

INDIRECT SOURCE CONTROLS: AN INTERSECTION OF AIR QUALITY MANAGEMENT AND LAND USE REGULATION

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1. WHAT DOES AIR QUALITY MANAGEMENT HAVE TO DO WITH LOCAL LAND USE MANAGEMENT?

1.1. Local land use regulation has become an instrument of air quality management

The federal Clean Air Act,¹ as amended in 1970² and amended again in 1977,³ regulated land use in several significant ways. Most obviously, it potentially limited economic growth in areas which either failed to achieve specified air quality standards (nonattainment areas)⁴ or where further deterioration of air quality was prohibited (prevention of significant deterioration or PSD areas).⁵ The Clean Air Act, for example, made it substantially more difficult and costly to obtain air pollution permits for major new sources of air pollution in nonattainment and PSD areas.⁶ However, the industrial source permit system of the Clean Air Act did not require significant affirmative implementing action by local land use regulators, and thereby avoided open conflicts with such regulators and their political constituencies. This is largely because the limitations on major new sources of air pollution affected relatively large areas of individual states.⁷

The Clean Air Act also affected land use less directly through its regulation of the transportation sector.⁸ For example, tailpipe emission standards for cars affect land use, albeit minimally, by increasing the cost of transportation.⁹ Certain other provisions of the Clean Air Act that regulated transportation were more immediately relevant to local land use regulation. For example, transportation control provisions were designed by the federal government to attempt both to regulate traffic flows directly and to change the demand function for transportation i.e., to shift demand from single to multiple occupancy vehicles and to lessen the demand for transportation

altogether. The aim of these provisions is, obviously, to reduce air pollution by reducing automobile and other transportation related emissions.

This communication concerns indirect source controls, which directly impact land use by attempting to reduce transportation emissions by shifting the transportation demand function. The federal Clean Air Act defines the term "indirect source" as "a facility . . . which attracts . . . mobile sources of pollution."¹⁰ As the implementing regulations of the federal Environmental Protection Agency (EPA) reflect, the term encompasses any ordinary public facility that attracts cars. Indirect sources include:

- (a) highways and roads,
- (b) parking facilities,
- (c) retail, commercial and industrial facilities,
- (d) recreation, amusement, sports and entertainment facilities,
- (e) airports,
- (f) office and government buildings,
- (g) apartment and condominium buildings, and
- (h) education facilities.¹¹

Thus, an indirect source is in essence anything that increases air pollution emissions from motor vehicles by attracting motor vehicles.

Federal and California authorities are presently attempting to regulate indirect sources to decrease the transportation demand function, or at least decrease demand for transportation by single occupancy vehicles.¹² These efforts to shift the demand function create tension with the traditional local government responsibility for land use. This communication explains why the tension exists and how it complicates air pollution efforts. The communication further reviews how and why the federal government, the state of California and regional agencies created by California law have attempted to compel local government to incorporate air quality concerns associated with indirect source emissions into local land use decisions. Elsewhere the authors have closely examined the issue of indirect source regulation in Southern California's South Coast Air Basin,¹³ which is perhaps the most polluted airshed in the United States and consequently represents an extreme example of the tension between local land use and air quality regulation.

Essentially three approaches have emerged for the formulation and implementation of indirect source control policy in the South Coast Air Basin:¹⁴ (1) traditional regional planning efforts (regional planning); (2) use of environmental assessment requirements of the California Environmental

Quality Act,¹⁵ which require indirect source mitigation measures in respect of local government individual project approvals (project approval); and, (3) the efforts by a specialized regional air pollution control agency to require local governments to implement general indirect source control policies under threat of preemption by the regional air pollution control agency for failure to act (regional preemption). All three models have potential for contributing to effective management of the South Coast Air Basin's air pollution problem.

Each, however, also has its limitations. The regional planning approach has a long time horizon and may often fail to address local problems. It is also relatively easy for local governments which are of a mind to do so to work at cross purposes to it. The project approval approach fails effectively to reach existing sources, and its case-by-case application may fail to yield uniformly stringent realization of indirect source control benefits. The California Environmental Quality Act, however, requires mitigation of environmental impacts to the extent feasible, a fact which strengthens the force of the project approval approach. The regional preemption approach may ultimately fail because of entrenched groups' vested interest in the traditional land use regulation by local government, which regulation has not included much attention to air pollution concerns. If artfully implemented, however, the regional preemption approach might succeed in overcoming the limitations of the other two approaches.

The three approaches to indirect source control together constitute a novel system of federalism and regional government and of technocracy and local politics.¹⁶ The communication concludes with a review of the present system of indirect source regulation and considers how the alternative approaches to indirect source regulation complement each other. It offers some thoughts on the parallels between the federalism model of the Clean Air Act and the three regional government approaches to implementing indirect source controls in the South Coast Air Basin. Finally, the concluding section offers a few thoughts on whether the alternative approaches to indirect source regulation adequately satisfy the participation and political legitimacy concerns associated with local land use regulation.

1.2. Local land use regulation tends to treat air pollution as an externality

Although local land use regulation and growth are inextricably related to the control of air pollution, there is constant political tension between local land use and air pollution regulation. One source of the tension is the dichotomy between the national and state responsibility for controlling air

pollution and the largely local government control of local land use. At a more substantive level, the tension arises because of the dramatic differences in the perspectives from which local government and other levels of government view the air pollution problem.

The federal government and the state of California set absolute standards for air quality. As long as the state and federal governments work to achieve such air quality standards through command and control schemes - requiring air pollution permits based on emissions, ambient air quality or technology standards, or economic incentive schemes¹⁷ - focused largely on stationary sources of emissions or on sales of equipment, such as cars, they do not impinge directly on the traditional local regulation of land use, nor do they affect in any significant way the lifestyles of very many people. As the potential of such air pollution control policies is achieved, however, control policies implicating land use come to the fore. Likewise, the need to change behaviors and patterns associated with the consumption of polluting transportation services assumes greater importance. In short, as the inadequacy of stationary source controls to meet air quality standards becomes apparent, air pollution control begins to impinge on lifestyles in a more direct fashion.

Local land use regulation is a component of the police power¹⁸ reserved to the states by the tenth amendment of the United States Constitution¹⁹ and is largely delegated by the states to local government.²⁰ Thus, to attain federal or state air quality standards through local land use reform, federal and state authorities must either wrest control of land use from local authorities or in some other manner impose state and federal air pollution priorities on local land use decisions. The land use priorities of air pollution regulators may conflict with the land use priorities of local government in a variety of ways. These conflicts arise by virtue of the fact that air pollution is generally a regional rather than a merely local problem.²¹ For example, from the perspective of a local government, the air pollution associated with land development within its territory is an externality.²² By way of illustration, in the South Coast Air Basin, emissions from coastal areas contribute more to the severe ozone problems of inland areas than to the problems of the originating coastal areas.²³ Accordingly, local land use regulators may have little incentive to consider degradation of air quality outside their areas.²⁴ Another consequence of the regional nature of air pollution is that local land use regulators may have affirmative disincentives to consider air quality concerns. When the sources of air pollution are spread over many local jurisdictions, no one jurisdiction is able to implement or enforce the land use

reforms that are necessary to limit air pollution. A real estate developer has both the incentive and the ability to locate a project in the most compliant local jurisdiction, thereby bringing with it the associated property tax, job creation and other benefits. Faced with this reality, local government has less incentive than regional or national government to control air pollution, be it through land use or otherwise. This reality is in fact reflected in the law: state and federal law set air quality standards and assume primary responsibility for ensuring achievement of those standards.²⁵

2. COMBAT BETWEEN LOCAL LAND USE AND REGIONAL AIR QUALITY REGULATORS IS NOT THE POINT

As the history of indirect source regulation shows, a major difficulty in successfully implementing indirect source controls is overcoming local resistance. Thus the key to successful regulation of air pollution emissions from so-called indirect sources is accomplishing the regulation with a minimum of intrusion by air pollution regulators into the traditional domain of local land use regulators. A combination of the three approaches to indirect source regulation discussed with respect to the South Coast Air Basin in this article might lead to such a result. Some land use reforms require area or region-wide implementation. For example, one might hope that the regional planning undertaken for the South Coast Air Basin would lead to a job/housing balance and to the development of a transportation infrastructure which would minimize the traffic and consequent air pollution associated with office complexes, shopping centers, special event centers and other indirect sources of air pollution. The planning process, however, works slowly at best, and it is far from clear that its effects alone on local land use zoning and permitting decisions would be sufficient to achieve the desired air quality benefits. Although California law prohibits the regional air quality regulator from regulating land use, it recognizes a need to induce changes in land use.

Consideration of air quality concerns by local governments does occur. Authorization to construct and modify indirect sources are subject to provisions of the California Environmental Quality Act. The environmental assessment process required by the provisions of this act does not take decision making authority out of the hands of the traditional local land use regulators. Instead, it merely requires them to consider additional elements. The recent adoption by the regional air quality regulator of a policy of systematically commenting upon the air quality aspects of environmental impact reports prepared in conjunction with local government decisions to

approve such projects does not threaten the existing decision making structure. It merely reinforces the consideration of air quality as one aspect of local land use.

Given the severity of the South Coast Air Basin's air pollution problem, long-term planning and intervention in indirect source project approvals are insufficient to achieve the reductions necessary to meet air quality goals for the basin. The EPA has expressly taken such a position in the Federal Implementation Plan (FIP) proposed pursuant to its determination that existing plans were not sufficient to achieve air quality standards in timely fashion. Accordingly regional and federal plans of action adopt an approach reminiscent of the federal Clean Air Act's model of federalism. That is, they set certain goals for indirect source control regulation and assign responsibility for meeting those goals to local governments, subject however to the threat of the regional air quality regulator's substituting itself for the local governments if the local governments do not act in a timely fashion.

Given the sensitivity of local governments toward intrusions upon their regulation, this scheme may prove wise for two reasons. First, it postpones and perhaps obviates any dispute over what constitutes unacceptable intrusion by an air quality regulator into local land use regulation. If by and large, local governments in fact do what the technocrats have deemed necessary, the legal arguments about the extent of the regional air quality regulator's authority become moot. Second, the insistence on local regulation of local land use seems to reflect not just vested interests, but also respect for local government expertise in land use regulation and the perceived legitimacy of resolution of local land use issues at the local level, i.e., respect for the theory that the local community is the community most directly implicated by local and use decisions and accordingly the entity with the greatest interest in seeing that they are made wisely. The threat of regional substitution should cause local governments to consider air quality concerns which they have previously overlooked.

Whether the regional air quality regulator in fact will be able to substitute itself for local governments if they do not act remains unclear. Those adverse to the substitution of local governments will advance legal arguments based on provisions of the California Health and Safety Code to the effect that air quality regulation may not intrude on local land use regulation. Moreover, even if those legal arguments are insufficient, there will be substantial political pressure from vested interests to prevent accomplishment of the substitution. EPA's unsuccessful efforts to impose stringent indirect source and transportation control measures on the states

generally and on the South Coast Air Basin in particular suggest that the regional air quality regulator might have similar difficulties.

Advocates of the prerogatives of local governments will argue that they are more legitimate fora for implementing indirect source controls, because they are more politically accountable for the resolution of local land use concerns. The regional air quality regulator is not a directly elected body as would be a city council or a county board of supervisors. Despite significant efforts to stimulate public participation in regional air quality rulemaking, it is accordingly less directly accountable to the electorate.²⁶ The counter to this argument is that, because of the externality nature of air quality concerns to local and use regulators, regional regulators are necessary elements of sound indirect source control policy. From a legitimacy perspective, however, the project approval approach, the regional planning approach understood as being optional for local governments, and the regional preemption approach in its merely "threatened preemption" phase, are preferable to actual regional preemption. Nonetheless, if local government fails to meet the undeniable challenge of responding to air quality concerns, actual regional preemption to overcome the failure of local government to effectively respond to a serious local problem with regional implications may be appropriate.

There remains, in sum, a great deal of uncertainty as to where the boundary is between the power of federal and regional air pollution regulators to control air quality through indirect source regulations and the exclusive power of local government to regulate local land use. The California Legislature has failed to define the boundary legislatively. EPA has told California that it has not gone far enough, even though federal law prohibits EPA from directly requiring indirect source regulations or from otherwise regulating "land use."

The resolution of this confusion lies not in the technical task of defining the term "land use." It does not even really reside in determining where, as matter of policy, to draw the boundary between the authority of air pollution regulators and local government. Instead, it resides in identifying the ways in which local government land use regulators can work in meaningful partnership with regional air quality regulators.²⁷ Through a combination of design and fortuity, a sophisticated set of parallel approaches to accomplish this partnership has developed in the South Coast Air Basin. Each of these approaches will contribute to achieving air quality controls in the South Coast Air Basin. This communication has identified the elements of these approaches and how they work. This understanding of the dynamic and

multifaceted regulatory process in the South Coast Air Basin provides a strong foundation for those who would translate this experience to other contexts.

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Notes

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1. 42 U.S.C. §§ 7401-7642 (1988), amended by Clean Air Act Amendments of 1990, pub. L. No. 101-549, 1990 U.S. code Cong. & Admin. News (104 Stat.) 2399.

2. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

3. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.). The Clean Air Act was once again amended by the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1990 U.S. code Cong. & Admin. news (104 Stat) 2399. For a description of previous United States air pollution control efforts and of why, largely due to their lesser stringency, they affect land use to a lesser degree, see Del Duca, United States, French and Italian Air Pollution Control: Central and Local Relations as a Structural Determinant of Policy, 10 Loy. L.A. Int'l & Comp. L.J. 497, 504-08 (1888). On the federal Clean Air Act generally, see D. Currie, Air Pollution: Federal Law and Analysis (1981 & Cumm. Supp. 1990).

4. See 42 U.S.C. § 7410(a)(2)(I) (1988), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(b), 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2404-06 (construction ban under 1977 amendments for non-attainment areas without attainment plan); *id.* §§ 7501-7506, amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 102, 110(4), 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2413-

23, 2471 (provisions enacted with 1977 amendments concerning non-attainment areas); *id.* § 7616(b) (withholding of funding for sewage treatment construction if non-attainment area does not have approved plan for attainment and does not demonstrate reasonable efforts toward such a plan).

5. *See id.* §§ 7470-7491, amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 105(b), 108(m), (n) 110(1)-(8), 708, 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2458-59, 2469, 2470, 2684. On the prevention of significant deterioration provisions of the federal Clean Air Act, *see generally* Oren, Detail and Delegation: A Study in Statutory Specificity, 15 Colum. J. Envtl. L. 143 (1990).

6. *See* 42 U.S.C. § 7503 (1988), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 102(c), 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2415-17 (permit requirements for nonattainment areas); *id.* § 7575 (pre-construction requirements for PSD areas).

7. *See id.* § 7407(a).

8. *See id.* §§ 7521-7574, amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 201-228, 230, 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2472-2511, 2529.

9. *See id.* § 7521, amended by Clean Air Act Amendments of 1990, Pub. L. 101-549, §§ 201-207(b), 230(2)-(5), 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2472-83, 2529. Beyond tail pipe emission controls, efforts are underway to establish the viability of alternative motor vehicle fuels, such as methanol, ethanol, natural gas, hydrogen and electricity. *See Office of Technology Assessment*, U.S. Congress, OTA-E-364, Replacing Gasoline: Alternative Fuels for Light-Duty Vehicles 1 (1990).

10. 42 U.S.C. § 7410(a)(5)(C) (1988).

11. 40 C.F.R. § 52.22(b)(i) (1990).

12. *See, e.g.*, 40 C.F.R. § 52.263 (1990) (establishing preferences for buses and carpools).

13. Del Duca and Mansueto, Indirect Source Controls: an Intersection of Air Quality Management and Land Use Regulation, 24 Loyola of Los Angeles Law Review 1131 (1991). The South Coast Air Basin includes all of Orange

County and the most urbanized parts of Los Angeles, Riverside and San Bernardino Counties. Its largest city is Los Angeles.

14. Other approaches are certainly conceivable. For an example of one approach which has not fared well against constitutional challenge, see Eggert, Traffic Linked Growth Control in California, 16 Ecology L.Q. 481 (1989) (discussing local ordinances which limited growth pending the development of highway infrastructure). Another approach is reflected in the city of Los Angeles' Ventura/Cahuenga boulevard corridor specific plan, which imposes fees on property owners for each afternoon rush hour trip generated by new development on their land.

15. Cal. Pub. Res. Code §§ 21000-21177 (West 1986 & Supp. 1991).

16. Constitutional and administrative scholars in recent years have worried considerably about the framework within which the legitimacy of actions by public agencies can be assessed. See, e.g., C. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 130-264 (1990); Stewart, Beyond Delegation Doctrine, 36 Am. U.L. Rev. 323, 329-35 (1987); Stewart, Madison's Nightmare, 57 U. Chi. L. Rev. 335, 342-48 (1990). In conjunction with the evaluation of the three approaches to indirect source controls in the South Coast Air Basin discussed in this Communication little attention has been given to questions of the theory of legitimacy of such approaches. Although one might try, and would succeed only with some awkwardness, to fit the approaches within various of the theories described by the authors just cited, for example, models of delegation, interest representation, as well as some not described by these authors, for example, neocorporativism, the fact is that the three approaches not only seem likely to work, but also seem reasonably responsive to local and regional political control.

17. For discussions of these techniques and their limitations, see Ackerman & Stewart, Reforming Environmental Law, 37 Stan. L. Rev. 1333 (1985); Del Duca, The Clean Air Act: A Realistic Assessment of Cost-Effectiveness, 5 Harv. Envtl. L. Rev. 184 (1981); Stewart, Controlling Environmental Rights Through Economic Incentives, 13 Colum. J. Envtl. L. 153 (1988); Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 Colum. J. Envtl. L. 171 (1988).

18. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 295 (1926).

19. U.S. Const. Amend. X.
20. See D. Mandelker, Land Use Law 205 (2d ed. 1988); see also Nelson, Property: Zoning Ordinances that Exclude Mobile Homes from Districts Reserved for Single-Family Dwellings, 62 N.C.L. Rev. 1374 (1984).
21. L. Malone, Environmental Regulation of Land Use 10-16 (1990).
22. For discussions on the concept of externality from the perspective of economists, see generally D. Pierce, Environmental Economics (1976); Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).
23. See, e.g., South Coast Air Quality Management Dist. & S. Cal. Ass'n of Gov'ts, 1989, Summary of Air Quality Management Plan 1 (May 1989).
24. By the same token, local government authorities may not be able to do anything about air pollution which originates elsewhere, but which affects their jurisdiction.

Arguably, appropriate local and regional tax policies would accomplish internalization of the externality. For example, a developer of a polluting project in a coastal city would have to pay a pollution tax to the government of the adversely affected in all areas. The likelihood of implementation of such a concept, due to adverse administrative and political interests, is small. The three approaches on which this Communication focuses are the plausible means at hand for accomplishing internalization of the externality.

25. See, e.g., U.S.C. §§ 7409-7412 (1988), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(b), (c), (d), 1990 U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2405-09; California Clean Air Act of 1988, ch. 1568, 1988 Cal. stat. 4397 (codified as amended in scattered sections of Cal. Health & Safety Code).
26. However, in the formulation of the AQMP, there has been substantial participation by a wide variety of interest groups, in part by virtue of CEQA. This results from the fact that CEQA applies not only to approval by agencies of private action, but also to undertakings of the agencies themselves. Cal. Code Regs. tit. 14, § 15002(a)(c) (1990); see also Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972) (Mono County Planning Commission required to file EIR

before approving building permit); Cal. Pub. Res. Code §§ 21080(a), 21100 (West 1986) (projects approved or proposed by public agencies are subject to CEQA). Thus, the CEQA required preparation of an Environmental Impact Report for the AQMP. This in turn allows the public and other agencies to compel that their comments be taken into account in preparing the AQMP. CEQA also applies when and if cities or counties amend their general plans to include air quality elements or to otherwise incorporate the AQMP's control measures. From a legitimacy perspective, this broad participation in public agency action is not a substitute for electoral or legislative control of the agencies' agenda and decisions. It does, however, provide some degree of political accountability and hence legitimacy for the actions involved. See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1776-79 (1975).

27. For thoughts on the value of cooperation and how to achieve it, see Susskind & McMahon, The Theory and Practice of Negotiated Rulemaking, 3 Yale J. on Reg. 133 (1985); Susskind & Weinstein, Towards a Theory of Environmental Dispute Resolution, 8 B.C. Envtl. Aff. L. Rev. 311 (1981).