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

Patrick Del Duca
*Daniel Mansueto**

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

A. 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 signifi-

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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 affected 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 (1988). 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).

cant 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—to shift demand from single to multiple occupancy vehicles and to lessen the demand for transportation altogether.¹⁰ The aim of these provisions is, obviously, to reduce air pollution by reducing automobile and other transportation related emissions.

This Article 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 . . .

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. No. 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. See *infra* notes 12-17 and accompanying text.

mobile sources of pollution."¹¹ 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.¹²

Thus, an indirect source is in essence anything that increases air pollution emissions from motor vehicles by attracting motor vehicles.¹³

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.¹⁴ These efforts to shift the demand function create tension with the traditional local government responsibility for land use. This Article explains why the tension exists and how it complicates air pollution efforts. The Article 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. To accomplish these ends, the Article closely examines the issue of indirect source regulation in Southern California's South Coast Air Basin,¹⁵ 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

11. 42 U.S.C. § 7410(a)(5)(C) (1988).

12. 40 C.F.R. § 52.22(b)(i) (1990).

13. For a description of the indirect source controls proposed for the South Coast Air Basin, see *infra* text accompanying notes 210-35.

14. See, e.g., 40 C.F.R. § 52.263 (1990) (establishing preferences for buses and carpools); see also *infra* notes 146-298.

15. The South Coast Air Basin includes all of Orange County and the most urbanized parts of Los Angeles, Riverside and San Bernardino Counties. SOUTHERN CAL. ASS'N OF GOV'TS, GUIDELINES FOR THE DEVELOPMENT OF LOCAL AIR QUALITY ELEMENTS 1-4 (1990) [hereinafter 1990 SCAG GUIDELINES]. Its largest city is Los Angeles. See *id.*

Basin:¹⁶ (1) traditional regional planning efforts (regional planning); (2) use of environmental assessment requirements of the California Environmental Quality Act,¹⁷ 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.¹⁸ 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.¹⁹ If artfully implemented, however, the regional preemption approach might succeed in overcoming the limitations of the other two approaches.

Most of this Article is devoted to the regional preemption approach because of its novelty, its potential, and the legal and political issues associated with its implementation. The Article will largely pass over the important contributions of regional planning, which are well treated in an extensive body of literature and of which the regional preemption approach is in some sense an extension.²⁰ However, the Article also dis-

16. 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.

17. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1991).

18. See *infra* notes 265-92 and accompanying text.

19. See *infra* notes 28-31 and accompanying text.

20. See, e.g., C. HAAR, *LAND USE PLANNING* 392-440 (3d ed. 1976); J. KELLER, *THE PLANNING OF COMMUNITIES: ANTICIPATIONS AND HINDSIGHTS—THE IDEA OF SOCIAL*

cusses the project approval approach because of the active role assumed by the regional air pollution agency in implementing it and in order to illustrate its conservatism. This approach is conservative because it does not disturb the existing framework for local government land use regulation, as does the regional preemption approach.

The three approaches to indirect source control together constitute a novel system of federalism and regional government and of technocracy and local politics.²¹ The Article 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.

B. 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

STRUCTURE 283 (1975); J. MEYER, J. KAIN & M. WOHL, *THE URBAN TRANSPORTATION PROBLEM* (1965); Babcock, *Implementing Metropolitan Regional Planning*, 4 J. LAND USE & ENVTL. L. 299 (1989); Haar, *Regionalism and Realism in Land Use Planning*, 105 U. PA. L. REV. 515 (1957); Mantell, *Going Beyond Environmental Quality: Will Land Use Planning Solve Our Environmental Problems?*, ENVTL. F., July-Aug. 1989, at 18, col. 3; Comment, *Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict*, 8 LOY. L.A.L. REV. 432 (1975) (authored by David R. McEwen).

21. 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 Article 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.

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.²² 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 schemes²³—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 power²⁴ reserved to the states by the tenth amendment of the United States Constitution²⁵ and is largely delegated by the states to local government.²⁶ 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.²⁷ For example, from the perspective of a local

22. See *infra* notes 61-87.

23. 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).

24. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

25. U.S. CONST. amend. X.

26. 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).

27. L. MALONE, *ENVIRONMENTAL REGULATION OF LAND USE* 10-16 (1990).

government, the air pollution associated with land development within its territory is an externality.²⁸ 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.²⁹ Accordingly, local land use regulators may have little incentive to consider degradation of air quality outside their areas.³⁰ 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.³¹

*C. The Acute Air Quality Problems of the South Coast Air Basin
Exacerbate the Tensions Between Air Pollution and Land Use*

Regional air pollution regulators are seeking the adoption by local Southern California governments of a far-ranging package of growth management measures designed to improve air quality.³² These meas-

28. 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).

29. 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) [hereinafter 1989 AQMP SUMMARY].

30. 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 inland areas. The likelihood of implementation of such a concept, due to adverse administrative and political interests, is small. The three approaches on which this Article focuses are the plausible means at hand for accomplishing internalization of the externality.

31. See, e.g., 42 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).

32. See 1989 AQMP SUMMARY, *supra* note 29, table 3 at 34; see also SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT & S. CAL. ASS'N OF GOV'TS, DRAFT AIR QUALITY MAN-

ures call for regulation of shopping centers, office complexes, so-called special event centers,³³ and other traffic-attracting facilities to reduce the traffic they generate.³⁴ The measures also include efforts to reduce commuting miles in order to promote a regional balance throughout the South Coast Air Basin between housing and jobs.³⁵ These measures would expressly introduce air quality concerns into local land use decisions.³⁶

These measures are part of current efforts to manage the South Coast Air Basin's massive and interrelated problems of growth and air pollution.³⁷ By many standards, the South Coast Air Basin has the worst air pollution problem in the nation.³⁸ Moreover, the rapid growth which is expected over the next twenty years promises to significantly worsen the basin's air quality.³⁹ The South Coast Air Basin presently exceeds state and federal standards for ozone, carbon monoxide and PM-10.⁴⁰ The South Coast Air Quality Management District (SCAQMD) estimates that between the years 1985 and 2010, the population of the South Coast Air Basin will increase by thirty-seven percent and that this

AGEMENT PLAN (Dec. 1990) [hereinafter 1991 DRAFT AQMP]. One indirect source control regulation which the South Coast Air Quality Management District (SCAQMD) has already implemented, Regulation XV, requires employers of 100 or more employees to develop plans to encourage carpooling and discourage single vehicle occupancy trips to work. SOUTH COAST AIR QUALITY MANAGEMENT DIST., RULES AND REGULATIONS, regulation XV at 1503-1 (Dec. 11, 1987) [hereinafter SCAQMD RULES AND REGULATIONS]. The 1989 AQMP contemplates further enlarging the scope of application of Regulation XV by extending its applicability to smaller employers as well as to additional categories of employers. SOUTH COAST AIR QUALITY MANAGEMENT DIST. & S. CAL. ASS'N OF GOV'TS, 1989 AIR QUALITY MANAGEMENT PLAN, app. IV-G at 69 (Mar. 1989) [hereinafter 1989 AQMP].

33. As examples of special event centers, the AQMP refers to "stadiums, concert halls and amusement parks with potential occupancies of 10,000 or more individuals at a time." 1989 AQMP, *supra* note 32, app. IV-G at 103 (Transportation, Land Use and Energy Conservation Measures).

34. *See infra* notes 226-34 and accompanying text.

35. *See infra* notes 215-17 and accompanying text.

36. *See* 1989 AQMP, *supra* note 32, app. IV-G at 101-06.

37. *See* 1989 AQMP SUMMARY, *supra* note 29, at ii, 1.

38. *See, e.g.*, 55 Fed. Reg. 36,458, 36,460, 36,464 (1990) (to be codified at 40 C.F.R. pts. 51, 52) (proposed Sept. 5, 1990) (EPA reports that the South Coast Air Basin has "by far the worst ozone levels in the country," and possibly the worst carbon monoxide and particle matter-10 problem of any urban area in the United States). The South Coast Air Basin suffers 150 violations of the federal ozone standard each year, compared to 20 in New York City and Chicago, the next worst ozone areas. *Id.* at 36,460, 36,464.

39. *Id.* at 36,464 ("Regional Forecasts for the South Coast Air Basin project the following growth rates from 1985-2012: Population 37%, Housing 46%, Jobs 47%, Vehicle Miles Traveled 68%, Vehicle Trips 40%.")

40. *Id.* at 36,458. PM-10 is particulate matter smaller than ten microns in diameter. *Id.* The principal air pollutants of concern in the South Coast Air Basin are discussed in the 1989 AQMP. *See* 1989 AQMP, *supra* note 32, at 1-4 to -5.

growth will alone, absent further control efforts, result in increases in emissions of carbon monoxide of forty-four percent, and of two ozone precursors, reactive organic gases and nitric oxides, of thirty-one percent and forty-one percent respectively.⁴¹ Thus, because of growth, the South Coast Air Basin will need to achieve significant emissions reductions simply to avoid further exceeding state and federal air quality standards.⁴²

Indirect source controls are an important—arguably critical—element of any plan to bring the South Coast Air Basin into compliance with state and federal standards. Air pollution controls in the South Coast Air Basin for stationary sources and motor vehicles are already stringent.⁴³ As a result, many of the “easy” reductions of emissions—those which provide large reductions at low cost—have already been or soon will be achieved. Accordingly, a significant percentage of the projected reductions in emissions required to bring the South Coast Air Basin into compliance with federal air quality standards by the year 2010 would result from proposed indirect source and growth management controls. By 2010, indirect source and growth management controls are projected to contribute 9.3% of the total required reactive organic gases reduction, 15.7% of the total required nitric oxides reduction and 23.5% of the total required carbon monoxide reduction.⁴⁴ The absence of indirect source controls is one of the reasons the South Coast Air Basin has never had a federally approved air pollution control plan.

The indirect source controls required to meet state and federal standards have from an early date proven politically unacceptable.⁴⁵ The

41. 1989 AQMP, *supra* note 32, at v-vi, 3-8 to -9; *see also* 1989 AQMP SUMMARY, *supra* note 29, table 3 at 34 (describing impact of growth on air quality in South Coast Air Basin).

42. According to the EPA, the South Coast Air Basin must reduce current levels of volatile organic compounds by 86% and make “deep reductions” in nitrogen oxides emissions to meet the national ozone standard. 55 Fed. Reg., *supra* note 38, at 36,460. EPA estimates that the South Coast Air Basin must reduce carbon monoxide loading by 60% to meet federal standards. *Id.* at 36,460.

43. *Id.* (“State and local regulations in the South Coast already are among the strictest in the nation.”).

44. Computed by the authors from tables 4-1 and 4-14 in the 1989 AQMP, *supra* note 32, at 4-3, 4-32. However, the results projected for 1994 are much less dramatic. According to the AQMP, the indirect source and growth management controls would by 1994 achieve only 0.53% of the total reactive organic gases reduction, 1.12% of the total nitric oxides reduction and 0.90% of the total carbon monoxide reduction. Computed by the authors from 1989 AQMP, *supra* note 32, at app. IV-G. Although the AQMP does not explain why the vast majority of the reductions would not occur until after 1994, part of the reason is the magnitude of the reductions to be achieved by other kinds of controls in the near future. Another reason is the time lag associated with development of new projects and with application of indirect source controls to existing sources.

45. 55 Fed. Reg., *supra* note 38, at 36,465. During 1973, the EPA issued several proposed FIPs, all but one of which contained extreme provisions, including gas rationing. *See, e.g.*, 38

first clash in Southern California between air quality standards and the political will to implement measures necessary to achieve those standards came soon after the enactment of the 1970 Clean Air Act amendments.⁴⁶ Those amendments required California to submit a State Implementation Plan (SIP) by 1972, which would result in attainment of federal air quality standards by 1975 or, if EPA granted an extension, by 1977.⁴⁷ EPA Administrator William Ruckelshaus disapproved the SIP which California submitted in 1972 because he found that it was inadequate to bring California into attainment by 1975.⁴⁸ A federal district court in Los Angeles then ordered EPA to promulgate a Federal Implementation Plan (FIP) which would be adequate to bring the South Coast Air Basin into attainment by 1975, or by 1977 if the EPA granted a two-year extension.⁴⁹ The EPA then promulgated a FIP with draconian transportation and land use control measures, which the EPA felt would be necessary for Southern California to achieve compliance.⁵⁰ For example, this FIP would have implemented a gas rationing plan reducing gasoline supplies to the Los Angeles area by up to 82%.⁵¹

Fed. Reg. 3526 (proposed Feb. 7, 1973) (plan included gasoline marketing controls). Following promulgation of the final plan on October 12, 1973, 38 Fed. Reg. 31,232 (1973) (to be codified at 40 C.F.R. §§ 52.222-.266), many suits were filed to enjoin enforcement of the FIP, and EPA later in the year postponed implementation of much of the FIP. The FIP was finally withdrawn in 1976 because EPA believed that its social and economic consequences would be unacceptable. *Id.*

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

47. See 42 U.S.C. § 7410(a)(1) (1988), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(d)(8), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2409; 38 Fed. Reg. 2194 (1973) (to be codified at 40 C.F.R. pt. 52) (proposed Jan. 22, 1973); 53 Fed. Reg. 49,494, 49,496 n.3 (1988) (to be codified at 40 C.F.R. pt. 52) (proposed Dec. 7, 1988).

48. 37 Fed. Reg. 10,842 (1972) (to be codified at 40 C.F.R. §§ 52.01-.14, .220-.239).

49. *City of Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972); see 38 Fed. Reg., *supra* note 47, at 2194.

50. See 38 Fed. Reg., *supra* note 47, at 2194. In responding to criticism of the plan by Angelenos, Ruckelshaus explained, "Faced with the choice between my freedom and your mobility, my freedom wins." R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 331-32 (1983).

51. 38 Fed. Reg., *supra* note 47, at 2195, 2199. This FIP also included various "tail pipe" controls, such as requirements for inspection and maintenance, retrofits on cars and fuel conversions, as well as various stationary source controls, such as requirements for dry cleaner vapor recovery and degreaser substitutes. *Id.* at 2195-96. However, just over half of the emissions reductions projected by the plan were from the gas rationing measure. See *id.* at 2196 (269 tons/day reduction of total of 531 tons/day reduction from gas rationing).

In promulgating the regulations, the Administrator noted that the "low density sprawling land use pattern in the Los Angeles area is not conducive to the efficient use of mass transit" and that "proper land use policies would greatly assist the long term implementation of such emissions control measures as VMT [Vehicle Miles Traveled] reductions." *Id.* at 2198. The

The political uproar that ensued caused EPA twice to revise this FIP, but the revisions failed to calm the political storm.⁵² The EPA ultimately withdrew the gas rationing regulations.⁵³ This withdrawal left the South Coast Air Basin without a legally adequate FIP or SIP, and the EPA did not propose another FIP until 1990, when it was compelled to do so by a federal court.⁵⁴

To date, no federally approved plan for the South Coast Air Basin exists.⁵⁵ SCAQMD and the Southern California Association of Governments (SCAG) adopted the 1989 Air Quality Management Plan

Administrator concluded, however, that the 1977 attainment deadline prohibited him from using such policy measures because the measures required a greater time period to achieve results. *Id.*

Interestingly, the land use measures that the Administrator had in mind are directly contrary to those currently being pursued in Southern California by local air pollution authorities. The Administrator expressed the view that Southern California should implement land use policies designed to build up population densities so as to make mass transit feasible. *Id.* The Air Quality Management Plan (AQMP) on the other hand seeks to even out population density so as to reduce commuting miles traveled. *See* 1989 AQMP SUMMARY, *supra* note 29, at 23.

52. *See* 38 Fed. Reg. 17,683 (1973) (to be codified at 40 C.F.R. pt. 52) (proposed June 22, 1973); 38 Fed. Reg. 31,232 (1973) (to be codified at 40 C.F.R. §§ 52.222-.266); 53 Fed. Reg., *supra* note 47, at 49,494, 49,498; *see also* 55 Fed. Reg., *supra* note 38, at 36,465 (EPA withdrew FIP because it believed FIP's "disruptive social and economic consequences would be unacceptable")

The second and third proposed FIPs also contained stringent measures. The second FIP proposed, among other things, three options for limits on gasoline consumption: (1) 100% gasoline rationing (which EPA believed necessary to achieve literal compliance with the Clean Air Act); (2) limiting consumption to 1972-73 levels; or (3) implementing only existing controls. *See* 38 Fed. Reg., *supra*, at 17,685. The third FIP required, although it was never implemented, the following: (1) use of specified freeway lanes and surface streets by buses and carpools only; (2) a surcharge on public parking (which would have radically altered the Los Angeles area's parking rate structure); (3) an annual charge on free parking spaces provided by businesses to their patrons; and (4) that employers charge employees for parking and provide incentives for the employees to use carpools and mass transit. *See* 38 Fed. Reg., *supra*, at 31,244-55. This plan retained limitations on gasoline use as well. *Id.* at 31,245.

53. 41 Fed. Reg. 45,565 (1976) (revoking 40 C.F.R. §§ 52.241, .330, .1110, .1592, .2293).

54. *See id.*; 53 Fed. Reg., *supra* note 47, at 49,494, 49,498.

55. Confronted with the failure of Southern California, as well as many other areas of the country, to attain national ambient air quality standards (NAAQS) within the time set by the 1970 amendments, *see* Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1678, Congress again amended the Clean Air Act in 1977 to extend the deadline for "non-attainment" areas. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 746-47 (codified as amended at 42 U.S.C. 7501(a)(1), (2) (1988)). The new deadline was set for December 31, 1982. 42 U.S.C. § 7502(a)(1) (1988). However, the 1977 amendments permitted the EPA to grant a five year extension, to December 31, 1987, for those areas where it was not possible to meet the 1982 deadline for ozone or carbon monoxide ambient air quality standards. *Id.* § 7502(a)(2). Consequently, the EPA designated the South Coast Air Basin as a "non-attainment" area for ozone and carbon monoxide, 43 Fed. Reg. 8964 (1978) (to be codified at 40 C.F.R. §§ 81.300-.356), and later granted California an extension for attainment of carbon monoxide and ozone

(AQMP) in March 1989.⁵⁶ On September 5, 1990, shortly before enactment of the 1990 Clean Air Act amendments,⁵⁷ the EPA considered disapproving the 1989 AQMP in part, and also proposed, pursuant to a court order, a FIP for the South Coast Air Basin.⁵⁸ As a result of the

NAAQS until December 31, 1987. 47 Fed. Reg. 50,864 (1982) (to be codified at 40 C.F.R. §§ 52.220, .238, .246).

Southern California failed to achieve attainment by the extended date of December 31, 1987, and as was the case previously under the 1970 amendments, it did not even have a legally sufficient FIP or SIP in place by the time the deadline was reached. See 53 Fed. Reg., *supra* note 47, at 49,497. Once again the failure resulted in significant part from lack of political will to implement the necessary control measures. See *id.* at 49,497-98. EPA, after extending the South Coast's attainment deadline to 1987, approved the control measures in the 1982 revisions to the South Coast portion of California's SIP. 49 Fed. Reg. 30,300 (1984) (to be codified at 40 C.F.R. §§ 52.220, .232, .269). However, EPA had proposed disapproving the 1982 revisions to the plan on the ground that they would not achieve attainment by December 31, 1987, 48 Fed. Reg. 5074, 5082-83 (1983) (to be codified at 40 C.F.R. pt. 52) (proposed Feb. 3, 1983), and approved the control measures in the revisions only after an avalanche of negative comments from local industry. See *id.* at 50,686, 50,689 (to be codified at 40 C.F.R. § 52.24(a)); 49 Fed. Reg., *supra*, at 30,303-04. Less than four years later in 1987, the Ninth Circuit, in *Abramowitz v. EPA*, found the California SIP inadequate because it did not provide for attainment by December 31, 1987 and ordered the EPA to disapprove it. 832 F.2d 1071, 1078-79 (9th Cir. 1987). The EPA complied. See 53 Fed. Reg. 1780 (1987) (to be codified at 40 C.F.R. § 52.237) (EPA disapproves SIP pursuant to *Abramowitz*).

56. See *infra* note 196.

57. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399.

58. 55 Fed. Reg., *supra* note 38, at 36,458; see *Coalition for Clean Air v. EPA*, CV88-4414-HLH (C.D. Cal. Jan. 9, 1991) (order granting EPA's motion to dismiss), *appeals filed*, Nos. 91-55383, 91-55386 (9th Cir.).

An important innovation of the 1990 amendments is the staggering of attainment deadlines according to the severity of nonattainment for the area and pollutant at issue. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 103-106, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2423-64. The 1970 and 1977 amendments, by contrast, set attainment deadlines which applied equally to all pollutants regulated by EPA and to all areas of the country, regardless of the degree by which any given area fell short of attainment. See 42 U.S.C. §§ 7410(a)(2)(A)(i), 7502(a)(1) (1988). The only provision for flexibility on attainment deadlines in the 1970 and 1977 amendments was to allow EPA to grant an extension, for areas which could not reasonably reach attainment within the initial deadline, of two years in the case of the 1970 amendments, *id.* § 7410(e), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(d)(5), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2409, and of five years in the case of the 1977 amendments, *id.* § 7502(a)(2).

A state could obtain the two year extension for one or more pollutants under the 1970 amendments if EPA determined that (1) the NAAQS for the pollutant would not be attained within the initial three year period because the necessary technology or other alternatives were not available or would not be available soon enough to permit compliance within the three year period, and that (2) the state had considered and applied as part of its plan reasonably available alternatives means of attaining the NAAQS and had justifiably concluded that attainment could not be achieved within the initial three year period. *Id.* § 7410(e)(1), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(d)(5), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2409. A state could attain a five-year extension under the 1977 Amendments, from 1982 to 1987, for ozone and/or carbon monoxide upon a

additional time for formulation of a SIP provided by the 1990 Clean Air Act amendments,⁵⁹ the EPA has been able to abandon its proposed FIP.⁶⁰

II. MODELS OF GOVERNMENTAL ORGANIZATION

A. *The Model of Federalism Imposed by the Clean Air Act Has Not Worked Well for Indirect Sources Because it Conflicts With the Established Allocation of Responsibility for Local Land Use Regulation*

1. The Clean Air Act's model of federalism was conceived for stationary sources, for which it has worked reasonably well

The 1970 amendments to the federal Clean Air Act established a joint federal and state program to control air pollution. The amendments called upon EPA to establish primary and secondary national ambient air quality standards (NAAQS) for pollutants which, in the EPA's judgment, "might endanger public health or welfare."⁶¹ They required the states to enact SIPs to provide for the "implementation, maintenance, and enforcement" of the NAAQS.⁶² The EPA was required to approve or disapprove the SIP based on whether it contained various statutorily prescribed provisions and control measures.⁶³ If the state failed to submit a SIP, or if the EPA disapproved the SIP, the Act required EPA to enact and enforce its own FIP.⁶⁴

The Air Resources Board (ARB) is the agency in California charged with developing California's SIP and adopting state standards for ambient air quality.⁶⁵ County, unified or regional air pollution control dis-

showing that attainment by 1982 was not possible "despite the implementation of all reasonably available measures." *Id.* § 7502(a)(2).

59. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(c), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2406-08.

60. *Coalition for Clean Air*, No. CV88-4414-HLH (order granting EPA's motion to dismiss).

61. 42 U.S.C. § 7408(a)(1)(A) (1988). The EPA has established NAAQS for the following six pollutants: carbon monoxide, nitrogen dioxide, lead, sulfur dioxide, fine particulate matter and ozone. 40 C.F.R. §§ 50.4-12 (1990).

62. 42 U.S.C. § 7410(a)(1), (2) (1988), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(b), (d)(8), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2404-06.

63. *Id.* § 7410(a)(2).

64. *Id.* § 7410(c)(1).

65. CAL. HEALTH & SAFETY CODE §§ 39003, 39602 (West 1986). California has enacted legislation that authorizes regulations to supplement the EPA's NAAQS with state ambient air quality standards. Act of Sept. 22, 1975, ch. 957, § 12, 1975 Cal. Stat. 2138, 2143 (codified as amended at CAL. HEALTH & SAFETY CODE § 39014 (West 1986)). In addition to the six pollutants regulated by the EPA pursuant to NAAQS, see *supra* note 61, California has set

tricts or air quality management districts are charged with adopting and enforcing rules and regulations which "[assure that reasonable provision is made] to achieve and maintain state and federal ambient air quality standards [in their respective territories.]"⁶⁶ Each district's responsibilities include developing a plan to achieve state ambient air quality standards.⁶⁷ In response to the federal Clean Air Act, the ARB designates an air quality planning agency for areas that have not attained NAAQS to develop plans for inclusion in California's SIP.⁶⁸ The designated planning agency usually includes the air pollution control district for the non-attainment area and may include local councils of governments.⁶⁹ The ARB may revise a non-attainment area plan to bring the plan into compliance with the federal Clean Air Act.⁷⁰

The 1990 amendments to the Clean Air Act (the 1990 amendments) do not fundamentally alter the preexisting model of federalism. They do, however, change deadlines for meeting air quality goals while creating an attainment program which, among other things, ties more specifically an area's degree of non-attainment to the kinds of measures a SIP for the area must include.⁷¹ Specifically, the 1990 amendments call upon the

standards for ethylene, hydrogen sulfide, sulfates, visibility and vinyl chloride. CAL. CODE REGS. tit. 17, §§ 70200-70200.5 (1990). The ARB divides the State into "air basins" and sets state ambient air quality standards for each basin. CAL. HEALTH & SAFETY CODE § 39606 (West 1986). The regulations adopted in California establish ambient air quality standards that in many instances are more stringent than federal standards.

66. CAL. HEALTH & SAFETY CODE § 40001 (West 1986 & Supp. 1991).

67. *Id.* §§ 40001, 40460-40461 (South Coast Air Basin); *id.* §§ 41600-41601 (air basins other than South Coast Air Basin).

68. See 42 U.S.C. § 7504 (1988), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 102(d), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2417-18; CAL. HEALTH & SAFETY CODE §§ 41650, 40460-40470 (West 1986 & Supp. 1991).

69. See 42 U.S.C. § 7504 (amended 1990).

70. CAL. HEALTH & SAFETY CODE § 41652 (West 1986). The ARB will determine whether the 1989 AQMP meets the requirements of the 1988 California Clean Air Act, *id.* § 40469, and will use the recently adopted guidelines in making such determinations. See *id.* § 40469(a). After the SCAQMD submits its plan to the ARB, the ARB will review the plan to determine its adequacy to meet federal and state ambient air quality standards through the use of indirect source controls and other air quality improvement measures. *Id.* If the ARB determines that the AQMP does not meet the requirements of the 1988 California Clean Air Act, a committee comprised of two members each of the ARB, the Executive Committee of SCAG, and the SCAQMD will attempt to resolve the differences and if necessary the ARB will amend the plan at a public hearing. *Id.* § 40469(b).

71. See generally Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399. Among the many other important changes, not directly related to federalism, made by the 1990 amendments to the Clean Air Act, are new or refocused programs for dealing with acid rain, hazardous air pollutants, facility permitting and motor vehicle fuels. *Id.* at §§ 401-413, 2584-2634 (acid deposition control); *id.* § 301, at 2531-74 (air pollutants); *id.* § 501-507, at 2635-48 (permits); *id.* §§ 201-230, at 2471-2528 (mobil sources).

states to designate, affirm the designation of, or redesignate areas within the state as non-attainment, attainment or, where information is inadequate, unclassifiable.⁷² The EPA then either adopts the designations, modifies them (for example, by adjusting the boundaries of the area) or may in certain cases make redesignations.⁷³ The 1990 amendments set attainment deadlines which vary according to pollutant and according to the degree of non-attainment for the pollutant in the area. For example, the 1990 amendments classify ozone non-attainment areas as "marginal," "moderate," "serious," "severe" and "extreme." In addition, the 1990 amendments set different deadlines within which to achieve standards for each classification, which vary from three years for "moderate" areas to twenty years for "extreme" areas.⁷⁴ As noted, SIP requirements under the 1990 amendments also vary according to the non-attainment classifications, with additional and more stringent controls required for each higher non-attainment classification.⁷⁵

The Clean Air Act leaves substantial responsibility to the states both for devising control measures and for implementing them.⁷⁶ It also al-

72. § 101(a), at 2399-2404 (amending 42 U.S.C. § 7407(d) (1988)).

73. *Id.*

74. *Id.* § 108(a), at 2423 (to be codified at 42 U.S.C. § 7511) (ozone). The 1990 amendments classify carbon monoxide and particulate matter non-attainment areas as either "moderate" or "serious." *Id.* § 186, at 2452 (to be codified at 42 U.S.C. § 7512 (carbon monoxide); *id.* § 188, at 2458 (to be codified at 42 U.S.C. § 7513) (particulate matter). For carbon monoxide the attainment deadline for "moderate areas" is December 31, 1995 and the attainment deadline for "serious" areas is December 31, 2000. *Id.* § 188(c), at 2452 (to be codified at 42 U.S.C. § 7512). For particulate matter the deadline for "moderate areas" is December 31, 1994 and the deadline for "serious areas" is December 31, 2001. *Id.* § 188(c), at 2459 (to be codified at 42 U.S.C. § 7513). The 1990 amendments permit in certain circumstances up to two one year extensions for the attainment deadlines. *See id.* § 181(a), at 2424 (to be codified at 42 U.S.C. § 7511) (ozone); *id.* § 181(a)(5), at 2453 (to be codified at 42 U.S.C. § 7512) (carbon monoxide); *id.* § 186(a)(4), at 2459 (to be codified at 42 U.S.C. § 7513) (particulate matter).

The 1990 amendments classify the Los Angeles area as an "extreme" area for ozone and as a "serious" area for carbon monoxide and particulate matter. *See id.* § 181, at 2423 (to be codified at 42 U.S.C. § 7511) (ozone); *id.* § 186, at 2452 (to be codified at 42 U.S.C. § 7512) (carbon monoxide); *id.* § 188, at 2459 (to be codified at 42 U.S.C. § 7513) (particulate matter). Los Angeles is the only area in the country which the Act classifies as "extreme" for ozone. *See id.* § 181, at 2423 (to be codified at 42 U.S.C. § 7511). The 1990 amendments define "extreme" ozone areas as any area with an ozone "design value" of 0.280 ppm (parts per million) or over, "serious" carbon monoxide areas as areas with carbon monoxide "design values" of 16.5 and above, and "serious" particulate matter areas as those that cannot reach the NAAQS for particulate matter by December 31, 1994. *Id.* § 181, at 2423 (to be codified at 42 U.S.C. § 7511) (ozone); *id.* § 186, at 2452 (to be codified at 42 U.S.C. § 7512) (carbon monoxide); *id.* § 188, at 2459 (to be codified at 42 U.S.C. § 7513) (particulate matter).

75. *Id.* § 181, at 2426-38 (to be codified at 42 U.S.C. § 7511(a)) (ozone); *id.* § 186, at 2453-57 (to be codified at 42 U.S.C. § 7512(a)) (carbon monoxide); *id.* § 188, at 2459 (to be codified at 42 U.S.C. § 7513) (particulate matter).

76. *See* 42 U.S.C. §§ 7401-7642 (1988), amended by Clean Air Act Amendments of 1990,

lows the states to impose measures more stringent than the federal minimums if they so choose.⁷⁷ While the Act specifies certain categories of control measures that a state's SIP must contain, such as "transportation controls" and "pre-construction reviews of stationary sources,"⁷⁸ it does not specify any particular control measures that a state must adopt nor does it require any particular means for implementation of control measures.⁷⁹ The Act does, however, require the EPA to disapprove a state's SIP if the EPA finds the SIP does not provide assurances that the state has adequate personnel, funding and authority to carry out the implementation plan set forth in the SIP.⁸⁰

The EPA has in fact disapproved of several states' SIPs on the

Pub. L. No. 101-549, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399. When amending the Clean Air Act in 1977, Congress emphasized the need to delegate to local governments as much responsibility as possible for air pollution control. The House of Representatives recommended "an approach that is intended to involve the least possible intrusion into State affairs consistent with the primary task of protecting public health." H.R. REP. NO. 294, 95th Cong., 1st Sess., *quoted in* 53 Fed. Reg., *supra* note 47, at 49,498. The House also found this particularly true of transportation control measures. "[A]s a practical matter, state and local governments are in a better position than [the] EPA to resolve these [transportation] pollution problems, which involve millions of motor vehicles. . . ." *Id.* Similarly, a senate report on the senate bill, S. 252, 95th Cong., 1st sess. (1977), indicated that the transportation control aspects of the bill had been designed to take into account that "[t]he Federal Government does not have and will not have the resources to do an effective job of running the air pollution control programs of the State." S. REP. NO. 127, 95th Cong., 1st Sess. 10 (1977). The Senate Committee added that "transportation planning is a local process." *Id.*

The Congressional findings in the Clean Air Act echo this preference for delegation to local government. There Congress finds "that the prevention and control of air pollution at its source is the primary responsibility of states and local governments." 42 U.S.C. § 7401(a)(3) (1988).

These comments focus on the practical reasons for delegating substantial air pollution control responsibility to local governments. There are also political legitimacy reasons, particularly when air pollution concerns intersect with land use regulation. Local government may simply be a better forum for political accommodation of competing local land use concerns. *See infra* notes 262-64 and accompanying text.

77. 42 U.S.C. § 7416 (1988).

78. *See id.* § 7410(a)(2)(B), *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.

79. *See Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975) (Clean Air Act allows EPA to sanction state for noncompliance but does not empower EPA to require state to implement particular control measure), *vacated as moot*, 431 U.S. 99 (1977).

80. 42 U.S.C. § 7410(a)(2)(F), *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. The SIP must also contain necessary assurances that, where the state has relied on a local or regional government agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision. *See id.* The Act also provides that the SIP shall provide for consultation and participation by local political subdivisions affected by the plan. *Id.* § 7421(2)(B), *amended by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(b)(2)(A), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2406.

ground that they reflected insufficient bureaucratic resources for control of air pollution from stationary sources.⁸¹ The states whose plans were denied repropose them providing for significantly greater administrative resources for the issuance and enforcement of air pollution permits for industrial sources of pollution.⁸² Although the EPA has also disapproved SIPs because of inadequate indirect source controls,⁸³ it appears that it has not had as much success in causing states to repropose SIPs in which the problem is inadequate indirect source controls, rather than inadequate industrial stationary source controls.⁸⁴

The 1990 amendments maintain the EPA's authority to substitute itself for a state in the event of a state's failure to develop or adequately implement a SIP.⁸⁵ Without this power of substitution, states would be unlikely to take seriously the EPA's disapproval of their SIPs. In addition to maintaining the EPA's power of substitution, the 1990 amendments allow the EPA to impose in specified circumstances various sanctions for a state's failure to submit an adequate SIP or for its failure timely to attain ambient air quality standards. The sanctions for an inadequate SIP include a prohibition on the approval by the Secretary of Transportation of transportation projects or grants, and imposition of a higher emissions offset requirement for new or modified sources.⁸⁶ The

81. For the examples of Wisconsin and Pennsylvania, see Del Duca, *supra* note 3, at 507, 510.

82. *Id.*

83. *See infra* note 87.

84. *See infra* text accompanying notes 89-113, 145.

85. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2399-2412.

86. *Id.* § 102(g), at 2420-22 (to be codified at 42 U.S.C. § 7509). The Act requires the Administrator to select one of these two sanctions if the EPA finds that the state has failed to submit all or part of a SIP, or that the SIP fails to meet the requirements of the Act for SIPs, and the state does not correct the deficiency within 18 months of the EPA's finding. *Id.* The EPA may also select one of these sanctions if it finds that a state is not implementing an approved plan and the state does not correct this deficiency within 18 months of the EPA's finding. *Id.* Both sanctions apply for a failure to submit or implement an adequate SIP if the failure is not in good faith or not corrected within six months after imposition of one sanction. *Id.* This sanctions section also authorizes the Administrator to withhold grants for the support of air pollution planning and control measures. *Id.*

The 1990 amendments require offsets of varying stringency as a condition to creating new sources of air pollution, according to how far an area is from achieving air quality standards. *Id.* The SCAQMD's present rules on offsets are contained in its Regulation XIII. SCAQMD RULES AND REGULATIONS, *supra* note 32, regulation XIII at 1307-1. Regulation XIII applies only to the conditions pursuant to which new or modified *equipment* will be issued an air pollution permit by the SCAQMD. *Id.* Review pursuant to Regulation XIII does not include analysis of effects on indirect air pollution, e.g. increased pollution caused by the attraction of additional traffic. *See id.*

Pursuant to Regulation XIII, new sources of air pollution are required to be offset by

consequences of failing to attain an NAAQS include that the state must submit a revised SIP which meets all the requirements of the 1990 Clean Air Act and in addition contains "such additional measures as the Administrator may reasonably prescribe. . . ."⁸⁷ This consequence is, however, less significant than the EPA's ability to substitute itself in the enforcement of the Clean Air Act should a state not be able adequately to formulate and implement a SIP.

2. The South Coast Air Basin illustrates the failure of the Clean Air Act model of federalism as applied to indirect sources

In the 1970s, the EPA attempted to compel the states to adopt indirect source controls which, in principle, were similar to the indirect source controls contemplated for the South Coast Air Basin by the 1989 AQMP.⁸⁸ The EPA's experience illustrates many of the problems of incorporating air quality concerns into local decisions, including the problem of making or directing local decisions from the national level. The EPA's experience also illustrates problems which can exist at the state or

reductions of emissions from existing sources beyond the regulatory requirements otherwise applicable to such sources. *Id.* That is, under the present Regulation XIII, any one wishing to produce increased emissions beyond a certain threshold by the operation of new equipment must obtain credit for the shutdown of previously existing and permitted equipment or make an arrangement with the operator of existing equipment to control the pollution emissions of that equipment beyond the level required under existing regulations. *Id.*

To mitigate the impact of offset requirements on certain categories of sources, Regulation XIII provides for the creation of a so-called Priority Reserve and Community Bank. *Id.* at 1309-1 to -5. A Priority Reserve of offsets would be created for schools, hospitals, and certain other facilities deemed to be of overriding public interest. *See id.*

A Community Bank of offsets would be established for new sources or modifications of existing sources involving only small increases in pollution. Access to the Community Bank would be limited in several ways. The maximum quantities of various pollutants which any facility can withdraw from the Community Bank are relatively small. *Id.* Various aspects of eligibility to use offsets generally and of the calculation of eligibility to use the Community Bank are likely to increase the difficulty of access to the Community Bank.

The supply of offsets to "fund" the Priority Reserve and the Community Bank is created in part by heavily discounting existing Emission Reduction Credits and in part by requiring new and modified sources of pollution not qualifying for the Priority Reserve or the Community Bank to obtain offsets in a greater than one to one ratio. *Id.*

New Sources or modifications not qualifying for the Reserve Bank or the Community Bank have to obtain offsets by purchase. *Id.* To facilitate such purchases, the SCAQMD proposes to maintain a registry of available offsets. *Id.*

87. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 102(g), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2420-22 (amending 42 U.S.C. § 7508 (1988)). In addition, the 1990 amendments require that SIPs for states with severe or extreme ozone non-attainment areas must provide for imposition of fines on major stationary sources of VOCs in the non-attainment area in the event the area does not reach attainment by the deadline. *Id.* § 103, at 2423-52.

88. *See infra* text accompanying notes 91-106.

regional level, and which SCAQMD may encounter in its current efforts to mitigate emissions associated with indirect sources.

The EPA undertook to regulate indirect sources because it found that the impact of growth on air quality would prevent states from maintaining NAAQS through emissions controls on stationary sources and tailpipe controls on vehicles alone.⁸⁹ In 1972 and 1973, the EPA made this determination in connection with its initial review of SIPs submitted pursuant to the Clean Air Amendments of 1970.⁹⁰ On May 31, 1972, the EPA published initial approvals and disapprovals of SIPs.⁹¹ However, the Natural Resources Defense Council and others challenged the approvals in litigation which ultimately led the Circuit Court of Appeals for the District of Columbia to order the EPA to further consider whether the approved plans analyzed and provided measures for maintenance of NAAQS (the *NRDC* litigation).⁹² The EPA concluded that no plan contained all of the measures necessary to assure maintenance of NAAQS because no plan had adequately analyzed the impact of growth on air quality maintenance.⁹³ The EPA also concluded that no plan without indirect source controls could adequately assure maintenance of air quality in the face of growth.⁹⁴ Accordingly, the EPA disapproved the SIP of every state in the nation, since no plan contained indirect source controls.⁹⁵

In another action on that same day, the EPA issued an advance notice of proposed guidelines for the states regarding approvable indirect source review measures.⁹⁶ The indirect source guidelines promulgated by the EPA consisted of two parts: one which required states to engage in planning for growth, and one which sought to induce, or if necessary, compel, states or local governments to incorporate air quality considerations into local land use decisions.⁹⁷

The planning portion of the guidelines reflected concern that growth would thwart attainment or maintenance of federal air quality standards. The guidelines directed states to identify those areas "which, due to current air quality and/or projected growth rate, may have the potential for

89. 38 Fed. Reg. 6279 (1973) (to be codified at 40 C.F.R. § 52.22); *see id.* at 9599; *id.* at 15,834 (to be codified at 40 C.F.R. §§ 51.1, .11, .12, .18).

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

91. 37 Fed. Reg., *supra* note 48, at 10,842.

92. *See* Natural Resources Defense Council v. EPA, 475 F.2d 968 (D.C. Cir. 1973).

93. 38 Fed. Reg., *supra* note 89, at 6279.

94. *Id.*

95. *Id.*

96. *Id.* at 6290.

97. *Id.* at 15,834, 15,836 (to be codified at 40 C.F.R. §§ 51.1, .11, .12, .18).

exceeding any national standard within the next ten-year period,"⁹⁸ in order to provide the EPA with information sufficient to allow it to publish a list of "potential problem areas."⁹⁹ The guidelines then required states to submit an analysis of the impact on air quality of projected growth in each identified area, and to submit plans describing the measures to be taken to insure maintenance of the national standards during the ensuing ten-year period.¹⁰⁰

The second portion of the guidelines required the states to implement "legally enforceable" procedures enabling a state or local agency to disapprove the construction or modification of an indirect source if the agency determined that the construction or modification would either result in a violation of the control strategy or interfere with the attainment or maintenance of a national standard.¹⁰¹ The EPA found that it was "neither necessary or practical to specify in detail the possible considerations which States must examine in reviewing new facilities."¹⁰² The guidelines did, however, require that the procedures "identify types and sizes of facilities, buildings, structures, or installations which will be subject to review,"¹⁰³ "discuss the basis for determining which facilities shall be subject to review,"¹⁰⁴ and describe the administrative procedures the state would use to conduct the review.¹⁰⁵ The guidelines also directed the states to require persons seeking to construct or modify indirect sources to provide information on the nature and amount of emissions from "associated mobile sources" and other information necessary to make a determination concerning the impact of the facility on air quality.¹⁰⁶

While the guidelines required the states to identify an agency to implement these procedures, they left to the states the question of which agency to choose.¹⁰⁷ The guidelines provided, however, that if the selected agency was not an air pollution control agency, the states must require it to consult with an air pollution control agency in carrying out the indirect source review.¹⁰⁸ The guidelines did not state what action

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.*

102. *Id.* at 15,835.

103. *Id.* at 15,836.

104. *Id.*

105. *Id.* at 15,835, 15,836.

106. *Id.* at 15,836.

107. *See id.*

108. *Id.*

the EPA would or might take if the states did not implement or properly enforce the indirect source review procedures.

The states largely ignored the EPA's guidelines, which led EPA to issue regulations on indirect sources. Pursuant to the order of the District of Columbia Circuit in the *NRDC* litigation, the EPA directed the states to submit SIP revisions with indirect source review procedures in compliance with the EPA guidelines by August 15, 1973.¹⁰⁹ The District of Columbia Circuit Court also required the EPA to approve or disapprove the revisions by October 15, 1973 and to issue regulations by December 15, 1973 for all states whose plan revisions were not approved.¹¹⁰ As of October 30, 1973 only seven jurisdictions had submitted SIP revisions, and the EPA had not yet approved or disapproved those seven revisions because they were still within the public comment period.¹¹¹ The EPA accordingly found it necessary to propose regulations for all the states.¹¹²

The regulations adopted by the EPA were significantly more intrusive than the EPA guidelines. The regulations provided substantive standards for approving construction or modification of indirect sources, which the EPA threatened to directly enforce if the states did not.¹¹³ The regulations prohibited any "owner or operator" of an indirect source from commencing construction of or modifying an indirect source without first obtaining approval from the EPA.¹¹⁴ The regulations provided that the EPA would disapprove an application to construct or modify an indirect source if the indirect source would: (1) cause a violation of a control strategy in the state's SIP; (2) delay timely attainment; or, (3) cause a violation of certain NAAQS.¹¹⁵ The regulations also set forth detailed standards concerning traffic flow characteristics which were designed to guide EPA officials in making the foregoing determination.¹¹⁶ The EPA could condition approval of an application on commit-

109. *Id.* at 15,835.

110. *Natural Resources Defense Council*, 475 F.2d at 970-71.

111. 38 Fed. Reg. 29,893 (1973) (to be codified at 40 C.F.R. pt. 52) (proposed Oct. 30, 1973) (Alabama, Florida, Puerto Rico, Guam, Maine, New York and Oregon).

112. *Id.* The EPA suspended the regulations without comment on December 30, 1974. See *infra* note 141.

113. 38 Fed. Reg., *supra* note 111, at 29,894.

114. 40 C.F.R. § 52.22(b)(3) (1990).

115. *Id.* § 52.22(b)(4)(i), (5)(i), (6)(i). Generally the regulations called for consideration of whether the indirect source would cause a violation of the carbon monoxide NAAQS. See *id.* § 52.22(b)(4)(i)(b)(ii). However, for highways and airports the regulations called for consideration of other pollutants. See *id.* § 52.22(b)(5)(i)-(ii) (airports—carbon monoxide, photochemical oxidants and nitrogen dioxide); *id.* § 52.22(b)(6)(i)(a), (b)(6)(ii), (highways—carbon monoxide and, for larger highways, photochemical oxidants and nitrogen dioxide).

116. See, e.g., *id.* § 52.22(b)(4)(ii).

ments by the owner or operator to adopt or provide measures to mitigate air pollution associated with the source.¹¹⁷ Examples cited in the regulation included commitments to roadway improvements or additional mass transit facilities, and commitments to specific programs for mass transit incentives for the employees and patrons of the indirect source.¹¹⁸ While the regulations provided for the EPA to pass on the applications for construction or modification of indirect sources, the regulations also permitted the EPA to delegate implementation of the application procedures to state agencies.¹¹⁹ As did the indirect source review guidelines, the regulations provided that if the agency was not an air pollution control agency, the agency was required to consult with an air pollution control agency prior to deciding on an application to construct or modify an indirect source.¹²⁰ In addition, the regulations provided that if the designated agency *was* an air pollution control agency, it was required to "consult with the appropriate State or local land use planning agency" prior to deciding on an application.¹²¹

The regulatory history of the indirect source review regulations shows that the EPA was assuming more control of implementation of the regulations in response to local resistance to, or legal incapacity for, implementation. The EPA's initial proposed regulations, unlike the final regulations, called for the governor of the state to designate a state or local agency to carry out implementation of the reviews and did not provide for direct enforcement of the regulations by the EPA or for any involvement by the EPA in designating the state or local agency.¹²² The EPA found that this local control was appropriate "[s]ince the decisions which will have to be made pursuant to these proposed regulations are pertinent to local situations"¹²³ The EPA recognized, however, when promulgating the proposed regulations, that the states might refuse or be unable to implement the indirect source reviews and that, as a consequence, the EPA might have to take control of implementation from the states. In the preamble to the proposed regulations the EPA observed: "[M]any states do not yet have adequate legal authority to approve or disapprove construction or modification of indirect sources."¹²⁴ The EPA added "that any regulatory provisions of a State implementa-

117. *Id.* § 52.22(b)(9).

118. *Id.*

119. *Id.* § 52.22(b)(14).

120. *Id.*

121. *Id.*

122. See 38 Fed. Reg., *supra* note 111, at 29,895, 29,896.

123. *Id.* at 29,894.

124. *Id.*

tion plan approved or promulgated by [the] EPA are enforceable by [the] EPA” and that they threatened to “assume responsibility. . . [w]here states are unwilling or unable to implement [the regulations].”¹²⁵ The EPA invited the states to be explicit on the question of whether they would or could cooperate: “[S]tates are particularly invited to indicate, in their comments on these proposed regulations, whether they can and will implement these regulations.”¹²⁶

The final regulations shifted authority from the local level to the national level. They provided for implementation by the EPA or an agency of its choice, and not, as in the proposed regulations, by an agency of the State’s choice.¹²⁷ The preamble to the final regulations suggests that the EPA may have made this shift as the result of the mixed reviews the regulations received from the states.¹²⁸ As of the date of the final regulations,¹²⁹ only fourteen jurisdictions had submitted SIP revisions with indirect source review programs, and EPA had approved only two.¹³⁰ EPA noted that while “[s]everal states have thus far indicated their willingness to carry out [indirect source] review, others have indicated that they would not, and many have not indicated their position with certainty on this issue.”¹³¹

Despite the trouble it was having in inducing the states to implement indirect source reviews, the EPA continued to express the view that implementation was most appropriate at the local level.¹³² The EPA also expressed the view that review by local government was preferable to review by a state agency.¹³³ This was so, the EPA found, because of the impact of indirect source reviews on land use and urban growth and development.¹³⁴

125. *Id.*

126. *Id.*

127. *See infra* notes 132-33 and accompanying text.

128. *See* 40 C.F.R. § 52.22(a) (1990).

129. 39 Fed. Reg. 7270 (1974).

130. *Id.* at 7270, 7271.

131. *Id.* at 7274.

132. *See id.* at 7275. The Administrator:

emphasize[d] that the Clean Air Act places primary responsibility for the prevention and control of air pollution on the States and local governments[. . .] urge[d] States and/or localities to accept the responsibility to conduct review under these regulations as the administrator’s agent [and] even more strongly encourage[d] States to develop their own indirect source review procedures

Id.

133. *See id.*

134. *See id.* (“Because of the impact which projects to be reviewed under these regulations may have on land use and urban growth and development, the Administrator encourages the states to delegate substantial authority under these regulations to appropriate local governmental units.”).

In addition to the question of *who* should regulate indirect sources, the EPA's regulations raised the question of *how* to regulate indirect sources.¹³⁵ One of the major objections to indirect source regulations was that they called for changes in land use to improve air quality without balancing countervailing economic and social considerations.¹³⁶ EPA responded to this criticism by arguing that the regulations created only one additional requirement in obtaining local approval for construction or modification of a facility—a requirement in the EPA's view no different than the requirements for zoning approval, site plan approval, etc.—and that the regulations would not preclude any actual construction or modification “except in those rare cases in which no accommodation with air quality maintenance can be reached.”¹³⁷ The EPA conceded, however, that in its view “a final determination as to a specific source's approvability under the regulation must be based solely on air quality factors”¹³⁸ because “[t]o do otherwise would exceed the scope and purpose of [the] regulations.”¹³⁹

The EPA never implemented its indirect source regulations.¹⁴⁰ The EPA later commented that the regulations failed for three reasons: (1) political opposition; (2) the EPA lacked resources to implement the regulations; and, (3) the EPA failed to offer technical resources to the states to carry out the regulations.¹⁴¹

Congress has taken to heart local opposition to indirect source controls. As part of the Clean Air Act Amendments of 1977, Congress included a provision prohibiting the EPA from requiring a state to include in its SIP any indirect source regulation.¹⁴² This prohibition was unchanged by the Clean Air Act Amendments of 1990.¹⁴³ In addition, section 131 of the 1990 amendments further emphasizes the local prerogative over land use by providing that the Act does not “infringe[] on . . . or transfer[] . . . the existing authority of counties and cities to plan or control land use.”¹⁴⁴

135. *Id.* at 7275-76.

136. *Id.* at 7274 (EPA reports that some public comments “criticized the basic approach of the regulations as requiring approval decisions to be based solely on air quality considerations, ignoring social and economic considerations”).

137. *Id.*

138. *Id.*

139. *Id.*

140. EPA suspended the regulations without comment on December 30, 1974. See 40 C.F.R. § 52.22(b)(16) (1990).

141. 53 Fed. Reg., *supra* note 47, at 49,494, 49,497.

142. 42 U.S.C. § 7410(a)(5)(A)(i)-(ii) (1988).

143. Pub. L. No. 101-549, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399.

144. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 131, 1990 U.S. CODE

In short, the EPA has had relatively little success in achieving implementation of indirect source controls. Indeed, its attempts, mandated by inflexible statutory language, but nonetheless heavy-handed, to impose them led to express congressional limitation of its authority to do so.¹⁴⁵ A factor contributing to this failure of indirect source control regulation is the manner in which EPA attempted to intrude into the traditionally local prerogative of local land use regulation. Not only did the EPA not have any realistic possibility of substituting itself for noncomplying local regulators, any move to accomplish such substitution led to significant backlash from individuals and interest groups affected by change in local land use regulation.

B. A Regional Land Use and a Regional Air Quality Agency Share Responsibility for Leading the South Coast Air Basin's Indirect Source Control Efforts

The California Health and Safety Code divides responsibility for developing and implementing an air quality management plan (AQMP) for the South Coast Air Basin between two regional agencies, the Southern California Association of Governments (SCAG) and the South Coast Air Quality Management District (SCAQMD).¹⁴⁶ The delegation of the formulation of the SIP component for the South Coast Air Basin to two locally based agencies¹⁴⁷ reflects an effort to balance the need to impose air pollution concerns on land use regulation with the existing prerogative of local government to control land use regulation.¹⁴⁸

SCAG and the SCAQMD are different kinds of agencies with different responsibilities. SCAG is a council of local governments and is charged with developing land use plan reforms to reduce air pollution.¹⁴⁹ It, however, has no power to compel its members to adopt those reforms.¹⁵⁰ The SCAQMD is a state agency whose governing board reflects an amalgam of state, local government and environmental group

CONG. & ADMIN. NEWS (104 Stat.) 2399, 2689. The California statutory scheme governing air pollution regulation contains an analagous provision. See CAL. HEALTH & SAFETY CODE § 40402 (West 1986 & Supp. 1991).

145. 42 U.S.C. § 7410(a)(5)(A)(i) (1988).

146. CAL. HEALTH & SAFETY CODE § 40460(a) (West 1986). The California Air Resources Board (ARB) has discretion to approve or amend the AQMP and then to submit it to EPA for approval as part of California's SIP. See *infra* note 249.

147. The territories of SCAG and the SCAQMD are not entirely identical, although they do substantially overlap. See *infra* notes 156, 173 and accompanying text.

148. CAL. HEALTH & SAFETY CODE § 40402.

149. See Feldman, *Regional Report: 25 Years Later, SCAG Is Still a 'Toothless Tiger'*, L.A. Times, Apr. 8, 1991, at A3, col. 1.

150. P. DOUGLAS, THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS: A RE-

interests.¹⁵¹ It is prohibited from directly regulating land use although it has statutory power to regulate "indirect sources" and transportation.¹⁵² It has declared its intention to require local governments to integrate air pollution control concerns into their land use regulation policies.¹⁵³ The distinction between regulation of indirect sources and regulation of land use is far from clear, and SCAQMD has claimed in the AQMP the power to issue regulations which, if successfully implemented, would certainly impinge upon local land use.¹⁵⁴

1. Southern California Association of Governments

SCAG is an association of governments formed by voluntary agreement in 1964 pursuant to California's Joint Exercise of Powers Act.¹⁵⁵ Its members include six Southern California counties: Los Angeles, Orange, Ventura, Riverside, San Bernardino and Imperial, and more than 180 cities in those counties.¹⁵⁶ Nearly fourteen million people live in the geographic area covered by SCAG, and SCAG projects that more than eighteen million people will live in the area by the year 2010.¹⁵⁷

The primary function of SCAG is to identify, study and exchange information concerning inter-county problems and to create regional plans for solving or mitigating those problems.¹⁵⁸ SCAG is divided into four departments: Community and Economic Development, Environmental Planning, Transportation Planning and Government and Public Affairs.¹⁵⁹ SCAG's planning work is funded by state and federal agencies, and by dues paid by its members.¹⁶⁰ SCAG also acts as a clearinghouse for some federal grants to local governments, a function which allows SCAG to ensure that projects seeking federal funds are in line

SPONSE TO FEDERAL CONCERN FOR METROPOLITAN AREAS 20-29 (1968) (discussing SCAG as a voluntary organization); Feldman, *supra* note 149, at A3, col. 1.

151. CAL. HEALTH & SAFETY CODE § 40420 (discussing district board membership).

152. *Id.* § 40468 (West 1986) (discussing general powers and duties).

153. *See* 1989 AQMP, *supra* note 32, table 6-3, at 6-12 to -13.

154. *See infra* notes 210-34 and accompanying text.

155. CAL. GOV'T CODE §§ 6500-6522 (West 1980 & Supp. 1991); *see* SOUTHERN CAL. ASS'N OF GOV'TS, BYLAWS preamble & art. IX (adopted Mar. 27, 1964) [hereinafter BYLAWS].

156. SOUTHERN CAL. ASS'N OF GOV'TS, YOUR GUIDE TO SCAG 3 (1988) [hereinafter GUIDE].

157. *Id.* at 2.

158. *See* BYLAWS, *supra* note 155, art. I. These plans are in addition to the general plans which all California cities and counties are required to adopt. *See, e.g.*, CAL. GOV'T CODE §§ 65300, 65302 (West 1983 & Supp. 1991).

159. 1989 AQMP, *supra* note 32, at 6-15.

160. GUIDE, *supra* note 156, at 3.

with SCAG's overall plans for the region.¹⁶¹

California law assigns responsibility to SCAG for "preparing and approving the portions of the plan [the AQMP] relating to regional demographic projections and integrated regional land use, housing, employment, and transportation programs, measures and strategies."¹⁶² The statutory scheme does not confer upon SCAG any independent regulatory or legislative power, but rather directs it merely to "coordinate the efforts of the counties and cities in the process of developing and reviewing plan elements which meet the requirements of the plan, state and federal law, and local needs relating to transportation, land use . . . and other matters of local concern."¹⁶³

Federal and state law directly assign certain additional relevant responsibilities to SCAG. Federal law provides for the establishment of metropolitan planning organizations (MPOs) to undertake comprehensive transportation planning with respect to federally funded transportation projects.¹⁶⁴ State law also provides for the creation of regional transportation agencies.¹⁶⁵ SCAG is the designated MPO within the South Coast Air Basin pursuant to both federal and state law.¹⁶⁶ The Clean Air Act contemplates that SCAG, as the MPO for the South Coast Air Basin, will act as an agency responsible for creation of the South Coast Air Basin's portion of California's SIP.¹⁶⁷ The Clean Air Act provides that air quality plans such as those required for the South Coast Air Basin "shall be prepared by an organization of elected officials of local governments" and that:

Where feasible, such organization shall be the metropolitan planning organization [MPO] designated to conduct the continuing, cooperative and comprehensive transportation planning process for the area under section 134 of Title 23, or the organization responsible for the air quality maintenance planning process under regulations implementing this section, or the organization with both responsibilities.¹⁶⁸

The Clean Air Act prohibits an MPO from approving any project, pro-

161. *Id.* (SCAG's responsibilities as MPO under federal law and as regional transportation agency under state law).

162. CAL. HEALTH & SAFETY CODE § 40460(b) (West 1986).

163. *Id.* § 40464.

164. 23 U.S.C. § 134(a), (b) (1988).

165. CAL. GOV'T CODE § 65080 (West 1983 & Supp. 1991).

166. CAL. HEALTH & SAFETY CODE § 40460(a).

167. *Id.* §§ 40460(a), 40465; *see* 42 U.S.C. § 7504(a) (1988).

168. 42 U.S.C. § 7504(a) (1989), *amended by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 102(d), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2417-18.

gram or plan which does not conform to an applicable SIP.¹⁶⁹ State law similarly requires that state transportation plans developed by SCAG be consistent with the SIP.¹⁷⁰

2. The South Coast Air Quality Management District

The South Coast Air Quality Management District (SCAQMD) is a unique hybrid of state, regional, local, and, in some sense, federal government charged with implementing state and federal law over a geographical area that encompasses many local boundaries, but does not correspond to the boundary of any single local government. The twelve member board of SCAQMD is a combination of local elected officials—mayors, city council members or county supervisors—and air pollution experts appointed by state officials.¹⁷¹ Four members of SCAQMD's board are mayors, city council members or county supervisors selected by the Board of Supervisors of the four counties within SCAQMD's jurisdiction, five are mayors or city council members selected by cities within SCAQMD's jurisdiction, and three are air pollution control experts—one selected by the Governor, one by the Senate Rules Committee and one by the Speaker of the Assembly.¹⁷² The geographical jurisdiction of the SCAQMD, drawn in recognition of the regional nature of air pollution in Southern California, encompasses all of Orange County and the most populous portions of Los Angeles, Riverside and San Bernardino Counties.¹⁷³

SCAQMD possesses impressive technical resources and expertise and, in the words of the EPA, is "one of the most sophisticated agencies

169. *Id.* § 7506(c)(2), amended by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(f), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2409-10; see *Citizens for a Better Environment v. Deukmejian*, No. C89-2044 TEH (N.D. Cal. Dec. 21, 1990) (LEXIS, Genfed library, Dist file). Section 101(f)(4)(A) of the 1990 Amendments calls upon the EPA to issue regulations detailing criteria and procedures for determining conformity. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(f)(4)(A), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2399, 2409-12 (amending 42 U.S.C. § 7506(c) (1988)).

170. CAL. CODE REGS. tit. 21, § 8114(c) (1990).

171. See CAL. HEALTH & SAFETY CODE § 40420 (West 1986 & Supp. 1991). Rather than being selected through a popular election, the SCAQMD members are appointed by several mechanisms, enabling them to be representative of various constituencies or to bring special expertise to the SCAQMD. Although this form of a collegial, mixed membership body is not typical of American government, local or otherwise, it is, interestingly, quite typical of Italian government at all levels, including committees addressing air pollution. See Del Duca, *supra* note 3, at 548-49. However, unlike many of the Italian mixed collegial bodies for regional air pollution matters, the SCAQMD has a huge and competent staff.

172. CAL. HEALTH & SAFETY CODE § 40420.

173. See *id.* § 40410; 55 Fed. Reg., *supra* note 38, at 36,458, 36,464.

of its kind.”¹⁷⁴ SCAQMD has a staff of over 1000 persons and an annual budget of over \$100,000,000.¹⁷⁵ The staff, which includes engineers, attorneys and a wide variety of technicians, has produced and continues to develop comprehensive rules and regulations governing such complex matters as surface coating and solvent use, the production and distribution of gas and petroleum, various industrial and commercial engines, the use of pesticides, and many other areas.¹⁷⁶ The staff also prepares complicated projections and modeling analyses.¹⁷⁷ To prepare these projections and analyses, SCAQMD has developed and continues to refine a comprehensive data base that, among other things, attempts to inventory emissions of pollutants from a variety of sources.¹⁷⁸ SCAQMD’s Office of Technology Advancement researches new technologies for reducing emissions.¹⁷⁹

3. What are the limits of the SCAQMD’s mandate to regulate indirect sources?

California state law, adopted in 1987,¹⁸⁰ requires SCAQMD to include in its AQMP, and enforce through rules and regulations, four categories of air pollution control measures.¹⁸¹ The categories of air pollution control measures are:

- (1) [r]equire the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources.
- (2) [p]romote cleaner burning alternative fuels.
- (3) [c]onsistent with Section 40414, provide for indirect source controls in those areas of the south coast district in

174. 55 Fed. Reg., *supra* note 38, at 36,460.

175. *Id.*; SOUTH COAST AIR QUALITY MANAGEMENT DIST., ABSTRACT OF FISCAL YEAR 1990-91 DRAFT BUDGET 3, 9, 14 (May 4, 1990) (reporting expenditures for 1990-91 of \$104,405,600 and 1021 authorized positions of employment as of June 30, 1990).

176. *See id.*; 1989 AQMP, *supra* note 32, at 4-1 to 4-38.

177. *See* 1989 AQMP, *supra* note 32, at 5-1 to 5-18.

178. *See id.* The Clean Air Act requires that SIPs provide for the establishment of “appropriate devices, methods, systems, and procedures necessary” to “monitor, compile, and analyze data on ambient air quality. . . .” 42 U.S.C. § 7410(a)(2)(C) (1988).

179. *See* 1989 AQMP, *supra* note 32, at 4-33.

180. The South Coast’s failures to meet air quality standards in the early and mid-1980s led SCAQMD to request additional regulatory authority from the California Legislature. *See id.* at 1-14.

181. The 1987 law made the SCAQMD, at least for a short while, the only air pollution control district in California with the power to regulate indirect sources. The California Clean Air Act of 1988, ch. 1568, 1988 Cal. Stat. 4397 (codified as amended in scattered sections of CAL. HEALTH & SAFETY CODE) extended the power to regulate indirect source controls to all air pollution control districts in California, including SCAQMD.

which there are high-level, localized concentrations of pollutants or with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin.

(4) [p]rovide for transportation control measures as listed in the plan.¹⁸²

The categories of control measures vary in their potential for infringing on areas that are traditionally the province of local government. The first two categories—requirements for use of best available control technology and promotion of cleaner burning alternative fuels—are traditional types of air pollution control measures which do not generally interfere with local government concerns.¹⁸³ Measures aimed at regulating “indirect sources” and transportation, on the other hand, potentially impact local concerns, including land use concerns beyond air pollution.

There is no California statute or regulation that defines the term “indirect source.” However, federal law has long recognized the concept of indirect source regulation, and there is little doubt that the California statute is referring to the same type of regulation.¹⁸⁴ The California legislature did make clear when first authorizing indirect source controls that they were *not* to be land use regulations. Section 40414 of the California Health and Safety Code provides:

No provision of this chapter [which provides for the authority of the SCAQMD] shall constitute an infringement on the existing authority of counties and cities to plan or control land use, and no provision of this chapter shall be interpreted as providing or transferring new authority over such land use to either the South Coast District, the Southern California Association of Governments, or the State Board.¹⁸⁵

182. CAL. HEALTH & SAFETY CODE § 40440(b) (West Supp. 1991).

183. See generally J. LAITOS, A LEGAL-ECONOMIC HISTORY OF AIR POLLUTION CONTROLS (1980). The first two categories are also the ones with respect to which EPA has had the best results in accomplishing control measures through SIPs. See *supra* text accompanying notes 61-87.

184. For the federal definition of “indirect source,” see *supra* text accompanying note 11. SCAG has cited and relied upon the federal definition of “indirect source” in implementing the AQMP. See 1990 SCAG GUIDELINES, *supra* note 15, at 1-18 to -19. SCAQMD has also cited and relied upon an essentially similar definition. See SOUTH COAST AIR QUALITY MANAGEMENT DIST., THE CHALLENGE OF ATTAINMENT, ANNUAL PROGRESS REPORT 17-18 (1990) [hereinafter SCAQMD CHALLENGE OF ATTAINMENT] (“Numerous sources . . . produce only a limited amount of emitted pollutants within their own operation but attract motor vehicles that generate significant air pollution. These sources are commonly referred to as indirect sources. . . . [E]xamples are regional shopping malls, specific plan developments, airports, and amusement parks.”).

185. CAL. HEALTH & SAFETY CODE § 40414 (West 1986).

The 1987 law was followed by the California Clean Air Act of 1988 (the California Clean Air Act),¹⁸⁶ which was in part an effort by California to implement an independent state program to improve California's air quality. The impetus for this independent state program was Congress' failure to amend the federal Clean Air Act as of 1987, despite the fact that the federal attainment deadline was at the end of that year and Southern California and other urban areas would clearly not meet the deadline. The legislature found that "in order to ensure . . . the state's environment and economy . . . are protected despite lack of action or direction from the federal government," it was necessary for California to develop and implement its own program to attain air quality standards.¹⁸⁷ The program established by the California Clean Air Act included what the legislature characterized in its findings as "control of indirect and area wide sources of emissions . . . and the incorporation of air quality considerations into local land use planning decisions."¹⁸⁸ The requirement of indirect source controls, like several other requirements in the legislation, went beyond what federal law directly required. As noted, federal law since 1977 has expressly prohibited EPA from requiring a state to include indirect source controls in its SIP.¹⁸⁹

The California Clean Air Act allows, and in many instances requires, districts to adopt indirect source controls in consideration of state, but not federal, standards. Section 40716 of the California Health & Safety Code permits districts to adopt regulations "with respect to the attainment of state ambient air quality standards [which] [r]educe or mitigate emissions from indirect and area-wide sources of pollution."¹⁹⁰ However, under sections 40918 through 40920, what is optional under section 40716 is mandatory for any district with "moderate," "serious" or "severe" air pollution, and thus is mandatory for SCAQMD, which falls within the severe category.¹⁹¹ Districts with "moderate" or worse

186. Ch. 1568, 1988 Cal. Stat. 4397 (codified as amended in scattered sections of CAL. HEALTH & SAFETY CODE).

187. AB 2595, Cal. Leg., 1987-88 Reg. Sess. (Mar. 6, 1987).

188. *Id.*

189. *See supra* note 142 and accompanying text.

190. CAL. HEALTH & SAFETY CODE § 40716(a)(1) (West Supp. 1991).

191. *Id.* §§ 40918(a), 40919(a), 40920(a). A district's air pollution is "moderate" if the ARB finds and determines that the district can attain and maintain the applicable state standard by not later than December 31, 1994. *Id.* § 40918(b). A district's air pollution is "serious" if the ARB finds and determines that the district cannot attain and maintain the applicable state standard until after December 31, 1994, but can attain and maintain the standard by not later than December 31, 1997. *Id.* § 40919(b). A district's air pollution is "severe" if the ARB finds and determines that the district cannot attain and maintain the applicable state standard until after December 31, 1997, or is unable to identify an attainment date. *Id.* § 40920(b).

air pollution must include in their plan provisions to develop area source and indirect source control programs "to the extent necessary" to meet the legally mandated requirements of the plan.¹⁹² When conferring this new authority over indirect sources to districts, the legislature again sought to distinguish it from local government's control over land use. Section 40716(b), in wording that is virtually identical to the wording of section 40414,¹⁹³ provides that "[n]othing in this section constitutes an infringement on the existing authority of counties and cities to plan or control land use . . . [or] provides or transfers new authority over such land use to a district."¹⁹⁴ There is nothing in California's statutory scheme which provides guidance on how to distinguish between a permitted indirect source regulation and a prohibited infringement on local authority over land use. Neither concept is defined in the Health and Safety Code or in other California statutory sources. While federal law does provide a fairly secure reference for determining what constitutes regulation of an indirect source,¹⁹⁵ there is no similar easy reference point for answering the more difficult question of when an indirect source regulation infringes on local authority over land use.

A significant problem in reconciling the statutory distinction between land use and indirect source regulation is finding a definition of land use that is accurate and that at the same time does not completely coincide with the concept of indirect source regulation. There is no specific delegation of land use authority to local government that is separate from or a distinct component of local government's general police power and, as noted, no statutory scheme in California supplies any technical

192. *Id.* § 40920(b).

193. *Id.* § 40414 (West 1986).

194. *Id.* § 40716(b) (West Supp. 1991). A legal opinion of an attorney for the ARB attempts to resolve the conflict between local land use regulation and indirect source regulation through reference to the concept of concurrent jurisdiction. The opinion reasons in part:

[C]ities and counties determine the permissive uses of land in various areas within their boundaries, and districts impose additional requirements upon sources which desire to locate and operate in those areas; such sources must comply with both sets of requirements. Exercise by a district of its existing authority over indirect sources simply maintains the historical balance of authority and does not infringe on the existing authority of the cities and counties with regard to land use.

Memorandum from Leslie M. Krinsk, Senior Staff Counsel, ARB, to William L. Sylte, Deputy Executive Officer (May 3, 1990), reprinted in Air Resources Board, California Clean Air Act Guidance on the Development of Indirect Source Control Programs, app. B at 2 (July 1990) (unpublished, on file at Loyola of Los Angeles Law Review Office) [hereinafter Krinsk Memo].

This opinion is logical, but relies upon an analogy to *Orange County APCD v. Public Utilities Comm'n*, 4 Cal. 3d 945 (1970), in which the court held that the regulatory schemes for public utilities and air pollution had to coexist and that, therefore, the PUC could not preempt air pollution regulation.

195. *See supra* note 11.

meaning to the term. Dictionary definitions of the term "land use" reflect that it is merely a generic term that encompasses a broad range of activities that relate to the use of real property.¹⁹⁶ Used in this broad sense, it is nearly impossible to distinguish "land use" regulation from "indirect source" regulation because many, perhaps all, indirect source regulations relate to the use of real property.

The failure of the California Clear Air Act and its legislative history to clearly distinguish between land use and indirect source regulation appears to be more a choice by the legislature not to make a policy decision than the result of poor drafting. The real difficulty is not the assignment of a technical or more precise definition to the term "land use." Rather, it is determining as a matter of policy what SCAQMD should regulate and what local government should regulate. By using the overly broad generic term of "land use" to define the division between SCAQMD's authority and the authority of local government, the legislature has avoided providing any specific guidance on how far SCAQMD may intrude in the name of air pollution regulation into local land use concerns.

III. CONCURRENT APPROACHES

A. *The Regional Preemption Approach*

1. Overview of the 1989 South Coast Air Basin Air Quality Management Plan

The 1989 South Coast Air Basin Air Quality Management Plan (1989 AQMP),¹⁹⁷ adopted by SCAQMD and SCAG shortly after

196. *Black's Law Dictionary*, for example, defines "land use planning" as "[a] generic term used to describe activities such as zoning, control of real estate developments and use, environmental impact studies and the like." BLACK'S LAW DICTIONARY 792 (5th ed. 1979).

197. See generally 1989 AQMP, *supra* note 32 (overview volume summarizes the plan, its goals and strategies, various analyses and studies of present and projected emissions and air quality, and the control measures). The 1989 AQMP incorporates numerous appendices, including three appendices prepared by SCAG, the "Regional Mobility Plan," the "Regional Growth Management Plan," and "Transportation, Land Use and Energy Conservation Measures." See generally *id.* app. IV-G to IV-I.

The 1991 DRAFT AQMP, *supra* note 32, required by California law to be adopted by June 30, 1991, preserves a majority of the substantive provisions of the 1989 AQMP. See generally 1991 DRAFT AQMP, *supra* note 32. Among the changes the 1991 draft does make are a proposal for additional control measures and a relaxation of the dates for implementation of certain control measures. See *id.* app. IV-E (*Transportation, Land Use and Energy Conservation Measures*). Apart from the 1991 draft revision process, the EPA, the ARB, the SCAG and the SCAQMD have attempted to revise the California SIP by making minor amendments to the 1989 AQMP and by then incorporating the amended Appendix IV-G of the 1989 AQMP into the California SIP. See SOUTHERN CAL. AIR QUALITY MANAGEMENT DIST., NOTICE OF HEARING (Apr. 3, 1991). These amendments relax many of the implementation dates of the 1989 AQMP. See *id.*

SCAQMD gained the power to regulate indirect sources,¹⁹⁸ reflects an ambitious program to reduce air pollution through both traditional emissions controls on industry and automobiles as well as through control measures which the plan denominates as "land use" and growth management. According to the 1989 AQMP, the pollution controls it prescribes will cut otherwise projected emissions of carbon monoxide (CO) by the year 2010 by 96%, from 4467 tons a day to 184 tons a day.¹⁹⁹ The 1989 AQMP seeks similarly dramatic results for the two ozone precursors, reactive organic gases (ROG) and nitrogen oxides (NOx). According to the plan, the control measures it prescribes will cut the otherwise projected emissions in 2010 for ROG by 84%, from 1130 tons a day to 182 tons a day, and the otherwise projected emissions for NOx in the year 2010 by 80%, from 1017 tons a day to 204 tons a day.²⁰⁰

The 1989 AQMP divides the control measures into three tiers. The first tier of measures includes currently available control technologies and management practices which can be at least initially adopted by 1993.²⁰¹ All the indirect source, land use and growth management controls are included in Tier I, although their implementation and impact will take place mainly in later years.²⁰² Tier II includes already demonstrated and "on-the-horizon" control technologies which can be introduced by the year 2000.²⁰³ Tier III includes hoped for new technologies to be introduced after the year 2000. The 1989 AQMP projects that the Tier I measures will result in compliance with state and federal CO and NO₂ standards, but not state and federal ozone or PM-10 standards.²⁰⁴ According to the plan, only the cumulative impact of Tier III measures will result in attainment of federal ozone standards and even those meas-

198. SCAQMD and SCAG adopted the 1989 AQMP on March 17, 1989. 1989 AQMP, *supra* note 32, at ii.

199. 1989 AQMP, *supra* note 32, at 4-3, 4-26, 4-32.

200. *Id.*

201. *Id.* at 4-1. The SCAQMD has made substantial progress on the adoption of Tier I rules. See SCAQMD CHALLENGE OF ATTAINMENT, *supra* note 184, at 3 ("80 percent of Tier I control measures targeted to be completed by the end of the first quarter of 1990 have been adopted by the [SCAQMD Governing] Board"). None of the Tier I measures so far adopted concern indirect sources, in part because of the delay to provide an opportunity for local government action inherent in the regional preemption approach. Although the existing SCAQMD Regulation XV, adopted in 1987, SCAQMD RULES AND REGULATIONS, *supra* note 32, is not a Tier I measure, it is an important existing indirect source control measure and its broadening is a significant component of the Tier I measures. See *supra* note 32.

202. See 1989 AQMP, *supra* note 32, at 4-19 to -21.

203. *Id.* at 4-24.

204. *Id.* at vii, 4-2. PM-10 is defined as fine particulate matter primarily from secondary aerosols. 53 Fed. Reg., *supra* note 47, at 49,502. Particulate matter can irritate or damage the respiratory system, cause acute respiratory illness and increase the number and severity of chronic respiratory diseases. *Id.*

ures will not result in attainment of state PM-10 or ozone standards.²⁰⁵

The 1988 California Clean Air Act requires the SCAQMD to adopt a program to reduce emissions from indirect sources and incorporate the program into the 1991 AQMP,²⁰⁶ a statutorily required update of the 1989 AQMP.²⁰⁷ Thus, the SCAQMD is in the process of developing its indirect source program. The indirect source program is intended to complement the measures contained in SCAG's appendix IV-G to the 1989 AQMP, entitled "Transportation, Land Use and Energy Conservation Measures."²⁰⁸

As the author of the land use and transportation sections of the 1989 AQMP, SCAG is also participating in the drafting of the analogous sections of the 1991 AQMP. With regard to indirect source controls, the primary modification from the 1989 AQMP is the extension of various implementation deadlines, including those relative to parking management, merchant transportation incentives and automobile use restrictions.²⁰⁹

2. Indirect source controls in the 1989 AQMP

The 1989 AQMP lists twenty "transportation system and land use" control measures, all but one of which are listed and described in SCAG's Appendix IV-G.²¹⁰ Of the nineteen AQMP "land use and transportation" measures described in Appendix IV-G, eighteen are denominated "transportation" measures.²¹¹ The 1989 AQMP indicates, however, that eleven of these measures are within SCAQMD's power to

205. 1989 AQMP, *supra* note 32, at ix, 4-30.

206. SOUTH COAST AIR QUALITY MANAGEMENT DIST., PROTOCOL FOR COMMENT LETTERS ON ENVIRONMENTAL IMPACT REPORTS FOR REGIONALLY SIGNIFICANT PROJECTS 3 (proposed Feb. 21, 1990) [hereinafter SCAQMD PROPOSAL]. For a brief discussion of the draft of the 1991 AQMP see also *supra* note 197.

207. See CAL. HEALTH & SAFETY CODE § 40911(b) (West Supp. 1990). The deadline for submission of an updated AQMP is June 30, 1991. *Id.*; see also *id.* § 40463 (West 1986) (imposing mandatory review every two years).

208. SCAQMD PROPOSAL, *supra* note 206, at 5; 1989 AQMP, *supra* note 32, app. IV-G.

209. See 1991 DRAFT AQMP, *supra* note 32, app. IV-E.

210. *Id.* app. IV-G at 47-216. The draft of the 1991 AQMP revises and updates these measures in its Appendix IV-E. 1991 DRAFT AQMP, *supra* note 32, app. IV-E.

211. See *id.* app. IV-G. The nineteen land use and transportation control measures in Appendix IV-G are: (1) alternative work weeks and flextime; (2) telecommunications; (3) employer rideshare and transit incentives; (4) parking management; (5) vanpool purchase incentives; (6) merchant transportation incentives; (7) auto use restrictions; (8) High Occupancy Vehicle facilities; (9) transit improvements; (10) truck dispatching, rescheduling and rerouting; (11) diverting port-related truck traffic to rail; (12) traffic flow improvements; (13) non-recurrent congestion relief; (14) centralized ground power systems; (15) airport ground access; (16) rail consolidation to reduce grade crossings; (17) freeway and highway capacity enhancements; (18) high speed rail; and (19) growth management. *Id.*

regulate indirect sources; these eleven, as well as several of the others, in fact appear to be examples of indirect source regulations.²¹² These measures attempt to discourage or mitigate the effect of single occupancy vehicle trips by measures that apply to facilities that attract such trips.²¹³ The one measure in the 1989 AQMP "land use and transportation" category that is not in SCAG's Appendix IV-G is also an indirect source regulation. That measure would ban the construction of drive-through facilities.²¹⁴

The 1989 AQMP also contemplates a "growth management" measure intended to improve air quality by creating a "jobs/housing balance" across Southern California.²¹⁵ The idea of this measure is to reduce commuter miles by increasing housing in job rich areas and increasing jobs in housing rich areas.²¹⁶ The measure called upon local governments to adopt general plans and zoning ordinances by July 1, 1990 to favor these ends.²¹⁷

The 1989 AQMP calls upon cities and counties to implement three of the indirect source control measures by incorporating the measures into their general plans by January 1, 1991.²¹⁸ Once a measure is incorporated into a general plan, a local government may not take measures contrary to it.²¹⁹ Although the December 1990 draft of the 1991 AQMP

212. The 1989 AQMP classifies the following control measures as indirect source controls: (1) banning of new drive-through facilities, 1989 AQMP, *supra* note 32, app. IV-A at H3-H4; (2) alternative work weeks and flextime, *id.* app. IV-G at 47-52; (3) telecommunications, *id.* at 53-62; (4) employer rideshare and transit incentives, *id.* at 65-70; (5) vanpool purchase incentives, *id.* at 77-82; (6) merchant transportation incentives, *id.* at 83-88; (7) auto use restrictions, *id.* at 89-94; (8) truck dispatching, rescheduling and rerouting, *id.* at 105-12; (9) centralized ground power systems, *id.* at 141-46; (10) airport ground access, *id.* at 147-54; and (11) growth management, *id.* at 209-16.

213. *See supra* note 32.

214. *See* 1989 AQMP, *supra* note 32, at 4-20.

215. *Id.* app. IV-G at 209-16.

216. *See id.*

217. The December 1990 draft of the 1991 AQMP revises this measure to focus on goals for reduction of vehicle miles traveled and is intended to produce results equivalent to the criteria for jobs/housing balance in the 1989 AQMP. *See* 1991 DRAFT AQMP, *supra* note 32, at ES-11. The 1991 AQMP will likely extend the 1989 AQMP deadlines.

218. *See* CAL. GOV'T CODE § 65103(b) (West 1983 & Supp. 1991) (requires local governments to implement their plans).

219. SCAG points out that there may be valid causes of action against local governments which adopt air quality elements in their general plans, but subsequently take action inconsistent with them. 1990 SCAG GUIDELINES, *supra* note 15, at 14. The usefulness and limitations of recourse to the courts for the application of air pollution policy are discussed in P. DEL DUCA, ITALIAN JUDICIAL ACTIVISM IN LIGHT OF FRENCH AND AMERICAN DOCTRINES OF JUDICIAL REVIEW AND ADMINISTRATIVE DECISIONMAKING: THE CASE OF AIR POLLUTION (European University Institute Working Paper No. 89/391, 1989); Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 667 (1986). Although it is certainly possible

has proposed changing this date to January 1, 1992,²²⁰ the three measures remain the first to be implemented as part of the local government land use planning process.²²¹ They are also illustrative of the ways in which indirect source control requirements might impinge upon local government land use regulation. Finally, according to SCAG, the 1989 AQMP purports to "require" inclusion of the three measures in each local government's general plan, but only "recommends" others.²²² These measures are parking management (measure 2(b)),²²³ merchant transportation incentives (measure 2(d)),²²⁴ and auto use restrictions (measure 2(e)).²²⁵ It is useful to describe each measure briefly.

Measure 2(b), concerning parking management, provides that local governments must adopt local parking management ordinances and/or adopt air quality elements into their general plans.²²⁶ To this end, the measure suggests a variety of indirect source controls to be adopted as appropriate, including:

- (1) Elimination of free parking for non-residential developments by 1994,
- (2) Imposition of a surcharge on parking spaces for single occupant vehicles and/or providing a discount for multi-occupant vehicles in all parking facilities, and
- (3) Limiting the number of parking spaces permitted per square foot

that there will be judicial wrangling over the extent of the SCAQMD's powers with respect to indirect source controls *vis à vis* local governments, citizen lawsuits, except possibly pursuant to CEQA as part of the project approval process, are not a significant part of the indirect source control system as it has so far evolved in the South Coast Air Basin.

220. 1991 DRAFT AQMP, *supra* note 32, at ES-11, app. IV-G.

221. Measure 2(a) of Appendix IV-G, entitled "Employer Rideshare and Transit Incentives," 1989 AQMP, *supra* note 32, app. IV-G, at 65, is an extension of the SCAQMD's Regulation XV, adopted in 1987 and effective 1988. SCAQMD RULES AND REGULATIONS, *supra* note 32. Regulation XV requires employers with greater than 100 employees at any location to develop plans to raise the average vehicle ridership of vehicles arriving at the location at the beginning of the working day. *Id.* Measure 2(a) contemplated the adoption of local ordinances by July 1, 1990 which would extend the Regulation XV concept to facilities with tenants where in aggregate more than 100 persons were employed and over a period of several years expanding application of Regulation XV to smaller businesses. What distinguishes measure 2(a) from measures 2(b), 2(d) and 2(e), 1989 AQMP, *supra* note 32, app. IV-G at 71-93, is the application of measure 2(a) by a combination of local ordinance and SCAQMD rule in the first instance. Unlike measure 2(a), measures 2(b), 2(d) and 2(e) are to be applied in the first instance by modification of local government plans, and, only if their application by the general plan vehicle is unsuccessful, then by SCAQMD rule. *Id.* at 65-67.

222. 1990 SCAG GUIDELINES, *supra* note 15, at 1-8.

223. 1989 AQMP, *supra* note 32, app. IV-G at 71-76.

224. *Id.* at 83-88.

225. *Id.* at 89-94.

226. *Id.* at 71.

for specified uses.²²⁷

Measure 2(d), merchant transportation incentives, is focused on shopping centers.²²⁸ It calls for the adoption of non-work trip reduction ordinances by local jurisdictions. Such ordinances would require major retail centers to offer customer incentives not to arrive in single occupancy vehicles and require owners/managers/developers of new and existing large retail establishments to provide facilities for bicycles and pedestrians.²²⁹ In the absence of local action, measure 2(d) calls for the SCAQMD to adopt an indirect source rule by July 1, 1992.²³⁰ The 1991 AQMP is likely to relax this date.

Measure 2(e), auto use restrictions, is specifically targeted at special event centers (stadiums, amusement parks, race tracks, concert halls with 10,000 or more person capacity) and reflects two principles not expressly set forth in the other indirect source measures: (1) any controls should be cost effective, and (2) any regulation should be at the level of local government in order to take into account the unique circumstances of each venue.²³¹ Measure 2(e) calls for local government adoption of air quality elements in general plans, designed to identify the local applicability of requiring special event centers to operate park-n-ride and off-site facility lots, requiring auto free zones, requiring street closure during peak periods, and enhancing transit performance.²³² By January 1, 1993, local governments are to adopt local special event center trip-reduction ordinances to require those measures identified as applicable.²³³ If local governments fail to act, the 1989 AQMP calls on the SCAQMD to adopt indirect source regulations for special event centers tailored to the specific circumstances of each center.²³⁴

To assist counties and local governments in making indirect source control modifications to their general plans, SCAG has issued guidelines for the development of local air quality elements.²³⁵ However, local gov-

227. *Id.* at 72. SCAG issued a report in March, 1990, entitled "Guidelines for the Development of Local Air Quality Elements." SCAG GUIDELINES, *supra* note 15. In the area of parking management, the report suggests the inclusion in the air quality element of a general policy that the availability and cost of parking in congested areas by subject to modification to discourage the use of single-occupant vehicles. *Id.* at 6-4.

228. 1989 AQMP, *supra* note 32, app. IV-G at 83.

229. *Id.* at 83-84.

230. *Id.* at 85.

231. *See id.* at 94.

232. *Id.* at 90.

233. *Id.* The draft of the 1991 AQMP and the proposed SIP modification would extend this date. *See supra* note 197.

234. 1989 AQMP, *supra* note 32, app. IV-G at 93.

235. *See* 1990 SCAG GUIDELINES, *supra* note 15.

ernments do not appear thus far to have made substantial progress in the adoption of ordinances and general plan provisions contemplated pursuant to the three measures just reviewed in detail. As noted, it is also likely that the 1991 AQMP will extend the deadlines by which such local government action is required to be taken.

3. Enforcement of indirect source controls: the guts of regional preemption

The 1989 AQMP's implementation provisions assume that the SCAQMD has the power to implement all the prescribed indirect source and growth management controls through SCAQMD rule. The 1989 AQMP provides two manners of adopting these controls: (1) through SCAQMD rule, or (2) by asking or attempting to persuade local government to adopt the controls, and then by SCAQMD rule if local government defaults.²³⁶ In no instance does the AQMP concede lack of authority based on the statutory prohibition against infringing on local government's authority over land use.

Given that state law prohibits SCAQMD from infringing on local land use authority, the indirect source and growth management regulations that the 1989 AQMP proposes must either not be land use regulations or violate state law. Perhaps the distinction which advocates of the SCAQMD's authority to regulate indirect sources would draw is the somewhat formal one that such SCAQMD regulations are merely air pollution permitting regulations, albeit ones which affect land use but which are not traditional local government zoning and building permit

236. See 1989 AQMP, *supra* note 32, app. IV-G at 284. The 1989 AQMP threatens enforcement by SCAQMD rule of the following control measures if local governments do not adopt them: (1) alternative work weeks and flextime (SCAQMD rule if necessary by January 1, 1993); (2) telecommunications (SCAQMD rule by January 1, 1993); (3) employer rideshare and transit incentives (expansion of existing SCAQMD rule (Regulation XV) if necessary by January 1, 1994); (4) vanpool purchase incentives (SCAQMD rule by 1990); (5) merchant transportation incentives (SCAQMD rule by January 1, 1992); (6) auto use restriction (SCAQMD rule or expansion of existing SCAQMD rule (Regulation XV) if necessary by 1993); (7) truck dispatching, rescheduling and rerouting (SCAQMD rule by July 1, 1991 if necessary); (8) centralized ground power systems (SCAQMD rule by January 1, 1992 if necessary); (9) airport ground access (SCAQMD rule by January 1, 1991 if necessary); (10) growth management (SCAQMD rule after January 1, 1994 if necessary); and (11) banning of new drive-in facilities (SCAQMD rule by 1993). See 1989 AQMP, *supra* note 32, app. IV-G at 43-44; *id.* table 6-2 at 6-7 to -11.

The 1991 AQMP is likely to extend these deadlines. The 1991 AQMP may also further institutionalize the regional preemption approach. The December 1990 draft of the 1991 AQMP comments: "Local government 'certification' is suggested as a model rule with a delay period prior to implementation. During this window, local governments that adopt a comparable regulation would be 'certified' to implement the rule." 1991 DRAFT AQMP, *supra* note 32, at ES-11.

regulations. However, it is difficult to argue that this distinction holds with respect to every provision of the 1989 AQMP. For example, any SCAQMD rule to implement the parking management, merchant transportation incentives and auto use measures discussed above would, if it was to be successful, necessarily involve the SCAQMD in the sorts of regulation traditionally accomplished by local government through zoning, use and occupancy and building permit regulations, among others.

Other of the indirect source regulations also present close calls. Is, for example, a ban on drive-through facilities a land use regulation? It does prohibit a particular land use, but might be qualified as an air pollution regulation rather than as a land use regulation because it bans outright an indirect source that exacerbates vehicular emissions. Other indirect source controls raise somewhat different but essentially related questions concerning the boundary between SCAQMD's power to control indirect sources and local government's power over land use. SCAQMD and SCAG offer no suggestion in the 1989 AQMP that the statutory preservation of local government's control over land use imposes limits on SCAQMD's power to implement the indirect source measures set forth in the 1989 AQMP.

The 1989 AQMP has in many instances deferred the confrontation between its rule making power and local government's land use authority by giving local government an opportunity voluntarily to adopt the indirect source control measures. For example, the 1989 AQMP provides that during the first tier (5 years) of the implementation process, local governments have the responsibility for implementing job/housing balance measures.²³⁷ It threatens implementation by SCAQMD rule only after SCAG's assessment of the "effectiveness of local programs by January 1, 1994."²³⁸ Thus, under the 1989 AQMP there would be no SCAQMD rule coercing a job/housing balance prior to 1994.

4. The judgment of the Air Resources Board (ARB) and EPA on the 1989 AQMP

While the AQMP might be interpreted to violate state law by usurping too much local authority, the ARB and the EPA both raised concerns that it did not usurp enough local authority.²³⁹ They were also both concerned about its lack of timetables for definitive action.²⁴⁰ For

237. See 1989 AQMP, *supra* note 32, app. IV-G at 63.

238. *Id.*

239. The ARB anticipated this criticism when approving the 1989 AQMP. See *infra* note 249.

240. *Id.*

the time being, the EPA's concerns are largely of academic interest because the EPA has abandoned its proposed FIP in light of the new timetable established by the 1990 Clean Air Act Amendments.²⁴¹ The requirements of the ARB, however, remain very much in force. And, as the EPA moves to review SIPs in accordance with the timetables established by the 1990 amendments,²⁴² the previously identified concerns will become relevant again unless rectified in the interim.

The ARB found that because the Plan contains all currently and reasonably foreseeable controls it could not add additional measures to provide for more rapid attainment of the standards.²⁴³ The ARB also commended SCAQMD and SCAG "for their monumental effort to develop a plan to improve the air quality, public health, and quality of life in the South Coast Air Basin."²⁴⁴ However, the ARB also found that "some of the measures in Tier I . . . do not contain either adequate legally enforceable commitments . . . to comply fully with [the Clean Air Act's] requirements."²⁴⁵ The ARB accordingly gave only conditional approval to certain measures, resolving that SCAQMD and SCAG "obtain legally enforceable commitments to adopt and implement" those measures and requesting the SCAQMD and the ARB to adopt and implement the measures where commitments from local government were not forthcoming.²⁴⁶ Many of the AQMP's indirect source and growth management controls were among the measures given this conditional approval.²⁴⁷

The ARB conducted a public meeting in Sacramento on July 12 and 13, 1990, and approved a guidance document for the development of indirect source control programs.²⁴⁸ The guidance document proposes the use of emissions offsets and a permit requirement for the construction or operation of new or modified indirect sources.²⁴⁹ If the SCAQMD im-

241. The EPA's timetable for action pursuant to the 1990 Clean Air Act Amendments is set forth in OFFICE OF AIR AND RADIATION, ENVTL. PROTECTION AGENCY, IMPLEMENTATION STRATEGY FOR THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1 (Jan. 15, 1991). An effort, however, is being made to amend California's SIP in a manner consistent with the concerns which the EPA expressed in its review of the 1989 AQMP. *See supra* note 197.

242. *See supra* note 236.

243. AIR RESOURCES BOARD RESOLUTION 89-66 (Aug. 15, 1989) [hereinafter ARB RESOLUTION].

244. *Id.* at 7.

245. *Id.* at 5.

246. *Id.* at 8.

247. *See id.* attachment B.

248. Krinsk Memo, *supra* note 194, at 2.

249. Some question might be raised about the ARB's authority to require that indirect source controls be included in the AQMP for the South Coast Air Basin. California's statute provides: "The state board shall not require as a condition of approval of the plan or subse-

plements the recommended measures, a new or modified indirect source might be required to offset pollutant emissions from mobile sources attracted to the facility. The ARB has suggested that the requirements of the 1988 California Clean Air Act could be met by an AQMP that includes the adoption of indirect source control regulations or a schedule for the development and adoption of an indirect source control program.²⁵⁰ The ARB has also suggested that the AQMP include a commitment to implement or develop a monitoring program to assess the results of the indirect source control program.²⁵¹

The ARB's guidance document is substantially more aggressive than the SCAQMD and SCAG provisions discussed above. Because the ARB will review and may modify the 1991 AQMP prepared by SCAG and the SCAQMD, the ARB's views merit close attention.

The indirect source review programs that the ARB might mandate if necessary to achieve ambient air quality standards include:

- * Review and approval of any new or modified indirect source prior to the commencement of construction.²⁵²
- * Requiring the use of the best available design to mitigate any air pollution impact of an indirect source.²⁵³
- * Requiring mitigation fees or offsets to obtain emission reductions not directly associated with the project as an offset to emission increases that cannot be eliminated through mitigation measures.²⁵⁴
- * Requiring permit denials if a project would interfere with the attain-

quent revisions, any indirect source review program or other land use control measures." CAL. HEALTH & SAFETY CODE § 40468 (West 1986). Section 40468, however, is inserted in chapter 5.5 of part 2, division 2G of the Health and Safety Code, which is devoted exclusively to the SCAQMD. *See id.* §§ 40400-40540. This part of the code also made inclusion of indirect source controls in the 1989 AQMP an option, although not a requirement. As discussed earlier, subsequent amendments to the Health and Safety Code added sections 40918-40920 as part of a new chapter 10, part 2, division 26. *Id.* §§ 40918-40920 (West Supp. 1990). These amendments require inclusion of indirect source controls in the 1989 AQMP for the South Coast Air Basin. Accordingly, there is a strong argument that section 40468 was intended to be repealed. The ARB might also argue that it has authority to include such provisions in its formulation of California's SIP even if it might not have the power to force their inclusion in the AQMP for the South Coast Air Basin. *See id.* § 39602 (West 1986). *But cf. id.* § 40469 (West 1986 & Supp. 1991) (contemplates that the 1989 AQMP will be at least the starting point for ARB's formulation of relevant portions of SIP).

250. ARB RESOLUTION, *supra* note 243, at 4-7.

251. *Id.*

252. Air Resources Board, California Clean Air Act Guidance on the Development of Indirect Source Control Programs 34-52 (July, 1990) (unpublished, on file at Loyola of Los Angeles Law Review Office).

253. *See id.*

254. *See id.*

ment of air quality standards.²⁵⁵

The ARB has suggested that the SCAQMD or local jurisdictions would administer any indirect source review program.²⁵⁶

The EPA likewise expressed the view that the 1989 AQMP is inadequate because it “depends heavily . . . on measures it neither adopts as regulations nor schedules for quick adoption” and fails “to set forth rules in regulatory language and to commit [s]tate and local resources to implement many of the measures.”²⁵⁷ However, while the EPA proposed disapproving the SIP as a whole for its failure to demonstrate attainment, the EPA found much merit in the substance of the SIP and proposed accepting most of the individual control measures on the ground that the measures strengthen the SIP.²⁵⁸

The EPA identified three problems with the 1989 AQMP’s “land use and transportation” control measures that “need[ed] to be addressed prior to final approval of the measures into the SIP for credit”: (1) the descriptions of the measures often did not clearly or specifically identify what entity is responsible for implementation; (2) the measures did not clearly or specifically identify what actions are to be taken; and (3) the implementation schedules often did not include enough detail.²⁵⁹ The EPA also found fault in the lack of sufficient specificity of the 1989 AQMP in identifying the criteria for when the SCAQMD would substitute itself for local government in the event of local government inaction.²⁶⁰ The EPA’s problem was that the 1989 AQMP did not set forth with specificity when SCAQMD would step in to issue a rule. The EPA stated: “The need to adopt the rules should be tied to whether control measures are adopted by the date specified, whether they result in the projected emission reductions, or whether the Basin is making reasonable further progress in reducing total precursor emissions”²⁶¹

Both the 1977 and the 1990 amendments to the Clean Air Act limit

255. *See id.*

256. Air Resources Board, Staff Report on the 1989 Air Quality Management Plan for the South Coast Air Basin 1 (May 1989) (unpublished, on file at Loyola of Los Angeles Law Review Office).

257. 55 Fed. Reg., *supra* note 38, at 36,461; *see also id.* at 36,485 (detailed description of the EPA’s findings). Because the proposed disapproval of the AQMP would have left the South Coast without an approved SIP, the EPA also proposed a FIP. *Id.* at 36,500-39.

258. *Id.* at 36,461. The EPA hoped that by relying on local initiatives, it could “minimize federal intrusion, avoid conflict with and duplication of local efforts, and encourage speedy implementation of the measures [s]tate and local authorities wish to adopt.” *Id.* at 36,460.

259. *Id.* at 36,486-87. With respect to several measures, however, the EPA approved SCAG’s, SCAQMD’s and the ARB’s implementation commitments. *See id.*

260. 55 Fed. Reg., *supra* note 38, at 36,489.

261. *Id.*

the EPA's ability to require that a SIP provide for intrusion into local land use regulation in the name of air pollution control.²⁶² However, the EPA may approve and enforce a SIP which a state submits of its own initiative and which includes indirect source controls.²⁶³ Nonetheless, some uncertainty about how far the EPA and SCAQMD may intrude into local government's authority over land use through indirect source regulations remains as a matter of both California and federal law.²⁶⁴ Whether the indirect source control measures in the 1989 AQMP constitute impermissible intrusions into local land use regulation is an issue a court may someday have to decide.

B. *The Project Approval Approach*

Both SCAG and SCAQMD may have input to land use decisions pursuant to the California Environmental Quality Act (CEQA).²⁶⁵ As outlined below, the CEQA does not confer independent land use authority on SCAG or SCAQMD, but does mandate that local government when exercising its land use authority take into account environmental impacts, including air quality concerns as identified by the SCAG and the SCAQMD, and mitigate them to the extent feasible.

CEQA establishes a process designed to identify and assess the environmental effects of proposed land uses and to compel local and state government to take those environmental effects into account when approving, financing or undertaking land uses.²⁶⁶ Under CEQA, the agency with principal responsibility for approving or disapproving a project with potential for "significant effect on the environment" must first prepare an Environmental Impact Report (EIR)²⁶⁷ and take that report into consideration when approving or disapproving the project.²⁶⁸ The agency that prepares the EIR is known as the "lead agency."²⁶⁹ Any other agencies with responsibility for approving the project, known as

262. *See supra* notes 61-145 and accompanying text.

263. *Id.* § 7410(a)(5)(A)(i).

264. *See supra* notes 61-145 and accompanying text.

265. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1991). The California Office of Planning and Research prepares guidelines for the implementation of CEQA. *See id.* § 21083. These guidelines are found at CAL. CODE REGS. tit. 14, §§ 15000-15387 (1990).

266. *See* CAL. PUB. RES. CODE §§ 21000(g), 21001(d), (f), (g), 21080, 21100 (West 1986); CAL. CODE REGS. tit. 14, §§ 15002(a)-(c), 15021(a)(1).

267. CAL. PUB. RES. CODE §§ 21067, 21080(a), (c), 21100, 21151, 21165 (West 1986); CAL. CODE REGS. tit. 14, §§ 15002 (f)(1), 15064 (a)(1), (g)(1), 15089.

268. CAL. PUB. RES. CODE §§ 21002.1(b), 21061, 21081 (West 1986); CAL. CODE REGS. tit. 14, §§ 15002(h), 15064(a)(2), 15089, 15091.

269. CAL. PUB. RES. CODE §§ 21067, 21165 (West 1986); CAL. CODE REGS. tit. 14, §§ 15002(f)(1), 15089.

“responsible agencies,”²⁷⁰ must take the lead agency’s EIR into account when doing so.²⁷¹ In preparing the EIR, the lead agency must solicit comments from each responsible agency and any public agency which has jurisdiction by law with respect to the project.²⁷² The public is also entitled to comment on the EIR.²⁷³ The lead agency cannot reject the comments or suggestions of other agencies or the public without detailed consideration of the comments or suggestions and specific reasons for rejecting them.²⁷⁴ Additionally, CEQA does not independently confer permitting or other approval authority.²⁷⁵

When an EIR shows that a project would have a significant effect on the environment, agencies with approval authority must, subject to the limitations in their jurisdiction,²⁷⁶ either disapprove the project,²⁷⁷ approve the project but require adoption of alterations or changes designed to substantially lessen the significant environmental effect identified in the EIR,²⁷⁸ or approve the project as proposed based on certain findings as to why approval is appropriate despite significant effect on the environment even after mitigation to the extent feasible of adverse environmental impacts.²⁷⁹ Findings which can justify approval notwithstanding the significant negative impact the project would have on the environment are essentially two: (1) that specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the EIR; or (2) that the benefits of the proposed project outweigh the unavoidable adverse environmental effect.²⁸⁰

270. CAL. PUB. RES. CODE § 21065; CAL. CODE REGS. tit. 14, § 15050.

271. CAL. PUB. RES. CODE §§ 21002.1(b), 21061 (West 1986); CAL. CODE REGS. tit. 14, §§ 15050(b), 15064(a)(2), 15091(a), 15096(a), (g)(2).

272. CAL. PUB. RES. CODE §§ 21104, § 21153 (West 1986 & Supp. 1991); CAL. CODE REGS. tit. 14, §§ 15002(j), 15086(a)(1), (3).

273. CAL. PUB. RES. CODE §§ 21003.1(a), (c), 21092 (West 1986 & Supp. 1991); CAL. CODE REGS. tit. 14, §§ 15002(j), 15044.

274. CAL. PUB. RES. CODE § 21104, 21153 (state and local lead agencies) (West Supp. 1991); CAL. CODE REGS. tit. 14, § 15088.

275. CAL. CODE REGS. tit. 14, § 15040(b).

276. *See* CAL. PUB. RES. CODE §§ 21002.1(d), 21081(b) (West 1986); CAL. CODE REGS. tit. 14, § 15096(g)(1).

277. CAL. PUB. RES. CODE §§ 21002, 21081 (West 1986); CAL. CODE REGS. tit. 14, § 15042 (authority to disapprove).

278. CAL. PUB. RES. CODE §§ 21002, 21002.1(b), 21081(a) (West 1986); CAL. CODE REGS. tit. 14, § 15041 (authority to require mitigation measures).

279. CAL. PUB. RES. CODE §§ 21002, 21002.1(c) (West 1986); CAL. CODE REGS. tit. 14, § 15043 (authority to approve despite significant effects). The federal National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1982), has no such express mitigation requirement; it merely requires assessment and consideration of environmental impacts.

280. CAL. PUB. RES. CODE §§ 21002, 21002.1(c), 21081(c) (West 1986); CAL. CODE REGS. tit. 14, § 15043.

The significance of the CEQA is that it gives SCAQMD and SCAG a legal mechanism for inducing local government to incorporate air quality concerns into land use decisions that is less coercive than direct regulation but more coercive than exhortations to voluntary action. If SCAG or SCAQMD find in the course of preparation of an EIR that the project at issue would have a significant effect on air quality, the lead agency must incorporate that finding into the EIR unless it can articulate a basis for rejecting it. If the lead agency incorporates SCAG's or SCAQMD's comments, public agencies with approval authority cannot thereafter approve the project unless changes are required to mitigate the environmental effect identified by SCAG or SCAQMD. Public agencies may, however, override SCAG's or SCAQMD's concerns if they find that mitigation measures are not feasible for economic, social or other reasons or that the benefits of the proposed project outweigh the adverse effect on air quality. The consequence of improperly overriding air pollution concerns or of otherwise not complying with CEQA may be a court order voiding the approval and enjoining all action pursuant to it.²⁸¹

SCAQMD has actively participated in the CEQA EIR process for individual project approvals by local governments. SCAQMD comments in an advisory capacity on any project for which it has authority to issue subsequent permits or which may affect implementation of the AQMP.²⁸² SCAQMD also reviews EIRs and other CEQA documents²⁸³ for many projects over which it does not have even subsequent permitting power.²⁸⁴ SCAQMD reports that many of the CEQA documents are submitted to it on a voluntary basis, and not because the CEQA requires input from SCAQMD.²⁸⁵

SCAQMD is using the CEQA EIR process to ensure conformity with the AQMP of real estate developments and other indirect sources. For example, SCAQMD recently indicated that it will comment on EIRs

281. CAL. PUB. RES. CODE § 21168.9 (West 1986).

282. SCAQMD PROPOSAL, *supra* note 206, at 1.

283. The CEQA calls for the preparation of various documents in addition to the EIR, most of which relate to whether a project is subject to CEQA or requires the preparation of an EIR. CAL. CODE REGS. tit. 14, § 15002(k). The lead agency first considers whether a project is subject to CEQA and prepares a notice of exemption if it determines the project is not subject to CEQA. CAL. PUB. RES. CODE § 21080 (West 1986); CAL. CODE REGS. tit. 14, §§ 15061-15062. If the project is not exempt, the agency conducts an initial study to determine whether the project may have a "significant effect on the environment" and therefore require preparation of an EIR. CAL. PUB. RES. CODE § 21080(c) (West 1986); CAL. CODE REGS. tit. 14, § 15063. If the initial study results in no substantial evidence that the project may have a significant effect, the lead agency prepares a "negative declaration." CAL. PUB. RES. CODE § 21080(c) (West 1986); CAL. CODE REGS. tit. 14, § 15070.

284. SCAQMD PROPOSAL, *supra* note 206, at 1.

285. *Id.*

concerning airports, state highways, hospitals, schools, hotels and motels, office buildings, residential developments, shopping centers and sports, entertainment and recreation facilities.²⁸⁶ SCAQMD has sought to compel consideration in EIRs of proposed real estate developments. The EIRs would explore whether the development would upset the job/housing balance prescribed by the AQMP or would otherwise interfere with attainment of the goals set by the AQMP.²⁸⁷

SCAG has also used the CEQA EIR process to enforce the "housing/jobs balance" and other AQMP control measures.²⁸⁸ Like SCAQMD, SCAG has prepared guidelines for determining whether a project conforms to the AQMP.²⁸⁹

The AQMP allows local governments to displace SCAQMD and SCAG in the CEQA process under specified conditions providing an incentive for cities and counties to incorporate air quality elements into their general plans. The 1989 AQMP provides that: "If a local government adopts an Air Quality Element consistent with SCAG/SCAQMD guidelines and revises their Land Use and Circulation Elements to be consistent with the Air Quality Element, then conformity review for each project would not be required."²⁹⁰ The AQMP further provides, however, that if "cumulative impacts are not consistent with the AQMP, then conformity review for each project would be required."²⁹¹ SCAG

286. See *id.* tables 1 & 2 at 5.

287. As an example, the SCAQMD submitted a comment letter to the City of Los Angeles concerning the draft EIR for the proposed Porter Ranch development. See Letter from Barry R. Wallerstein, Director of Planning, South Coast Air Quality Management District, to Kenneth Topping, Planning Director, City of Los Angeles (Jan. 22, 1990) (available on file at Loyola of Los Angeles Law Review). In that letter the SCAQMD commented that the impact analysis contained in the EIR did not adequately address air quality, in part because the development "far exceed[ed] thresholds for land use projects generating adverse air quality impacts" as set forth in Appendix IV-G. *Id.* The District staff criticized the EIR for, among other things, "incorrectly assuming" that no indirect source impacts will result from the proposed project" and failing to demonstrate "how [the] project conforms with the goals and objectives of the AQMP, especially goals such as encouraging infilling and progress towards attaining a subregional jobs/housing balance." *Id.* The District identified and recommended that the Los Angeles City Council consider various mitigation measures. These mitigation measures included "[e]nergy conservation beyond that required by state or local regulations," "scaling down" of certain components of the project and a demonstration that the price of the housing matched the income of the people employed in the project area. *Id.*

288. See, e.g., 1990 SCAG GUIDELINES, *supra* note 15, at 4-1 to 5-3. The State CEQA Guidelines provide that draft EIRs for projects "of sufficient statewide, regional, or areawide environmental significance . . . should be submitted to [the] appropriate metropolitan area council of governments [which is SCAG in the South Coast Air Basin] for review and comment." CAL. PUB. RES. CODE § 21083 (West 1986).

289. See 1990 SCAG GUIDELINES, *supra* note 15.

290. 1989 AQMP, *supra* note 32, app. IV-G at 306.

291. *Id.*

has indicated that although it "will review all submitted projects, formal conformity reviews will be limited to those jurisdictions that have not adopted air quality elements determined to be consistent with [its] Guidelines."²⁹²

IV. 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.²⁹³ 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 by SCAG 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.²⁹⁴ 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 SCAQMD from regulating land use, it recognizes a need for the AQMP to induce changes in land use and accordingly gives SCAG responsibility for the portions of the AQMP relevant to land use planning.

Consideration of air quality concerns by local governments does occur. Authorizations to construct and modify indirect sources are subject

292. 1990 SCAG GUIDELINES, *supra* note 15, at 7-5.

293. See *supra* notes 88-145 and accompanying text.

294. This Article expresses no view on the question of whether, as part of the regional planning process, higher or lower density of development is desirable. Although most of the discussion in this Article has been directed to the regional preemption and project approval approaches, there are some issues, such as low density, which are clearly better considered through the regional planning approach than through the regional preemption or project approval approaches. Although there is no directly elected body which corresponds to the territory of the South Coast Air Basin, basic questions such as this one are properly the subject of debate in the directly elected governing bodies of cities and counties within the South Coast Air Basin. By virtue of the pressures from SCAG and SCAQMD discussed in this article, it can be hoped that such debates will internalize, or to use less economic jargon—take to heart, air pollution concerns.

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 SCAQMD's recent adoption 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, the 1989 AQMP implies that 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 the 1989 AQMP was not sufficient to achieve air quality standards in timely fashion. The 1989 AQMP, and the proposed FIP in stronger form, accordingly 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 SCAQMD's substituting itself for the local governments if the local governments do not act in a timely fashion.²⁹⁵

Given the sensitivity of local governments towards 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 at the SCAQMD and SCAG have deemed necessary, the legal arguments about the extent of SCAQMD'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

295. A SCAG summary of the consequences of local governments not complying with the AQMP emphasizes the continued force of substitution or second guessing of local governments by higher levels of government, including the federal government. SCAG's list of potential consequences for local governments of not complying with the AQMP requirements is: (1) continued conformity review of new projects by SCAG under CEQA; (2) SCAQMD enforcement of AQMP control measures by rule; (3) enforcement by EPA of a FIP with "a number of extreme measures which are not in the AQMP"; and (4) sanctions authorized by the 1977 Clean Air Act Amendments. 1990 SCAG GUIDELINES, *supra* note 15, at 1-13 to -14.

issues at the local level, i.e. respect for the theory that the local community is the community most directly implicated by local land use decisions and accordingly the entity with the greatest interest in seeing that they are made wisely. The threat of SCAQMD substitution should cause local governments to consider air quality concerns which they have previously overlooked.

Whether the SCAQMD in fact will be able to substitute itself for local governments if they do not act remains unclear. Although the SCAQMD has taken the position that it presently has such power, those adverse to the SCAQMD's substitution of local governments will advance legal arguments based on provisions of the California Health and Safety Code to the effect that the SCAQMD's 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 SCAQMD 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. Neither SCAG nor the SCAQMD is 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,²⁹⁶ SCAG and the SCAQMD are accordingly less directly accountable to the electorate.²⁹⁷ The counter to this argument is

296. For a description of these efforts to inform the public of pending rulemakings and to solicit comments, see SCAQMD CHALLENGE OF ATTAINMENT, *supra* note 184, at 12-15.

297. 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 applies to the AQMP itself and required SCAQMD and SCAG to prepare an EIR for the AQMP. This in turn allows the public and other agencies to compel SCAG and SCAQMD to take their comments into account when preparing the AQMP. The 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. See 1990 SCAG GUIDELINES, *supra* note 15, at 5-1. 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

that, because of the externality nature of air quality concerns to local land use regulators, SCAG and SCAQMD 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 by SCAQMD 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, and the AQMP does not set forth a boundary. EPA has told California that SCAQMD 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.²⁹⁸ 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 goals in the South Coast Air Basin. This Article 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.

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).

298. 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).

