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THE REGULATION OF AIR POLLUTION IN THE SAN ANTONIO AREA

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Air pollution may be defined generally as the presence in the atmosphere of one or more man-made air contaminants in such concentration and of such duration as to tend to adversely affect human health or welfare, animal life, vegetation or property, or interfere with the normal use and enjoyment of animal life, vegetation or property.[1]

The most common air contaminants which are harmful to human health comprise the following list:

1. *Carbon Monoxide* (CO): A colorless, odorless toxic gas which results from the incomplete combustion of carbons in fuels such as oil, coal, gasoline or natural gas. The primary producer of this pollutant is the internal combustion engine.
2. *Hydrocarbons* (HC): Compounds from materials which contain carbon and hydrogen. Hydrocarbons constitute a principal ingredient of photochemical smog and are produced primarily from the internal combustion engine.
3. *Nitrogen Oxide* (NO): Produced when fuel containing hydrocarbons is burned at very high temperature. This pollutant is produced primarily by stationary power plants and the internal combustion engine.
4. *Particulates*: Microscopic solid or liquid substances in the air which are generally produced from industrial operations of various kinds.
5. *Photochemical Oxidants*: A complex variety of pollutants which include, among others, ozone (a toxic form of oxygen), nitrogen dioxide, peroxyacyl nitrates, aldehydes and acrolein. These oxidants, mixed with particulates in the air and the radiant energy of the sun produce smog.

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1. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.03(3) (Supp. 1975). An "air contaminant" is defined as "particulate matter, dust, fumes, gas, mist, smoke, vapor or odor, or any combination thereof produced by processes other than natural . . . ." *Id.* § 1.03(1).

6. *Sulphur Oxide* (SO): A colorless gas created from the inefficient combustion of compounds which contain sulphur. Stationary power and industrial plants which burn coal produce most of this kind of pollutant.[2]

These air contaminants are the by-product of substantial expansion and the rapid growth of urban areas which have occurred since the end of World War II.[3] Most of the air contaminants described above are produced from the use of either petroleum or coal and have a damaging effect on our health and the plant life of our environment.[4] The federal government has estimated that the loss attributable to air pollution related sickness amounts to $6 billion each year. Property losses attributable to air pollution amounts to an estimated $10 billion per year.[5]

Historically, the control and regulation of air pollution has been considered a local problem reserved to local governments.[6] However, the alarming deterioration of the air during the expansion of industrial facilities and the rapid urban concentration of this nation's population since the end of World War II has motivated the United States Congress and the Texas Legislature to provide for a necessary regulatory system which, if enforced, reduces air pollution to acceptable health standards.

This article will briefly sketch the development of federal and state regulatory legislation, the responsibilities of the various governmental agencies to enforce the pollution prevention plans, and the applicability of these regulatory plans to the San Antonio area.

FEDERAL REGULATION OF AIR POLLUTION

Prior to 1955 the control of air pollution was recognized as a "local" matter for municipal governments and regulation by the federal government was not authorized by any act of Congress.[7] The year 1955

2. 1 F. GRAD, ENVIRONMENTAL LAW § 2.01(2), at 2-6 (1974); 1 A. REITZE, ENVIRONMENTAL LAW § 3, at 323-24 (1972).

3. 1 F. GRAD, ENVIRONMENTAL LAW § 2.01(1), at 2-4.1 (1974); 1 A. REITZE, ENVIRONMENTAL LAW § 3, at 3-1 (1972).

4. 1 F. GRAD, ENVIRONMENTAL LAW § 2.01(3), at 2-9 (1974); 1 A. REITZE, ENVIRONMENTAL LAW § 3, at 3-2 (1972). The most common health disorders which can be aggravated by air pollutants are asthma, chronic bronchitis, pulmonary emphysema, and heart disease. *See generally* 1 F. GRAD, ENVIRONMENTAL LAW § 2.01(3), at 2-9 (1974); 1 A. REITZE, ENVIRONMENTAL LAW § 3, at 3-2 (1972).

5. W. RUCKELSHAUS, THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY 4 (1972). *See also* 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(1)(a), at 2-13 (1975).

6. 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(1)(a), at 2-49 (1975).

7. *See generally* 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(1)(a), at 2-49 (1975); Greco, *The Clean Air Amendments of 1970; Better Automotive Ideas from Congress*, ENVIRONMENTAL AFFAIRS 384, 386 (1974); Kramer, *The 1970 Clean Air Amendments: Federalism in Action or Inaction?*, 6 TEX. TECH L. REV. 47, 49-51 (1974).

brought congressional legislation commencing the federal government's role as a participant in the control and abatement of air pollution. This initial legislation authorized the first federally funded air pollution research and provided technical assistance to state and local governments who were attempting to abate pollution.[8] Congress, however, still took a narrow view of federal control of air pollution.[9] In 1960, the Motor Vehicle Exhaust Study Act was passed directing the Surgeon General to undertake a study of the health hazards resulting from motor vehicle emissions.[10] The Clean Air Act of 1963 authorized greater involvement of the federal government in regulation of air pollution by allowing the Secretary of Health, Education and Welfare to intervene directly in a state area when air pollution endangered the "health or welfare" of the individual citizen.[11] In 1965, Congress amended the Clean Air Act by passing the Motor Vehicle Air Pollution Control Act which authorized the Department of Health, Education and Welfare to establish permissible emission levels for new motor vehicles.[12] One year later, the Act was amended again primarily to increase grants to state air pollution control agencies for maintenance of their respective air pollution programs.[13] The passage by Congress of the Air Quality Act in 1967 as another amendment to the Clean Air Act allowed the Secretary of Health, Education and Welfare, for the first time, to participate directly in air pollution control by authorizing that agency to issue mandatory air quality criteria and to assist in the designation of air quality control regions.[14] In 1970, Congress substantially amended the Clean Air Act of 1963. These amendments constituted the most significant air pollution control legislation that Congress has ever enacted.

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8. Act of July 14, 1955, Pub. L. No. 84-159, ch. 360, 69 Stat. 322, *as amended*, 42 U.S.C.A. 1857 (Supp. 1976).

9. This view is expressed in the following:

> The Committee recognized that it is primarily the responsibility of state and local governments to prevent air pollution. The bill does not provide any exercise of police power by the federal government and no provision in it invites the sovereignty of states, counties or cities. There is no attempt to impose standards of purity.

S. Rep. No. 389, 84th Cong., 1st Sess. (1955).

10. Motor Vehicle Exhaust Study Act, Pub. L. No. 86-493, 74 Stat. 162 (1960), *as amended*, 42 U.S.C.A. § 1857b (Supp. 1976).

11. 1 F. GRAD, ENVIRONMENTAL LAW § 2.01, at 2-1 (1975).

12. Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965), *as amended*, 42 U.S.C.A. 1857f-5a, -6, -6a (Supp. 1976).

13. 42 U.S.C. § 1857(C) (Supp. II, 1967), *as amended*, 42 U.S.C.A. § 1857(C) (Supp. 1976).

14. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967), *as amended*, 42 U.S.C. § 1857 (1970). *See also* 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(1)(a), at 2-52 (1975).

The principal provisions of these amendments authorize the federal government to set uniform national air quality and emission standards and to regulate new stationary sources and emissions of moving sources of air pollution such as motor vehicles and aircraft. The amendments generally limit the authority of state governments to the development of plans to implement the air quality standards established by the federal government and to enforce compliance with those standards.[15]

The 1970 amendments to the Clean Air Act granted the federal government, through its various regulatory agencies, considerable power to set national air standards, to perform research upon the causes, effects and extent and ways to control air pollution, to give assistance to pollution control agencies at the state and local levels through grant programs and to enforce the new air standards required by the new legislation. In assuming this new responsibility concerning the regulation of air pollution on a national scale, Congress departed from its reliance on its taxing powers under article I, clause 8 of the United States Constitution and commenced to base its power to regulate national air standards on its powers to regulate interstate commerce.[16] Although Congress stated in one of its findings that the prevention and control of air pollution at its source is a primary responsibility of state and local governments, passage of the 1970 amendments greatly restricted this doctrine of "primary responsibility" by vesting in the federal government the requisite authority to set national air quality standards, to regulate emission standards, and to generally supervise state implementation of air pollution control and to enforce these various standards in the event the respective states failed to do so.[17]

The Environmental Protection Agency (EPA) is the agency primarily responsible for the implementation and enforcement of the various provisions of the Clean Air Act. Created by executive order in 1970, the principal purpose of the EPA is to control and coordinate federal

15. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), *as amended*, 42 U.S.C.A. § 1857 (Supp. 1976). *See generally* 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(1)(b), at 2-57 (1975). For an excellent discussion of the legislative history of the Clean Air Amendments of 1970 and the legal problems which this legislation poses to the administrative and judicial authorities charged with the responsibilities of enforcing this legislation, see Kramer, *The 1970 Clean Air Amendments: Federalism in Action or Inaction?*, 6 TEX. TECH L. REV. 47 (1974).

16. *See generally* 1 F. GRAD, ENVIRONMENTAL LAW § 2.03, at 2-49 to 2-176 (1974).

17. The intent by Congress that the 1970 amendments to the Clean Air Act were to revitalize the air pollution control program then in effect and to grant the federal government substantial powers to regulate and enforce national air standards are evidenced by the findings and purposes which are stated in section 101 of the Clean Air Act. 42 U.S.C. § 1857 (1970).

activities for monitoring pollution of the environment. The Clean Air Act, as amended, grants to the Administrator of the EPA broad powers to research, develop and designate national ambient air quality standards, to regulate emission standards for new stationary sources and for hazardous air pollutants, to regulate emissions for motor vehicles and aircraft, to evaluate and approve state implementation plans to achieve the air quality standards required by federal law, and to prescribe such regulations as are necessary to carry out delegated functions under the Clean Air Act.[18]

In order for the EPA to accomplish its regulatory activities throughout the nation, it has organized regional offices in 10 areas throughout the United States to implement and enforce agency programs and policies.[19] The San Antonio geographical area is in Regional Area VI, whose offices are located in Dallas, Texas.

Establishment of National Ambient Air Standards

Section 106 of the Clean Air Act, as amended, directs the Administrator of the EPA to designate national ambient air quality standards.[20] Ambient air is that which occupies the unconfined space of the atmosphere. An ambient air quality standard is defined as a limit on the amount of a given pollutant which will be permitted in the ambient air. The section requires that the Administrator publish regulations prescribing a national primary and a national secondary ambient air quality standard for each air pollutant for which the Administrator has previously prepared air quality criteria.[21] National primary ambient air quality standards are defined as those which are necessary to attain and maintain in order to protect the public health, while national secondary ambient air quality standards are defined as those which are necessary to attain and maintain the public welfare. In essence, a primary standard establishes a limit on the amount of a pollutant in the ambient air which the Administrator considers to be safe for human consumption; a

18. One administrative order describes the functions of the EPA as
> bringing under one organization federal control of air and water pollution, drinking water quality, solid waste, pesticides, environmental radiation and noise. . . . It has only one mission—to protect and enhance the environment. In general, the agency is responsible for conducting research and demonstration, for establishing and enforcing standards, for monitoring pollution in the environment, and perhaps most importantly, for assisting state and local governments in their own efforts.

Reorganization Plan Number Three, 35 Fed. Reg. 15623 (1970).

19. 1 A. REITZE, ENVIRONMENTAL LAW § 3, at 3-23 (1972).

20. Act of July 14, 1955, ch. 360, tit. I, § 109, *as amended*, 42 U.S.C. § 1857c-4(b)(1) (1970).

21. 42 U.S.C. § 1857c-4(a)(2) (1970).

secondary ambient air standard establishes a limit on the amount of pollutant in the ambient air which is considered safe for animals and vegetation. The EPA has designated specific national primary and secondary ambient air quality standards for sulphur dioxide, carbon monoxide, nitrogen dioxide, particulates, photochemical oxidants, and hydrocarbons.[22]

Regulation of Hazardous Emissions

The Administrator of the EPA is authorized to establish national emission standards for hazardous air pollutants and has promulgated standards for asbestos, beryllium, and mercury as hazardous air pollutants.[23] The Clean Air Act, as amended, specifically provides the procedure by which the EPA promulgates such a standard for a hazardous air pollutant and prohibits the emission of the hazardous air pollutant after the emissions standard has become effective.[24] The Act also authorizes the Administrator to delegate to a state any authority which the Administrator has under the Act if he finds the state's procedures for implementing and enforcing emission standards for hazardous air pollutants to be adequate.

Regulation of Emissions From New Stationary Sources

The Clean Air Act, as amended, also authorizes the EPA to prepare standards of performance for designated new and modified sta-

22. *See* 40 C.F.R. §§ 50.4 to .11 (1975).

23. *See generally id.* § 61. The process for establishing a standard is outlined in a document published by the EPA. EPA, ACTION FOR ENVIRONMENTAL QUALITY (1973). That document states that the process of setting a standard begins in the EPA with pertinent scientific research and monitoring programs. If the pollutant requires control and regulation, the EPA prepares a draft of a regulation which is coordinated through the various technical offices of the EPA before it is forwarded to other governmental agencies for comments and criticisms. Thereafter, the EPA coordinates the proposed regulation with other federal agencies such as the Department of Commerce, Defense, Interior, and Transportation. Analysis by state agencies and interested non-governmental organizations are also invited. The EPA reviews the comments from the other agencies and subsequently publishes the regulation in the Federal Register as a "proposed regulation"; thereafter the general public is allowed at least 30 days to offer comments concerning the proposed regulation. In some instances a public hearing may be held on the regulation. The EPA analyzes the comments concerning the proposed regulation and makes appropriate changes as it deems necessary. The Administrator then approves the new regulation and it is coordinated with the appropriate federal agencies for final review. After this final review has been accomplished, the regulation is promulgated by the EPA and published in the Federal Register.

24. The term "hazardous air pollutant" is defined as

> an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

42 U.S.C.A. § 1857c-7 (Supp. 1976).

tionary sources of pollution.[25] "Stationary source" is defined broadly as "any building, structure, facility, or installation which emits or may emit any air pollutant."[26] This pertains to all sources of air pollution other than moving vehicles, and includes power plants, incinerators, pulp plants, oil refineries, concrete plants, industrial facilities and sewage treatment plants.

The EPA's regulations require a standard of performance which must be the best technological control available and economically feasible.[27] The pertinent statutory and regulatory provisions concerning the control of pollution from new stationary sources require an owner of a new stationary source of pollution which is otherwise subject to the regulations to so advise the Administrator 30 to 60 days prior to the anticipated operational commencement of the new facility. If the facility has commenced operations the Administrator must be notified within 15 days of the actual start-up date. Thereafter the owner or operator of the new stationary source must perform tests and furnish the Administrator with a written report of the results of the performance tests, not later than 180 days after the initial start-up of the source.[28]

The provisions empowering the Administrator of the EPA to establish federal emission standards for stationary sources are the first to authorize the federal agency to provide such emission standards. Another significant feature of the provisions is the fact that by the enactment and authorization of these emission standards, the federal government, through its exercise of its power to regulate interstate commerce, has asserted its authority to regulate and control air pollution produced from a stationary source regardless of its geographical location.[29] The administrator may delegate the implementation of the standards authorized by the statute to a state if he finds state standards and procedures to be adequate.

25. *Id.* § 1857c-6. Persons who intend to build new stationary sources which may emit these hazardous pollutants must attain prior approval from the EPA. The Act does allow the Administrator of the EPA to waive the new standards for an existing stationary source for a period of up to two years if that amount of time is needed to install new equipment to prohibit the emission of the pollutants and appropriate action is otherwise taken to protect the health of the people from the hazardous pollutants. Furthermore, the President of the United States may exempt a stationary source from compliance with the regulation for a period of not more than two years if it is found that the technology to implement such standards is not available and the operation of the source is required for national security. *Id.* § 1857c-5.

26. *Id.* § 1857c-6(a)(3).

27. *Id.* § 1857c-6.

28. *Id.* § 1857c-6.

29. *See* 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(iv) at 2-90.40, 2.04(a) at 2-176 (1975).

Regulation of Motor Vehicle Emissions

Although federal legislation had authorized the Surgeon General to study the effect of motor vehicle exhaust on human health, it was not until the 1965 amendment to the Clean Air Act that federal authorities were empowered to prescribe national standards for emissions of new motor vehicles.[30] Congress continued to increase the power of the federal government to regulate vehicle emission by further amendments in 1967 and 1968.[31]

Title 2 of the Clean Air Act prescribes emission standards for moving sources and directs the Administrator of the EPA to promulgate regulations for the emission of new motor vehicle engines. The 1970 amendment requires that the emission of hydrocarbon, carbon monoxide and nitrogen dioxide from new motor vehicles be reduced 90 per cent from the standard set by the 1968 amendments to the Clean Air Act.[32] The EPA is required to test all new motor vehicles and engines to determine whether they meet the performance requirements of the new regulations, and a certificate of conformity is issued when the required emission standards have been met. The administrator has discretion, however, to grant a one year suspension of the standards where the circumstances require such action.[33]

The 1970 amendment makes it unlawful for any manufacturer to sell a new car unless it has been certified by the EPA as complying with emission standards.[34] Manufacturers of new vehicles or engines are required to warrant to the ultimate purchaser and each subsequent purchaser that the vehicle is designed, built, and equipped so as to conform at the time of sale with applicable regulations, and that it is free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life.[35]

Under its statutory authority, the EPA has published extensive promulgations of emission standards for new motor vehicles and engines, as

30. *Id.* §§ 2.03 at 2-49, 2.04 at 2-176.

31. 42 U.S.C. § 1857f-1(b) (1970), *as amended*, 42 U.S.C.A. § 1857f-1(b) (Supp. 1976). *See also* 1 F. GRAD, ENVIRONMENTAL LAW § 2.04(2)(A) (1975).

32. 42 U.S.C.A. § 1857f-1(a)(1), (b) (Supp. 1976), *amending* 42 U.S.C. § 1857f-1(b) (1970).

33. *Id.* § 1857f-1(b)(5)(A).

34. *Id.* § 1857f-5a(a).

35. *Id.* § 1857f-6c(b)(2). The amendment further authorizes the EPA to require the manufacturer of the vehicles or engines to recall and repair them at its own expense if the EPA determines that a substantial number of the vehicles or engines do not conform with applicable regulations. *Id.* § 1857f-5a(c)(1).

well as regulations of fuels and fuel additives that may endanger public health or interfere with anti-pollution devices on motor vehicles.[36]

Regulation of Indirect Sources of Air Pollution

Pursuant to an order issued by the Court of Appeals for the District of Columbia,[37] the EPA has promulgated a regulation which requires air quality review of indirect sources of air pollution such as highways, airports and parking-related facilities.[38] An "indirect source" of air pollution has been defined as a facility which "does not itself emit air pollutants, but which attracts automobiles in sufficient numbers so as to have the potential for creating concentrations of auto-related pollutants in excess of the ambient air standards set to protect the public health and welfare."[39] Examples are shopping centers, apartments, office buildings, parking garages, highways, and airports. Recently the EPA has suspended the parking-related aspects of the federal regulation; however, that part of the regulation dealing with highways and airports continues to be subject to the review and approval of the EPA.[40]

Air Quality Control Regions

The 1967 amendments to the Clean Air Act authorized the Secretary of Health, Education and Welfare to designate certain geographical regions in the nation as Air Quality Control Regions.[41] These regions were established because they similarly involve urban concentrations and atmospheric conditions that require similar solutions.[42] The 1970 amendment to the Clean Air Act authorized the Administrator of the EPA to consult with the appropriate local and state authorities and thereafter designate additional Air Quality Control Regions in any interstate area or major intrastate area which he deems necessary.[43] Pursuant to this authority, the Administrator has proceeded to designate additional Air Quality Control Regions and has established a classification system to categorize these regions for purposes of air control enforcement and evaluation. Each Air Quality Control Region has been

36. *See generally* 40 C.F.R. part 85 (1975).
37. National Resources Defense Council, Inc. v. EPA, 475 F.2d 968, 970 (D.C. Cir. 1973).
38. 40 Fed. Reg. 28064 (1975).
39. *Id.*
40. *Id.* at 28065.
41. 42 U.S.C. § 1857c-2 (1970), *as amended*, 42 U.S.C.A. § 1857c-2 (1976).
42. *See generally* 1 A. REITZE, ENVIRONMENTAL LAW § 3, at 30-32 (1972).
43. 42 U.S.C.A. § 1857c-2(c) (Supp. 1976).

classified separately with respect to the various pollutants for which the Administrator has published standards, and each region is categorized as a Priority I, Priority II or Priority III area, depending on the seriousness in each geographical location of that particular pollutant. The San Antonio geographical area has been included in the "Metropolitan San Antonio Intrastate Air Quality Control Region."[44]

State Implementation Plans

After national air quality standards are established by the EPA, each state is required to submit to the Administrator an implementation plan which will provide for the accomplishment of the respective national ambient air standards. The Administrator is required to review and approve each state plan to determine if it complies with the requirements of federal law.[45]

Each implementation plan is required to accomplish the following:

1. Provide for the attainment of the national primary ambient air quality standards as expeditiously as practicable (but in no case later than three years from the date of the approval of the plan by the Administrator) and the implementation of national secondary ambient air quality standards within a reasonable time;
2. Include emission limitations and necessary schedules to insure attainment and maintenance of primary and secondary ambient air quality standards;
3. Include methods and procedures for monitoring and analyzing ambient air quality data and to make that data available to the Administrator;
4. Include adequate provisions for intergovernmental cooperation;
5. Provide that the state will have adequate personnel, funding and authority to carry out the implementation plan; make requirements for installation of equipment to monitor emissions from stationary sources and for periodic reports on the nature and amounts of such emissions;
6. Provide for periodic inspection and testing of motor vehicles to enforce compliance of applicable emission standards; and
7. Provide for revisions to the implementation plan if necessary.[46]

In the event the implementation plan does not ensure the enforcement of national ambient air standards, the Administrator is authorized to

44. 40 C.F.R. §§ 51.3, 81.40 (1975); Tex. Air Control Bd. Biennial Report Sept. 1, 1972-Aug. 31, 1974, at 15 (chart).

45. 1 F. GRAD, ENVIRONMENTAL LAW § 2.03(1)(b)(iii), at 2-63 (1974).

46. 42 U.S.C.A. § 1857c-5(a)(2) (Supp. 1976).

substitute a plan which will satisfy and accomplish the national ambient air standards.[47]

Prevention of Significant Air Quality Deterioration

Prior to the ruling of the trial court in *Sierra Club v. Ruckelshaus*,[48] the Administrator of the EPA did not require states to provide in their implementation plans for non-degradation of the quality of the air within the respective state, so long as the air quality in that state did not exceed national ambient air standards. In *Ruckelshaus*, however, the trial court concluded that the Clean Air Act of 1970 was based on a policy of non-degradation of existing clean air, and that the pertinent regulations which permitted the states to submit plans allowing pollution levels of clean air to rise to the secondary standard level of pollution were invalid.[49] As a result of this decision the EPA has attempted to develop proposed regulations requiring states which have cleaner air than that required by national ambient air standards to maintain their particular high quality of air. These requirements limit or bar industrial and population developments in the areas which have cleaner air than the quality of air required by federal standards. The Administrator of the EPA has promulgated final regulations for preventing the significant deterioration of air quality in these states.[50] Modifications to these regulations, however, have been made to allow elected leaders of local governmental entities to assist in the reclassification process of these areas. Recently the Administrator of the EPA has proposed an amendment to the Clean Air Act which would specifically state that nothing in the Act was intended to require or authorize the establishment by the Administrator of any standards more stringent than those primary and secondary ambient air quality standards provided by the Act.[51]

STATE REGULATION OF AIR POLLUTION

One of the findings expressed by Congress in the 1970 amendments to the Clean Air Act was that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments . . . ."[52] The Clean Air Act, as amended, authorized

47. *Id.*
48. 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 412 U.S. 541 (1973).
49. *Id.* at 256.
50. *See* 40 C.F.R. § 52 (1975).
51. Environmental Law Conference Report by Environmental Law Section, State Bar of Texas, March 1, 1975, at 73.
52. 42 U.S.C.A. § 1857(a)(3) (Supp. 1976).

any state or political subdivision thereof to adopt and enforce emission standards and controls of air pollutants. The statute requires that any emission standards and controls adopted by a state or political subdivision thereof cannot be less stringent than the standard or limitation provided by federal law.[53]

Pursuant to this federal statutory directive, the Texas Legislature has passed the Texas Clean Air Act which grants to the Texas Air Control Board extensive authority to prepare and develop a comprehensive state air control plan, and to monitor and direct the enforcement of pollution emission standards within the state.[54]

Role of the Texas Air Control Board

The Texas Clean Air Act designates the Texas Air Control Board (TACB) as the principal state agency for the administration of state and federal legislation establishing air pollution standards.[55] In order to accomplish its broad responsibilities, the TACB is authorized to prepare and develop a general comprehensive plan for the proper control of the air resources of the State of Texas. The TACB is to establish procedures by which to acquire information concerning emissions of air contaminants for the purpose of developing an inventory of the emissions of air contaminants in the state. The Board is authorized to promulgate rules and regulations to accomplish the general intent and purposes of the Texas Clean Air Act, and to issue necessary orders, to hold hearings, to make findings of facts and to enter decisions with respect to administering provisions of the Act. The Board is directed to designate Air Quality Control Regions within the state and to advise, consult, and cooperate with other agencies of the state, industries, other states, and the federal government concerning matters of common interest in the control of air pollution.[56]

53. *Id.* § 1857d-1 (Supp. 1976); *see* Houston Compressed Steel Corp. v. State, 456 S.W.2d 768, 772 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). The Clean Air Act, however, as amended, does specifically prohibit a state or any political subdivision thereof from adopting or attempting to enforce any standard relating to the control of new motor vehicle emissions which is subject to federal regulation. Furthermore, that section of the federal statute prohibits a state from requiring certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or motor vehicle engine as a condition precedent to the initial retail sale of the vehicle, engine, or equipment. 42 U.S.C.A. § 1857f-6a(a) (Supp. 1976).

54. TEX. REV. CIV. STAT. ANN. art. 4477-5, §§ 3.01-3.28 (1975).

55. *Id.* § 1.05.

56. *Id.*; *see* TEX. STAT. BAR COMM., LAW, POLLUTION AND THE ENVIRONMENT 122-41 (1970); TEX. AIR CONTROL BD. BIENNIAL REP. 5-9 Sept. 1, 1972-Aug. 31, 1974.

Approval of Implementation Plan for State of Texas

On January 28, 1972, the TACB forwarded the Texas Air Pollution Control Implementation Plan to the Administrator of the EPA for approval. With the exceptions noted therein, the Administrator approved the plan for the attainment and maintenance of national air quality standards.[57] Part of the implementation plan which was rejected by the EPA concerned the control of photochemical oxidant pollution. The State of Texas filed suit against the EPA to contest the agency's disapproval of that part of the state's Air Quality Implementation Plan. The United States Court of Appeals for the Fifth Circuit held that the EPA had the power and did legally determine that the state's plan was inadequate with regard to the control of photochemical oxidant pollution.[58] The court also held, however, that the agency's regulations which were substituted for the disapproved part of the plan were invalid; the Agency was directed to reconsider those particular regulations.[59] To ensure maintenance of air quality standards within the state, the TACB has issued eight regulations pertaining to control of various sources of air pollution.[60]

Monitoring of Air Contaminants in the San Antonio Area

The San Antonio area has been designated by the TACB as State Air Quality Control Region No. 9 and includes the Counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gillespie, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kimble, Kinney, LaSalle, Mason, Maverick, Medina, Real, Uvalde, Val Verde, Wilson, and Zavala.[61] In 1968 the San Antonio Metropolitan Health District published its first report involving the air pollution project in the San Antonio area. Since that time, the San Antonio Metropolitan Health District has published yearly reports which present, in statistical formats, the amounts of air pollutants and emissions of other air contaminants for the City of San Antonio and Bexar County.[62] The statistical data presented in the yearly reports is gathered from data collection sites composing part of the National Air Surveillance Network which is supported, in part, by federal funds.

57. 40 C.F.R. §§ 50.2270, 50.2273, 52.2283-2299 (1974).
58. Texas v. EPA, 499 F.2d 289, 303-304 (5th Cir. 1974).
59. *Id.* at 318.
60. TEX. AIR CONTROL BD. BIENNIAL REP. Sept. 1, 1972-Aug. 31, 1974.
61. TEX. AIR CONTROL BD. BIENNIAL REP. Sept. 1, 1972-Aug. 31, 1974, at 15.
62. Air Pollution Protection Reports for the years 1968, 1969, 1970, 1971, 1972, and 1973, prepared by the San Antonio Metropolitan Health District.

In 1968 a survey was conducted in the City of San Antonio and Bexar County to determine air pollution sources located in that area.[63] The results of the survey indicated that the highest level of air pollutants were being emitted by transportation sources such as automobiles, trucks, and aircraft. Automobiles accounted for approximately 90 per cent of the emissions from these transportation sources. The next largest contributor of emissions was industrial sources which included manufacturers of cement and lime, asphalt batching, rock crushing and concrete production, metal foundry operations, feed and grain processing, petroleum refining, roofing manufacturing, and burning of salvage materials. Other sources of pollution were power plants, space heating, and waste disposal facilities. According to the findings of the TACB, the principal air contaminants in the San Antonio area have been photochemical oxidants (produced chiefly by the interaction of hydrocarbons and nitrogen dioxide in sunlight), ozone, and non-methane hydrocarbons.[64] During the reporting periods for 1973 and 1974, the level of other air contaminants in San Antonio—sulphur dioxide, carbon monoxide, nitrogen dioxide and total suspended particulates—has been below the national average for these various air contaminants.[65]

The EPA has prepared a transportation plan for the San Antonio geographical area which is part of the transportation plan promulgated for implementation throughout the state. The EPA concluded that in order for the metropolitan San Antonio area to ultimately meet the requirements of the Clean Air Act, there must be a reduction of 40 per cent in the vehicle miles traveled in the geographical area; however, the Administrator concluded that such a reduction by 1975 would be socially disruptive. Therefore, the Administrator has developed a control strategy which will implement controls, including reduction in vehicle miles traveled, as expeditiously as practicable but which will allow a degree of flexibility in the controls to insure that they will not be socially disruptive. The transportation plan for the San Antonio geographical area includes vapor recovery from all gasoline sales outlets, including vapor return from motor vehicle tanks; an inspection and maintenance program for light duty vehicles; requirements that certain lanes of major streets and freeways be converted to bus and car pool use; limitation on gasoline sales conditionally effective in 1977; and a com-

63. TEX. AIR CONTROL BD. BIENNIAL REP. Sept. 1, 1972-Aug. 31, 1974, at 31-36.
64. TEX. AIR CONTROL BD. BIENNIAL REP. Sept. 1, 1972-Aug. 31, 1974, at 35, 36.
65. TEX. AIR CONTROL BD. BIENNIAL REP. Sept. 1, 1972-Aug. 31, 1974, at 31-36.

puterized car pool and bus program, and car pool incentives provided by employers.[66]

The EPA's disapproval of part of the Texas Air Quality Implementation Plan for control of photochemical oxidant pollution was considered by the United States Court of Appeals for the Fifth Circuit in *Texas v. EPA*[67] in 1974. Although the appellate court sustained the EPA's determination that the state's plan was inadequate, the court also held that certain of the Agency's additional regulations were invalid and deferred their implementation pending further considerations by the EPA.[68] This opinion stayed the implementation of transportation control by the EPA in the San Antonio geographical area pending that agency's reconsideration of certain technical aspects of its plans for the area, namely, its reconsideration of the refinery reactivity factor and its regulation requiring vapor recovery during vehicle refueling.[69]

Availability of a Variance from Regulatory Requirements

The Texas Clean Air Act authorizes the Texas Air Control Board to grant individual variances beyond the statutory limitations imposed, and to the rules and regulations established by the board, if the movant can prove that compliance with any provision of the Act or the attendant rules and regulations "will result in an arbitrary and unreasonable taking of property, or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people."[70] Any person seeking a variance must state his reasons in a petition filed with the executive secretary of the board. Upon receipt of the petition, the executive secretary may recommend the granting of the variance without a hearing. The board may require a hearing at its discretion and shall give due recognition to the progress of the petitioner toward controlling or preventing air pollution.[71]

66. 38 Fed. Reg. 30640-41 (1973).
67. 499 F.2d 289, 318 (5th Cir. 1974).
68. *Id.* at 318.
69. *Id.* at 318.
70. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.21 (1975).
71. *Id.* § 3.23(a). The Act specifies the conditions upon which the holder of a variance shall comply and further provides that the variance is not a vested right but can be revoked or superceded for good cause after a public hearing. *Id.* § 3.23(d). The Act also states that the mere filing of a petition for a variance does not serve to abate any suit, hearing, investigation or other proceeding which is pending at the time of the filing of the petition. The granting of a variance petition only authorizes the variance for the period and to the extent specified in the board's order. *Id.* § 3.26; *see* Tyler,

The granting of variances by the TACB is subject to the approval of the Environmental Protection Agency.[72] Several federal courts have ruled that the EPA may approve variances prior to the date set for a mandatory attainment of national ambient air quality standards on the grounds that the granting of the variance is the revision of the state implementation plan rather than a postponement of the implementation of the plan.[73] These decisions are based on the premise that such a deferral should not interfere with the time schedule specified in the plan for the attainment or maintenance of the national standard.[74] If, however, the variance is granted after the date set for mandatory attainment of national ambient air quality standards, the approval by the EPA of any variances granted by state authorities must comply with the formal implementation plan postponement procedures. Until the EPA has approved a variance granted by a state, the applicant for the variance continues to be subject to federal enforcement actions.[75]

Construction and Operating Permits

The construction of new or modification of existing facilities may require the acquisition of a construction permit from the TACB. The Texas Clean Air Act requires application for a permit before any actual work is undertaken to modify an existing facility or to construct a new facility "which may emit air contaminants."[76] The word "may" has been defined as used in its natural sense to indicate possibility rather than probability.[77]

With regard to an existing facility, the term "modification" is defined in the statute as

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant

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Legal Character of the Variance and Waste Discharge Permits and the Nature of Appeals, 34 TEXAS B.J. 239 (1971); Comment, *1970 Clean Air Amendments: Use and Abuse of the State Implementation Plan*, 26 BAYLOR L. REV. 232, 234 (1974); Comment, 47 TEXAS L. REV. 1086, 1106 (1969).

72. 40 C.F.R. § 51.8 (1975).

73. *E.g.*, National Resources Defense Council, Inc. v. EPA, 478 F.2d 875, 887 (1st Cir. 1973); Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089, 1094 (D.D.C. 1974).

74. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975); Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690, 692 (8th Cir. 1973).

75. Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F. Supp. 1040, 1047 (D. Del. 1973), *aff'd*, 510 F.2d 969 (3d Cir. 1975).

76. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.27(a) (1975).

77. Europak, Inc. v. County of Hunt, 507 S.W.2d 884, 886 (Tex. Civ. App.—Dallas 1974, no writ).

> emitted by such source into the atmosphere or which results in the emission of any air pollutant not previously emitted.[78]

The statute further specifies that

> insignificant increases in the amount of any air pollutant emitted are not intended to be included, nor is maintenance or replacement of equipment components which do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted to the atmosphere.[79]

As an abundance of precaution, any person who plans to construct any new facility, or modify an existing facility, should coordinate the planned developments with the TACB to determine whether or not a construction permit is required.

The Texas Clean Air Act requires further that a person in charge of any facility on which a construction permit has been issued shall apply for an operating permit within 60 days after the facility has begun operation.[80] When the board has determined that all of the stipulations of the construction permit have been met and that the operation of the facility will not contravene any air pollution control standards, the board shall issue an operating permit for the facility.

ENFORCEMENT OF GOVERNMENTAL REGULATIONS

Enforcement of Federal Regulations

The Clean Air Act, as amended, authorized actions for enforcement of federal air control legislation and regulations both by the EPA and by private citizens.[81] The statute authorized the Administrator of the EPA to issue a compliance order, following a 30-day notice, to any person which the Administrator believes to be in violation of any requirement of a state implementation plan.[82] Compliance orders may also be issued for alleged violations of the new sources performance standards, hazardous emission standards, and those provisions which authorize inspections and monitoring of air contaminants. A compliance order, however, cannot become effective until the alleged violator has been given an opportunity to confer with the EPA concerning the violation. In the event the matter is not settled and the alleged violator disregards a compliance order, the EPA may proceed to file a civil action in a federal

78. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.03(9) (1975).
79. *Id.*
80. *Id.* § 3.28(a).
81. 42 U.S.C.A. § 1857c-8 (Supp. 1976).
82. *Id.* § 1857h-2.

district court against the alleged violator. Violation of a compliance order is punishable by a maximum fine of $25,000 per day during each day of the violation or one year imprisonment for a first offense. In the event of a second conviction a fine of $50,000 per day of the violation may be imposed in addition to a two year imprisonment term.

Suits may be brought by private citizens against the United States and any governmental agency as well as any person who is alleged to be in violation of an emission standard or limitation issued pursuant to the Clean Air Act.[83] The suit may not be commenced, however, until the plaintiff has given 60 days prior notice to the Administrator, and no action may be commenced if the Administrator or State is in the process of prosecuting a civil action to require compliance with the standard, limitation, or order, after such notice has been received. The court has the authority to award costs of litigation, including reasonable attorney's fees to any party.

Enforcement of State Regulations

Unlike the Federal Act, the Texas Clean Air Act authorized enforcement of the provisions of the state statute and regulations only by the Texas Air Control Board or by a local government which has adopted a resolution authorizing the exercise of such power.[84] It does not provide for citizen suits which may be filed by private citizens. The state statute provides that the enforcement agency may file a civil suit in a district court of competent jurisdiction for both injunctive relief to restrain the person from continuing to commit the alleged violation and for civil damages not less than $50 and not more than $1,000 for each day of the alleged violation, or both. In the event a local government institutes the suit, the Act requires that the Air Control Board be joined as a necessary and indispensable party to that suit.[85]

The City of San Antonio has, by ordinance, adopted the rules and regulations of the Texas Air Control Board.[86] A violation of those rules and regulations is punishable in a city municipal court, upon conviction, by a fine of not more than $200 for each day of the alleged violations.

Although the Federal Clean Air Act authorized citizen suits to enforce the provisions of the federal statute, neither the Federal Clean Air

83. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.03 (1975).
84. *Id.* §§ 4.01(c), 4.02(a).
85. *Id.* § 4.03.
86. CODE OF THE CITY OF SAN ANTONIO § 3A-1 (1975).

Act nor the Texas Clean Air Act authorize private actions for damages. The Texas statute, however, specifically provides that nothing in that Act affects the right of any private person to pursue "all common law remedies available to abate a condition of pollution or other nuisance or recover damages therefore, or both."[87] Private actions have been based generally on the theories of nuisance or trespass; both of these theories of action, however, contain pitfalls as to the burden of proving liability and damages.[88]

CONCLUSIONS

The Federal Clean Air Act, as amended, reflects the direct involvement by the federal government in the regulation and control of air pollution, a problem which before 1955 had been reserved exclusively to state and local governments. The participation of the federal government in the regulation of air pollution has reduced the ineffectiveness of state and local efforts to handle the increasingly serious problem. On the other hand, federal involvement in this area has tended to create problems in administering and coordinating the applicable federal and state statutes and regulations.

The San Antonio geographical area does not have any acute air pollution problems at the present time, although pollution from automotive exhaust is on the increase. As urbanization and industrialization of the area in and around metropolitan San Antonio expands, attendant air pollution problems will proportionately increase. Therefore, cities, business leaders and developers in this area should coordinate to the maximum extent planning of industrial expansion and urban growth so that early solutions may be achieved as problems arise. Cities and planning agencies in the San Antonio geographical area should establish planning and review committees with sufficient authority and tenure in order to timely evaluate and recommend viable solutions to increasing air pollution problems.

87. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.06 (1975).
88. *See* 1 F. GRAD, ENVIRONMENTAL LAW § 2.02(1)(d), at 2-36 (1975).