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When Citizens Sue: Some Federalism Issues

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WHEN CITIZENS SUE: SOME FEDERALISM ISSUES

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I. INTRODUCTION

Almost all of the major federal environmental laws contain provisions which allow private citizens to sue environmental regulatory agencies and regulated industries in order to enforce federal environmental laws.[1] As California legislators have enacted state environmental legislation paralleling the federal programs, they have sometimes proposed similar citizens' suit provisions.[2]

This Article explores the probable ramifications of dual federal and state citizens' suit provisions. We look at these effects in the context of enforcing the air pollution regulatory system in California. We will argue that enforcement in this area will be facilitated *only* if state provisions are carefully drafted to complement existing federal law.

II. AIR POLLUTION CONTROL IN CALIFORNIA

An understanding of the problems which would be raised by the enactment of a state citizens' suit provision requires a working knowledge of the present air pollution law structure. The following is a brief description of the overlapping federal, state and local systems.

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1. *See* Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1982); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1982); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (1982); Federal Water Pollution Control (Clean Water) Act (CWA) § 505, 33 U.S.C. § 1365 (1982); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g) (1982); Deepwater Port Act § 16, 33 U.S.C. § 1515 (1982); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1982); Noise Control Act § 12, 42 U.S.C. § 4911 (1982); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1982); Clean Air Act (CAA) § 304, 42 U.S.C. § 7604 (1982); Outer Continental Shelf Lands Act § 23, 45 U.S.C. § 1349(a) (1982).

2. *See, e.g.*, Cal. A.B. 2173, 1985-86 Reg. Sess. (Mar. 8, 1985) (introduced by Assembly Member Margolin); Cal. A.B. 1638, 1983-84 Reg. Sess. (Mar. 3, 1983) (introduced by Assembly Member Margolin).

A. The Relationship Between Local, State and Federal Regulatory Authority

The California system of air pollution control is a complex, three-tiered structure. It is premised upon a balanced exercise of local, state and federal environmental regulatory authority. In brief, local air pollution control districts[3] first adopt regulations controlling air emissions from stationary sources (e.g., factories rather than cars).[4]

Next, the State Air Resources Board (ARB) must review and, if necessary, alter the local district rule to assure conformance with the air pollution provisions of the California Health and Safety Code.[5] ARB then forwards local district rules to Region IX of the United States Environmental Protection Agency (EPA) for further review.[6] EPA approves district rules if it determines that they are in conformance with the Clean Air Act and federal air pollution regulations and policies.[7] Upon approval by EPA, the local district rules become part of California's State Implementation Plan (SIP).[8]

Once incorporated into the California SIP, the "federalized" local regulations become federally enforceable, both by EPA[9] and by citizens under section 304 of the Clean Air Act.[10] The local rules are also independently enforceable by ARB and the local districts under the California Health and Safety Code.[11] In other words, a single rule limiting, say, emissions from breweries in Los Angeles can be enforced by the South Coast Air Quality Management District (based in El Monte, California), by the ARB (in Sacramento), by EPA (in San Francisco and in Washington, D.C.) and, if EPA fails to enforce, by citizens (in Los Angeles and anywhere else they have standing).[12]

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3. CAL. HEALTH & SAFETY CODE § 40000 (West 1984).
4. *Id.* §§ 40000-40001.
5. *Id.* §§ 39601-39602; *see* Clean Air Act (CAA) § 110, 42 U.S.C. § 7410 (1982).
6. CAL. HEALTH & SAFETY CODE § 39601 (West 1984).
7. CAA § 110, 42 U.S.C. § 7410 (1982).
8. *Id.*; CAL. HEALTH & SAFETY CODE § 40752 (West 1984).
9. CAA § 113, 42 U.S.C. § 7413 (1982); *see also id.* § 120, 42 U.S.C. § 7420 (1982).
10. *Id.* § 304, 42 U.S.C. § 7604 (1982).
11. CAL. HEALTH & SAFETY CODE §§ 42400-42407 (West 1984).
12. The determination whether citizens not residing in the city in which a source is located have standing to enforce a rule against that source, although a crucial issue in the citizens' suit field, is a topic beyond the scope of this Article.

B. The Federal System of Air Pollution Control: Substantive Requirements and Enforcement Options

1. Federal air pollution requirements applicable to stationary sources in California

The complex federal regulatory system that has evolved in response to the mandates of the Clean Air Act distinguishes between new and existing industrial facilities.[13] For new facilities, federal regulations also distinguish between areas which have attained the goals established for "criteria pollutants"[14] and those areas characterized by "nonattainment" for these pollutants.[15] At the heart of the federal regulatory system are technology-based standards requiring the installation of various levels of pollution control equipment.

a. federal control technology standards for existing industrial facilities

In general, all existing plants in nonattainment areas (such as the Los Angeles basin) are required to install "Reasonably Available Control Technology" (RACT).[16] RACT is the most flexible level of control technology imposed by federal regulations. In determining RACT for a given source, a local district in California must consider the likelihood that a proposed requirement will assure that the area will attain applicable air quality goals, as well as the social and economic impacts of imposing the requirement and the alternate means of achieving the same goals.[17]

b. federal control technology standards for new industrial facilities

All major new plants and major modifications of existing plants are required to undergo a "New Source Review" (NSR) process prior to construction.[18] The purpose of the NSR process is to assure that emissions from the new facility will not result in a harmful decrease in the air quality of the affected area.[19]

New plants in areas deemed to be "in attainment with" the quality standards are required to install the "Best Available Control Technol-

13. *See* CAA §§ 165, 173, 42 U.S.C. §§ 7475, 7503 (1982).
14. *Id.* § 108, pt. C, 42 U.S.C. §§ 7408, 7470-7479 (1982).
15. *Id.* §§ 171-173, 42 U.S.C. §§ 7501-7503 (1982).
16. 40 C.F.R. § 51.1(o) (1985).
17. *Id.*
18. CAA § 165, 42 U.S.C. § 7475 (1982).
19. *Id.*

ogy" (BACT).[20] BACT is a more stringent standard than RACT, and requires that a district impose the maximum level of emission reductions achievable by a given source, considering energy, environmental and economic impacts.[21]

New plants in nonattainment areas are further required to achieve the "Lowest Achievable Emission Rate" (LAER).[22] As defined in the Clean Air Act, LAER represents the most stringent level of control technology that has been adopted as a rule by any state or achieved in practice by any similar source.[23] LAER may in no case be less stringent than federal performance standards established by EPA for new sources in each industrial category.[24]

2. EPA enforcement tools

EPA may directly exercise its enforcement authority under the Clean Air Act by bringing an enforcement action against a stationary source which is in violation of any applicable federal regulation.[25] EPA is empowered to seek civil and criminal penalties as well as injunctive relief against the owners and operators of a regulated facility that is violating environmental laws.[26] EPA may also pursue a variety of enforcement options short of obtaining a court judgment, including administrative orders, consent decrees and settlements. In short, EPA may and does directly exercise its enforcement authority over local stationary sources through a variety of formal and informal methods. Direct federal enforcement authority can create conflicts when, for example, EPA disagrees with ARB's and/or a district's assessment that a particular type of control technology represents RACT, BACT or LAER, or that a given source is or is not in compliance with applicable emissions limitations. When this type of conflict arises, ARB and the district will attempt to enforce the technology requirement of a district rule pursuant to state law,[27] while EPA may enforce an alternate technology requirement under federal law.[28]

At present, citizens may sue only to enforce federal or "federalized"

20. *Id.* §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3) (1982).
21. *Id.*
22. *Id.* § 171(3), 42 U.S.C. § 7501(3) (1982).
23. *Id.*
24. *Id.*
25. *Id.* § 113, 42 U.S.C. § 7413 (1982).
26. *Id.*
27. CAL. HEALTH & SAFETY CODE §§ 42400-42407 (West 1984).
28. CAA § 112, 42 U.S.C. § 7412 (1982); 40 C.F.R. § 60.1 (1985).

requirements.[29] Should a California citizens' suit provision be adopted, the murky conflicts between federal and state enforcement actions for a source subject to conflicting federal and local requirements will be further muddled.

Conflicts also may arise in those areas in which EPA may also indirectly exercise its enforcement authority by disapproving or failing to act upon a proposed California SIP revision.[30] For example, local air districts in California often adopt "phased" approaches to pollution reduction for existing sources.[31] The viability of each phase is premised upon a combination of economic and technical factors. Should one of these factors prove infeasible—e.g., if expected improvements in technology fail to materialize—then industrial compliance with the local rule, as approved by EPA and incorporated into the California SIP, will be impossible. Under such circumstances, the local district may choose to revise its local rule by requiring an entirely different type of control technology. If EPA disagrees with the local district's assessment of the feasibility of enforcing the original rule, EPA may both disapprove the proposed revision and attempt to commence an enforcement action against sources which are in violation of the original local rule. Simultaneously, the district may commence an enforcement action based upon violations of the revised, locally enforceable district rule. A regulated source is then presented with the Hobson's choice of investing in technology which the district requires but EPA does not recognize, or attempting to meet EPA's demand that it move toward compliance with the infeasible original technology standards until the district and EPA can resolve the technical issues in dispute.

As the above examples demonstrate, while local districts theoretically have primary responsibility for regulating industrial air pollution sources in California, EPA, as a practical matter, retains a significant level of control over the enforcement of federal, state and local regulations. Conflicts between EPA and districts are not unusual, and there is no clear legal mechanism through which they can be avoided or resolved. Resolution of such conflicts takes many forms, but almost always involves complicated technical exchanges between experts at the federal, state and district levels.

3. Federal citizens' suits under section 304 of the Clean Air Act

Section 304 of the Clean Air Act authorizes private citizens to bring

29. CAA § 304, 42 U.S.C. § 7604 (1982).
30. *Id.* § 110(a)(2), 42 U.S.C. § 7410 (1982).
31. *See, e.g.*, BAAQMD Reg. 8, Rule 3.

a federal court action against any person who is in violation of any of the following requirements: (1) an applicable emission standard or limitation; (2) an order issued by EPA or ARB with respect to an emission standard or limitation; (3) the permit requirements for new and existing sources located in attainment and nonattainment areas; or (4) any provision of such a permit. The remedies available under section 304 include injunctive relief and the cost of litigation (including attorneys' fees), but not penalties. EPA may, but is not required to, intervene as a party in such a suit.[32]

In general, a potential section 304 plaintiff must provide EPA, the state and the alleged violator sixty days notice before filing the suit. If EPA, ARB or the local district either has commenced an enforcement action in state or federal court or will commence such an action prior to the expiration of the sixty-day period, the citizen suit is barred. If, however, a government agency has commenced an administrative enforcement action against the party targeted by the citizens' suit, the suit will be barred only if the administrative tribunal is empowered to grant the same relief available in a court.[33]

Although numerous citizens' suits have been filed under the Clean Water Act,[34] the number of such suits filed under the Clean Air Act has been somewhat limited. This is due to two factors. First, unlike the Clean Water Act, the Clean Air Act does not allow private citizens to seek penalties from violators.[35] Second, there is no readily accessible means by which a private party can discover whether a given source is out of compliance with a specific air pollution standard or permit limitation, while such information is readily available regarding water pollution.

C. *The California System of Air Pollution Control: Substantive Requirements and Enforcement Options*

1. Permits for stationary sources

The Clean Air Act requires states to adopt a permit system to regulate sources of air pollution located in each state.[36] A central focus of the California air pollution control system thus concerns the issuance of permits for the construction and operation of industrial facilities which will

32. CAA § 304, 42 U.S.C. § 7604 (1982).
33. *Id.*
34. CWA § 505, 33 U.S.C. § 1365 (1982).
35. *Compare* CAA § 304, 42 U.S.C. § 7604 (1982) *with* CWA § 505, 33 U.S.C. § 1365 (1982).
36. CAA § 165, 42 U.S.C. § 7475 (1982).

emit air contaminants.[37] With few exceptions, such permits must be obtained from the local district before air contaminant emitting equipment may be constructed or operated.[38] Districts have a great deal of discretion in deciding whether to issue a permit as well as whether to impose special conditions on the permit holder.[39] All permits must include emission limitations and the appropriate level of control technology requirements.[40]

The California air pollution regulatory system also regulates air pollution issues pursuant to a nuisance statute.[41] For example, odors, which are difficult to quantify scientifically, have until recently been regulated—and eliminated—primarily by district nuisance provisions triggered by citizens' complaints.[42]

2. ARB and district enforcement tools

The California Health and Safety Code includes a comprehensive enforcement and penalty section applicable to violations of both state and district air pollution control laws, rules, regulations and permit conditions.[43] Districts may seek civil and criminal sanctions as well as injunctive relief—including plant shutdowns—against violators.[44] Districts may also engage in less formal enforcement proceedings, such as negotiations, designed to identify and implement plans for achieving compliance with applicable laws, rules, regulations and permit provisions.

3. Proposed citizens' suit provisions: the Margolin bill

Assembly Bill 2173,[45] introduced by Assembly Member Margolin, parallels the Clean Air Act citizen suit provision in most respects and duplicates that provision at the state and district levels. The bill would authorize "any aggrieved person" to seek to enjoin any violation of the laws, orders, rules, regulations and variance or permit conditions of ARB or a district. The plaintiff in such an action would be required to provide written notice to the alleged violator, the district and ARB sixty days

37. CAL. HEALTH & SAFETY CODE §§ 41500-42700 (West 1979 & Supp. 1986).

38. *See, e.g.*, BAAQMD Reg. 2, Rule 52-1-113-2-1-1-128 (exemptions from permit requirements).

39. *See, e.g., id.* Rule 2-2-400.

40. *Id.*

41. CAL. HEALTH & SAFETY CODE § 41700 (West 1984).

42. *See, e.g.*, BAAQMD Reg. 7.

43. CAL. HEALTH & SAFETY CODE § 42300 (West 1984).

44. CAL. HEALTH & SAFETY CODE §§ 42400-42407 (West 1984).

45. Cal. A.B. 2173, 1985-86 Reg. Sess. (Mar. 8, 1985) (introduced by Assembly Member Margolin).

prior to commencing most types of enforcement actions. A citizens' suit could not be brought if ARB or the district is "diligently prosecuting or negotiating" an administrative or court enforcement action. The bill also would give "aggrieved persons" the right to intervene in certain types of administrative enforcement proceedings. Finally, it would provide reasonable attorney fees to prevailing plaintiffs in civil actions at the discretion of the court or to intervenors in administrative enforcement actions if ARB or the district finds that their participation has resulted in "a benefit . . . conferred to the general public."[46]

III. FEDERALISM ISSUES RAISED BY DUAL FEDERAL AND STATE CITIZEN SUIT PROVISIONS

As the foregoing discussion illustrates, the enactment of legislation authorizing citizens' suits at the state level would add a new layer to an already complex enforcement system. Far more troublesome than this added complexity, however, are the issues of federalism inherent in the enforcement of similar, but potentially conflicting, state and federal measures. A few of these issues are discussed below.

A. Choice of Forum Issues

The first issue raised by a state citizens' suit provision of the type introduced by Assembly Member Margolin is forum shopping. Since most district air pollution rules are enforceable at the federal level as part of the California SIP, a person contemplating a citizens' suit would be free to bring the action in either state or federal court if a Margolin-type bill is enacted.

This new right presents several new possibilities. Consider first the possibility that a citizen chooses to file in federal court. Without speculating about the reasons for such a choice, the result will be both a federal court remedy and a federal interpretation of "federalized" state law. In all likelihood, the resulting federal court opinion would be elaborate, and the remedy substantial. The decision would be reported throughout the Nation and potentially affect enforcement nationwide.

Conversely, under a Margolin-type provision, the citizen may choose to proceed in a California state court. The perceived advantages here would include speed of judicial process, familiarity of and concern by the court regarding the environment, litigation cost savings and a favorable state supreme court. However, California state courts typically

46. *Id.* The 1985 incarnation of the Margolin bill died in committee on Jan. 30, 1986. *See* ASSEMBLY WEEKLY HISTORY, 1985-86 Reg. Sess., at 1285 (Jan. 30, 1985).

do not prepare elaborate opinions and they are not officially reported. Further, state courts are bound by state law remedies which, at least in monetary terms, are far less substantial than Clean Air Act penalties.

These differences create new incentives for forum shopping on the basis of the following factors:

—Degree of discovery allowed (or not allowed)
—Identity or reputation of judiciary
—Perceived quality of opinions
—Precedential value of decisions
—Magnitude of penalties
—Opportunity for agencies to participate in litigation
—Appeal opportunities

The new possibilities for abuse are serious. The owner of a single plant subject to a single emission limit under a single permit could be subject to a federal citizen suit for a first alleged violation and to a state citizen suit for a second.

In theory, this possibility exists now. A local district may commence an enforcement action in state court while EPA commences an action in federal court to enforce against the same alleged violation. In practice, however, this situation seldom occurs because the agencies coordinate and work with one another in enforcement matters. The citizens' suit introduces a substantially increased likelihood of duplicative and inconsistent enforcement.

B. Collateral Estoppel

An analysis of federal citizens' suits brought pursuant to the Clean Water Act shows that persons who are not parties to the original action are rarely barred by the principles of collateral estoppel from relitigating the same issues in the same or, in the event of a state citizens' suit provision, in an alternative forum. If the citizens' suit brought under the Clean Water Act are any indication, the most likely outcome of both state and federal citizens' suits in the air pollution area are settlement agreements which typically include a phased plan for the violator to come into compliance with the applicable requirements.

If a Margolin-type provision is enacted, a citizen who is dissatisfied with the settlement reached will acquire new rights. It will be much easier for such a person to file a state court action based exclusively upon the applicable state law. A state court would not be bound to recognize the federal court settlement, nor would a federal court be bound to recognize a state court settlement if the order of the suits were reversed. Due to the inapplicability of collateral estoppel inherent in the Clean Air Act

citizens' suit provision, the adoption of a parallel state provision thus doubles the possibility of conflicting results.

IV. ALTERNATIVE APPROACHES TO THE MARGOLIN CITIZENS' SUIT PROVISION

Fairly simple measures can be taken to avoid the federalism problems discussed above. These measures may take the form of a modification of the language of the proposed state provision itself or of alternative methods of citizen intervention which would render a state citizens' suit provision unnecessary. In either form, these preventative measures would have the effect of facilitating enforcement in this area.

A. Structuring an Effective California Citizens' Suit Provision

A California citizens' suit provision must take into account the federalism problems discussed above. For example, in addition to barring an independent citizens' suit when the ARB or a district is pursuing a judicial or administrative enforcement action, the provision should bar such suits when EPA is involved in any aspect of the enforcement action. EPA involvement implies federal enforceability; for issues which are federally enforceable, the Clean Air Act citizens' suit provision should be the exclusive statutory authority for private enforcement actions. Similarly, if the ongoing violation at issue has been subject to a federal, state or district enforcement action in the past, citizens should be precluded from relitigating the matter under a state citizens' suit provision for the duration of any settlement agreement reached in the prior enforcement action.

B. Citizen Intervention in Administrative Enforcement

Citizen involvement in air pollution control issues can be effectively assured by allowing citizen intervention in administrative enforcement actions. Such involvement would be a less expensive and conceivably far more effective method of including the public in air pollution enforcement matters than allowing private citizens' litigation. Formalizing the procedural requirements for district enforcement, so as to assure adequate public notice and ample opportunity for public comments to be received and considered, can be achieved through regulatory reform at either the district or the state level. Legislation would not be needed.

C. Citizen Intervention in Agency Rulemaking and Permitting Decisions

The public may also indirectly affect air pollution enforcement activity by becoming involved in rulemaking and permit decisions. Again, formalizing the procedure for public participation may be achieved at either the district or the state level. Citizens can and do routinely participate in district rulemaking and permit decisions.

D. Mandamus Action Against ARB and Districts

When ARB or a District fails to perform a non-discretionary duty imposed by federal, state or local law, it may be advisable to allow citizens to sue the agencies directly in a madamus action. State legislation authorizing such actions has been introduced for other state agencies,[47] and could be drafted to avoid the federalism problems mentioned in the preceding section.

V. CONCLUSION

Thus far, state and federal legislators have not adequately considered the possible impacts of adopting parallel federal and state environmental citizens' suit provisions. If citizens' suit remedies are to be effectively incorporated into the air pollution control enforcement system in California, state and federal provisions must be coordinated to prevent inconsistent and/or duplicative judicial actions. If citizens' suit remedies are not provided at the state level, public concerns over enforcement of the air pollution control laws may be addressed at a variety of formal and informal levels. While public involvement in health-related matters such as air pollution enforcement is desirable, lawmakers owe it to the courts and to the public to assure that such involvement is effective and efficient.

47. *See, e.g.*, CAL. PUB. RES. CODE § 4514.5 (West 1984).