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Regulate Pollution or Land Use? Managing Toxic Air Contaminants in Southern California*

Marc Dohan**

Introduction

As the U.S. attempts to reduce risks associated with breathing unhealthy air, potential overlaps between land use controls and air pollution regulations appear. This paper examines how The South Coast Air Quality Management District (SCAQMD) proposed to reduce the health risks to residents of Southern California caused by toxic air contaminants. The proposed regulations serve as a case study of the boundary between air quality and land use regulations.

In addition to managing the risk of toxic emissions by restricting locations where sources of hazardous emissions could be sited, SCAQMD proposed Rule 1408 to regulate the location of receptors. Although SCAQMD eventually concluded that Rule 1408 was beyond the scope of its authority,¹ the conflict between land use control and air pollution regulation is likely to continue.

Tensions between land use controls and air quality regulations in Southern California foreshadow national problems. As with auto emissions controls only recently adopted elsewhere,² California routinely addresses air pollution issues in advance of other states because it has the nation's dirtiest air.

SCAQMD's aborted attempt to wrest control of land use from local jurisdictions portends that the reservation of police powers to local

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¹ Telephone conversation with Ditas Shikiya, Program Supervisor Office of Planning and Rules at SCAQMD (Apr. 23, 1993).

² See Mass. Ann. Laws ch. 111 § 142(k) (Law. Co-op. 1992).

jurisdictions will interfere with regional attempts to solve air pollution problems. Hence, citizens in other states should be interested in whether SCAQMD's proposal was necessary.

In this paper, Part I analyzes SCAQMD's statutory authority to regulate toxic air pollutants. Part II examines Rule 1408 and two other toxics regulations. Finally, the paper concludes that, as the law now stands, SCAQMD can help manage risks from toxic air contaminants without usurping local control of land use law.

Statutory Background

The driving force behind cleaning California's air is the federal Clean Air Act, enacted in 1970 when Congress created the Environmental Protection Agency (EPA).³ The National Emissions Standards for Hazardous Air Pollutants (NESHAP), § 112 of the Clean Air Act, regulates toxic air pollutants. Congress listed dozens of hazardous air pollutants and instructed the EPA to "promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation..."⁴ Regulations cover both new and existing sources.⁵ EPA has so far developed regulations for only seven hazardous air pollutants.⁶

Congress gave the states authority to develop "a program for the implementation and enforcement" of federal emissions standards.⁷ In California, the Air Resources Board (ARB) enforces state and federal clean air law. Because it has several airsheds, the state established regional air quality enforcement districts, including SCAQMD.⁸

³ 42 U.S.C. §§ 7401-7761 (1992). Congress has passed several major amendments to the act, most recently in 1990.

⁴ *Id.* § 7412(d)(1).

⁵ *Id.* § 7412(d)(3).

⁶ GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990*, 44 (1993). The seven substances are asbestos, benzene, vinyl chloride, beryllium, mercury, radionuclides, and arsenic.

⁷ 42 U.S.C. § 7412(l)(1).

⁸ Cal. Health & Safety Code § 40469 (West 1993).

The California legislature established SCAQMD in 1976 to regulate the air quality in the South Coast airshed, consisting of Orange County and the most populous parts of Los Angeles, San Bernardino and Riverside Counties. Because air quality is a fundamentally regional issue, SCAQMD was designated the lead agency to clean the South Coast's air.⁹ SCAQMD is accountable for developing and implementing an Air Quality Management Plan (AQMP) to meet guidelines established by the federal and California Clean Air Acts. However, EPA, ARB, The Southern California Association of Governments (SCAG) and local jurisdictions all retain some control over cleaning California's air.¹⁰

One important limitation on agencies that regulate air quality in Southern California is that they are prohibited from regulating land use. In establishing SCAQMD, the legislature provided that:¹¹

No provision of this chapter shall constitute an infringement on the existing authority of counties and cities to plan or control land use, and no provisions of this chapter shall be interpreted as providing or transferring new authority over such land use to either the south coast district,

⁹ *Id.* § 39002 (West 1993).

¹⁰ The EPA has sole responsibility for the minimal air pollution standards for U.S. cars not licensed in California; for pollution related to airplanes, trains, and ships; and for pollution from offshore oil development. South Coast Air Quality Management District and South California Association of Governments, Final 1991 Air Quality Management Plan for the South Coast Air Basin 7-1 (July 1991) [hereinafter Final AQMP].

The ARB's primary responsibility is to assure that every district plan will bring the State into compliance with the Federal and State Clean Air Acts. Cal. Health & Safety Code § 40469. The ARB is solely accountable for regulating emissions that are best managed at the state level, such as emissions from on- and off-road vehicles, motor vehicle fuels, and consumer products. Final AQMP, *supra* note 10, at 7-2.

SCAG is a regional body that is accountable for coordinating the AQMP assessment and the adoption of regional transportation and improvement program. Final AQMP, *supra* note 10, at 7-2; Cal. Health & Safety Code § 40464 (West 1993). In addition, as a co-author of the AQMP, SCAG is responsible "for preparing and approving the portion of the [AQMP] plan relating to.... integrated regional land use." Cal. Health & Safety Code § 40460(b) (West 1993). SCAG's role is limited to helping to "coordinate the efforts of counties and cities." *Id.* § 40464(b).

Finally, local jurisdictions have authority over transportation facilities and uses and land use measures. Final AQMP, *supra* note 10, at 7-2.

¹¹ Cal. Health and Safety Code § 40414; *see also* § 40716(b) (prohibiting SCAQMD from implementing land use regulations in the area of indirect sources).

the Southern California Association of Governments or the state board.

ARB is also prevented from making land use decisions,¹² and the 1990 amendments to the Clean Air Act prohibit federal authorities from “infring[ing] on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use.”¹³ Thus, most land use decisions in the South Coast Air Basin are local.

SCAQMD derives its authority over toxic air pollutants from three different sources: (1) the power to issue and deny permits, (2) the ability to comment on potential environmental damage under California Environmental Quality Act (CEQA) and (3) the responsibility to identify sources of hazardous emissions under the Air Toxics “Hotspots” regulations.

The Permitting Power of SCAQMD

SCAQMD’s greatest responsibility is to issue operating permits. The permitting scheme allows SCAQMD to track and control polluters. SCAQMD derives its permitting power over sources of toxic air contaminants from three statutes: the California Clean Air Act, the Tanner Act and the Waters Act.

The heart of the California Clean Air Act is section 42300. It enables SCAQMD to establish a permitting system, such that:¹⁴

... before any person builds, erects, alters, replaces, operates or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants, such person obtain a permit to do so from the air pollution control officer of the district.

The permitting system must not “prevent or interfere with” attainment of any air quality standards. The statute prohibits issuing a permit unless the recipient complies with all “applicable orders, rules and regulations

¹² *Id.*

¹³ 42 U.S.C. § 7431 (1992).

¹⁴ Cal. Health & Safety Code § 42300 (West 1993).

To have the authority to implement NESHAP, SCAQMD must have the power to issue and deny permits. NESHAP requires that the local authority have the power to “assure compliance by all sources... with each applicable standard, regulation or requirement.” 42 U.S.C. § 7412(i)(5)(A)).

of the district and state boards.”¹⁵ The Act also gives SCAQMD indirect land use authority.¹⁶

The second statute that allows SCAQMD to issue permits is the Tanner Act¹⁷. The legislature adopted it to control emissions of toxic air contaminants to “prevent harm to the public health.”¹⁸ The Act defines a toxic air contaminant as a pollutant which may increase mortality, or illness or “may pose a present or potential hazard to human health,” including any material that the federal Clean Air Act identifies as toxic.¹⁹

At a minimum, the Tanner Act requires that SCAQMD reduce emissions from each source below the threshold level determined by the State to be safe.²⁰ It explicitly states that districts such as SCAQMD may adopt “more stringent control measures than the airborne toxic control measures adopted by the state board”²¹ and requires a panel of

¹⁵ Cal. Health & Safety Code § 42301 (West 1991).

¹⁶ Section 40717 of the Code authorizes a district to enter into an agreement with local jurisdictions to “develop a plan for transportation control measures.” Cal. Health & Safety Code § 40717 (West 1993). If the plan fails to sufficiently reduce emissions from transportation sources to attain state and federal ambient air quality standards, then SCAQMD shall develop its own plan. *Id.* § 40717(b). In principle, this provision allows SCAQMD to cap the amount of pollution that a local jurisdiction can generate from transportation. To avoid the fate of having a draconian SCAQMD plan that reduces transportation emissions through mandatory carpooling, four day work schedules or the like, local jurisdictions can cut emissions by using the land use and other powers that they have at their disposal. This statute gives SCAQMD a tenuous hold over some land use regulations. Although this regulation only applies to ambient air, it is conceivable that SCAQMD could also hold up approval of a project based on concerns over toxic air.

¹⁷ Cal. Health & Safety Code. §§ 39650–75 (West 1993).

¹⁸ *Id.* § 39650(c) (West 1993).

¹⁹ *Id.* § 39655 (West 1993).

²⁰ *Id.* § 39666 (West 1993). If there is no safe threshold level, the Act requires the source to reduce levels to the “lowest level achievable” using the “best available control technology or a more effective method.” Cal. Health and Safety Code § 39666.

²¹ *Id.* § 39666(d).

In 1989, the California Supreme Court clarified the meaning of the Tanner Act by unanimously holding that it “does not preclude air pollution control districts from identifying and regulating emissions of a substance before the [state] board has identified the substance as a toxic air contaminant under the act,” *Western Oil and Gas Ass’n v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d. 157, 168. Finally the Court noted that “local and regional authorities have the *primary responsibility* for control of air pollution from all sources other than vehicular

experts to establish the threshold level of emissions, based on “estimated levels of human exposure.”²²

The Waters Act (AB3205) provides the statutory authority for SCAQMD to regulate the issuance of building permits. Section 65850.2(b) of the Health and Safety Code requires that “no city or county shall issue a final certificate of occupancy unless the applicant has met... the requirements for a permit from the air pollution control district... exercising jurisdiction in the area governed by the city or county....”²³ This appears to give SCAQMD the power to veto new construction on grounds that the project violates its regulations.²⁴

However, § 65850.2(d) of the Waters Act states that the county “shall decide whether and under what conditions” to allow construction at the site “*after considering the recommendations* of the air pollution control district” and thus appears to give the district only an advisory role.²⁵ SCAQMD staff attorney, Peter Greenwald, maintains that the act allows SCAQMD to force builders to obtain permits if they are so required by another regulation.²⁶

Greenwald has the most plausible way to reconcile the Waters Act: Local jurisdictions have authority to start construction and issue certificates of occupancy, but commercial developers, to obtain certificates of occupancy, must comply with all SCAQMD regulations.

The California Environmental Quality Act

A second major source of SCAQMD authority is the California Environmental Quality Act (CEQA). It requires agencies to take all actions necessary to ensure the long term protection of the environment consistent with the provision to provide a decent home and suitable living standard for all Californians.²⁷ CEQA does not authorize sources.” *Id.*

²² Cal. Health & Safety Code § 39665(b)(1).

²³ Cal. Gov’t Code § 65850.2(b) (West 1993).

²⁴ Steve Broiles, a former attorney at SCAQMD, maintains that combining the Waters Act requirements with the California Clean Air Act requirements gives SCAQMD the authority to regulate land use. See Thomas McHenry, *The Land Use/Air Quality Connection*, L.A. Law., Jan. 1990, at 22, 26.

²⁵ Cal. Gov’t Code § 65850.2(d) (emphasis added).

²⁶ Telephone interview (Apr. 4, 1992).

SCAQMD to regulate land use, but the District can use this statute to push local jurisdictions to regulate land use as a means to control toxic air pollutants. CEQA is somewhat analogous to the National Environmental Policy Act, but it applies to any “project,” whether it is public or private, that requires any discretionary governmental action and can potentially affect the environment.²⁸

CEQA forces governmental agencies like SCAQMD to evaluate project impacts by preparing an Environmental Impact Report (EIR). Agencies must respond to an adverse EIR by (1) changing the project, (2) suggesting an alternative, (3) disapproving the project or (4) finding that “unavoidable significant environmental damage is acceptable.”²⁹

Local jurisdictions and agencies must integrate the EIR into their planning.³⁰ Thus, SCAQMD can press local authorities to reduce potential harm to air quality³¹ at the project level.³²

There are two serious limitations to using CEQA as the mainstay of the SCAQMD regulatory scheme. First, it allows SCAQMD only to comment on new sources seeking agency approval. Second, SCAQMD has not always had the time to respond adequately to every project that needs CEQA review.³³

²⁷ Cal. Pub. Res. Code § 21001 (West 1993).

²⁸ See Cal. Code Regs. tit. 14 § 15378 (1993). Most land use decisions, e.g., adopting or amending zoning ordinances or general plans, or granting conditional use permits or zoning variances, are subject to CEQA. Since major development projects usually involve some sort of discretionary approval, they are subject to CEQA. See Pub. Res. Code §§ 21080, 21080.5, 21084, 21166 (West 1993).

²⁹ Cal. Code Regs. tit. 14 § 15002 (1993). If the lead agency finds that “the benefits of a proposal outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered acceptable.” *Id.* § 15093 (1993).

³⁰ Cal. Pub. Res. Code § 21003 (West 1993).

³¹ For example, suppose SCAQMD determines that the traffic generated by a new office building will have an adverse impact on air pollution. It can suggest measures to reduce traffic ranging from a four day work week to more carpooling. Local authorities can achieve the same reduction by altering land use to reduce building square footage and thus reduce the amount of traffic attracted. Peter Greenwald suggested the general idea behind this example; telephone interview, *supra* note 26.

³² Patrick Del Duca & Daniel Mansueto, *Indirect Source Controls: An Intersection of Air Quality Management and Land Use Regulations*, 24 LOY. L.A. L.REV. 1131, 1134 (1991).

³³ Telephone interview with Steven Smith, Program Supervisor of Local Government, SCAQMD (Apr. 1, 1991). Smith also mentioned that SCAQMD hopes

Hotspots Legislation

A third source of power for SCAQMD is the 1987 Air Toxics Hotspots (ATH) legislation.³⁴ It seeks to identify locations where “releases may create localized concentrations of air toxics ‘hotspots’ where emissions from specific sources may expose individuals and population groups to elevated risks of adverse health effects.”³⁵ SCAQMD can use ATH to persuade local jurisdictions to use their land use authority, but the Act does not give SCAQMD any power to regulate land use.

ATH requires SCAQMD to collect emissions data from any facility that uses one of over 300 toxic chemicals.³⁶ Once SCAQMD has that information, it categorizes facilities based on danger to human health. SCAQMD considers the potency, toxicity and volume of released materials.³⁷ It also considers the proximity of a facility to potential receptors including hospitals, schools, day care centers, work sites and residential areas. Next, SCAQMD ranks facilities as high, intermediate or low priority.³⁸ The higher the priority, the more likely SCAQMD is to develop a risk assessment for that facility.³⁹

After SCAQMD has completed the risk assessment and prioritized the sources within its jurisdiction, the State must approve a risk assessment plan⁴⁰ before SCAQMD can make the information available to entice developers to seek SCAQMD CEQA approval early in the project’s life so that developers can take mitigation measures into account early on and relieve SCAQMD of the task of following up on every proposal.

Note that although SCAQMD has its own protocol to decide which projects to review, the agency has not had the resources to be able to adequately follow-up on all CEQA requests to assure that they have satisfactorily implemented the mitigation measures. Telephone interview with Peter Greenwald, *supra* note 26.

³⁴ Cal. Health & Safety Code § 44300 et seq. (West 1993).

³⁵ *Id.* § 44301(d) (West 1993).

³⁶ Cal. Code of Regs. tit. 26 § 90705, App. A (1993); *see also* Final AQMP, *supra* note 10, at 8–4.

The SCAQMD allows firms to report their own chemical inventory if they can demonstrate that their reporting system is comprehensive, uses state of the art technology, has been independently verified, and collects data for each exposure rate. Cal. Health & Safety Code § 44340 (West 1993).

³⁷ Cal. Health & Safety Code § 44340.

³⁸ Final AQMP, *supra* note 10, at 8–4.

³⁹ Cal. Health & Safety Code § 44360 (West 1993).

to the public.⁴¹ The District interprets this to mean that information is published only if a city or county requests it.⁴² Thus, cities or counties may make land use decisions without knowing the level of toxicity in a given area. However, if SCAQMD finds “there is a significant health risk associated with the emissions from the facility” then it may require the operator of the facility to inform all exposed persons.⁴³

In essence, the ATH relegates SCAQMD to an information providing role. It can, at most, inform towns, school districts, residents or others receptors about the dangers of a particular emissions source near them. These receptors then may take action to prevent the local toxic emitter from fouling the air in their neighborhoods.

SCAQMD Toxic Regulations and Land Use Law

This section illustrates the boundary between toxic emission controls and land use regulation by comparing rejected Rule 1408 with a regulation governing toxic emissions near schools and a more traditional regulation governing carcinogenic emissions from new sources.

Rule 1408

Rule 1408, an “Indirect Source Review for Toxic Air Contaminants,” had potentially profound implications for toxic air pollution regulations. It sought to regulate receptors, rather than sources of toxic emissions. Its goal was to use available information on sources of toxic air contaminants to prevent inappropriate siting of such sources near sensitive receptors (schools, residential areas, hospitals).⁴⁴ Because it was never adopted, toxic source facilities are not required to identify nearby sensitive receptors, and SCAQMD has no basis for notifying sensitive receptors of toxic sources in their vicinity.

Four terms are critical to Rule 1408: *inappropriate siting*, *indirect sources*, *sensitive receptors* and *toxic air contaminants*.

⁴⁰ *Id.* § 44362 (West 1993).

⁴¹ *Id.* § 44361(a) (West 1993).

⁴² Telephone interview with Mark Saperstein, Program Supervisor, SCAQMD Office of Planning and Rules (Nov. 13, 1991).

⁴³ Cal. Health & Safety Code § 44362(b).

⁴⁴ Final AQMP, *supra* note 10, at 8–9.

• *Inappropriate siting.* According to a control measure upon which the rule had been based, inappropriate siting occurs when a new source of pollution is sited within “close proximity” to a sensitive receptor.⁴⁵ As in ATH, potency, toxicity and volume of released materials should be considered along with proximity to potential receptors.⁴⁶

• *Indirect sources.*⁴⁷ The California Clean Air Act does not define “indirect sources.”⁴⁸ According to Mark Saperstein of the SCAQMD Office of Planning and Rules, Rule 1408 was designed to reduce toxic emissions from both direct and indirect sources.⁴⁹ It sought to prevent siting sensitive receptors near “sources of toxic air contaminants”⁵⁰ including “freeways and major traffic thoroughfares.”⁵¹

⁴⁵ Control Measure No. 90-M-H-3, *id.*, App. IV–Cat H-42.

⁴⁶ The control measure and the state regulations do not define close proximity, but the control measure does refer to AB3205 and ATH. If 1408 defined close proximity as AB3205 does, then inappropriate siting exists when a source is sited within 1,000 feet of a sensitive receptor, while a sensitive receptor is inappropriately sited if it is within one quarter mile of a source.

This interpretation sets distinct geographic guidelines about which sources and which receptors fall within the purview of the regulations. Hence it provides the business community with clear expectations of which receptors they should consider when opening or modifying their plants. However this definition over protects receptors from toxic emissions that are not harmful at the statutory distance, and fails to provide enough protection from toxic emissions that are dangerous outside the prescribed radius. The definition based on ATH takes the toxicity of the emissions and the harm to individuals into account is more flexible.

⁴⁷ For a detailed discussion of indirect sources and land use control, *see* Del Duca & Mansueto, *supra* note, 32.

⁴⁸ Del Duca & Mansueto, *supra* note 32, at 1160. Furthermore, the California Code of Regulations does not define indirect source.

The Federal Clean Air Act defines an indirect source as “a facility... which attracts... mobile sources of air pollution. Direct emissions sources... shall not be deemed indirect sources.” 42 U.S.C. § 7410(a)(5)(C) (1992). EPA’s definition of an indirect source includes any facility that attracts cars such as highways and roads; parking facilities; retail, commercial and industrial facilities; recreation, amusement, sports and entertainment facilities; airports, office and government buildings; apartment and condominium buildings; and education facilities. 40 C.F.R. § 52.22(b)(i)(1990). However, indirect source legislation regulates the pollution that the facility attracts, not that it emits. Hence, a source that both pollutes and attracts mobile sources is regulated as an indirect source only on the basis of the mobile sources it attracts.

⁴⁹ Telephone interview with Mark Saperstein, *supra*, note 42.

⁵⁰ Final AQMP, *supra*, note 10 at 8–9.

⁵¹ *Id.*

- *Sensitive receptors.* Neither California statutes nor regulations define “sensitive receptors” but the above-mentioned control measure refers to schools, residential areas and hospitals.⁵²

- *Toxic air contaminants.* California law clearly defines a toxic air contaminant as one that may increase mortality or illness or pose a potential hazard to human health.⁵³ The Code of Regulations includes a list of over 300 chemicals considered toxic.⁵⁴

SCAQMD could have used Rule 1408 to prevent siting sensitive receptors near any source emitting one of these chemicals as well as the converse. It would have given SCAQMD a veto over the location of receptors as well as direct and indirect sources of air toxics.

This clearly has major land use implications. Under current regulations, before a *source* begins operations it must obtain a permit from SCAQMD. Under the proposal, SCAQMD’s power would have expanded, so that a local governing body would be unable to approve *receptor* sites without SCAQMD approval. Because sensitive receptors cannot reduce emissions, no permitting issue was involved. The proposal was, thus, a quantum leap from the permitting of sources to a determination of where sensitive receptors might locate. SCAQMD’s District Council’s office eventually acknowledged that it violated prohibitions against land use regulations and rejected the measure.⁵⁵

Toxic Emissions Near Schools

In 1988, the legislature enacted legislation to protect school children from the effects of air toxics (AB3205).⁵⁶ It requires anyone wishing

⁵² *Id.*, at App. IV-C, H-42. Even if a residential area is a sensitive receptor, one still must define the minimum size neighborhood that qualifies.

⁵³ Cal. Health & Safety Code § 39655.

⁵⁴ Cal. Code of Regs. tit. 26 § 90705, App. A

⁵⁵ Telephone conversation with Ditas Shikiya, *supra*, note 1. The SCAQMD also recognized when it first proposed 1408 that “[t]he measure will require a cooperative effort with city and county governments involved in land use decisions.” Final AQMP *supra* note 10, App. IV-C, at H-43.

⁵⁶ The legislation was enacted as Chapter 1589 of the 1988 Statutes, and codified as Cal. Health & Safety Code §§ 42301.6–9, and Cal. Gov’t Code 65850.2(c). This legislation was part of the Waters Act, discussed above. To avoid confusion, whenever I mention the part of the Act that discusses schools, I will refer to the Act as AB3205, and when I speak of the entire Act, I will refer to it as the Waters Act.

to construct or modify a toxic source located within 1,000 feet of a school to notify the parents of all attending children of the potential impact on air quality.⁵⁷

If SCAQMD determines that there is a “reasonably foreseeable threat” of a release of an air contaminant from an existing source within 1,000 feet of a school, it must notify the agency⁵⁸ in charge of the school as well as the fire department.⁵⁹ If SCAQMD concludes that the emissions pose a substantial probability of injury, it has the authority to prevent the release of toxics by immediately closing the facility.⁶⁰

AB3205 thus empowers SCAQMD to assure that people using one class of sensitive receptors, school children, breathe air cleaner than that which may be available to the general population.⁶¹ SCAQMD’s authority to regulate sources located on different pieces of land unequally may be seen as a narrow exception to the general principle that it cannot encroach on the land use authority of local jurisdictions.⁶²

New Source Review of Carcinogenic Air Contaminants

Under the Tanner Act, SCAQMD has also adopted Rule 1401 to “specif[y] limits for maximum individual cancer risk.”⁶³ It applies to

⁵⁷ Cal. Health & Safety Code § 42301.6. The statute also calls upon SCAQMD to notify all residents whose children attend school that is within one quarter mile of the source. *Id.*

⁵⁸ *Id.* § 25532(c) (West 1993), (defining administering agency as the agency which is designated to implement the law, which in this case is the local school board.)

⁵⁹ *Id.* § 42301.7(a), (b). The administering agency then can order modification and implementation of a revised risk management plan, or order a review of the facility’s risk management and prevention plan.

⁶⁰ *Id.* § 42301.7(c)(1).

⁶¹ SCAQMD also maintains that this legislation also requires it to conduct a survey of existing toxics within one quarter mile of all proposed school sites. Final AQMP, *supra* note 10, at 8–5.

⁶² SCAQMD might argue that this regulation does not implicate land use law, it merely attempts to clean the air that school children breathe. Just as an upwind source must emit fewer toxics than a downwind one, a source near a school faces a higher standard than other sources. Yet, if this argument were followed to its logical extreme, SCAQMD could regulate all sources on the basis of their impacts on nearby receptors. This sort of regulation represents a distinct change from the traditional “public health” justification as articulated in such statutes as the Tanner Act. Nevertheless, the legislature gave SCAQMD limited power to do so.

⁶³ South Coast Air Quality Management District and Southern California Ass’n of Governments, Air Quality Management District Rules 1401–1 (Adopted June 1, 1990,

new, relocated and modified permit users⁶⁴ and is a typical, traditional toxic regulation. Rule 1401 requires SCAQMD to deny any permit if emissions of “any carcinogenic air contaminant” may occur, unless a facility is constructed with the Best Available Control Technology for Toxics (T-Bact) and the maximum individual cancer risk “within a radius of 100 meters” is less than one in one million.⁶⁵ In no case, can the facility pose the risk of more than 0.5 excess cancer cases in a population already subject to a risk greater than one in one million.⁶⁶ The rule sets forth elaborate risk assessment procedures, emissions calculations and a few exemptions.⁶⁷

In contrast with the AB3205 and proposed Rule 1408, Rule 1401 does not conflict with land use regulation. It merely caps emissions within the statutory framework established by the Tanner Act.⁶⁸

Making the Most of SCAQMD Authority

SCAQMD already has the authority to accomplish the most important parts of Rule 1408 without regulating land use. The Tanner Act gives it authority to “reduce emissions” to protect the public health.⁶⁹ While it does not authorize the part addressed to the location of receptors, it authorizes reduction of facility emissions.

Ordinarily under CEQA, local governments are lead agencies and need only consider the effects of pollution on receptors. However, when SCAQMD is designated a lead agency under CEQA, it can prevent the siting of new receptors.

and Amended Dec. 7, 1990) [hereinafter SCAQMD Rules].

⁶⁴ Final AQMP, *supra* note 10, at 8–6.

⁶⁵ SCAQMD Rules, *supra* note 63, at 1401–3. If the facility uses T-Bact, the risk can be no greater than ten in one million. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1401–5, 1401(g). Exemptions include stationary sources that renew permits, change ownership, or make modifications that cause no increase in estimated cancer cases.

⁶⁸ There is no argument that 1401 regulates land use by imposing regulations that are so strict that new sources cannot comply with the ordinance. 1401 requires industry to regulate the emissions of potentially carcinogenic chemicals by using technology that is widely employed in many financially competitive industries. *See* Environ, Elements of Toxicology and Chemical Risk Assessment 31–51 (1986).

⁶⁹ Cal. Health & Safety Code § 3966(c).

Presently, SCAQMD only disseminates requested information, and local authorities either do not have information regarding toxic emissions or can ignore it. However, if SCAQMD were fully to implement ATH and routinely disseminate information that it gathers and analyzes about air toxic hotspots, local officials would be obligated to evaluate that information under CEQA.

Conclusion

When California passed AB3205 to reduce the health risks to school children, it took a limited step toward allowing regional air quality districts to regulate land use. However, rejected Rule 1408 would have gone much further, stripping municipalities of the power to site sensitive receptors.

Although SCAQMD did not implement Rule 1408, the District can still achieve many of the rule's goals through the Tanner Act, CEQA and ATH. Specifically, SCAQMD can control the location of new sources by using the Tanner Act. Although it cannot regulate the location of new receptors, the District could combine the powers it has under ATH and CEQA to force communities to evaluate the impact of local air toxics.

Most importantly, SCAQMD should reverse its policy of only distributing hotspots data upon request. It could then use CEQA to force communities to evaluate air quality along with other factors in making land use decisions. If municipal authorities continue to site receptors without adequately evaluating risks from local air contaminants, then SCAQMD should seek legislative authority of the type proposed in rejected Rule 1408.

