AIR POLLUTION ABATEMENT PROCEDURES UNDER THE CLEAN AIR ACT*

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One of the paradoxes of modern life is that although economic growth is a condition precedent for solving most social problems, it creates many new ones. Economic growth, which is in large measure the source of environmental problems such as air and water pollution, does not in itself assure a solution of those problems. On the contrary, it makes them more urgent.

This urgency is reflected in what I think may fairly be characterized as an increasing emphasis on the social challenge that air pollution presents. As one observer has put it:

> The fact that species, including man, adapted to life in unpolluted air, have survived in polluted air indicates the existence of what we may call a physiological reserve we are obviously drawing on for survival . . . . The main issue in air quality criteria is the extent we are willing to dedicate this reserve to achieve economic and social benefits.[1]

Air pollution control legislation and regulations express in terms of law the social judgment which organized society, at the national, state, and local levels has, from time to time reached on this issue. In this legal context, we have, of course, passed from education and reliance on voluntary action, to control, which includes education, but involves another important element — coercion — if persuasion fails.

The Clean Air Act, as amended in 1967,[2] presents a multifaceted approach to the air pollution problem. It directs the Secretary of Health, Education, and Welfare to establish a national research and development program for the prevention and control of air pollution from all sources, provides for grants to support state, interstate and local air pollution planning and control programs, authorizes federal standards for the control of emissions from new motor vehicles, and finally, provides for federal abatement action under carefully prescribed conditions. The

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[1] Stern, *Basis for Criteria and Standards*, 15 J. AIR POLLUTION CONTROL ASS'N 281 (1965).

[2] Air Quality Act of 1967, 42 U.S.C.A. §§ 1857-1857l (Supp. Feb. 1968), *amending* 42 U.S.C. §§ 1857-1857l (1964).

involved procedures called for in abatement cases not presenting an emergency situation constitute one-third of the text of the amended act and are clearly designed to afford ample opportunity for appropriate remedial action by sources of pollution, as well as by the states and local governments concerned.

Both the 1963 Act and the amendments of 1967 demonstrated positive action at the federal level to meet an ever growing national problem and made federal resources and authority available for abatement action where state and local governments are either unable or unwilling to act. Far from pre-empting the field of air pollution control, the Act declares specifically that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments."[3] Section 108 of the Act, which establishes the procedures for federal abatement action, emphasizes this point and, in paragraph (b) states:

> Consistent with the policy declaration of this title, municipal, State, and interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided by or pursuant to a court order under . . . [this section].

Turning to the specific provisions of the Act, the jurisdictional requirement for federal abatement action is stated in section 108 (a) as follows:

> The pollution of the air in any State or States which endangers the health or welfare of any persons, shall be subject to abatement as provided in this section.

Although the statute was amended in 1967 to provide a new federal enforcement system based on air quality control regions, it preserved[4] (with minor amendments) the earlier — and more general approach — of the 1963 Act. Since that older approach is still available, and will, as discussed more fully below, constitute the major, if not the exclusive, federal abatement power available for the next year or more, it merits discussion.

Briefly, the Secretary of Health, Education, and Welfare is required to call a conference of the state, municipal, and interestate air pollution control agencies concerned whenever so requested by a governor, or a state air pollution control agency, or, with their concurrence, by a municipality, and the request refers to air pollution "which is alleged to endanger the health or welfare of persons in a state other than that in which the discharge or discharges (causing or contributing to such

[3] Air Quality Act of 1967 § 101(a)(3), 42 U.S.C.A. § 1857(a)(3) (Supp. Feb. 1968).

[4] Air Quality Act of 1967 § 108(c)(6), 42 U.S.C.A. § 1857 d(c)(6) (Supp. Feb. 1968).

pollution) originate." He may also call a conference on interstate air pollution on his own initiative after consultation with officials of the affected states.

If such request for a conference refers only to intrastate pollution (i.e., endangering the health or welfare only of persons within the state), however, the Secretary is directed to call the conference, unless in his judgment, "the effect of such pollution is not of such significance as to warrant exercise of federal jurisdiction." It should also be noted that the Secretary has no authority to initiate action on intrastate pollution without such a request.

Although the Secretary and the air pollution control agencies are the only official participants in a conference, the agencies may bring such persons as they desire to the conference and the statute requires that interested persons be given an opportunity to present their views to the conference.

Under the recently enacted amendments to the Clean Air Act, the Secretary is required to give at least 30 days prior notice to the agencies invited, and to give similar advance notice to the public by publication on at least three different days in a newspaper or newspapers of general circulation in the area. It is clear from this provision that Congress reaffirmed the premise under which our earlier abatement conferences were held — that the conference proceedings were of public interest, and were open to the public and all the communications media.

Those accustomed to the formalized structure of administrative proceedings conducted under the Administrative Procedure Act, with direct and cross-examination of witnesses, objections and motions, are usually surprised by the informal procedures of the conference. The conference procedure is, however, shaped to fit the nature of the conference which is basically a meeting of all the governmental agencies involved to consider a problem of common concern in the light of all the information available (including that presented by interested persons) in order to arrive at the remedial action necessary to meet whatever air pollution problem may be shown to be present.

One of the difficult problems facing the federal agency in preparing for a conference is the identification of sources of air pollutants and evaluating their contribution to the air pollution under investigation. The Clean Air Act does not provide for inspection authority but it does provide a limited authority to require reports. Section 108(j)(1) of the Act provides that after a conference is called the Secretary is authorized to require any person whose activities result in the emission of air pollutants causing or contributing to air pollution to file a report based on existing data concerning the character, kind and quantity of

pollutants discharged and the systems or devices used to prevent or reduce the emission of pollutants. The failure to file a report as required is punishable by a forfeiture of $100 for each day the failure continues. While this authority has been utilized in a few cases, we have considered it preferable on the whole, to attempt to obtain this relevant information on a voluntary basis *prior* to calling the conference.

In accordance with the Federal Reports Act of 1942[5] the questionnaire forms we have developed for our "Inventory of Air Contaminant Emissions," were cleared with the Bureau of the Budget, and reviewed by an industry advisory committee. As approved by the Budget Bureau, the nature of the request and the proposed utilization of the information is clearly spelled out in information printed on every copy of the form. This information begins with the statement:

"A. Response on all parts of the survey form is voluntary."

I should point out in all candor, however, that where the response is not forthcoming on a voluntary basis, we will unhesitatingly move to *require* the report by invoking section 108(j)(1).

While the information furnished on the questionnaire is treated as confidential for limited purposes,[6] the form states that all the data supplied may be disclosed as necessary by the Public Health Service at various stages of the abatement procedure. If a responding plant should limit the use of the data supplied so as to preclude its availability in abatement proceedings, the forms would be returned immediately and the mandatory reporting provisions would be invoked.

The information so obtained, if used, is compiled in a technical report for use at the conference. All information included in the report is submitted to the company concerned prior to publication for its approval or comment.

Under the statute, the federal technical report is to be provided to the participating agencies and made available to other interested parties at least thirty days prior to the conference whether the conference is initiated by the Secretary or called at the request of state or local authorities. It should be noted that no corresponding obligation is placed on the non-federal participants.

A presiding officer and a participant for the Department are designated by the Secretary. The Department participant is responsible for the presentation of the federal views on (1) the occurrence of air pollution subject to abatement under the Act; (2) the adequacy of measures taken toward abatement of the pollution; and (3) the nature of the delays, if any, being encountered in abating the pollution.

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[5] 44 U.S.C.A. § 421 (1967 Supp.).
[6] 42 C.F.R. § 1.103(c)(1) (1968).

Following the discussions, it has been the practice of the official conference participants, although not required by statute, to develop recommendations for remedial action to be considered by the Secretary. These conference recommendations, usually accompanied by a time schedule for corrective action, are arrived at in an executive session of the conference participants and are then read into the record at an open conference session.

One of the important values of the conference procedures is that a comprehensive presentation of the problem, supported by technical data, is made available to the concerned agencies and the public, usually for the first time. The discussions of the report also cover the health and welfare effects, the availability of air pollution control measures and their economic feasibility.

It is not surprising that, after the presentations outlined above, the official participants, who represent federal, state and local control agencies, usually are able to reach a consensus on the issues with a minimum of difficulty.

After the conference, the Secretary may recommend to the appropriate agencies that necessary remedial action be taken to abate the pollution, allowing a specified period, but not less than six months, for such action. If the recommendations are not followed, the Secretary may call a public hearing before a statutory hearing board. All interested persons (including, of course, the alleged polluter) are to be given an opportunity to present evidence at the hearing. On the basis of the evidence presented at the hearing, the board makes recommendations for effective action to abate the pollution. If these recommendations are still not complied with, the Secretary is authorized, in the case of interstate (and international) air pollution, to request the Attorney General to bring a suit against the alleged polluter, on behalf of the United States, to abate the pollution.

If only intrastate pollution is involved, the Secretary, if so requested by the Governor, may provide technical and other assistance as may be necessary to help the state abate the pollution or may ask the Attorney General to institute a suit to secure such abatement.

If suit is brought, the court will receive the transcript of the administrative hearing, and may receive such further evidence as it deems proper. After giving due consideration to the practicability of compliance with applicable standards, and to the physical and economic feasibility of abating the pollution, the court is directed to "enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require."

This abatement authority has to date been invoked in 9 interstate areas, covering parts of 13 different States and the District of Columbia. The problems range from single sources of pollution to the highly com-

plex mix of pollutants in the New York-New Jersey Interstate Metropolitan Area. The total population of the areas involved exceeds 20 million people or more than 10 per cent of the nation's population. Only one of these cases has gone beyond the conference recommendation stage. That case involves a rendering plant in Bishop, Maryland which is charged with emitting unspeakably vile odors endangering the health and welfare of persons in Selbyvile, Delaware, two miles away.

The conference there which, incidentally, was the first under the Act, was called at the request of the Governor of Delaware, and was held on November 10-11, 1965. The hearing took place in May 1967, and suit against the company to secure abatement of the pollution — the first litigation of this kind under the Act — was filed in the Federal District Court in Baltimore on March 7, 1968. If this case goes to trial, it will furnish an important precedent for federal abatement action.

The 1967 amendments provide an additional and entirely different approach to federal abatement action and call initially for state action directed to air quality control regions. After the Secretary designates air quality control regions, issues air quality criteria for the regions, and issues information on pollution control techniques, the states are required to establish ambient air quality standards and plans for their enforcement; upon approval they become the federal standards for that region. If state action is untimely, insufficient or inconsistent with the Act, the Secretary may establish and publish the standards for that region.[7]

The statute contemplates that the standards, established by either of the routes outlined above, will be implemented by the state concerned, since further federal action is contingent on a finding by the Secretary that: (1) the ambient air quality in the region is below the standards; and (2) that such lowered air quality is due to the failure of a state to take reasonable action to enforce such standards.

If these findings are made, the Secretary is directed to notify the affected state or states, persons contributing to the alleged violation and other interested parties of the violation. Unless reasonable action to enforce the standards is taken within 180 days from such notification, the Secretary may, in the case of pollution "which is endangering the health or welfare of persons in a state other than that in which the discharge or discharges (causing or contributing to such pollution) originate," ask the Attorney General to bring suit on behalf of the United States to abate the pollution.

If only intrastate pollution is involved, the Secretary is not authorized to take action on his own initiative but may, if so requested by the Governor, provide technical and other assistance to help the state

[7] For a more complete discussion of these procedures, see Middleton, *Summary of the Air Quality Act of 1967, supra* at 25.

abate the pollution or ask the Attorney General to bring suit on behalf of the United States to abate the pollution.

If suit is brought, the court will receive in evidence all records of prior proceedings and "such additional evidence, including that relating to the alleged violation of the standards, as it deems necessary to complete review of the standards and to determination of all other issues relating to the alleged violation." After giving due consideration to the practicability and to the technological and economic feasibility of complying with the standards, the court may "enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require."

The 1967 amendments also added a provision authorizing suit by the United States to abate pollution on the initiative of the Secretary in emergency situations where air pollution "presents an imminent and substantial endangerment of the health of persons" and state or local authorities have not acted.

While some of the recently enacted provisions, particularly those relating to the later stages of federal abatement action, are rather complicated and will require detailed analysis for their implementation, it is clear that standards for air quality, enforceable by state, as well as Federal action are on their way. Cooperation by all levels of government, the public and industry will help expedite the development and implementation of standards necessary to prevent further degradation of our environment and to improve the quality of the air that people breathe. But I want to make clear that at the federal level the air pollution control officials are, and will be, prepared to exercise to the fullest extent necessary, the powers and responsibilities vested in them by the Clean Air Act to achieve this goal.

The Clean Air Act, and the increasing number of air pollution control laws adopted by state and local governments, convey the unmistakable message that the people of this country want cleaner air.

As one commentator on the American scene, discussing the spirit of America, put it, the American "knows what he wants, and he cannot be turned from the struggle to attain it, whatever the cost."[8]

[8] H. LASKI, THE AMERICAN DEMOCRACY 55 (1948).