County is in the Bay Area Air Pollution Control District.
60. Unpublished Table, supra note 27.
62. Interview with John A. Maga, former ARB Executive Officer, in Sacramento, California, May 23, 1974 [hereinafter cited as Maga Interview].
63. CAL. HEALTH & S. CODE § 24331 (West Supp. 1974). The utility of weighted voting is clear in instances when one county has, for example, twice the population and three times the air pollution sources of another county with which it seeks to form a unified district.
64. See id. § 24333.
65. Unpublished Table, supra note 27.
66. CAL. HEALTH & S. CODE § 24337 (West 1967). Why the date of merger is used is unclear; it would appear better to require revision as population shifts.
67. Id. §§ 24345-74.
68. Id. §§ 39300-570 (West 1973).
69. As that term is defined in the Health and Safety Code section 39005. Id. § 39005 (West 1973).
The Bay Area Air Pollution Control District

In the early 1950's various groups in the San Francisco Bay Area became concerned with the smog problem in that region. At the same time extensive investigation by an assembly joint subcommittee indicated that neither the county nor unified enabling acts were suitable for application to the Bay Area. There was general consensus that a regional strategy should be developed because of the peculiar geography of the area; however, if this approach were to be adopted, the county districts would clearly be inappropriate, while a unified district would be cumbersome and impracticable in such a large geographic area. Hence the subcommittee proposed and carried legislation to create a special air pollution control district within the nine-county Bay Area.

It is interesting to note that the subcommittee decided to set the boundaries at county lines rather than at the 500 foot contour, which generally marks the air basin.

Like the county APCD, the BAAPCD has an air pollution control board, an ACPO, and a hearing board, but there are noticeable differences from the county model. The air pollution control board is composed of one member from the board of supervisors of each county, and one city councilman or mayor from within each county, nominated by a city selection committee. (In contrast, a unified district board would have consisted of forty-five supervisors.) There is also an advisory committee within the district to provide additional resources for the governing board.

Generally the powers of the BAAPCD are the same as those of a county APCD. At one time it appeared that a substantial differ-
ence existed between them in that the BAAPCD did not seem to have power to establish a permit system similar to that specifically authorized in the county law. However, the attorney general has recently opined that such power is implicit in the general authority given the district to promulgate rules and regulations.

Until quite recently a second distinction was that the misdemeanor sanctions were not available to the BAAPCD except for open burning.

One other significant feature of the BAAPCD deserves mention: unlike the county or the unified district, the BAAPCD has the power to tax, although the district is clearly limited as to the maximum amount it may so exact, and the formula for apportionment of the responsibility therefor is also fixed.

The nature and function of the APCO in the BAAPCD is essentially the same as that of his counterpart in the county district.

The hearing board of the BAAPCD contains the same membership as a county hearing board. It has the same powers as the latter, but has other responsibilities as well. In an action to recover a civil penalty for a violation of certain emission standards or rules, the board is given authority to review the merits of the case upon its own motion, or on motion of the district or the defendant in such cause. The hearing board may then either allow the district to proceed with its action, or it may order that a variance be granted the defendant.

79. See id. § 24263 (West 1967) (expressly authorizes a permit system; no similar section in the BAAPCD law). Health and Safety Code section 24362.3 prohibits the BAAPCD from specifying the type of equipment to be used for control of emissions, while the counties are expressly authorized to do so by section 24264. The belief that the BAAPCD did not have permit powers was generally held by both state and BAAPCD officials. Maga Interview, supra note 62; Telephone Interview with Matthew S. Walker, former BAAPCD counsel, May 28, 1974 [hereinafter cited as Walker Interview].


81. CAL. HEALTH & S. CODE §§ 24361, 24361.5 (West 1973), which was changed by giving the Bay Area the same powers as the counties. Cal. Stat. 1974, ch. 455, § 1 (July 11, 1974) (adding section 24361.10 to the Health & Safety Code).

82. CAL. HEALTH & S. CODE §§ 24370.1-70.6 (West 1967).

83. Compare id. §§ 24355.2, 24355.4 (West Supp. 1974) (BAAPCD law), with id. §§ 24224, 24224.1 (county law). One specific difference is that the APCO in the Bay Area need not enforce emission-related sections of the Vehicle Code unless the BAAPCD receives state subventions. See text accompanying notes 261-75 infra.

84. Compare id. § 24357 (BAAPCD law), with id. § 24225 (county law).

85. Compare id. §§ 24365-65.12 (West 1967 & Supp. 1974) (BAAPCD law) with §§ 24291-303 (county law). Note that the provisions of sections 24368-68.7 are absent from county law.

86. Id. § 24369.1 (West Supp. 1974).
in which event the case is dismissed. Further, the BAAPCD hearing board has the authority to issue orders of abatement, while the county hearing board does not unless the air pollution control board delegates such power to it.

The Regional Air Pollution Control District

In 1967, at the same time the State Air Resources Board was created, the legislature established machinery for the formation of regional air pollution control districts. The regional district was a formal recognition of what had been known all along, that is, that air pollution respects no political boundaries. However, the formation of such districts is optional with the counties in a particular basin and, to date, none have been voluntarily formed.

A regional district can only be formed by agreement between two or more counties whose boundaries are within one air basin. Upon its own motion the board of supervisors of two or more counties may vote to form a regional district; on petition of 10 percent of the electorate in each of such counties, the supervisors thereof are required to hold a hearing to determine whether to become part of a regional district. They cannot, however, actually be compelled to join.

87. Id. at §§ 39261-62 (West 1973). This power is considered such an impediment to efficient enforcement of air pollution laws in the Bay Area that the District has been levying civil penalties under the Mulford-Carrell Act rather than under its own rules and regulations. Recently, a justice court held that that act could not be used by the BAAPCD, because it applied only to county and regional districts. People v. Humble Oil & Refining Co. (J. Ct., Benicia Jud. Dist., Solano Cty., 1974) (applying Cal. Health & S. Code § 39261 (West 1973) in conjunction with id. § 39005, which limits "regional district" to those created under part 2 of the Mulford-Carrell Act. According to David Self, former counsel for the BAAPCD, this had the effect of invalidating several pending actions and causing procedural delays in others); Telephone Interview, May 23, 1974. The BAAPCD has solved the problem by obtaining a change in the law. Cal. Stat. 1973, ch. 1110, at 2373, amending Cal. Health & S. Code § 39261 (West 1973).


89. Id. § 24260.5 (West Supp. 1974).


92. Aside from the BAAPCD the only "regional" district was the ill-fated San Joaquin Valley Regional Air Pollution Control District, created by a special law which has since been repealed. Cal. Stat. 1959, ch. 1915, at 4486, repealed, Cal. Stat. 1961, ch. 96, at 1103.


94. Id. §§ 39350-52. The authors are not aware of any such petition ever having been initiated.
A number of counties, such as Los Angeles, hesitate to form a regional district at least in part because of the composition of the air pollution control board. That body is set up much as in the Bay Area District, with equal representation from member counties. Because of this a large county with more advanced control programs, larger population, and more sources fears a detrimental loss of control to the smaller counties. If this were the only problem perhaps a system of weighted votes, such as that permitted under the unified district law, would provide a solution; but again like the BAAPCD, one half of the board's membership lies in the cities, with those from each member county having one vote. There is a certain reluctance to share with cities the power which presently rests entirely in the counties.

In most other respects the regional district, were one established, would resemble the other districts in that each has an air pollution control officer, a hearing board, and responsibility for essentially those matters described in a later section of this article. The only other noteworthy point is that regional districts are also given power to tax, in much the same way as is the BAAPCD.

**Basinwide Air Pollution Control Coordinating Councils**

In 1970, at the time the Legislature activated APCDs in all counties, it mandated the creation of Basinwide Air Pollution Control Coordinating Councils (Basinwide Coordinating Councils). These bodies are composed of one supervisor from the board of each APCD wholly or partially within the air basin for which the council is established.

The councils themselves have no direct enforcement powers, no authority to tax or otherwise raise revenue, nor to compel member

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95. Telephone Interview with Robert Barsky, Esq., Deputy Air Pollution Control Officer, Los Angeles APCD, May 24, 1974 [hereinafter cited as Barsky Interview].
97. Barsky Interview, supra note 95.
99. Barsky Interview, supra note 95.
100. Cal. Health & S. Code §§ 39400-02.1 (West 1973) (air pollution control officer); id. §§ 39380-90, 39430-509 (powers and duties); id. §§ 39420-21 (hearing board). Where the county and the BAAPCD laws differ, the regional law follows one or the other. There is no discernable reason for choosing one over the other in any particular case.
101. Id. §§ 39521-24.
102. Id. § 39272.
103. Id.
APCDs to comply with their decisions. However, councils are charged with one important responsibility: the preparation and maintenance of a master plan for air quality management in each air basin. These implementation plans are discussed below.

**Local Authorities**

While it might be supposed that the existence of an air pollution control district in a county pre-empts air quality decisions by local authorities, this is not necessarily the case. Cities and counties may enact regulatory ordinances more stringent than those provided in state law or district regulations, and counties and cities in the BAAPCD or in any regional district, if formed, may enforce the state air pollution laws and district rules and regulations. No instance is known where a city or a county has utilized this option.

**The State Air Resources Board**

In 1967 the legislature, in the Mulford-Carrell Act, established the Air Resources Board (ARB) upon finding that, "It is imperative to provide a single state agency for administration, research, establishment of standards, and the coordination of air conservation activities carried on within the state." The new agency was a recasting of the existing Motor Vehicle Pollution Control Board, to which was added the functions of the Bureau of Air Sanitation in the Department of Public Health and certain additional powers. The ARB was given authority not only to control vehicular emissions, but also to establish air basins within the state, to set ambient air quality stand-

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104. *Id.* § 39273.
105. *Id.* §§ 24247, 24360.3, 39057, 39433 (West 1967, 1973 & Supp. 1974). Of these, only section 39057 subjects local jurisdictions to the prohibitions on banning agricultural burning, discussed in text accompanying notes 276-307 infra. There is no apparent explanation for this inconsistency.
106. *Id.* §§ 24360.3, 39433 (West 1967 & 1973). In other words, the law does not allow cities to enforce county APCD regulations, another inconsistency.
109. Maga Interview, *supra* note 62. The Motor Vehicle Pollution Control Board was abolished by CAL. HEALTH & S. CODE § 39064 (West 1973). The Bureau of Air Sanitation was theoretically left intact; however, most of the personnel of the Bureau were transferred to the ARB administratively at a later date. Maga Interview, *supra* note 62.
110. See generally CAL. HEALTH & S. CODE, div. 26, pt. 1, ch. 4 (West 1973). This chapter generally carries forward the authority of the Motor Vehicle Pollution Control Board. Vehicular emissions, while of critical importance, are beyond the scope of this article, as noted earlier.
111. *Id.* § 39051(a).
ards, and to cooperate with the federal government. However, "primary" responsibility for stationary sources, including enforcement of state standards, remained with the "local and regional authorities." Generally this means that while these latter officials have the basic responsibility for control of emissions from stationary sources, and while many of the day-to-day activities of stationary source air pollution control are carried on by such authorities, the state, in its supervisory capacity, can make demands on the APCDs in order to achieve air quality standards.

The state agency is not organized in the same manner as the air pollution control districts. Rather the ARB consists essentially of the Air Resources Board, and the executive officer and his staff. In addition there exists a hearing board for certain matters relating to vehicles, but it has never been utilized.

The Air Resources Board itself is the official governing body of the agency, although ostensibly the ARB is part of the executive branch and therefore responsible to the governor through the Resources Agency. The board presently consists of five part-time paid members, appointed by the governor.

112. Id. § 39051(b).
113. Id. §§ 39067, 39067.2.
114. Id. §§ 39060-61.
115. Id. § 39012.
116. Discussed more fully in text accompanying notes 233-42 infra.
118. Id. §§ 39190-201.
119. Maga Interview, supra note 65. The hearing board may permit variances from emission standards for new or used motor vehicles (CAL. HEALTH & S. CODE § 39192 (West 1973)), but it shall not function unless California's request for new vehicle standards has been turned down by the federal government (id. § 39201) pursuant to section 209 (formerly section 208) of the Clean Air Act, 42 U.S.C. 1857f-6(a) (Supp. 1974). This condition renders the variance board useless, because if a federal waiver is denied, California will be unable to enforce its new vehicle standards (Clean Air Act § 209(a), 42 U.S.C. § 1857f-6(a) (Supp. 1974)), and there is no need for a variance. Even more curious is the apparent intent to allow variances for used as well as new vehicle standards (CAL. HEALTH & S. CODE § 39192 (West 1973)), but the condition permitting use of the variance proceeding can only occur when a new vehicle standard is denied waiver. Code sections 39190-201 should be repealed.
120. CAL. GOV'T CODE § 12805 (West Supp. 1974).
121. Id. §§ 39020, 39021.3 (West 1973). Originally the Board consisted of 14 unpaid members: five ex-officio from specific state agencies, and nine public members appointed by the Governor. The only qualification for appointment of these nine latter persons was an interest in air pollution control. Cal. Stat. 1967, ch. 1545, at 3681. This larger group was unwieldy, and it lacked expertise. In 1971 the legislature reduced the board to its present five members, who must have specific qualifications: two persons with training and experience in automotive engineering or closely related fields; two with training and experience in chemistry, meteorology, or related scientific fields,
The executive officer of the ARB is in a rather unique position, as any power of the board is "conclusively presumed . . . delegated to [him] unless it is shown that the board . . . specifically has re-

served the same for its own action." Since the board has reserved only certain important matters to itself, much of the routine work of air pollution control at the state level is conducted by the executive officer.

The Functional Aspects of Air Pollution Control

The Basic Structure of Air Quality Management

The purpose of this part of the article is to analyze the relationships between the various levels of government responsible for air quality management in California, as well as the nature of their responsibilities. While an extended discussion of the federal role in the total control strategy is beyond the scope of this article, it is important to place the California program in context with federal law before proceeding further.

Section 101(a)(3) of the federal Clean Air Act asserts "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . . ." Nonetheless the Environmental Protection Agency (EPA), administrator of the act, has made its presence strongly felt in the field. Although the state network which is the focus of this article forms a solid part of the mechanics of air quality management, the federal government now provides considerable direction by (1) setting national ambient air quality standards for certain air contaminants; (2) setting emissions standards for various stationary sources, including those which emit hazardous pollutants for which an ambient air quality standard has not been established; and (3) approving or disapproving state plans to achieve federal air quality standards by 1975 (or, with an extension, by 1977).

including agriculture, or law; and one who would qualify under the first category or who has administrative experience in air pollution control without special technical training. CAL. HEALTH & S. CODE § 39020 (West 1973). Recently, legislation has been introduced to increase the board to full-time status. A.B. 2884 (1973); S.B. 1556 (1973). Senate Bill 1556 would also make the ARB an appellate body to review the decisions of the APCDs.

123. See ARB Resolution 72-104 (July 19, 1972).
126. Id. §§ 111-12, 42 U.S.C. §§ 1857c-6, 1857c-7.
However the principal stimuli for federal involvement are new concepts in air pollution control law contained in the Clean Air Act Amendments of 1970, and the absolute deadlines in those amendments for achieving the federal standards. The new concepts are:

1. Transportation controls;

2. Land use planning;

3. Consideration of the impact of major sources on air quality, notwithstanding their ability to meet specific emission limits;

4. Analysis of the indirect impact of new development caused by potential increased vehicular miles associated with it;

5. Long-range strategies for maintaining air quality once standards are achieved.

6. Prevention of significant degradation of air quality where it is better than the standard.

These concepts are not expressly contained in California law.

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128. Id. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B); 40 C.F.R. §§ 51.1(n)(7), 51.14 (1973). EPA's own transportation controls for California include gasoline rationing (id. § 52.241), limitation on the use of motorcycles (id. § 42.243), exhaust catalyst retrofit (id. § 42.244), and limitations on parking (id. § 52.247-251).


131. Id. The Air Resources Board terms this “negative” land use planning.

132. Clean Air Act § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (Supp. 1974); 40 C.F.R. § 51.12(e) (1973). Under this latter section of the Code of Federal Regulations, air quality maintenance areas will be those which have a potential for exceeding the standards over the next ten years due to growth. The states are required to develop special plans to prevent this from happening.

133. 38 Fed. Reg. 18986 (1973) (proposed regulations). Although a detailed discussion of the topic is beyond the scope of this article, it should be noted that a new dimension to the air quality approach characterized by emissions and performance standards was enunciated in Sierra Club v. Ruckelshaus, 344 F. Supp. 253, aff’d mem. by an equally divided Court sub nom., Fri v. Sierra Club, 93 S. Ct. 2770 (1973) (Powell, J., not participating). The district court had restrained the Administrator of the EPA from approving any state implementation plan which would permit “significant deterioration of existing air quality” in areas where air quality is better than existing standards. Thus, in those areas virtually no new sources can be operated if they alone, or in combination with other sources, would cause significant deterioration of existing air quality; in regions such as California’s deserts, where little air pollution now exists, emissions standards would apparently have to be more stringent than those currently imposed. Essentially, this implies that the once accepted strategy of simply moving sources from areas with acute air pollution problems to regions without such difficulties is no longer viable, as it does not resolve the matter, but merely provides short-term relief and spreads the air pollution around.
(with the possible exception of maintaining air quality),¹³⁴ nor were they in the ARB's or the APCDs' regulations at the time that the EPA required them.

Absolute deadlines for achieving air quality are likewise new. Section 39051(c) requires the ARB to establish air quality standards, but neither it nor other sections discussing standards¹³⁵ speak of the time for attainment. The only possible exception is section 39273, enacted in 1970, which requires the APCDs in each air basin to create basin-wide air pollution control plans which must meet or exceed the air quality standards "within a reasonable time."¹³⁶

Direct federal regulation in California is now a reality because the state has been unable¹³⁷ or unwilling¹³⁸ to implement the new federal control concepts and because the present state program will not realize several of the federal air quality standards in some air basins by the July, 1977 deadline.¹³⁹

An interesting legal twist in the problem is the EPA's apparent authority and oft-stated willingness to delegate its powers to state and

¹³⁴ Cal. Health & S. Code § 39273 (West 1973) requires, inter alia, the basinwide plans to be reviewed at least every two years. Presumably this review will be to maintain air quality once achieved, and to see that where air quality is better than the standards, it will be prevented from deteriorating to the point where the standards are not met. In this respect, however, there is nothing indicating that the board and the APCDs are to keep clean areas already blessed with clean air; for example, sections 39274 and 39276 of the Health and Safety Code speak only of achieving the standards. However, the authors expect that authority to maintain air quality can be found as a necessarily implied power in the general grants of authority of the ARB and APCDs.

¹³⁵ Id. §§ 39011, 39052(f); Cal. Adm. Code tit. 17, §§ 70101, 70200.


¹³⁷ For example, the authors believe the ARB and APCDs do not have the authority to regulate traffic to reduce vehicle miles traveled. The Mulford-Carrell Act persistently speaks of reducing vehicle emissions through emission standards and the use of devices.

¹³⁸ For example, the Air Resources Board refused to adopt the EPA approach to regulating indirect sources (it prefers control of these sources through the land use planning process (ARB Minutes, April 11, 1974), even though the attorney general advised in a formal opinion that the APCDs had the authority to control such indirect sources. Ops. Cal. Att'y. Gen., S.O. 73/43, December 18, 1973.

¹³⁹ Clean Air Act § 110(e)(1), 42 U.S.C. § 1857c-5(e)(1) (Supp. 1974); 40 C.F.R. § 52.222 (1973). The most notable problem is achievement of the federal oxidant standard in the Los Angeles metropolitan area (South Coast Air Basin). The ARB has said in its implementation plan that an 87% reduction in hydrocarbons over 1970 levels is needed, but only 77% will be achieved by 1977 under its plan. State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards, Revision 4, at 41 (December 31, 1973). The EPA itself admits that at least an 80% reduction in miles traveled by gasoline powered vehicles will be necessary by 1977 to achieve the standard. 38 Fed. Reg. 2195 (1973). This is to be achieved by gasoline rationing. 40 C.F.R. § 52.241 (1973).
local agencies when they have not been given any prerogative by their own legislatures to assume federal power. We do not believe that such authority can be accepted without a legislative act stating that the agency may accept and implement federal power.

**Programs and Enforcement**

**Implementation Plans**

Pursuant to federal law, California has developed an implementation plan which is ostensibly designed to enable the state to comply with federal ambient air quality standards. That scheme was in large part assembled from basinwide implementation plans submitted to the ARB by the basinwide air pollution control coordinating councils under a state statute enacted prior to the 1970 amendments to the Clean Air Act.

Under the California legislation, APCDs within each air basin developed a basinwide air pollution control plan. In all except the Bay Area and San Diego air basins, a group composed of one supervisor from each county met as the air pollution control coordinating council and formulated the basinwide plan designed to achieve.

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140. See, for example, the discussion in the preamble to EPA's indirect source regulations, 39 Fed. Reg. 7274-75 (1974). There the EPA states that it will delegate its authority if requested, citing 40 C.F.R. § 50.02(d) (1973). However, the authors believe that this regulation, as interpreted by the EPA, is not supported by the Clean Air Act, because no specific authority can be found therein. Such power can be seen in certain limited areas relating to standards of performance for new stationary sources (Clean Air Act § 111(c)(1), 42 U.S.C. § 1857c-6(c)(1) (Supp. 1974)), and to standards for hazardous pollutants (id. at § 112(d)(1), 42 U.S.C. § 1857c-7(d)(1)); but the APCDs have authority to regulate the sources and emissions contemplated by these special programs, so delegation is not needed.

141. A fundamental principle of law is that an administrative agency has only that power directly or impliedly granted by its legislative body. 2 CAL. JUR. 3d, Administrative Law § 36 (1973). The legislature has not granted the ARB or the APCDs prerogative to assume federal powers, and therefore it is felt that they cannot do so. But see 2 Antieau, Municipal Corporation Law, Intergovernmental Relations § 19A.08 (1973).


143. State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards (January 30, 1972). This Plan is constantly being amended, formally (Revisions 1-4) and informally by submission to and approval by the EPA of compliance schedules for noncomplying sources.

144. CAL. HEALTH & S. CODE §§ 39270-76 (West 1973). The Clean Air Act amendments were signed into law December 31, 1970. It was fortuitous that state planning dove-tailed with the federal timetable. Maga Interview, supra note 62.


146. See text accompanying notes 102-04 supra.

state air quality standards. The proposals were then filed with the ARB in late 1971. Each county APCD was to file a county program to implement the basin plan, but few did so, relying on what was already in the basinwide design.

These plans have probably provided the incentive for many counties to evolve adequate programs for air pollution control, which might not have occurred from only the activation of districts by state law. The prime impetus was and is that if any plan or program will not achieve the ambient air quality standards for the air basin, the ARB is directed to promulgate one that will meet those criteria. Moreover, if any APCD fails to enforce its plan or program, the ARB may step in and do so. The ARB has, therefore, a most effective tool to compel proper enforcement of adequate regulations. This scheme has proved more effective than prior supervisory powers because it not only forced the APCD to plan, but it also made the ARB examine those plans, the sources of pollution and existing and projected air quality in each area. The basinwide plans must be reviewed upon the request of any APCD within a basin, or upon request of the ARB, but in no case at intervals greater than every two years.

Standards

There are, as one might be able to gather from earlier discussion, a number of different types of standards for the regulation of air pollution in California.

Ambient air quality standards really require little further discussion; from a technical standpoint they are interesting, but from a legal view they are rather straightforward. Standards specifying emission limits are another matter, and much more interesting from a legal perspective.

Some criteria are set forth in the general law. They consist of (1) a standard for opacity of smoke, the Ringelmann scale, (2) a

148. Id. § 39273.
149. Wong-Woo Interview, supra note 42.
150. Id. Regarding activation of the districts, see text accompanying note 8 supra.
152. Id. § 39274.
153. See text accompanying notes 233-42 infra.
154. Wong-Woo Interview, supra note 42.
156. Id. §§ 24242, 39077.1 (West 1967 & 1973). Certain exemptions for fires set pursuant to orders of fire prevention and fire-fighting personnel, and for some agricultural operations, are contained in id. §§ 24245, 24251, 39077.4-.5 (West 1967 & 1973). Inexplicably the exceptions are not the same.
public nuisance provision,\textsuperscript{157} and (3) certain smoke opacity and discharge requirements for motor vehicles.\textsuperscript{158} The APCDs have primary responsibility for enforcement of all such regulations,\textsuperscript{159} except for highway administration of smoke provisions by the California Highway Patrol.

Air pollution control districts may, however, set more stringent standards than those contained in state law,\textsuperscript{160} and may, in addition, impose specific emissions criteria for various sources.\textsuperscript{161} A number of districts have exercised this power by setting the Ringelmann standard at number 1, or 20 percent opacity.\textsuperscript{162} However, APCO authority to impose more stringent standards probably does not extend to the Vehicle Code.\textsuperscript{163}

Both the Ringelmann and the nuisance standards are rules of a general nature. More precise, and much more technically complex, are the emission standards promulgated by the districts. The Los Angeles APCD has, for example, Rule 52 for particulate matter, set pursuant to rather sophisticated calculations.\textsuperscript{164} Most such standards have been accepted both by the state and by the EPA.\textsuperscript{165}

\textbf{Enforcement}

There exists a variety of remedies for past or prospective violations of state law or district rules and regulations relating to air pollution. These can generally be classified as administrative, civil, and criminal. In addition, certain enforcement powers are vested in city and county governments, and in the attorney general.

\textbf{Administrative}

There are two enforcement tools at the administrative level: the order of abatement and the permit system. The order of abatement

\textsuperscript{157} \textit{Id.} §§ 24243, 39077 (West 1967 & 1973). Again, there are inconsistent exceptions. \textit{Id.} §§ 24251.1, 39077.4-.5 (West 1967 & 1973).

\textsuperscript{158} \textbf{CAL. VEH. CODE} §§ 27153, 27153.5 (West Supp. 1974).

\textsuperscript{159} \textbf{CAL. HEALTH & S. CODE} § 39012 (West 1973).

\textsuperscript{160} \textit{Id.} § 39057.


\textsuperscript{162} \textit{E.g., Rules and Regulations, County of Los Angeles Air Pollution Control District, rule 50 (undated).}

\textsuperscript{163} Letter from Evelle J. Younger, Attorney General, to Assemblyman Peter Schabarum, February 17, 1972 (Attorney General No. IL 72-37, \textit{formerly} No. SO 71/40).

\textsuperscript{164} Rules and Regulations, County of Los Angeles Air Pollution Control District, rule 52 (undated).

\textsuperscript{165} Wong-Woo Interview, \textit{supra} note 42.
is available in all air pollution control districts. It merely directs a polluter to abate a violation. At least in the Bay Area, a person subject to an order is given a reasonable time, often thirty days, to achieve compliance.

The order may be issued, after notice and hearing, by either the air pollution control board or the hearing board, but in county districts the hearing board may not so act unless authorized by the control board. The violation may be of specified statutes, such as the nuisance or Ringelmann laws, or of any rule or regulation prohibiting or limiting the discharge of contaminants into the air. In the Bay Area and regional districts, the hearing board must find, in addition to a violation of state law or district rules and regulations, "that no variance is justified and that a reasonable time has been allowed for compliance . . . ."

County law is strangely silent as to how an order for abatement is to be framed. The BAAPCD and regional law, however, provide that "[t]he order for abatement shall be framed in the manner of a

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167. Id. § 24368.3 (West 1967). See id. § 39505 (West 1973) (the comparable regional statute).
168. The abatement order law is another example of the confusing and conflicting provisions often found in the state's air pollution control statutes. Abatement order authority (id. § 24368) was first given to the hearing board of the BAAPCD in 1961 and civil penalties were not available. When the Mulford-Carrell Act was passed in 1967, regional hearing boards were given the same power, and the provisions were made essentially identical to those in the BAAPCD law. Compare id. §§ 24368-68.7, with id. §§ 39502-09 (West 1973). Cal. Stat. 1970, ch. 694 at 1323 gave the air pollution control boards in each kind of district the power to issue orders of abatement, and the further authority to delegate this prerogative to the hearing boards. Id. §§ 24260.5, 24354.15 and 39391 (West 1973 & Supp. 1974). The same act added the $6,000 per day civil penalty. Id. § 39260. There was no amendment to the earlier sections, but there should have been. For example, one question left unresolved is whether the hearing boards of the BAAPCD and regional districts can issue orders of abatement without a directive from the control boards, per the 1970 law. Can the $6,000 per day penalty be imposed in these districts if the control boards have not made the delegation, or if the hearing board expressly acts under its original authority (per section 39260, the $6,000 penalty only applies to the abatement order issued under the later sections)? The BAAPCD and regional statutes contain specific criteria, under the pre-1970 sections, for issuing orders, and also precise procedures, but these are totally lacking in the county law. Can these specifics be implied in the latter law? While political necessities and compromises often led to the conflicts in the air pollution laws, at least some of them could have been avoided with better draftsmanship.
writ or injunction" and may "require a respondent to refrain from a particular act unless certain conditions are met."\textsuperscript{171}

Orders are not self-executing—enforcement lies in the courts.\textsuperscript{172} In all districts violation of an order may be remedied by mandatory or prohibitory injunction, and an intentional or negligent breach may lead to a civil penalty of up to $6,000 for each day that the violation occurs.\textsuperscript{173} In county and regional districts, contravention of an order is also a misdemeanor.\textsuperscript{174}

Although the order for abatement would seem to be an expeditious method of cutting off violations of emission standards, it has received little use by the districts, other than the BAAPCD. The Los Angeles APCD, in particular, has recently been criticized for its failure to utilize the sanction.\textsuperscript{175} Use of the abatement order is desirable because its initiation need not depend on crowded court dockets. Moreover, except for injunctions, it may be more effective because of the relatively large penalties involved as compared with the $500 maximum fines in direct civil or criminal actions (incarceration is seldom imposed as a criminal penalty).\textsuperscript{176} Its disadvantages are that the hearing board may not be capable of spending the time on potentially protracted litigation, and such proceedings may delay getting into court.

One of the most effective mechanisms to insure compliance with applicable standards has proven to be the permit system.\textsuperscript{177} The Los Angeles APCD has made extensive use of this procedure since its inception.\textsuperscript{178} All other districts, including the Bay Area APCD,\textsuperscript{179} now

\textsuperscript{171} Id.
\textsuperscript{172} Id. § 39077.7 (West 1973). See also §§ 24369.6 (West 1967) (BAAPCD); id. § 39508 (West 1973) (regional).
\textsuperscript{173} Id. § 39260.
\textsuperscript{174} Id. §§ 24261, 39438 (West 1967 & 1973).
\textsuperscript{175} See Air Resources Board, Final Report, Investigation of the Los Angeles Air Pollution Control District 51 (1973) [hereinafter cited as Final Report].
\textsuperscript{176} See text accompanying notes 186-96 infra.
\textsuperscript{177} CAL. HEALTH & S. CODE § 24263 (West 1967). "The air pollution control board may require by regulation that before any person either builds, erects, alters, replaces, operates, sells, rents or uses any article, machine, equipment, or other contrivance specified by such regulation the use of which may cause the issuance of air contaminants, such person shall obtain a permit to do so from the air pollution control officer." Id.
\textsuperscript{178} Kennedy, supra note 21; see, e.g., Los Angeles County Air Pollution Control District Rule 10 (undated).
\textsuperscript{179} Bay Area Air Pollution Control District Regulation 2 §§ 1300-02 (10th rev. March, 1973). Note that while there exists no express statutory authority in the
have a permit system in operation so that the state will be in compliance with the EPA requirements.\textsuperscript{180}

Most APCDs divide their permit system in two—the authority to construct, and the permit to operate. The former is issued after a review of plans persuades the APCO’s staff that emission limits will likely be met; the latter after the source is in operation, and the staff is satisfied that the source does in fact meet the standards.\textsuperscript{181}

The permit system has a number of features which make it an attractive enforcement tool. First, it provides an efficient way to obtain source data, for if the operator of a source refuses to furnish information, the air pollution control officer may suspend his permit.\textsuperscript{182} Second, it is a misdemeanor to operate without such a permit.\textsuperscript{183} Third, if the air pollution control officer suspects a violation of any standard, rule, or regulation, he may ask the hearing board to determine, after public hearing, whether to revoke the permit.\textsuperscript{184} Within thirty days after the complaint the hearing board must hold a hearing to rule on the case, after which it may revoke the permit, find that no violation exists, continue the suspension, or grant a variance.\textsuperscript{185}

Finally, the continued effectiveness of the permit system comes mainly from the fact that, once it is established and applied to existing sources, all future construction or modification of pollution sources within a district must receive prior APCD approval of plans and operation; the burden of going forward lies with the source, not the APCD. No other procedure has been found which obliges the polluter to seek consent and prove compliance.

\textbf{General Civil Sanctions}

All air pollution control districts have the power to seek injunc-

\footnotesize

\textsuperscript{180} \textsuperscript{BAAPCD’s enabling act, the attorney general has opined that such power is implicit in the general rule-making authority of the district. See note 80 supra.}

\textsuperscript{180} 40 C.F.R. § 51.18 (1973).

\textsuperscript{181} See Los Angeles Air Pollution Control District Rule 10 (undated). Note that when the system first went into effect in Los Angeles, blanket permits were granted; then, pursuant to Health and Safety Code section 24274, the air pollution control officer acted to obtain various data from source operators which were used (a) in criminal prosecutions, and (b) to suspend permits. See Kennedy, supra note 21.

\textsuperscript{182} CAL. HEALTH & S. CODE § 24270 (West 1967). The permittee may thereafter request a public hearing before the hearing board for reinstatement of the permit. Id. § 24271.

\textsuperscript{183} Id. § 24278-79. This is true in all districts except the BAAPCD; see id. §§ 24362.5-62.7.

\textsuperscript{184} Id. §§ 24274-76 (West 1967 & Supp. 1974).

\textsuperscript{185} Id. § 24276 (West Supp. 1974). Variances are discussed in text accompanying notes 198-217 infra.
tions for any violation of state law or of the rules and regulations of the district.\textsuperscript{186} To obtain such relief, "the plaintiff shall not be required to allege facts necessary to show or tending to show lack of adequate remedy at law or to show or tending to show irreparable damage or loss."\textsuperscript{187} The diminished proof requirements would seem to make injunctive relief an attractive remedy.

There are, in addition to the $6,000 fines for violation of orders of abatement discussed above, civil penalties for violating laws and regulations when the order of abatement procedure is not used.\textsuperscript{188} However, the fine is only $500 per day.\textsuperscript{189} In determining the amount of the penalty, the court is directed to consider all relevant information, including "the extent of the harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurred, and corrective action, if any, taken" by the polluter.\textsuperscript{190}

Criminal Sanctions

Misdemeanor penalties are generally available to county and regional air pollution control districts for violations of statutory nuisance and Ringelmann provisions, and for infractions of district rules and regulations.\textsuperscript{191} In county districts, violation of certain aspects of the permit system may be punished as a misdemeanor.\textsuperscript{192} Infringement

\textsuperscript{186} Id. §§ 24252, 24360.7, 39437 (West 1973 & Supp. 1974).
\textsuperscript{187} Id.
\textsuperscript{188} Id. § 39261 (West 1973).
\textsuperscript{190} CAL. HEATH & S. CODE § 39262 (West 1973). At one time, the Bay Area District had to follow a rather cumbersome procedure to recover $500 "forfeitures" under sections 24369 to 24369.3. This came into play upon any violation of the state Ringelmann standard or statutory nuisance provisions, or of Regulation 2 of the BAAAPCD (applying to "incineration, salvage, heat transfer, general combustion and general operations"). If the APCO found that such a breach had occurred, he could instruct the district's counsel to file a civil action for recovery of the penalty. The unique feature of the system was that the hearing board could step in to review the case, pursuant to section 24369.1. If, after a hearing, the board found that a violation existed, the prosecution would continue, but if the body found no such breach or that the violation was "justifiable," it had to order the action dismissed. Moreover, under that same section, if the board found that a variance was justified, it could proceed to issue such variance at that time. To avoid this entanglement, the BAAAPCD utilized the general provision for fines in section 39261; when this was ruled improper by a Solano County justice court, the District obtained a change in the law. See note 87 supra.
\textsuperscript{192} Id. §§ 24277-80, 24282 (West 1967). Construction, alteration, replacement,
of the general prohibition against open burning is also punishable as a misdemeanor,\textsuperscript{193} and any person who knowingly sets or permits agricultural burning without the requisite permit is likewise guilty of a misdemeanor.\textsuperscript{194} As noted earlier,\textsuperscript{195} in Bay Area law criminal sanctions were, until quite recently, notably absent from all but the open burning sections, a fact which was reflected in that district's preference for the civil sanction as an enforcement tool.\textsuperscript{196} This has been altered to give the Bay Area the same powers in this context as the counties.\textsuperscript{197}

The Variance

As might be expected, the legislature has provided a mechanism to relieve polluters from the extraordinary hardship sometimes caused by the operations of state law, or district rules and regulations.\textsuperscript{198} A former superior court judge, who was the first chairman of the Los Angeles Air Pollution Control District's hearing board, has classified cases wherein a variance is justified as those in which: (1) the equipment in question is issued only in emergency situations; (2) a variance is needed to permit the source operator to conduct experiments to determine what devices will be necessary to solve his air pollution problem; (3) the industry is operating during the time installation of control equipment is taking place; (4) the best equipment known to date, which has been installed at the source, is not sufficient to bring the source into compliance with standards; and (5) the financial situation of the industry (mostly very small enterprises) is such as to preclude immediate installation of equipment, and time is needed to enable the source to secure equipment financing.\textsuperscript{199} The first three grounds seem reasonable on their facts; the fourth and fifth perhaps less so. Following \textit{Huron Portland Cement Co. v. City of Detroit}\textsuperscript{200}

\textsuperscript{193} Id. §§ 39296-96.1 (West 1973).
\textsuperscript{194} Id. § 39298.1(a).
\textsuperscript{195} See note 81 & accompanying text supra.
\textsuperscript{196} See Walker, supra note 8.
\textsuperscript{197} See note 81 & accompanying text supra.
\textsuperscript{199} Walker, \textit{The Air Pollution Control Hearing Board—Functions and Jurisdictions}, 27 S. CAL. L. REV. 399, 402-03 (1954).
\textsuperscript{200} 362 U.S. 440 (1960).
it is fairly certain that a state can require compliance even though the "state of the art" is not sufficiently advanced to permit a particular source to conform. Thus, California could constitutionally require compliance in the fourth instance; the same may be true of the fifth situation. In any event, California has chosen not to adopt the more stringent position.

In order to grant a variance the hearing board must find, after properly noticed public hearing, that the source is violating a statutory standard or a rule or regulation of an air pollution control district, and

b) 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.

c) That such closing or taking would be without a corresponding benefit in reducing air contaminants.

As is evident from the use of the words "reasonable control," "arbitrary and unreasonable taking," and "without corresponding benefit," there is a great deal of discretion vested in the hearing board. In some cases the equities are fairly clear, but in others there are subtle values to be weighed.

If the hearing board finds that a variance is justified, it must then decide what other conditions to impose upon the source, e.g. time limits for compliance, alternative standards, and the like. The applicable statute provides for the exercise of broad discretion by the board in balancing the equities in each situation: "the advantages to the residents of the district from the reduction of air contaminants and the disadvantages to any otherwise lawful business, occupation, or activity" that would result from the application of contemplated requirements. Thus, again, the hearing board is given a free hand in the solution of what are often very complex problems. In addition, var-

201. CAL. HEALTH & S. CODE §§ 24295, 24365.4, 39474, as amended, Cal. Stat. 1972, ch. 950, at 1710. These amendments provide for better public noticing of variance hearings. In the past notice was required to be sent only to the applicant and to the air pollution control officer; it must now be sent to every daily newspaper within the county (or counties, in the case of regional districts and the BAAPCD) in which the district is operating. At hearings on this bill (A.B. 1084)) it was argued that the change would lead to a desirable increase in public participation in the important work of the hearing board.


203. Id. §§ 24297, 24365.5, 39476.

204. Id.
iances may be revoked or modified by the board upon a properly noticed hearing, at which there is a reconsideration of the above-mentioned guidelines.\textsuperscript{205}

A number of procedural changes have recently been made in the variance laws,\textsuperscript{206} principally to meet certain requirements of federal regulations.\textsuperscript{207} The most significant alterations are: (1) notices of hearings must be given thirty days in advance;\textsuperscript{208} (2) each variance must have a final compliance date;\textsuperscript{209} (3) each variance exceeding one year must have increments of progress\textsuperscript{210} (dates on which milestones of progress can be measured); (4) compliance schedules must be developed for regulations enacted, but not yet effective;\textsuperscript{211} and (5) the compliance schedules must be submitted to the ARB\textsuperscript{212} for forwarding to EPA for approval.\textsuperscript{213} As to the last matter, the former law gave ARB no formal mechanism to review variances unless they continued for longer than a year.\textsuperscript{214} Now, not only must variances be sent to the ARB,\textsuperscript{215} but the ARB can modify or revoke them.\textsuperscript{216} While this new law probably improves variance procedure, it also has created bureaucratic paper shuffling, viz., from the APCD to the ARB to the EPA and back down again.

One final power is worthy of mention: if the hearing board finds that certain work is needed to bring equipment in line with standards, or that contemplated action requires additional time, it may now require a performance bond from the source operator. This bond will

\begin{itemize}
\item \textsuperscript{205} Id. §§ 24298-99, 24365.6-65.7, 39477-78.
\item \textsuperscript{207} 40 C.F.R. §§ 51.4(a), 51.15 (1973).
\item \textsuperscript{209} Id. §§ 24301, 24365.10, 39480.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. §§ 24304, 24365.13, 39483.
\item \textsuperscript{212} Id. §§ 24303, 24365.12, 39482.
\item \textsuperscript{213} 40 C.F.R. § 51.15(a)(2) (1973).
\item \textsuperscript{216} Cal. Stat. 1974, ch. 172 (West Cal. Legis. Service 416) (Apr. 17, 1974), amending Cal. Health & S. Code § 39054.2 (West 1973). Under the prior law, enacted in 1971, the ARB could revoke any variance, assuming it could find out about it if not reported (see text accompanying note 214 supra) if the increase in contaminants outweighed the economic loss from revocation. This power to revoke was never exercised.
\end{itemize}
be forfeited to the district should the agreed upon work not be finished, unless the surety itself agrees to undertake the job, in which case it retains the funds.\footnote{217}

**APCD Enforcement Tools Compared**

The variance enforcement tools are utilized to different degrees. The permit system is in effect in every district, due to federal mandate. The criminal sanctions are widely used, probably because the Los Angeles APCD has had such success with them for so many years.\footnote{218} This penalty makes the fewest demands on the APCD staff and hearing board. Although the $500 civil fine should be no more laborious, it is not used extensively by any district except the Bay Area.\footnote{219}

The abatement order, in contrast, places time burdens on staff and either the control board or hearing board, and court action may still be required to enforce the order.

The injunction is the ultimate weapon when all else fails, but it is undoubtedly more complex than the other procedures and makes substantial demands on staff and counsel. Also, the control board is likely to want to approve each injunctive action, for this traditionally extraordinary remedy may have political implications. During a period of three years the Los Angeles APCD used injunctive relief only six times.\footnote{220}

While the criminal sanction remains the most widely used method of enforcement, the authors believe that reliance on it may be misplaced. Arguments that criminal sanctions have inherent deterrent effects can be countered by a demonstration that the civil penalties available to APCDs are never less than the misdemeanor fine, and for violation of an abatement order they are considerably more.\footnote{221} Of course


\footnote{218. Telephone Interview with J.W. Whitsett, Deputy County Counsel, Los Angeles County, May 28, 1974 [hereinafter cited as Whitsett Interview]. Mr. Whitsett believes criminal provisions are effective on opacity violations of the one-shot kind, which comprise the preponderance of LAAPCD's infractions. A citation often brings compliance or a petition for a variance.}

\footnote{219. Interview with James J. Morgester, ARB Senior Air Pollution Operations Specialist, in Sacramento, California, May 24, 1974 [hereinafter cited as Morgester Interview].}

\footnote{220. *FINAL REPORT*, *supra* note 175, at 51-52.}

\footnote{221. The standard misdemeanor penalty in California is a maximum of 6 months imprisonment or $500 fine, or both. *CAL. PEN. CODE* § 19 (West 1970). Compare this with the maximum $500 *per day* civil penalty contained in *CAL. HEALTH & S. CODE* § 24369 (West Supp. 1974) and the maximum $6,000 *per day* civil penalty available
there is the threat of jail terms, but there are few cases in which incarceration has been imposed upon a defendant, perhaps because corporations are most often the accused. One might question the efficacy of a criminal sanction against a corporation, unless penalties against the officers are specially available and readily obtainable.

It should also be pointed out that there are a number of important procedural objections to criminal remedies. Most of the problems traditionally associated with criminal actions are present: the burden of proof is higher; unanimity of jury verdict (at least in California) is a consideration; and criminal statutes and regulations must be drawn with a certainty some argue is not desirable in a technically complex and rapidly changing area such as air pollution control. Moreover, it has been contended that it is difficult to present technical issues to a jury; it is much easier, and thus more efficient, to submit the case to a panel of experts such as those on the hearing board, seeking the issuance of orders for abatement. Further, it is argued, if injunction or even civil penalties were sought, a judge could weigh the equities involved to fashion a more appropriate remedy than the black-and-white determination of guilt/innocence that accompanies the criminal penalty.

There are, in addition, some nice constitutional issues raised by the use of criminal sanctions. If, for example, information were obtained from a source operator under threat of misdemeanor penalty, there is a question as to whether use of that evidence in a subsequent criminal action would constitute self-incrimination in violation of the Fifth Amendment.

under id. § 39260 (West 1973). Legislation has been introduced to provide an incremental increase for subsequent civil violations; although it was defeated in the Senate, reconsideration was granted on February 27, 1974. A.B. 2284 (1973).

222. Morgester Interview, supra note 219.

223. Walker, supra note 8, at 85.

224. Id. at 87, and Walker Interview, supra note 79. In many cases defendants plead nolo contendere to avoid the time and trouble of trial, and the stigma of a criminal guilty plea or conviction; the court then weighs the equities in determining the amount of the penalty. Whitsett Interview, supra note 196.

225. Walker Interview, supra note 79.

226. Following Shapiro v. United States, 335 U.S. 1 (1948), it appears that records required to be kept, pursuant to a regulatory statute, for filing with a governmental agency can be used in subsequent criminal prosecutions. In 1968, however, the Court cast a new light on this area in Marchetti v. United States, when it reversed the defendant's conviction under federal gambling registration laws, noting three distinguishing factors between the two cases. 390 U.S. 39 (1968). First, in Shapiro the defendant was ordered to keep more or less customary records under the Emergency Price Control Act, while in Marchetti the registration was unrelated to wagering records.
Further, following the decisions of the United States Supreme Court in *Camara v. Municipal Court*\(^ {227} \) and *See v. City of Seattle*\(^ {228} \) searches in business establishments of areas not open to the public have been prohibited without a warrant; thus, information so obtained would be inadmissible in a criminal action.\(^ {229} \) At first these cases caused some consternation among those charged with the administration of air pollution laws,\(^ {230} \) but in California, at least, this problem has been obviated by the statutory administrative search warrant provisions.\(^ {231} \) At any rate, these cases will now need to be re-evaluated in light of the recent case of *Air Pollution Variance Board v. Western Alfalfa Corp.*\(^ {232} \)

**The Air Resources Board's Role in Enforcement**

As noted earlier, the function of the board is essentially to oversee standard-setting and enforcement operations of the districts.\(^ {233} \) As a corollary to this, statutory provisions state that enforcement activities

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\(^{227}\) 387 U.S. 523 (1967).  
\(^{228}\) 387 U.S. 541 (1967).  
\(^{229}\) Moreover, it seems likely that proceedings to recover a penalty or forfeiture would be deemed "quasi-criminal" in nature, so the exclusionary rule would also apply. *See*, e.g., Annot., 5 A.L.R.3d 670 (1966). This seems analogous to proceedings for forfeiture of a vehicle, treated in *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 96, 396 P.2d 706, 709, 41 Cal. Rptr. 290, 293 (1964).  
\(^{230}\) *See*, e.g., Mix, *The Misdemeanor Approach to Air Pollution Control*, 10 Ariz. L. Rev. 90, 95 (1968). *See also*, Mulchay, *Camara and See: A Constitutional Problem with Effect on Air Pollution Control*, 10 Ariz. L. Rev. 120 (1968).  
\(^{231}\) CAL. CODE CIV. PROC. §§ 1822.50-.57 (West 1972).  
\(^{232}\) 42 U.S.L.W. 4756 (U.S. May 20, 1974). Essentially, the opinion applies the "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1924), to smoke opacity tests conducted by a state health inspector on respondent's outdoor premises. Finding no violation of the Fourth Amendment, Justice Douglas stated that the inspector had "sighted what anyone in the city who was near the plant could see—plumes of smoke" and that the "invasion of privacy... if it can be said to exist, is abstract and theoretical." *Id.* at 4757.  
\(^{233}\) CAL. HEALTH & S. CODE §§ 39012, 39052(f), 39054, 39274-75 (West 1973).
are to be undertaken by the ARB only after a public hearing has been held to determine whether "local or regional authorities have failed to meet their responsibilities pursuant to [Division 26 of the Health and Welfare Code]," and the board has thereafter so decided. 234

The principal and most direct method whereby the ARB can enforce air pollution control laws or the rules and regulations of an APCD is by assuming the powers of the district. 235 If the board finds that the local regulations are insufficient to achieve applicable air quality standards, it may adopt adequate ones which the district must administer. 236 If the ARB finds that reasonable action to execute any basinwide coordinated plan has not been taken in a district it "may take any appropriate legal action to enforce any such plan, including the emission standards and enforcement procedures therein." 237 Or if it finds that a district's implementation program designed to carry out the plan will not achieve the air quality standards established for the basin, or if no program is submitted, the ARB may exercise the powers of the county air pollution control district. 238

Pursuant to 1972 amendments to the law, before the ARB can act it must hold a public hearing, upon thirty days written notice to the district and the basinwide coordinating council. 239 If there is "an imminent and substantial endangerment to the health of persons, and . . . the districts affected are not taking reasonable action," the ARB may give as little as twenty-four hours notice, and that may be oral, if necessary. 240 These amendments greatly streamlined a time consuming notice and investigation procedure 241 which had proven to be of little use in correcting unacceptable practices of APCDs. 242

The board has commenced proceedings under these provisions in a number of cases throughout the state. 243 Most often, once the APCD in question and the polluter causing the problem learn of the board's threat to intervene, compliance is obtained in due course with

234. Id. § 39012.
235. Id. §§ 39052(f), 39274, 39275.
236. Id. § 39052(f).
237. Id. § 39274.
238. Id. § 39275.
239. Id. § 39054, as amended, Cal. Stat. 1972, ch. 806, at 1433. This amendment controls the procedure to be followed in actions pursuant to sections 39052(f), 39274, and 39275 of the Health and Safety Code, cited in note 235 supra.
242. Maga Interview, supra note 62.
243. Id.
no actual assumption of authority by the board.\textsuperscript{244} For example, a plant in San Benito County was virtually uncontrolled; its white plume could often be seen for miles. Some local ranchers complained of the dust on the ground. The board put the APCD on notice, and as a result a variance was requested. The variance was granted but the ARB continued to apply pressure because the compliance schedule was inadequate. Finally, the company announced its plans to abandon the old plant and to build a new one. The board continued to apply pressure, and a specific time table was established, which was acceptable to the Board. Ultimately the company abandoned the new plant and closed the old one.\textsuperscript{245}

A more difficult case was presented by a steel plant in San Bernardino County. The first formal action of the board was an extensive investigation of the multitude of complex sources at the plant; this resulted in a 156-page report.\textsuperscript{246} Some sources had been controlled, but many had not. The staff, at board direction, met frequently with the APCD and the owner, and continued to assert that sufficient corrective action had not taken place. Notable improvements were undertaken, but some sources are still on variance, and the ARB (and now EPA) continues to work on the matter; there are some specific operations for which control technology is still not available.\textsuperscript{247}

In both of these cases compliance was slow because control was difficult and/or expensive on old equipment. Closing the plants would have caused severe economic hardship to the communities involved. The hearing boards when granting variances, and hence the ARB when considering exercising its own authority, must take such economic impact into account.\textsuperscript{248}

Many investigations by the board involve burning of wood waste in northern California. In these cases, technology for control is usually available at a reasonable cost; enforcement may be lacking because the APCDs were slow to develop effective programs, and because local officials may not be anxious to cause any considerable hardship to important sources of employment.\textsuperscript{249}

\textsuperscript{244} Id.

\textsuperscript{245} Wong-Woo Interview, \textit{supra} note 42; \textsc{California Air Resources Board, Status of Portland Cement Plants in California}, at 24-27 (1973).

\textsuperscript{246} \textsc{California Air Resources Board, Survey of Air Pollution from the Kaiser Steel Plant, Fontana, California} (1971).

\textsuperscript{247} Wong-Woo Interview, \textit{supra} note 42.


\textsuperscript{249} Morgester Interview, \textit{supra} note 219.
The cases that the ARB examines usually involve specific sources, and do not entail an overall review of the APCD's rules and enforcement practices. The most notable exception is the ARB's investigation of the Los Angeles APCD. Two individuals had compiled extensive data which they considered to be evidence of deficient rules and lax enforcement procedures. A formal petition was filed with the ARB, which, in light of the material, felt compelled to investigate. Rather than have the staff act, the board appointed a four-man panel.250 One reason for this special body was probably that an investigation of one of the oldest and most prestigious air pollution control districts in the country might prove difficult for the staff, some of whom had learned the trade working there. Another was undoubtedly the sensitivity of the investigation.251 The panel reduced the issues raised to twenty-two, and reported on each one. Generally the group found the district to be performing satisfactorily, but criticized it for relying too much on the penal sanctions for enforcement, and for not following the law requiring the release of information to the public. The panel's report did not limit itself to the questions raised;252 it reproached the district for generally failing to inform the public accurately and effectively about air pollution, its causes and controls. The APCD's deficiencies in this area probably cannot be pursued by the ARB in the courts, and the panel recognized this: nonetheless, the panel felt that there was good cause for the petitioners to be upset and that the reasons should be brought into focus.253

Other Actors

The attorney general in California holds a distinct constitutional office and as such operates independently of the governor and administrative agencies like the ARB. In recognition of this separation, certain powers of enforcement have been given the attorney general, which he may utilize without formal regard to the actions of the ARB or of the APCDs. The Health and Safety Code states:

250. The Chairman was the Vice-Chairman of the Air Resources Board, Gerald Shearin. The technical experts were the Chairman of the Technical Advisory Committee of the 14-member board, R. Robert Brattain, and Dr. John Heslep, who was the Department of Public Health's representative on the board at that time. William Simmons, one of the authors of this article, was the fourth panel member.

251. Maga Interview, supra note 62.

252. Among the more important questions were: (1) Is the LAAPCD correctly assessing the contribution of statutory sources to the overall air quality program? (2) Are emissions limits reasonably related to achieving air quality standards? (3) Is the hearing board carrying out its obligations? (4) Are the permit and inspection programs attaining compliance?

253. See Final Report, supra note 175.
No provision of [Mulford-Carrell Act, Division 26], or of any order, rule, or regulation of authority, is a limitation on:

(b) The power of the Attorney General, at the request of a local or regional authority, the State Air Resources Board, or upon his own motion, to bring an action in the name of the people of the State of California to enjoin any pollution of nuisance.254

Additionally, the civil penalties noted previously255 may be recovered in a suit brought in the name of the People by, inter alia, the attorney general.256 Finally, in addition to any common law powers, the attorney general may, by statutory authority, bring actions to protect the environment.257

As noted above,258 cities and counties are not foreclosed from adopting more stringent standards than the state or district, and enforcement power is concurrent with the authority to adopt.259

There is nothing in the air pollution law authorizing a lesser political unit to enforce APCD's regulations or state law. However, a district attorney, or a city attorney vested with misdemeanor enforcement powers, could at least enforce the misdemeanor provisions of such laws.260

The Air Pollution Control Subvention Program

There is another important mode of interaction between the ARB and the APCDs. In 1972 the Legislature added a program whereby money is to be subvened to air pollution control districts each year.261 The subvention is to be on a one-for-one262 basis for: (a) every county or regional district whose boundaries include an entire air basin; (b) every unified district whose boundaries include an entire air basin.

255. See text accompanying notes 186-90 supra.
256. CAL. HEALTH & S. CODE § 39262 (West 1973). Arguably this section only applies when the attorney general serves as counsel for a district or for the ARB, since the section on the disposition of penalties collected seems to assume that either a district or the ARB will be a party. Id. § 24262 (West 1967).
257. CAL. GOV'T CODE §§ 12600-12 (West Supp. 1974).
258. See text accompanying note 105 supra.
260. See text accompanying notes 191-97 infra. This is so because generally the prosecutor of a governmental unit is vested with power to enforce all criminal laws of the state. E.g., CAL. GOV'T CODE § 26500 (West 1968).
262. One dollar for every dollar budgeted by the APCD from local sources. CAL. HEALTH & S. CODE § 39282 (West 1973).
basin; or (c) county districts (including unified districts) whose boundaries include an entire air basin and who are parties to a joint power or similar enforceable agreement which provides for uniform rules and regulations among all districts, at least four meetings per year of the Basinwide Air Pollution Control Coordinating Council, and suitable sharing of qualified air pollution personnel and equipment. Allocation is to be on a two-for-three basis in all other districts. In both cases, however, the amount of the subvention is limited by population.

The allowance may be reduced by the amount of any funds received by a district from the federal government, but this need not occur if certain conditions exist, such as a critical air pollution problem. The ARB may make additional subvention from any funds not allocated at the end of any year.

The reason for the difference in ratios should be obvious: the board and the legislature hoped it would lead to regional approaches to air pollution control, and might even result in basinwide unified APCDs. This money may not be manna for the districts, however, since it comes with the proverbial strings: unless the districts concerned "are actively and effectively engaged in the reduction of air contaminants" in line with ARB-approved county programs and coordinated basinwide plans, the funds will not be forthcoming. When,

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263. Formed pursuant to Health and Safety Code section 39272.
265. Two dollars for every three dollars budgeted by the APCD from local sources.
267. If the ratio is 1:1, the limit is 23 cents per capita; if the ratio is 2:3, the limit is 18.4 cents per capita. Id. §§ 39282, 39283. In air basins of less than 98,000 population, the subvention may exceed the dollar and population limits if the counties in the air basin qualify for a 1:1 subvention, but these special allowances may not exceed $45,000. Id. § 39284. The ARB believed no effective program could be operated on less than $45,000, and the dollars-per capita limits would not permit payment of anywhere near one-half that sum in those basins. Two very rural air basins (Northeast Plateau, in northeastern California, and the Great Basin Valleys, east of the Sierra Nevada) qualify for the special subvention. Interview with George J. Taylor, ARB Deputy Executive Officer, in Sacramento, California, May 24, 1974 [hereinafter cited as Taylor Interview].
269. Id. § 39289.
270. This has occurred in the North Central Coast Air Basin (Monterey, Santa Cruz, and San Benito counties), and is being actively considered in the North Coast Air Basin. In both cases, a unified APCD is the approach followed. Several basins obtain a 1:1 subvention through the contractual approach.
271. Id. § 39286 (emphasis added).
through ARB proceedings or pursuant to a resolution of a district's board of directors, the ARB concludes that this condition is not being satisfied, the moneys that such district would have received "plus such additional sum as may be necessary . . . shall be allocated to the [ARB] itself to carry out the approved plan or program." This section dovetails quite nicely with the direct enforcement procedures discussed earlier, so that if the board finds it necessary to undertake enforcement activities it can use subvention funds to pay for them.

Moreover, if the ARB finds that the moneys budgeted by an APCD in order to obtain the subvention are not being expended in conformity with that plan, the ARB may cease further payments, withhold future subventions, bring an action to recover moneys already subvened, or assume the powers of the district summarily.

It might be interesting at this point to analyze the conceptual threads running through this scheme. Clearly a primary interest is to provide an infusion of funds into the various districts. There is apparently a direct correlation between the amount of money expended and the effectiveness of a program, and districts have long contended that one of the major impediments to effective enforcement on the county level is this lack of funds. At the same time, however, the subvention program is designed to encourage the formation of control strategies along regional lines, so it would appear that the aim of the bill is not merely to provide money to counties—a position which indirectly attacks the efficacy of those districts. The rebuttal to this contention is that rather than striking at local districts, the subvention program respects the options of county districts: instead of simply imposing a regional district upon certain counties, it encourages a regional strategy by whatever means appear most acceptable in the particular air basin.

Open Burning

One final area of nonvehicular pollution must be studied. In 1970 the legislature added chapter 10 to the Mulford-Carrell Act to provide for a uniform statewide policy regarding the control of open burning for the disposal of combustible wastes. With certain excep-

274. Note that if the APCD board asks for intervention, the ARB need not follow the procedure outlined in section 39054. Id. § 39286.
275. Id. § 39288.
tions, such burning was prohibited after December 31, 1971. 277 This means that open burning of "petroleum wastes, demolition debris, tires, tar, trees, wood waste, or other combustible or flammable solid or liquid waste" 278 is illegal. The air pollution control district is responsible for the primary administration of open burning laws, just as it is for general industrial sources of pollution. 279

The most important exception to the general ban is agricultural burning, which is discussed below. Other exclusions involve: (1) fires permitted by any public officer to abate a fire hazard, or to instruct persons in fire fighting methods; 280 (2) backfires; 281 (3) fires on the premises of single- or two-family dwellings; 282 (4) fires for right-of-way clearing by a public utility, as long as the material has been stacked and dried or otherwise prepared for better combustion to the satisfaction of the air pollution control officer; 283 (5) fires for levee, ditch, or reservoir maintenance, subject to the same combustion provisions as class (4); 284 (6) fires at solid waste dumps owned or operated by cities or counties, for a limited time only, upon permit from the ARB issued under special circumstances described in the statute; 285 and (7) fires for the combustion of certain wood wastes on property being developed for residential or commercial purposes. 286

The most extensive exemption from the ban is for agricultural burning. 287 In order not unduly to disrupt the agricultural industry, 288

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278. Id.
279. Id. §§ 39298.8, 39299.2.
280. Id. § 39297.
281. Id. (when "necessary to save life or valuable property").
282. Id. § 39297.2 (except for "disposal of combustible or flammable solid waste").
283. Id. § 39297.3.
284. Id.
285. Id. § 39297.4. These circumstances include sparse population and "economic and technical difficulties." Id. The ARB initially granted time extensions ranging from two months to two years for about 300 city and county dumps, and some further extensions are being given. An extension is granted only when there is a showing that there are problems in changing to sanitary landfills or other refuse disposal plans.
286. Id. § 39297.6 (waste from "trees, vines, or bushes"). This amendment was designed to permit selective burning of materials from cleared subdivisions so that sanitary landfills in certain areas would not be overburdened. Before such burning can occur (1) the APCD board must find that it is more desirable to burn rather than to use other means of disposal; (2) the district must have developed criteria for such burning to improve the combustibility of material; (3) the ARB must approve these standards; and (4) the air pollution control officer must issue a permit for the burning. The section automatically expires as of July 1, 1977.
287. Id. § 39297.1. The variance provisions, discussed in text accompanying notes 198-217 supra, do not apply to the open burning sections of chapter 10.
288. Id. §§ 39298.4, 39299.3.
the legislature provided for the regulation of agricultural burning so that such burnings will be prohibited on days when dispersion and diffusion of smoke will be low.289

Administration of the agricultural burning provisions essentially is accomplished on three levels. The ARB determines from meteorological conditions upon what days such burning is to be permitted.290 The ARB is also responsible for the promulgation of guidelines for the regulation and control of agricultural burning in each air basin.291 To implement these standards local authorities are to adopt (and have adopted) plans which must include both emission criteria and enforcement procedures.292 The ARB is required to review the plans, and if it finds that a scheme is “reasonably calculated to achieve air quality standards applicable to the basin” it must approve the plan.293 If it does not so find, however, or if no timely program is submitted, then the board, after public hearing, “. . . shall have all the powers of any local and regional authority within the basin to adopt an alternative plan for the local or regional authority.”294

Although the APCD is responsible generally for the enforcement of regulations relating to agricultural burning, fire protection agencies perform much of the day-to-day administrative functions, because they are appointed by the ARB to administer the specialized permit system.295 This bifurcation of “front-line” authority over agricultural burning has essentially worked well, but some friction has developed where fire officials feel they have been injected into a program which has nothing to do with fire suppression and which has created administrative headaches.296 Generally, the APCD alone enforces the no-burn-day ban when it is violated.297

Two interesting legal questions related to the control of agricultural burning have arisen. The first is substantive: how broad is the definition of “agricultural burning”? The second is jurisdictional: may an APCD impose more stringent regulations upon agricultural burning, as it may with other nonvehicular sources? For example, can an

289. See id. § 39298.
290. Id. Under contract with the ARB, the Los Angeles APCD and the BAAPCD do the forecasting for their respective air basins.
291. Id. § 39298.2.
292. Id. § 39298.8. Emission limits are not practical for agricultural burning and have not been adopted. Wong-Woo Interview, supra note 42.
293. CAL. HEALTH & S. CODE § 39298.9 (West 1973).
294. Id.
295. Id. § 39298.1.
296. Wong-Woo Interview, supra note 42.
297. Id.
APCD ban the burning of one crop as long as it does not ban all types of agricultural burning?

The ARB staff thought that the statutory definition of agricultural burning298 excluded material not grown on the property. However, some counties insisted on including within such burning items like paper pesticide sacks, wood pallets, paper used to wrap palm dates hanging on trees, and raisin trays used in the fields to dry grapes.299 The ARB finally resolved the issue at a public hearing, by specifically including “material . . . intimately related to the growing or harvesting of crops and which are used in the field . . .”300 and by listing certain examples, such as “trays for drying raisins, date palm protection paper, and fertilizer or pesticide sacks or containers”301 where such items are emptied in the fields.

The second question may be more important, for various citizens' groups would like to eliminate the burning of certain crops altogether.302 These organizations contend that the smoke from such burning is a great detriment to the general public, while the burning itself benefits only a few people; moreover, alternatives to combustion are available in some instances.303

Section 39057 of the Health and Safety Code asserts that 'no local or regional authority may completely ban all agricultural burning';304 in contrast, section 39299.3 of that code states that "[i]t is the intent of the Legislature, by the enactment of this article, that agricultural burning be reasonably regulated, and not be prohibited by the board."305 The attorney general has rendered an informal opinion which concludes that no air pollution control district may ban any type of agricultural burning;306 clearly, however, it is also possible to reach

298. CAL. HEALTH & S. CODE § 39295.6 (West 1973); CAL. ADM. CODE tit. 17, § 80100(b).
299. The staff was not too concerned with these types of burning per se, but was worried that if a broader definition were used, to permit this sort of burning, other, needless kinds of burning would result. Wong-Woo Interview, supra note 42.
300. CAL. ADM. CODE tit. 17, § 80100(b).
301. Id.
302. In Yolo County, for example, a Sierra Club group has undertaken a study of the agricultural burning situation, with an eye to the elimination of at least some forms of such burning.
303. Morgester Interview, supra note 219; Interview with Sydney Thornton, ARB Assistant Air Pollution Operations Specialist (plant pathologist), in Sacramento, California, May 24, 1974. Common alternatives are plowing or discing under. The difficult issue is the determination of when the alternatives are economically feasible. Id.
305. Id. § 39299.3 (emphasis added).
306. Letter from Evelle J. Younger, California Attorney General, to John A.
another result, e.g., that some of the many types of agricultural burning may be banned, as long as all such burning is not completely prohibited. Therein, of course, lies the problem, one upon which the two authors of this article are in fact in discord.\textsuperscript{307} The difficult questions posed by either position perhaps indicate that further legislative pronouncement on the matter would be the most appropriate solution.

\textbf{Jurisdictional Problem Areas}

While there appears to be a distinct delineation between and among entities charged with air pollution control, there remain areas of concern for which no nice separation of powers has been made. In this section we will discuss two examples of jurisdictional overlay and conflict.

\textit{The Air Pollution Control Framework versus Other Governmental Agencies}

Emissions from fossil-fueled powerplants have long been troublesome. In Orange County, for example, it was estimated that some 63 percent of the oxides of nitrogen\textsuperscript{308} from nonvehicular sources was attributable to generating plants of Southern California Edison.\textsuperscript{309} Statistics tend to indicate that coal-burning powerplants are the source of even more hazardous pollutants.\textsuperscript{310} However, there is also an abundance of evidence that this country is experiencing the initial stages of a long-term energy shortage. Thus, it seems that there has been, and likely will be, conflict between those agencies charged with environmental regulation of energy-producing facilities, and those agencies with responsibility for developing energy resources.

In 1969, for example, the Southern California Edison Company

\begin{谢文}{Maga, ARB Executive Officer, December 23, 1971 (Attorney General No. S.O. 71/43 IL).}
307. These include, in support of the attorney general’s position, the unanswered dilemma as to the extent of prohibition permitted if “some but not all” crop burning can be banned, and the general matter of legislative intent: the ARB staff member who worked on the burning bills in the legislature in 1970 believes that that body intended to prevent the ARB and the APCDs from banning any burning of agricultural waste. Interview with George J. Taylor, ARB Deputy Executive Officer, in Sacramento, California, May 24, 1974.

308. Oxides of nitrogen react in the sunlight with hydrocarbons to produce photochemical oxidant, which is commonly called smog.

309. Orange County APCD v. PUC, 4 Cal. 3d 945, 953, 484 P.2d 1361, 1366, 95 Cal. Rptr. 17, 22 (1971).

(hereinafter Edison) sought to add two new fossil-fueled generating units to its existing installation at Huntington Beach. It applied to the Public Utilities Commission (PUC) for a certificate of public convenience and necessity,\textsuperscript{311} and to the Orange County Air Pollution Control District (OCAPCD) for a permit to construct.\textsuperscript{312} The air pollution control officer refused Edison's application on the grounds that the information did not adequately show that the plant, when operated, would comply with statutory nuisance provisions of the Health and Safety Code,\textsuperscript{313} and that the proposed addition would meet certain emission standards adopted by the OCAPCD after Edison's first application.\textsuperscript{314} A subsequent appeal by the company to the hearing board of the OCAPCD resulted in affirmation of the permit denial, and Edison did not seek judicial review.\textsuperscript{315} Very shortly thereafter, however, the PUC issued a certificate to Edison which directed the utility to begin construction immediately. The PUC claimed that it had exclusive jurisdiction over matters of powerplant siting.

The OCAPCD sued to block construction, and the case eventually wound up in the California Supreme Court. That tribunal decided that air pollution control districts exercise coequal jurisdiction with other state agencies, and that the OCAPCD could therefore require Edison to obtain a permit, notwithstanding the certificate from the PUC. In reaching this conclusion the court looked to provisions of the enabling act which permit the APCD to enforce its rules and regulations against state or local governmental agencies.\textsuperscript{316} These, it reasoned, while not dispositive, are strong indications that the power of an APCD is not limited to that of a mere local body. Moreover, the court found that an APCD is clearly not merely a subdivision of county government, but a separate and distinct political entity.\textsuperscript{317} Because (1) the power of the OCAPCD vis-a-vis state agencies is greater than that of a county, (2) the nature of the entity itself is separate from that of the county, and (3) the legislature itself had enacted the comprehensive scheme for the regulation of air pollution rather than sim-

\textsuperscript{311} CAL. CONST. art. XII, §§ 22, 23. Such a certificate is issued pursuant to CAL. PUB. UTIL. CODE § 1001 (West Supp. 1974).
\textsuperscript{312} See note 178 supra for the Los Angeles APCD's permit rule.
\textsuperscript{313} 4 Cal. 3d at 949, 484 P.2d at 1363, 95 Cal. Rptr. at 19.
\textsuperscript{314} Rule 67 of the OCAPCD as it then existed.
\textsuperscript{315} 4 Cal. 3d at 950, 484 P.2d at 1364, 95 Cal. Rptr. at 20. Note that judicial review is permitted pursuant to sections 24322 and 24323. Some commentators think that this failure was a significant factor in subsequent litigation. See Environmental Regulation, supra note 310, at 543.
\textsuperscript{316} 4 Cal. 3d at 952, 484 P.2d at 1365-66, 95 Cal. Rptr. at 21-22.
\textsuperscript{317} Id. at 952-53, 484 P.2d at 1366, 95 Cal. Rptr. at 22.
ply delegating that authority to the county, the supreme court concluded that the PUC and the APCD must share concurrent jurisdiction over generating plants.

The court never specifically characterized the nature of the APCD—it simply noted that it has attributes both of a state agency and of a local entity. Thus, the APCD remains an anomaly, having neither the status of a special district, nor that of a county or city, nor that of a true state agency. Clearly, however, the APCD may exercise jurisdiction concurrently with any other state agencies in the absence of statutory language limiting such authority.

The Warren-Alquist State Energy Resources Conservation and Development Act has the effect of negating Orange County v. PUC. The act pre-empts the regulatory jurisdiction of the air pollution control agencies and all other local and state agencies formerly having jurisdiction over power plants. The apparent purpose of this change is to give the utilities a one-stop permit system, and at the same time to subject them to state-imposed siting requirements of the new act.

All is not lost, however, because the new State Energy Resources Conservation and Development Commission, in issuing a permit for a powerplant, must assure itself that the plant complies with all state, local and regional laws and standards. Such a finding is unnecessary, however, if the commission determines that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such purposes. In addition the commission shall in no event make any finding in conflict with applicable federal laws or regulations. The restriction of federal prescripts is the ultimate restraint, because APCD rules and regulations are approved and incorporated into EPA regulations and therefore have the same effect as federal law. Thus, while the APCDs have lost jurisdiction, their EPA-approved rules must still be met. No control has been lost, except possibly in enforcement, and stream-

322. See id. §§ 25004, 25006, 25500.
323. Id. § 25525.
324. 40 C.F.R. §§ 52.02(d), 52.223 (1973).
325. See Cal. Pub. Res. Code §§ 25506, 25538 (West 1970). The APCDs must be consulted as to the emission capabilities of a facility, but nothing gives them any authority to enforce. Hopefully, the commission will seek the assistance of the experts in the APCDs to assure compliance.
lined procedures have been gained for the siting and approval of powerplants.

Problems within the Infrastructure: ARB versus APCD

Many, if not most, of the separate functions of the ARB and the various APCDs are carefully set forth in the enabling acts, as noted previously. There are still some areas of regulation open to speculation, however, and the following case study illustrates one aspect of the problem of division of authority.

It is the belief of the Environmental Protection Agency that lead in the atmosphere can have a seriously deleterious effect on human beings. The Air Resources Board agrees, and has an ambient air quality standard for lead (the EPA does not). Leaded gasoline is one of the major sources of lead particulates in the atmosphere, but it only becomes a real problem when the fuel is burned, such as in the internal-combustion engine of a motor vehicle. In California, though, there is still dispute over which agency has jurisdiction to prescribe the lead content in gasoline: the APCD, the ARB, or neither?

Recent litigation has emphasized the problem. In one case, the Environmental Defense Fund petitioned the ARB to promulgate vehicular emissions standards for lead particulates and thereby indirectly

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327. CAL. ADM. CODE tit. 17, § 70200.
329. It is important to note that the EPA has established standards for lead content in motor vehicle fuel—primarily because catalytic converters to be used as emission control devices on 1975 and later model-year vehicles are damaged by lead. Id. at 1253. EPA is still considering health-related lead regulations. Id. at 1257. Note, too, that federal action does not foreclose California from establishing additional, stricter regulations. See Clean Air Act § 211(c)(4)(B), 42 U.S.C. 1857f-6c(c)(4)(B) (1970). Frank Bonamassa, Supervising Engineer for the ARB, indicated the reason why the lead issue is still alive, despite the federal rules in testimony at an EPA hearing on proposed federal lead regulations held in Los Angeles, May 2, 1972: "Sixty to sixty-five percent reduction of lead from motor fuels is not good enough in California."

A related problem has recently become the subject of litigation in San Diego: regulation of the recovery and disposal of gasoline vapors emitted throughout the gasoline marketing process. Atlantic Richfield Co. v. APCD of San Diego County, No. 356319 (Super. Ct., San Diego County, filed July 29, 1974). The San Diego APCD has established regulations requiring marketers of gasoline to obtain permits for approved vapor collection and disposal systems. ARCO, seeking an alternative writ of mandate, has alleged inter alia that the APCD is without jurisdiction to issue rules concerning such vapor emissions, implying that only the ARB or the Legislature has such power. Telephone Interview with Foster Knight, Deputy Attorney General, San Diego County, August 24, 1974.
to control lead discharge. The ARB refused, on the advice of the attorney general, who opined that the board was without statutory authorization to regulate such emissions. The Environmental Defense Fund then sought a declaratory judgment to the effect that the ARB did, in fact, possess such power; defendants' motion for summary judgment was granted, and the Court of Appeal, First Appellate District, affirmed (certiorari was denied). In another action the Western Oil and Gas Association sought to restrain enforcement of Rule 74 of the Orange County APCD which regulates the lead content of gasoline. The superior court granted the request on the grounds that only the ARB has authority to regulate lead content in motor vehicle fuels.

The court of appeal in the first case above found that while the ARB had authority to promulgate emissions standards for specified pollutants and although it was given certain special powers relating to fuels, there was no specific grant of authority to regulate the content of motor vehicle fuel. Stated simply, the tribunal held that the authority to regulate what comes out of the car does not implicitly authorize ARB to indirectly control those emissions by prescribing what goes into the vehicle.

There seem to be four possible answers to this apparent conflict: (a) the ARB alone has the power; (b) the APCD alone has the power; (c) they enjoy concurrent jurisdiction; or (d) neither has the power.

The attorney general, the only party common to both suits, has taken the position (along with Orange County APCD) that only

331. Id.
332. Western Oil & Gas Ass'n v. Orange County APCD, No. 191239 (Super. Ct., Orange County, April 21, 1972). This case has become mired in a procedural morass; moreover, a petition to the California Supreme Court to consolidate it with the Environmental Defense Fund case for a ruling on the merits was rejected. Letter from G.E. Bishel, Clerk of the Supreme Court, to Roderick Walston, Deputy Attorney General, Thomas J. Graff, & J. William Wigert, October 11, 1972. Trial was finally conducted in the Orange County Superior Court on July 12, 1973; the court held that the APCD lacked authority, relying on state preemption under section 39102 of the Health and Safety Code, and on the notion that fuel regulation is not a proper subject for county-by-county regulation. Telephone Interview with John Powell, Deputy County Counsel, Orange County, May 31, 1974. The Court of Appeal affirmed the judgment on July 10, 1974, and a petition for a hearing in the supreme court has been filed.
333. 30 Cal. App. 3d at 833-34, 106 Cal. Rptr. at 600-01.
334. Id. at 836, 106 Cal. Rptr. at 602-03.
APCD's can regulate lead content of gasoline. The Court of Appeal, First Appellate District, agreed that the ARB does not have the power, but the *Environmental Defense Fund* decision is not dispositive of whether the APCD's do have such authority.  

An analysis of those arguments hopefully will add some dimension to an understanding of the ARB and the APCDs.

The attorney general and the Orange County APCD essentially contend that the APCDs were originally endowed with broad general jurisdiction over all forms of air pollution. The authority for lead regulation may be found in the general rulemaking powers given APCDs, as well as in the emergency powers of such districts. Only that authority expressly given the ARB by the Mulford-Carrell Act was removed from the APCDs, and regulation of lead was not included therein. Moreover, it is asserted that no such power may be fairly implied, for several reasons:

1. The ARB has certain limited authority over fuel content, indicating that if the legislature had meant to extend that power it could specifically have done so.

2. As evidenced by federal statutes there is a clear distinction between the emission standards and the setting of fuel content standards. Had the latter been intended in California, it would have been expressed as in the federal law.

3. The legislature's consistent refusal to enact laws empowering the ARB to regulate lead indicates its intent that the ARB not have such power.

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335. There was dicta in the original, unprinted decision to the effect that the APCD did not possess the power to regulate lead either, but on motion of the attorney general (who argued that this point was superfluous and had therefore not been briefed by either side) that dicta was excised. *Id.* at 837, 106 Cal. Rptr. at 603.

336. See Brief for California Attorney General & Air Resources Board as Amici Curiae at 8-14, Orange County Air Pollution Control Bd. v. Superior Court, 4 Civil No. 12228 (Cal. Ct. App., 1st Dist., filed Sept. 7, 1972) [hereinafter cited as ARB Brief].

337. *Id.* at 8 (citing Health and Safety Code sections 24260, 24262 and 24263.7).

338. Memorandum of Points and Authorities in Support of Demurrer and Motion for Summary Judgment, Environmental Defense Fund, Inc. v. California Air Resources Bd., 30 Cal. App. 3d 829, 106 Cal. Rptr. 598 (1973) [hereinafter cited as A.G. Memorandum]. The attorney general contends that the ARB is charged with responsibility to set ambient air quality standards, and to regulate emission from motor vehicles, but that these powers do not give it authority to require emission control devices for regulation of lead (since none are technologically feasible) nor to control lead emissions indirectly through regulation of fuel content.

339. *Id.* at 4-5.


4. Power to regulate lead would be an impermissible enlargement or alteration of the enabling act.\textsuperscript{342}

5. The ARB could not indirectly control lead by promulgating an emission standard therefor, since such an indirect regulation of lead content in fuel is technologically unfeasible.\textsuperscript{343}

Some of these arguments are persuasive and indeed were made by the \textit{Environmental Defense Fund} court. However, there are possible criticisms of this perception of the nature of each of the agencies in question.

There are at least two potential problems with the assertion that APCDs have broad authority over all sources and that the ARB acquired only limited powers in 1967. First, there is no specific authorization for APCDs to regulate lead; hence, unless such authority is to be inferred from the very general powers given the APCDs, then it does not exist therein. Further, if it can be so implied, there are more persuasive reasons for inferring the power from the ARB's general authority, to be discussed shortly. Second, there is no reason given for the assertion that the Mulford-Carrell Act should be construed narrowly; the better rule of statutory construction would seem to augur for an interpretation giving full effect to the provisions of each act and harmonizing where possible.\textsuperscript{344} Moreover, the policy declarations contained in that act appear to give the ARB very broad power to control vehicular emissions,\textsuperscript{345} to establish other standards, and to coordinate\textsuperscript{346} and supervise\textsuperscript{347} air conservation activities within the state. It is therefore difficult to see why the APCD alone should be given lead regulation authority.

The statutory division of powers seems to be along vehicular versus nonvehicular lines;\textsuperscript{348} thus, the problem would seem to be characterization of the source. Once the general classification of a source is made, it can be argued that a presumption of regulatory jurisdiction adheres to the agency generally charged with responsibility, and the issue becomes whether the agency has real authority to \textit{act} upon this general responsibility.

According to the definitions in the act, "vehicular" sources refers

\begin{itemize}
\item \textsuperscript{342} A.G. Memorandum, \textit{supra} note 338, at 10.
\item \textsuperscript{343} \textit{Id.} at 11-12.
\item \textsuperscript{344} \textit{See generally} 82 C.J.S. \textit{Statutes} §§ 311, 362 (1953); \textit{Friends of Mammoth v. Board of Supervisors}, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
\item \textsuperscript{345} \textit{See CAL. HEALTH & S. CODE} § 39012 (West 1973).
\item \textsuperscript{346} \textit{See id.} § 39013.
\item \textsuperscript{347} \textit{Id.} §§ 39052(f), 39054, 39274-75.
\item \textsuperscript{348} \textit{See id.} § 39012.
\end{itemize}
to those "emitted from motor vehicles" while nonvehicular sources are everything else.\textsuperscript{350}Unless regulation of lead is related to motor vehicle emissions, then, the ARB would seem to be out of luck; but, of course, lead from gasoline only becomes an air pollution problem after it is burned and emitted from the tailpipe of a motor vehicle. While this seems persuasive, the attorney general asserts that there are differences between emissions control and fuel composition control; and the First District Court of Appeal agreed.\textsuperscript{351}The attorney general contends that the fuel, when composition is actually regulated, is not vehicular in any sense and therefore falls within the province of the APCD; but this may be a rather artificial position, since lead is only emitted into the air after combustion. Moreover, one could certainly argue that the regulation of lead content is an indirect regulation of emission, or, alternately, that a restriction that could only be complied with by use of unleaded fuel is nonetheless clearly an emissions regulation. It seems, therefore, that leaded gasoline is probably a vehicular source.

The issue then becomes whether the ARB has authority to act upon its general jurisdiction in the area, and if so, whether the grant of jurisdictional authority to the ARB forecloses the APCD even if there is some statutory authorization for the APCD to act. First, it might be argued that indirect regulation of fuel content (by an emission standard that could be met only by altering fuel composition) is permissible.\textsuperscript{352}The strongest proposition advanced by the attorney general against this contention is that removal of lead from gasoline is technologically unfeasible, but he stated just the reverse in the \textit{Western Oil & Gas} case.\textsuperscript{354}Second, it may be asserted that the power to regulate lead in gasoline can be inferred from the ARB's responsibilities to set and meet ambient air quality standards and to set emissions standards for pollutants.\textsuperscript{356}There is substantial judicial support for the proposition that

\begin{itemize}
\item 349. \textit{Id.} § 39007.
\item 350. \textit{Id.} § 39008.
\item 352. The attorney general asserted that emission requirements can only be met through "devices" of some sort (A.G. Memorandum, \textit{supra} note 338, at 12), but there is no statutory language so limiting the standards, and "device" is defined very broadly to apply to engine modifications. \textsc{Cal. Health & S. Code} § 39093 (West 1973).
\item 354. ARB Brief, \textit{supra} note 336, at 17.
\item 355. \textsc{Cal. Health & S. Code} § 39052(f), (m) (West 1973).
\item 356. \textit{Id.} § 39052(m).
\end{itemize}
powers necessarily ancillary to specifically delegated authority may be implied.\textsuperscript{357} In one recent Supreme Court case, for example, the Federal Communications Commission was permitted to regulate cable TV even though (a) it was not even invented at the time of enactment of the enabling legislation, (b) it was not one of the enumerated powers of the agency, and (c) the commission itself denied its authority for several years, and even sought special enabling legislation from Congress (which was not enacted).\textsuperscript{358}

Although this latter decision is federal authority, the reasoning seems persuasive.\textsuperscript{359} A similar situation obtains in California insofar as the state is unable to achieve its ambient air quality standard without some means of regulation of lead in gasoline. It is empowered to control motor vehicle emissions which include lead. To avoid frustration of the significant state interest involved, the power to regulate lead content directly or indirectly should be implied. The dilemma arises from cases holding that alteration or enlargement of statutory authority is unlawful;\textsuperscript{360} however, on the basis of decisions like Southwestern Cable, and because the authority to regulate emissions exists within the statute, without regard to whether such limitation is direct or indirect, those cases are arguably inapplicable to the problem at hand.

It should also be stressed that were the ARB to have adopted this construction of the statute, it would have been entitled to great weight in subsequent court proceedings. Unfortunately, the board took the opposite stance upon the advice of the attorney general,\textsuperscript{361} and that position became a self-fulfilling prophesy: the court of appeal in the Environmental Defense Fund decision apparently found


\textsuperscript{359} The Supreme Court said in that case, for example: "The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting . . . . The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'" 392 U.S. at 177. Note that FCC sponsorship of legislation which was defeated was not "compelling evidence" of intent; other cases hold negative implication from failing legislation to be unpersuasive as well.

\textsuperscript{360} See note 357 supra.

\textsuperscript{361} Letter from Evelle J. Younger, California Attorney General, to Senator Nicolas C. Petris, March 8, 1971.
that the ARB’s interpretation was a significant factor against implying the power, and accorded that construction “great weight.”

These two cases illustrate the fundamental separation of function between the ARB and the APCD: the vehicular-nonvehicular dichotomy. The dividing line between respective responsibilities is not always clear, but it should be noted that while the vehicular-nonvehicular split is a basic division, it is not an exclusive separation: as discussed earlier, the ARB exercises supervisory jurisdiction over the standards, administration, and enforcement of the APCDs.

Conclusion

As a preliminary matter, if our footnotes regarding the California air pollution control statutes have been followed closely, it should be apparent that there is a great need for reorganization, reduction and simplification of these laws, particularly for elimination of inconsistencies. Basically, there is no necessity now for three sets of substantive rules on nonvehicular pollution (county, BAAPCD and the unused regional). The solution lies with Assembly Bill 2867, by Assemblyman Richard D. Hayden, introduced at the request of the Air Resources Board.

It may seem from our discussion that it takes an extraordinarily complex bureaucracy to protect and enhance a resource which everyone once seemed to take for granted: clean air. Economists once spoke of air as the classic “free good”; hopefully, few still harbor this tragically mistaken notion. Is the particular system for air quality management which exists in California today really a good one? Is it wastefully striated and diverse? Or does it balance the need for local input into the allocation process with the need to maintain certain statewide standards and policies for all citizens? While an intensive comparative law study is beyond the scope of this article, we would like to comment on the structure as we see it, and to suggest how it might be improved.

Our central finding could be expressed as follows: air pollution is a regional phenomenon; and, at least in areas where the problem

362. Environmental Defense Fund, Inc. v. California Air Resources Bd., 35 Cal. App. 3d 829, 836, 106 Cal. Rptr. 598, 602 (1973). Even if plaintiffs’ position were approved by the courts, the ARB would still face Health and Safety Code section 39180.2, which, as to used vehicles, requires legislative approval of devices not specifically authorized elsewhere in the code. Might not this restriction apply to fuel additives as well?

363. 1973-74 Legislative session; this measure failed passage in 1974.
of air contaminants is relatively serious, the benefits of "grass roots" local control are outweighed by the need for regional regulation. Coupled with this notion is our belief that a strong state regulatory agency must exist to supervise the activities of local and regional agencies, and to insure that certain standards of air quality are met throughout the state.

As we have noted previously, air pollution is a physical phenomenon which only respects political boundaries when they happen to coincide with the natural boundaries. Because of this, the thesis that regulation should be by a governmental unit of smaller size than the air basin—which, by definition, cannot exercise jurisdiction over all sources of air pollution in that basin—is inherently suspect to us.

Proponents of local air pollution control programs often advance the proposition that local government is both more responsive to its constituency and more sensitive to the types of problems associated with the locality than are higher levels of administration. However, a number of authors have noted that local management may be impotent to deal with the problems of metropolitan areas. In the area of air

364. See COMMITTEE REPORT, supra note 72, at 29, 32.

365. "In the township, as well as everywhere else, the people are the source of power; but nowhere do they exercise their power more immediately. . . . Yet municipal institutions constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty." A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 63-64 (1954), cited in G. BLAIR, AMERICAN LOCAL GOVERNMENT 9 (1964). This author notes other philosophical and historical roots of what has been called everything from "Jacksonian Democracy" to "Power to the People." See generally J. BOLLENS, J. BAYES, & K. UTTER, AMERICAN COUNTY GOVERNMENT (1969), and works cited in the bibliography therein; H. TUNER, AMERICAN DEMOCRACY, STATE AND LOCAL GOVERNMENT (1968); C. ADRIAN, STATE AND LOCAL GOVERNMENTS (2d ed. 1967).

Supervisor Warren M. Dorn of Los Angeles County has said, for example, "Truly air pollution knows no boundaries. . . . This suggestion should not be interpreted as recommending a larger control agency [than the county united]. It may be that . . . the program is being diluted by using an agency that is too distant from the problem." Dorn, Improving Existing Local or Regional Air Pollution Control Programs, U.S. PUBLIC HEALTH SERVICE, PUB. NO. 1649, PROCEEDINGS: THE THIRD NATIONAL CONFERENCE ON AIR POLLUTION 410, 411 (1966). See also Lochner, The Case for a Local or Regional Air Pollution Control Program, id. at 400, 402. This author also discusses regional control as opposed to state or federal control.

pollution control, for example, the very receptiveness which is supposedly an asset for local government may oversensitize it to economic issues, such as expanding the property tax base, or increasing the wage of the voter. 367

Another related criticism of local control over air pollution programs is that local entities cannot generate enough funds to support effective plans adequately, 368 the problems of local government finance in any number of matters are well-known. 368 Moreover, the fiscal crisis in many areas has led to wide variation in programs of all types, which diversity is not necessarily reflective of any real difference in the problems, but is often due only to disparities of wealth. 370

On a practical level, the theory of utilizing existing county government as a policy-making body eliminates much of the high cost of setting up a distinct unit and avoids certain criticisms of "special districts" as agencies of governmental control unresponsive to their constituency (in derogation of the cardinal principle of local government). However, it also demands too much time and expertise of the county supervisor.

In any event, the fundamental problem is that air pollution emitted in one place may affect another area downwind. This is the situation which obtains in the South Coast Air Basin, which is comprised of six counties that have some differing standards. Yet the downwind counties of San Bernardino and Riverside are affected by air pollution generated in Los Angeles and Orange Counties. Unfortunately, the former two have little input into the air quality decisions in the latter

becomes acute, and the legal problems monumental when it comes to air basins located in more than one state. See Hassett, Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects, 4 Ecology L.Q. 63 (1974).

367. "The intense competition between the states for industry militates against the adoption of an effective air pollution control program. State and local governments hesitate to embark upon a vigorous program to improve the quality of the air if the program, by increasing the cost of plant operations, will not only force individual firms to relocate in other states to gain a competitive advantage but will also discourage other firms from locating in that state." Zimmerman, Political Boundaries and Air Pollution Control, 46 J. Urban L. 173, 175 (1969). While Zimmerman is referring specifically to interstate problems in a relatively small geographic area on the Atlantic Seaboard (id. at 173), the comment is equally germane to the large counties in California.

368. See, e.g., Committee Report, supra note 72, at 29.


370. One of the best examples of this general phenomena is the variation of school district budgets, recently successfully attacked in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
except through the Basinwide Coordinating Council, which, as we have noted, has virtually no power to enforce standards.371

There are several ways to remedy the problems associated with local government control. Robert Bish, for example, in his book *The Public Economy of Metropolitan Areas*,372 recognizes the criticisms advanced earlier and notes three general solutions which may be applicable to air pollution control.

The first is a system of direct grants to local government.373 Such an infusion of funds would enable those jurisdictions presently unable to allocate resources to air quality management to establish a program, thus minimizing the “spill over out” which occurs when sources in one area are left uncontrolled. It would also tend to equalize programs among the counties, and it could remove some of the pressure for additional funds that a district might exert upon a county. As discussed previously, California now has such a program in the Air Pollution Control Subvention Fund.374 Note, however, that this scheme involves a great deal of state supervision; thus there is a certain loss of local autonomy even in a financial program.

The second alternative involves contracts between jurisdictions.375 In California this approach is represented by the joint-powers-agreements possible between air pollution control districts,376 and by the unified air pollution control district.377 Through such compacts, some of the decision-making powers of two or more counties are consolidated, thereby partially resolving the problem of protecting downwind areas. The accords would also mean that the districts could share resources so that both (or all) would not have to spend as much for personnel and equipment. Of course, unless all of a particular air basin were included within the agreement or unified district, many of these difficulties would not be alleviated to the maximum extent possible;

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371. Slowly there is developing an integrated effort in the South Coast Air Basin. The coordinating council, under ARB and EPA pressure, has created a uniform emergency regulation which may cause one county to act to protect another. At the time of writing of this article, the council is developing an application for a coordinated subvention (see text accompanying notes 261-67 supra) which requires additional harmonization. Wong-Woo Interview, supra note 42.


373. Id. at 56, 75-77.

374. See text accompanying notes 261-75 supra.

375. BISH, supra note 372, at 76-77.


377. Id. §§ 24330-41.
and, again, a certain amount of local autonomy is inevitably sacrificed when local governments establish horizontal ties with co-equal entities.

The third possibility is a system of performance standards imposed equally upon all local jurisdictions by some higher authority.\textsuperscript{378} This would eliminate some of the "disparity" from inconsistent standards within one air basin; perhaps more importantly, some of the pressure upon local government to refrain from regulating sources which contribute materially to the economy of the area might be diminished. In California, the EPA, the ARB and the Basinwide Air Pollution Control Coordinating Councils all prescribe emission criteria and review other standards set by the counties to insure that state and federal rules will be met thereby.\textsuperscript{379} Again, however, the local entity has lost a measure of its autonomy.

These measures may be functional and perfectly adequate in counties like Sutter, Inyo, Calaveras and Siskiyou, and other areas where the air quality picture is much brighter than it is, for example, in the Bay Area or in the South Coast Air Basin. However, in regions with severe problems (like Los Angeles), the coordinating steps we have just mentioned are no substitute for a functioning agency with complete control over planning, implementation, and enforcement of air quality management in the entire air basin.\textsuperscript{380}

Possibly the single most significant criticism of political bodies of much larger size than traditional local government is that, in most cases, the larger the entity is the more diverse are the interests of the population and the harder it is for the organization to make decisions that are acceptable to all its constituents.\textsuperscript{381} This is part of the reason that Los Angeles County has consistently opposed efforts to impose a regional district upon its air basin. The county first argues that the needs of its citizens could not be given full effect in a regional district, since it would have only the same number of representatives as every

\textsuperscript{378} Bish, supra note 372, at 127.

\textsuperscript{379} See notes 156-65 & accompanying text supra.

\textsuperscript{380} Besides the preservation of local authority, the most persuasive argument against this position is that the large staff created by a South Coast basin district will not be as efficient as county control because new layers of supervision, and new travel demands, will develop. While we agree that these difficulties may arise, we do not think they are substantial enough to override the need for the basin district. It has also been suggested that the real basin problem is not stationary sources but vehicular emissions, and the counties do not have any control over these. This may be true, but the contribution of stationary source emissions to the overall air quality picture is often down-played too much. For example, a uniform policy on new fossil fuel power plants is essential.

\textsuperscript{381} See, e.g., Bish, supra note 372, at 45-61.
other county in the district. Los Angeles fears that decisions made by Riverside, San Bernardino, and Orange Counties, for example, whose residents suffer from serious pollution problems, would prove inordinately detrimental to the economy and enjoyment of citizens of more populous Los Angeles.\textsuperscript{382}

Two comments are appropriate here. First, are the needs of Los Angeles inhabitants really that different from those of other residents of the basin? Moreover, if they do differ in terms of simple economics, is that an acceptable distinction, or is it the kind of pressure noted earlier,\textsuperscript{383} and one which should be avoided?

Second, Los Angeles County does not want to share any control over its air pollution regulation programs with cities within the county. This position seems to be based on parochialism as much as anything else. It seems only equitable that a representative of a large city such as Los Angeles, and a representative of all the myriad of smaller cities within the county (selected by the city selection committee), should \textit{both} be given some voice in this rather critical process.

Legislation which would have created such a South Coast APCD was passed by the Legislature, but vetoed by the governor\textsuperscript{384} largely at the behest of Los Angeles County. The bill contained a number of other provisions, some of which are thought to have been more objectionable to the governor than the establishment of the regional district itself.\textsuperscript{385} Consequently, the author of that work, Assemblyman Moretti, has joined with Senator Biddle in another attempt to create a South Coast Regional District.\textsuperscript{386} While we strongly favor the regional approach in this air basin, we suggest that it may take single-purpose legislation (which the bill is not) to get the proposal enacted.

The question, as we see it, is not \textit{which} level of government should be entrusted with air quality management, but rather what \textit{combination} will best preserve legitimate local interests while ensuring the highest possible degree of air quality?

It seems to us essential that certain minimum levels of air quality

\begin{footnotes}
\footnotetext[382]{Los Angeles County, with a population of 7,036,463, is more than two and a half times as populous as the other three counties combined (Orange County, 1,420,036; Riverside County, 456,074; San Bernardino County, 681,092). U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK: 1972.}
\footnotetext[383]{See note 367 supra.}
\footnotetext[384]{A.B. 2283 (1973).}
\footnotetext[385]{Such as the imposition of fees upon stationary emissions sources within the basin (not a true effluent charge), and $.001 per gallon tax on gasoline, revenues to go to the new APCD.}
\footnotetext[386]{S.B.1556 (1973).}
\end{footnotes}
be maintained statewide regardless of the talisman of "local autonomy"; and, indeed, nothing less is acceptable under the federal Clean Air Act. It is our opinion that the state should also determine ambient air quality standards, as it does, and effectively oversee both the establishment and the enforcement of emissions standards by local and regional bodies, preserving, to some extent, local autonomy. Within this framework of minimum standards, local and regional entities could be given wide latitude to implement more stringent criteria than those set by state law.

Moreover, a centralized state research program makes more sense than fragmented, local programs, and therefore this essential function should be and is carried out by the ARB.

The "nuts and bolts" decision making, within the above framework, could be left to regional and local authorities. In areas like the South Coast Air Basin where there is a significant air pollution problem, however, a regional entity seems a necessity.

In areas with few air quality problems, continued county-level control, coupled with joint-powers agreements, subventions, and state regulation, may well be acceptable. Such an approach provides a great degree of local autonomy, without sacrificing basinwide air quality to any great extent. In such areas another level of bureaucracy may really be superfluous, although it is questionable whether there is, in fact, less bureaucracy when the basinwide councils are imposed above the counties.