

Legislative and Regulatory Action in Air Pollution Control

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FOR almost two decades we have heard the pleas and arguments of those who advocate self-regulation of air contamination. We have been warned against hasty action and advised to conduct thorough research before imposing regulations.

In the late 1940's, Los Angeles County was faced with the dilemma of whether to attempt to single out and control specific sources of pollution or to attack each and every source. We decided to move immediately to abate all emissions. Consequently, the Air Pollution Control District was criticized frequently for attempting to control "harmless" emissions.

Fifteen years later, however, the real and effective control achieved over all sources of air contamination for which control methods exist demonstrated that an effective program need not await the culmination of research projects. Equally important, our strong program did not cause even an apparent ripple in the tide of economic progress. Moreover, not one of our rules, new and untried as they were, was successfully challenged in the courts.

Undeniably, scientific research in air pollution and its effects should be expanded many times. The point under consideration here, however, is whether the adoption of regulations should be delayed until more research has been performed. We can only conclude that strong and effective rules can be adopted now.

Legal Foundation for Regulation

Much of the legal groundwork for regulation of air contamination has already been laid. The following discussion outlines the basic legal

questions which any rule must answer satisfactorily (1).

Does the agency have power to adopt the regulation? Almost all regulation of air pollution is founded on the police power of government. The broad term "police power" does not lend itself to any practical definition. It is a dynamic term, subject to change and evolution as a commonwealth develops politically, economically, and socially (2).

Police power is a power of sovereignty inherent in a State and possessed by each State. The police power of a municipality is never inherent, but is a power received by delegation from a higher source through a constitutional, statutory, or charter provision (3-5). The mode of delegation of the power ordinarily is not important, if it is in fact delegated (6, 7).

The police power delegated to cities and counties is not all-embracing, however, in that the State may take such power unto itself by direct enactment or by occupying the field (8).

It is the general rule that there cannot be a conflict between local ordinances and the State law, unless the State law itself allows the difference (9,10). Under this rule an ordinance ordinarily cannot permit that which the statute forbids, or prohibit that which a statute in effect directs to be permitted. Ordinances may ordinarily add restrictions to those established by State law (11,12). In some States, ordi-

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nances which cover the same acts as the State statutes are invalid. The most common theory for so holding is that to allow both to stand would result in double jeopardy (10).

The validity of an ordinance, statute, or rule regulating the emission of smoke or fumes does not depend on whether the emission is a "nuisance" at common law. The validity depends entirely upon whether or not the law comes within the constitutional limitations and, in the case of a local agency, whether or not it has power to pass such a law.

A leading case on the subject is *In re Jungwa*, 10 Cal. App. 602, 605, 103 Pac. 159. In this California case the petitioner sought a discharge on a writ of habeas corpus to test the validity of a Sacramento ordinance which provided: "It shall be unlawful for any person, firm, or corporation to permit any soot to escape from the smokestack or from the chimney of any furnace within the City of Sacramento in which distillate or crude oil is consumed as fuel."

The petitioner claimed that the ordinance was unconstitutional and void on its face, as under the ordinance it made no difference how little soot was emitted. The court stated:

That the police power is an inherent attribute of every state or commonwealth in the Union is a proposition which will be readily conceded. It is not only a power which inheres in the sovereignty of the States, but is a power the exercise of which by the states is indispensably essential to the health, peace, comfort and welfare generally of the inhabitants thereof. . . .

This power embraces the right to regulate any class of business, the operation of which, unless regulated, may in the judgment of the appropriate local authority, interfere with the rights of others, for, as is said in *Dobbins v. City of Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970, "all property is subject to the police power." In other words, the proposition cannot be maintained that the exercise of this power is confined to the regulation only of such interferences with the public welfare and comfort as come strictly within the common law definition of a "nuisance." [See also (13).]

Within the limitations noted, and within constitutional principles of due process and equal protection of the laws, the power of a city, county, or district to regulate air contamination is essentially complete.

Without a doubt it is within the competence of a State legislature to confer upon municipi-

palities power to enact ordinances to protect against atmospheric contamination or pollution, such as smoke ordinances (14).

Does the emission constitute a nuisance? Most of the American and British early law dealt with air contamination as part of the field of tort law commonly referred to as "nuisance." Smoke was considered a nuisance at common law, but it was not a nuisance per se. That is, in each individual case it had to be proved that the smoke was in fact injurious or offensive to the senses. In the case of a public nuisance, it had to be proved that a large number of persons were affected.

It is now a well-settled principle that, although at common law smoke and other contaminants were not considered a nuisance per se, the legislature can declare air contaminants a public nuisance and the courts will not invalidate such legislative acts provided the legislative declaration is reasonably clear and certain. Indeed, whatever pollutes the atmosphere, whether it is smoke, dust, chemicals, or gas, depriving inhabitants of pure, uncontaminated, and inoffensive air, constitutes a public nuisance in fact, if not per se (15-16).

In the case of *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S.W. 10, it was held that the State, under its police power could declare smoke a nuisance per se, even though not a nuisance per se or a nuisance at common law, and strong support for the rule can be found in subsequent cases (17, 18).

It is well established that impairment of health need not be shown for an emission to constitute a nuisance. Discomfort, inconvenience, and annoyance to the public is sufficient to render the emission of fumes a nuisance, and also to permit its abatement by statute (19-23).

Is the rule certain? (due process). Any law must be clear, precise, definite, and certain in all its terms, and one which is vague to the extent that its meaning cannot be ascertained is invalid. The underlying basis for this rule is the necessity of notice to those affected by the enactment.

In 1955 the United States Supreme Court (351 U.S. 990, 100 L. Ed. 1503), dismissed an appeal from the decision handed down by the Appellate Department, Superior Court, Los Angeles, comprising four separate cases each of

which involved one or more convictions of smog violation (24).

The defendants were convicted of violating section 24242 of the Health and Safety Code, which provides:

A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is: (a) As dark or darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or (b) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section.

Directly involved was subdivision (b) relative to opacity of emission. The Appellate Department, after recalling its prior decision in *People v. International Steel Corp.* (1951), 102 Cal. App. 2d Supp. 935, 226 P. 2d 587, that the standard made use of in subsection (a) is sufficiently definite to satisfy due process, went on to say:

Subdivision (a) only begins to solve the problem of the discharge of contaminants into the air; it does not touch smoke and other substances too light in shade to come up to Ringelmann No. 2. They may be so substantial in nature, however, that they make it impossible to see an object on the other side. We have all seen very white smokes that shut out the view completely. Again they may obscure the view to a lesser degree than totality. . . .

We may, therefore, express the test of subdivision (b) in simple terms; it condemns smoke or any other contaminant that is at least as hard to see through as is smoke which is as dark or darker than Ringelmann No. 2. There is nothing mystic or incomprehensible about such a statement.

The court, in upholding the validity of subsection (b) of the statute, dismissed the contention made by appellants that section 24242 was unconstitutional for uncertainty under the theory that a person with no special training, will not be able to tell whether certain smoke is as dark as Ringelmann No. 2, by stating:

A statute is invalid if its terms leave that which it attempts to control shrouded in uncertainty, but a statute which declares an act, identified with certainty, to be unlawful is not rendered unconstitutional because the act, as a fact, may not be readily identifiable by the common man as that forbidden by the statute.

Is the rule reasonable? Any ordinance or statute under the police power must be reason-

able, and for that reason must regulate or forbid something which is or could be considered detrimental to the public peace, health, safety, morals, or general welfare. If any set of facts may be assumed, under which a law or ordinance is reasonable, or if reasonable minds may differ on the question, the enactment will be sustained (25, 26, 2). If the ordinance or statute passes this test, a naked violation of the ordinance is all that need be shown.

The legislature has a wide discretion in determining what is a nuisance and what is not, and what may be regulated under the police power. In doubtful cases, the determination of the question by the legislative body is conclusive. The courts will not interfere unless the law results in needless oppression, and will not question the wisdom of the legislation. The courts are not limited to the face of the law itself. They may look behind the law and determine from competent extrinsic evidence whether or not the law is reasonable (20, 27-29).

In the case of *Moses v. United States* (20), supra, the court said:

The policy of adopting a regulation to meet the conditions is a matter purely and exclusively within the province of the legislative department. The judiciary can only interfere with the exercise of the power where it is manifest that the regulation has no real or substantial relation to the object within the police power, and constitutes a palpable invasion of private rights.

What is reasonable depends on the circumstances. No hard and fast rule can be established for all cases. It has been urged that legislation regulating the use of bituminous coal is unreasonable, especially in a district where soft coal is produced in large quantities and where such coal is universally used for fuel. It is argued that to enforce a law of this character would require industry to use expensive anthracite or other smokeless fuel, causing great hardship and perhaps driving many plants from the city. This contention was rejected by the Supreme Court of Illinois in the case of *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698, as follows:

It may be that some, and perhaps, very great inconvenience would be experienced by a rigid enforcement of the provisions of this ordinance. How that may be this court cannot know. What powers the city coun-

cil may exercise under the general law or under its police powers is a question of law to be determined by the courts; but when the city council will exercise the powers with which it is clothed rests in its legislative discretion, and the consequences that may flow from the enforcement of ordinances enacted within the powers conferred, rests alone upon the body enacting them, and with which the courts have no concern.

In the case of *City of Brooklyn v. Nassau Electric R. Co.*, 44 App. Div. 462, 61 N.Y.S. 33 (1899) an action was brought to recover from defendant a penalty of \$100 for using soft coal in contravention of a statute providing: "No factory, engine room or electrical station shall use what is known as soft coal for fuel . . . within a radius of four miles of the city hall. . . ."

The court held that it was within the police power of the legislature to declare that the burning of soft coal within certain prescribed limits of the city was detrimental to the public welfare and that the same be forbidden.

In the case of *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S.W. 10, the general assembly of the State had passed an act in 1901 which made "the emission or discharge into the open air of dense smoke within the corporate limits of this State which now have or may hereafter have a population of 100,000 inhabitants" a public nuisance. The statute exempted owners of premises who could show to the satisfaction of the court that there was no known practical device to prevent the emission of dense smoke. The court upheld the Missouri statute as valid and reasonable. (See also 29-34.)

Is there a reasonable classification in the rule? This question involves the "equal protection clause" of the Federal Constitution. Many States have similar constitutional provisions. The clause in essence provides that the legislature cannot arbitrarily discriminate although it can make a reasonable classification with respect to subjects, objects, places, and circumstances. The basic considerations are: (a) Does the rule apply equally to all within its terms? and (b) Where a classification is adopted, is it reasonable?

In *Moses v. United States* (20), the statute exempted chimneys of buildings used exclusively for private residences, while declaring the emission of dense or thick black or gray smoke of cinders from smoke stacks or chim-

neys to be a public nuisance. The statute was upheld.

In *State v. Dower* (35) the court sustained a conviction under a Missouri statute prohibiting dense smoke in cities of more than 100,000 except where no device for compliance existed. It was shown that the defendant was using a boiler to which no device could be attached.

In *Atlantic City v. France* (36) the court upheld an ordinance which made it unlawful to permit the emission of dense smoke from any stack connected with any engine or locomotive within the city limits, if the smoke contained sufficient soot or other substances to injure health or damage property within the corporate limits of the city. The ordinance made no distinction between locomotive engines operated on railroads and any other kind of engine.

Is criminal intent necessary or provided for by the rule? "The criminal intent or *mens rea* essential to a conviction in the case of true crimes need neither be alleged or proven with respect to violations of municipal ordinances which forbid the commission of certain actions contrary to the general welfare and makes them *malum prohibitum*. Proof or admissions of the doing of the forbidden thing, regardless of intent, good faith, or willfulness, must bring a conviction" (37).

In *People v. Alexander* (38) the defendant was charged with violating the provisions of a California statute governing visible emissions.

The court held that an instruction of the trial court was correctly given as follows: "It is the actuality and not the guilty intent that determines guilt. Intent is not an element of the offense defined in Health and Safety Code, Sec. 24242."

Specific Methods of Regulation

In drafting specific regulations or ordinances, different approaches may be used. The method or methods selected will depend upon the nature of the problem and the particular source to be controlled. Some of the approaches in actual use are:

Control of darkness or opacity. This is the most simple and common approach. It is also quite effective if the problem is one of smoke or other visible emission. Its purpose is to prohibit emissions from exceeding a stated dark-

ness or opacity. This method has the advantage of ease of enforcement. The Ringelmann Chart test is a familiar example of this approach.

Control of the observed effect. This approach of ancient origin is usually referred to as "nuisance." The method is to prohibit directly the injury of persons and property. This approach has the advantage of being solidly based in the common law, but prosecutions under this type of rule are difficult because of the difficulty of proof.

Control of quality of emission. The limitation is based upon the percentage of the offensive contaminant which may be contained in a particular emission. Such rules are difficult to enforce except by employing a permit system, but they provide excellent standards for control devices.

Control of quantity of discharge related to process. A specific limitation is placed upon the discharge, depending on the type of process or weight of materials processed. This type of rule may also provide an absolute maximum. It has the advantage of being more logical than some other methods.

Control by required equipment. This relatively novel approach requires specified proper control equipment, or its equal. It is particularly useful where emissions are difficult to measure. Enforcement is quite easy compared with rules which require tests to determine whether they are being violated.

Prohibitions of acts or processes. The method is to prohibit nonessential acts or processes which result in contamination of the air. Prohibition of open fires and incineration is a common example. This approach requires careful advance planning, but it is quite effective.

Control of fuels or methods of operation. The chemical composition of fuels (or other materials being processed) is controlled. This type of rule has long been employed in areas where bituminous coal was used for fuel. It represents a sophisticated approach, particularly where pollution is caused by a single type of industry.

Some rules, of course, combine various approaches. Some rules, for example, absolutely prohibit an act (incineration) but then go on to allow it if the required equipment is used (multiple chamber incinerator).

The foregoing analysis does not include every approach which may be used. Indeed, we may expect that with advances in technology, new methods will be developed which we cannot now imagine. Our experience in Los Angeles, however, has shown that all of the approaches discussed can be used effectively to reduce air pollution.

The Permit System

Separate consideration should be given to rules and regulations which provide for and regulate the issuance of permits. Not all air pollution control programs include a permit system. However, experience in Los Angeles County has clearly shown that the most effective and positive weapon in the arsenal of air pollution control officers is the power to grant or deny permits.

Probably no serious urban air pollution can be effectively dealt with without some sort of licensing system. The effect of such a program is to prevent air pollution, in contrast to some of the other approaches which seek by injunction or prosecution to control an existing emission. When it is properly applied, such a program should eventually bring under the scrutiny of the air pollution engineers each source of contamination and each control device.

The enforcement of law under a permit system is far more effective than occasional visits by a violator to the criminal courts or protracted litigation in a civil action.

The Criminal Penalty

Some people believe that no criminal penalty should be attached to the rules of an air pollution control agency. There are still some who suggest self-control by industry. Such programs may work under particular circumstances, but if the problem is serious or expensive to solve, they will surely fail.

In southern California we observed the inadequate efforts of self-regulation. We also noticed that it had that common fault of nearly all self-regulation plans—they seem to evaporate when the pressure is taken off. The reasons for this are not complicated.

Typical of the cases we have observed is a corporation with headquarters in another State which establishes a branch plant in Los Angeles

County. The vice-president in charge must convince the home office that he is an efficient manager, but the plant develops an air pollution problem which will cost \$200,000 to control. The manager then does one of two things—he will try to get by, perhaps with a cheap but inadequate system, or he will request that the \$200,000 be appropriated. This request is almost invariably refused.

Under our law, violation of the rules is a misdemeanor (California Health and Safety Code, sec. 24281). This gives the local manager a very persuasive argument for his superiors, and usually the necessary funds are provided.

The injunction is a fine legal tool for many purposes. It is still the “big gun” when dealing with a large and continuous violation. But, as a basic or sole remedy to defeat air pollution, we have found it almost useless. The chief defect in this remedy is that it takes too long. The period between the decision to file and the entry of a final judgment is seldom less than a year, and often is much longer. In the meantime the process has been changed or the control system altered. The plant may have changed hands. The result is that little is accomplished, compared with the energy and money expended.

The conclusion drawn from these factors is that any effective rule must rest finally upon a possible criminal penalty. Ordinances usually provide for such a penalty. If “administrative” rules are employed, basic legislation may be needed to provide for the criminal penalty.

Motor Vehicle Contamination

Probably the most difficult source of air pollution is the motor vehicle. Effective techniques for reducing contamination from automobiles seem to remain just out of reach of the scientists. But concrete progress has been made in control of crankcase fumes, and there are indications that the technical problems will be solved in the near future. We are concerned here with legal regulation which will result in reducing pollution from this source.

The standard. Assuming that there will soon be available an effective control device at a reasonable cost, the task of the legislative draftsman is to design a statute which will make its use mandatory.

The first issue is the standard. This may be stated in various ways. For example, (a) a limit on emissions of particular contaminants, (b) a specified percentage reduction of particular contaminants, (c) the use of a control device of a specified efficiency, or (d) particular treatment of the emission (temperature, retention time, and so forth). If (d) is used, provision should be made for any treatment of an efficiency equal to that specified.

Such a standard must be determined first by experts in the field. Then it may be enacted into law by direct legislation or by administrative regulation.

The responsible agency. The second legislative task is to determine the responsible agency. Because vehicles are by definition mobile (as are the air masses), local control by cities and counties is likely to be difficult and ineffectual. Regulation by the Congress under the Commerce Clause of the Constitution has been proposed, but bills introduced to accomplish this have not progressed. Moreover, many States have no serious pollution source. Even if such legislation were passed, its standards probably would reflect the least common denominator rather than the serious problems of urban communities.

It thus appears that the State government is the proper entity to prescribe regulation of air pollution from motor vehicles. Furthermore, State governments, through their constitutional responsibility to protect the health and safety of people, as well as their long histories of motor vehicle regulation, are ideally constituted to cope with this situation. This does not rule out supplementary Federal regulation of vehicles in interstate commerce, nor does it eliminate the traditional responsibility of local agencies to enforce the law.

Whereas the State is the ideal agency, it would be politically naive to believe that every State legislature is guided by the needs of urban areas. Situations will surely arise in which it will be left to cities, counties, and districts to protect themselves.

The approved device. The only feasible method of substantially reducing air contamination from vehicles appears to be a control device. Unless he is assisted, the vehicle owner will be unable to determine whether an ad-

vertised device will meet the standard. Enforcement officers will be in a similar uncertain position. One obvious solution is certification of approved devices. This procedure is not novel, for in many States automotive equipment (lamps, safety belts, and safety glass) is presently tested and approved by a State agency.

The primary enforcement point. It is unlikely that control devices could be developed and produced in sufficient variety and volume to fit and equip all existing and new vehicles in a short time. One method of dealing with this would be to require that all new vehicles be controlled when first sold. The process could be accelerated by requiring that used vehicles be controlled when resold, after a fixed date, with a final cutoff date on which all vehicles must meet the standard. The primary enforcement points could be the issuance of first registration, transfer of registration, and periodic re-registration.

Such a system would be relatively simple and economical, and should result in nearly 100 percent compliance, if devices are available. The vital weakness in this system is that it would not provide any assurance that a device, once installed, would be maintained in efficient working order. This brings us to the point of periodic inspection and control.

Periodic inspection and control. With periodic inspection of motor vehicles by public agencies or by licensed inspection stations, motor vehicle exhaust control devices could be maintained at an acceptable level of efficiency. However, if complex devices such as catalytic afterburners are used, developing simple instrumentation and training personnel in its use will be a substantial factor. Direct-flame afterburners would be relatively simple to inspect and to maintain in good working condition. States which now require periodic motor vehicle inspection should have little difficulty in providing inspection of the less complicated control devices.

In some States (such as California), the suggestion of periodic vehicle inspection can be calamitous. Perhaps no other one statute has been so often introduced and so regularly rejected. The fact remains that the average automobile owner is quite lax in adequate main-

tenance of his vehicle. This is true even with regard to safety equipment, and would be much more so in the case of air pollution control devices. Unless a device is developed which needs little or no maintenance, some inspection will be the only alternative to an ineffective over-all motor vehicle control program.

When to adopt controls. One reason that legislation cannot await the full development of near-perfect and inexpensive motor vehicle control devices is that usually many years elapse between the submission of a new proposal and its final enactment into law. Part of this delay is because many State legislatures do not convene every year.

A more important factor is probably the chicken-or-the-egg dilemma. A valid statute requires an available device. However, as we have seen, the manufacturers are unwilling to commit themselves to a substantial production program unless and until they are assured that their particular product will be acceptable. The passage of enabling legislation, with an escape clause to deal with the possibility that unforeseen delay may occur, seems to be a practical escape.

Legislation in California. In 1960, at a special session of the Legislature, California adopted the first comprehensive act designed specifically to require vehicle exhaust control devices (California Health and Safety Code, div. 20, ch. 3). It would be beyond the scope of this paper to discuss the act at length. However, persons charged with preparing legislation of this type may be interested in the California approach.

The law creates a Motor Vehicle Pollution Control Board which must determine criteria for approval of control devices and also is required to conduct tests on devices submitted. When two or more devices are approved, motor vehicles may not be sold or registered (after specified periods for new, used, and commercial vehicles) unless they are equipped with approved devices. Counties with no air pollution problem may be exempted by action of their governing bodies.

The progress which the control board has made to date has convinced those of us who are familiar with the problem that the California legislation is fundamentally sound. We have

observed no need for substantial amendment to it.

Conclusion

No set of principles can supply a design for a particular regulation to solve an individual problem because the drafting of regulations requires a good deal more than mechanical application of a pattern. On the other hand, the experienced legislative draftsman always begins his work by searching for an existing statute or regulation which has been tested. Thus, some of the first air pollution legislation was borrowed from statutes designed to abate other types of nuisances. The Ringelmann Chart was similarly adapted to air pollution regulation.

The most important mechanical device involved in regulatory action has not been discussed above. That device is the lever which starts the process in motion. In our experience, the drafting of effective legislation and regulations is not the greatest difficulty in this field. The hardest task is taking the first step toward air pollution control. Almost everyone, from the homeowner to the steel manufacturer, has a reason for emitting pollutants into the air. Powerful groups will attempt to gain exemptions or favorable treatment for themselves. Some will suggest that self-regulation be encouraged. Others will recommend more studies and research. If the responsible members of the community yield to these arguments, one result can be predicted with certainty—the people of that community will continue to breathe contaminated air for a long time.

With our present legal knowledge and with the application of existing scientific and technical skills, air pollution can be defeated as a serious menace to our urban population. The elements which we must supply are the courage and the initiative to enter the arena.

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