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## Section I - Air Quality

Marilyn S. Kite

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## SECTION I. AIR QUALITY

The Air Quality portion of the Wyoming Environmental Quality Act (EQA) supersedes the previous Air Quality Act passed during the 1967 legislative session.<sup>1</sup> It is the purpose of this comment to analyze the Air Quality division of the Act, to point out the changes made in the old Air Quality Act, to examine the effectiveness of enforcement of the Air Quality regulations, and to delineate some areas of weakness and possible improvements. As a general observation, the new Act has strengthened the powers of the Director and made tighter controls of air pollution possible in Wyoming.<sup>2</sup> This action of the Wyoming Legislature seems to demonstrate recognition of air pollution as a problem even in the wide open spaces, and the desire of the state to "prevent, reduce and eliminate"<sup>3</sup> air pollution. The magnitude of the national problem is demonstrated by the study that the Environmental Protection Agency (EPA) recently completed on the 1968 national costs of air pollution.<sup>4</sup> The costs totaled \$6.1 billion, including damage estimates to residential property, materials, health, and vegetation. It was estimated that 18-20% of the \$2 billion of national health costs resulted from air pollution. Provided that sufficient funding is available to allow adequate enforcement, the Air Quality portion of the Wyoming Environmental Quality Act can efficiently and effectively deal with air pollution in Wyoming.

## CHANGES MADE FROM 1967 AIR QUALITY ACT

Most of the significant alterations were made to bring the Wyoming Act into compliance with the federal requirements under the Clear Air Act. In 1972, the EPA rejected Wyoming's implementation plan on three points.<sup>5</sup> All of these contested areas were corrected by the 1973 Act.

First, the federal regulations require the state plans to show their legal authority to "prevent construction, modifi-

1. Ch. 234, § 1, [1973] WYO. SESS. LAWS 412. See also discussion of repealed act in Comment, *The Wyoming Air Quality Act*, 4 LAND & WATER L. REV. 159 (1969).

2. The director is the head administrative officer of the Environmental Quality Department as explained in the introduction. Defined at WYO. STAT § 35-502.3a (iii).

3. WYO. STAT. § 35-502 (Supp. 1973).

4. 4 ENVIRONMENT REPORTER 197 (June 8, 1973).

5. The Denver Post, June 2, 1972, at 38, col. 1.

cation or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard."<sup>6</sup> The previous implementation plan stated that Wyoming had no such authority to comply with this requirement.<sup>7</sup> This position was substantiated by an Attorney General's letter stating his opinion to that effect, in the appendix of the plan.<sup>8</sup> However, the 1973 EQA included in the Administrator's power the authority to recommend to the Director regulations to prevent construction, modification or operation of any stationary source.<sup>9</sup> The wording follows exactly the requirement of the regulation previously quoted. This provision can be used to prevent the entrance of new industries unwilling to meet the air standards or to prevent modification of an existing source causing it to violate the standards.<sup>10</sup> However it should be noted that, similar to the basic format of the Act, this is merely legal authority for such action, not a legal requirement. Whether such regulations are actually promulgated depends on the discretion of the Director, and the decisions of the Administrator, Advisory Boards, and Council.

A second change gives the administrator the authority to require operators to keep records and make reports.<sup>11</sup> This is also required of the state implementation plans by the federal regulations.<sup>12</sup> In conjunction with the record keeping requirement, the 1973 Act gives the authority to the Administrator to require operators to "install, use and maintain monitoring equipment,"<sup>13</sup> an additional requirement of the federal regulations.<sup>14</sup> The foregoing can be used to force self-regulation on the operators of pollution sources, and relieve some of the burden of enforcement from the Air Quality Division itself.

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6. 42 U.S.C. § 1857 et seq., EPA Reg. § 410.11a(4), 36 Fed. Reg. 15489 (1971).
  7. Air Quality Section, Wyoming Division of Health and Medical Services, IMPLEMENTATION PLAN FOR AIR QUALITY CONTROL, STATE OF WYOMING, § II B(4) (1972).
  8. *Id.* at Appendix F.
  9. WYO. STAT. § 35-502.17c (Supp. 1973).
  10. Chuck Ward, *Wyoming's Air Quality Program—A Report to the Public*, Air Quality Section, Wyoming Division of Health and Medical Services, August, 1972, at 14.
  11. WYO. STAT. § 35-502.10a (iii), (vii) (A) & (B) (Supp. 1973).
  12. EPA Reg. § 420.11a(5), 36 Fed. Reg. 15489 (1971).
  13. WYO. STAT. § 35-502.10a (vii) (C) & (D) (Supp. 1973).
  14. EPA Reg. § 420.11a(6), 36 Fed. Reg. 15489 (1971).

A third change required by federal regulation<sup>15</sup> will make all records, reports, and regulations available to the public unless special circumstances are shown.<sup>16</sup> The earlier provision of the 1967 Air Quality Act required the owner or operator to consent before certain information could be made public, although compilations of the Air Quality Council were public.<sup>17</sup>

A fourth change was made, although not as a requirement of the EPA regulations. The old 1967 Wyoming Act provided that standards devised could not exceed federal standards.<sup>18</sup> In other words, Wyoming's requirements could not be any stricter than the federal ones. The 1973 Act simply deletes these words, and allows any regulations "as may be necessary to prevent, abate or control pollution."<sup>19</sup> Now, although Wyoming standards cannot be lower than national ones,<sup>20</sup> they can be higher. This would seem a significant change and could become a possible means of Wyoming staying ahead of the air pollution problem. With the use of strict standards, this state could be involved in prevention rather than cure. Thus, this state, with its relatively clean air, can attempt to learn from the experiences of the more populated areas and stop the pollution before it starts.

The changes made brought Wyoming's plan into compliance with the federal requirements. This made the federal intervention provided for in the Clean Air Act unnecessary.<sup>21</sup> At the present time, Wyoming's implementation plan has been approved, subject to new EPA regulations regarding non-degradation, which will be discussed later. Most of the changes made simply gave the Administrators and Director greater authority to exercise their discretion, rather than requiring such acts statutorily.

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15. EPA Reg. § 420.11a(6), 36 Fed. Reg. 15489 (1971).

16. Wyo. STAT. § 35-502.53a (Supp. 1973). If the administrator is convinced that exposure of the information would cause injury to the competitive position of those concerned, such as divulging trade secrets, he may keep the information confidential.

17. Ch. 186, § 13, [1967] Wyo. SESS. LAWS 540.

18. Ch. 186, § 13, [1967] Wyo. SESS. LAWS 535.

19. Wyo. STAT. § 35-502.17a (Supp. 1973).

20. EPA Reg. § 420.11a(1), 36 Fed. Reg. 15489 (1971).

21. 42 U.S.C. § 1857c-5 (1970).

## ENFORCEMENT AND EFFECTIVENESS

This section is not intended to be a scientific analysis of the adequacy of the ambient and emission standards. Rather, it will be directed to federal enforcement provisions as they relate to the Wyoming Act, and some of the logistics problems in enforcement itself.

The enforcement scheme set up by the Clean Air Act provides that the state shall have the primary responsibility.<sup>22</sup> However, various provisions of the Act provide for federal action if the state fails to meet its responsibility. For example, if the EPA becomes aware of a violation within the state of the state implementation plan, it notifies the violator and the state, then after 30 days, it issues a compliance order. Finally, the EPA can resort to injunctive action.<sup>23</sup> If the EPA believes the state is failing to enforce its own plan, after 30 day notice it will give public notice of a period of "federally assumed enforcement,"<sup>24</sup> thus putting pressure on local authorities to get the job done.

Although explicit federal powers of enforcement are spelled out in the 1970 amendments to the Clean Air Act, actual instances of federal enforcement are rare. As of January, 1973, only two thirty-day notices have been issued by the EPA.<sup>25</sup> In reality, federal action has generally been limited to establishing standards and passing on state implementation plans.<sup>26</sup>

State enforcement, as provided by the Wyoming Act, consists mainly of cease and desist orders and fines.<sup>27</sup> The policy of the Director of Environment Quality, Mr. Robert Sundin, is primarily one of conference, negotiation, and persuasion with the owners and operators of sources, coming to the desired result without the use of finers and orders. However,

22. 42 U.S.C. § 1957c-2(a) (1970).

23. 42 U.S.C. § 1857c-2(a) (1970); Keener, *A Current Survey of Federal Air Quality Control—Legislation and Regulation*, 5 NATURAL RESOURCE LAW 42, 46 (1972).

24. 42 U.S.C. § 1857c-8(a) (1970).

25. Jones, *Enforcement of Clean Air Amendments of 1970*, 48 NOTRE DAME LAW 921, 923 (1973).

26. *Id.*

27. Penalties, as they apply to the entire act are dealt with in detail in a separate section of this article.

cease and desist orders have been issued and brought about compliance with the regulations.<sup>28</sup>

The largest factor in effective enforcement is adequate manpower to serve as Air Quality Control engineers and qualified observers. No matter how well-drawn the regulations are, the Act will be ineffective without adequate enforcement. In most cases it will probably cost owners and operators of pollution sources money to comply with the Act. Thus, this compliance must be encouraged by adequate enforcement of the Act's penalties. As an example, it was estimated that to administer Indiana's Air Quality Plan, it would require 168 man-years of effort.<sup>29</sup> In contrast Wyoming's Air Quality Division currently consists of 5 persons. The Air Quality Division was budgeted \$83,255 by the last legislative session. Some additional funding is provided by the EPA. Of course, equally as important as finances are the quality and dedication of the administrators and directors. Currently, the enforcement is being effectively carried out. However, with the size of the state and the increased industrial development, increasing numbers of enforcement officials will become more necessary. In the future, adequate protection of Wyoming's air will require an increased amount of money allotted to it.

At first glance, a possible loop-hole in enforcement of the regulations is the variance provision as it is discussed in a separate section of this article. However, this idea is quickly dispersed when it is learned that Wyoming has, as of September 1973, not granted a single variance.<sup>30</sup>

#### POTENTIAL WEAKNESSES OF WYOMING ACT

Although the air quality portion of Wyoming's EQA seems improved and strengthened over the 1967 law, there are several factors that have been omitted or could have been dealt with differently. As a result of the basic structure of the Act, many of these problems can be dealt with by regulation and do not require further legislation. The Act is basically an

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28. *Supra* note 10, at 15.

29. *Supra* note 25, at 926. A man-year is a unit of measurement, being the work of one man for one year.

30. Interview with Robert A. Sundin, Director of the Department of Environmental Quality, in Cheyenne, Wyoming, Sept. 11, 1973.

enabling one, giving the director and administrator power to control pollution and the flexibility to meet the following problems.

The first omission is the lack of control over emissions from moving sources, or vehicular pollution. The regulations provide that no one can remove emission control devices from automobiles, but there is no control over actual emission.<sup>31</sup> The federal act directs most of the moving source regulations to the manufacturer.<sup>32</sup> It also specifically prohibits states from regulating new vehicles in any way.<sup>33</sup> However, the used vehicle category remains open to states.<sup>34</sup> It has been the attitude of the Wyoming Air Quality Division that federal controls would take care of the problem when the 1975 requirements are met by automobile manufacturers. This may be the more effective method of control, although it will involve a lengthy wait. Although enforcement may be difficult, the Wyoming Act could set out standards and goals for used automobiles which could be used if the money and manpower were provided for enforcement.<sup>35</sup> As one of the state's largest industries is tourism, moving sources are significant even though the actual population of the state is relatively small.

A second area, which is governed by federal regulations but ignored by Wyoming, is new sources. The 1970 Clean Air Act amendments provided special standards for newly installed sources.<sup>36</sup> These sources must meet "standards of performance" which reflect the degree of emission limitation achievable through the application of the best system which is available, costs considered.<sup>37</sup>

The federal government can delegate the authority to the state for implementation and enforcement.<sup>38</sup> However, the Wyoming Act makes no mention of such standards of per-

31. Section 17, Wyoming Air Quality Standards and Regulations (1973). This will preserve automobiles in the condition they were made, but will fail to control used cars which have no emission control devices.

32. 42 U.S.C. § 1857f-1 to 8 (1970).

33. 42 U.S.C. § 1857c-6(b)1 (B) (1971).

34. 42 U.S.C. § 1857f-6a(c) (1970).

35. Greco, *Clean Air Amendments of 1970: Better Automotive Ideas*, 1 ENVIRONMENTAL AFFAIRS 384, 411 (1972).

36. 42 U.S.C. § 1857c-6(b)1 (B) (1971).

37. Keener, *A Current Survey of Federal Air Quality Control—Legislation and Regulation*, 5 NATURAL RESOURCES LAW 42, 51 (1972).

38. *Id.*

formance for new sources. Since the State may well become involved in this area with federal action, it would strengthen its position to have these federal standards included in its regulations.

Another important problem with the 1973 Act is that there are no regulations or plans for the prevention of significant deterioration of existing air quality as required by EPA regulations.<sup>39</sup> The requirements of non-degradation clause have been debated and have resulted in a recent court decision which caused the Wyoming Implementation Plan to be in a state of limbo, waiting for EPA regulations to follow. A brief discussion of this case is necessary to understand Wyoming's position and the importance of this type of control.

In May 1972, the Sierra Club brought suit against the EPA trying to force its federal administrator to require all state implementation plans to provide control strategy to prevent significant deterioration of relatively clean air.<sup>40</sup> The U. S. District Court of the District of Columbia held that an injunction would lie barring approval of any state plan which would conceivably allow significant deterioration of the air quality. The national ambient air standards set a maximum level that pollution cannot exceed. However, many areas of relatively clean air could be significantly more polluted and still be within the national requirements.<sup>41</sup> The court held that the combination of the purpose of the Act being "to protect and enhance" air quality, the regulations which allow states to set higher standards than the federal ones, and the specific regulation against allowance of significant deterioration of existing air quality,<sup>42</sup> make non-degradation part of the requirements of the Clean Air Act.<sup>43</sup> However, the EPA has not yet adopted guidelines for non-degradation plans. The Wyoming Act will be required to include such provisions when they are promulgated.

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39. EPA Reg. § 410.2(c), 36 Fed. Reg. 8187 (1971).

40. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972). This was affirmed by a four-four tie of the Supreme Court. 41 U.S.L.W. 4825 (U.S. June 11, 1973).

41. Note, *The Clean Air Act and The Concept of Non-Degradation*, *Sierra Club v. Ruckelshaus*, 2 *ECOLOGY L. Q.* 801 (1972).

42. *Supra* note 39.

43. *Supra* note 40, at 256.



This particular idea has special importance in Wyoming. As a relatively clean and sparsely populated state, the ambient levels could seriously increase in some areas and still meet federal and state requirements. Although these requirements could be covered by regulation, a general policy of non-degradation in the statute itself would considerably strengthen it. The Director, Mr. Sundin, has indicated that this will require considerable testing of present air conditions all over the state to develop a basis on which to apply the percentage increments of ambient levels that will be allowable.

There are several methods of controlling the degradation process and the actual effectiveness may depend on which method is chosen for Wyoming.<sup>44</sup> Four such plans have been suggested. 1) The Air Quality Increment plan would provide for a uniform national allowable increase in particulate and sulphur dioxide pollutant concentration over 1972 levels. 2) The Emission Limitation plan would set an average ceiling for only particulate and sulphur dioxide for an air quality region. 3) The Local Definition plan would allow each state to determine on a case-to-case basis if a new source would cause significant deterioration. 4) An Area Classification plan would allow zones to be drawn with varying degrees of pollution allowed.<sup>45</sup>

Some factors to consider in selecting such a plan are 1) that it deals with all pollutants and all significant sources, 2) that some sort of national, uniform limits be set, 3) that regulations apply to all pollution not just ground level, and 4) that some small sources may be exempted.<sup>46</sup> Non-degradation will probably be the area of the most significant change made in the Wyoming act in the near future.

A final aspect of the 1973 Act that may require additional attention is in the area of licensing and permits. No specific standards are set either in the act or the regulations for when licenses or permits are necessary and exactly what prerequisites must be met before granting them. It appears that li-

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44. High Country News, Aug. 31, 1973, at 10, col. 4.

45. *Id.*

46. *Id.*

47. Note, *Legal Aspects of Air Pollution Control in Ohio, 1971*, 40 CINN. L. REV. 511, 529 (1971).

censes may be discretionary as to when and if they are required. Although some discretion on the part of the Administrator and Director is desirable, more definite standards would be helpful to all parties. Enforcement may be aided if definite state licensing requirements must be met initially. Especially with the new provision that allows prevention of construction of a source if it would increase ambient levels beyond the limits, it would seem inherent that some type of licensing is necessary to provide the division with the opportunity to exercise its power and prevent construction. Licensing could easily be dealt with in the form of regulations, with all penalty provisions of the Act applying.

#### CONCLUSION

From the environmental standpoint, the Air Quality portion of the Wyoming EQA substantially strengthened the previous air quality laws. The increased authority of the Director to actually prevent construction of detrimental sources, and to require owners and operators to test, monitor and report their contributions to air pollution, creates a much firmer stand against the pollution of Wyoming air. The factor that is in greatest need of improvement is in the area of non-degradation. Wyoming is in a unique position with the quality of air that we presently enjoy. An effective program that would prevent significant deterioration of the air quality could make it possible for Wyoming to avoid the problems and expense that other areas of the country are undergoing. Strict non-degradation regulations may discourage incoming industry. However, if national standards are adopted, industry would face the same restrictions everywhere and would not specifically avoid Wyoming.

As a result of the structure of the Act, its success is greatly dependent on the discretion of the Director, Administrator, advisory boards, and council. In the air quality portion, the Administrator is given enabling authority to actually carry out the policy of the Act. To aid in this effort significant funding is essential in order to enforce and carry out the requirements of the Air Quality Division.

In comparison with other states, Wyoming's act appears to be more effective. For example, Ohio's does not even provide for cease and desist orders, or reports from polluters themselves.<sup>47</sup> Thus, Wyoming has the tools in the 1973 Environmental Quality Act. It remains to be seen whether sufficient funding and effective administration can combine to keep the Wyoming air clean.

MARILYN S. KITE