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## State Regulation of Air Pollution

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# STATE REGULATION OF AIR POLLUTION

Increased public awareness of the problem of air pollution has produced newer, more stringent statutory controls in most states.<sup>1</sup> These enactments are generally justified as either protection of air resources<sup>2</sup> or safeguards of public health, safety, and welfare.<sup>3</sup> Even so, many laws reflect a state's desire not to hinder its own industrial growth,<sup>4</sup> realizing that unreasonable restrictions will only force an affected industry to seek a more sympathetic jurisdiction. The synthesis of these two considerations has produced a commonly-accepted state goal of realizing and maintaining an economically feasible standard of air purity;<sup>5</sup> and moreover, of enabling officials to provide progressively more severe regulations as air pollution control techniques become more sophisticated and less costly.

## I. THE AIR POLLUTION CONTROL AUTHORITY

The initial choice faced by a state legislature is whether to create a body specifically for air pollution control or to attach the function to the duties of an operative state agency.<sup>6</sup> The selection is likely to make little difference in fact. Whether the responsibility for air pollution control is given to a new agency or an existing one, the need for additional funds and personnel will nonetheless arise. In a new agency, it may be possible to avoid more of the bureaucratic intertwinings that impede administrative action; but an established agency may offer a system already streamlined for the quickest response to public concern.<sup>7</sup> In short, each alternative presents advantages with concomitant

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1. No attempt has been made to exhaust the many variations that exist in the state statutes on air pollution control. The purpose here is to provide a general view of the approaches that are used. Resort to a particular state statute should be made for specific details.

2. See CAL. HEALTH & SAFETY CODE § 24198 (Deering 1961).

3. ARK. STAT. ANN. § 82-1931 (Supp. 1967).

4. See IND. ANN. STAT. § 35-4601 (Supp. 1967); PA. STAT. ANN. tit. 35, § 4002 (1964).

5. See ARK. STAT. ANN. § 82-1931 (Supp. 1967).

6. A state may deem that the primary control of air pollution should come from smaller units than the state government, and create air pollution control districts for this purpose. See CAL. HEALTH & SAFETY CODE §§ 24199-201, 24212, 24346.1-2, 24350 (Deering 1961); WASH. REV. CODE ANN. §§ 70.90.030 (1-2) (Supp. 1967).

7. Compare ARK. STAT. ANN. § 82-1935 (Supp. 1967); ILL. ANN. STAT. ch. 111½, § 240.4 (Smith-Hurd 1966); IND. ANN. STAT. § 35-4603 (Supp. 1967); LA. REV. STAT. ANN. § 40:2203

liabilities; each state should choose its approach according to the strengths of its own administrative structure.<sup>8</sup>

### A. *The Administrative Officer*

Many states have anticipated the bureaucratic maze and have moved to unravel it by providing for the appointment of a chief administrative officer.<sup>9</sup> He is generally elected by the air pollution control authority itself,<sup>10</sup> with various restrictions on its freedom of choice.<sup>11</sup>

The functions of the chief administrative officer are fairly uniform among the states. He is usually responsible for keeping records, supervising personnel, and handling correspondence.<sup>12</sup> In addition, he often performs as a special official, receiving and investigating complaints, prosecuting violators before the air pollution control authority,<sup>13</sup> recommending and evaluating regulations, and ruling on requests for statutory variances and regulatory exemptions.<sup>14</sup> Whether the air pol-

(Supp. 1967); MO. REV. STAT. § 203.040 (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 3 (Supp. 1967); *with* MD. ANN. CODE art. 43, § 695(H) (Supp. 1967); MICH. STAT. ANN. § 14.58(3) (Supp. 1967); N.M. STAT. ANN. § 12-14-3 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1268 (McKinney 1967); PA. STAT. ANN. tit. 35, § 4004-5 (1965); Air Pollution Control Act of 1967, ch. 347, § 3, KAN. LAWS (1967).

8. Another alternative has been to join air pollution control with water pollution control in one independent agency; the resultant advantage being to consolidate two major atmospheric control programs in one body. FLA. STAT. ANN. §§ 403.041, 403.061 (Supp. 1968); MISS. CODE ANN. §§ 7106-111, 7106-113, 7106-116 (Supp. 1966).

9. *E.g.* ILL. ANN. STAT. ch. 111½, § 240.4 (Smith-Hurd 1966); MISS. CODE ANN. §§ 7106-115(a) (Supp. 1966).

10. ILL. ANN. STAT. ch. 111½, § 240.4 (Smith-Hurd 1966); MO. REV. STAT. § 203.040(4) (Supp. 1967). The administrative officer may also assume his position *ex officio*. *See, e.g.*, LA. REV. STAT. ANN. § 40:2203 (1965); N.Y. PUB. HEALTH LAW § 1272 (McKinney Supp. 1967).

11. *See, e.g.*, MISS. CODE ANN. § 7106-115(a) (Supp. 1966); MO. REV. STAT. § 203.040(4) (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 3(H) (Supp. 1967). It is also possible to leave the authority free to choose the administrative officer with no restrictions. *See* ILL. ANN. STAT. ch. 111½, § 240.4 (Smith-Hurd 1966).

12. *See* ILL. ANN. STAT. ch. 111, § 240.6 (Smith-Hurd 1966); LA. REV. STAT. ANN. § 40:2205(A)-(D) (1965); MO. REV. STAT. § 203.060 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1273 (McKinney Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 5(H) (1967 Supp.); *see also* MISS. CODE ANN. § 7106-115(a) (Supp. 1967). Generally, the administrative officer has no voting power. *See, e.g.*, ILL. ANN. STAT. ch. 111½, § 240.6(a) (Smith-Hurd 1966); MO. REV. STAT. § 203.060(1) (Supp. 1967).

13. ILL. ANN. STAT. ch. 111½, § 240.6(c) (Smith-Hurd 1966); MO. REV. STAT. § 203.060(3) (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 5(D) (Supp. 1967).

14. ILL. ANN. STAT. ch. 111½, § 240.6(d) (Smith-Hurd 1966); MO. REV. STAT. § 203.060(4,5) (Supp. 1967). An adverse decision against a party is made reviewable by the body after the officer's determination. *Id.*

Such power may also be expressly prohibited. MISS. CODE ANN. § 7106-115 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1273 (McKinney Supp. 1967).

lution control program becomes effective thus depends mainly on the efficiency of this man.<sup>15</sup>

Even in states where he is accorded the broadest range of duties, however, the real power of the administrative officer lies in his position as the chief full-time air pollution official. While most state statutes provide for regular meetings of the full air pollution authority,<sup>16</sup> the meetings are often too infrequent to meet the problem of air pollution on the day-to-day basis that is required. The administrative officer is consequently the only completely available air pollution authority; his power and responsibility are increased by the absence of his superiors.

### B. *The Membership*

State air pollution control authorities are generally a mixture of state officials, air pollution experts, and interested private citizens. The state officials often include the senior health officer; the heads of the agriculture, industry, commerce, labor and conservation departments; or the chief sanitary engineer.<sup>17</sup> Special economic or industrial interests of the state may prescribe that other officials be included as well.<sup>18</sup>

Private citizens sitting on the air pollution control board are appointed by the governor, usually from specified fields. Representatives of management and labor, agriculture and conservation, and a professional physician are common required appointees.<sup>19</sup> There may be the

15. The administrative officer usually has authority to recommend, though not to promulgate, rules and regulations. MISS. CODE ANN. § 7106-115 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1273 (McKinney Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 5(A) (Supp. 1967).

16. E.g., IND. ANN. STAT. § 35-4603 (Supp. 1968); LA. REV. STAT. ANN. § 40:2203 (Supp. 1967); MONT. REV. CODE § 6-3908 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1272(1) (McKinney Supp. 1967); UTAH CODE ANN. § 26-29-6 (Supp. 1967).

17. E.g., ILL. ANN. STAT. ch. 111½, § 240.4 (Smith-Hurd 1966); IND. ANN. STAT. § 35-4603 (Supp. 1967); LA. REV. STAT. § 40:2203 (Supp. 1967); MICH. STAT. ANN. § 14.58(3) (Supp. 1968); MISS. CODE ANN. § 7106-113 (Supp. 1967); MO. REV. STAT. § 203.040 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1268(1)(a) (McKinney Supp. 1967); PA. STAT. ANN. tit. 35, § 4005(8) (1965); Air Pollution Control Act of 1967, ch. 347, § 4, KAN. LAWS (1967).

18. See MISS. CODE ANN. § 7106-113 (Supp. 1967) (game & fish commission, marine conservation commission, oil & gas board); PA. STAT. ANN. tit. 35, § 4005(b) (1965) (department of mines); TEX. REV. CIV. STAT. art. 4477-5, § 3(D) (Supp. 1967).

19. ILL. ANN. STAT. ch. 111½, § 204.4 (Smith-Hurd 1966) (industry, labor, agriculture, and conservation); IND. ANN. STAT. § 35-4603 (Supp. 1968) (industry, agriculture); N.Y. PUB. HEALTH LAW § 1268(1)(b) (McKinney Supp. 1967); PA. STAT. ANN. tit. 35, § 4005(c) (1965). Air Pollution Control Act of 1967, ch. 428, § 4, KAN. LAWS (1967).

additional requirement that at least one appointee represent the interest of municipal areas in the state.<sup>20</sup>

It is often true that both classes of appointees must be experienced in air pollution control,<sup>21</sup> and that the freedom of selection accorded the governor may be restricted to lists prepared by appropriate professional associations.<sup>22</sup> Finally, some states have wisely provided that no more than one-half of the air pollution control body may be affiliated with one political party.<sup>23</sup>

The membership of most state air pollution control authorities has thus been constructed with the purpose of providing both qualified and representative viewpoints. Though in many specific instances we might desire further provision for specialists in the field, and expanded responsibility for those already prescribed, most states appear prepared to meet the air pollution dilemma with respectable officials.

## II. POWERS AND DUTIES OF THE AUTHORITY

It is uniformly true that the air pollution control authority, whether it is independent or subsidiary, is the sole state functionary in its field. As such, it has the power to formulate rules and regulations, convene informational hearings, issue compliance orders, and prosecute actions to enforce its authority.<sup>24</sup> Powers reasonably related to these—inspection, investigation, hiring consultants, seeking assistance from other air pollution agencies—are also granted.<sup>25</sup>

Most states have described the duties of the air pollution authority as well as its powers. Generally, these include the dissemination of in-

20. *E.g.*, IND. ANN. STAT. § 35-4603 (Supp. 1967); MICH. STAT. ANN. § 14.58(3) (Supp. 1968); N.Y. PUB. HEALTH LAW § 1268 (McKinney Supp. 1967).

21. *See* IND. ANN. STAT. § 35-4603 (Supp. 1967); PA. STAT. ANN. tit. 35, 4005(c) (1964); Air Pollution Control Act of 1967, ch. 347, § 4, KAN. LAWS (1967). *Compare* ILL. ANN. STAT. ch. 111½, § 204.4 (Smith-Hurd 1966); MICH. STAT. ANN. § 14.58(3) (Supp. 1968); TEX. REV. CIV. STAT. art. 4477-5, § 3(A) (Supp. 1967); *with* LA. REV. STAT. ANN. § 40:2203 (Supp. 1967).

22. *See* LA. REV. STAT. ANN. § 40:2203 (Supp. 1967) (all appointments made from submitted lists); MD. ANN. CODE art. 43, § 695 (Supp. 1967) (engineers, industrial representatives and medical person chosen from submitted lists).

23. *See* MO. REV. STAT. § 203.040 (Supp. 1967).

24. ARK. STAT. ANN. § 82-1935 (Supp. 1967); ILL. ANN. STAT. ch. 111½, §§ 240.5-1 to 5-5 (Smith-Hurd 1966); IND. ANN. STAT. § 35-4604(a) (Supp. 1967); LA. REV. STAT. ANN. § 40:2204(A) (1965); MO. REV. STAT. § 203.050(1) (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 4(A) (Supp. 1967).

25. ILL. ANN. STAT. ch. 111½, §§ 240.5-1.6 to -1.8 (Smith-Hurd 1966); LA. REV. STAT. ANN. §§ 40:2204(A)(3), (7) (1965); MO. REV. STAT. §§ 203.050 (1)(3)(a), (1)(9), (1)(10), (2)(8) (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, §§ 4(A)(3), 4(A)(7), 4(B)(6) (Supp. 1967).

formation, the continuing study of air pollution, and the furnishing of technical assistance to public and private institutions.<sup>26</sup> Perhaps most important are the obligations to negotiate interstate compacts and seek federal support. The problem of air pollution can hardly be geographically defined; and with the growth and concentration of industry, it is likely that only a program coordinated in all affected states can successfully abate the problem.

Depending on the method of administration chosen, noticeable differences in state air pollution control programs arise. It is possible, for instance, to divide the powers and duties of the air pollution control authority between two different state organs, giving, perhaps, a newly-created agency or subdepartment the functional "powers" and an existing department the "duties."<sup>27</sup> Further alternatives are either to make the new agency's function strictly advisory,<sup>28</sup> or to confine it solely to rule-making, leaving the enforcement to an operative arm of the state.<sup>29</sup>

All of these alternatives, however, seem to suggest the administratively questionable results of either separating the policy-makers from the policy-enforcers or eliminating the well-informed from responsibility and power.

The union of power and duty in one identifiable body, be it independent or subordinate, would seem at least theoretically more desirable.<sup>30</sup>

26. Those functions classified as duties vary little from state to state. *See, e.g.*, ARIZ. REV. STAT. § 36-1705 (Supp. 1968); IDAHO CODE ANN. § 39-2909 (1967); ILL. ANN. STAT. ch. 111½, §§ 240 5-2.1 to -2.8 (Smith-Hurd 1968); LA. REV. STAT. ANN. § 40:2204 (B) (1965); MO. REV. STAT. § 203.050(2) (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 4(B) (Supp. 1967).

27. IND. ANN. STAT. § 36-4604(A), (B) (Supp. 1967). The power to enter and investigate complaints may also be given to the state health authority, relieving the pollution control board of much field work. *Id.* at §§ 36-4604(B)(9), (B)(10).

28. *See* MD. ANN. CODE art. 43, § 695(h) (Supp. 1967).

29. *See* MICH. STAT. ANN. §§ 14.58(5), (6) (Supp. 1968) (Michigan statute provides that the Commissioner of Health is the authorized agent for this purpose); N.Y. PUB. HEALTH LAW §§ 1271, 1279, 1280, 1282, 1283 (McKinney Supp. 1967) (provision for review of health authority's order); PA. STAT. ANN. tit. 35, §§ 4004-05 (1965) (provision made for referral to the air pollution control division); Air Pollution Control Act of 1967, ch. 347, §§ 5, 6, KAN. LAWS (1967).

Statutes may provide specifically for judicial review of the rules, regulations, and orders. MISS. CODE ANN. § 7106-128 (Supp. 1966); MO. REV. STAT. § 203.130 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1283 (McKinney Supp. 1967). There also may be a provision for obtaining a declaratory judgment on rules and regulations adopted as opposed to normal review for orders of enforcement. ILL. ANN. STAT. ch. 111½, §§ 240.8, 240.13 (Smith-Hurd 1966); LA. REV. STAT. ANN. §§ 40:2207-2213 (1965).

30. The separation of power from duty, of course, enables both the agency with power and the agency with duty to "pass the buck" for lack of an effective program to the other.

### III. THE ADMINISTRATION OF AN AIR POLLUTION CONTROL PROGRAM

#### A. Rules and Regulations

It is clear that the thrust of an air pollution control program is carried in the rules and regulations it may adopt.<sup>31</sup> As a backdrop to this function, an air pollution control agency is usually directed to consider the nature and amount of air contamination in its jurisdiction (including local variations), topography and climate, and the economic and technical realities of the abatement program it may propose.<sup>32</sup> Blanket state regulations and policies are generally discouraged.<sup>33</sup>

In addition, most states require public hearings to be held before any proposed regulation is adopted. Here, either the public at large or interested and affected persons alone may offer their own evaluations of the proposal.<sup>34</sup> Such measures seem aimed toward producing a cooperative effort at reducing air contamination through reasonable regulations.

#### B. Scope of Activity

Most states enacting new air pollution legislation have been forced to be cognizant of local programs already in effect. In order to avoid any conflict, some states have chosen to pre-empt local legislation.<sup>35</sup> On a realistic basis, however, it would appear unwise to destroy any program which, by its nature, will effect a closer and more constant

Instead of efficient air pollution control, the public may find each body claiming that the other has failed to perform its function.

31. This is not so for those states in which the specially created body has only an advisory function or where there is no special body created. FLA. STAT. ANN. § 403.10 (Supp. 1967); MD. ANN. CODE art. 43, § 695(h) (1967); NEV. REV. STAT. § 445.490 (1967); N.C. GEN. STAT. § 130-224 (1964).

32. ARK. STAT. ANN. §§ 82-1936 (a,b,c,d,e,f,g,i,j,k,l,n) (Supp. 1967); ILL. ANN. STAT. ch. 111½, § 240.7(B) (Smith-Hurd 1966); LA. REV. STAT. ANN. § 40:2206(B) (1965); MICH. STAT. ANN. §§ 14.58(7)(3), (4) (Supp. 1968); MO. REV. STAT. § 203.070(4) (Supp. 1967); N.M. STAT. ANN. § 12-14-5 (Supp. 1967); N.Y. PUB. HEALTH LAW §§ 1276(3), (4) (McKinney Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 6(B) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 7, KAN. LAWS (1967).

33. The most enlightened state approach in this respect has been taken by Washington, where the state has been divided by legislative mandate to cope with differing topographical and climatic conditions. See WASH. STAT. ANN. § 70.94-1 (Supp. 1967).

34. FLA. STAT. ANN. § 403.051(b) (Supp. 1967); ILL. ANN. STAT. ch. 111½, § 240.7(A) (Smith-Hurd 1966); LA. REV. STAT. ANN. § 40:2206(A) (1965); MICH. STAT. ANN. § 14.58(7)(2) (Supp. 1968); MO. REV. STAT. §§ 203.070(1,2) (Supp. 1967); N.Y. PUB. HEALTH LAW § 1276(2) (McKinney Supp. 1967); PA. STAT. ANN. tit. 35, § 4007 (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 6(A) (Supp. 1967).

35. ARK. STAT. ANN. § 82-1941 (Supp. 1967); LA. REV. STAT. ANN. § 40:2216 (1965).

policing of air pollution sources. Other states have therefore chosen not to pre-empt any local programs which meet or exceed the standards or air quality enunciated by state legislation.<sup>36</sup> Some states have even provided for "certification" of local programs which fulfill this criterion.<sup>37</sup> Furthermore, there are statutes which direct the enlistment of local officials to assume some of the state's powers and duties in their respective areas.<sup>38</sup>

Most statutes exempt certain air pollution causing activities from any regulation. On the whole, these are limited to cooking fires, incinerators and ovens in family dwellings, or air pollution wholly contained within a private or commercial establishment.<sup>39</sup>

### C. *Air Pollution Control Devices*

It is inevitable that the wave of public outrage over air pollution will be greeted with a wave of devices designed or purported to alleviate the problem. Some states, in order to prevent the offering of makeshift controls giving only lip-service to statutory standards, have provided for approval by the authority of all devices used in abating air pollution.<sup>40</sup>

Furthermore, most states require permits from the air pollution control authority before the construction of any potential air pollution source.<sup>41</sup> Generally, hearings must be held before any such permit is granted, denied, modified, or revoked.<sup>42</sup> In addition to new sources, states often regulate existing sources of air pollution by requiring that

36. ILL. ANN. STAT. ch. 111½, § 240.14 (Smith-Hurd 1966); IND. ANN. STAT. § 35-4608 (Supp. 1967); MICH. STAT. ANN. § 14.58(26) (Supp. 1968); MO. REV. STAT. § 203.140(1) (Supp. 1967); N.M. STAT. ANN. § 12-14-13 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1297 (McKinney Supp. 1967); PA. STAT. ANN. tit. 35, § 4012 (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5 § 15(8) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 16 KAN. LAWS (1967).

37. ILL. ANN. STAT. ch. 111½, §§ 240.14(a,b) (Smith-Hurd 1966); IND. ANN. STAT. § 35-4605 (Supp. 1967); MICH. STAT. ANN. § 14.58(26)(1) (Supp. 1968); MO. REV. STAT. §§ 203.150(2,3) (Supp. 1967).

38. CAL. HEALTH & SAFETY CODE § 2422(F) (Deering 1961); N.J. STAT. ANN. § 26:2C-11 (1964); TEX. REV. CIV. STAT. art. 4477-5, § 13 (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 16 KAN. LAWS (1967).

39. ARK. STAT. ANN. § 82-1934 (Supp. 1967); ILL. STAT. ANN. ch. 111½, § 240.5-3 (Smith-Hurd 1966); LA. REV. STAT. ANN. § 40:2204(c) (1965).

40. See, e.g., MICH. STAT. ANN. § 14.58(5)(h) (Supp. 1968); N.Y. PUB. HEALTH LAW § 1277(a,b) (McKinney Supp. 1967); PA. STAT. ANN. tit. 35, § 4004(9) (1964).

41. See MO. REV. STAT. § 203.050 1(3)(b) (Supp. 1967).

42. ARK. STAT. ANN. § 82-1935(j) (Supp. 1967); MISS. CODE ANN. § 7106-118(a) (Supp. 1966); Air Pollution Control Act of 1967, ch. 347, §§ 8(b),(c), KAN. LAWS (1967).



permits be obtained before any major repair work is undertaken.<sup>43</sup> Both of these standards may be enforced by a provision requiring the operator of any new or modified source of air pollution to make periodic reports to the authority on the nature and amount of pollution he is responsible for releasing.<sup>44</sup>

Despite the available data on present air pollution rates, the most notable failings of proposed air pollution regulation systems seem to arise under abatement of current, unmodified sources. Reporting provisions here are the most scarce, and limited amount of action taken by air pollution authorities to date indicates that this is the area of least concern to the regulators.<sup>45</sup> While this attitude may be theoretically defensible, it is strange to suppose that serious abatement of air pollution may be accomplished in a reasonable period of time by an overly farsighted enforcement program.

#### D. *Variances*

One uniform feature of state air pollution laws is the so-called "variance" procedure, which enables the operator of an air pollution source, on application, to receive for overriding reasons permission to continue his operation. Standards are high—the applicant must demonstrate that compliance with the controls would involve prohibitive cost or effectively close his business, and either negligible or utterly disproportionate public benefit would result.<sup>46</sup> No variance can be granted when a danger to public health is involved.<sup>47</sup>

Generally, a variance permit has no prescribed form. It is possible, for instance, to postpone or modify compliance measures until neces-

43. This may also be accomplished without a permit by requiring approval of any equipment that may cause air pollution as defined by the commission's rules and regulations. ILL. ANN. STAT. ch. 111½, § 240.6(d) (Smith-Hurd 1966); MO. REV. STAT. § 203.050(3)(b) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, §§ 8(b),(c), KAN. LAWS (1967).

44. ARK. STAT. ANN. § 82-1935(m) (Supp. 1967); MO. REV. STAT. § 203.050(3)(a) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 7(b), KAN. LAWS (1967).

45. In Missouri, for instance, provisions for the abatement of existing pollution sources seem to be satisfied by any showing of attempted compliance, down to makeshift and blatantly inadequate controls. Some industrial sources in St. Louis say that any demonstration of compliance is sufficient to sidestep the statutory mandates. Private communication on July 15, 1968.

46. ARK. STAT. ANN. § 82-1939 (Supp. 1967); ILL. ANN. STAT. ch. 111½, § 240.11(a) (Smith-Hurd 1966); LA. REV. STAT. ANN. § 40:2211(a) (1965); MICH. STAT. ANN. § 14.58(19) (Supp. 1968); MO. REV. STAT. § 203.110(1) (Supp. 1967); N.M. STAT. ANN. § 12-14-8 (Supp. 1967); TEX. REV. CIV. STAT. art. 4477-5, § 9(A) (Supp. 1967).

47. MICH. STAT. ANN. § 14.58(21) (Supp. 1968); Air Pollution Control Act of 1967, ch. 347, § 13(a), KAN. LAWS (1967).

sary adjustments can be made in the source, as well as to grant an exemption for a specified period.<sup>48</sup> Additionally, a variance invariably requires the operator to make frequent reports, and is subject to almost immediate revocation when a change of any relevant circumstance develops.<sup>49</sup>

While the variance provision undoubtedly opens avenues of potential abuse, it seems only realistic to permit a good-faith showing of inability to comply with law when noncompliance does not substantially undermine the purpose of the law. So long as the granting of a statutory variance remains an exception and does not become the rule, it is difficult to imagine that any major obstacle to air pollution abatement will be created from the procedure.<sup>50</sup>

### E. Enforcement Procedures

It is obviously pivotal for any effective air pollution statute that its enforcement measures be capable of eliminating sources of air pollution. The initial stage of enforcement is investigation, which may be initiated by required self-reporting,<sup>51</sup> inspection, or complaints from affected individuals. Normally, the authority, either on its own or through the chief administrative officer, performs as the investigative functionary.<sup>52</sup> Finding a violation, many statutes direct the air pollution control authority to seek the offender's compliance through conference, conciliation, or some form of persuasion.<sup>53</sup> If this fails, formal complaint proceedings are inaugurated.

The first step in a formal proceeding is the issuance of a complaint,

48. See, e.g., ARK. STAT. ANN. § 82-1939 (Supp. 1967); ILL. ANN. STAT. ch. 111½ § 240.11 (Smith-Hurd 1966); MD. ANN. CODE art. 43, § 693 (1967); MICH. STAT. ANN. § 14.58(22) (Supp. 1968); N.M. STAT. ANN. § 12-14-8 (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, §§ 10, 13, KAN. LAWS (1967).

49. ILL. STAT. ANN. ch. 111½, §§ 240.11(b), (c) (Smith-Hurd 1966); LA. REV. STAT. ANN. §§ 40:2211(b),(c) (1965). See, e.g., CAL. HEALTH & SAFETY CODE §§ 24291-302 (Deering 1961); ORE. REV. STAT. § 449.810 (1967); MICH. STAT. ANN. § 14.58(23) (Supp. 1968).

50. If the membership of the air pollution authority is slanted toward a special interest group, it is of course more likely that this procedure will be abused. See text accompanying notes 17-23 *supra*.

51. See MO. REV. STAT. § 203.050 (Supp. 1967). It would perhaps be interesting to speculate if these required reporting provisions are constitutional.

52. Such determination and enforcement may be the duty of another state official, such as the state commissioner of health, who is given that function by the act. There would then be no enforcement by the pollution control body. See N.Y. PUB. HEALTH LAW §§ 1277-84 (McKinney Supp. 1967). See also MD. ANN. CODE art. 43 § 698 (Supp. 1967).

53. E.g., ARIZ. REV. STAT. ANN. § 36-781 (Supp. 1967); IDAHO CODE ANN. § 39-2915 (Supp. 1967); MICH. STAT. ANN. § 14.58(8) (Supp. 1968); MO. REV. STAT. § 203.080(2) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347 § 5, KAN. LAWS (1967).

usually by the chief administrative officer, which will require the offender to appear at a hearing of the air pollution authority.<sup>54</sup> Here, the case for the state is presented by the chief administrative officer, who may subpoena both witnesses and relevant company documents, books, or records.<sup>55</sup> The confidentiality of this information, as it relates to trade secrets or production methods, is required by statute.<sup>56</sup>

If the authority determines that there is a violation, it will generally accord the party time to correct the problem on his own initiative. The authority may assess penalties of various weights,<sup>57</sup> or direct the appropriate state official to bring an action in state court for an injunction, closing down the operation.<sup>58</sup> There are provisions to escape the penalty if the violation is caused by an act of God, war, strike, or other circumstances beyond the control of the offender.<sup>59</sup>

54. See ARK. STAT. ANN. §§ 82-1935(e),(n) (Supp. 1967); ILL. ANN. STAT. ch. 111½, 240.5-1.3 (Smith-Hurd 1966); LA. REV. STAT. ANN. § 40:2208(A) (1965); MICH. STAT. ANN. § 14.58(9) (Supp. 1968); MO. REV. STAT. §§ 203.080(1)-(3) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 11(a), KAN. LAWS (1967).

55. The power to compel the production of documents may be limited or not, depending upon the wording of the statute. It may be stated in terms of documents reasonably related to matters at the hearing: ILL. ANN. STAT. ch. 111½, §§ 240.5-1.3 (Smith-Hurd 1966); simply related to the matters of the investigation; LA. REV. STAT. ANN. § 40:2208(C); MO. REV. STAT. § 203.080(5) (Supp. 1967); or any documents related to the investigation; MD. ANN. CODE art. 43, § 698(c) (Supp. 1967); MICH. STAT. ANN. § 14.58(10)(2) (Supp. 1968); Air Pollution Control Act of 1967, ch. 347 § 11(b), KAN. LAWS (1967).

56. *E.g.*, ARK. STAT. ANN. § 82-1937 (Supp. 1967); MO. REV. STAT. § 203.100(5) (Supp. 1967).

57. ARK. STAT. ANN. § 82-1938 (Supp. 1967) (misdemeanor); ILL. ANN. STAT. ch. 111½, § 240.15 (Smith-Hurd 1967) (up to \$200.00 per day); LA. REV. STAT. ANN. § 40:2214 (1965) (up to \$50.00 per day); MICH. STAT. ANN. § 14.58(16)(1) (Supp. 1968) (up to \$500.00 for the first violation, \$100.00 for each day of the continuing violation); MISS. CODE ANN. § 7106-127 (Supp. 1967) (one year imprisonment, fine of no less than \$50.00, no more than \$3,000.00); PA. STAT. ANN. tit. 35, §§ 4009(a), (b) (1965) (one year imprisonment, fine between \$30.00 to \$300.00 for the first violation, between \$500.00 to \$1,000.00 for the third and subsequent violations); Air Pollution Control Act of 1967, ch. 347, § 18(a), KAN. LAWS (1967) (up to \$1,000.00). Each day the violation exists may constitute a continuing violation. MO. REV. STAT. § 203.160(1) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 18(a), KAN. LAWS (1967).

58. *E.g.*, ILL. ANN. STAT. ch. 111½, 240.15 (Smith-Hurd 1966); MO. REV. STAT. § 203.160 (Supp. 1967) (The assessment of a fine and injunctive relief are cumulative and not in the alternative). ILL. ANN. STAT. ch. 111½, § 240.15 (Smith-Hurd 1966); MICH. STAT. ANN. § 14.58 (16)(1) (Supp. 1967); MO. REV. STAT. § 203.160(1) (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 18(b), KAN. LAWS (1967).

59. ARK. STAT. ANN. § 82-1938(d) (Supp. 1967); MD. ANN. STAT. art. 43, § 703(c) (Supp. 1967); MICH. STAT. ANN. § 14.58(18) (Supp. 1968); MO. REV. STAT. § 203.160(3) (Supp. 1967).

There is always the possibility that there will be periods when the threat to human health is so great that there is not time for the normal procedures. The declaration of an emergency is made when immediate action is needed to protect human health. The responsibility for making the declaration is usually left to the judgment of the air pollu-

It is most important to note that government action against one who violates the air pollution code does not create, support, dissipate, or prejudice a private right of action against that party.<sup>60</sup> Thus, these statutes do not affect private relationships.

An understanding of state programs of air pollution control is possible only after an examination of the federal role in this area. There is little doubt that Congress prefers the states to have a primary role in pollution control. But the degree of coordination called for in the federal scheme has not been achieved, as discussed in the note dealing with the Federal Air Pollution Program. An approach that is to be both effective and comprehensive within the present framework will require stronger and more responsible state and local action.

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tion control authority alone, MISS. CODE ANN. § 710.6-123 (Supp. 1966); the state health authority alone, MICH. STAT. ANN. § 14.58(14) (Supp. 1968); N.Y. PUB. HEALTH LAW § 1284 (McKinney Supp. 1967); or either of these two with the concurrence of the governor of the state, N.M. STAT. ANN. § 12-14-9 (Supp. 1967); Air Pollution Control Act of 1967, ch. 347, § 12(a), KAN. LAWS (1967).

60. ARK. STAT. ANN. § 82-1943 (Supp. 1967); LA. REV. STAT. ANN. § 40:2215 (1965); MICH. STAT. ANN. § 14.58(24) (Supp. 1968); MO. REV. STAT. § 203.170(2) (Supp. 1967).