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## The Wyoming Air Quality Act

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## LEGISLATIVE COMMENT

### THE WYOMING AIR QUALITY ACT

In 1967, the Wyoming State Legislature enacted the Wyoming Air Quality Act.<sup>1</sup> It is probably safe to surmise that a great deal of the impetus behind the passage of the Act arose from the realization that the Federal Government would interfere if the State remained inactive, and would force upon the State standards set by the Secretary of the U.S. Department of Health, Education, and Welfare, as provided by the Federal Air Pollution Control Act.<sup>2</sup>

The purpose of the Wyoming Act is to regulate the pollution of air in the State of Wyoming for the health, safety and welfare of the people of the state. Implicit in the scope of such legislation is the recognition that air pollution is a health hazard. This Act is not the first indication that the state government recognizes air pollution to be a hazard to health. City ordinances have in the past been aimed at the control of such a nuisance, in the form of zoning ordinances, etc. The Wyoming Supreme Court has on occasion taken judicial notice that smoke, gas, dust and noxious odors are inherently harmful.<sup>3</sup> But, whether or not air pollution was considered a nuisance in the past, the Wyoming Supreme Court recognized, in the case of *Hillmer v. McConnell Bros.*,<sup>4</sup> that

As a general rule, the police power of the state extends to the prevention and abatement of nuisances; and a legislative body within constitutional limits, may prescribe what shall constitute a nuisance. This power extends to the prohibiting of acts or things not considered offensive or injurious in the past.<sup>5</sup>

It is questionable whether anyone would contest the power of the state to enact this anti-pollution legislation on the grounds that such pollution was not a nuisance at common law. Such a question has been raised in other states, at earlier dates. However, in view of the *Hillmer* decision, and in view of the Wyoming decision recognizing pollution to be a nuisance,<sup>6</sup>

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1. WYO. STAT. § 35-487 to § 35-504 (Supp. 1967).

2. 42 U.S.C. § 1857(d) (1967).

3. *Sheridan Drive-In Theatre, Inc. v. State*, 384 P.2d 597, 600 (Wyo. 1963).

4. 414 P.2d 972 (Wyo. 1966).

5. *Id.* at 973.

6. *Sheridan Drive-In Theatre, Inc. v. State*, *supra* note 3.

such an argument would be difficult to seriously offer to the court for consideration. In addition, the question of whether pollution is in fact a health hazard, in this day of modern science and technology, would be quickly answered in the positive.<sup>7</sup>

The State of Wyoming is in the peculiar situation of passing air pollution control measures before the state has suffered greatly from the effects of modern industrialization. The state is still relatively sparsely populated, and only a few localities have been introduced to the blight of industrial air pollution. Thus, Wyoming is in an enviable position of being armed to stop pollution before it starts. However, the Act puts the state in an awkward position insofar as one of the recurrent problems of the state economy is the need to attract new industry into the state. The saving grace of course will be that industry cannot fail to realize that, in view of the recent Federal legislation in this area, air pollution control will be an expense wherever industry turns throughout the United States in the near future. Industry may even be attracted to this state by virtue of a provision of the Act, that the Wyoming standards will never be *more* stringent than those required by Federal law. Thus, Wyoming standards will not fluctuate above the minimum standards to be found anywhere in the United States.

Our purpose here shall be to review the statute with an eye toward possible areas of weakness, that is, with a view to investigating the provisions of the Act most likely to come under attack should litigation arise under the Act.

### THE GENERAL CONSTITUTIONALITY

Air pollution is not a modern problem.<sup>8</sup> The first smoke abatement law was passed during the reign of Edward I, in 1273, prohibiting the use of coal as being detrimental to human health.<sup>9</sup> But the development of modern industry and the modern megalopolis has created a crisis which our legislatures are not attempting to cope with through legis-

7. For a brief recital of the damaging effects of air pollution on health and property, see 9 RUTGERS L. REV. 616-620 (1955).

8. In *William Aldred's Case*, 77 Eng. Rep. 816 (1611), the court enjoined the maintenance of a pigstye by the defendant when the pigstye so corrupted his neighbor's air as to constitute a nuisance.

9. *Chass & Feldman, Tears for John Doe*, 27 S. CAL. L. REV. 349, 352 (1954).

lation. Such legislation is so recent that there is little case law directly in point.<sup>10</sup> In turning to other related areas of the law, it is possible to prognosticate with some confidence as to the direction the courts will take when the validity of these statutes is questioned.

Legislation in this area has been implemented through the use of the state police power to regulate commerce for the health, safety, and welfare of the public. The end result of such legislation is the imposition of use restrictions on property. The courts have generally recognized that such use restrictions on property are valid if they "find their jurisdiction in some aspect of the police power exerted for the public welfare. Unless the particular regulation bears a substantial relation to the public health, safety, morals, comfort, convenience, or the general good and welfare in the proper sense, it is an invasion of the constitutional right of private property."<sup>11</sup> Not only does the statute declare the fundamental policy behind the Act to be the promotion of public health and welfare,<sup>12</sup> but, as noted in the *Sheridan Drive-In, Inc.* case, the Wyoming Supreme Court has taken judicial notice of the fact that pollution is a hazard to public health. It is therefore doubtful that the Wyoming courts will find the Act to be an unconstitutional restriction on the use of property.

The first general question which arises is whether abatement of air pollution is a reasonable, not an arbitrary, exercise of the state police power to regulate commerce. It has generally been held that such an exercise is constitutional if the regulation does not interfere with interstate commerce, and is not arbitrary and unreasonable.<sup>13</sup> The question of interference with interstate commerce would seem most easily answered. The United States Supreme Court held in the *Huron Portland Cement Co.* case<sup>14</sup> that the Detroit ordinance prohibiting air pollution did not interfere with interstate com-

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10. The United States Air Pollution Control Act has been litigated only once, *U.S. v. Bishop Processing Co.*, 287 F. Supp. 624 (D.C. Md. 1968). The Wyoming Air Quality Act has yet to be litigated.

11. *State ex rel. George v. Hull*, 65 Wyo. 251, 199 P.2d 832 (1948).

12. WYO. STAT. § 35-488 (Supp. 1967).

13. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Northwest Laundry Co. v. City of Des Moines*, 239 U.S. 486 (1916); *Penn-Dixie Cement Corp. v. City of Kingsport*, 189 Tenn. 450, 225 S.W.2d 270 (1949).

14. *Huron Portland Cement Co. v. City of Detroit*, *supra* note 13.

merce, without discussing *why* it did not interfere with interstate commerce.<sup>15</sup>

The question of the validity of this Act as to unreasonable and arbitrary regulation may be more meritorious than the preceding question. An exercise of a regulatory police power is valid if it is not arbitrary and unreasonable in application.<sup>16</sup> The Wyoming Air Quality Act provides that "Any rule or regulation or standards, or amendment thereof, may differ in its terms and provisions . . . as between particular air pollution sources . . . ."<sup>17</sup>

It would seem from the wording of the particular clause quoted above that the language could be plainly construed as authorization to differentiate between two sources similarly situated, polluting in the same manner, and to the same degree. Should such a situation ever arise, the pollutant unfavorably affected will be certain to raise the question of unconstitutional and arbitrary application of the Act.

One answer to this problem may be found in decisions treating application of zoning ordinances. In a representative case, *Consolidated Rock Products Co. v. City of Los Angeles*,<sup>18</sup> the plaintiff was foreclosed from running a gravel operation on his land by the zoning board while, in the same zone on adjacent land, a neighboring gravel operation was permitted a variance. The court found that plaintiff's operation, in and of itself, raised sufficient dust and sand to constitute a pollution hazard to the people of the adjoining town, without regard to what the other operation does. Therefore, the zoning board did not act capriciously, arbitrarily and unreasonably in enjoining plaintiff's operation.

It would seem, then, that if this case would lend direction, the emphasis in future litigation will be placed on the hazard the individual pollutant represents to the community; not on a comparative, but on an individual basis.

#### ENFORCEMENT AS TO MUNICIPALITIES

A further problem arises to the applicability of the Act to cities. A person is defined by the Act to be, among others,

15. See, Note, 59 MICH. L. REV. 964, 965 (1961).

16. See note 13.

17. WYO. STAT. § 35-491(c) (Supp. 1967).

18. 20 Cal. Rptr. 638, 370 P.2d 342 (1962).

a municipality.<sup>19</sup> The standards set by the Council are to be enforced against any person found contaminating the air.<sup>20</sup> But, the Act stipulates, "Nothing in this Act shall supersede or limit the applicability of any law or ordinance relating to sanitation, industrial health or safety."<sup>21</sup>

At least one Wyoming city provides in its ordinances that "The city manager is hereby authorized to establish rules and regulations for the operation of the city dump ground and its use by the public."<sup>22</sup>

If the Act is not to supersede the applicability of any ordinance, then it may be understood that a city may continue to operate its dump in such a manner<sup>23</sup> as to cause air pollution. The only qualification would seem to be that the city must have made such provision for the operation of the dump in its ordinances, and that the ordinance be enacted prior to the effective date of the Air Quality Act.

On reflection, however, doubts arise as to the legitimacy of such contentions. The legislature did manifest an intent to abate air pollution. It also specifically identified the municipality as an entity governed by the statute.

There is a body of law which deals with exceptions to statutes. Exceptions to a statute should be reasonably construed.<sup>24</sup> Ordinarily, a statute and an exception proviso or saving clause constituting a part thereof are to be considered together in endeavoring to ascertain legislative intent.<sup>25</sup> Here, the legislative intent as to application of the anti-pollution standards to cities is confused. An over-view of the whole Act would seem to indicate that cities were meant to be governed by the Act. Impliedly, all that would be excepted from the Act and its standards are city ordinances previously in effect which already provided for standards governing air pollution. Such would be the only reasonable construction of

19. WYO. STAT. § 35-489(d) (Supp. 1967).

20. WYO. STAT. § 35-495 (Supp. 1967).

21. WYO. STAT. § 35-502(c) (Supp. 1967).

22. LARAMIE, WYO., CODE § 15-23 (1964).

23. Laramie, Wyoming, operates an open-pit incineration dump. The trash is first burned, then buried.

24. *Palkosky v. Garcia*, 19 N.J. 175, 115 A.2d 539, 542 (1955); *State v. Brown*, 22 N.J. 450, 126 A.2d 161, 166 (1956); *Lien v. Rowe*, 77 S.D. 422, 92 N.W.2d 922, 924 (1958).

25. *McJimsey v. City of Des Moines*, 231 Iowa 693, 2 N.W.2d 65, 68 (1942).

the saving clause<sup>26</sup> when considered as a part of the whole Act. The fact that such intent is not clearly set forth in the language of the clause may lead to litigation.

### OPERATION OF THE WYOMING AIR QUALITY ACT

The Wyoming Air Quality Act is designed to effectuate the policy of maintaining "a reasonable degree of purity of the air resources of the state."<sup>27</sup> An air resource council is established under the Act, which is charged with the responsibility of establishing rules, regulations, and standards regarding air pollution levels throughout the state, and also with the duty of enforcement of such standards, rules or requirements.

The council is composed of three representatives of related state agencies (health, agriculture, land and water conservation), and six members to be appointed by the Governor, one from municipal government, three from industry, and two from the public at large. The division of administration of the Department of Public Health is given the responsibility of doing the research, administrative tasks, pollution level measurement and enforcement of rules, etc. for the council.

The first job of the council was to establish ambient air standards "and/or" emission control requirements and rules for the state. The standards for the state were established after a series of public hearings concerning all interested parties throughout the state, the standards being set pursuant to general guidelines laid down by the legislature and incorporated into the Act.

Since the general air pollution standard has been adopted by the council for the state, the appropriate Department of Health teams have proceeded to test scientifically the air pollution levels of various parts of the state, to see if violations of the standard set by the council are occurring. The testing of the air in different state areas continues as of this time.

If, after the testing procedure the division has cause to believe that a rule, regulation, or air standard is being violated, or if a written and verified complaint alleging a viola-

26. WYO. STAT. § 35-502(c) (Supp. 1967).

27. WYO. STAT. § 35-488 (Supp. 1967).

tion is filed with the division, a prompt investigation is to be made. If the division finds a violation, it shall try through conciliation to eliminate the source or cause of the air pollution violation.

If conciliation fails, the division may issue a cease and desist order against the pollutant source, such pollution order to become final unless within 30 days after the notice of the order, the pollutant source asks for a hearing before the council. If a hearing is requested, the council may affirm, modify, or reverse the cease and desist order. Violation of any order, rule, or regulation causes the offender to be guilty of a misdemeanor (if found guilty in the courts), and misdemeanor punishable by a fine of \$750/week of violation. Misdemeanor action is not a bar to further court proceedings to enforce the provision of the Act, because the division is given the power to institute any necessary enforcement proceedings in the name of the state.

The fact that the act provides for fines and further court action to enforce the act does not deprive the private citizen of his right to bring suit against the pollutant source in the courts.

Various emergency provisions are contained in the Act, whereby pollution can be immediately halted if an imminently dangerous situation of air pollution exists. The provisions call for "hurry-up" hearing procedures so that the council itself may determine what action is appropriate and whether the cessation of the polluting emission should be ordered to continue. The Act clearly states that such emergency provisions as are contained in the Act are not to limit any power which any authorized officer of the state may have to declare an emergency and act on that declaration.

The council has the authority to examine witnesses, issue subpoenae, and obtain evidence relevant to the air pollution situation under consideration. This information may include all relevant records and information of any private source of contamination, but such information is to be kept confidential, unless approved by the contamination source for release to the public.



Any authorized person in connection with the division has the right of entry on the premises (except private residences) where a pollutant source is or may be located. The right of entry must be at a reasonable time, and the occupant or operator of the premises shall receive a written report setting forth all facts which relate to the compliance status of the source. All provisions of the Act relating to rules, regulations orders, setting of standards, variances, enforcement procedures, etc., are subject to the provisions of the Wyoming Administrative Procedure Act.

Finally, the Act expressly does not have jurisdiction or authority over pollution existing solely on private or industrial property. The Act cannot affect employer-employee relationships with regard to air pollution problems. And finally, the Act does not supersede or limit the applicability of any law or ordinance relating to sanitation, industrial health or safety.

This capsule summary of the provisions of the Wyoming Air Quality Act is included merely to give the reader an overview of the operation of the Act. Specific provisions will be dealt with in greater depth in the course of the article.

#### “TAKING” QUESTION

The Council is given the authority to establish “such ambient air standards and/or emission control requirements . . . as in its judgment may be necessary to prevent, abate, or control air pollution.”<sup>28</sup> Further, the council is given certain enforcement tools with which to ensure compliance with the above-mentioned standards and requirements.

The Act<sup>29</sup> gives the division of public health power to issue “cease and desist” orders pursuant to a notice-public hearing procedure, such “cease and desist” orders being capable of extending for indefinite periods of time depending upon the aggrieved party’s lack of action in regard to contesting the order,<sup>30</sup> or upon the council’s power to affirm the order after a hearing.<sup>31</sup> It should be noted that the aggrieved

28. WYO. STAT. § 35-494(a) (Supp. 1967).

29. WYO. STAT. § 35-495 (Supp. 1967).

30. WYO. STAT. § 35-495(c) (Supp. 1967).

31. WYO. STAT. § 35-495(d) (Supp. 1967).

party is at all times entitled to judicial review of the order "in the manner prescribed by the Wyoming Administrative Procedure Act."<sup>32</sup>

Also, under specified types of emergency situations, the director of the Department of Health may issue immediate "cease and desist" orders subject to (in some "generalized" air pollution situations) the concurrence of the governor in the issuance of the order,<sup>33</sup> and in all situations, "generalized" or not, to the power of the council to affirm, deny, or modify the order.<sup>34</sup>

The granting of variances of the standards and requirements,<sup>35</sup> while primarily intended as means with which to alleviate the economic hardship of immediate compliance with the standards or requirements, are nevertheless subject to the provision that they may continue only until such time as the necessary means of pollution control become available,<sup>36</sup> or only for a time period which would allow a reasonable distribution of the cost of the abatement methods.<sup>37</sup>

Violation of any regulation or order of the council is punishable by a fine (misdemeanor) not to exceed \$750 per week of violation.<sup>38</sup>

Finally, the Division of Public Health is given the authority to bring, in the name of the state, court proceedings for injunction or other appropriate judicial remedy,<sup>39</sup> against a pollutant source which has failed to comply with council regulations, orders, or requirements.

The enforcement tools above enumerated, of the Wyoming Air Quality Act are essential for the accomplishment of the pure air purpose of the Act, but by their very nature they raise an issue common to most kinds of regulation of property use legislation promulgated under the general authority of police power. That issue is whether the regulation of property uses, causing elimination of the value of the property or complete prohibition of its use, under the author-

32. WYO. STAT. § 35-498(c) (Supp. 1967).

33. WYO. STAT. § 35-496(a) (Supp. 1967).

34. WYO. STAT. § 35-496(a) and (b) (Supp. 1967).

35. WYO. STAT. § 35-497 (Supp. 1967).

36. WYO. STAT. § 35-497(i) (Supp. 1967).

37. WYO. STAT. § 35-497(ii) (Supp. 1967).

38. WYO. STAT. § 35-500(a) (Supp. 1967).

39. WYO. STAT. § 35-500(b) (Supp. 1967).

ity of an act promulgated under the police power of the state, constitutes a "taking" of property without compensation, which is unconstitutional under the fourteenth amendment of the United States Constitution and art. 1, sections 32 and 33 of the Wyoming Constitution.

It is doubtless obvious to the reader that the issuance of a cease and desist order in regard to any type of industrial plant, would involve at least some diminution of value of the plant operation, and, at most, a prohibition of the operation itself. Compliance with the Act through the variance procedure, which involves a procedure for abatement of the pollution level over a period of time, will involve some diminution in the value of the property regulated.

As to the diminution question, the U.S. Supreme Court<sup>40</sup> and the Wyoming Supreme Court,<sup>41</sup> are in agreement that a regulation or order promulgated under the police power which merely diminishes the value of property by restricting a use upon it is constitutional.

The real problem involving "taking" arises, however, when the enforcement of the Act causes not merely a reasonable diminution of the value of the property regulated, but causes a diminution to the point of prohibition of the use to which the property had formerly been put. In other words, while the courts are sure the diminution as the result of regulation under police power laws is acceptable, they hesitate to some extent to allow actual prohibition of a property use, for the benefit of the public, without some compensation to the prohibited owner. It should further be noted that, in the context of the Wyoming Air Quality Act, the general class of property uses (industrial) which will bear the brunt of the regulation, and hence, the possibility of prohibition, are uses which hitherto had been considered beneficial.

Perhaps, the problem which may arise may be illustrated by a hypothetical ore-refining plant in the State of Wyoming which has long been established on the outskirts of a Wyoming town. In order to refine ore it is necessary for the plant

40. *Mugler v. Kansas*, 123 U.S. 623 (1887); *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

41. *Weaver v. Pub. Services Comm.*, 40 Wyo. 462, 278 P. 542 (1929); *Steffy v. City of Casper*, 357 P.2d 456 (Wyo. 1961); *Hillmer v. McConnell Bros.*, 414 P.2d 972 (Wyo. 1966).

to operate large furnaces with stacks which emit smoke and fumes of a very noxious nature over the town. Any change in the refining method involving abatement of the emissions would be impossible or highly impractical. The emission level from the plant is tested by the division of public health and is found to exceed the maximum pollution level allowable. The council finds that a variance on the basis of economic hardship or lack of practical reduction methods cannot be granted because it is proved that the emissions from the plant tend to endanger human health, and that the economic loss to the community if the plant was to be closed down is minor compared to the benefit of elimination of the health hazard. The council therefore affirms the cease and desist order of the division and the company is forced to close. The company then takes its situation to court, claiming that the enforcement of the Wyoming Air Quality Act has forced a prohibition of their ore-refining operation, and hence, is unconstitutional as a taking of property without compensation.

Two of the classic Supreme Court cases dealing with regulation of property by police power statutes, *Mugler v. Kansas*,<sup>42</sup> and *Pennsylvania Coal Co. v. Mahon*,<sup>43</sup> while agreeing on the concept of reasonable diminution, disagree as to whether regulation amounting to prohibition constitutes an unconstitutional taking.

The *Mugler* decision stated that:

A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.<sup>44</sup>

On the other hand, Justice Holmes, writing the *Pennsylvania Coal* decision in 1922, stated:

Some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an

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42. 123 U.S. 623 (1887).

43. 260 U.S. 393 (1922).

44. *Mugler v. Kansas*, supra note 42, at 668-669.

exercise of eminent domain and compensation to sustain the act.<sup>45</sup>

In 1962, the Supreme Court, in the case of *Goldblatt v. Hempstead*<sup>46</sup> made a somewhat unclear attempt to determine which "regulation" doctrine would be adopted as a standard by the court. In *Goldblatt*, the Court upheld a municipal ordinance which was a valid exercise of police power, and which totally deprived the owner of certain of the property regulated by the ordinance of the beneficial use to which the property had formerly been devoted. The Court first stated that "if [the] ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."<sup>47</sup> The Court proceeded, however, to show some deference to Justice Holmes' diminution theory by continuing:

This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation . . . although a comparison of values before and after is relevant . . . it is by no means conclusive.<sup>48</sup>

The state of taking law as a result of the *Goldblatt* case is aptly summed up by an authority on eminent domain, Professor Joseph L. Sax,<sup>49</sup> who states:

Unfortunately, the incomplete state of the record in *Goldblatt* relieved the court from having to decide just when onerous became too onerous, or how seriously the court was going to take its stated deference to Mr. Justice Holmes' theory.<sup>50</sup>

Therefore, the status of the right of government to prohibit certain property uses under the police power is still to be decided, as far as the U.S. Supreme Court is concerned.

It should be noted at this point that Professor Sax has proposed a rule for taking cases which would probably eliminate many of the uncertainties created by the *Goldblatt* decision, or at the very least, would set forth a clearer set of

45. *Penn. Coal Co. v. Mahon*, supra note 43, at 413.

46. 369 U.S. 590 (1962).

47. *Id.* at 592.

48. *Id.* at 594.

49. Associate Professor of Law, University of Colorado Law School.

50. Sax, *Takings and the Police Power*, 74 YALE L.J. 43 (1964).

guidelines to determine whether compensation in the context of a certain fact situation is required. The rule, stated succinctly by Professor Sax is,

[T]hat when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required . . . . [B]ut losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.<sup>51</sup>

The Wyoming Supreme Court, in the fashion of the U.S. Supreme Court, has developed a body of case law on taking apparently based on the *Mugler* and *Pennsylvania Coal* doctrines, which, as has been suggested, are perhaps somewhat cumbersome when applied to the taking problems of the present.

The Wyoming Supreme Court's stand on taking is more clearly on the side of the *Mugler* (allowance of prohibition) doctrine. In *Weaver v. Public Service Comm'n*<sup>52</sup> the Court declared that, "the Legislature may prohibit occupations that are detrimental to the public welfare, but only if detrimental."<sup>53</sup> In *Hilmer v. McConnell Brothers*,<sup>54</sup> the Wyoming court, in a reversal of a district court decision, ordered an injunction to issue against a rabbit processing plant, which excluded noxious odors over the surrounding territory, and was prohibited by an ordinance of the City of Laramie which prohibited placing offal, carcasses, or refuse in a locality where it might become a source of annoyance, or within a half mile of a dwelling or public road. The court stated, as noted previously in this article, that the police power, in regard to prevention and abatement of nuisances, "extends to the prohibiting of acts or things not considered offensive or injurious in the past."<sup>55</sup>

While the trend in Wyoming, on the basis of the *Weaver* and *Hilmer* cases would indicate a direction of the court in favor of the *Mugler* doctrine, one Wyoming case, *Steffey v. City of Casper*<sup>56</sup> clouds the statement of a clear doctrine, some-

51. *Id.* at 63.

52. 278 P. 542, *supra* note 41.

53. *Id.*, 278 P. at 548.

54. 414 P.2d 972 (Wyo. 1966).

55. *Id.* at 973.

56. 357 P.2d 456 (Wyo. 1961).

what in the fashion of the "onerous" proviso in the *Goldblatt* decision.

*Steffey* involved a situation wherein the court upheld the constitutionality of a municipal ordinance prohibiting trading stamps as a valid exercise of the police power. However, in the course of the decision, the court noted:

We might say in this connection that counsel who are in favor of trading stamps admit that the legislation *may make reasonable regulations of any business* but that it *may not prohibit it*. But the legislature has not prohibited business. It has merely prohibited an incident to or a particular method in connection with business. That is merely regulation . . . . Regulation necessarily implies restriction in some respects, and that means nothing more or less than a partial prohibition.<sup>57</sup>

It is interesting to note that while the court in the *Steffey* opinion says that business can "be reasonably regulated" but not prohibited, it continues its discussion with some extremely pertinent elaboration of its basic statement to the effect that particular methods incident to and in connection with business *can* be prohibited. In connection with a "taking" involving prohibition of business in the context of the Wyoming Air Quality Act, it could be argued that the use of a cease and desist order or other method to abate the level of pollution would be prohibition merely of a particular method in connection with a business, and *not* of the business itself. It should also be noted that a plausible argument on the other side could be made, to the effect that prohibition of the process causing the pollution is, as a matter of fact, the prohibition of the business itself, and hence any regulation causing prohibition would be unconstitutional as a "taking" without compensation.

However, the general trend of decisions in Wyoming in regard to the "taking" question would appear to authorize the enforcement of Air Quality Act standards and requirements to the point, if necessary, of causing the shut-down of a pollutant source. This would greatly facilitate the effectiveness of the enforcement procedure under the Act, and would provide a considerable incentive on the part of business and

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57. *Id.* at 461.

properties affected by the Act's authority to conform to the standards, orders, or requirements laid down by the council.

#### RIGHT OF ENTRY FOR PURPOSE OF INSPECTION

The Wyoming Air Quality Act provides:

Any duly authorized officer, employee, or representative of the division may enter and inspect any property, premise or place, except private residences, on or at which an air contaminant source is located or is being constructed or installed at any reasonable time upon reasonable notice to the owner, occupant, or operator thereof for the purposes of investigating actual sources of air pollution and for ascertaining compliance or non-compliance with this Act or rules, regulations, or orders promulgated hereunder. Such owner or occupant or operator of the premises shall receive a written report setting forth all facts found which relate to compliance status.<sup>58</sup>

It is essential to note that this section provides for *no* warrant procedure in regard to the power of "any duly authorized officer, employee, or representative of the division," to enter and inspect. This applies to all kinds of property upon which air pollution sources might be located, "except private residences." During the fall of 1966, during which time the Air Quality Act was being formulated, the status of the law was such that an administrative agency could, without bothering with the warrant procedure, order valid inspection of all classes of property, including private property. Authority for their administrative inspection right was based on two Supreme Court cases, *Frank v. Maryland*<sup>59</sup> and *Eatin v. Price*.<sup>60</sup> Both cases involved warrantless inspections of private property by administrative officials (health and housing inspectors), and in both cases, the right of the officials to inspect premises without a warrant was upheld. In 1967, however, the Court's view of administrative inspection was completely altered. In *Camera v. Municipal Court*,<sup>61</sup> a case involving the issue of constitutionality of a warrantless administrative health inspection of private premises, the Court held that administrative searches by

58. WYO. STAT. § 35-493 (Supp. 1967).

59. 359 U.S. 360 (1959).

60. 364 U.S. 263 (1960).

61. 387 U.S. 523 (1967).



municipal health and safety inspectors of private property are "significant intrusions upon the interests protected by the 4th Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the 4th Amendment guarantees to the individual,"<sup>62</sup> and hence are unconstitutional. *See v. City of Seattle*<sup>63</sup> sealed the constitutional fate of the warrantless administrative inspection doctrine in a case involving an action by the City of Seattle against a warehouse owner for his refusal to admit the city fire inspector to his locked warehouse. In the *See* case the Supreme Court expanded the *Camara* rule requiring administrative inspectors to have warrants for inspection of private property to commercial property inspections. The court stated:

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant . . .<sup>64</sup> We therefore conclude that administrative entry, without consent, upon the portion of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.<sup>65</sup>

In light of the *Camara* and *See* cases, one can only conclude that the warrantless inspection procedure provided for in the Air Quality Act<sup>66</sup> could be unconstitutional if tested in the courts. The difficulty of enforcement of the Wyoming Air Quality Act without the benefit of warrantless inspection is hard to determine at this time. In a vigorous dissent to the *Camara* and *See* opinions, Justice Clark, joined by Justices Harlan and Stewart, speaking on the warrantless system of administrative inspection, states: "It is regrettable that the Court wipes out such a long and widely accepted practice

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62. *Id.* at 534.

63. 387 U.S. 541 (1967).

64. *Id.* at 543.

65. *Id.* at 545.

66. WYO. STAT. § 35-493 (Supp. 1967).

and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop."<sup>67</sup>

What the problems will be caused in the varied situations of municipal health and housing codes is beyond the scope of this treatise, but in the context of the enforcement of the Wyoming Air Quality Act, it would seem that Justice Clark's dissent position<sup>68</sup> would be somewhat alarmist. As a practical matter, ambient air standards are measured from locations outside of plant property, and apparently there would be little problem in determining, in a relatively non-industrial state like Wyoming, who is polluting the air, to what degree, from where.<sup>69</sup>

#### DELEGATION OF AUTHORITY

In the Wyoming Air Quality Act, it is declared "to be the policy of the State of Wyoming to maintain a reasonable degree of purity of the air resources of the state . . . and to that end by rules, regulations, and standards based on scientific knowledge, require the use of available practical and reasonable methods to prevent and control air pollution in the State of Wyoming."<sup>70</sup> To facilitate this policy, an air resources council is established<sup>71</sup> which has the powers and duties: "to develop and formulate a comprehensive program for the prevention, control, and abatement of air pollution in this state,"<sup>72</sup> "to manage its internal affairs,"<sup>73</sup> "to devise, formulate, adopt, amend, and repeal rules, regulations and standards, but *not* to exceed federal standards,"<sup>74</sup> to grant variance,<sup>75</sup> to hold hearings in connection with the promulgation of standards and granting of variances, and to compel the attendance of witnesses and the production of documents and other relevant matters.<sup>76</sup> Methods for enforcement of these powers are also provided.<sup>77</sup>

67. 387 U.S. 541, 547 (1967).

68. *Id.*

69. For a more complete treatment of enforcement problems created by the *Camara* and the *See* decisions, refer to: Mulchay, *Camara and See: A Constitutional Problem with Effect on Air Pollution Control*, 10 ARIZ. L. REV. 120-137 (1968). Also see, Morse & Juergensmeyer, *Air Pollution Control in Indian In 1968*, 2 VAL. L. REV. 312-314 (1968).

70. WYO. STAT. § 35-488 (Supp. 1967).

71. WYO. STAT. § 35-490 (Supp. 1967).

72. WYO. STAT. § 35-491(b) (Supp. 1967).

73. WYO. STAT. § 35-491(a) (Supp. 1967).

74. WYO. STAT. § 35-491(c) (Supp. 1967).

75. WYO. STAT. § 35-491(d) (Supp. 1967).

76. WYO. STAT. § 35-491(e) (Supp. 1967).

77. See discussion herein relating to 'taking', *supra* p. ....

From this brief recitation of the policy to which the air resources council is to address itself, and the powers with which it is to carry out that policy, it is clear that we are dealing with a delegation of authority from the Wyoming Legislature to the council. In other words, the legislature has established an administrative agency charged with effectuating a specific policy by creation of and enforcement of rules and regulations.

Certainly such a delegation of authority is commonplace as a legislative practice in Wyoming, and as in common across the United States. Professor Harold S. Bloomenthal<sup>78</sup> has stated:

The importance of administrative agencies in Wyoming is demonstrated by the fact that there are more than fifty agencies that either have powers of adjudication or rules making or both on the state level alone.<sup>79</sup>

A relevant question in regard to such a delegation of power to an administrative agency is whether adequate standards have been established by the legislature to guide the agency in its exercise of its powers. In the Wyoming Air Quality Act, two crucial areas in which the "delegation of authority" issue could become important are the criteria formulated in the act for the establishment of standards and requirements, and the criteria for the granting of variances from the general standards.

Section 35-494<sup>80</sup> of the Act reauthorizes<sup>81</sup> the council to establish "ambient air standards and/or emission requirements by rule or regulation, as in its *judgment* may be necessary to prevent, abate, or control air pollution." Criteria established to guide the council's judgment are as follows: the council must "consider all the facts and circumstances bearing upon the reasonableness of the emissions involved, including . . . character and degree of injury to the health and physical property of the people and the flora and fauna within the state,<sup>82</sup> the social and economic value of the source

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78. Professor of Law, University of Wyoming Law School.

79. Bloomenthal, *Administrative Law in Wyoming—An Introduction and Preliminary Report*, 16 WYO. L.J. 191, 192 (1962).

80. WYO. STAT. (Supp. 1967).

81. See WYO. STAT. § 35-491(a) (Supp. 1967).

82. WYO. STAT. § 35-494(i) (A) (Supp. 1967).

of the air pollution,<sup>83</sup> the priority of location in the area involved,<sup>84</sup> and the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from such source."<sup>85</sup> Finally, the council is authorized to "grant such time as it shall find to be reasonable and necessary for owners and operators of air contaminant sources to comply with such standards or requirements."<sup>86</sup>

The relatively detailed criteria laid down to guide the council's decision as to the reasonableness of the emissions in regard to the council's setting of general air pollution standards would appear to be about as detailed as the drafters could possibly get without handicapping the effectiveness of the council with an "overkill" of guidelines to consider in the course of making a decision.

While the guidelines might be a target of attack upon the constitutionality of the Act, they would be upheld as an adequately detailed delegation of authority to an administrative agency. In an earlier article in the Wyoming Law Journal on administrative rule making in Wyoming, it was noted that:

A sampling of standards imposed on Wyoming agencies that are similar to those which have been held adequate on the Federal level of delegation assert that the particular agency may promulgate rules and regulations which are: "proper and necessary" [Board of Registration of Chiropody], "as it may deem necessary" [Board of Cosmetology], "reasonable rule" [Insurance Commission], and others.<sup>87</sup>

Wyoming case law has supported broad delegations of authority in the past.<sup>88</sup>

In *Brinegar v. Clark*,<sup>89</sup> the court stated that a statute<sup>90</sup> which authorized the State Fire Marshall to "promulgate necessary rules and regulations for the better protection of the lives and property of the public" was a valid delegation

83. WYO. STAT. § 35-494(i) (B) (Supp. 1967).

84. WYO. STAT. § 35-494(i) (C) (Supp. 1967).

85. WYO. STAT. § 35-494(i) (D) (Supp. 1967).

86. WYO. STAT. § 35-491(ii) (Supp. 1967).

87. Note, 16 WYO. L.J. 257, 262 (1962).

88. For discussion of cases in addition to those referred to, *infra*, see 16 WYO. L.J. 257, 262-264 (1962).

89. 371 P.2d 62 (Wyo. 1962).

of a legislative function even though the fire marshall, instead of formulating his own standards, merely adopted his minimum standards from a National Board of Fire Underwriters' pamphlet.

In *Marion v. City of Lander*<sup>91</sup> the Court upheld a statute delegating plenary power as to local improvement districts to cities and towns.<sup>92</sup> In answer to counsel's argument that the statute failed to fix proper standards as to the nature and extent of the improvement to be made, the court stated:

Of course, the statutes furnish general standards, but counsel's complaint is lack of detail. We [find] no constitutional inhibitions against such a delegation of power. Concerning such grant we also said, at 205 P. 1016, that determination "of the extent of the improvement and what shall be included in it" is the exercise of a legislative power and rests in the legislative discretion of the city council. That being true, it follows that no impropriety results in leaving *details* to the city council and unless it exceeds such power or exercises its discretion in a fraudulent, arbitrary, or capricious manner . . . the courts will not interfere.<sup>93</sup>

A fine statement as to what elements constitute a proper delegation of legislative power was made in the neighboring jurisdiction of Montana in the case of *City of Missouli v. Missoula County*,<sup>94</sup> in which the court stated:

[I]f an act but authorizes the administrative officer or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to do are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.<sup>95</sup>

It should further be noted that the Wyoming Air Quality Act limits the power of the council to set standards by the statement already noted<sup>96</sup> to the effect that Wyoming standards may not exceed Federal standards. This provides a definite quantitative limitation on the powers of the council

90. WYO. STAT. § 35-421 (1957).

91. 394 P.2d 910 (Wyo. 1964).

92. WYO. STAT. §§ 15-444 to -512 (1957).

93. 394 P.2d 910, 915-916 (Wyo. 1964).

94. 362 P.2d 539 (Mont. 1961).

95. *Id.* at 541.

96. WYO. STAT. § 35-491(c) (Supp. 1967).

and so in an important aspect limits the scope of the council's judgment as to what the standards shall be.

Therefore, the Air Quality Act, with its four policy guidelines,<sup>97</sup> plus the quantitative Federal standard limitation<sup>98</sup> would seem to have enumerated adequate legislative guidelines for the establishment of air standards and requirements.

The criteria for the granting of variances from the general ambient air standards, like the general standard criteria, would also appear to be well within the safe zone of valid legislative guidelines in regard to delegation of authority.

The council is authorized to grant variances if "the variances do not tend to endanger human health or safety, and that compliance with the rules or regulations from which variance is sought would produce serious hardships, without equal or greater benefits to the public."<sup>99</sup> Also, the variances are subject to renewal,<sup>100</sup> and are further subject to the timetable limitation<sup>101</sup> for hardship cases and the "availability of practical means of abatement" limitation.<sup>102</sup>

The variance section of the Air Quality Act would fit into the same general category of legislative delegation of powers as the previous section dealing with guidelines for setting the general standards. Therefore, the Wyoming Court would probably apply its philosophy of allowing relatively broad administrative guidelines to a variance problem as readily as to a general standards guideline question. However, because of the proliferation of local zoning ordinances in recent years, many specific legislative variance guidelines have been litigated as to their adequacy as constitutional delegations of authority. Therefore, some further elaboration is in order.

The Wyoming Air Quality Act has three basic guidelines for the council to consider in granting variances: public health and safety, economic hardship, and finally, benefits to the

97. Public health; economic value of the source regulated; priority of location; and, technical practicability of reducing air pollution. WYO. STAT. § 35-494(i) (Supp. 1967).

98. WYO. STAT. § 35-491(c) (Supp. 1967).

99. WYO. STAT. § 35-497(a) (Supp. 1967).

100. WYO. STAT. § 35-497(d) (Supp. 1967).

101. WYO. STAT. § 35-497(c) (i) (Supp. 1967).

102. WYO. STAT. § 35-497(c) (ii) (Supp. 1967).

public as weighed against hardship created by the regulation. Variance provisions with combinations of guidelines similar to the Wyoming Act's have generally been held to be constitutional.<sup>103</sup> The logic of courts in holding such variance guidelines constitutional is well illustrated by a quote from *Ward v. Scott*,<sup>104</sup> a New Jersey case which held a variance guideline section similar to Wyoming's constitutional.

The court stated:

Nor do we see any real dangers that unwarranted or arbitrary action will successfully survive the ample safeguards which are ever available. It is true that in lieu of the general standards set forth the Legislature might have sought to anticipate and enumerate with fixed details all of the individual special instances in which variance would be justified. However, experience has indicated the un wisdom of this course, and an acknowledged advantage of the administrative process has been its flexibility in enabling administrators to deal justly with unanticipated as well as anticipated situations in accordance with general legislative guides.<sup>105</sup>

In the issue of delegation of authority is the inherent conflict between the desire, on one hand, to protect the public from unwarranted or arbitrary action on the part of administrators who have been given a blank check as to their authority, and on the other, the necessity of allowing administrators enough flexibility to be able to accomplish the purposes, beneficial to society as a whole, for which the agency was created. The Air Quality Act's general standard and variance provisions attempt to hit the elusive balance point in this conflict.

The Wyoming court, which apparently has accepted the philosophy of allowing relatively broad administrative guidelines to pass as constitutional, would probably give the Air Quality Act's guidelines "the benefit of the doubt" on the delegation of authority issue. By doing this, however, the court would not necessarily be making any concession to creation of an "arbitrary or unwarranted" use of authority. As has previously been stressed, Air Quality Act guidelines

103. See Annot., 58 A.L.R.2d 1083-1126. See also A.L.R.2d LATER CASE SERVICE.

104. 11 N.J. 117, 93 A.2d 385 (1952).

105. *Id.*, 93 A.2d at 389.

for both "general standard" and "variance" situations are about as detailed as could be designed if the council is to be left with some flexibility. Secondly, the Air Quality Act procedures are all subject to the authority of the Wyoming Administrative Procedure Act,<sup>106</sup> which sets up standards for notice, hearing procedures, rights of parties in contested cases, judicial review, and many other provisions which are designed to protect the rights of a person or business affected by a decision of the council.<sup>107</sup>

### IMPARTIAL HEARINGS

Section 12(a) of the Wyoming Administrative Procedure Act of 1966<sup>108</sup> provides that [when] an officer of a hearing board shall withdraw if he feels himself at any time to be disqualified, and provides that the officer function in an impartial manner.

Originally, the Act provides that the Board of Health will appoint someone from the Department to represent the Department of Public Health on the Clean Air Council. Further, the Act provides that an administrative division of the Department of Public Health shall enforce and administer this Act.<sup>109</sup> Had these provisions been left without consideration, any future decision of the Wyoming Clean Air Council could have been exposed to an attack on the basis that the representative of the Department of Public Health, being the department charged with enforcement of the Act, could not have maintained an impartial position in the decision.

However, the problem has been foreseen, and the Council has amended its rules of practice and procedure to provide that the representative from the Department of Public Health excuses himself from sitting with the Council in hearing a complaint brought by his department before the Council.<sup>110</sup>

106. WYO. STAT. §§ 35-498, -491(e) and -497(e) (Supp. 1967).

107. WYO. STAT. §§ 9-276.19 to -276.33 (Supp. 1967).

108. WYO. STAT. § 9-276.30(a) (Supp. 1967).

109. WYO. STAT. § 35-492 (Supp. 1967).

110. In an interview with Assistant Attorney General Speight, assigned to advise the Council pursuant to § 2 of the Wyoming Administrative Procedure Act [WYO. STAT. § 9-276.20(c) (Supp. 1967)], Mr. Speight indicated that the decisions of the Council would be less vulnerable to litigation if and when the change is embodied in an amendment to the Act, rather than reply on the Rules of Procedure and Practice promulgated by the Council itself to change statutory law.



## EXCLUSION OF INDUSTRIAL EMPLOYEES

The novel question which perhaps may be of little concern to the implementation of the Act, is raised by Section 35-502 of the *1957 Wyoming Statutes*. In this section, subsections (a) and (b) remove from the jurisdiction of the council any pollution created by a person which pollution remains on the premises of the polluter. Subsection (a) would appear to be dead-letter law from the date of the statute, as to pollution emitted into the atmosphere and falling on the pollutant's property. It is difficult to imagine, in windy Wyoming, where air is most ambient, that pollution emitted into the open air would never journey beyond the boundaries of the pollutant's property. But, the problem that appears in these two subsections is that it does preclude the Council from acting to reduce pollution inside the factory or mine, etc. These provisions effectively exclude employees from protection under the Act, specifically so by Subsection (c). While the State has made some provision for the control of air pollution within the plant, these provisions are generally<sup>111</sup> very weak, except for those providing for sanitation in coal mines.<sup>112</sup> Thus, exclusion of the industrial employee from the provisions of the Act effectively deprive the employee of protection from the health hazards which is provided for every other class of citizen under the Act. These subsections, then, may be open to a valid attack from the employee as discriminatory in that he, a member of the public, is excluded as a class, and is therefore being denied equal protection under the law.

## SEVERABILITY

It may be suggested, in taking an over-view of the complete Act, that one standard provision is lacking, that is, no provision has been made for severability. Omission of such a clause will, in all likelihood, be of little consequence, as no court is likely to negate the whole act, should a single provision be found unconstitutional. If the provision is so substantial as to constitute the heart of the Act, little benefit will be derived from the addition of a severability clause.<sup>113</sup>

111. WYO. STAT. § 30-75 [mines, generally] and §§ 35-80 to -82 [industrial] (1957).

112. Coal mines, WYO. STAT. § 30-130 to -190 (1957).

113. See *McFarland v. City of Cheyenne*, 48 Wyo. 86, 42 P.2d 413, 416 (1935); *Stewart v. City of Cheyenne*, 60 Wyo. 497, 154 P.2d 355, 370 (1944); *Hanson v. Town of Greybull*, 63 Wyo. 467, 183 P.2d 393, 399 (1947).

## CONCLUSION

As has been stressed so often, air pollution is one of the major problems an industrialized America faces in today's world. The passage of the Wyoming Air Quality Act by the state legislature is recognition that this national problem can extend even to the plains and mountains of Wyoming. Fortunately, the Wyoming Air Quality Act is more than a tacit recognition of the problem, it is also, and most importantly, a means to the end of solving the problem. Some states far more industrialized than the State of Wyoming have passed what appear to be far less effective legislation to deal with the problem of air pollution.<sup>114</sup> Their type of minimal legislation, while *recognizing* the problem, does little in a practical vein to provide the means to its solution. We would submit that recognition alone, without effective methods of solution would be disastrous to the success of air pollution control at present, and that the effects of this disaster could be felt for generations to come.

Since the article originated from the frontier State of Wyoming, the following analogy, may not be inappropriate: If effective measures are not soon taken, clean air will go the way of the American Buffalo. In a ten year period, vast herds of buffalo were annihilated from the western prairies with no rhyme or reason to the slaughter, and creating, as a result, the waste of what might have been a valuable natural resource. Without effective control *now*, this analogy may become all too pertinent to the quality of the air breathed in the State of Wyoming. The phenomenal growth of American industry will not allow piecemeal and token attempts to regulate the types and amounts of emissions it sends into our atmosphere.

The Wyoming Air Quality Act, subject as it might be to some of the criticisms which have here been made of it, still is a workable piece of legislative machinery, sound in the important aspects of adequate legislative guidelines with which to achieve the purpose of the act and enforcement techniques with teeth in them; yet at the same time recognizing generally the rights of individuals or businesses affected by the Act, and providing for workable conciliation and

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114. See Morse & Juergensmeyer, *supra* note 69, at 296-314.

variance procedures which can, if used, effectively reduce the onerous effect of the Act on certain types of businesses to a minimum.

The Act is still in an embryonic stage, having only just been passed in the 1967 Wyoming Legislature, and having not yet been litigated. The matters so far to come before the council have been resolved through the medium of conciliation and conference between the council and the affected parties. If the future use of the Act can continue in this spirit of cooperation, working on a personalized level with present or future contaminant sources to find a mutually acceptable way to keep the pollutant level of the air under control, Wyoming will benefit from a sensible and relatively painless method of solving the serious problem of air pollution.

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