ENFORCEMENT OF PERFORMANCE REQUIREMENTS WITH INJUNCTIVE PROCEDURE

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Recent interest in air pollution control legislation has emphasized the contrast between two different approaches to regulation in this field. The familiar method of control by what is called "permit procedure" and the application of criminal sanctions of a misdemeanor level is probably the most common. Another approach gaining widespread recognition uses only performance standards in its regulations and all enforcement is through the use of a civil injunction. Pioneer work from this approach was done by the Bay Area Air Pollution Control District in the San Francisco Bay Area.[1] An early history of air pollution control efforts in the San Francisco Bay Area accounts for this.

In 1949 a number of conscientious community leaders became aware of the fact that this area faced an air pollution problem. The boards of supervisors of the Bay Area counties asked the Bay Area Council, an unofficial, nongovernmental spokesman for chambers of commerce, industrial development groups, local governments, labor, and others, to analyze the air pollution control problem in the San Francisco Bay Area.[2] The Bay Area Council formed a Bay Area Pollution Committee to carry out a program of voluntary control and education. By 1953 this Committee reported that responsible industries had undertaken voluntary control programs. By 1953 it had also become apparent that some segments of the community were not co-operating and that legislation was required.[3]

Shortly after World War II the need for a water pollution control program on a regional basis in California became apparent. The intensive use of water for many different purposes, and the corresponding need for more water, brought into clear focus the inadequacy of a control program based upon action by local jurisdictions. Water pollution on a stream affects all other water users downstream. Water pollu-

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[1] CAL. HEALTH & SAFETY CODE §§ 24345-24374 (West 1967), *as amended,* (Supp. 1967) [hereinafter cited as the BAY AREA AIR POLLUTION CONTROL LAW].

[2] SAN FRANCISCO BAY AREA COUNCIL, INC., AIR POLLUTION IN THE SAN FRANCISCO BAY AREA (1949).

[3] San Francisco Chronicle, Jan. 15, 1953, at 3, col. 2.

tion on a bay or other body of water affects all other users of the water. In some cases "local control" meant "no control," so something else had to be done. At the same time widely divergent conditions and needs dictated some approach that would give recognition to local needs and problems. The California State Legislature divided the state into major "hydrographic divisions" and created regional water pollution control boards in each of the hydrographic divisions to regulate the problem.[4] In 1953 a similar approach to air pollution control was introduced in the California Legislature. This proposal was referred to an interim study committee in 1953.[5]

The joint interim study committee, consisting of the members of the Standing Committee on Public Health and the Standing Committee on Conservation, Planning and Public Works in the California State Assembly,[6] held several hearings that were closely followed by public officials of the Bay Area. At the request of these officials, the joint committee held an intensive conference on August 13, 1954, to review presentations by officials interested in the problem of air pollution.[7] The need for a regional structure of an air pollution regulatory agency was widely recognized, yet at the same time responsibility to local government was considered eminently desirable. The joint committee appointed a "working committee" of seven officials of local government to make a study and submit a report. The draft presented by the working committee contained provision for a permit procedure that was to be enforced by civil injunction.

In the 1955 session of the California Legislature several bills were introduced.[8] The one bill which passed the Legislature in 1955 had to be amended in several important particulars in order to get it passed. Most important of these changes were, first, a requirement that regulations should be "performance standards" — i.e., should not specify the design of equipment, type of construction, or particular method to be used in reducing air pollution;[9] and, second, a deletion of any reference to criminal or misdemeanor powers in enforcement, and the substitution of "injunctive enforcement after administrative hearing."[10]

The phrase "performance standard" is taken from zoning and building code terminology. Earliest building codes contain what are now called "specification standards." In these early codes the legislative body adopting the code determined what sort of building or structure was desired in the community and specified construction details that

[4] CAL. WATER CODE §§ 13040-13080 (West 1956), *as amended*, (Supp. 1967).
[5] House Res. 167, 177, Cal. Legis., 1953 Sess.
[6] JOINT SUBCOMM. REPORT ON AIR POLLUTION, ASSEMBLY INTERIM COMM. REP. No. 4, Vol. XIII (1953-55).
[7] *Id.* at 41-58.
[8] AB 2042, AB 3545, AB 3788.
[9] BAY AREA AIR POLLUTION CONTROL LAW § 24362.3.
[10] BAY AREA AIR POLLUTION CONTROL LAW §§ 24368-24368.7.

would result in such a structure. No allowance was made for development of the art of building. As the art of building progressed, new methods of construction were devised, new materials were developed, and it became necessary to make these codes flexible. This was accomplished by amendments extending the types of permitted construction and by introducing alternatives into the codes. But the flexibility of these statutes increased their complexity to the point where they were difficult to understand and almost unworkable. When this happened in zoning regulations, building codes, highway codes, fire regulations, and other similar technical regulations, the concept of regulating by performance standards was developed.[11]

Performance standards differ from specification standards in that performance standards do not specify what must be done but rather what must be accomplished. The legislative body, in designing the performance regulations, decides what problem is to be solved and leaves it up to the owner or builder to solve the problem in his own way.

Similarly, performance standards in air pollution control work may be contrasted with equipment design standards. A control program based upon a design standard will specify the type and size of equipment, perhaps even the make and model number of the equipment, that is required of the operator. He is allowed little flexibility for his own ideas. He must propose and install the kind of equipment that will be approved by the regulatory agency or else a permit will be denied. Contrasted with the permit procedure, a performance standard control program would state the limitations on the emissions in terms of some emission standard. The operator is then free to achieve this result by any method or equipment he chooses. How he achieves the result is his own business. He may use any design for cleaning the gas; he may innovate a new design not heretofore used in engineering practice; or he may undertake process changes. Both the design standard, or permit procedure, and the performance standard have advantages and disadvantages. Contrasting these is the principal scope of this article.

There is a sort of "halfway house" between a specification regulation and a true performance regulation. This requires the use of a permit system. Such a regulation may specify a level of performance required to be obtained, but by requiring a permit to be obtained from an administrative officer prior to construction or use of any equipment will actually vest all discretion in the administrative officer as to how performance will be achieved. This cannot truly be called a performance type of regulation. The administrator is as much a government agent as is a legislative board or commission. To the operator it matters

[11] The Uniform Building Code adopted by many western communities is an example of a performance code.

little which arm of the government controls his action so long as he is not free to make his own choice.[12]

A permit system is almost always used in connection with equipment design and operational specification standards, and is preferred by the small operator.

In preparing a design standard or a specification system of regulation, the legislative or administrative body considers what methods and devices will be suitable for the solution of various problems confronting the community, and specifies and requires that these solutions be adopted. The simplest example is that of a permit required for a small refuse incinerator. Since the legislative or administrative body has made a decision as to what equipment will be allowed and that no other equipment will be permitted, the simplest and most expeditious way of enforcing such a regulation is to require every person using a refuse incinerator to get a permit stating that the equipment design is approved. In applying for the permit, plans and specifications must be presented. These must conform to the plans and specifications already approved and adopted by the agency. Very little deviation will be allowed. Occasionally with the permit system two separate permits are required. First, a permit is required to construct the structure or facility, and then a second permit is required before it may be operated. Since the agency feels some strong pressure to grant an operational permit after the structure is completed according to the construction permit, the agency is likely to make the design requirements strict. There have been cases in air pollution control work where an operating permit was refused after the equipment had been constructed according to the plans approved with the construction permit.

Air pollution control ordinances using the permit system are generally enforced under a misdemeanor power.[13] Performance standard regulations are more likely to be enforced by a civil action in which an injunction is sought. There are certain basic reasons for this difference. Criminal prosecution must be based upon violation of a regulation which is definite and certain and free from ambiguity.[14]

Air pollution control is a difficult, technical subject. It is also a new and rapidly developing discipline. An attempt to write a regulation that will meet constitutional standards of certainty for a criminal statute will necessarily result in a rigid regulation that is too harsh in some cases and not progressive enough in others. It will require the use of the "tried and established" procedures because these are well understood and can be described with clarity. This is a good, conserva-

[12] The Rules and Regulations of the Los Angeles County Air Pollution Control District are of this type.

[13] *E.g.*, CAL. HEALTH & SAFETY CODE §§ 24277-24282 (West 1967).

[14] *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Champlin Ref. Co. v. Commission, 286 U.S. 210 (1932); Smith v. Cahoon, 283 U.S. 553, 564 (1931); United States v. Cohen Grocery Co., 255 U.S. 81, 89-93 (1921).

tive practice in regulation draftsmanship, and is commendable in most cases. In air pollution control regulations, however, such an approach will "overregulate," i.e., impose more control than the community need warrants in some cases and thus stifle progress in the art. In other cases the "tried and established" method of regulation will completely miss control of some new processes previously unknown. It is to avoid this paradox that the permit procedure is used. This, in effect, leaves the process of regulation drafting up to the administrator to be performed on a day-to-day, case-by-case, basis.

Performance standards can often be complied with at less cost to the operator than can equipment design standards. An example of this difference is the use of a baghouse on a gray iron foundry. Earlier practice for such operations called for a scrubber and electrostatic precipitator. Under a permit system this may be the only control method which will gain agency approval. Under performance standards, where the requirement is in terms of the quantity of particulate matter in the exhaust gas, the operator is free to experiment. He may choose to use a baghouse, and this may happen to be more economical to install, more economical to operate, and do a better job. The basic merit of this approach is that the operator can experiment and try out new equipment. He can discover new methods which cost him less and which do a better job. All of this advances the art, is of less cost to the operators being regulated, and does a better job for the whole community.

Another advantage to performance standards is that the agency can operate with a smaller staff. In a permit procedure it is necessary for the agency to review all of the plans presented by every operator who wishes to install equipment. They are, in effect, second guessing the owner's engineers and acting in the capacity of consultants. The agency, under these circumstances, has strong moral responsibility and political pressure to approve only those designs which they can be completely sure will easily meet the community's requirements. Under these circumstances, they are likely to be overcautious, and this tendency will cause "over engineering" of control equipment. This adds not only to the operator's cost, but ultimately to the cost of the air pollution control program from the standpoint of the whole community. Furthermore, after the agency's staff has approved the design, there is, at least in the public's mind, and certainly in the mind of the person who has obtained the permit, an inference that the agency is committed to the sufficiency of the design.

There are immediate advantages to equipment design standards as contrasted with performance standards, particularly with respect to the small operator. Most of the air pollution control ordinances in the United States use this approach. It is the easiest type of ordinance to draft. It is not too hard to discover some equipment design which will

solve the community's anticipated problems. This equipment design can then be incorporated in the ordinance and required of the operators.

Design standards have the advantage of quasi-formal approval from the control agency of an operator's action. If, after he has constructed the equipment, he must also get an operating permit, he has a substantial assurance that he is in compliance with the regulation. Thus, he is relieved in large part of the responsibility for determining what the emissions are and keeping them within limits. This relief may come with the price of greater installation costs and greater maintenance costs. Even in the case of those ordinances which state that having a proper permit is not an excuse for exceeding limits on emissions, there is a very practical security in having a permit. As a matter of fact, most agencies using the permit system seldom proceed under a section which says that they may enforce emission limits anyway. They are more likely to undertake proceedings to revoke the permit.

Design standards may be easier for the control agency to enforce than performance standards. In enforcing a performance standard the agency must be fully informed as to the quantity of exhaust gases, the process itself, and the content of the exhaust gases, both as to what is in it and how much. The agency must also be informed as to the source test — how it was done, whether the methods were proper, and whether the methods of analysis were correctly carried out. There are many difficult technical and evidentiary problems connected with the validity of a source test. In enforcing a design standard ordinance, all that is required of the agency is that it show that the operator does not have the permits called for. However, it should be noted that after a permit has been granted for specific equipment, the owner of that equipment has a deep interest in his permit. Air pollution control standards for the community can thereafter be upgraded only with considerable resistance and only after allowing some considerable period of time for the use of existing permits. Under a performance regulation the community's air pollution control standards can be more readily upgraded.

A consideration of the use of the injunction as an enforcement tool for air pollution control regulations requires a consideration of the nature of this writ. Injunction is a particularly useful remedy in nuisance cases. In the early common law a land owner was, with certain limitations, a feudal ruler within his own domain. As society advanced and became more complicated, and as people began to live closer together, the activities of each person on his own property affected his neighbor's comfort and repose. All of this led to the development of the law of nuisance. Air pollution problems are nuisances, and very early in legal history were recognized as such.[15]

[15] 3 Blackstone, Commentaries 217; 1 H. TIFFANY, REAL PROPERTY 1124 (2d ed. 1920). *See also* Comment, *The Role of Private Nuisance Law in the Control of Air Pollution, infra* p. 107.

Criminal prosecution need not have regard for how serious the violation is, how much the operations have affected the community's atmosphere, or what if any extenuating circumstances exist. A civil action, in which an injunction is sought, can consider all of these things in determining the equities of the case. The injunction looks to the future and seeks to regulate future conduct. An injunction operates directly to prevent future air pollution. Misdemeanor enforcement prevents nothing. It looks only to the past and seeks only punishment for past action. An injunction can shut down a source of pollution, while a misdemeanor conviction can only increase the cost of production — a special service charge that may be cheaper than the cost of pollution control for the offender.

Injunction enforcement can be contrasted with misdemeanor enforcement. A petition for an injunction is addressed to the equity jurisdiction of the court, and is handled under equitable rules and principles. It is a civil matter, and the burden of proof required of the petitioner is a preponderance of the evidence.[16] There is a great difference between this and the burden of proof required to gain a criminal conviction. An injunction case is tried, as a rule, only by the judge and no jury is involved.[17] In a criminal case, if a jury is demanded a unanimous verdict must be obtained. Another important difference is the effect of the proceedings. Criminal enforcement can only be referred to past conduct. A defendant may be punished for the errors he has committed, but it will be assumed that all of his future conduct will be lawful. An injunction on the other hand can be directed to future conduct. In the abatement of nuisances, and particularly in air pollution cases, it may be more important to control future conduct than to punish past misconduct.

In effect, a decree of injunction is a special act of the sovereign prepared after knowledge of the circumstances of the special case and is, therefore, most appropriate to the remedy of the nuisance as found from the facts. An injunction has a greater degree of permanence as a remedy. In a criminal case repeated prosecutions must be made for repeated violations, and it is ordinarily not admissible in evidence that the defendant has committed previous violations. Indeed, this may be grounds for a mistrial. In an injunction case an important issue is the fact that the offender has a record of repeating his offense. Such conduct is an offense to the dignity of the court, and is often taken as contempt by the judge of the court. This can result in summary and drastic punishment.

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[16] United States v. Loque, 344 F.2d 290 (5th Cir. 1965); Baton Rouge Cigarette Serv. v. Bloomenstiel, 88 So. 2d 742 (La. App. 1956).

[17] United States v. Jellico Mountain Coal & Coke Co., 46 F. 432, 434 (C.C. Tenn. 1891).

An important addition to the injunction procedure in the enforcement of air pollution control regulations is the use of an administrative hearing board. Such a hearing board can be given quasi-judicial power or, in other words, the power to hear evidence and decide facts. The board can be composed of experts on air pollution, giving it an advantage over judges and jurors who may have no knowledge of technical problems. This board of experts will have a more consistent approach to air pollution problems, and can more readily understand the difficult technical testimony that is likely to be presented. It is extremely difficult to present technical testimony to jurors. It is even difficult to present such testimony to judges. Because of the degree of expertness on the part of an administrative hearing board, a technical case can be more easily and more quickly presented at less cost to all concerned, including the control agency.

The Bay Area Air Pollution Control District has been enforcing performance standards by injunction after administrative hearing since 1957. Approximately 150 cases have been disposed of in this period of time. It is now possible to express an opinion on the effectiveness and efficiency of a program of enforcing performance standards by injunction. In considering this, the budget limitations of the Bay Area Air Pollution Control District must be kept in mind. From 1957 to 1961 the enforcement staff of the District had one field man. Each year since then the number of men in the field has been increased, and there are now 26 men to cover an area of 3,800 square miles. During this period legal services were on a part-time basis for three years. Since 1960, one lawyer and one secretary have handled all legal preparation and presentation in addition to other legal work for the District.

The time required to present a case to the Hearing Board varies with the complexity of the case. One case — a major contest — required parts of 16 days. Some cases require more than a day, but most are presented to the Hearing Board in half a day or less. From initial complaint to final order of the Hearing Board, ordinary cases take from six to eight weeks. Due process of law requires that the respondent be given notice of the charges against him and an opportunity to prepare his case. The pace of these procedures could not be quickened very much and still give the respondent a fair hearing. This can be compared with misdemeanor enforcement which usually takes from six to eight weeks for disposition when courts are available, and usually involves a much simpler set of facts.

The experience of the Bay Area Air Pollution Control District can be summarized briefly. Technically complex cases, or cases involving any complex set of facts, can be best heard and disposed of by an administrative hearing board familiar with the subject matter and competent to hear and judge technical evidence. This procedure, followed by civil

injunction, is both expeditious and powerful. Simple cases, such as open burning violations, can be more expeditiously handled as misdemeanors. Performance standards are both fair and feasible for major operations. For such operations they are superior to permit procedures. For a simple operation, such as a refuse incinerator, permit procedures appear to be superior. Design problems in refuse incinerators are well known. As a rule, the cost of the equipment is moderate and the owner has no desire to experiment in new designs. A permit procedure for such simple operations can be administered at reasonable cost.

A combined program will most efficiently accomplish the desired results of effective air pollution control at the least cost to both the agency and the operations being controlled.