McGeorge Law Review

Volume 21 | Issue 3 Article 9

1-1-1990

Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.: The California Supreme Court Gives a Green Light to Local Toxic Air Emission Control Programs

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Prior to 1983, regional and county air pollution control districts (districts)[1] were at liberty to regulate nonvehicular or stationary[2] sources of air pollution according to the specific needs of the communities they served.[3] Because of the districts' regulatory independ-

1. *See* CAL. HEALTH & SAFETY CODE § 39025 (West 1986) ("District" includes air pollution control districts and air quality management districts). The boundaries of single-county Districts are prescribed by county limits. *Id.* § 40150 (West 1986). Two, or more, individual Districts may merge into a "unified district." *Id.* The Monterey Bay Unified Air Pollution Control District, consisting of Santa Cruz, San Benito, and Monterey Counties, is an example of a unified district. *See* Note, *Stationary Source Air Pollution Control in California: A Proposed Jurisdictional Reorganization*, 26 U.C.L.A. L. REV. 893, 900 n.33 (1979) [*hereinafter A Proposed Jurisdictional Reorganization*]. *See also infra* notes 19-33 and accompanying text (discussing the structure of the county air pollution control district).

2. Nonvehicular source means any source of air pollution other than from motor vehicles. CAL. HEALTH & SAFETY CODE § 39043 (West 1986).

3. *See infra* notes 22-33 and accompanying text (discussing the statutory authority of the air pollution control districts). However, the regulatory authority of districts is subject to minimum standards established by the State Air Resources Board and the Environmental Protection Agency (EPA) under the Federal Clean Air Act. *See also* 42 U.S.C. § 1857 c-4 (1987) (Federal Clean Air Act); *A Proposed Jurisdictional Reorganization*, *supra* note 1, at 896-98 (discussing the development of federal legislation relating to the control of air pollution); *id.* at 898 n.19 (discussing the authority of federal EPA in the regulation of state air pollution control activities). *See also infra* notes 35-45 and accompanying text (discussing the function and responsibility of the State Air Resources Board).

ence, the degree of air pollution regulation within neighboring counties might vary widely.[4] The Tanner Act (Tanner),[5] enacted in 1983, provides a statewide program designed to promote minimum air quality control standards throughout California.[6] Under Tanner, the State Air Resources Board (ARB)[7] studies potentially toxic air pollutants to determine whether they require regulation.[8] For each pollutant identified as a toxic air contaminant (TAC), the ARB formulates a series of control measures applicable to specific nonvehicular sources of the TAC.[9] Districts are required to adopt regulations which are at least as stringent as the control measures promulgated by the ARB.[10]

The procedures mandated under Tanner do not address whether districts retain authority to identify toxic substances independent of the ARB.[11] In *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.*,[12] the California Supreme Court recognized the authority of county and regional districts to regulate all nonvehicular sources of air pollution.[13] The court held that the legislature, in enacting Tanner, did not intend to repeal the preexisting regulatory authority of the districts.[14] Reversing the court of appeals, the supreme court determined that the legislature intended the ARB, acting under Tanner, to assist the districts in the identification of TAC's in order to improve air pollution regulation rather than to "eviscerate" the existing regulatory structure.[15]

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4. *See infra* note 34 and accompanying text (discussing the regulatory difficulties resulting from individual district authority).

5. CAL. HEALTH & SAFETY CODE §§ 39650-39674 (West 1986) (enacted by 1983 Cal. Stat. ch. 1047, § 1) (Tanner Act as enacted).

6. *Id.* § 39650(k) (statewide program necessary to provide technical and scientific assistance to districts and minimize inconsistencies in protecting public health).

7. *See id.* § 39510 (West 1986) (providing for the State Air Resources Board). The ARB is a nine member panel appointed by the Governor. *Id. See also id.* §§ 39003, 41500 (West 1986 & Supp. 1989) (ARB's mandate includes researching sources of air pollution and coordinating local and regional efforts to achieve state and federal ambient air quality standards).

8. *See infra* notes 51-59 and accompanying text (discussing the toxic air contaminant identification program).

9. *See infra* note 49 (defining toxic air contaminant).

10. CAL. HEALTH & SAFETY CODE § 39666(d) (districts must adopt regulations within six months of the ARB's determination that a substance is a toxic air contaminant).

11. *See* Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 513, 248 Cal. Rptr. 418, 419 (1988) (grappling with the effect of the Tanner Act on district statutory authority). The court of appeal held that the Tanner Act preempted the District's authority to identify toxic air contaminants until identified by the Board as a toxic air contaminant. *Id.* at 522, 248 Cal. Rptr. at 424.

12. 49 Cal. 3d 408, 777 P.2d 157, 261 Cal. Rptr. 384 (1989).

13. *Id.* at 411, 777 P.2d at 158, 261 Cal. Rptr. at 385.

14. *Id.*

15. *Id.* at 412, 777 P.2d at 158, 261 Cal. Rptr. at 385.

Part I of this Note discusses the structure and authority of districts prior to Tanner, the mechanics and legislative intent of Tanner, and the pollution control regulation in *Monterey Bay* creating the dispute.[16] Part II discusses the facts of *Monterey Bay* and reviews the analysis and decision of the California Supreme Court.[17] Part III discusses the legal ramifications of *Monterey Bay*.[18]

I. LEGAL BACKGROUND

A. Nonvehicular Air Pollution Regulation in California Prior to the Tanner Act

County air pollution control districts were the first legislatively created agencies specifically responsible for regulating nonvehicular sources of air pollution.[19] Each county is required to establish an air pollution control district (district), unless the county falls within one of several statutorily designated regions.[20] The structure of a district mirrors the legislative, executive, and judicial branches of the United States government.[21]

The rule-making body, called the air pollution control board (Board), is composed of the members of the county board of supervisors acting ex-officio.[22] The Board enacts regulations necessary or proper to enforce state, federal, or local air quality standards.[23] Public notice and hearing is required for any action enacting, amending, or repealing a district regulation.[24] Additionally, the Board may

16. *See infra* notes 19-82 and accompanying text.
17. *See infra* notes 83-156 and accompanying text.
18. *See infra* notes 157-168 and accompanying text.
19. *See* Simmons, *A Many Layered Wonder: Nonvehicular Air Pollution Control Law in California*, 26 HASTINGS L.J. 109, 115 (1974) [hereinafter *A Many Layered Wonder*] (as common law nuisance became inadequate to manage growing air pollution problems, a statutory remedy was required).
20. CAL. HEALTH & SAFETY CODE § 40002 (West 1986) (each district required to provide pollution control unless located within the Bay District, South Coast District, regional district or unified district). *See id.* § 39015 (West 1986) (definition of Bay District); *id.* § 39052.5 (West 1986) (definition of South Coast District); *id.* § 39049 (West 1986) (definition of regional district); *id.* § 39056 (West 1986) (definition of unified district).
21. *See A Many Layered Wonder*, *supra* note 19, at 115 (discussing the structure of county air pollution control districts).
22. CAL. HEALTH & SAFETY CODE § 40100 (West 1986).
23. *Id.* § 40001 (West 1986 & Supp. 1989).
24. *Id.* § 40725(a) (West 1986 & Supp. 1989) (hearings must be preceded by 30 day public notice).

issue orders of abatement for violations of federal, state, or local air emission standards.[25]

The executive function of the district is carried out by the air pollution control officer (Officer), who implements and enforces the regulations adopted by the Board.[26] The regulations adopted by the Board are imposed upon nonvehicular sources of air pollution by means of a permit system which is administered by the Officer.[27] Under the district's permit system, the owner or operator of a facility which emits a regulated air pollutant must apply for, and receive, a permit to operate.[28] If the Officer is satisfied that a facility complies with district pollution control regulations, a permit will be issued.[29] Attendant to the responsibility of issuing permits, the Officer conducts on-site inspections of air pollution sources to ensure continuing compliance.[30]

The hearing board serves as the judicial branch of the air pollution control district. Members of the hearing board, who are appointed by the Board, include an attorney, an engineer, a doctor, and two lay persons.[31] The hearing board's responsibilities include hearing petitions for variances from state or district regulations and reviewing the enforcement activities conducted by the air pollution control officer.[32] When authorized by the Board, the hearing board may

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25. *Id.* § 42450 (West Supp. 1989) (requiring district air pollution control boards to provide 30 day notice and hearing on the matter before issuing an order of abatement). *See id.* § 42452 (order for abatement issued in the form of an injunction requiring the violator to refrain from a specified act); *id.* § 42453 (district may seek an injunctive order from superior court against a person violating an order for abatement).

26. *Id.* § 40752 (West 1986) (authority of air pollution control officer).

27. Applicants seeking to build, alter, replace or operate equipment which may emit air pollutants must apply for, and receive, a permit from the district. *Id.* § 42300 (West 1986). *See id.* § 39013 (West 1986) (air pollutant means a release into the atmosphere of any noxious substance).

28. *Id.* § 42300 (West 1986). In the application, source operators must furnish the Officer with any data relating to current emissions of regulated substances. Facilities seeking to increase emissions of regulated substances are required to apply for a new permit. *Id.* § 42303 (West 1986).

29. *Id.* §§ 42300, 42301(b) (West 1986).

30. *Id.* §§ 41510, 42707 (West 1986).

31. *Id.* § 40801 (West 1986). Board members must have the following qualifications: (1) A lawyer admitted to the California Bar, (2) an engineer registered under the Professional Engineers Act, (3) a member of the medical profession, having specialized skill in the fields of environmental medicine, community medicine, occupational medicine, or toxicologic medicine, and (4) two members of the public. *Id.* In the event that a hearing board position cannot be filled with a qualified person from within the district, the air pollution control board may appoint any ready or able person. *Id.* § 40802 (West 1986).

32. The review function includes the authority to issue, revoke, or reinstate permits granted or suspended by the air pollution control officer. *Id.* § 42309 (West 1986). *See generally* Manaster, *Administration of Air Pollution Disputes: The Work of the Air Pollution Control Hearing Boards in California*, 17 U.C. DAVIS L. REV. 1117 (1984).

issue orders for abatement.[33]

The independent authority of county air pollution control districts caused practical difficulties in statewide efforts to control air quality. Differing political and economic climates within individual districts contributed to corresponding differences in the degree of air pollution regulation between districts.[34] The legislature's first effort to establish uniform minimum air pollution control among the districts was the creation of the ARB.[35] In providing for the ARB, the legislature emphasized the need for a single agency responsible for coordinating air conservation activities within the state.[36] Initially, the ARB was

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33. *See* CAL. HEALTH & SAFETY CODE § 42451 (West 1986) (hearing board's authority to issue order for abatement subject to public notice and hearing requirements).

34. Economic and political pressures may influence the degree of regulation within a county district. The air pollution control board is composed of the members of the county board of supervisors who are politically sensitive to a relatively small community. In regions that benefit substantially from tourism, political pressure may produce resistance to smokestack industries operating, or seeking to operate, within that county. However, air pollution is not a local problem. If economic pressures, as explained below, tend to produce the lowest possible regulatory standards in one county, every county down wind suffers.

Assume that a county does not benefit from tourism, but does provide a haven for smokestack industry. Its development depends on taxes and employment resulting from those industries. In a sparsely populated county, industry might employ a significant number of voters. In the case of smokestack industries, economic welfare is inversely related to the degree of air pollution regulation. Hence, to the extent that an employee's perceived welfare is contingent on that of the industry, political leverage, when brought to bear, will seek to reduce or fix pollution regulation. If the most politically influential industries are also the largest polluters, the substances most in need of control may be minimally regulated. The result, from a statewide perspective, is that polluters will tend to concentrate in areas having the least regulation and total air pollution regulation will remain at the lowest possible standard.

Air pollution emitted in one county effects surrounding counties as much, or more, than it effects the source region. If one district chooses to minimize air pollution regulation in order to promote its economy, the ill effects resulting from increased emissions will affect counties downwind. The negative environmental effect on neighboring counties downwind is compounded by a revenue drain as polluters move to districts requiring less regulation. A loss of business, in the surrounding counties provides incentive for them to reduce regulation correspondingly. As for the source region, the economic cost of any increase in air pollution standards would be borne internally, while any benefits would accrue downwind. For the system as a whole, a stable equilibrium is achieved at the lowest possible levels of regulation. *See generally A Proposed Reorganization*, *supra* note 1, at 908-913 (discussing the ineffectiveness of local air pollution control structure).

Water pollution regulation presents a similar regulatory problem, however, the administrative structure is better suited for the job. The state is divided into nine regions, each headed by a regional board. *See* CAL. WATER CODE §§ 13200, 13201 (West 1971). The Governor appoints members of the regional boards. There are strict rules prohibiting conflicts of interest. *Id.* §§ 13201, 13207 (West 1971 & Supp. 1989) (no member may be employed in any manner by a "waste discharger"). The nine regional boards are headed by a State Board, acting much like the ARB, responsible for implementing federal water pollution legislation and creating state water policy. *See id.* §§ 13140, 13160 (West Supp. 1989).

35. CAL. HEALTH & SAFETY CODE § 39510 (West 1986) (composition and required qualifications for members of the Air Resources Board). *See A Many Layered Wonder*, *supra* note 19, at 115 (discussing the legislative history of county air pollution control districts).

36. *See* CAL. HEALTH & SAFETY CODE §§ 39003, 39500 (West 1986) (ARB charged with the responsibility of coordinating efforts to achieve and maintain ambient air quality standards).

authorized to regulate vehicular air pollution,[37] establish air basins,[38] set ambient air quality standards,[39] and conduct research programs.[40] However, primary responsibility for regulating nonvehicular air pollution sources was left to the districts.[41]

Although the ARB does not directly regulate nonvehicular air pollution sources, it is authorized to supervise certain district regulatory activities. Districts must enact regulations reasonably calculated to meet the ambient air quality standards established by the ARB.[42] The ARB reviews regulations enacted, amended, or repealed by district Boards to ensure that ambient air quality standards will continue to be met.[43] If the ARB finds that a district's regulations are insufficient, the ARB is authorized to step in and directly regulate nonvehicular air pollution sources within the district's jurisdiction.[44] The ARB also reviews variances granted by a district hearing board and may revoke or modify the variance according to its findings.[45]

With the enactment of the Tanner Act, the legislature provided the ARB with the additional responsibility of identifying toxic air contaminants.[46] Traditionally, the districts determined what substances warranted regulation when standards were not specified by state or federal law.[47] The Tanner Act was enacted to clarify the ARB's authority relative to the districts; however, the new program left many questions unanswered.[48]

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37. *See id.* § 39500 (West 1986) (authority to regulate motor vehicle emissions); *id.* § 39060 (West 1986) (definition of vehicular sources).

38. *Id.* § 39606(a) (West 1986) (ARB authority to establish air basins and set ambient air quality standards). *See id.* § 39012 (West 1986) (definition of air basin).

39. *Id.* § 39606(b) (West 1986) (standards may vary from one air basin to another). Ambient air quality standards are specified concentrations and durations of air pollutants established by the ARB. *Id.* § 39014 (West 1986) (defining ambient air quality standards).

40. *Id.* § 39701 (West 1986). Required research areas include: vehicular emission controls, alternative fuels, nonvehicular emissions controls, control of specific contaminants, and alternatives to agricultural burning. *Id.*

41. *Id.* § 40000 (West 1986) (statement of legislative intent allocating authority of districts and the ARB).

42. *Id.* § 40001 (West 1986).

43. The ARB must review district enforcement practices to ensure that reasonable provision is made to promote state air quality standards. *Id.* § 41500(c) (West 1986).

44. *Id.* § 41505 (West 1986).

45. *Id.* § 42362 (West 1986) (authority of the ARB to modify variance).

46. *See infra* notes 51-59 and accompanying text (discussing the Tanner Act's toxic air contaminant identification procedures).

47. CAL. HEALTH & SAFETY CODE. §§ 40001, 40702 (West 1986) (district authority to adopt rules and regulations deemed necessary or proper to regulate nonvehicular air pollution sources).

48. *Id.* § 39650(f) (West 1986) (statement of legislative intent expressing a need to clarify the ARB's authority with respect to the identification of toxic air pollutants).

B. The Tanner Act of 1983

Under the Tanner Act (Tanner), the ARB administers a two prong procedure. The first stage is designed to identify substances that qualify as toxic air contaminants (TAC's).[49] In the second stage, the ARB considers the degree of control necessary to render a TAC safe and adopts an airborne toxic control measure (ATCM), which serves as a minimum standard for district regulation of the substance.[50] Tanner provides liberal opportunity for public comment and interagency review, and establishes checks for scientific integrity.

1. Identification of Toxic Air Contaminants

The ARB initiates the identification process by requesting the State Department of Health Services (Health Services) to evaluate a substance and prepare a recommendation regarding its toxicity.[51] Health Services collects all available scientific data[52] on the substance and prepares an estimate of the minimum level of exposure likely to produce harmful health effects in humans.[53] Based on this report from Health Services, the ARB prepares a preliminary report containing findings sufficient to serve as a basis for regulatory action.[54] The supporting data and scientific method employed in producing the report is reviewed by a Scientific Review Panel to ensure integrity.[55]

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49. *See id.* § 39655 (definition of toxic air contaminant). A toxic air contaminant is defined as an airborne substance which may cause or contribute to an increase in mortality rate, the rate of serious illness, or which poses a present or potential threat to human health. *Id.* Substances identified under the Federal Clean Air Act as hazardous air pollutants must be designated as toxic air contaminants by the ARB. *Id. See* 42 U.S.C. § 7412 (1987) (federal criterion for the identification of hazardous air pollutants).

50. *See* CAL. HEALTH & SAFETY CODE §§ 39660-62 (procedure for identification of toxic air contaminants); 39665, 39666 (procedure and other requirements for developing airborne toxic control measures). *See also id.* § 39656 (definition of airborne toxic control measure). An air toxic control measure (ATCM) is a recommended method of reducing emissions of toxic air contaminants. *Id.*

51. *Id.* § 39660(a).

52. The Tanner Act provides that the protection of public health mandates the identification and control of toxic air contaminants by means of the best available scientific evidence. *Id.* § 39650(d).

53. *Id.* § 39660(c) (if no threshold level is determinable, Health Services must assess the potential range of risk to human health resulting from estimated levels of exposure). Health Services must complete and return the report to the ARB within 120 days. *Id.* § 39660(d).

54. *Id.* § 39661(a).

55. *Id.* §§ 39661(b) (the nine member panel must formally review scientific procedures

If the preliminary report passes the Scientific Review Panel's inspection and the ARB considers the substance a TAC, the ARB lists the substance in a proposed regulation.[56] After a public hearing on the ARB's proposed regulation, substances identified as TAC's are listed in a formal regulation.[57] For each TAC included in the regulation, the ARB must establish an exposure level below which no adverse health effect is anticipated.[58] The ARB has completed the identification process for only nine substances since Tanner was enacted in 1983.[59]

2. *Adoption of Airborne Toxic Control Measures*

Once the identification process is completed, the second phase of Tanner is triggered. The ARB prepares a report specifying the degree of regulation necessary for effective control of each identified TAC.[60] Based upon all available data for each TAC, the ARB's report must specify present and expected future emissions rates, chemical stability within the atmosphere, potential sources, feasibility of effective control, health and environmental risks, and available control technologies along with their associated costs.[61] After another public hearing, the ARB adopts a series of ATCM's designed to reduce emissions of the TAC from potential nonvehicular sources.[62] Within six months of the ARB's adoption of an ATCM, the districts must adopt their own regulations for each TAC, which must be at least as stringent as the ATCM.[63]

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and methods supporting the data and the resulting conclusions); 39661(c) (if the panel finds the report seriously deficient, it is returned to the ARB for revision). *See id.* § 39670(b) (members of the scientific review panel must be highly qualified and active in scientific research). The Scientific Review Panel has rejected at least two of the health effects reports submitted by the ARB. Brief for Respondent at 11 n.8, Western Oil & Gas Ass'n v. Monterey Bay Air Quality Management Dist., 49 Cal. 3d 408, 777 P.2d 157, 261 Cal. Rptr. 384 (No. S006708) (1989).

56. CAL. HEALTH & SAFETY CODE § 39662(a).

57. *Id. See id.* § 39662(b) (public hearing requirement).

58. *Id.* § 39662(c).

59. *See* Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 414 n.8, 777 P.2d 157, 160 n.8, 261 Cal. Rptr. 384, 387 n.8 (1989). The nine identified substances are asbestos, benzene, cadmium, carbon tetrachloride, chlorinated dioxins and dibenzofurans, chromium (VI), ethylene dibromide, and ethylene oxide. *Id.* All nine substances were included on the list attached to Rule 1000 when it was enacted. *Id.*

60. CAL. HEALTH & SAFETY CODE § 39665(a). In preparing the report, the ARB consults with districts, affected sources, and the interested public. *Id.*

61. *See id.* § 39665(b) (findings to be included in report if reasonably available).

62. *Id.* § 39666(a).

63. *Id.* § 39666(d).

To date, the ARB has not produced a single ATCM.[64] As a result, the districts have been left without the minimum toxic air pollution control standards contemplated under Tanner. In order to fill this regulatory void, Monterey Bay Unified Air Pollution Control District (District) created its own toxic air contaminant identification and control program, Rule 1000.[65]

C. Monterey Bay's Interim Solution - Rule 1000

Like Tanner, Rule 1000 establishes a two prong procedure for the identification and subsequent regulation of toxic air contaminants. Under Rule 1000, the identification process is administered by the Officer,[66] who conducts a study of substances considered potentially toxic by the state.[67] The Officer draws candidate substances from a list of toxic substances regulated in the workplace.[68] As a result of the study, the Officer determines whether a substance qualifies as either a toxic air contaminant[69] or a carcinogenic toxic air contaminant (CTAC).[70] To aid in the determination, the Officer consults with the ARB, Department of Health Services, and the International Agency for Research on Cancer Monographs.[71]

Unlike Tanner's complicated procedure for the development of emission control measures, Rule 1000 simply directs the Officer to require generally specified control measures.[72] Facilities emitting toxic air contaminants at a rate exceeding some "threshold value" must

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64. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 516, 248 Cal. Rptr. 418, 421 (1988).

65. *See Monterey Bay*, 49 Cal. 3d at 418 n.14, 777 P.2d at 163 n.14, 261 Cal. Rptr. at 390 n.14. Rule 1000 was the first district regulation enacted after the Tanner Act which provided for the identification and control of toxic air contaminants. *Id.*

66. *See* CAL. HEALTH & SAFETY CODE § 40750 (West 1986) (providing district authority to appoint air pollution control officer).

67. Rule 1000 §§ 3.2, 3.9 (1986) (copy on file at the *Pacific Law Journal*).

68. *Id.* § 3.9.1 (list of hazardous substances to be regulated in the workplace as codified in 8 CAL. CODE. REGS. § 5155(a) (West 1989).

69. A toxic air contaminant is a substance which may cause or contribute to an increase in mortality, morbidity, or may otherwise pose a material impairment to human health. *Id.* § 3.9.1.

70. A CTAC is a toxic air contaminant which the Officer determines causes cancer in humans. *Id.* § 3.2. *See id.* §§ 3.2.1-3.2.3 (guidelines and presumptions governing the Officer's procedure for the identification of CTAC's).

71. *Id.* § 3.2.3 (the Officer's consultations appear to be informal with no established guidelines).

72. *See infra* notes 73-79, and accompanying text (describing Rule 1000's applicable control measures).

use reasonable control technology to reduce emissions.[73] Facilities which emit CTAC's are required to use the best control technology available which has been successfully used.[74] As a lower regulatory threshold, all air pollution control measures approved by the Officer must be at least as stringent as measures required by other federal, state or district laws.[75]

Control measures apply to new or modified stationary air pollution sources emitting substances identified as toxic air contaminants or CTAC's.[76] The required control measures are imposed by means of a permit system.[77] A facility undergoing expansion, which may increase air emissions of substances identified as toxic air contaminants or CTAC's, must satisfy the Officer that necessary control measures have been implemented.[78] Permit applicants must prepare a pollutant status report detailing proposed changes in the emission rate of regulated air pollutants, alternative processes, substitute compounds, and other procedures which may be available to protect the public health.[79]

In contrast to Tanner's ATCM procedure, which failed to produce a single control measure over a six year period, Rule 1000's procedure proved to be easily managed. Prior to the enactment of Rule 1000, but pursuant to its directive, the Officer identified 125 substances as toxic air contaminants and 23 substances as CTAC's.[80] A list of these substances was attached to Rule 1000 when it was formally adopted by the District's Board.[81] However, because Rule 1000 duplicated the functions of Tanner, the supreme court had to determine whether the legislature, in enacting Tanner, intended to preclude individual district regulation of potentially toxic substances.[82]

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73. Reasonable control technology means pollution controls readily available and commonly used. Rule 1000 § 3.7.1.

74. Best control technology means the most effective control measures successfully used which the Officer determines to be cost effective. *Id.* § 3.1.1.

75. *Id.* § 3.1.2.

76. *Id.* § 1.2.1. *See id.* § 4.1.1 (toxic air contaminant control measure applicable to noncarcinogenic toxic air pollutants).

77. *Id.* § 4.1.3. *See supra* notes 26-30 and accompanying text (standards and regulations comprising a district's permit procedures are established by the air pollution control board).

78. Rule 1000 §§ 4.1.1, 4.4.1.

79. *Id.* § 3.6.

80. *See Monterey Bay*, 49 Cal. 3d at 415, 777 P.2d at 161, 261 Cal. Rptr. at 388.

81. *Id.*

82. *Id.* at 417, 777 P.2d at 162, 261 Cal. Rptr. at 389.

II. The Case

A. The Facts

Western States Petroleum Association (WSPA), a trade association representing various oil refining interests, filed suit in California Superior Court seeking declaratory relief invalidating Rule 1000.[83] WSPA challenged Rule 1000 on two grounds. Their primary argument was that Rule 1000 frustrated the legislative goals expressed in Tanner.[84] WSPA noted that the purpose of Tanner was to provide uniform air pollution regulations across the state and to identify toxic air contaminants by means of the best available scientific evidence.[85] Since independent district regulation would promote regulatory inconsistencies across the state and ad hoc identification schemes would almost certainly not utilize the best available scientific evidence, WSPA argued that the legislature must have intended to preclude continued district regulation.[86]

WSPA's second argument against the validity of Rule 1000 attacked the delegation of rule-making authority to the Officer.[87] Under Rule 1000, the Officer exercises some discretion in the toxic air contaminant identification procedure.[88] The Officer's determination that a substance qualifies as a toxic air contaminant triggers Rule 1000's control measure requirements.[89] WSPA contended that the power to

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83. *Id.* 49 Cal. 3d at 416, 777 P.2d at 161, 261 Cal. Rptr. at 388.

84. *Id.*

85. *Id.* Respondent's argument concerning the need for the "best scientific evidence" in the identification and control of toxic air contaminants, is illustrated by the recent switch from lead to benzene as an octane booster in gasoline. Brief for Respondent at 24, Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 777 P.2d 157, 261 Cal. Rptr. 388 (No. S006708) (1989). The substitution resulted from EPA and ARB restrictions on the use of lead. *Id.* Benzene, however, has been identified as a TAC. *Id.* Since both substances are extremely toxic the benefit from the substitution is unclear, while the immediate economic cost is substantial. *Id.* Regulations imposed by districts, without the resources to conduct comprehensive studies of potential alternatives might likewise, impose burdensome regulations without gaining anything other than a perceived benefit. *Id.*

86. *See Monterey Bay*, 49 Cal. 3d at 416, 777 P.2d at 161, 261 Cal. Rptr. at 388. *See also* Brief for Respondent at 17, Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 777 P.2d 157, 261 Cal. Rptr. 388 (No. S006708) (1989) (discussing WSPA's interpretation of Tanner).

87. *See Monterey Bay*, 49 Cal. 3d at 412, 777 P.2d at 161, 261 Cal. Rptr. at 388 (1989).

88. *Id.*

89. *See id.* at 427, 777 P.2d at 168, 261 Cal. Rptr. at 395.

exercise discretion was an exercise of rule-making authority.[90] Existing law requires the exercise of rule-making authority, if delegated, to be accompanied by a public notice and hearing.[91] WSPA argued that because Rule 1000 makes no such provision, the delegation was improper.[92]

At the trial level, the parties filed cross motions for summary judgment and the court entered judgment in favor of the District.[93] In reversing the trial court, the court of appeal focused upon whether the legislature, in enacting Tanner, intended to preempt a district's authority to independently identify and control toxic air contaminants.[94]

Since nothing in Tanner expressly preempted district authority, the court of appeal turned to an implied preemption analysis.[95] The test for implied preemption was whether local legislation had entered an area so completely occupied by general law that the matter had become exclusively a state concern.[96] As construed by the court of appeal, the central purpose of Tanner was to provide for the utilization of the best available scientific evidence in the identification of toxic air contaminants.[97] This statement of legislative intent was supported by Tanner's comprehensive and detailed identification procedures designed to ensure careful study and scientific integrity.[98] Continued independent district identification and regulation of toxic

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90. Brief for Respondent at 25, Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 777 P.2d 157, 261 Cal. Rptr. 388 (No. S006708) (1989).

91. *See* CAL. HEALTH & SAFETY CODE §§ 40725-28 (West Supp. 1989) (public notice and hearing requirements necessary for the adoption of rules for general application).

92. *See Monterey Bay*, 49 Cal. 3d at 427, 777 P.2d at 168, 261 Cal. Rptr. at 395.

93. *Id.* at 416, 777 P.2d at 161, 261 Cal. Rptr. at 388.

94. *Id. See* Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 516, 248 Cal. Rptr. 418, 423 (1988).

95. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 516, 248 Cal. Rptr. 418, 423 (1988).

96. *Id. See In re* Hubbard, 62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 393, 399 (1964). The test in *Hubbard* requires the court to consider whether the legislature, in enacting a statutory scheme, has preempted local legislation by implication. *Id.* The test is whether: (1) The state law so completely covers the subject that the matter has become exclusively a state concern; (2) whether the state law is couched in such terms as to clearly indicate that a paramount state concern will not tolerate local regulation in that area; or (3) whether the state law is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. *Id.*

97. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 521, 248 Cal. Rptr. 418, 424 (1988).

98. *Id.* (preemption finding necessary to effectuate legislative goals). *See* CAL. HEALTH & SAFETY CODE § 39650(d) (legislative goals include the utilization of the best available scientific evidence and scientific review in the TAC identification process).

air contaminants might conflict with ARB determinations under Tanner and frustrate the legislature's desire to provide for uniform regulation of toxic air contaminants.[99] Thus, the court concluded, Tanner preempted Rule 1000's toxic air contaminant identification process.[100]

Applied to Rule 1000, the court of appeal's holding invalidated the identification procedures contained in Rule 1000, but not the subsequent regulatory provisions applicable to identified toxic air contaminants.[101] Since districts would be precluded from identifying toxic air contaminants, any new regulatory action by districts would be restrained until after the ARB had finished its identification procedures mandated under Tanner.[102] Once an air contaminant was identified as toxic by the ARB, however, districts would be free to regulate the substance.[103] The California Supreme Court, in a unanimous decision, reversed the court of appeal.[104]

B. The Opinion

1. Tanner's Preemption of District Regulation

In an opinion by Justice Eagleson, the supreme court examined the statutory authority granted to districts before the passage of Tanner. The court determined that prior to Tanner, the districts had clear authority to regulate all nonvehicular air emissions.[105] Therefore, Rule 1000 was valid unless Tanner repealed preexisting district authority.[106] Nothing in Tanner expressly indicated an intent to preclude a district from regulating a substance until after the ARB determined

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99. *Monterey Bay*, 202 Cal. App. 3d at 521, 248 Cal. Rptr. at 424.

100. *Id.* The court determined that conflict might result if the ARB studied a substance and determined that it was not toxic, but the District, under Rule 1000 concluded otherwise. *Id. See* Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 426 n.18, 777 P.2d 157, 168 n.18, 261 Cal. Rptr. 384, 395 n.18 (1989) (the California Supreme Court declined to resolve this potential conflict).

101. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 522, 248 Cal. Rptr. 418, 424 (1988).

102. *Id.*

103. *Id.*

104. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 429, 777 P.2d 157, 170, 261 Cal. Rptr. 384, 397 (1989).

105. *Id.* at 417, 777 P.2d at 162, 261 Cal. Rptr. at 389.

106. *Id.* at 417, 777 P.2d at 162, 261 Cal. Rptr. at 389.

that it was toxic.[107] Contrary to the implied preemption analysis applied by the court of appeals, however, the supreme court framed the controlling issue as whether the passage of Tanner repealed by implication the district's otherwise existing statutory authority.[108] Pursuant to this approach, the court reviewed judicial presumptions relating to implied repeal.[109]

Judicial analysis of a statute requires the presumption to be against implied repeal of existing statutes.[110] To overcome the presumption, the two statutes must be totally irreconcilable.[111] The presumption against implied repeal is especially difficult to rebut if a statute serves an important public purpose.[112] There was no doubt that the District's mandate, the protection of public health through the regulation of toxic air pollutants, involved an important public purpose.[113] Hence, the *Monterey Bay* court concluded that a finding of repeal by implication must be supported by "undebatable evidence" of legislative intent to repeal district authority.[114] Undebatable evidence of intent to repeal may be found when there is no possibility that the statutes will operate concurrently, or where the statute itself evidences an intent to repeal a former grant of authority.[115]

a. Concurrent Operation

In determining whether concurrent operation was possible, the court first distinguished the regulatory function of the ARB from that of the districts in the existing air pollution regulatory framework.[116] The court noted that the ARB's regulatory authority extended primarily to vehicular sources of air pollution.[117] The districts, on the other hand, were left with the primary responsibility for

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107. *Id.* at 417, 777 P.2d at 162, 261 Cal. Rptr. at 390.

108. *Id.* However, the court emphasized that the result did not depend on whether the issue was characterized as preemption or implied repeal. *Id.*

109. *Id.*

110. Flores v. Workman's Comp., 11 Cal. 3d 171, 176, 520 P.2d 1033, 1038, 113 Cal. Rptr. 217, 222 (1974).

111. Penziner v. West Am. Fin. Co., 10 Cal. 2d 160, 176, 74 P.2d 252, 368 (1937); Metropolitan Water Dist. v. Dorff, 98 Cal. App. 3d 109, 114, 159 Cal. Rptr. 211, 216 (1979).

112. SUTHERLAND, STATUTORY CONSTRUCTION § 23.10 (4th ed. 1985).

113. *Monterey Bay*, 49 Cal. 3d at 419, 777 P.2d at 163, 261 Cal. Rptr. at 390.

114. *Id.* at 420, 777 P.2d at 164, 261 Cal. Rptr. at 391 (quoting Hays v. Wood 25 Cal. 3d 772, 784, 603 P.2d 19, 24, 160 Cal. Rptr. 102, 107 (1979)).

115. *See Penziner*, 10 Cal. 2d at 176, 74 P.2d at 368.

116. *Monterey Bay*, 49 Cal. 3d at 420, 777 P.2d at 164, 261 Cal. Rptr. at 391.

117. *Id. See* CAL. HEALTH & SAFETY CODE § 40000 (West 1986) (ARB authority to regulate vehicular emissions does not extend to nonvehicular emissions).

regulating nonvehicular sources of air pollution.[118] Since the ARB and districts operated in different spheres of authority there could be little risk of conflict.[119]

Under Tanner, districts are required to implement ATCMs produced by the ARB only if their own existing regulation is less stringent.[120] Given the slow pace at which the ARB was progressing under Tanner, the Supreme Court recognized the need for continued district regulation.[121] Because the existing statutory authority of districts could operate concurrently with the authority exercised by the ARB under Tanner, there was no basis for implied repeal.[122]

b. Absence of Undebatable Evidence of Legislative Intent to Repeal

The supreme court noted that in rare cases, the language of a state statute may provide undebatable evidence of an intent to supercede local authority.[123] In reviewing Tanner for such language, the court placed special significance on the legislature's expressed intent to provide a regulatory system which would *compliment* existing authority.[124] The court found it unreasonable to conclude that the legislature intended to restrict longstanding district authority through language expressly stating a desire to compliment local activity.[125] Citing other provisions of Tanner, the court noted that the ARB's role under Tanner was to provide technical and scientific assistance to districts in order to achieve the earliest practicable control of air pollution.[126] Such a legislative pronouncement did not indicate an intent to preclude district identification of toxic air contaminants

118. *Monterey Bay*, 49 Cal. 3d at 420, 777 P.2d at 164, 261 Cal. Rptr. at 391. Under Tanner, districts are not required to implement ARB ATCM's unless their existing regulation is less stringent than the ATCM. *Id.* Thus, the court reasoned that the potential for conflict or duplication would be minimal; the ATCM adopted by the ARB would simply provide a lower bound for district regulation across the state. *Id.*

119. *See id.*

120. *Id.* at 421, 777 P.2d at 170, 261 Cal. Rptr. at 391.

121. *Id.*

122. *Id.*

123. *Id. See* Hays v. Wood, 25 Cal. 3d 772, 784, 603 P.2d 19, 24, 160 Cal. Rptr. 102, 107 (1979).

124. *Monterey Bay*, 49 Cal. 3d at 421, 777 P.2d at 164, 261 Cal. Rptr. at 391 (1989) (quoting section 39650 subsection (i) of the California Health and Safety Code).

125. *Id.* "Such an interpretation violates both grammatical and common sense." *Id.*

126. *Id.* at 421, 777 P.2d at 165, 261 Cal. Rptr. at 392.

until after the ARB was able to provide the assistance by completing the identification process established by Tanner.[127]

Turning to WSPA's contention that independent district regulation was inconsistent with the express purpose of minimizing inconsistencies in the protection of public health across the state, the court noted that Tanner merely required district regulations to be at least as stringent as the ATCM's promulgated by the ARB.[128] Since districts were free to establish their own standards, subject only to the minimum standards set by the ARB, Tanner expressly sanctioned regulatory inconsistencies.[129] Thus, the legislative declaration could not indicate an intent to repeal district authority.[130] Since no other language in Tanner indicated an intent to limit district authority, the court found no undebatable evidence of an intent to repeal district authority.[131]

Finally, as a rhetorical exercise, the court addressed the practical effect of WSPA's interpretation of Tanner.[132] As a general rule of statutory construction, if the language of a statute is susceptible to more than one interpretation, the interpretation which best promotes the legislative purpose should be adopted.[133] WSPA contended that the legislature's expressed intent to provide for the identification of TAC's by means of the best available scientific evidence and for the uniform regulation of TAC's throughout the state, indicated an intent to prevent local districts from independently identifying toxic substances.[134]

The supreme court again focused on the expressed need to achieve the earliest practicable control of TAC's.[135] If WSPA's construction of Tanner were adopted, districts would be precluded from regulating new toxic substances until after the ARB had completed its own

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127. *Id.*

128. *Id. See* CAL. HEALTH & SAFETY CODE § 39650(k) (West 1986) (legislative purpose to minimize inconsistencies in the protection of public health).

129. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 421, 777 P.2d 157, 165, 261 Cal. Rptr. 384, 392 (1989).

130. *Id.*

131. *Id* at 422, 777 P.2d at 165, 261 Cal. Rptr. at 394.

132. *Id.*

133. *Id.* (quoting Clements v. T.R. Bechtel Co., 43 Cal. 2d 227, 233, 273 P.2d 5, 11 (1954)). *See* Dyna-Med Inc. v. Fair Employment & Housing Comm., 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 1327, 241 Cal. Rptr. 67, 70 (1987) (consideration should be given to the consequences that will flow from a particular statutory interpretation).

134. *See supra* notes 84-86 and accompanying text (discussing WSPA's interpretation of Tanner).

135. *See Monterey Bay*, 49 Cal. 3d at 426, 777 P.2d at 168, 261 Cal. Rptr. at 395.

evaluation.[136] Given the presumption that the legislature was aware of the ARB's slow progress under Tanner, the court found it unreasonable to conclude that the legislature intended to repeal the long-standing authority of districts in the interim.[137] Since the procedures provided under Tanner could require years to complete for each substance considered, the practical effect of precluding district regulation would seriously limit air pollution control within the state.[138] Nonvehicular sources of TAC's could emit unrestricted amounts of substances until after the ARB had identified the substances as toxic.[139] That result would be inconsistent with the legislature's desire to achieve effective regulation by the earliest possible date.[140]

c. Implied Preemption of District Authority in the Absence of ARB Identification

As a concession to the analysis and decision by the court of appeals, the supreme court briefly addressed the issue from an implied preemption perspective.[141] Generally, local legislation that conflicts with general law is void.[142] A conflict arises when a local ordinance duplicates, contradicts, or enters an area covered by general law.[143] The court of appeals emphasized Tanner's complex identification procedure, coupled with the legislature's expressed intent to utilize the best scientific evidence, to conclude that Tanner preempted district identification of toxic substances.[144]

The supreme court tempered the general rule with the presumption that a long history of local regulation, coupled with a legislatively imposed duty to protect the public health, weighs against a finding

136. *Id.*

137. *Id. See* Hays v. Wood, 25 Cal. 3d 772, 784, 603 P.2d 19, 24, 160 Cal. Rptr. 102, 107 (1979) (presumption that the legislature is aware of existing statutes and intends all subsequent enactments to be consistent).

138. *See Monterey Bay*, 49 Cal. 3d, at 425, 777 P.2d at 167, 261 Cal. Rptr. at 394.

139. *Id.*

140. *Id.* If local Districts were precluded from regulating substances in the absence of an ARB determination of toxicity the authority to regulate nonvehicular air emissions would be lost for all practical purposes. *Id.* at 412, 777 P.2d 158, 261 Cal. Rptr. at 385.

141. *Id.*

142. *Id. See* People *ex rel.* Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 484, 683 P.2d 1150, 1155, 204 Cal. Rptr. 897, 902 (1984) (quoting Lancaster v. Municipal Court, 6 Cal. 3d 805, 806, 494 P.2d 681, 682, 100 Cal. Rptr. 609, 610 (1972) (conflict means duplicate, contradict, or impinge in an area already fully occupied by state law)).

143. Lancaster v. Municipal Court, 6 Cal. 3d 805, 807, 494 P.2d 681, 682, 100 Cal. Rptr. 606, 610 (1972).

144. *Id.*

of implied preemption.[145] Districts had clear authority to protect the public health by regulating nonvehicular air pollution within their regions.[146] Further, Tanner provides that protection of the public health required the control of TAC's by the earliest possible date.[147] Since the legislature was presumably aware that Tanner's procedures would take a substantial amount of time for the ARB to complete, its failure to provide an interim procedure supported the conclusion that the legislature did not intend to preempt district regulatory power.[148] The complexity of the identification procedures, alone, was insufficient to support a finding of implied preemption.[149] Furthermore, in the supreme court's view, the legislative statement requiring that the identification of toxic air contaminants utilize the best scientific evidence merely indicated an intent to ensure effective ARB regulation in the future.[150] The statement did not indicate an intent to "hamstring" district control in the interim period.[151]

2. *Delegation of Legislative Authority*

The *Monterey Bay* court then turned to WSPA's second contention, that the Officer's discretion in the identification of toxic air contaminants and CTAC's constituted an improper exercise of rule-making authority.[152] The court dismissed the improper delegation issue as premature on the ground that the Officer's initial list of 125 substances was attached to Rule 1000 when it was enacted.[153] As a general rule, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act and the act becomes an act of the agency.[154] Because the Officer's initial list of substances was attached to Rule 1000 when it was enacted by the pollution

145. *See Monterey Bay*, 49 Cal. 3d at 424, 777 P.2d at 166, 261 Cal. Rptr. at 393 (1989). *See* People *ex rel.* Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 484, 683 P.2d 1150, 1155, 204 Cal. Rptr. 897, 902 (1984).

146. *See supra* notes 19-33 and accompanying text (discussing district authority).

147. *See* CAL. HEALTH & SAFETY CODE § 39650(k).

148. *See Monterey Bay*, 49 Cal. 3d at 424, 777 P.2d at 166, 261 Cal. Rptr. at 393.

149. *Id.*

150. *Id.* (referencing section 39650, subdivision (d) of the California Health and Safety Code).

151. *Id.*

152. *Id.* at 427, 777 P.2d at 168, 261 Cal. Rptr. at 395.

153. *Id.* at 427, 777 P.2d at 169, 261 Cal. Rptr. at 396.

154. *Id.* at 428, 777 P.2d at 168, 261 Cal. Rptr. at 395 (quoting California School Employees Ass'n v. Personnel Comm., 3 Cal. 3d 139, 145, 474 P.2d 436, 439, 89 Cal. Rptr. 620, 623 (1970)).

control board, the Officer's list of identified toxic air contaminants had been ratified by the pollution control board. Thus, there had been no exercise of rule-making authority.

By limiting its decision to the initial list of identified contaminants adopted by the pollution control board, the supreme court left open the issue of whether future identification of toxic air contaminants by the Officer would comport with the proper exercise of rule-making authority.[155] Justice Eagleson suggested that any future due process challenge might be obviated if the District simply provided for public notice and hearing in Rule 1000's toxic air contaminant identification process, or that the Board simply ratify identified substances as an amendment to the existing list.[156]

III. Legal Ramifications

The Tanner Act's comprehensive identification process was enacted to promote uniformity and scientific integrity in the regulation of toxic air pollutants within the state.[157] Because of the difficulties presented by independent district regulation, the ARB's assistance was deemed necessary to achieve such regulation by the earliest practicable date.[158] Measured by these standards, Tanner has been a failure. The ARB has managed to identify only nine substances as TAC's since Tanner was enacted and no ATCM's have been adopted.[159] Since the ATCM is the only standard actually imposed upon districts under Tanner, the ARB's inability to produce an ATCM in nine years underscores Tanner's ineffectiveness.[160] Additionally, Tanner's silence concerning the continuing authority of the districts may have discouraged districts from refining their own regulatory programs

155. *See infra* notes 166-67 and accompanying text (discussing the need for compliance with rule-making formalities).

156. *See Monterey Bay*, 49 Cal. 3d at 428, 777 P.2d at 169, 261 Cal. Rptr. at 396.

157. *See* Cal. Health & Safety Code § 39650(k) (West 1986).

158. *Id. See supra* note 34 and accompanying text (discussing the practical difficulties associated with independent district management of air pollution).

159. The ineffectiveness of the ARB's performance under Tanner is illustrated by the fact that methyl isocyanate, a substance accidentally released by a subsidiary of Union Carbide operating in Bhopal India in 1984 and which killed more than 2500 people, has not been identified as a TAC. Amicus Curiae Brief at 6, Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 202 Cal. App. 3d 511, 248 Cal. Rptr. 418 (No. S006708) (1988).

160. *See Monterey Bay*, 202 Cal. App. 3d 511, 516, 248 Cal. Rptr. 418, 421 (1988) (discussing the effect of ATCM's adopted by the ARB).

while they waited for ARB action.[161] As a result, the Supreme Court's decision in *Monterey Bay*, recognizing the primary responsibility of the districts for the control of nonvehicular sources of air pollution, as well as their authority to identify toxic air pollutants, was necessary to preserve the pre-Tanner air pollution regulatory structure managed by the districts.[162]

The *Monterey Bay* court expressly reserved the issue of whether a substance may be regulated by a district if the ARB makes a final determination that the substance is not toxic.[163] Clearly, the possibility for conflict exists where a district decides that a substance is toxic and the ARB declares that it is not toxic. Under existing law, districts can regulate any noxious substance emitted from nonvehicular sources, whether technically toxic or not.[164] The supreme court's decision, recognizing the districts' primary responsibility with respect to nonvehicular sources, would indicate that districts may regulate contrary to the ARB finding. If such regulation is possible, an argument could be made that the value of the ARB's careful study of toxic air contaminants, mandated under Tanner, would be reduced.[165]

Districts seeking to implement a regulation like Rule 1000 should take special care to comply with statutory rule-making requirements. In declining to decide the delegation of authority issue, the *Monterey Bay* court leaves the door open for future litigation on the point.

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161. *See Monterey Bay,* 49 Cal. 3d at 418 n.14, 777 P.2d at 163 n.14, 261 Cal. Rptr. at 390 n.14 (1989). (Rule 1000, adopted three years after the enactment of Tanner, was the first toxic air contaminant identification program enacted by a district).

162. *See Monterey Bay*, 49 Cal. 3d at 412, 777 P.2d at 158, 261 Cal. Rptr. at 385 (court of appeal's construction, finding implied preemption of district identification programs, would seriously hamper air pollution control in California).

163. *See id.* at 426 n.18, 777 P.2d at 168 n.18, 261 Cal. Rptr. at 395 n.18 (the California Supreme Court declined to resolve this potential conflict).

164. *See* CAL. HEALTH & SAFETY CODE §§ 41700 (West 1986) (prohibits discharge of any air contaminant); 39013 (West 1986) (air contaminant defined); 42450, 42451 (district authority to issue order of abatement for discharge of air contaminant).

165. Presumably, the careful study of potential TAC's conducted by the ARB is intended to protect business from inefficient regulation of harmless air emissions as much as to identify toxic substances. In any case, if districts are not bound by the ARB's TAC identification process, as it progresses, the resulting ad hoc regulatory system would appear much as it did prior to Tanner. As a result, the legislative purpose to minimize inconsistencies in the protection of public health across the state may not be served. *See* Brief for Respondent at 17, Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 777 P.2d 157, 261 Cal. Rptr. 388 (No. S006708) (1989) (discussing WSPA's argument concerning the need for utilizing the "best scientific evidence"). The counter argument is that the ARB's determination under Tanner, made with consideration of statewide application, should be more conservative than a local district regulation, which, in any case, may be more stringent than standards proposed by the ARB. Such a system defers to local control and allows regulatory flexibility necessary to meet local needs.

Where an Officer adds new substances to the list of identified toxic air pollutants, a plaintiff could argue that the amendment requires public notice and a hearing in order to comply with statutory rule-making requirements.[166] In order to avoid such a challenge, the supreme court noted that a district can simply provide for public notice and hearing in the identification process, or, as in this case, the Board can ratify the new substances added by the air pollution control officer.[167]

Until the legislature revises or replaces Tanner, districts should take the initiative and enact procedures similar to Rule 1000. Without aggressive action at the district level, pollution problems can only get worse. It is clear that Tanner will not contribute much to achieve its stated goals in the foreseeable future.[168]

IV. CONCLUSION

Effective control of nonvehicular sources of air pollution by independent districts is limited by economic and political constraints.[169] In enacting Tanner, the legislature responded to a need for minimum regulation of toxic air contaminants throughout the state and for more careful scientific evaluation of potentially toxic air pollutants.[170] Tanner's comprehensive toxic air contaminant identification procedures, administered by the ARB, did not address whether districts retained authority to identify toxic air contaminants for purposes of regulation.[171] The ARB's slow progress under Tanner left a regulatory void and created a need to resolve the issue of whether districts retained authority to identify toxic substances.[172]

In *Monterey Bay*, the California Supreme Court held that the legislature, in enacting Tanner, did not intend to repeal the statutory authority of districts to regulate all nonvehicular sources of air

166. *See* CAL. GOV'T CODE § 11342(b) (West 1987) (definition of regulation includes any rule, regulation, or standard of general application adopted by an agency). Hence, the identification of a substance as toxic, and the consequent imposition of regulatory standards, is an exercise of rule-making authority. *Id. See* CAL. HEALTH & SAFETY CODE §§ 40725-28 (West Supp. 1989) (describing rule-making requirements, public notice and hearing requirements, and other necessary formalities).

167. *See Monterey Bay*, 49 Cal. 3d at 412, 777 P.2d at 169, 261 Cal. Rptr. at 396.

168. *See id.* at 412, 777 P.2d at 169, 261 Cal. Rptr. at 395 (many years of study are required before any significant number of substances will have been identified under Tanner).

169. *See supra* notes 34-36 and accompanying text.

170. *See supra* notes 46-47 and accompanying text.

171. *See supra* notes 46-48 and accompanying text.

172. *See supra* notes 46-48 and accompanying text.

pollution.[173] Districts may adopt procedures designed to identify toxic air pollutants independent of the ARB acting under Tanner.[174] The court found that the legislature intended Tanner to compliment the existing air pollution regulatory structure, rather than to provide a new source of direct regulation of nonvehicular air pollution sources.[175] The ARB merely studies potentially toxic substances in detail and develops *minimum* standards for regulating toxic air pollutants by districts throughout the state.[176] In light of the ARB's slow progress, a contrary holding would have severely hampered the already limited ability of air pollution control districts to respond to the growing air pollution problem in the state.[177]

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173. *See supra* notes 105-51 and accompanying text.
174. *See supra* notes 12-15 and accompanying text.
175. *See supra* notes 124-27 and accompanying text.
176. *See supra* notes 117-20 and accompanying text.
177. *See supra* notes 132-39 and accompanying text.