State of California
AIR RESOURCES BOARD

Resolution 82-46

September 22, 1982

Agenda Item No.: 82-18-2

WHEREAS, Health and Safety Code Section 39601 requires the Air Resources Board (the "Board") to adopt rules and regulations necessary for the proper execution of the powers and duties granted to and imposed upon the state board;

WHEREAS, Health and Safety Code Section 39606(b) requires the Board to adopt standards of ambient air quality for the protection of the public health, safety and welfare, including but not limited to health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy;

WHEREAS, the Board has received and reviewed a substantial body of evidence and testimony, in both written and oral form, from its staff, other scientists, and members of the public at a duly-noticed public hearing to consider the proposed standards;

WHEREAS, Health and Safety Code Section 39606(b) states that standards relating to health effects shall be based upon the recommendation of the State Department of Health Services;

WHEREAS, the Board has received and considered a recommendation from the Department of Health Services, dated June 30, 1982;

WHEREAS, the current statewide ambient air quality standard for carbon monoxide, as set forth in Title 17, California Administrative Code, Section 70200, is 10 parts per million (ppm) averaged over 12 hours and 40 ppm averaged over 1 hour;

WHEREAS, in consideration of the recommendation of the Department of Health Services and in consideration of the staff's analysis of relevant data and studies, the staff has proposed amendments to the sea level ambient air quality standards for carbon monoxide, applicable statewide, as follows: 9.0 ppm averaged over 8 hours and 20 ppm averaged over 1 hour;

WHEREAS, the California Environmental Quality Act and Board regulations require that action not be taken as proposed if feasible mitigation measures or alternatives exist which would substantially reduce any significant adverse environmental effects of the proposed action; and

WHEREAS, the Board finds that:

Carbon monoxide reduces the oxygen carrying capacity of the blood by binding to hemoglobin, the principal oxygen carrier of the blood, to form carboxyhemoglobin;

Carbon monoxide's affinity for hemoglobin is 210-250 times greater than that of oxygen for hemoglobin;

Reductions in the oxygen-carrying capacity of the blood are critical to the health of certain groups of sensitive persons; there is evidence of greater than normal risk from exposure to carbon monoxide for persons with angina pectoris or other cardiovascular diseases, chronic obstructive lung disease, persons with anemia, pregnant women, and fetuses;

The lowest mean level of carboxyhemoglobin linked to adverse effects on health is in the range of 2.0 to 3.0 percent, expressed as percent saturation of hemoglobin with carbon monoxide;

Two percent carboxyhemoglobin is the lowest group mean level at which an earlier onset of angina has been demonstrated based upon a recent study by Aronow (1981). Other studies by Aronow et al. and Anderson et al. have found earlier onset at slightly higher group mean COHb levels;

Carbon monoxide is also known to affect the central nervous system by causing decrements in alertness and visual function at carboxyhemoglobin levels of 4.0 to 6.0 percent.

Eight-hour average measurements of carbon monoxide are higher than twelve-hour averages;

Predictions of carboxyhemoglobin levels show that exposure to carbon monoxide concentrations of no higher than 9.0 ppm for 8 hours and 20 ppm for 1 hour will ordinarily prevent carboxyhemoglobin levels from rising above 2 percent, and thereby prevent the noted adverse health effects;

The current California ambient air quality standards for carbon monoxide do not adequately protect sensitive segments of the population from adverse effects on health;

The recommendation of the Department of Health Services does not adequately take into account all available evidence, including the 1981 study by Aronow, and for this reason, the Board finds, in light of all the evidence presented to it, that the standards recommended by the Department of Health Services will not adequately protect the public health;

The standards adopted by this resolution are necessary to protect the public health; and

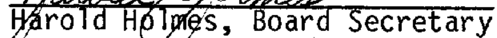
There exist technologically feasible and cost-effective measures to reduce emissions of carbon monoxide; and

The standards adopted by this resolution will have a beneficial effect on air quality and will have no adverse environmental impacts.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby amends the regulations contained in Title 17, California Administrative Code, Section 70200, as set forth in Attachment A.

BE IT FURTHER RESOLVED that the Board directs the staff to continue to study the effects of CO on COHb levels of susceptible groups in the population, such as pregnant and menstruating women, fetuses, and persons with anemia and cardiovascular disorders.

I certify that this is a true and correct copy of Resolution 82-46, as adopted by the Air Resources Board



Harold Holmes, Board Secretary

Amend Title 17, California Administrative Code, Section 70200, to read as follows:

70200. Table of Standards, Applicable Statewide.

Substance	Concentration and Methods*	Duration of Averaging Periods	Most Relevant Effects	Comments
Oxidant (as ozone)	0.10 ppm ultraviolet photometry	1 hour	Aggravation of respiratory diseases	This level is below that associated with aggravation of respiratory diseases.
Carbon Monoxide	~~10 ppm NDIR~~ 9.0 ppm NDIR** ~~40 ppm NDIR~~ 20 ppm NDIR**	~~12 hours~~ 8 hours ~~1 hour~~ 1 hour	~~2-2-1/2% COHb~~ ~~2-2-1/2% COHb~~ a. Aggravation of angina pectoris and other aspects of coronary heart disease. b. Decreased exercise tolerance in persons with peripheral vascular disease and lung disease. c. Impairment of central nervous system functions. d. Possible increased risk to fetuses.	~~This level is below those associated with impairment in time discrimination, visual function, and psychomotor performance.~~ The relevant effects were found to be due to decreased capacity of the blood to carry oxygen, as measured by carboxyhemoglobin content.
Carbon Monoxide (Applicable only in the Lake Tahoe Air Basin)	6 ppm NDIR	8 hours	Will increase COHb by 1-1 1/2%	At altitude the lowered oxygen tension leads to greater absorption of CO. Persons participating in strenuous recreational activities at higher altitudes are often unacclimated.
Sulfur Dioxide (SO_2)	0.5 ppm conductimetric method	1 hour	a. Approximate odor threshold. b. Possible alteration in lung function.	Alteration in lung function was found at this level in only one study. Other studies reported higher concentrations to cause this effect.
	0.05 ppm conductimetric method with oxidant, (ozone) equal to or greater than the state standard, or with suspended particulate matter equal to or greater than the state 24-hour suspended particulate matter standard.	24 hours	a. Will help prevent respiratory disease in children b. Higher concentrations associated with excess mortality.	a. Further studies on cocarcinogenic role are necessary. b. Does not include effects on vegetation, ecosystems and materials. c. May not include a margin of safety.

Visibility Reducing Particles	In sufficient amount to reduce visibility*** to less than 10 miles when relative humidity is less than 70%	1 observation	Visibility impairment on days when relative humidity is less than 70%.	
Visibility Reducing Particles (Applicable only in Lake Tahoe Air Basin)	In sufficient amount to reduce the prevailing visibility*** to less than 30 miles when relative humidity is less than 70%	1 observation	Reduction in scenic quality on days when the relative humidity is less than 70%	
Suspended Particulate Matter	60 μg/m³ high volume sampling	24 hour samples, annual geometric mean	Long continued exposure may be associated with increase in chronic respiratory disease.	This standard applies to suspended particulate matter in general. It is not intended to be a standard for toxic particles such as asbestos, lead, or beryllium. Because size distribution influences the effect of particulate matter on health, the standard will be reevaluated as data on health effects related to size distribution become available.
	100 μg/m³ high volume	24 hour sample	Exposure with SO_2 may produce acute illness.	
Lead (Particulate)	1.5 μg/m³ AIHL Method No. 54, or equivalent	30 day average	Increased body burden, impairment of blood formation and nerve conduction	
Hydrogen Sulfide	0.03 ppm cadmium hydroxide STRactan Method	1 hour	Exceeds the odor threshold	
Nitrogen Dioxide	0.25 ppm, Saltzman	1 hour	a. At slightly higher dosage effects are observed in experimental animals, which imply a risk to the public health. b. Produces atmospheric discoloration.	
Sulfates	25 μg/m³ total sulfates, AIHL #61	24 hours	a. Decrease in ventilatory function b. Aggravation of asthmatic symptoms c. Aggravation of cardiopulmonary disease d. Vegetation damage e. Degradation of visibility f. Property damage	This standard is based on a Critical Harm Level, not a threshold value.

* Any equivalent procedure which can be shown to the satisfaction of the Air Resources Board to give equivalent results at or near the level of the air quality standard may be used.

** These standards are violated when concentrations exceed those set forth in the body of the regulation.

*** Prevailing visibility is defined as the greatest visibility which is attained or surpassed around at least half of the horizon circle, but not necessarily in continuous sectors.

NOTE: Authority cited: Sections ~~39601(a)~~, 39600, 39601, and 39606(b), Health and Safety Code.
Reference: Sections ~~70200~~ 39606(b) and 39701, Health and Safety Code.

State of California
AIR RESOURCES BOARD

Response to Significant Environmental Issues

Item: Public Hearing to Consider Amendments to Section 70200, Title 17, California Administrative Code, Regarding the State Ambient Air Quality Standards for Carbon Monoxide (Sea Level)

Agenda Item No.: 82-18-2

Public Hearing Dates: August 26, 1982, and September 22, 1982

Response Date: September 22, 1982

Issuing Authority: Air Resources Board

Comment: No comments were received identifying any significant environmental issues pertaining to this item. The staff report identified no adverse environmental effects.

Response: N/A

CERTIFIED:
Board Secretary

Date: 11-10-82

State of California
AIR RESOURCES BOARD

Public Hearing to Consider Amendments to Section 70200, Title 17, California Administrative Code, Regarding the State Ambient Air Quality Standards for Carbon Monoxide (Sea Level)

Scheduled for Consideration: August 26, 1982
Agenda Item No.: 82-18-2

FINAL SUMMARY AND STATEMENT OF REASONS FOR PROPOSED RULEMAKING

A. BACKGROUND

The Air Resources Board (the "Board") revised the California ambient air quality standards for carbon monoxide on September 22, 1982. The standards adopted were 9.0 ppm averaged over 8 hours and 20 ppm averaged over 1 hour. The Board conducted a public hearing on August 26, 1982. Testimony and written comments were received in the public hearing. The hearing record was left open for additional comment until September 15. Staff was directed to respond to comments received by the close of the comment period.

The initial summary and statement of reasons is attached hereto and incorporated by reference herein.

B. OPPOSING CONSIDERATIONS AND AGENCY RESPONSE

Opposing Consideration: Comment submitted by Gregory R. McClintock on behalf of Western Oil & Gas Association: The Air Resources Board (ARB) did not comply with the provision in Health and Safety Code Section 39606(b) that the standard be "based upon the recommendation of the Department of Health Services", as interpreted in WOGA v. ARB, California Court of Appeal (2d. Dist.), Civil No. 63339 (March 10, 1982).

Agency Response: This comment rests in large part*on the cited decision of the California Court of Appeal (WOGA v. CARB, No. 2 Civil 63339). This decision is presently of no force and effect, since on May 27, 1982, the California Supreme Court by a vote of 7-0 granted a hearing in the case. One of the issues which the Supreme Court will decide when it hears the case is the effect of the statutory mandate that health-related standards be "based on the recommendation of the Department of Health Services."

It is the position of the ARB that in giving the Department of Health Services (DHS) a recommending function only, the statute left with the ARB the discretion to depart from the DHS recommendation if the evidence before it warranted such a departure.

The phrase "based upon" as used in the statute does not equate with "identical to". If the Legislature had intended the ARB standard to be identical to that recommended by DHS, it would have so stated. On the contrary, the ARB was given authority to hold hearings which require it to exercise its discretion based upon all the evidence presented. (Health and Safety Code Section 39601(a); Government Code Section 11346.8(a)). The public hearing process, which is designed to permit persuasion of the decision makers by those testifying, would be a total sham if the outcome had to be adoption of a standard identical to that recommended by DHS.

It is also relevant that the ARB is presently required by statute (Health and Safety Code Section 39510(b)(3)) to have among its members a person who is either "a physician and surgeon or an authority on health effects of air pollution." This is an indication that the Legislature intends the ARB to have the final discretion regarding health-based ambient standards.

Agency Response: This comment rests in large part on the cited decision of the California Court of Appeal (WOGA v. CARB, No. 2 Civil 63339). This decision is presently of no force and effect, since on May 27, 1982, the California Supreme Court by a vote of 7-0 granted a hearing in the case. One of the issues which the Supreme Court will decide when it hears the case is the effect of the statutory mandate that health-related standards be "based on the recommendation of the Department of Health Services."

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The ARB complied fully with the statute in adopting this regulation in that it based the adopted standard on the DHS recommendation. The Board fully considered the recommendation and departed from it only to the extent called for by scientific evidence introduced into the record.

Even were the cited case to apply, the ARB complied with the criteria set forth in the decision and quoted by Mr. McClintock. The DHS was looked to as a primary source of information and the decision to set a standard necessary to prevent carboxyhemoglobin (COHb) levels from exceeding 2 percent (rather than 2.5 percent) was based upon evidence that the lower level of COHb was necessary to prevent adverse health effects on sensitive groups, as discussed elsewhere in this document. (See below, page 12.)

Opposing Consideration: Comment submitted by Gregory R. McClintock on behalf of WOGA: The ARB has failed to consider the "effects on the economy" of adopting the standard, as required by Health and Safety Code Section 39606(b).

Agency Response: Here again the commenter has relied on a judicial decision which is of no force and effect because of the grant of hearing in the case by the California Supreme Court. It is the Board's position that Section 39606 requires it to consider the effects of air pollution on the economy (e.g. damage to materials, injury to agriculture), not the effects of setting the standard on the economy. Indeed, when adopting a health-based standard, the ARB is directed to assure that the levels of the pollutant in the ambient air will not adversely affect public health; economic considerations are not relevant in this inquiry, but are extensively analyzed when individual control measures are considered so that the most cost-effective methods practicable are implemented in order to attain the ambient standards.

A full discussion of the Board's position on this issue is contained in the Petition for Hearing filed before the California Supreme Court in WOGA v. CARB. A copy of this Petition is attached hereto.

Opposing Consideration: Comment submitted by Mr. McClintock on behalf of WOGA: The discussion of what additional air pollution controls, if any, would be needed to achieve the 20 parts per million (ppm) hourly standard is inadequate because it does not discuss whether more stringent controls would be needed, what types of controls are available, their relative costs, and whether such costs are reasonable.

Agency Response: The discussion in the staff report regarding cost-effectiveness is not required by law because the standard is to be set at a level to protect the public health. Consideration of control measures, their relative costs, and their relative effectiveness, takes place either at the local level when the air pollution control districts adopt specific measures to attain the standard, or when the ARB adopts emission standards for the control of motor vehicle emissions. It is not possible at this time to know the amount of additional control, if any, necessary to meet the standard and it is not appropriate to consider control measures in detail in a proceeding to adopt an ambient air standard, which simply indicates how healthy air is to be defined. The brief discussion in the staff report is solely intended to provide information that there are in fact cost-effective controls which could be implemented if needed.

Opposing Consideration: Comment submitted by Mr. McClintock on behalf of WOGA: The standard for carbon monoxide (CO) is not yet ripe for ARB consideration since the DHS has failed to hold any notice and comment proceedings with respect to its recommendations.

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Agency Response: There is no statutory requirement that the DHS hold public hearings in the preparation of its recommendation to the ARB. The DHS is not adopting a standard, the ARB is, based upon but not necessarily identical to the DHS recommendation. The DHS recommendation is subject to comment at the ARB proceeding, as are all other scientific data, which serves to emphasize the importance of the ARB hearing and the need for the decision makers to consider all the testimony presented rather than rely solely on DHS. The DHS recommendation represents the result of mandatory consultation between two state agencies; a public hearing by the consulted agency is simply not part of the legally required scheme. WOGA has cited no authority to support its position, because none exists.

Opposing Consideration: Testimony presented by William E. Lambert: The ARB and DHS reports do not adequately estimate COHb levels in susceptible populations and also underestimate the response of the general population to CO exposure. For example, in Table XI-1 of the staff report (p. 44) hemoglobin and blood volume values are representative of a normal adult male while values for women are not adequately considered. Also, the selected endogenous CO production rate of 0.007 ml/min. is a value at the lower end of a range cited by the USEPA (0.007 - 0.014 ml/min). A more appropriate value would be 0.010 ml/min, the midpoint of the range.

Agency Response: Table XI-1 has been expanded to include parameters representative of women. The results are shown in the attached Table XI-1 -- (Revised).

Opposing Consideration: Testimony presented by William E. Lambert: In Table XI-2 of the staff report, the physiological parameters used in the important hypothetical Case 3 are typical of the normal adult male and thus

underestimate COHb levels for the adult female segment of the population. Some of the female population with coronary artery disease will manifest levels of COHb that exceed 2 percent. Probably no margin of safety is afforded to either sex at the 20 ppm level.

Agency Response: Staff agrees that the appropriate parameters for women should be considered and recognizes the importance of using those values to afford adequate protection of public health. Staff has recalculated Table XI-2 in light of the above suggestions, and the results are shown in the attached revised table. Case 3 in Table XI-2 represents persons exposed to CO with an elevated COHb level. The margin of safety will vary depending upon an individual's initial COHb level. This case was intended to demonstrate that persons may not be adequately protected if they have an initial COHb level approaching 1.5 percent. The revised table indicates that women are indeed at higher risk, for example, as initial COHb levels increase.

Opposing Consideration: Testimony present by William E. Lambert: Tables XI-2 and XI-3 in the ARB staff report (and Table 4 and 5 in the DHS recommendation) identify Case 2 as representing extreme conditions, i.e., where each physiological parameter is adjusted in the direction of increasing the resulting COHb level. However, it could be argued that values for each of the parameters are typical of a large segment of the adult female population and not truly "extreme" conditions. It is more appropriate to consider Case 2 in Tables XI-2 and XI-3 as representative of a large part of the adult female population.

Agency Response: As noted above, Tables XI-1 and XI-2 have been revised to include parameters representing women. In Table XI-2 (Revised) two additional cases (4 and 5) have been added. Case 4 represents a baseline case

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Agency Response: As noted above, Tables XI-1 and XI-2 have been revised to include parameters representing women. In Table XI-2 (Revised) two additional cases (4 and 5) have been added. Case 4 represents a baseline case

for women. Case 5 for women is similar to Case 3 for men. Case 5 indicates that women are predicted to reach 2 percent COHb when initial COHb levels are slightly below 1.5 percent. Case 2 in Table XI-2 is still shown as representing an extreme case where all physiological parameters have been adjusted to increase resulting COHb levels.

In a revision to Table XI-3, an additional case (3) has been calculated for a standard level of 9.0 ppm for eight hours, using actual air quality profiles that had been adjusted to simulate attainment. In one air quality profile the predicted COHb level for women rose to 2.1 percent. In the other air quality patterns COHb levels remained below 2.1 percent.

Opposing Consideration: Testimony presented by William E. Lambert: The ARB and DHS reports have identified high risk subgroups of the population most affected by the proposed CO standard revisions. The Board should consider effects on hypersusceptible groups such as women, fetuses and newborns, persons with certain genetic blood disorders, users of certain medications, persons with certain nutritional deficiencies, pregnant and menstruating women, and high altitude populations.

Agency Response: Obtaining information on the physiological parameters of some of these groups is quite difficult. Staff believes that the major sensitive groups, such as women (including pregnant women), fetuses, and persons with heart and lung disease, have been considered in the proposed standards. As noted in the staff report, populations residing or visiting high altitudes will be specifically addressed in an upcoming report next year concerning the Lake Tahoe Air Basin carbon monoxide standard. Staff is proposing to be directed by Board resolution to seek additional information

concerning the other hypersusceptible groups identified in the comment for consideration in the next review of the carbon monoxide standards.

Opposing Consideration: Comment submitted by M. M. Hertel on behalf of Southern California Edison (SCE): The proposed standards are not based on the DHS recommendation as required by statute, since the ARB proposal is not identical to the DHS recommendation.

Agency Response: See above response to Gregory R. McClintock.

Opposing Consideration: Comment submitted by M. M. Hertel on behalf of SCE: The Coburn equation (used to predict COHb levels relative to ambient CO levels) has not been adequately evaluated at low doses of CO and in people considered unusual (sensitive). The accuracy of predictions derived from this equation using "sensitive" physiological parameters is not known.

Agency Response: The consensus of expert scientific opinion, as summarized by the EPA in its August 18, 1980 proposal, is that the equation is the best tool available for estimating COHb levels resulting from short-term (1-8 hours) exposures to ambient CO concentrations (USEPA, 1980). Peterson and Stewart (1970 and 1975) have reported good correlation between COHb values measured in both male and female subjects and those predicted by the Coburn equation.

Not setting a standard because of imperfect knowledge can always be argued. The Board must consider whether the evidence presently available is sufficiently supported to warrant taking action to protect persons who may be more sensitive to CO. Using the best evidence available, the Board has decided that public policy requires protecting such subgroups.

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Opposing Consideration: Comment submitted by M. M. Hertel on behalf of SCE: The public health significance of the earlier occurrence of angina (chest pain) when exercising, at COHb levels near 2.5 percent, is not known at present. The health basis for the proposed standards is overstated.

Agency Response: Earlier onset of angina pectoris (incapaciting pain in the chest) is significant to public health because it is an indication that the heart muscle is not receiving sufficient oxygen. Persons suffering such attacks must usually cease activity. The EPA (1980) noted that increased duration of angina attacks has also been reported (e.g., Anderson et al., 1973). Thus, earlier onset of angina or reduced time (during exercise) to onset of angina is an indication that persons suffering from cardiovascular disease and exposed to CO may have their ability to carry out normal daily activities impaired or have angina attacks prolonged.

The EPA concluded that aggravation of angina is an adverse health effect because it may result in cardiovascular damage, which is unquantifiable using present technology (USEPA, 1980). Aggravation of angina may be the first in a series of increasingly more serious symptoms accompanying cardio-vascular disease. At higher levels of oxygen deprivation, angina patients experience more serious symptoms such as coronary insufficiency. Coronary insufficiency is sometimes accompanied by changes in enzyme levels and electrocardiographic irregularities. Myocardial infarction is the most serious symptom in this continuum of effects. Infarction is accompanied by irreversible heart damage as revealed by changes in enzyme levels and electrocardiographic irregularities. The staff concurs with the EPA and therefore considers aggravation of angina an adverse effect and an indicator that more serious effects may occur in some individuals at the same COHb levels.

Opposing Consideration: Comment submitted by Donald R. Buist on behalf of Ford Motor Company: The 1-hour/20 ppm standard is unneccessary because the 8-hour standard is the controlling factor with respect to attainment of both standards. Because the proposed 1-hour standard will have no impact on ambient air CO levels, it is reasonable to conclude that there would not be any public health benefits either.

Agency Response: Although the 8-hour standard is usually the controlling standard, this fact does not negate the need to define when a health hazard may occur from short-term exposures. One expert witness (Dr. Steven Horvath) at the August 1982 public hearing stated his concern about effects of short-term, high level CO peaks. (Transcript, August 26, 1982, pp. 101-103).

These transient peaks may not be accurately measured by fixed monitoring stations. Because CO emissions are chiefly due to motor vehicles, localized high concentrations or "hotspots" may occur near major traffic arteries or in downtown urban streets. A five day study performed in Los Angeles County by Peterson and Allen (1982) showed that the average ratio of traffic artery to fixed site measurements was 3.9:1. Although this ratio decreased with increasing ambient CO levels, it demonstrates that fixed site measurements of CO concentration may significantly underestimate acute human exposures.

Opposing Consideration: Comment submitted by Donald R. Buist on behalf of Ford Motor Company: With respect to the proposed change from a 12-hour standard of 10 ppm to an 8-hour standard of 9 ppm, Ford recommends that one allowable exceedance per year (on an expected statistical basis) be permitted.

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Agency Response: The ARB is required to adopt a CO standard as necessary to protect the public health. The ARB has determined that the CO ambient levels represented by the standard must not be exceeded at all, even under worst case conditions, or the public health will not be adequately protected. If the ARB had intended to allow exceedances of the standard, it is possible that the standard itself would have been more stringent in order to achieve the goal of health protection. The method of achieving this goal (e.g. a "no exceedance" standard) is within the discretion of the ARB, and since the level in either case will equate to the same degree of protection of public health, there will not be different compliance burdens on regulated sources. All that changes is the way of expressing the standard, not the stringency of the standard itself. The fact that the EPA has chosen a "multiple exceedance" standard is a feature of the federal regulatory structure which has no relevance to the ARB program, since Section 39606(b) requires the ARB to adopt ambient air quality standards for California.

Opposing Consideration: Comment submitted by Gregory R. McClintock on behalf of WOGA: The staff report failed to address allowable exceedances.

Agency Response: See above response to Donald R. Buist.

Opposing Consideration: Comment submitted by M. M. Hertel on behalf of SCE: Both proposed standards are more stringent than federal standards even though the 8-hour standard is numerically the same as the federal standard. The federal standards can be exceeded once per year. On the other hand, California standards are violated if they are equalled or exceeded.

Agency Response: See above response to Donald R. Buist.

Opposing Consideration: Comment submitted by Gregory R. McClintock on behalf of WOGA: The ARB staff proposal to change the 1-hour standard is

contrary to the overwhelming weight of expert opinion. The Aronow study on which the ARB staff is basing its proposal has been subjected to critical analysis by public health experts in California and has been determined to be an inadequate basis on which to base regulatory action. It has received the same reception at the federal level.

The Clean Air Scientific Advisory Committee (CASAC) was well aware of the Aronow 1981 study. The Aronow study did not cause CASAC to change their recommendation to EPA. The lowest COHb levels associated with adverse effects range from 2.7 to 2.9 percent, as determined by CASAC and the EPA. Taken alone, Aronow (1981) cannot support the ARB staff recommended standard.

Agency Response: The proposal to change the 1-hour standard is not "contrary to the overwhelming weight of expert opinion". WOGA has submitted no specific substantive evidence that the consensus of expert opinion in California is opposed to the use of the Aronow study other than a reference to a recent Clean Air Scientific Advisory Committee (CASAC) meeting. To the contrary, several expert witnesses who appeared at the Board hearing testified in support of the ARB staff proposal and one witness testified that the standards may not be stringent enough because of the lack of a adequate margin of safety.

The ARB staff considers the Aronow 1981 study significant enough that it should not be ignored in establishing a standard designed to protect public health. The ARB proposal was supported by several witnesses who appeared at the August 26, 1982 public hearing, including Dr. Aronow himself, who explained and discussed his findings in great detail before the Board.

Regarding the July 1982 CASAC meeting WOGA refers to, it should be noted that this meeting was one in a series of CASAC meetings dating back to

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Regarding the July 1982 CASAC meeting WOGA refers to, it should be noted that this meeting was one in a series of CASAC meetings dating back to

January 1979 on the federal CO standards. Contrary to WOGA's assertion - that CASAC disapproved the Aronow 1981 study - the transcripts clearly state that CASAC could not reach a consensus, for or against including the Aronow 1981 study. CASAC was divided as to the weight to be given the study and concluded that it must be a judgment by the EPA Administrator. WOGA implies in their comments that CASAC disapproved or rejected the Aronow study. This simply was not the case.

Opposing Consideration: Comment submitted by Marilyn M. Stanton representing the Spokane County Air Pollution Control Authority (SCAPCA): The Coburn Prediction Table (Federal Register, August 18, 1980 (corrected date)) fails to accurately predict COHb levels resulting from CO exposures (for example, in the Anderson et al., 1973 study) and therefore cannot be used to support an ambient standard. The results of studies by Aronow et al., and Anderson et al., cited by the EPA (USEPA, 1980) and the ARB in its August 26, 1982 report do not show a significant correlation when graphed (Stanton comment, Appendices A_2, B_1, B_2).

Agency Response: Ms. Stanton has assumed that subjects in the Anderson et al. (1973) study were exposed continuously to 50 ppm and 100 ppm for four hours which would have resulted in higher COHb levels than were measured. The EPA Air Quality Criteria for Carbon Monoxide (USEPA, 1979) states that patients breathed CO intermittently which resulted in lower than predicted COHb levels. This fact was also confirmed by Dr. Aronow at the August 26, 1982 hearing (Transcript, pages 153-4).

Ms. Stanton apparently believes that a necessary prerequisite for using the Aronow et al. and Anderson et al. angina-related studies is that the

results of all the studies must be significantly correlated. Such a requirement is untenable and certainly not appropriate for standard-setting. It might be appropriate to examine studies that used the same or matched subjects and measured similar endpoints in similar experimental protocols. Ms. Stanton, however, believes this constitutes a "pick and choose match" and is simply incorrect. The staff in its evaluation of the literature relating effects to CO exposures examined the completeness of the stated experimental protocols, the biological plausibility of the results and whether the results were consistent with the investigator's results found in earlier experiments or in the results of other investigators. The ARB staff did not suggest as Ms. Stanton states (page 4) that experiments by Aronow in 1973 and Anderson et al. in 1973 "should show significant correlation".

Opposing Consideration: Comment submitted by Marilyn M. Stanton on behalf of SCAPCA: There are problems involving the Aronow et al. and Anderson et al. studies that make it illogical to base national (and presumably state) standards upon them.

Agency Response: Ms. Stanton has listed several concerns which lead her to the conclusion above. Careful review of her statements, however, reveal errors or misinterpretations which undermine her conclusion. For example, Ms. Stanton states (Testimony, page 5, part IIA) that there are no animal data at COHb levels below 7 percent and cites page 1 of her supporting paper attached to SCAPCA's letter to the EPA Administrator dated September 3, 1981. This support paper claims that EPA has erred in not correctly citing Lindenberg (EPA reference 53) and Tumasonis and Baker (EPA reference 101). Reading the Air Quality Criteria Document for Carbon Monoxide (USEPA, 1979) and EPA's earlier criteria document (USDHEW, 1969) shows that Ms. Stanton has

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misread these documents. The earlier criteria document, on the following page (8-25), states that Lindenberg also studied dogs with COHb levels of 2.6 to 5.5 percent. Similarly, she has confused Tumasonis and Baker (EPA reference 101) with Baker and Tumasonis (EPA reference 9).

Ms. Stanton also misses the most important conclusion that the EPA draws from its review of the animal studies. Following the paragraph that she quoted, the EPA goes on to conclude that the particular levels of CO in animal studies are less important than the generalizations about the variables that are likely to be important to humans. Knowledge from animal studies allows us to predict specially sensitive populations, anticipate new effects not yet seen in human studies or effects too dangerous to experiment for in humans, and to study mechanisms.

Ms. Stanton's concern about the consistency of Aronow's results ("too consistent"), lack of replication, the subjects used by Aronow in his 1981 study and the use of exposure regimes with high CO levels have been addressed in letters to the EPA by researchers who were asked to review her earlier comments (see letters from Dr. Wilbert S. Aronow, Dr. Steven M. Horvath and Dr. Stephen M. Ayres to Mr. Joseph Padgett dated October 9, 1981, November 9, 1981 and December 8, 1981 respectively). Also, as discussed by Dr. Horvath in the August 26, 1982 hearing, persons in metropolitan areas certainly may be exposed to extremely high, short-term peak concentrations of CO.

As discussed in the preceeding response, staff has concluded that the 1973 study by Anderson et al. is indeed consistent and supportive of the Aronow studies and does not contradict those findings. What the Board must decide is the weight to be given to the most recent Aronow study. The effect observed was less severe when compared to results at higher COHb levels but nevertheless consistent with the earlier results.

Opposing Consideration: Comments submitted by Ms. Marilyn Stanton on behalf of the SCAPCA: There are problems with the California "key studies" listed in Table 1 of the DHS report (p. A-1). The Federal Register, set forth in the August 18, 1980 EPA proposal for the national standards, lists only the Aronow and Anderson studies as pertinent (Table 2). Other studies listed in Table 1 of the DHS report are ambiguous or only partially positive.

Agency Response: The purpose of Table 1 in the DHS recommendation is not to list "key studies" to be relied upon for standard-setting. Rather, it is intended to illustrate levels of COHb at which effects have been observed. Table 2 in the EPA proposal of August 18, 1980 (FR 8-18-80) lists "key studies" relied upon by that agency for standard setting.

The DHS listed the EPA's "key studies" in its table in addition to other studies summarized by the EPA in its staff paper (USEPA, 1979b). Ms. Stanton recommends these studies be eliminated because they are only "partially positive". These studies, however, do offer evidence of effects at various levels of COHb, and staff recommends that they remain in the table. For example, these studies do support the staff conclusion, stated on page 3 of the staff report, that adverse effects on the central nervous system have been demonstrated at COHb levels of about 4 to 6 percent.

Staff has also noted that Ms. Stanton has expressed doubt as to the validity of the Aronow studies because the results are highly consistent and positive. Some of the studies in this table represent the converse of that situation, i.e., studies that demonstrate both positive and negative results from CO exposure. Ms. Stanton suggests that because of the inconsistencies, these studies also are suspect and should be eliminated. This seems to require that research results always be consistent but not too consistent, a

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Agency Response: The purpose of Table 1 in the DHS recommendation is not to list "key studies" to be relied upon for standard-setting. Rather, it is intended to illustrate levels of COHb at which effects have been observed. Table 2 in the EPA proposal of August 18, 1980 (FR 8-18-80) lists "key studies" relied upon by that agency for standard setting.

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standard that cannot be met. Staff has concluded that, for standard-setting purposes, each research study must be evaluated as to its own merit and a judgment made as to the weight to be given to that study.

Opposing Consideration: Comment submitted by T. M. Fisher on behalf of General Motors Corporation: The DHS and ARB staff recommendations are based upon worst case calculations (a highly improbable combination of events). No perspective is provided as to the actual risks involved. The EPA has attempted to put risk in a meaningful perspective in two recent documents (USEPA, 1982a; USEPA, 1982b). Somewhat relaxed standards (more so than the ones recommended) would assure that COHb levels would seldom rise above 2 percent.

Agency Response: The staff has considered the EPA "Senstivity Analysis" (USEPA, 1982a) and "NAAQS Exposure Model" (USEPA, 1982b). Staff supports such efforts that attempt to put into perspective the risk associated with various standard levels but urges that caution be exercised in drawing conclusions from them. The conclusions drawn from such analyses, including the risk estimates cited by Mr. Fisher, are dependent upon numerous assumptions. As the ARB staff has pointed out in comments to the EPA (Holmes, 1982), not even all the assumptions are stated in the analyses. The "Sensitivity Analysis" fails to discuss adequately how the analysis was done, why various values are used as parameters in the Coburn model and, finally, how the percentages of the sensitive population with different COHb levels (referred to by Mr. Fisher) were arrived at.

Similar limitations have been noted with the "NAAQS Exposure Analysis" (Holmes, 1982; Colome and Lambert, 1982). Staff has noted that the "Sensitivity Analysis" concludes (Table 5) that 61 percent of the sensitive

population would have a peak COHb level of 2.1 percent or greater when exposed to air quality associated with a 8-hour/12 ppm (one expected exceedance) ambient standard. A 12 ppm ambient standard is approximately equal to a 8-hour/9 ppm/5 exceedance standard. Table 8-8 of the EPA "NAAQS Exposure Analysis" concludes that 405,000 out of a total of 5 million sensitive persons, or approximately 8 percent, would have COHb levels exceeding 2 percent associated with a 8-hour/9 ppm/5 exceedance standard. These two divergent conclusions are an example of the great variability dependent upon assumptions and the methodology utilized.

Opposing Consideration: Comment submitted by T. M. Fisher on behalf of General Motors Corporation: Until more data are available to corroborate Dr. Aronow's clinical findings or epidemiological evidence becomes available to demonstrate carbon monoxide effects on the sensitive population in the real world, it would seem inappropriate to use Dr. Aronow's 1981 study to identify a critical effect level.

Agency Response: The ARB staff report concludes that Dr. Aronow's results published in 1981 are consistent with earlier findings and therefore should be included by the Board in this standard-setting proceeding.

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Agency Response: The ARB staff report concludes that Dr. Aronow's results published in 1981 are consistent with earlier findings and therefore should be included by the Board in this standard-setting proceeding.

TABLE XI-1 (Revised)

PREDICTED COHb RESPONSE TO
EXPOSURE TO CONSTANT CO CONCENTRATIONS
(Percent COHb based on Coburn Equation)

	1-hour Exposure				8-hour Exposure			
	Light Activity		Moderate Exercise		Light Activity		Moderate Exercise	
CO (ppm)	Men	Women	Men	Women	Men	Women	Men	Women
7.0	0.7	0.8	0.7	0.8	1.2	1.4	1.2	1.3
9.0	0.7	0.8	0.8	1.0	1.5	1.7	1.6	1.7
12.0	0.8	1.0	1.0	1.2	1.9	2.1	2.0	2.2
15.0	0.9	1,1	1.1	1.4	2,3	2.6	2.5	2.6
20.0	1.1	1.4	1.3	1.7	3.0	3.4	3.2	3.4
25.0	1.2	1.6	1.6	2.0	3.6	4.1	4.0	4.2
35.0	1.6	2.1	2.0	2.7	5.0	5.6	5.4	5.7
50.0	2.1	2.8	2.7	3.6	6.9	7.9	7.6	8.0

Parameters:
Men:

Ventilation rates = 10L/min. and 20L/min. (light activity/moderate exercise);
Hemoglobin (g/dl) = 15 ; Blood Volume (ml) = 5500;
Haldane Constant = 246; Lung Diffusivity (ml/min/mmHg) = 30;
Endogenous CO production (ml/min) = 0.007: Initial COHb (%) = 0.5;
Altitude (ft.) = 0.

Women:

Ventilation rates = 10L/min. and 20L/min. (light activity/moderate exercise);
Hemoglobin (g/dl) = 13.5 ; Blood Volume (ml) = 4000;
Haldane Constant = 246 ; Lung Diffusivity (ml/min./mmHg) = 30;
Endogenous CO production (ml/min.) = 0.010; Initial COHb (%) = 0.5;
Altitude (ft.) = 0.

Source: ARB, Research Division, September 1982

TABLE XI-2 (Revised)

COBURN MODEL ESTIMATES OF COHb LEVELS
ASSOCIATED WITH ALTERNATIVE 1-HOUR CO STANDARD LEVELS

CO Concentration (ppm)	Case 1		Case 4		Case 2		Case 3		Case 5	
	Light Activity	Moderate Exercise	Light Activity	Moderate Exercise	Light Activity	Moderate Exercise	Light Activity	Moderate Exercise	Light Activity	Moderate Exercise
15.0	0.9	1.1	1.1	1.4	1.4	1.7	1.7	1.8	1.8	2.0
20.0	1.1	1.3	1.4	1.7	1.7	2.1	1.9	2.0	2.1	2.3
25.0	1.2	1.6	1.6	2.0	2.0	2.5	2.1	2.3	2.3	2.6
35.0	1.6	2.0	2.1	2.7	2.6	3.3	2.4	2.7	2.8	3.7
50.0	2.1	2.7	2.8	3.6	3.4	4.5	2.9	3.4	3.5	4.2

Parameters:

Case 1: Alveolar ventilation rates = 10L/min. 20L/min. (light activity/moderate exercise); hemoglobin = 15g/dl; blood volume = 5500 ml; Haldane constant 246; lung diffusivity = 30 ml/mmHg; endogenous CO production = 0.007 ml/min; initial COHb = 0.5%; altitude = 0.0 ft.

Case 2: Alveolar ventilation rates = 10L/min. 20L/min. (light activity/moderate exercise); hemoglobin = 13g/dl; blood volume = 3500 ml; Haldane constant 246; lung diffusivity = 40 ml/min/mmHg; endogenous CO production = 0.014 ml/min; initial COHb = 0.7%; altitute = 0.0 ft.

Case 3: Same as Case 1 except initial COHb = 1.5%.

Case 4: Alveolar ventilation rates = 10L/min. 20L/min.(light activity/moderate exercise); hemoglobin = 13.5g/dl; blood volume = 4000 ml; Haldane constant = 246; lung diffusivity = 30 ml/min/mmHg; endogenous CO production = 0.010 ml/min; initial COHb = 0.5%; altitude = 0.0 ft.

Case 5: Same as Case 4 except initial COHb = 1.5%.

Source: ARB Research Division September 1982

TABLE XI-2 (Revised)

COBURN MODEL ESTIMATES OF COHb LEVELS
ASSOCIATED WITH ALTERNATIVE 1-HOUR CO STANDARD LEVELS

CO Concentration (ppm)	Case 1 Light Activity	Case 1 Moderate Exercise	Case 4 Light Activity	Case 4 Moderate Exercise	Case 2 Light Activity	Case 2 Moderate Exercise	Case 3 Light Activity	Case 3 Moderate Exercise	Case 5 Light Activity	Case 5 Moderate Exercise
15.0	0.9	1.1	1.1	1.4	1.4	1.7	1.7	1.8	1.8	2.0
20.0	1.1	1.3	1.4	1.7	1.7	2.1	1.9	2.0	2.1	2.3
25.0	1.2	1.6	1.6	2.0	2.0	2.5	2.1	2.3	2.3	2.6
35.0	1.6	2.0	2.1	2.7	2.6	3.3	2.4	2.7	2.8	3.7
50.0	2.1	2.7	2.8	3.6	3.4	4.5	2.9	3.4	3.5	4.2

Parameters:

Case 1: Alveolar ventilation rates = 10L/min. 20L/min. (light activity/moderate exercise); hemoglobin = 15g/dl; blood volume = 5500 ml; Haldane constant 246; lung diffusivity = 30 ml/mmHg; endogenous CO production = 0.007 ml/min; initial COHb = 0.5%; altitude = 0.0 ft.

Case 2: Alveolar ventilation rates = 10L/min. 20L/min. (light activity/moderate exercise); hemoglobin = 13g/dl; blood volume = 3500 ml; Haldane constant 246; lung diffusivity = 40 ml/min/mmHg; endogenous CO production = 0.014 ml/min; initial COHb = 0.7%; altitute = 0.0 ft.

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Case 5: Same as Case 4 except initial COHb = 1.5%.

Source: ARB Research Division September 1982

TABLE XI-3 (Revised)

COBURN MODEL ESTIMATES FOR CARBOXYHEMOGLOBIN LEVELS ASSOCIATED WITH ATTAINMENT OF ALTERNATIVE EIGHT-HOUR CARBON MONOXIDE STANDARD LEVELS[a]

Standard Level	Maximum COHb Levels (%) Predicted on a Day when 8-hour CO Concentration Just Attains Standard Level, for a Range of Actual Air Quality Patterns Adjusted to Simulate Attainment of the Specified Standard[b,c]		
	Case 1	Case 3	Case 2
	Baseline physiological parameters (men)	Baseline physiological parameters (women)	High range of physiological parameters for normal persons at sea level
ppm			
7	1.1 - 1.4		1.5 - 1.9
9	1.3 - 1.8	1.8 - 2.1	1.9 - 2.4
12	1.7 - 2.3		2.4 - 3.2
15	2.1 - 2.8		2.9 - 3.9

[a]A daily maximum standard with one expected exceedance per year.

[b]COHb responses to fluctuating CO concentrations were dynamically evaluated using the Coburn model prediction of the COHb level for the next hour. Twenty sets of 1-hour average CO concentration patterns were evaluated to obtain the ranges of COHb shown for a given case and standard.

[c]Coburn model prameters: (All cases: ventilation rate = 10L/min)

Case 1: Hemoglobin = 15 g/dl; initial COHb = 0.5%; endogenous rates = 0.007 ml/min; blood volume = 5500 ml; CO lung diffusivity = 30 ml/min/mmHg; Haldane constant = 218.

Case 2: Hemoglobin = 13 g/dl; initial COHb = 0.7%; endogenous rate = 0.014 ml/min; blood volume = 3500 mL; CO lung diffusivity = 40 ml/min/mmHg; Haldane constant = 246.

Case 3: Hemoglobin = 13.5 g/dl; initial COHb = 0.5%; endogenous rate = 0.010 ml/min; blood volume = 4000 ml; CO lung diffusivity = 30 ml/min/mmHg; Haldane constant = 246.

Source: Adapted from USEPA, 1980b.

State of California
AIR RESOURCES BOARD

PUBLIC HEARING TO CONSIDER AMENDMENTS TO SECTION 70200, TITLE 17, CALIFORNIA ADMINISTRATIVE CODE, REGARDING THE STATE AMBIENT AIR QUALITY STANDARDS FOR CARBON MONOXIDE (SEA LEVEL)

Scheduled For Consideration: August 26, 1982

SUMMARY AND STATEMENT OF REASONS FOR PROPOSED RULEMAKING

The Air Resources Board (ARB) is required by Section 39606(b) of the Health and Safety Code to adopt ambient air quality standards to protect the public health and welfare. Standards are to be adopted in consideration of a number of factors "including, but not limited to, health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy."

Ambient air quality standards in California represent goals of satisfactory air quality. The ambient standards specify concentrations and averaging times chosen to prevent adverse effects. Health-related standards are adopted on the basis of recommendations of the Department of Health Services at levels so that sensitive groups in the general population will not suffer adverse effects.

Both the ARB and the federal Environmental Protection Agency (EPA) have adopted ambient standards for carbon monoxide (CO). The ARB adopted a standard of 20 ppm averaged over 8 hours in 1969. The standard was revised in 1970 to 10 ppm averaged over 12 hours and 40 ppm averaged over 1 hour. In 1971, acting pursuant to the Clean Air Act, the EPA promulgated national primary (health-related) standards of 9 ppm (8 hours) and 35 ppm (1 hour). The EPA has proposed reducing the one-hour standard on the basis of new health

effects data, but no action has been taken since the proposal was issued in late 1980. States are permitted to adopt more stringent standards than the national standards.

Mobile sources are the major contributor (about 85 percent) to ambient CO levels. Most of the remaining CO in urban areas is contributed by industrial processes, combustion processes, fires and agricultural burning.

Carbon monoxide is a colorless, odorless gas. It is toxic because of its strong tendency to combine with hemoglobin in the blood to form carboxyhemoglobin (COHb). Hemoglobin in this form is unable to transport oxygen, and the oxygen-carrying capacity of the blood is reduced. Also, the presence of COHb in the blood inhibits or slows the release of the oxygen from the remaining hemoglobin.

Reductions in the oxygen-carrying capacity of the blood may be critical for certain groups of sensitive persons. Groups for which there is substantial evidence of greater risk to exposure to CO are angina patients, persons with other cardiovascular diseases or with chronic obstructive lung disease, persons with anemia, and fetuses. Women may be more sensitive to CO exposure due to the lower hemoglobin content and lower blood volume. Visitors to high altitude locations may also be more sensitive to CO. A review of the California Lake Tahoe Air Basin standard for CO is being considered separately and will be noticed at a later date.

An estimated five percent of the adult population has definite or suspected coronary heart disease. A large fraction of this group suffers from angina, especially among older persons. Angina is a cardiovascular disease in which mild exercise or excitement produces symptoms of pressure and pain in the chest. These symptoms are caused by insufficient oxygen supply to the

effects data, but no action has been taken since the proposal was issued in late 1980. States are permitted to adopt more stringent standards than the national standards.

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An estimated five percent of the adult population has definite or suspected coronary heart disease. A large fraction of this group suffers from angina, especially among older persons. Angina is a cardiovascular disease in which mild exercise or excitement produces symptoms of pressure and pain in the chest. These symptoms are caused by insufficient oxygen supply to the

heart muscle. Aggravation of angina or other cardiovascular diseases is an adverse effect because it may result in cardiovascular damage and may represent initial step in a series of increasingly serious symptoms.

Animal studies have provided information that indicates that fetuses may be more sensitive to CO than is the general population. After long-term CO exposure, the animal fetus has been shown to develop a higher COHb concentration than the pregnant mother. Reduced birth weight, increased newborn mortality, and behavioral effects have been observed in experimental animal studies.

Persons with anemia have reduced hemoglobin levels. For this reason, such persons may reach higher COHb levels or attain equilibrium levels more quickly than normal persons.

A series of studies by Aronow and others has demonstrated aggravation of angina and other cardiovascular diseases following exposure to CO. These studies have reported decreases in the duration of exercise until onset of angina (Aronow and Isbell, 1973; Aronow et al., 1974; Aronow, 1981; and Anderson, et al., 1973). The lowest group mean level of COHb linked to adverse effects on health is in the range of 2.0 to 3.0 percent. Individual adverse effects levels of COHb in these studies were as low as 1.8 percent (Aronow, 1981). An additional study (Aronow, 1978) reported angina aggravation in the range of 1.8 to 2.3 percent group mean COHb. The CO exposure, however, was through a passive smoking regime, and there may have been confounding factors (USEPA, 1980).

Carbon monoxide is also known to affect the central nervous system. Decreases in vigilance are estimated to occur at about four to six percent COHb (Horvath, 1971; USEPA, 1980). Vigilance is the ability to detect small

changes in one's environment that take place at unpredictable times. Visual function and sensitivity are affected at COHb levels as low as four to five percent. These effects on the central nervous system are significant since functions such as vigilance are important to carrying out more complex tasks.

The Department of Health Services (DHS) has recommended that air quality standards for CO for the protection of the public health be designed to prevent the accumulation of more than 2.5 percent COHb. This level of COHb is principally to avoid aggravation of angina pectoris, the disabling chest pain that arises when the heart has an insufficient supply of oxygen. On this basis, the DHS has recommended ambient standards of 9 ppm averaged over 8 hours and 25 ppm averaged over 1 hour.

The ARB staff believes 2.0 percent COHb level to be the lowest level at which aggravation of angina has been demonstrated based upon a recent study by Aronow (1981). While the DHS believes that COHb measurement is difficult and may be less accurate at such low concentrations, ARB staff has found that measurements made by Aronow at very low levels of COHb have been confirmed as both accurate and precise by any interlaboratory comparison of COHb measurement methods (Case, 1980).

Therefore, in order to protect the health of the public and especially the health of sensitive populations, the staff proposes that the Board amend the present sea-level carbon monoxide standards for the state as follows: 9.0 ppm averaged over 8 hours and 20 ppm averaged over 1 hour. These standards were chosen to assure that individual carboxyhemoglobin levels in the blood will seldom rise above the level of 2.0 percent of saturation. This level was determined principally from an identification of risk of angina attack in moderately exercising individuals with impaired hearts.

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The eight hour period was chosen as a convenient duration to prevent any excess accumulation of carboxyhemoglobin due to prolonged exposure. That duration is sufficient to approach equilibrium in most subjects, even at rest. The one hour period was chosen as a convenient duration to prevent any excessive accumulation of carboxyhemoglobin due to short exposures to high peak values of carbon monoxide such as can occur during rush hour traffic.

Carboxyhemoglobin values for nonequilibrium situations resulting from various CO exposures have been calculated using a model developed by Coburn, et al. (1965). While further experimental verification may be needed, this model has been cited by the EPA in its 1980 proposal (USEPA, 1980) as the best tool available for nonequilibrium predictions.

The staff does not propose to change the present measurement method of nondispersive infrared spectroscopy.

Once ambient standards are adopted, source-specific control strategies to attain and maintain the standards are adopted by the ARB (mobile sources) and the local and regional air pollution control districts (stationary sources). Cost-effective control strategies that focus on reducing emissions from motor vehicles are available. If necessary, such strategies could include implementation of a 3.4 g/mile CO exhaust emission standard and inspection/maintenance programs.

vehicles are available, including implementation of a 3.4 g/mile CO exhaust emission standard and inspection/maintenance programs.

The staff has also concluded that the adoption of the proposed standards will not result in adverse environmental impacts and will have a beneficial effect on air quality.

The staff has prepared a staff report which contains a more detailed description of the proposal; its rationale and necessity; its environmental impacts; and a list of the studies, reports, and similar documents on which the staff relied in developing its proposal.

2 CIVIL No. 63339

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WESTERN OIL AND GAS ASSOCIATION, a nonprofit corporation; CALIFORNIA INDEPENDENT PRODUCERS ASSOCIATION, a nonprofit corporation; ATLANTIC RICHFIELD COMPANY, a corporation; CHEVRON U.S.A., INC., a corporation; CONTINENTAL OIL COMPANY, a corporation; GETTY OIL COMPANY, a corporation; GULF OIL CORPORATION, a corporation; MOBIL OIL CORPORATION, a corporation; SHELL OIL COMPANY, a corporation; TEXACO INC., a corporation; and UNION OIL COMPANY OF CALIFORNIA, a corporation,

Plaintiffs and Respondents,

v.

CALIFORNIA STATE AIR RESOURCES BOARD, a body corporate and politic; TOM QUINN, Chairman of the California State Air Resources Board; WILLIAM H. LEWIS, JR., Executive Officer of the California State Air Resources Board; and DOE I through X,

Defendants and Appellants.

PETITION FOR HEARING

After a Decision of the Court of Appeal
For the Second Appellate District Affirming
a Decision of the Los Angeles Superior Court

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v.

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Defendants and Appellants.

PETITION FOR HEARING

After a Decision of the Court of Appeal
For the Second Appellate District Affirming
a Decision of the Los Angeles Superior Court

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The Air Resources Board respectfully requests that a hearing be ordered in this case to secure uniformity of decision and settle important questions of law.

The decision of the Court of Appeal will directly and immediately eliminate a critical substantive element in the framework of California's environmental protection laws; standards of ambient air quality which are set at levels which

will protect public health. It will also cast a shadow over the validity of the procedures employed by all state agencies in their rulemaking proceedings, leaving the question of the procedural requirements of regulatory adoption in a state of perpetual uncertainty.

The Court of Appeal has decreed that society's only interest in human life and health is its monetary value; that no regulation designed to protect the public can ever be adopted by any agency of government unless the societal value to be protected is reduced to monetary terms, and proven to exceed the cost of compliance. Claiming that only this will satisfy its free-floating and newly-minted definition of "reasonableness," the Court of Appeal has invalidated air quality standards designed to protect the lives and health of the young, the elderly and those with chronic lung disease, because their suffering was not (and could not be) reduced to a monetary sum which was found to exceed the possible costs to oil companies.

The substantive effect of the decision of the Court of Appeal is far greater than the elimination of the ambient air quality standards for sulfur dioxide and sulfates. The public health effects of doing away with standards for these two pollutants, great as it is, is overshadowed by the fact that the Court of Appeal's decision effectively wipes out all of the state's ambient air quality standards.

Since 1969, the Board has adopted ambient air quality standards for nine air pollutants. These standards are primarily based on the harmful health consequences of pollutants in excess of the standards. All of the standards were adopted solely in

will protect public health. It will also cast a shadow over the validity of the procedures employed by all state agencies in their rulemaking proceedings, leaving the question of the procedural requirements of regulatory adoption in a state of perpetual uncertainty.

The Court of Appeal has decreed that society's only interest in human life and health is its monetary value; that no regulation designed to protect the public can ever be adopted by any agency of government unless the societal value to be protected is reduced to monetary terms, and proven to exceed the cost of compliance. Claiming that only this will satisfy its free-floating and newly-minted definition of "reasonableness," the Court of Appeal has invalidated air quality standards designed to protect the lives and health of the young, the elderly and those with chronic lung disease, because their suffering was not (and could not be) reduced to a monetary sum which was found to exceed the possible costs to oil companies.

The substantive effect of the decision of the Court of Appeal is far greater than the elimination of the ambient air quality standards for sulfur dioxide and sulfates. The public health effects of doing away with standards for these two pollutants, great as it is, is overshadowed by the fact that the Court of Appeal's decision effectively wipes out <u>all</u> of the state's ambient air quality standards.

Since 1969, the Board has adopted ambient air quality standards for nine air pollutants. These standards are primarily based on the harmful health consequences of pollutants in excess of the standards. All of the standards were adopted solely in

consideration of their adverse effects, with no consideration being given to the costs of measures local air pollution control districts might in the future select to achieve compliance with the standards. These standards have been continuously in effect for as long as 12 years, and, with the exception of the case at bar, have never been the subject of judicial challenge. The opinion of the Court of Appeal would, at a single blow, wipe out each and every one of the state's standards.

The insistence of the Court of Appeal that "due process" standards govern quasi-legislative proceedings of California administrative agencies contravenes many decisions of this Court and other appellate courts. Its application of the "due process" analysis to require pre-hearing discovery of staff reports is the first case, state or federal, to require such pre-hearing discovery, and is contrary to many decisions of this Court and other appellate courts. Its holding that a regulation finally adopted may not substantially differ from the regulation proposed (even in a manner more favorable to the objector) is directly contrary to other appellate decisions. Its conclusion that an agency may not consider any evidence, even cumulative evidence, not subject to rebuttal is contrary to a host of decisions of this Court and other appellate courts.

It is rare that one decision can at once do so much legal damage, can be contrary to so much precedent, can so endanger the public health, and can have such broad effects beyond the regulations at bar. If the decision of the Court of Appeal has no legitimate antecedents it will inevitably spawn numerous progeny. We urge the Court to grant a hearing.

I

THE COURT OF APPEAL ERRED IN ADOPTING AN ARBITRARY STANDARD OF "REASONABLENESS" AND MISINTERPRETING THE STATUTES TO REQUIRE THAT, IN SETTING STANDARDS WHICH DEFINE HEALTHFUL AIR, THE BOARD MUST REDUCE HUMAN HEALTH TO ITS MONETARY VALUE AND BALANCE THAT UNKNOWABLE SUM AGAINST THE SPECULATIVE COSTS OF HYPOTHETICAL LOCAL DISTRICT MEASURES.

A. Introduction.

The Court of Appeal has demanded that the Air Resources Board determine the monetary value of human health and then balance that sum against the hypothetical costs to polluters from pollution control measures which might later be adopted by local districts. It claims that only by reducing the suffering of asthmatic children and "excess mortalities" of family members to a monetary denominator, and then seeing if pollution control is "worth it", can an air quality standard be "worthy of the appellation 'reasonable.'" (Slip Op., pp. 19, 26.) Even if society's only interest in human life and health were its monetary value, itself a barbaric notion, the task set by the Court of Appeal is impossible in principle, as is developed below, and is inconsistent with the governing legislation. The Court's demand that its analysis be applied to all administrative proceedings, even absent statutory mandate, makes it even more imperative that this Court intervene and grant a hearing in this case.

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B. By Statutory Definition, Long-Standing Administrative Interpretation and Legislative Ratification, an Ambient Air Quality Standard is Simply a Definition of Acceptable Air Quality Which is not Self-Executing and Which in and of Itself Imposes no Costs on Anyone.

The only rational starting place in deciding what the Air Resources Board ought to consider in setting an ambient air quality standard is the statute which sets forth explicitly what an ambient air quality standard is. Health and Safety Code § 39014 provides:

> "'Ambient air quality standards' means specified concentrations and durations of air pollutants which reflect the relationship between the intensity and composition of air pollution to undesirable effects established by the state board or, where applicable, by the federal government." (Emphasis supplied.)

In other words, all an ambient air quality standard does is to relate the level of a pollutant to undesirable effects.

What are the "undesirable effects" that the Board should consider? They are set forth in Health and Safety Code § 39606:

> "The state board shall:
>
> ". . . . .
>
> "(b) Adopt standards of ambient air quality for each basin in consideration of the public health, safety and welfare, including, but not limited to, health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy."

As long ago as 1969, and consistently thereafter, the Air Resources Board interpreted those two statutes together to mean the following:

> "The objective of ambient air quality standards is to provide a basis for preventing or abating the effects of air pollution, including effects on health, esthetics and [the] economy." 1/

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1. Title 17, California Administrative Code, § 70101.

The contemporaneous construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight and the courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. (Rivera v. City of Fresno (1971) 6 Cal.3d 132, 140; Standard Oil Co. of California v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769; People ex Rel. Dept. Pub. Wks. v. Ryan Outdoor Advertising, Inc. (1974) 39 Cal.App.3d 804, 810.

It should be noted that Title 17, California Administrative Code, section 70101, quoted above, which contains the Board's interpretation, was first enacted in 1969 (Reg. 69, No. 52.) In 1975, the Legislature reenacted the language under consideration. (Stats. 1975, Ch. 957, § 12.) As was said in Universal Eng. Co. v. Bd. of Equalization (1953) 118 Cal.App.2d 36, 43:

> "It has been held that where an administrative officer or board has adopted a regulation defining . . . the scope of a . . . statute, and the Legislature subsequently reenacts the statute without amendment in this regard, the reenactment amounts to a legislative confirmation of the prior existing rules of interpretation. [Citations.]."

See also Division of Industrial Safety v. Municipal Court (1976) 61 Cal.App.3d 696, 701; Action Trailer Sales, Inc. v. State Bd. of Equal. (1975) 54 Cal.App.3d 125, 133-134.)

This rule was likewise approved in Wotton v. Bush (1953) 41 Cal.2d 460, 468:

> "Settled administrative interpretation at the time of such reenactment is entitled to consideration as legislative approval of that interpretation . . . [Citations.]."

See also Richfield Oil Corp. v. Crawford (1952) 39 Cal.2d 729, 736; Nelson v. Dean (1946) 27 Cal.2d 873, 882; Rivera v. Division of Industrial Welfare (1968) 265 Cal.App.2d 576, 601. See SO_2 Rec., Book 16, p. 17 for the Board's findings concerning legislative ratification.

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Since 1969, the Board has been acting consistently with its understanding that "effects on the economy," the last term in a list of undesirable effects of air pollution,[2] itself refers to an undesirable effect of air pollution.[3]

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2. As was said in Pasadena University v. Los Angeles Co. (1923) 190 Cal. 786, 790:

> "It is the rule of construction that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. [Citations]."

See Hart v. City of Beverly Hills (1938) 11 Cal.2d 343, 347. Moreover, "the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used. [Citations]." Vilardo v. County of Sacramento (1942) 54 Cal.App.2d 413, 420; In re Marquez (1935) 3 Cal.2d 625, 629; Coffee-Rich, Inc. v. Fielder (1972) 27 Cal.App.3d 792, 812.

3. We note that the effect of pollution on the economy is no trivial matter, and in fact was a central concern of Congress in considering air pollution legislation. As was noted in Motor and Equipment Mfrs. Ass'n., Inc. v. E.P.A. (D.C. Cir. 1979) 627 F.2d 1095, 1118 n.47:

> "The House Report on the 1977 amendments noted:
>
> "The committee recognizes that air pollution causes significant economic costs to the public by damaging health and welfare. Such costs include an increased incidence of illness, premature death, increased expenditures for health care and insurance and loss of tax revenues. Additionally, it causes damage to real estate and crops (and other vegetation), and could result in huge economic losses for tourist-related industries. While quantifications of these losses is obviously difficult, some estimates range as high as $16.1 billion annually (in 1968 dollars).
>
> "H.R. Rep. No. 294, 95th Congr., 1st Sess. 34 (1977)."

A statutory declaration concerning these effects is set forth at 42 United States Code section 7401.

The Court of Appeal, however, wrenches the words "effects on the economy" from their context, and strikes down these state air quality standards, and all state air quality standards, for failure to consider the "effects on the economy" of the standards themselves. (Slip Op., p. 17 et seq.)

The starting point in our statutory analysis, then, is the realization that the potential costs associated with future local efforts to achieve the goal of clean air has nothing whatever to do with the "relationship between the intensity and composition of air pollution to undesirable effects". (§ 39014.) In construing what the Board must "consider" in establishing such standards, an interpretation which is relevant to the question at hand should be preferred to one which is irrelevant.

As is detailed below, economic effects of implementation measures are considered at the time and place those measures are proposed, and only "reasonable" measures are required to be utilized. The hypothetical costs of future local regulations, however, have nothing to do with the definition of clean air.

C. Neither Congress in Enacting the Clean Air Act nor the Courts in Construing it Have Required the Environmental Protection Agency to take Costs of Compliance into Account in Adopting National Ambient Air Quality Standards. California's Parallel Statute Should be Construed to be Consistent With Federal Authority.

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The starting point in our statutory analysis, then, is the realization that the potential costs associated with future local efforts to achieve the goal of clean air has nothing whatever to do with the "relationship between the intensity and composition of air pollution to undesirable effects". (§ 39014.) In construing what the Board must "consider" in establishing such standards, an interpretation which is relevant to the question at hand should be preferred to one which is irrelevant.

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While the Court of Appeal indulges in a token statutory analysis, considered infra, it was not primarily

motivated by linguistic considerations, but rather by its own philosophic orientation:

> "Even if we were to assume that the phrase 'effect on the economy' as used in the statute meant only the effects of pollution, or if that phrase were deleted from the stature entirely, we would still conclude that consideration of the effect of compliance on the economy is a necessary ingredient of 'reasonableness.'"

If this remarkable statement is true, then Congress and the federal courts have for years been "unreasonable":

The Clean Air Act provides, and the federal courts have consistently held, that the costs of achieving the standards are not to be balanced against the economic "value" of human health.[4]

In Lead Industries Ass'n v. Environmental Protection (D.C. Cir. 1980) 647 F.2d 1130, it was argued that "reasonableness" requires consideration of the cost of achieving air quality standards prior to the promulgation of those standards. (Id. at 1150-1151.) The Court forcefully rejected this argument, holding that "economic considerations play no part in the promulgation of ambient air quality standards under Section 109." (647 F.2d at 1148.) The Court said:

> "Where Congress intended the Administrator to be concerned about economic and technological feasibility, it expressly so provided. For example, Section 111 of the Act, 42 U.S.C. § 7411, directs the Administrator to consider economic . . . feasibility in establishing standards of performance for new stationary sources of air pollution . . . .

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4. Moreover, the federal standards, unlike the state standards, must be achieved by statutory deadlines. South Terminal Corp. v. Environmental Protection Agcy. (1st Cir. 1974) 504 F.2d 675-676; see Union Electric Co. v. EPA (1975) 427 U.S. 246, 260-261.

In contrast, Section 109(b) speaks only of protecting the public health and welfare."[5]

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5. Likewise, the Legislature had no difficulty in telling the Board to consider the effects of its actions on the economy when it wanted the Board to do so. Health and Safety Code § 43101 contains an especially significant contrast to the language of section 39606:

> "The state board shall adopt and implement emission standards for new motor vehicles for the control of emissions therefrom, which standards the state board has found to be necessary and technologically feasible to carry out the purposes of this division. <u>Prior to adopting such standards, the state board shall consider the impact of such standards on the economy of the state</u>, including, but not limited to, their effect on motor vehicle fuel efficiency." (Emphasis supplied.)

It is also noteworthy, in considering the claim of the court below that section 39606 requires a "cost-benefit analysis," that the Legislature also knows how to require such an analysis when it wants one. Section 43630 deals with certification of pollution control devices:

> "(c) After one or more such devices are initially certified, no device shall be certified pursuant to this section which is substantially less effective than any device previously certified, unless the state board determines, <u>pursuant to a cost-benefit analysis</u>, that such less effective device is also substantially less costly and therefore merits certification."

Not only does the <u>language</u> of these statutes contrast starkly with that of § 39606, but the statutory schemes in which they appear also contrast tellingly.

As is explained below, in adopting an ambient air quality standard, the Board is only <u>defining</u> clean air. It is the primary task of other agencies--the local districts--to take "reasonable" action to attain and maintain those standards given the technological and economic feasibility presented at the hearings of those agencies. The Board, however, cannot know in advance what actions the scores of local agencies might find "reasonable," or what the cost of their then-nonexistent regulations might be.

By contrast, the Board's vehicle emission standards and certifications are immediately self-executing. (See Health & Saf. Code § 43105.) The Board need not speculate what some other agency might do at some future time, and what the hypothetical costs of hypothetical technology might then be.

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No suggested difference in the wording of the federal and state statutes concerning this identical question would account for the opposite conclusion reached by the Court of Appeal, without even a nod to the federal cases.[6/]

As in the federal Act, "effects in the economy" in section 39606 is given as merely an example of what is included in "public health, safety and welfare." When the phrase "health, safety and welfare" is introduced in the state Act,

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(Footnote 5 continued):

Totally skipping the contrasts in language and legislative schemes, the Court of Appeal actually cites § 43101 for the proposition "[t]hat the Legislature is concerned with economic impact in the area of regulating air quality . . . ."! (Slip Op., p. 20.) Of course it is, but it hardly follows that the Legislature effectuated that concern in the manner demanded by the Court in achieving air quality standards. Rather, implementing air quality standards is only achieved to the degree the costs are "reasonable," as is explained below. Moreover, if the costs of implementation are still too severe, a variance procedure is available. (Health & Saf. Code § 42352.)

6. The issue at bar is also similar to that before the United States Supreme Court in its recent decision in American Textile Manufacturers Institute, Inc. v. Donovan (1981) 452 U.S. 490 , 69 L.Ed.2d 185, 101 S.Ct. 2478. In that case, the petitioners contended that in setting a health standard for cotton dust, OSHA was required "to demonstrate that its Standard reflects reasonable relationship between the costs and benefits associated with the Standard." 101 S.Ct. at 2483. The Supreme Court disagreed, holding:

> "When Congress passed the Occupational Safety and Health Act in 1970, it chose to place preeminent value on assuring employees a safe and healthful working environment limited only by the feasibility of achieving such an environment." (101 S.Ct. at 2506.)

In the statutory scheme at bar, as is explained below, the Legislature placed preeminent value on protecting the public health in defining clean air, limited by the requirement that only "reasonable" actions be taken by the local districts in achieving it. Thus, economics are considered, but not at the time nor in the manner demanded by the Court of Appeal.

it unambiguously refers to detrimental effects of pollution. Health and Safety Code § 39000, the first section of the Act, sets forth the legislative declaration of policy:

> "The Legislature finds and declares that the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the atmosphere, thereby creating a situation which is detrimental to the health, safety, welfare, and sense of well-being of the people of California." (Emphasis supplied.)

The words "health, safety, and welfare" are repeated in Health and Safety Code section 39606 and, as in section 39000, clearly demand that the Air Resources Board consider the effects of pollution which are "detrimental to the health, safety, [and] welfare" of the people. Importantly, the phrase "effects on the economy" is only an example of detrimental effects on "public health, safety, and welfare" so the obvious inference is that "effects on the economy" denotes the detrimental effects of pollution on the economy. And as noted above, the Legislature defined air quality standards as reflecting "undesirable effects" of air pollution. (Health & Saf. Code § 39014.)

The air quality standards set by the Air Resources Board were authorized pursuant to the Legislature's declaration, in Health and Safety Code section 39001 "that this public interest [delineated in Section 39000] shall be safeguarded by an intensive, coordinated state, regional, and local effort to protect and enhance the ambient air quality of the state." There is no hint in any of these declarations

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of any requirement that polluters' economic interests be taken into account in determining a definition of clean air, so as to determine the requirements of the public health, safety or welfare.

D. Even if the Costs of Attaining a Standard may be "Considered" When the Standard is Adopted, the Cost-Benefit Analysis Mandated by the Court of Appeal is Without even Colorable Support in the Statute.

Not only does the Court write the words "balancing the benefit of the standard against the cost of achievement and the level of resources available for control" (Slip Op., p. 19.) into the statute, it ignores the words that are there already. Most particularly, the statute provides that the Board must "consider" effects on the economy.

Federal cases interpreting statutes which require an agency to "consider" a factor have never required the agency to assign a dollar amount to each of the factors listed for consideration and then compare these figures to decide if the regulation should be adopted.[7] Under the ruling of

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7. In Weyerhaeuser Co. v. Costle (D.C. Cir. 1978) 590 F.2d 1011 a statute called upon EPA to "consider" cost and environmental impacts. The plaintiff contended "that the Agency should have more carefully balanced costs versus the effluent reduction benefits of the regulations, and that it should have also balanced these benefits . . . to arrive at a 'net' environmental benefit conclusion." Noting that the statute calls for consideration of the factors and not comparison in relation to each other, the court held:

> "[W]e do not believe that EPA is required to use any specific structure such as a balancing test in assessing the consideration factors, nor do we believe that EPA is required to give each consideration factor any specific weight." (590 F.2d at 1045.)

See also Homestake Min. Co. v. U.S. Environ. Protection (D.S.D. 1979) 477 F.Supp. 1283.

the trial court in _this_ case, however, the Board would be charged with ascribing monetary sums to "health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy."

E. Benefits to Human Health which Attainment of an Ambient Air Quality Standard will Provide are Inherently not Susceptible to Quantification in Monetary Terms.

It is at once obvious that the Court of Appeal demands an impossible task. How is one to place a price tag on "aesthetic value" or "interference with visibility"? More importantly here, how is one to place a price tag on the value of health? This point was forcefully brought out at the hearing.

As "proof" that a "cost-benefit" analysis "is not impossible" the trial court below praised "a most detailed presentation on behalf of WOGA analyzing methods of _cost_ evaluation involved in a reduction of the SO_2 standard from the federal standard of .14 ppm down to the proposed standard of .04 ppm." (10 C.T. 2592, lines 19-22, emphasis supplied.) What the trial court obliquely conceded here, however, is that this report does not even _attempt_ to quantify the "benefits," but only the supposed "cost." Thus, the author of the report, Mr. Clark was asked:

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"What do you do in terms of [quantifying], for example, a child whose asthma is being aggravated?

"MR. CLARK: Well, we have not looked at any health effects. The health is excluded." (SO_2 Rec., Book 4, Item 5, p. 164, lines 22-25, emphasis supplied.)

The same attorney for plaintiffs and petitioners whose firm appears for them in this case then admitted that the benefits could not be quantified for comparison with the costs:

"Mr. McCLINTOCK: . . . As I said at the beginning, we would not for a second say that the benefits have been definitively quantified. No one has been able to do that to date and it may be a considerable time before we ever, if ever, that we do quantify benefits." (Id., p. 180, lines 22-25, emphasis supplied.)

The unexamined premise of the court below is that performing "cost-benefit balancing" is inherently a good idea in all proceedings, and that the Board should therefore be required to that. (Slip Op., p. 19.) While this apparent personal opinion of the court is irrelevant to the question of the legislative intent, it cannot go unquestioned. The usefulness of "cost-benefit analysis" was examined at length in American Federation of Labor, etc. v. Marshall (D.C. Cir. 1979) 617 F.2d 636, aff'd 452 U.S. 490, 69 L.Ed.2d 185, 101 S.Ct. 2478:

"Further, cost-benefit analysis would not necessarily improve agency health and safety determinations. These techniques require the expression of costs, benefits and performance in often arbitrary, measurable terms. They may hide assumptions and

qualifications in the seeming objectivity of numerical estimates. Especially where a policy aims to protect the health and lives of thousands of people, the difficulties in comparing widely dispersed benefits with more concentrated and calculable costs may overwhelm the advantages of such analysis." (617 F.2d at 665, footnotes omitted.)

In the words of one writer quoted by the Court:

> "Cost-benefit analyses are also invariably flawed. The reasons for this are well-known: the difficulty of indentifying and quantifying many costs and benefits; the inevitably arbitrary nature of valuations of human life or health. . . . and many others." (617 F.2d at 665, n.170.)

The Court notes that the National Academy of Sciences has also noted these "serious shortcomings of cost-benefit analysis." (617 F.2d at 665, n.171.) As the senator who sponsored the OSHA bill put it:

> "We are talking about people's lives, not the indifference of some cost accountants." (617 F.2d at 664.)

As the Board's chairman asked during the hearings: What is a child's case of asthma "worth"?

The insoluble problems with "cost-benefit analyses" were fully demonstrated in the case at bar as was discussed above. Given that such analyses are, in principle "invariably flawed," the insistence of the trial court that the Board has the burden to produce such an analysis which is <u>not</u> flawed is tantamount to a judicial repealer of the legislation. "Certainly, [the Legislature] would not have wanted administrative paralysis caused by debate over a standard's costs and benefits. (617 F.2d at 666 n.172.)

> qualifications in the seeming objectivity of numerical estimates. Especially where a policy aims to protect the health and lives of thousands of people, the difficulties in comparing widely dispersed benefits with more concentrated and calculable costs may overwhelm the advantages of such analysis." (617 F.2d at 665, footnotes omitted.)

In the words of one writer quoted by the Court:

> "Cost-benefit analyses are also invariably flawed. The reasons for this are well-known: the difficulty of indentifying and quantifying many costs and benefits; the inevitably arbitrary nature of valuations of human life or health. . . . and many others." (617 F.2d at 665, n.170.)

The Court notes that the National Academy of Sciences has also noted these "serious shortcomings of cost-benefit analysis." (617 F.2d at 665, n.171.) As the senator who sponsored the OSHA bill put it:

> "We are talking about people's lives, not the indifference of some cost accountants." (617 F.2d at 664.)

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F. Costs Associated with Attaining an Ambient Air Quality Standard are Properly Considered when Local Districts Adopt Future Measures Limiting Emissions from Specific Categories of Sources. Because such Measures may vary Widely from District to District and over time, the Costs of Attaining a Standard Can only be the Subject of Speculation When the Standard is Adopted.

In requiring the Board to determine the costs of attaining an ambient air quality standard, which must then be balanced against expected benefits of the standard, the Court of Appeal ignores the reality of California air quality regulatory programs. As discussed above, an ambient standard is simply a definition of acceptable air quality. (§ 39014.) In and of itself, it imposes no costs on anyone or on the economy in general. It is not self-executing. Only when specific measures designed to achieve and maintain a standard are adopted do any costs arise. An understanding of the process by which such rules and regulations are developed and adopted demonstrates that the Court of Appeal has, in misinterpreting the requirements of the Health and Safety Code, sought to impose upon the Board a burden that is both unsupported and impossible to meet.

California is divided into 46 local air pollution control and air quality management districts. Once an ambient air quality standard is adopted by the State Board, it is the responsibility of these districts to adopt a program of reasonable rules and regulations limited emissions from stationary sources of air pollution which will result in compliance with the standards. (§ 40001.)

Local district programs to attain state standards depend on numerous factors which, far from being uniform or constant, may differ greatly from one district to another and which may change greatly over time. Different districts contain different types of sources of air pollution. It is the function of local districts to plan and develop regulations to control emissions from some or all of those sources to attain the state standards. Which sources the districts choose to control and the level of controls imposed are matters to be determined by the local districts, which the Board cannot know or predict when it considers an ambient standard. A district may, as an example, choose to require a 40 percent emission reduction from all sources emitting a pollutant, or to require a 20 percent reduction from some sources and a 60 percent reduction from others. One district may choose one solution, other districts may choose others. Until the methods of meeting the standards are chosen by the districts and embodied in the form of specific rules and regulations, there is simply no way of knowing what the costs of attaining an ambient standard may be.[8]

8. The variation between districts also accounts for the provision that air quality standards themselves might vary from district to district. (§ 39606.) The Court of Appeal argues that "the only significant variable between the various air basins would be the impact on the economy in achieving and maintaining a particular level of air quality." (Slip Op., p. 20.) This is clearly false. The Court had before it examples of such variations in 17 Cal.Admin. Code § 70200, which provides for more stringent visibility standards in a relatively clean basin, and a lower carbon dioxide standard in a high altitude basin because of heightened health effects at high altitudes. And, of course, effects of pollution on the economy vary widely from basin to basin. Agriculture might be adversely affected in Kern County, but not in a more urbanized county. In short, the impacts of air pollution

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Moreover, the costs of attaining and maintaining a given air quality standard may vary greatly over time. Depending on economic and other factors, sources of emissions in any district, and throughout the state, will almost certainly change from year to year. Factories which emit certain pollutants will close, perhaps to be replaced by others which emit more or less of that pollutant or other pollutants. To the extent that a large source of emissions of a pollutant may shut down in a district, the level of controls required on other sources of the same pollutant in the district will be correspondingly decreased. Conversely, if there is an increase in mobile or stationary sources of emissions of a pollutant, it will likely be necessary for the district to impose a greater level of controls on other sources. In both cases, the costs of control will obviously change and will only be able to be determined on the basis of future developments.

Similarly, the nature and costs of equipment to reduce emissions will vary greatly over time. Air pollution control technology is in a constant and rapid state of development. While there may at present be no technologically feasible means of controlling emissions from a given source, such technology may well be developed in the future. As emission control technology develops, its costs is likely to vary. Present technologies may require $10.00 to remove a

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(Footnote 8 continued):

upon health, aesthetic value, interference with visibility and the economy all vary from one basin to another.

pound of a given pollutant, while more developed technologies may reduce emissions for only $5.00 or $2.00 per pound.

It is the function of local districts to evaluate the availability and costs of control technologies and to adopt rules and regulations accordingly. Until specific rules and regulations are identified, there is simply no rational or logical basis on which to calculate the costs of attaining and maintaining an ambient standard.[9]

In contrast to ambient standards, which impose costs only indirectly and in future years, vehicular emission standards, which the Board is also required to adopt, impose costs directly and on a yearly basis. California's vehicular

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9. Contrary to the assertion of the Court of Appeal that local districts are required to achieve air quality standards regardless of cost (Slip Op., p. 18), local districts in fact need only see that "reasonable provision is made to achieve and maintain the state ambient air quality standards." (Health & Saf. Code § 40001, emphasis supplied.) This necessarily involves questions of costs of compliance, and where costs are unreasonable (as they are for some pollutants in the South Coast Air Basin) the standards are not met, as the Court may judicially notice.

The State Board reviews local regulations only to see "whether the plans contain reasonable provision to achieve and maintain the state's ambient air quality standards." (Health & Saf. Code § 41500.) If they do not, the State Board may establish a program or regulation which "shall have the same force and effect as a program, rule or regulation adopted by the district. . . ." (Id., §§ 41503-41504.) The Board does not understand rules adopted by the State Board for a local district to be governed by different standards or considerations than those applicable to the districts in the first instance. (See id., § 41505.)

That costs of compliance are reasonable is a prime consideration in deciding whether and to what extent air quality standards will be achieved. That consideration, however, can only be intelligently considered in the context of a specific proposal, in a specific area, and at a specific time. It can be no part of the definition of clean air.

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emission standards are adopted for different classes of vehicles for each specific model year. (See Title 13, California Administrative Code, Section 1960.1). The standards reflect emissions levels achievable with different types of technology (e.g., catalytic converter, exhaust gas recirculation), the costs of which can be specifically evaluated by the Board when it considers the adoption of a particular vehicular emission standard. This is reflected in the precise language in Health and Safety Code section 43101, which mandates the Board to "consider the impacts of the standards on the economy of the state." (Emphasis added. See footnote 5, ante.)

G. Conclusion.

In short, the notion of the Court of Appeal that even in the absence of statutory directive, the Board must "balance" the costs of compliance with regulations which might be adopted by local agencies against the monetary "value" of human health is unsupportable. The Court of Appeal cites no authority save its own ipse dixit that "reasonableness" requires this. (Slip Op., p. 19.) Yet it ignores all of the federal authority on this precise question, apparently concluding, without analysis, that Congress and the federal courts are all "unreasonable."

Nor does the Court of Appeal ever address the fundamental defect of its opinion--that the effects of air quality standards on the economy has nothing whatever to do with "the relationship between intensity and composition of

air pollution to undesirable effects." (§ 39014.) Given two interpretations of "effects on the economy," one which would direct the Board to consider something utterly irrelevant to the question at hand, and one of which comports precisely with the statutory context, this Court's choice should not be difficult. The Court should not allow all of the State's air quality standards to fall, future standards to be compromised, and the public health endangered based on the Court of Appeal's analysis.

While the procedural issues addressed below may have broader implications, few issues this court has considered will have a deeper impact on the health, safety and welfare of the millions of citizens not before the Court. We ask the Court to grant a hearing on this issue.

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II

QUASI-LEGISLATIVE HEARINGS COMPORTING WITH ALL APPLICABLE REQUIREMENTS OF THE A.P.A. MAY NOT BE REVERSED FOR FAILURE TO OBSERVE "DUE PROCESS" REQUIREMENTS. THE OPINION OF THE COURT OF APPEAL TO THE CONTRARY CONFLICTS WITH NUMEROUS PRIOR DECISIONS.

A. Introduction and Summary of Argument.

The decision of the Court of Appeal subjects quasi-legislative proceedings not only to the panoply of requirements outlined in the Administrative Procedure Act, but also to summary reversal for failure to apply such further procedures which a reviewing court, in retrospection, thinks might have been helpful under a "due process/fundamental fairness" analysis.

In so concluding, the Court of Appeal placed itself in conflict with decisions of this Court, and other appellate courts, which hold that "due process/fundamental fairness" is not a standard which can be utilized to reverse decisions resulting from quasi-legislative proceedings held in full compliance with the A.P.A. The Court's decision is also contrary to the United States Supreme Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC* (1978) 435 U.S. 519, which was based on the federal A.P.A., upon which California's A.P.A. was molded.

Every state court which has considered the application of "due process" standards to quasi-legislative proceedings, and every state court which has considered the *Vermont Yankee* decision has rejected the view expressed by the Court of Appeal.

The vital importance of this case to California's administrative agencies is simply this:

Procedural predictability, while the most humble of virtues, is not the least important. Administrative agencies have been charged by the Legislature to protect a number of vital public interests; in the instant case, what is at stake is protection of the public health. Unless an agency can know in advance what procedures it must employ, carrying out the legislative will is transformed into a procedural game, where competing interests delay implementation of public policy, and disparate judges impose their own notions of the "best procedures" for the particular hearing after the hearing has been held. As the Supreme Court said:

> "This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings." 435 U.S. at 547.

This, as the Court rightly said, would disrupt the statutory scheme, which clearly differentiates between quasi-legislative, and adjudicatory proceedings.[10]

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10. "In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the

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An agency should not be put to the Hobson's choice of holding its hearings subject to years of later litigation concerning whether "more" procedures might have been "better," or to conduct its quasi-legislative hearings as though they were trials. To posit that the Legislature intended to put its agencies to this choice is not only unsupported, but pure folly, as it sacrifices the substantive mission of the agencies to years of litigation, as the present case illustrates.

Finally, the Court of Appeal cannot find legitimate solace from the fact that subsequent to the administrative proceedings at bar the Legislature amended the A.P.A. to require additional (and largely unrelated) procedures. (Slip Op. pp. 6-8.) The only legitimate lesson from the amendments is that the Legislature is capable of responding to any needed changes in the A.P.A. without the uncertainty and consequent litigation engendered by the Court of Appeal's case-by-case, post hoc, "due process/fundamental fairness" analysis. Far from settling the question at bar, the Court of Appeal has thrown open the amended A.P.A. to uncertainty by holding that even procedures additional to the additional procedures may be any time required in any given case.

(Footnote 10 continued):

> 'best' procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through the [the Legislature] enacted 'a formula upon which opposing social and political forces have come to rest,' Wong Yang Sung v. McGrath, 339 U.S., at 40, but all the inherent advantages of informal rulemaking would be totally lost." (435 U.S. at 546-547, footnote omitted.)

In the pages which follow, the Board will demonstrate that the "due process/fundamental fairness" analysis utilized by the Court of Appeal may not be employed to strike down a quasi-legislative decision adopted in conformity with the A.P.A. The Board will then demonstrate that its procedures in the case at bar did, in fact conform to the A.P.A., to prior and conflicting decisions and to the "due process/fundamental fairness" analysis which the Court of Appeal invented and then misapplied.

B. The Application of a "Due Process/Fundamental Fairness" Standard to Quasi-Legislative Proceedings Conflicts with Numerous Decisions of This Court, and of Other Appellate Courts.

California decisions are unanimous in holding that quasi-legislative actions are not subject to "due process" requirements.[11]

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11. In Horn v. County of Ventura (1979) 24 Cal.3d 605, 612-6133, this Court restated the governing principle attested by a long line of cases:

> "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. [Citations.]
>
> "It is equally well settled, however, that only those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements. [Citations.]." (Emphasis in original.)

See also Franchise Tax Board v. Superior Court (1950) 36 Cal.2d 538, 549; Darley v. Ward (1980) 103 Cal.App.3d 207, 216; Building Code Action v. Energy Resources Conservation & Dev. Com. (1980) 102 Cal.App.3d 577, 584 ["It is important to note at the outset that the Commission's adoption of regulations was a quasi-legislative proceeding, and notions of fairness or due process associated with judicial or even

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Nevertheless, the Court of Appeal has announced the rule that an administrative proceeding held in full compliance with the A.P.A. may nevertheless be reversed after "superimposing on the 'quasi-legislative' function and the prescribed statutory procedure a notion of 'fairness' which a court must define on a case-by-case basis." (Slip Op., p. 10.) The standards at bar were thus reversed, inter alia, because there was an asserted "lack of fundamental

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(Footnote 11 continued):

quasi-adjudicatory proceedings are not applicable. [Citations]."]; City of Santa Cruz v. Local Agency Formation Com. (1978) 76 Cal.App.3d 381, 388-389; California Optometric Assn. v. Lackner (1976) 60 Cal.App.3d 500, 505 ["[T]he promulgation proceeding is statutory and does not arouse the demands of procedural due process [Citations.]."]; Rivera v. Division of Industrial Welfare (1968) 265 Cal.App.2d 576, 587 ["There is no constitutional requirement for any hearing in a quasi-legislative proceeding; hence, the procedural requirements for conduct of the agency's hearings stem from the particular statute rather than the constitutional demands of due process"]; Brock v. Superior Court (1952) 109 Cal.App.2d 594, 606.

This rule has been held to be grounded in the doctrine of separation of powers. Stauffer Chemical Company v. California State Air Resources Board, ____ Cal.App.3d ____ (February 16, 1982) 1 Civil 52134, Slip Op., p. 6:

> "The limited scope of review of quasi-legislative administrative action is grounded upon the doctrine of separation of powers."

See also Anti-Facist Committee v. McGrath (1950) 341 U.S. 123, 167, Frankfurter, J., concurring; Brock v. Superior Court (1952) 109 Cal.App.2d 594, 603.

The decision of the Court of Appeal conflicts with these authorities, curiously holding that the doctrine of separation of powers applies only to members of the coordinate branches who are "individuals directly elected by the people." (Slip Op., p. 11; contra Zetterberg v. State Dept. of Public Health (1974) 43 Cal.App.3d 657, 663 [applying the doctrine of separation of powers to a state agency].) If this Opinion is allowed to become law, the Court of Appeal's novel restriction on the separation of powers doctrine to directly "elected individuals" could well take on a mischievous life of its own.

fairness" in the proceedings (id. at 17). "Fundamental fairness," of course, is the very definition of "due process."[12]

The Court of Appeal, then, is the first court in this State to hold that the same "due process" analysis which it acknowledges to have been repeatedly escorted out the front door by our Courts (Slip Op., p. 10) has somehow reentered by the back door.

The Court below thus placed itself in direct conflict with the many cases holding that "notions of fairness or due process associated with judicial or even quasi-adjudicatory proceedings are not applicable . . ." (Building Code Action v. Energy Resources Conservation & Dev. Com. (1980) 102 Cal.App.3d 577, 584), and that "'[a]n administrative order, legislative in character, is subject to the same tests as to validity as an act of the Legislature.' (Knudsen Creamery Co. v. Brock, 37 Cal.2d 485, 494; Board of Supervisors v. California Highway Commission, 57 Cal.App.3d 952, 960.)" (City of Santa Cruz v. Local Agency Formation Com. (1978) 76 Cal.App.3d 381, 389). (Cf. Slip Op., p. 11, and the Opinion's metamorphosis of the separation of powers doctrine, discussed at note 11, ante.)

How did "due process," reenter the arena? According to the Court of Appeal, permission to apply a case-by-case due process analysis was somehow obscurely conveyed by the

12. [F]undamental fairness [is] the touchstone of due process". In re Love (1973) 11 Cal.3d 179, 191; People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 268 ["'[F]undamental fairness [is] assured by the Due Process Clause'"]; In re Saunders (1970) 2 Cal.3d 1033, 1041; see McKeiver v. Pennsylvania (1971) 403 U.S. 528, 543 ["[T]he applicable due process standard . . . is fundamental fairness."].

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Legislature in the A.P.A. itself, although the Legislature never exactly said so.[13]

An identical argument was recently made to the United States Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council (1978) 435 U.S. 519, wherein it was held:

> "In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case." (Emphasis in original, 435 U.S. at 548.)

This holding should have inspired considerable deference, as California's A.P.A. was *patterned* on the federal act[14] and in such a circumstance the attribute of 'great

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13. The Court of Appeal claims to find at least permission for its "due process" interposition, asserting that "the statute is silent and therefore neutral." (Slip Op., p. 14.)

14. California Optometric Ass'n v. Lackner (1976) 60 Cal.App.3d 500, 507; Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal.App.3d 177, 192.

weight' which attaches to federal decisions[15] and particularly those of the United States Supreme Court[16] finds special application.[17]

Moreover, every state court which has considered the Vermont Yankee opinion has adopted it as its own.[18]

Indeed, the case for following Vermont Yankee was even stronger under the California A.P.A., as all of the textual criticisms which were directed by Professor Davis against the Supreme Court's decision are wholly inapplicable

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15. People v. Bradley (1969) 1 Cal.3d 80, 86; San Diego Unified Port Dist. v. Superior Ct. (1977) 67 Cal.App.3d 361, 371; Debtor Reorganizations, Inc. v. State Bd. of Equalization (1976) 58 Cal.App.3d 691, 696; People v. Cummings (1974) 43 Cal.App.3d 1008, 1019; Silman v. Reghetti (1935) 7 Cal.App.2d 726, 729.

16. See Gabrelli v. Knickerbocker (1938) 12 Cal.2d 85, 89, appeal dismissed 306 U.S. 621 (1938); Crocker v. Scott (1906) 149 Cal. 575, 582-83.

17. See, e.g., Social Workers' Union, Local 535 v. Alameda County Welfare Dep't. (1974) 11 Cal.3d 382, 391; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 260-61; Petri Cleaners, Inc. v. Automotive Employees, Local No. 88 (1960) 53 Cal.2d 455, 459-60; Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal.App.3d 532, 540; Pacific Water Conditioning Ass'n Inc. v. City Council (1977) 73 Cal.App.3d 546, 556; Shawn v. Golden Gate Bridge Highway & Trans. Dist. (1976) 60 Cal.App.3d 699, 705.

18. E.g., Grocery Mfrs. of Am. v. Dept. of Public Health (Mass., 1979) 393 N.E.2d 881, 889; Northern Plains v. Board of Natural Resources (Mont., 1979) 594 P.2d 297, 303; Somer v. Woodhouse (Wash.App. 1981) 623 P.2d 1164, 1171; Tri-State Generation v. Environmental Quality (Wyo., 1979) 590 P.2d 1324, 1331-1332.

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15. People v. Bradley (1969) 1 Cal.3d 80, 86; San Diego Unified Port Dist. v. Superior Ct. (1977) 67 Cal.App.3d 361, 371; Debtor Reorganizations, Inc. v. State Bd. of Equalization (1976) 58 Cal.App.3d 691, 696; People v. Cummings (1974) 43 Cal.App.3d 1008, 1019; Silman v. Reghetti (1935) 7 Cal.App.2d 726, 729.

16. See Gabrelli v. Knickerbocker (1938) 12 Cal.2d 85, 89, appeal dismissed 306 U.S. 621 (1938); Crocker v. Scott (1906) 149 Cal. 575, 582-83.

17. See, e.g., Social Workers' Union, Local 535 v. Alameda County Welfare Dep't. (1974) 11 Cal.3d 382, 391; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 260-61; Petri Cleaners, Inc. v. Automotive Employees, Local No. 88 (1960) 53 Cal.2d 455, 459-60; Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal.App.3d 532, 540; Pacific Water Conditioning Ass'n Inc. v. City Council (1977) 73 Cal.App.3d 546, 556; Shawn v. Golden Gate Bridge Highway & Trans. Dist. (1976) 60 Cal.App.3d 699, 705.

18. E.g., Grocery Mfrs. of Am. v. Dept. of Public Health (Mass., 1979) 393 N.E.2d 881, 889; Northern Plains v. Board of Natural Resources (Mont., 1979) 594 P.2d 297, 303; Somer v. Woodhouse (Wash.App. 1981) 623 P.2d 1164, 1171; Tri-State Generation v. Environmental Quality (Wyo., 1979) 590 P.2d 1324, 1331-1332.

Legislature in the A.P.A. itself, although the Legislature never exactly said so.[13]

An identical argument was recently made to the United States Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council (1978) 435 U.S. 519, wherein it was held:

> "In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case." (Emphasis in original, 435 U.S. at 548.)

This holding should have inspired considerable deference, as California's A.P.A. was patterned on the federal act[14] and in such a circumstance the attribute of 'great

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13. The Court of Appeal claims to find at least permission for its "due process" interposition, asserting that "the statute is silent and therefore neutral." (Slip Op., p. 14.)

14. California Optometric Ass'n v. Lackner (1976) 60 Cal.App.3d 500, 507; Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal.App.3d 177, 192.

weight' which attaches to federal decisions[15] and particularly those of the United States Supreme Court[16] finds special application.[17]

Moreover, every state court which has considered the Vermont Yankee opinion has adopted it as its own.[18]

Indeed, the case for following Vermont Yankee was even stronger under the California A.P.A., as all of the textual criticisms which were directed by Professor Davis against the Supreme Court's decision are wholly inapplicable

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to the California Act.[19/]

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19. Professor Davis' major argument against Vermont Yankee is that it overlooks section 559 of the A.P.A. which, as he quotes it, provides:

> "Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law." (1 Administrative Law Treatise 68 (1980 Supp), emphasis added.)

Professor Davis argues that the reference to "recognized by law," as opposed to "imposed by statute" or constitutional provision, clearly referred to court-made law. (Id.)

To the extent that argument has force in interpreting the federal Act, it is equally forceful in supporting the argument that the California Legislature, in omitting the language on which Professor Davis focuses, intended itself, and not the courts, to be the source of any additional requirements imposed upon the agencies. Speaking of the provision in the federal Act, Professor Davis insists:

> "The final word is 'law,' not 'statute.'" (Supp. at 68, emphasis supplied.)

In the California provisions, the final word is "statute."

> "[N]othing in this article repeals or diminishes additional requirements imposed by any such statute." (Govt. Code § 11350, emphasis added.)

Professor Davis makes a similar argument with respect to § 706 of the federal Act, which provides in pertinent part that "The reviewing court shall . . . set aside agency action . . . found to be without observance of procedure required by law." Again, Professor Davis insists:

> "The final word is 'law,' not 'statute.'" (1980 Supp. at 68.)

But the California analog to § 706 is Government Code § 13350, which provides in pertinent part:

> "Such regulation may be declared to be invalid for a substantial failure to comply with the provisions of this chapter . . ."

The Court of Appeal responds that these provisions are intended simply to avoid an inference of repeal of other statutes. (Slip. Op., p. 13.) The Court of Appeal takes no note of the contrast with the federal statute, on which the California statute was otherwise patterned, nor the undercutting of the basis of Professor Davis' argument engendered by this difference in language.

There is no valid distinction at all between the federal and state A.P.A.s. The Court of Appeal does not even profess to find any differences, noting merely that "the federal Administrative Procedure Act . . . is similar to California's Act". (Slip Op., p. 12.) The federal Act, like the California Act, was designed to impose "'minimum requirements of fair administrative procedure.'"[20] The question at bar is whether the Courts were designated as the source of additional requirements. The Supreme Court concluded that "the Act established the maximum procedural requirements which Congress was willing to have the Courts impose upon agencies conducting rulemaking procedures." (435 U.S. at 524.) Rather, requirements additional to the minima are to arise from the Legislature itself, as the California statute provides.

Nor does the Court of Appeal pay any attention to the policies which moved the Supreme Court to its decision, including the need for procedural predictability, and judicial restraint.[21]

C. The Decision of the Court of Appeal is Not Supported by Any Prior Decision, or Even Applicable Dicta.

The entire discussion of the Court of Appeal, in rendering its far-reaching and sui generis disposition of the issue at bar, consisted of the following:

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20. Davis, 1 Administrative Law Treatise 69 (2d ed., 1980 Supp.). (Emphasis in original.)

21. See Moskowitz, Vermont Yankee in California's Courts, 13 Pacific L.J. 315, 328-331 (1982).

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21. See Moskowitz, Vermont Yankee in California's Courts, 13 Pacific L.J. 315, 328-331 (1982).

"The rationale of Vermont Yankee . . . has previously been refused application in California. (California Optometric Assn. v. Lackner, supra.) We agree with that refusal." (Slip Op., p. 14.)

While this analysis displays the virtue of brevity, this is its only virtue. Lackner was decided two years before Vermont Yankee! No one even asked the Lackner Court to adopt the rule of Vermont Yankee, still less was the rationale for that adoption "rejected." Moreover, the portion of Lackner on which the Court of Appeal relies was carefully labelled "deliberate dicta" by the Lackner Court. 60 Cal.App.3d at 509. The Court of Appeal, moreover, misunderstands the entire thrust of the Lackner dicta, which was addressed to the need for a record adequate to informed judicial review.[22/] Still less does the Court understand the holdings in Lackner, which illuminate the dicta and strongly oppose the Court of Appeal's free-floating "due process/fundamental fairness" analysis.

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22. As the Court of Appeal relied so heavily on the dicta in Lackner, an examination of the entirety of that case, and the place of the dicta within it would be helpful to the Court.

The holdings in Lackner oppose the decision of the Court of Appeal, and leave one unequivocally of the mind that the court of appeal agreed with the decision in Vermont Yankee. The court first ruled that there is no requirement under the California Act that parties be allowed to appear in person and address the agency orally; the agency need merely fix a time and place for the receipt of written statements and then close the public portion of the hearing. (60 Cal.App.3d at 506-507.) Such a procedure would greatly limit the ability of the parties to engage in a dialogue, or rebut evidence received. The court realized this and held

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Nor could the Court of Appeal find legitimate comfort in dicta in California Hotel & Motel Assn. v. Industrial

(Footnote 22 continued):

that such rights are not guaranteed by the Act, and that the trial court "errs by making a fixed demand for trial-like hearings" at the adoption proceedings. (Id. at 507.)

Thus, the court ruled that the Act, "which permits the agency to proceed without opportunity for oral presentation is quite inconsistent with unyielding rights of cross-examination and rebuttal." (Id. at 508.) Likewise, the court reversed the trial court's judgment "confining the agency to action based exclusively upon evidence admitted at a hearing." (Id. at 508.) These holdings cannot be reconciled with the opinion of the Court of Appeal. As the Lackner Court said:

> "To restrict the agency to evidence produced at the time and place specified in the public notice would generate undesirable inflexibility. Decisions interpreting parallel statutes have discerned no subversion of statutory purpose, no fundamental unfairness when the agency considers information received after the hearing." (Id.)

Finally, the court rejected the requirement imposed by the trial court that the agency "prepare and adopt findings as a step additional to the rule adoption." (Id.)

Having so held, and because the court was concerned that the "opinion is vulnerable to serious misinterpretation it undertook to render "some deliberate dicta" (Id. at 509.) Unfortunately, as the oil companies essay exemplifies, the dicta themselves are "vulnerable to serious misinterpretation":

> "Like the Administrative Procedure Act itself, this decision deals only with procedural minima. Fulfillment of these minimal directions does not assure procedural invulnerability.
>
> "The procedural directions of the APA are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review. [Citation.] Although implied rather than expressed, these objectives are just as statutory and just as binding as the APA's itemized directions. Compliance with procedural minima does not necessarily achieve these goals." (Id.)

The only examples given of the possible implementation of this ominous warning deal with inclusion of evidence in the record and opportunity for rebuttal of evidence.

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Welfare Com. (1980) 27 Cal.3d 690, 702, app. dism. ____ U.S. ____ [101 S.Ct. 602] that "a reviewing court will ask . . . did

(Footnote 22 continued):

On the first issue, the court is straightforward; evidence relied upon must be placed in a record:

> "The body of evidence upon which the agency acted is indispensable to . . . informed judicial review. A proceeding which satisfies the minimum standards of the APA may be fatally deficient if it fails to satisfy the act's guarantee of effective judicial review." (Id. at 511.)

Obviously, no such issue exists in the case at bar. All the evidence is in the record.

The dicta concerning rebuttal, however, requires closer attention. The court first opines "that reception and consideration of post-hearing evidence need not result in unfairness" so long as the public hearings are not "'paralleled by substantial "off-record" investigations.' [Citation.]" To confuse the matter, the court immediately cites dicta from another case (California Assn. of Nursing Homes etc., Inc. v. Williams (1970) 4 Cal.App.3d 800, 811) to the effect "that an agency 'may not base its decision upon evidence outside the record and not made available for rebuttal by the affected parties.'" The court then interpreted the Supreme Court decision in Olive Proration etc. Com. v. Agri. etc. Com. (1941) 17 Cal.2d 204, as requiring "a middle ground between multilateral rebuttal among the contending parties and their legitimate need to confront the body of data upon which the agency intends to act." (60 Cal.App.3d at 510.)

What, then, is required of an agency with respect to providing an opportunity for rebuttal? The court says only:

> "A prescription so vague leaves considerable to ad hoc agency practices." (Id. at 511.)

Unfortunately, a prescription so vague also leaves considerable to contentious oil companies seeking to repose that discretion in the courts, rather than the agencies.

Taken as a whole, however, and considered the context of the cases cited, the meaning of the "deliberate dicta" is not impossible to reconstruct.

In the first place, the dicta cannot be read to swallow the holdings. Any reading of the dicta to say that all material evidence must be made available for rebuttal would be directly contrary to the statement that "[n]o statutory or decisional doctrine establishes ineluctable rights of . . . rebuttal at quasi-legislative hearings." (Id. at 507.)

The best guidance to the dicta concerning rebuttal is that the court announces that its orphic pronouncements "were framed with an eye to the California Supreme Court's Olive Proration decision . . . ." (Id. at 510.)

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the agency employ fair procedures . . . ." (Slip Op., p. 12.)

The holding of the Court of Appeal that this dicta applies to all administrative proceedings is directly contrary to the recent decision of the Court of Appeal in the First District in Stauffer Chemical Company v. California State Air Resources Board, supra [at note 11], ____ Cal.App.3d ____, (February 16, 1982) 1 Civil 52134, Slip Op., pp. 7-8, wherein the Court said of this language:

"Stauffer's heavy reliance on language found in California Hotel & Motel Assn. v. Industrial

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Olive Proration was concerned with a quasi-judicial decision wherein the Court noted, in dicta, (17 Cal.2d at 209) that the decision was based, in large measure, upon an unauthorized (Id. at 211) survey conducted after the hearing, and not subjected to cross-examination and rebuttal. (Id. at 210.) The Court observed that "[u]nder such circumstances, the statutory requirement of a hearing was not met." (Id.)

What the Court in Lackner alluded to, and what Olive Proration illustrates, is that it is possible to extend the principle allowing the agencies to determine the procedure governing their hearings to the point that the "hearing" is a "facade for a private decision" or that judicial review is impossible. (60 Cal.App.3d at 510.)

The possibility of judicial intervention was not, however, precluded by Vermont Yankee when "extraordinary" (435 U.S. at 541) or "extremely compelling" (Id. at 543) circumstances were presented. See Chrysler Corp. v. Brown (1979) 441 U.S. 281, 312-313, 99 S.Ct. 1705, 60 L.Ed.2d 208, 231. The evil addressed in Vermont Yankee was the routine undertaking by the courts "to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." (435 U.S. at 549.)

Taken as a whole, then, the decision in Lackner is fully reconcilable with, indeed supportive, of Vermont Yankee and impossible to reconcile with the decision of the Court of Appeal, which professes to rely on it.

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Taken as a whole, then, the decision in Lackner is fully reconcilable with, indeed supportive, of Vermont Yankee and impossible to reconcile with the decision of the Court of Appeal, which professes to rely on it.

Welfare Com., supra, 25 Cal.3d 200 [validity of wage orders] is misplaced. That case is clearly distinguishable since the governing statute involved therein expressly required the Industrial Welfare Commission to prepare 'a statement as to the basis upon which the [wage] order [was] predicated . . . .' (Lab. Code, § 1177.) No similar statutory duty existed herein; nor should such a duty be judicially fashioned in retrospect."[23]

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23. Indeed, in California Hotel the entire discussion in question was headed "The Statement of Basis Issue (Labor Code Section 1177)" (25 Cal.3d at 209) and the Court articulated its holding as being that "the commission did not include an adequate statement of basis to support the order, as required by section 1177." (Id. at 204, emphasis supplied.)

The Court closely defined the scope of its discussion:

> "In light of these considerations, we define the standard to evaluate the statement of basis required by section 1177." (Id. at 213, emphasis supplied.)

In the dicta quoted by the court, the Court undertakes to "discuss the purposes behind the statement of basic requirement, set out a standard to test a statement of basis, and apply the standard to the documents in this case." (Id. at 210.) While the dicta clearly expressed the thought that statements of basis were laudatory, it hardly undertook to require such statements in the absence of any statutory underpinning. Still less was it legislating a disembodied due process requirement.

Even Justice Newman's dissent, which argued forcefully that the opinion was too broad, had no different understanding as to whether a statutory requirement was being interpreted, rather than a free-floating policy being imposed:

> "I believe experienced observers will be astonished to learn that, when a statute requires a statement 'as to the basis' on which rules are predicated, administrative rulemaking is now to be encumbered as follows: . . ." (25 Cal.3d at 216, Justice Newman, dissenting, emphasis supplied.)

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III

THE OPINION OF THE COURT OF APPEAL CONCERNING THE ADEQUACY OF THE HEARING NOTICE CONFLICTS WITH SCHENLEY AFFILIATED BRANDS CORP. v. KIRBY (1971) 21 Cal.App.3d 177

Three notices of the hearing on the sulfur dioxide standard were promulgated.[24/] The first and primary of these proposed the retention of standard of 04 ppm over 24 hours. (SO_2 Record, Book 1, Item 2, p. 146.) That notice went on to indicate that the Board would "review all relevant evidence, including evidence supporting a more stringent or more lenient standard." (Id.)

The second notice incorporated the former notice and rescheduled the hearing. (SO_2 Rec., Book 1, Item 1, Part C.) The third notice also incorporated the first notice, and also indicated "The Board's intention to expand the scope of its proposed actions":

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(Footnote 23 continued):

Since California Hotel, when this Court was again ruling with a majority of sitting members, it opined that quasi-legislative zoning regulations did not need to be accompanied by findings of fact. (Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal.3d 511, 522.)

24. The Court of Appeal indicates that there were four notices. (Slip. Op., p. 15.) The record does not reflect this.

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> "The Board will also consider the establishment of an ambient air quality standard for SO_2 in combination with other pollutants." (SO_2 Rec., Book 1, Item 1, Part A.)

Ultimately, the standard adopted was for SO_2 in combination with oxidant or particulate matter.[25/]

The standard was stricken by the Court of Appeal because:

> "Needless to say, the final result had never been mentioned in the notices of hearing either in express terms or by way of an informative summary." (Slip Op., p. 16.)

But the Court of Appeal never cites Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal.App.3d 177, which is precisely on point, despite extensive discussion of this case, in the Board's brief on appeal (at pp. 34-35) the trial court's decision (10 C.T. 2635) and Respondent's brief (at p. 22). The Court of Appeal in this case, by its very silence concerning the leading authority, forgoing even an attempt to distinguish it, is conceding that any attempt to reconcile this case with Schenley would only further reveal the conflict.

As the Court knows, Schenley held:

> "[Government Code] section 11424, subdivision (c) . . . is not offended if the adoption procedure

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25. The Court of Appeal finds that the standard adopted was for SO_2 in combination with oxidant only. (Slip. Op., pp. 2-16.) The record does not reflect this. (10 C.T. 2511-2513.)

culminates in a regulation differing substantially from that described in the published notice but devoted to the same subject or issue." (21 Cal. App.3d at 193.) 26/

The Court on Schenley addressed the "fairness" issue as well, and directly disagreed with the conclusion of the Court of Appeal that the procedure followed embodied "a lack of fundamental fairness." Unlike the opinion at bar, however, the Schenley Court analyzed the fairness issue:

"After an opportunity for participation in a hearing considering the subject or issue evoked by the pre-hearing draft or summary, affected interests

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26. As the Schenley court explained:

"Section 11424 [of the Government Code, the statute on which petitioners rely] is part of a statutory system designed to provide 'a method for the adoption of administrative regulations which [will] afford a reasonable opportunity for those subject to such rules to present views and argument in advance of their promulgation . . . .' (Kleps, The California Administrative Procedure Act (1947) 22 State Bar J. 391, 393.) The participatory process is initiated by a notice arousing advance awareness of the subject or issue involved in the proposed action. . . . Awareness of the subject or issue supplies affected interests an opportunity to make advance preparations for the forthcoming hearing.

"..

"Regulatory agencies frequently find difficulty in predicting the practical impact of regulatory proposals. The hearing not only assures public participation; it also provides the agency with an improved set of predictions. A prime objective is to persuade the agency into action differing from its pre-hearing proposal. If the persuasion is successful, the adopted regulation will necessarily diverge from that described in the pre-hearing notice.

"Thus, eventual adoption of a regulation differing from that described in the pre-hearing notice is one objective of the hearing process." (Id. at 192-193, emphasis supplied.)

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26. As the Schenley court explained:

"Section 11424 [of the Government Code, the statute on which petitioners rely] is part of a statutory system designed to provide 'a method for the adoption of administrative regulations which [will] afford a reasonable opportunity for those subject to such rules to present views and argument in advance of their promulgation . . . .' (Kleps, The California Administrative Procedure Act (1947) 22 State Bar J. 391, 393.) The participatory process is initiated by a notice arousing advance awareness of the subject or issue involved in the proposed action. . . . Awareness of the subject or issue supplies affected interests an opportunity to make advance preparations for the forthcoming hearing.

"...

"Regulatory agencies frequently find difficulty in predicting the practical impact of regulatory proposals. The hearing not only assures public participation; it also provides the agency with an improved set of predictions. A prime objective is to persuade the agency into action differing from its pre-hearing proposal. If the persuasion is successful, the adopted regulation will necessarily diverge from that described in the pre-hearing notice.

"Thus, eventual adoption of a regulation differing from that described in the pre-hearing notice is one objective of the hearing process." (Id. at 192-193, emphasis supplied.)

cannot claim unfairness when the agency's consideration of new information and views persuades it into a different enactment dealing with the identical subject or issue. To confine the agency to the terms of its pre-hearing proposal would negate a basic purpose of the hearing. To require a new notice and hearing would tie the agency into time-consuming, circular proceedings transcending the statutory objective." (21 Cal.App.3d at 193, emphasis supplied.) 27/

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27. Courts in other jurisdictions have followed the lead of Schenley. As was said the American Bankers, Etc. v. Div. of Con., Etc. (VA., 1980) 263 S.E.2d 867, 875-876, in direct response to the ruling of the trial court:

> "Requiring an agency to provide an additional notice and comment period when it decides to change any provisions in a proposed rule would change the purpose of these notice provisions. Knowing that changes would trigger an additional round of notice and comment, agencies might be reluctant to change an original proposal even though the arguments for change offered at a hearing are persuasive. Bassett v. State Fish and Wildlife Commission, 27 Or.App. 639, 642, 556 P.2d 1382, 1384 (1976). Parties desiring to delay regulation would be inclined to point to potential weaknesses in a proposed plan without offering alternatives, knowing that an agency would be required to undertake an additional round of notice and comment before making any change. Such a process might lead to an endless round of notices and hearings before a regulation could be implemented.
>
> ". . . The Commission is not required . . . to provide additional notice and opportunity for comment where the changes in the promulgated rule, even if substantial, do not enlarge the proposed rule's subject matter, Schenley Affiliated Brands Corp. v. Kirby, 21 Cal.App.3d 177, 193, 98 Cal.Rptr. 609, 622 (1971); Bassett v. State Fish and Wildlife Commission, 27 Or.App. 639, 642, 556 P.2d 1382, 1384 (1976); East Greenwich Fire District v. Penn Central Co., 111 R.I. 303, 315-16, 302 A.2d 304, 310-11 (1973), and are a logical outgrowth of the public comments received. South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 658-59 (1st Cir. 1974)."

Rendering the claim of "unfairness" even more unfair itself is the fact that the regulation adopted was more lenient toward the oil companies than the regulation proposed, and was adopted in response to the oil companies' own testimony and argument.[28/]

In short, the decision of the Court of Appeal is impossible to reconcile with _Schenley_, and so the Court of Appeal simply issued an _ipse dixit_ without reference to that case. The Board issued a proposal as required by the statute, and went _even farther_ than _Schenley_ required in giving notice that it would consider other proposals, including a combination

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28. The oil companies insisted that the effects of SO_2 alone could not be "teased out" of the effects of SO_2 acting in combination with oxidants and/or particulates. The regulation adopted, unlike the regulation it replaced, is not violated by the presence of SO_2 alone, _regardless of how high a level_ it may be found, but is violated only by _SO_2 accompanied by_ oxidant or particulate matter in excess of the state standards for those substances.

Thus the "unfairness" inhered in the oil companies receiving a more lenient standard in response to their own testimony. Doubtless the oil companies had hoped, when they testified against the proposal of a standard for SO_2 alone that the Board would take no action at all. If they were "misled" into "focusing" on the primary proposal (Slip Op. at p. 15) they were misled into telling the truth. Certainly the Board gave ample warning in its notices that it was interested in hearing testimony concerning a combination standard.

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standard. Even by the Court of Appeal's own "due process" standard, the notice of hearing was full, fair, in compliance with the statute and expressly sanctioned by case authority.

IV

THE OPINION'S REQUIREMENT OF PRE-HEARING DISCOVERY IN QUASI-LEGISLATIVE HEARINGS IS WITHOUT PRECEDENT AND CONTRARY TO ALL EXISTING AUTHORITY

The Court of Appeal found that the staff report was distributed "just three days prior to the hearing." (Slip Op., p. 15.)

The trial court held that:

> "[T]he public should have [had] a reasonable and fair opportunity to receive it in sufficient time so that interested members therof, such as the plaintiffs in this case, may have time to engage experts in the particular fields covered by the report, so that those experts may read, analyze, and digest not only the report but the voluminous references therein which also comprise the administrative record." (10 C.T. 2641, lines 18-24.) 29/

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29. The Court of Appeal's conclusion that the oil companies had only three days to review the staff report prior to the Board's decision is flagrantly contrary to the record. The hearing at bar was held in two stages: first there was an oral hearing, and then the record was held open for a month for written response to the items received. (SO_2 Rec., Book 5, Item 6, pp. 94-95.)

The oil companies, in fact, took lavish advantage of the written hearing to submit a one-inch thick stack of papers constituting their rebuttal. (Book 14, Item, 13, Pt. 12.)

The oil companies, thus, had 33 days to review the staff report and comment thereon, more than the trial court thought was required.

The hearing might, of course, have been conducted entirely in writing. California Optometric Assn. v. Lackner (1974) 60 Cal.App.3d 500, 505-506 (discussed infra). That the oil companies also were accorded an oral hearing hardly made the proceedings less fair.

The Court of Appeal agreed:

"While there is no requirement in the law that an administrative agency obtain a staff report or follow the recommendation of such report, it is a matter of common knowledge, borne out by the above described conduct of the Board, that administrative agencies rely heavily on staff reports and that staff recommendations carry great weight.

"We are of the opinion that the Board's conduct in the proceeding were contrary to the spirit and purpose of the Act and were arbitrary and capricious." (Slip Op., p. 16.)

As the Court of Appeal acknowledges, no statute required preparation of a staff report, still less pre-hearing discovery of staff reports, and the statute which listed items which were to be made available prior to the hearing[30] made no mention of staff reports or other evidentiary material.[31]

No case, state or federal has ever called for pre-hearing discovery of evidentiary material in rule-making proceedings. The Court of Appeal does not cite even one.[32]

The Court of Appeal has, without citation to any authority, opened a whole new world of litigation. And the bounds of that world are left totally undefined.

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30. Government Code section 11424 lists such items as the hearing notice, the proposed regulation, and the authority for the hearing.

31. Government Code section 11423 provides that failure to mail these items to any person would not invalidate the action taken.

32. The oil companies relied solely on cases which called for production of evidence at the hearing. Portland Cement Association v. Ruckleshaus (D.C. Cir. 1973) 486 F.2d 375,

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Thus, sua sponte discovery[33] of staff reports is required because "of common knowledge . . . that administrative agencies rely heavily on staff reports and that staff reports carry great weight." (Slip. Op., p. 16.) Apparently, any information which might "carry great weight" would have to be disclosed sufficiently prior to the hearing to allow "time to engage experts . . . so that those experts may read analyze and digest not only the report but the . . . references therein."

What about a respected expert, scheduled to testify at a hearing? Is he required to prepare a text of his testimony sufficiently before a hearing to allow for this process? Is the staff allowed to testify at a hearing even if it does not prepare a staff report? Arguably not, for staff comments would "carry great weight" whenever delivered. All of these questions go unanswered as the Court of Appeal dashes into virgin territory without a compass and with only a vague idea where it is going.[34]

(Footnote 32 continued):

393 and fn. 67, cert den. 417 U.S. 921 (1974) dealt with critical data being withheld until months after the hearing. California Optometric Assn. v. Lackner (1976) 60 Cal.App.3d 500 likewise spoke of the desideratum that "relevant evidentiary material will be compiled at the hearing." (Id. at 510, emphasis supplied.) Olive Proration etc. Com. v. Agri. etc. Com. (1941) 17 Cal.2d 204, 210 likewise spoke of "evidence which the opposite party has an opportunity to refute at the hearing." (Emphasis supplied.)

33. The Court of Appeal never contended that the staff report was available earlier, but was withheld. "Discovery" might be too weak a word for what the Court of Appeal seems to require.

34. The Court of Appeal cannot take legitimate comfort from the fact that significantly after the hearing at bar,

(Footnote 34 continued next page)

If the Court of Appeal fails to mention any precedent, it equally fails to note that its opinion conflicts with several cases which expressly deny that there is a right of "rebuttal" in quasi-legislative proceedings. As it is this "right" which the Court of Appeal seeks to protect by its inauguration of pre-hearing discovery, this unresolved conflict undercuts the

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the A.P.A. was amended to require what amounts to a "staff report" upon promulgation of the hearing notice. (Slip. Op., p. 7.)

In the first place, that later amendment did not govern these proceedings. In the second place, that amendment neither moots this issue nor confirms the Court's judgment, as a host of quasi-legislative proceedings are <u>not</u> governed by the A.P.A., and yet the Court's new rule would apply there too. In the third place, while the legislation is precise, and limited to staff reports, the Court's ipse dixit is not so limited, but applies to all evidence which "carries great weight." This is the essential difference between legislation, which can be precise, and the Court's opinion, which is based on abstract principle.

As the United States Supreme Court noted in Lassiter v. <u>Department of Social Services</u> (1981) 452 U.S. 18, 68 L.Ed.2d 640, 101 S.Ct. 1253, 1258:

> "[T]he phrase ['due process'] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."

In the arena of quasi-legislative proceedings, our courts have "wisely observed [that] the other branches of the Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' [Citations]." <u>United States</u> v. <u>Richardson</u> (1974) 418 U.S. 166, 189, Justice Powell, concurring and quoting Justice Holmes. The subsequent legislation, if deserving of praise, shows that the Court of Appeal's vague judicial legislation is unneeded, not that it is wise.

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basis for the Court's invention. As this "right" of rebuttal is directly involved in the Court's next assignment of error, those cases will be cited and discussed in the argument imm-.iately *infra*.

V

THE COURT OF APPEAL'S REQUIREMENT OF REBUTTAL TO INFORMATION RECEIVED AT THE WRITTEN PHASE OF A QUASI-LEGISLATIVE HEARING CONFLICTS WITH CALIFORNIA OPTOMETRIC ASSN. v. LACKNER (1976) 60 Cal.App.3d 507 AND SEVERAL OTHER DECISIONS.

As was noted above, the hearing on the SO_2 standard was held in two phases. First, an oral hearing was held, and then the record was held open for a month so that all parties could submit additional information. The Court of Appeal said:

> "At the close of the hearing, the Board announced that it would keep the record open until June 5, 1977. On June 6, 1977, the Board placed in the record a staff report based on data received from Japan concerning the effect of concentrations of .05 to .09 parts per million of sulfur dioxide in combination with high levels of oxidants - another form of pollution."
>
> "The standard adopted was, as noted, the .05 parts per million level in combination with high oxidant level. This standard was based primarily on the Japanese data. All efforts by the interested parties to obtain the right to challenge this belated material were rejected." (Slip. Op., p. 16.)

The Court of Appeal struck down the standard on the grounds that "due process/fundamental fairness" requires for all parties and all evidence the opportunity "to counter or refute input which is contrary to their position." (Slip. Op., p. 11.)

There are several problems with this analysis, besides the absence of any discussion of authority.

First, the material was not "belated," nor was it submitted "after" the hearing. Following the oral phase of the hearing, the record was held open until June 6, 1977.[35]

On that date the oil companies themselves submitted over one-inch of new material. (SO_2 Rec., Book 14, Item 13, Part 2.). On that same date the staff submitted a telegram from the Japanese purporting to summarize pollutant readings reported in Japanese studies already in the record. The oil companies claimed before the trial court, on rebuttal, that there were discrepancies between the reports of the Japanese studies given in the staff report, the telegram in question, and the Board's own findings. (16 R.T. 2174-2186.) It was repeatedly stressed that the Board's findings were based on the original studies in the Administrative Record, not upon any of the summaries, and certainly not upon the telegram in question.

The second error of the Court of Appeal, then is that it makes no mention of the fact that the original studies were in the record all the time, and that contrary to this claim, to the extent the standard was "based primarily upon

35. While the Court of Appeal relies on the date June 5 to support its finding that the submission was "belated," the Court may take judicial notice that June 5, 1977 was a Sunday, and by operation of law the record was actually held open until June 6. (Code Civ. Proc., §§ 10, 12b, 13.)

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the Japanese data" it was based upon those original studies and _not_ upon the telegram. No claim has ever been raised that the Board's findings do not fully and faithfully conform to the original studies, which are in the record. The idea that "fundamental unfairness" resulted in the absence of rebuttal to secondary sources which the Board ignored is farcical, and is to be explained only by the Court of Appeal's studied failure to mention the original studies, which have never been asserted to deviate at all from the Board's findings.

The most fundamental error of the Court of Appeal, however, is its conflict with numerous decision of this Court and other appellate courts which deny any ineluctible right of rebuttal in quasi-legislative proceedings. The most telling of these cases is _California Optometric Assn. v. Lackner_ (1974) 60 Cal.App.3d 500, from which the Court of Appeal ironically claims to derive its "due process/fundamental fairness" doctrine. (Slip. Op., pp. 11-12.) The _Lackner_ court expressly upheld a hearing in which all parties make written submissions, _without the right_ "to counter or refute input which is contrary to their position." (Slip. Op., p. 11.)[36]

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36. The _Lackner_ court said:

> "[T]he act demands of an agency only that it fix a time and place for the reception of written statements; that the agency may then close the public portion of the proceeding; that _it may consult evidence not incorporated in a hearing record and made available to interested parties;_

(Footnote 36 continued next page)

Even more notably contrary to the position of the Court of Appeal are the numerous cases permitting an agency to receive and consider evidence after the hearing is closed, and with no right of rebuttal.

Thus, another holding in Lackner, which the Court of Appeal overlooked was the holding that "[n]either expressly nor impliedly does [Government Code] section 11425 prohibit consideration of 'post-hearing' information." Id., 60 Cal. App.3d at p. 508. As that court said:

> "The declaratory judgment errs in a third respect by confining the agency to action based exclusively upon evidence admitted at a hearing. In directing the agency to consider 'relevant matter,' section 11425 (fn. 4, ante) impliedly obliges it to exercise good faith, to avoid fixed preconceptions and to be responsive to new insights emanating from the parties' presentations. . . . To restrict the agency to evidence produced at the time and place specified in the public notice would generate undesirable inflexibility. Decisions interpreting parallel statutes have discerned no subversion of statutory purpose, no fundamental unfairness when the agency considers information received after the hearing. (Ray v. Parker, supra, 15 Cal.2d at pp. 303-304; California Grape etc. League v. Industrial Welfare Com. (1969) 268 Cal.App.2d 692, 708-710 [74 Cal. Rptr. 313]; Rivera v. Industrial Welfare Com.,

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> that even when an oral hearing takes place, the agency need not permit cross-examination and rebuttal. '[S]ection 11425 . . . invests the agency with discretion to proceed without supplying an opportunity for oral presentation. Section 11425 permits purely documentary proceeding yet, in its last paragraph, refers to the proceeding as a "hearing." Thus, contrary to superficial assumptions, it does not necessarily demand a hearing characterized by oral testimony and oral argument. In section 11425, the California act permits a choice of oral advocacy, written presentations or a combination of both.'" (Emphasis supplied.)

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> supra, 265 Cal.App.2d at pp. 589-590; Emby Goods, Inc. v. Paul, supra, 230 Cal.App.2d at p. 695.) Neither expressly nor impliedly does section 11425 prohibit consideration of 'post-hearing' information." (Emphasis supplied.)

The Court of Appeal ignores all of this contrary authority.

The only caveat issued by the court in Lackner was:

> "that the agency may not utilize the public proceeding as a facade for a private decision resting upon privately acquired data . . . [and] that post-hearing evidence, if any, must be incorporated in an identified body of evidence and preserved for possible judicial review." (60 Cal.App.3d at 510.)

The Court of Appeal never contests that the alleged post-hearing data was "incorporated in an identified body of evidence and preserved for possible judicial review." The question then devolves to whether "the public proceeding [was] a facade for a private decision resting upon privately acquired data."

We note at the outset that the trial court nowhere found that the Board's proceedings were a mere "facade." Nor could a finding, were one to be made, be anything but ludicrous that this 1000 page record and days of testimony were a "facade" for the bit of confirmatory data obtained from the Japanese.

Even if the entire hearing were somehow only a pretext for the receipt of confirmatory data from the Japanese, the court below again overlooks the fact that the original studies were in the record, and the telegram was but a second-hand account. Another second-hand account, the

original staff report, was available before and at the hearing and was at all times susceptible to rebuttal based on the original studies. To say that the Board's findings were "based" on the telegram was obviously erroneous. Board's findings on this issue were based on the published studies, not on the staff's refutation of the oil companies' earlier attempt to criticize those studies based on claims that the conductrimetric method was not used and that other pollutants interfered with the attribution of the health effects of sulfur dioxide.

The trial court's extraction of language from California Assn. of Nursing Homes, etc. v. Williams (1970) 4 Cal.App.3d 800 (10 C.T. 2658) where the result was the product of unrecorded, secret negotiations in the absence of any record (4 Cal.App.3d at 812-813) only highlights the absurdity of the trial court's comparison of that case and this. More to the point is language of this court in Ray v. Parker (1940) 15 Cal.2d 275, 307-308, a case cited to, but ignored by, the court below:

> "'The Commission was undoubtedly justified in the exercise of its legislative function in taking into consideration not only the facts presented at the public hearing, but those which came to it subsequently from interested parties or were disclosed by its own investigation into the facts and the literature bearing upon the subject. See State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 A. 116, 125, 126; Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 296, 308, 53 S.Ct. 350, 355, 77 L.Ed. 796.'" (Emphasis supplied.)

See Brock v. Superior Court (1952) 109 Cal.App.2d 594, 606.

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See Brock v. Superior Court (1952) 109 Cal.App.2d 594, 606.

In short, the Opinion of the Court of Appeal makes no distinction between submissions at a written hearing and post-hearing submissions, and more important, makes no distinction with respect to a "right" of rebuttal between secondary evidence and evidence so central that the remainder of the hearing is a "mere facade." The rule of the Court of Appeal that there is a "due process" right "to counter or refute input which is contrary to their position" (Slip Op., p. 11) is too broad and conflicts with numerous other decisions. The correct and settled rule could have no application in this case.

VI

THE COURT OF APPEAL HAS MISCAST THE ROLE OF THE HEALTH DEPARTMENT IN THE ADOPTION OF AIR QUALITY STANDARDS, AND MISPERCEIVED THE BOARD'S RESPONSE TO ITS RECOMMENDATIONS IN THIS CASE

Health and Safety Code section 39606(b) provides in pertinent part:

> ". . . Standards relating to health effects shall be based upon the recommendations of the State Department of Health Services."

The Court of Appeal concludes:

> "It seems obvious that this proviso was to insure that the Board, whose membership lacks any medical training or expertise, look to the health department as its primary source of information and expertise." (Slip Op., p. 24; emphasis supplied.)

According to the Court of Appeal, the recommendation must "constitute the central core of the regulation" and "the court must examine the basis for the health department's

recommendation and the Board's deviation from those recommendations." (Id.)

While this is certainly preferable to the trial court's odd view that "A deviation from the Health Department recommendations is not, in my opinion, a basing of the standard thereon." (10 C.T. 2612, lines 3-4.) There are still several things wrong, with this picture.

First, while the Court of Appeal was happy to look at subsequent amendments to the A.P.A. to justify its own ex post facto procedural inventions, it makes no note of Health and Safety Code section 39510(b)(3), which deals with qualifications for membership on the Air Resources Board:

> "(3) One member shall be a physician and surgeon or an authority on health effects of air pollution."

No change, however, was made in section 39606(b) concerning the Health Department's recommendation.

Second, the notion that a trial court will review the "basis" for the Health Department's recommendation and the "basis" of the Board's deviation therefrom, inevitably suggests that the Health Department must supply a Statement of Basis, as must the Board, in order to allow that review. Such a holding, however, is contrary to Stauffer Chemical Company v. California State Air Resources Board, et al., ___ Cal.App.3d ___ (February 16, 1982) 1 Civil No. 52134, discussed above, which held that in the absence of a statutory requirement, an agency need not prepare a Statement of Basis. Certainly the Health Department is not called upon by statute

recommendation and the Board's deviation from those recommendations." (Id.)

While this is certainly preferable to the trial court's odd view that "A deviation from the Health Department recommendations is not, in my opinion, a basing of the standard thereon." (10 C.T. 2612, lines 3-4.) There are still several things wrong, with this picture.

First, while the Court of Appeal was happy to look at subsequent amendments to the A.P.A. to justify its own ex post facto procedural inventions, it makes no note of Health and Safety Code section 39510(b)(3), which deals with qualifications for membership on the Air Resources Board:

> "(3) One member shall be a physician and surgeon or an authority on health effects of air pollution."

No change, however, was made in section 39606(b) concerning the Health Department's recommendation.

Second, the notion that a trial court will review the "basis" for the Health Department's recommendation and the "basis" of the Board's deviation therefrom, inevitably suggests that the Health Department must supply a Statement of Basis, as must the Board, in order to allow that review. Such a holding, however, is contrary to Stauffer Chemical Company v. California State Air Resources Board, et al., ___ Cal.App.3d ___ (February 16, 1982) 1 Civil No. 52134, discussed above, which held that in the absence of a statutory requirement, an agency need not prepare a Statement of Basis. Certainly the Health Department is not called upon by statute

to hold a hearing before making a recomemndation to the Board (nor does it do so). Moreover, the Health Department is not required to present an evidentiary administrative record to the Board, or to a court for review (nor does it do so). The Health Department is not under the A.P.A. in preparing recommendations, and even the *post hoc* amendments to the A.P.A. relied on by the Court of Appeal, would not change this result. Nor as the above case holds, is the Board required to state the basis for its actions.

Finally, and contrary to the holding of the Court of Appeal (Slip Op., pp. 24-25), there was no divergence whatsoever between the recommendation of the Health Department and the standards adopted by the Board with respect to either the sulfate[37/] or

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37. The sulfate standard was set at 25 micrograms per cubic meter (25 ug/m^3) averaged over 24 hours.

As the trial court notes, the Health Department's recommendation was transmitted to the board on January 15, 1976, the same date that the Board's hearing notice was given. That recommendation reads as follows:

> "At the urgent request of Governor Brown's Special Assistant for Energy and Environment, the Health Department has reviewed the evidence concerning health implications of sulfate air pollution in the South Coast Air Basin.
>
> "The Department, after consulting with the Air Quality Advisory Committee, recommends that regulatory actions be undertaken to prevent exposures from being greater than the critical value of 25 micrograms per cubic meter of sulfate averaged over twenty-four hours." (Sulfate Record, Pt. 5, Item 4, Att. 3, quoted at 10 C.T. 2615-2616; see *id.*, Item 1, p. 30.)

sulfur dioxide[38] standards.

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38. With respect to the sulfur dioxide standard, the Health Department recommended, in pertinent part:

> "1. Sulfur dioxide alone is not likely to produce significant health effects within the range of likely exposures. However, it appears to have produced effects in combination with particulate matter (black suspended matter) and it possibly could produce effects at presently occurring concentrations in combination with photochemical oxidants.
>
> "2. No report of which we are aware has indicated that human health effects of sulfur dioxide air pollution occur at concentrations less than 0.10 ppm averaged over 24 hours. However, long-term exposures at slightly greater than this concentration, in conjuction with black supended matter, are associated with the development or exacerbation of chronic respiratory conditions. It is therefore reasonable to apply a margin of safety in setting an air quality objective in order to prevent these long-term effects.
>
> "3. We, therefore, conclude that the present air quality standard of 0.04 ppm SO_2 for 24 hours average, is reasonable in light of what is known about human health effects and with a margin of safety as determined by the Air Resources Board. This judgment with respect to SO_2 includes consideration of presently available information on probable conversion of SO_2 to sulfates and resulting health effects." (SO_2 Record, Book 6, No. 7, pp. 1-2.)

The Health Department never recommended that the standard be at 0.10 ppm; it rather recommended that the Board apply a margin of safety and that a standard as low as 0.04 ppm is reasonable. The Department's 0.05 standard adopted by the Board takes into account the recommendation that _combinations_ of SO_2 and particulates or oxidant constitute the major danger, and set the level of sulfur dioxide at a slightly more _lenient_ level than that recommended as reasonable.

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VII

THE COURT OF APPEAL EMPLOYED ERRONEOUS TESTS IN CONSIDERING THE EVIDENCE AND ERRONEOUSLY WEIGHED THE EVIDENCE.

A. The "Cost-Benefit" Test Employed by the Court of Appeal in Weighing the Evidence is Without Authority and Conflicts with Prior Decisions of this Court and Appellate Courts.

According to the Court of Appeal, a reviewing court will review an administrative record with a view to determining not only the adequacy of the supporting evidence, but also to see if the agency did "balance the hoped-for benefits against the cost of compliance".[39] (Slip Op., p. 26.)

As was discussed in Argument I, supra, the Court of Appeal desires to incorporate a "cost/benefit" test into all judicial reviews of administrative actions, whether that test is called for by statute or not, under the aegis of deciding whether a regulation is "reasonable." (Slip Op., p. 21.)

Prior cases, however, make it clear that "[in] determining whether a regulation is reasonable, judicial

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39. As the Court of Appeal said:

"The test, we reiterate, is whether the regulation was . . . reasonable . . . . (Davis, Admin. Law Treatise (2d ed.) Vol. 2, p. 59, § 7.13 (1979).)

". . . [This] exposes the necessity for the Board to adopt ambient air quality standards which bear some rational relationship to the scientific data and the health department's recommendations and to balance the hoped-for benefits against the cost of compliance in attempting to adopt regulations which are worthy of the appellation 'reasonable.'" (Slip Op., p. 26.)

review is limited to an examination of the proceedings before the [agency] to determine whether its actions were arbitrary, capricious, or entirely lacking an evidentiary support. [Citations.]" Young v. Department of Fish and Game (1981) 124 Cal.App.2d 257, 282.[40] "Reasonable" refers to the quantum of required evidence; it is not a catchword for "cost/benefit analysis."

This Court has also held that so long as there is some evidence supporting the decision of the agency a reviewing court will not inquire into the wisdom of the agency's decision.[41] We submit that the test articulated by the Court of Appeal, viz., whether there is a financial "balance between the hoped-for benefits against the cost of compliance", is simply another way of saying that the Court of Appeal will inquire into the wisdom of a regulation, and will measure "wisdom" in purely financial terms.

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40. This this Court has repeatedly so held. Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 34 n.2; Sierra Club v. City of Hayward (1981) 28 Cal.3d 840, 818; International Business Machines v. State Bd. of Equalization (1980) 26 Cal.3d 923, 931 n.7; Pitts v. Perluss (1962) 58 Cal.2d 824, 833.

41. Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal.2d 317, 329 ["'The courts have nothing to do with the wisdom or expediency of the measures adopted by an administrative agency to which the formulation and execution of state policy have been entrusted. . . .'"]; See Pitts v. Perluss (1962) 58 Cal.2d 824, 835 n.4 ["'[T]he advisibility or wisdom of the Board's regulations is not a matter to be controlled by the courts.'"]; Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 118; Young v. Dept. of Fish and Game, supra, 124 Cal.App.3d at 282; County of Orange v. Heim (1973) 30 Cal.App.3d 694, 721.

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As was said in American Federation of Labor, etc. v. Marshall (D.C. Cir. 1979) 617 F.2d 636, 666 n.172, aff'd. 452 U.S. 490, 69 L.Ed.2d 185, 101 S.Ct. 2478:

> "Certainly, [the Legislature] would not have wanted administrative paralysis caused by debate over a standard's cost and benefits."

The Court of Appeal has decreed administrative paralysis not only in the field of public health, but for all administrative actions.

It is opaque why the Court of Appeal finds comfort for its ipse dixit in the fact that:

> "Government Code section 11346.5 also contains a new requirement - a cost impact estimate as to the cost or savings to the state." (Slip Op., pp. 7, 20, emphasis supplied.)

The fact that when the Legislature addressed the question of cost impact, it required only consideration of costs to the state itself, implies that no roving requirement to consider, let alone "balance," other costs is imposed.[42/]

We will not belabor this brief with a repetition of the analysis of the Court of Appeal's insistence that all human values must be reduced to their economic denominators for "balancing" in order for government action to be "reasonable." The Court announced that it used this novel and pernicious yardstick in evaluating the evidence before the Board (Slip Op., p. 26) and therefore improperly adjudged the evidence.

42. Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 196 ["[U]nder the doctrine of expressio unius est exclusio alterius, the creation of a limited express [requirement] suggests that a broader implied [requirement] could not have been intended." Garson v. Juarique (1979) 99 Cal.App.3d 768, 775.

B. The Court of Appeal Employed an Erroneous Test to the Evidence in Considering the Health Department's Recommendation.

As the Court of Appeal notes, the trial court "found that there was simply insufficient evidence to justify the wide divergence between the material presented by the health department and the standards finally adopted. In essence this was a holding that the Board acted arbitrarily and capriciously." (Slip Op., p. 25.)

Without at all discussing the record, the Court of Appeal merely adopted this reasoning, stating "that the trial court's conclusion based on the administrative record was sound, well supported and correct." (Slip Op., pp. 25-26.)

First of all, as was set forth in the discussion of the Health Department's recommendations at Argument VI, at notes 37-38, there was no "divergence" between the Health Department's recommendation and the Board's action. The Court of Appeal's finding to the contrary is incorrect as a matter of law.

Secondly, and was elaborated above, the Board's only obligation is to have evidentiary support for its action. It need not justify its failure to take alternative courses.

C. The Court of Appeal's "Review" of the Evidence is Facially Erroneous.

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C. The Court of Appeal's "Review" of the Evidence is Facially Erroneous.

Even though the Court of Appeal obviously did not wish to discuss the evidence in the administrative record,

and thought that it could safely avoid doing so by simply stating that the trial court was right, the Court knew so little about the record that even the little it did say was enough to constitute obvious and reversible error.

1. The SO_2 Standard

In adopting whole and without reserve the trial court's view of the adequacy of the evidence, the Court of Appeal failed to note that the trial court found that there was adequate evidence to support the SO_2 standard. (10 C.T. 2697, lines 11-16.)

The trial court struck down the standard, not because of any inadequacy of evidence, but because it was assertedly unclear to the trial court whether and to what extent the Board incorporated a "margin of safety into its deliberations. (The trial court was of the bizarre view that margins of safety were somehow unlawful.)[43]

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43. According to the trial court:

> "[It] is for CARB to set the standard just immediately below the level where any substantial health effects appear in any part of the population including the very young, the elderly, and those suffering from pulmonary or cardiac ailments." (10 C.T. 2709, lines 4-8.)

The trial court concluded:

> "Since there is no means of determining from CARB's resolutions and findings whether or to what extent CARB's SO_2 level included a margin of safety, it is impossible upon judicial review to determine whether or not it is supported by the record." (10 C.T. 2707, lines 22-25.)

While the Court of Appeal notes in passing that there was a dispute concerning the legality of a margin of safety (Slip Op., p. 21), the Court of Appeal never addressed that issue, and nowhere adopts the trial court's view.

That leaves the Court of Appeal precisely where the trial court was; with a conclusion that there was adequate evidence supporting the SO_2 standard.

For present purposes, and in view of the length of this brief, we will not attempt to review the enormous quantity of evidence supporting the Board's standards, nor the trial court's failure to command the most elementary scientific principles in reviewing that evidence.[44] This one ground alone is clearly adequate to secure a reversal.

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44. Two examples taken from the comprehensive analysis of the record set forth at pp. 91-117 of Appellant's Opening Brief typify the manner in which the trial court (and by its incorporation by reference, the Court of Appeal) approached the evidence.

First, the trial court examined two laboratory studies in which concentrations higher than the state standard were administered for a short period of time (in one case for 10 minutes) and this exposure produced significant health symptoms. The trial court rejected these studies outright on the sole ground that the exposure was at a level higher than the state standard adopted. (10 C.T. p. 2682, lines 4-10.) But the Board adopted a 24-hour averaging period. The trial court failed to realize that laboratory studies are designed for "demonstrating the adverse effects which occur in healthy individuals after brief exposure to relatively high concentrations" of a pollutant. (Board Findings, SO_2 Rec., Book 16, Item 16, p. 14, emphasis supplied.) When this data is used to extrapolate to a standard with a 24-hour averaging period, applying to the entire population (including the young, the elderly and those with chronic lung diseases) extrapolation to a lower concentration is required. The trial court's basis for dismissing this data ignores the averaging times and is purely fallacious. Other studies were also rejected because the trial court did not comprehend the significance of averaging periods. (10 C.T. 2684, lines 1-4.)

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(Footnote continued next page)

2. The Sulfate Standard.

Most standards, including the SO_2 standard, are set at a level considered relatively "safe" for the general population. In the case of sulfates, however, it is not

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(Footnote 44 continued):

Second, and equally typical is the handling by the trial court of Dr. Nadel's laboratory experiment. As the reasoning of the trial court so neatly self-destructs, we will report this study in the words of the court:

> "Next is the study of Dr. Nadel which involved laboratory experiments with dogs (SO_2 Rec., Book 3, Item 4, Part 1, pp. 10-13). He found that by exposing dogs to ozone at concentration of .2 to .5 ppm 'the airways of the cells are damaged.' Then, on his theory that histamine is a drug that is released in the body of an asthmatic and causes asthmatic attacks, he exposed the dogs to both ozone and histamine and found that the exposure to ozone made the dogs more adversely responsive to histamine.
>
> "Since these experiments did not deal with SO_2 at all I am unable to understand how they can possibly shed any light upon exposures of the human population to So_2." (10 C.T. 2682, lines 11-22.)

But Dr. Nadel testified to the Board, and it was repeatedly pointed out to the Court that he so testified that:

> "The evidence is that this drug [histamine] in the airways works very much like sulfur dioxide." (SO_2 Record, Book III, Item 4, Part 1, P. 10, quoted at 13 R.T. 1176, lines 24-26.)

It was further pointed out to the court below that there is absolutely no evidence in the record conflicting with Dr. Nadel's testimony that histamine in the airways works very much like sulfur dioxide. The court below, however, refused to believe it:

> "THE COURT: When he uses histamine and ozone with dogs, all he is doing is finding out the effects of histamine and ozone on dogs." (13 R.T. 1780, lines 4-6.)

The court below bases its "scientific" opinion on the ground that "they are two entirely different substances. SO_2 is a gas." (13 R.T. 1780, line 28; 1781, line 1.)

It was pointed out to the court below that there was no basis for "judicial notice" that Dr. Nadel was wrong. (13 R.T. 1784, lines 14-27.) Counsel argued:

(Footnote continued next page)

known what level is safe. Therefore, as the trial court noted, the sulfates standard was designed to be set "'just below a level actually productive of disablement or significant long-term effects, rather than at a lower "safe" or "threshold" level, with a margin of safety.'" (10 C.T. 2663, lines 21-24.) The standard was thus set at the "emergency" or "critical harm level" rather than at a safe level where health risks would not be expected to occur.

(Footnote 44 continued):

> "Now, the Court can reject that as not credible simply because histamine is not sulfur dioxide, and I can't help that. But it is the evidence in the record. I don't know where the Court would come up with a contrary proposition." (Id. at lines 27-28; 1785, lines 1-3.)

In rejecting the testimony of a research medical doctor in favor of its own unsupported opinion, on the bizarre basis that "SO_2 is a gas", the court below was "weighing" the evidence. It is not even accurate to call its exercise "weighing the evidence, for there was no evidence contradicting Dr. Nadel's testimony. As was said in American Federation of Labor, etc. v. Marshall, supra, 617 F.2d at 651 n.66:

> "But once courts step beyond [their] role and endeavor to judge the merits of competing experts views, they leave the terrain they know. In so doing, the judiciary may mislead the public into believing it provides an expert check on decisions that in fact it does not fully comprehend."

Here there was not even "competing expert views." There was only the court below, which had no right to substitute its view, which was not even in the record, for that of the research physician testifying before the Board.

The bizarre and uninformed review of the trial court illustrates the need for "restraining the courts from attempting to act 'as the equivalent of a combined Ph.D. in chemistry, biology and statistics' or from applying a standard of review which is appropriate only to review of adjudications or formal fact findings." Lead Industries Association, Inc. v. Environmental Protection (D.C. Cir. 180) 647 F.2d 1130, 1155 n.50

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This elementary point is lost on the Court of Appeal, which thought that the Health Department had concluded that there was no scientific information on which to base *any* standard:

> "The health department as a safeguard based on a complete lack of scientific data, did recommend the adoption of an *interim* standard of .25 [micrograms] per cubic meters of air in the presence of elevated levels of oxidants." (Slip Op., p. 25.)

This grotesquely distorts the position of the Health Department and the testimony before the Board. As one of the experts, Dr. Carl Shy, a Research Professor of Epidemiology, put it:

> ". . . I do not believe we have sufficient evidence to recommend a stringent air quality standard for sulfates, but I do believe we have the evidence to recommend a significant harm level.
>
> "The evidence for a consistent and qualitative relationship between adverse health effects and higher levels of exposure to suspended sulfates as an index of the atmospheric transformation products of SO_2 is sufficiently compelling to recommend that we establish some guidelines for control strategy to prevent the aggravation of respiratory systems that may cause disablement or long-term health effects.
>
> "In my opinion the recommended significant harm level of 25 micrograms per cubic meter is a reasonable conservative judgment concerning a critical harm level which should not be exceeded." (Sulfate Record, Part I, p. 43, lines 4-18.)

Dr. Shy opined that, based upon the evidence:

> "The critical level is twofold greater than the estimate for the threshold sulfate concentrations at which sensitive subjects, such as asthmatics or elderly people with heart or lung disease, are likely to experience aggravation of disease status, or at which children and adults appear to have increased risk for acute and chronic respiratory disease. I'm saying we're twofold above the lowest-- the estimate of the threshold level." (*Id.*, p. 44, lines 6-14.)

Indeed, "25 micrograms per cubic meter is also the upper limit of the range estimate for the risk of increased daily mortality." (*Id.* at p.44.) In other words, this level is a conservative estimate of when people begin to die because of the sulfates in the atmosphere.

Dr. Shy concluded:

> "Therefore, I believe that the proposed significant harm level represents a best current judgment value above which human exposure should not be allowed because of the great risk of disease aggravation at sulfate concentrations in excess of this level." (*Id.* at p. 44, lines 23-27.)

Were it not for the fact that the standard struck down was designed to protect the public from death, disablement or long-term health effects, the facile error of the Court of Appeal could be overlooked, especially when accompanied by the sophistic balm of the oil company lawyers.

The trial court, for its part, manages to ignore all of the toxicological studies, as though they were not in the record and mounts fallacious criticisms against other evidence. Most critically, the trial court utterly ignores a host of epidemiological studies conducted by E.P.A. in other states which show that 24-hour sulfate concentrations well below 25 micrograms per cubic meter aggravate respiratory symptoms and affect respiratory symptoms.[45/]

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45. We summarize some of the studies reported by the ARB staff:

— Dohan's 1961 study showed that the susceptibility of working women to viral diseases of the respiratory tract is enhanced by exposure to relatively low levels of sulfate pollution. A high correlation was found between respiratory illness and sulfate levels; the four localities with the highest

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The trial court pretended these studies did not exist; certainly it gave no reason for rejecting them.

The oil companies, seeking to supply their own rationale to cover the trial court's inexplicable silence, suggested that the E.P.A. studies dealt with eastern states, and maybe the "mix" of sulfates in California might be less harmful. (Respondents' brief, p. 60.)

This explanation for the trial court's silence ignroes the trial court's own finding that in the California air "all but a tiny fraction of the sulfates are harmful."

(Footnote 45 continued):

illness rates showed sulfate levels from 13-19 ug/m^3. (Sulfates Record, Part 3, p. 240.) The Court below ignored this study.

— Numerous EPA-sponsored studies have shown that the air pollutant correlating most closely with asthma attacks and lower respiratory disease is total suspended sulfates. (Sulfates Record, Part 3, p. 240.) The court below ignored these studies.

Many of these studies were sponsored by the EPA, as part of its Community Health and Environmental Surveillance System (CHESS) program. As the staff report noted:

> "EPA scientists have interpreted the CHESS data to indicate that 24-hour sulfate concentrations of 8-10 ug/m^3 aggravate the symptom status of subjects with respiratory diseases and can affect the respiratory function in growing children." (Sulfates Record, Part 3, p. 245, emphasis added.)

The same conclusion was reiterated in the testimony of Dr. Shy, who as a former EPA scientist was personally familiar with the CHESS work. Dr. Shy reported the data as showing that "suspended sulfate levels were the only pollutant consistently associated with symptom aggravation" (Sulfates Record, Item 5, p. 3 of written testimony), and found those symptoms beginning at levels as low as 9 ug/m^3 and generally in the range of 10-15 ug/m^3 (*Ibid.*, pp. 3-5).

Dr. Bernard Goldstein, a New York University medical researcher, reviewed the CHESS data thoroughly for the Board and concluded:

(Footnote continued next page)

(10 C.T. 2674, lines 11.)

Moreover, even if the trial court had not so concluded and we did not know, one way or the other, whether California's sulfates are as harmful as other states' sulfates, this would hardly justify not setting a standard until our citizens play the role of guinea pig, to see if they too suffer the same morbidity and mortality as those in other states. As the Health Department said, having reviewed the studies ignored by the trial court:

> "In What Way is it Appropriate to Draw Inferences from Morbidity and Mortality Data from Other Locations Concerning Health Effects of These Pollutants in California?
>
> "The data describing these effects have been acquired over a period of many years and at a very serious health cost as well as a substantial research effort. There is no conceivable justification for replicating these costs and efforts in the South Coast Basin in California. It is appropriate only to use the knowledge already available in order to prevent such costly effects." (Sulfates Record, Part 5, Item 4, p. 2.)

(Footnote 45 continued):

> "Other CHESS studies evaluating the effects of long-term exposures have suggested 'best judgment' thresholds of 13-15 ug/m^3 for such adverse effects as increased prevalence of chronic bronchitis in adults, increased acute respiratory disease in families, decreased lung function of children, and increased acute lower respiratory tract illness in children. While there are a number of experimental difficulties with each of these studies, they tend to reinforce one another and indicate an association of adverse health effects with atmospheric suspended sulfate at levels less than 20 ug/m^3." (Sulfates Record, Item 5, Written Testimony of Dr. Goldstein, pp. 6-7.)

All these studies were not refuted by the trial court; they were ignored.

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Moreover, even if the trial court had not so concluded and we did not know, one way or the other, whether California's sulfates are as harmful as other states' sulfates, this would hardly justify not setting a standard until our citizens play the role of guinea pig, to see if they too suffer the same morbidity and mortality as those in other states. As the Health Department said, having reviewed the studies ignored by the trial court:

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All these studies were not refuted by the trial court; they were ignored.

We have not dealt here with the trial court's simplistic and fallacious dealings with the evidence it _did_ consider, as that discussion would greatly prolong an already extended brief. The studies the trial court _ignored_, without criticizing them at all, are ample to refute the finding that the standard is without supporting scientific evidence.

The Court of Appeal's separate basis for rejecting the standard, _i.e._, that there is no evidence of a "safe" level of sulfates, either misunderstands the whole function of the standard--to protect the public against death and disability--or, worse, asserts that the Board cannot set a high standard to protect the public from death and disablement until it _also_ has evidence of what level is "safe."

The twin evils of the Opinion of the Court of Appeal--the holding that society's interest in the death and disability of its members is only in the balancing of its economic cost against costs of pollution control, and then proceeding to misinterpret, equivocate on, and _ignore_ compelling evidence of these very health effects--cannot be allowed to stand.

Before the Court are not only these two air quality standards; and not only all of the other air quality standards which will be upturned if the Court does not act in this case; and not only the possibility of the Board's enactment of future standards while bearing the burden imposed by the

Court of Appeal; and not only whether societal values must be reducible to monetary terms to be utilized in administrative rulemaking. Also before the Court by proxy are those whom these standards were designed to protect. We respectfully ask the Court to grant a hearing in this case.

DATED: April 19, 1982.

Respectfully submitted,

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Attorney General

R. H. CONNETT
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JOEL S. MOSKOWITZ
Deputy Attorney General

By ______________________
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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WESTERN OIL AND GAS ASSOCIATION, etc., et al., Plaintiffs and Respondents, vs. CALIFORNIA STATE AIR RESOURCES BOARD etc., et al., Defendants and Appellants.	2 CIVIL NO. 63339 (Super.Ct.No. C 246284) COURT OF APPEAL - SECOND DIST. FILED MAR 10 1982 CLAY ROBBINS, JR. Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Eugene E. Sax, Judge. Affirmed.

GEORGE DEUKMEJIAN, Attorney General of the State of California, R. H. Connett, Assistant Attorney General, Joel S. Moskowitz, Deputy Attorney General, for Defendants and Appellants.

Messrs. McCutchen, Black, Verleger & Shea, Philip K. Verleger, Esq., Jack D. Fudge, Esq., Michael L. Hickok, Esq., for Plaintiffs and Respondents.

Ronald A. Zumbrun, Esq., John H. Findley, Esq., Anthony T. Caso, Esq., for Amicus Curiae Pacific Legal Foundation.

In February of 1976, the California State Air Resources Board (Board) adopted a regulation which established a standard for the maximum level of sulfates[1] in the ambient air at 25 micrograms per cubic meter of air during a 24 hour period.

In June of 1977, the Board adopted a similar regulation fixing the standard for sulfur dioxide[2] limiting the level of that substance for a 24 hour period to .05 parts per million of air in the presence of a level of oxidants exceeding the previously adopted standard for that element.

Nine oil companies and two of their trade associations challenged the validity of these regulations on substantive and procedural grounds by instituting an action for injunctive and declaratory relief along with a petition for a writ of mandate. The action was directed against the Board, its chairman and executive officer. (We will hereafter refer to the defendants collectively as the Board.)

Underlying plaintiffs' attack on the regulations were their assertions that the regulations were more stringent than necessary to achieve the goal of healthful air quality and that the cost of compliance would have a devastating impact on the public and the economy.

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1. The term sulfate is a general term applied to a number of chemical substances which are derived from sulfuric acid, which is itself referred to as a sulfate. Some sulfates are toxic, others are harmless.

2. Sulfur dioxide is produced by the burning of any fuel containing sulfur as well as other sources.

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2. Sulfur dioxide is produced by the burning of any fuel containing sulfur as well as other sources.

The trial court, after a lengthy trial, concluded that the Board hearings which preceded the adoption of the regulations were unfair and that the Board was arbitrary and capricious in adopting the regulations without considering certain significant evidence and in fact relying on totally inadequate evidence. A writ of mandate issued compelling the Board to rescind the challenged regulations. We affirm.

THE ADMINISTRATIVE SCHEME FOR REGULATING AIR QUALITY

The Board, which is part of the California Resources Agency, is composed of five members appointed by the Governor. Two members are required to have training or experience in automotive engineering or a related field, two members are required to have training and experience in chemistry, meteorology or related fields, including agriculture or law, and the fifth member is required to have administrative experience in the field of air pollution control with no special technical training required. (Health & Saf. Code, § 39510.)

The Board is authorized by Health and Safety Code section 39601 to adopt standards and regulations. In so doing, it is required to comply with the Administrative Procedure Act. (Gov. Code, § 11340 et seq.)

A key function of the Board is to divide the state into "air basins" on the basis of meteorological and geographic

conditions and to adopt standards of ambient air quality for each basin. Those standards may vary from basin to basin. (Health & Saf. Code, § 39606.)

Health and Safety Code section 39014 provides:

"'Ambient air quality standards' means specified concentrations and durations of air pollutants which reflect the relationship between the intensity and composition of air pollution to undesirable effects established by the state board or, where applicable, by the federal government."

In adopting those standards, the Board is required by Health and Safety Code section 39606(b) to consider "the public health, safety, and welfare, including, but not limited to, health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy. . . . Standards relating to health effects shall be based upon the recommendations of the State Department of Health Services [health department]." (Emphasis added.)

Responsibility for control of air pollution and the achieving of the standards of air quality established by the Board rests with local and regional air pollution control districts created by the Legislature. (Health & Saf. Code, § 40000 et seq.)

These local and regional districts are themselves empowered to enact rules and regulations to carry out their responsibilities, but it is at once apparent that the entire

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enforcement mechanism with its social and economic impact depends on the standards set by the Board as permissible levels for any particulant or element in the ambient air for each basin.

THE ADMINISTRATIVE PROCEDURE ACT (THE ACT)

At the time the Board adopted the regulations at issue here, the Act, (then Gov. Code, § 11370 et seq., now Gov. Code, § 11340 et seq.)[3] primarily required regulations to be consistent with the statute which authorized an agency to adopt them and reasonably necessary to effectuate their purpose. (Gov. Code, § 11342.2.)

A notice to interested parties was required, said notice to contain a statement of the time, place and nature of the proceedings. The notice was required to contain, inter alia, "either the express terms or an informative summary of the proposed action; and to be published at least 30 days prior to the date of the proposed action." (Then Gov. Code, § 11424, now Gov. Code, § 11346.5.)

Then, as now, a hearing was required to precede the adoption of a regulation at which hearing any interested person could present written statements, arguments or contentions with or without the opportunity to make an oral presentation, and

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3. We will hereafter refer to the provisions of the Act by the present Government Code section numbers unless otherwise indicated.

the agency was required to consider all relevant matters presented before taking action. (Gov. Code, § 11346.8.)

Finally, any interested person could obtain judicial review as to the validity of any regulation and in addition to any other grounds of invalidity, a regulation could be declared invalid for a substantial failure to comply with the procedural requirements. (Gov. Code, § 11350.)

Effective July 1, 1980, just prior to the decision in the court below, the Act was amended. All of the provisions previously referred to were carried forward under differently numbered statutes. In addition, significant changes were made pursuant to a declaration of purpose by the Legislature.

That declaration contained in Government Code section 11340 in pertinent part states: "The Legislature finds and declares as follows: (a) There has been an unprecedented growth in the number of administrative regulations in recent years. (b) The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account. The language is often confusing to the persons who must comply with the regulations. (c) Substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established." (Emphasis added.)

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Government Code section 11346.4 now requires a 45-day notice of hearing and section 11346.5 (a)(3) requires that the agency shall make available to the public upon request "a concise and clear summary of . . . the effect of the proposed action . . . in a format similar to the Legislative Counsel's digest on legislative bills." (Emphasis added.) Government Code section 11346.5 also contains a new requirement - a cost impact estimate as to the cost or savings to the state.

Another completely new requirement is contained in Government Code section 11346.7, which provides in part:

"Every agency subject to the provisions of this chapter shall prepare, and make available to the public upon request, a general statement of the reasons for proposing the adoption or amendment of a regulation. Such statement shall include, but not be limited to, the following: (a) The specific purpose of the regulation; (b) The factual basis for the determination by the agency that the regulation is reasonably necessary to carry out the purpose for which it is proposed; (c) The substantive facts or other information and the technical, theoretical and empirical studies, if any, on which the agency is relying in proposing the adoption or amendment of a regulation. The statement shall be prepared prior to the time that the notice referred to in Section 11346.5 has been published. The statement shall be updated prior to final adoption of the regulation by the agency.

The final statement shall include a summary of the primary considerations raised by persons outside the agency in opposition to the regulation as adopted, together with a brief explanation of the reasons for rejecting those considerations." (Emphasis added.)

Finally the scope of judicial review was expanded by Government Code section 11350, subdivision (b), to include the following: "In addition to any other ground which may exist, such regulation may be declared invalid if the court cannot find that the record of the rulemaking proceeding supports the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute relied on as authority for the adoption of the regulation."

While these latest revisions of the Act were not specifically applicable to the action of the Board at the time it adopted the challenged regulations, the 1980 additions clearly indicate a recognition on the part of the Legislature of the existence of and the need to curtail the excesses and abuses which are innate to the exercise of administrative regulatory power.

This recognition and the Legislature's response is germane to and provides a background for our discussion and disposition of the claims which the Board makes in this appeal. As will later be apparent, under the Act as it is now worded, the procedures followed in the instant matter clearly would be in violation of the Act. The Board concedes that fact.

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ACTION OF THE TRIAL COURT

The trial court filed extensive written findings of fact and conclusions of law incorporating therein a lengthy and well-reasoned memorandum of intended decision in support of its conclusion that the two regulations were invalid.

These findings and conclusions can be distilled as follows:

(1) As to Regulation 76-11, setting the ambient air standards for sulfates at 25 micrograms per cubic meter of air, interested parties were denied a full and fair opportunity to meaningfully participate in the hearing in that, (a) the staff report which provided the only evidence relied on by the Board to support this standard was made available to the public only eight days before the hearing and was not received by some of the interested parties until three days before the hearing, (b) interested parties were not afforded a reasonable opportunity to comment on or rebut the staff report.

(2) As to Regulation 77.41, setting the ambient air standard for sulfur dioxide, (a) the notices for the hearing were so broad that they failed to provide either the express terms or an informative summary of the proposed action as required by then Government Code section 11424(c), (now section 11346.5) and (b) the standards were based on evidence placed in the administrative record after interested parties no longer had an opportunity to comment on or refute.

(3) That both standards were contrary to the recommendation of the State Health Department.

(4) The Board improperly refused to consider any evidence of economic impact in setting the two standards.

(5) The Board acted arbitrarily and capriciously in setting both standards in that there was no substantial evidence which would support them.

THE PROCEDURAL ISSUES

There is no question but that the Board was acting in a "quasi-legislative" capacity, hence the procedure followed presents no constitutional issue of due process. (Horn v. County of Ventura, 24 Cal.3d 605.) The procedural requirements for conducting the Board's hearings are to be gleaned solely from the Act.

Proceeding from this basic premise, the Board contends that the trial court's decision constitutes a violation of the doctrine of separation of powers in superimposing on the "quasi-legislative" function and the prescribed statutory procedure a notion of "fairness" which a court must define on a case-by-case basis.

Though the doctrine of separation of powers, of course, prevents the courts from dictating to the Legislature itself the procedure to be followed in holding hearings and enacting legislation, an administrative agency, in the exercise of what has been described as "quasi-legislative" functions is

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in no way comparable to the Legislature itself, which is composed of individuals directly elected by the people.

Administrative agencies (with some exceptions) are creatures of statute and have limited authority. The Act imposes on administrative agencies a myriad of constraints not applicable to the Legislature. The agencies' actions are specifically made subject to judicial review. Thus we wish to disabuse the Board of the notion reflected in its briefs that it enjoys a status comparable to that of the Legislature.

The role of the courts in reviewing the actions of an administrative agency is essentially that of discerning what the Legislature intended by the statute which created the agency and the Act which the agency is obliged to obey.

It is entirely consistent with the doctrine of the separation of powers for a court, as the trial court did here, to interpret the requirements of the Act as manifesting a legislative intent that an agency provide the persons to be regulated with a fair opportunity (1) to present their case, (2) to insure that the agency has available to it all relevant evidence, and (3) to counter or refute input which is contrary to their position. The California Supreme Court and the Courts of Appeal have repeatedly expressed this concept.

"The procedural directions of the APA are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review. (<u>California Assn.</u>

of Nursing Homes etc., Inc. v. Williams, 4 Cal.App.3d at pp. 810-812.) Although implied rather than expressed, these objectives are just as statutory and just as binding as the APA's itemized directions. Compliance with procedural minima does not necessarily achieve these goals." (California Optometric Assn. v. Lackner, 60 Cal.App.3d 500, at 509.)

Further the Supreme Court in California Hotel & Motel Assn. v. Industrial Welfare Com., 25 Cal.3d 200, stated at page 212:

"Although administrative actions enjoy a presumption of regularity, this presumption does not immunize agency action from effective judicial review. A reviewing court will ask three questions: first, did the agency act within the scope of its delegated authority; second, did the agency employ fair procedures; and third, was the agency action reasonable." (Emphasis added.)

The Board relies heavily on the United States Supreme Court decision in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519. There the high court, in interpreting the federal Administrative Procedure Act, which is similar to California's Act, concluded that the procedures set forth in the federal law were "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." (Page 524.)

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We are asked by the Board to adopt that same approach in interpreting the Act and hold that literal compliance with the Act is all that is required. In making that proposal, the Board points to Government Code section 11346 (formerly § 11420) which reads:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed <u>by any such statute</u>. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such <u>legislation</u> shall do so expressly." (Emphasis added.)

Board contends that the use of the words "imposed by any such statute" and the further reference to subsequent legislation indicate that the Legislature intended to foreclose the courts from imposing additional requirements and reserved that power solely to itself.

We read the language in a different light. The above quoted provisions are simply an attempt by the Legislature to avoid any implied repeal of statutes previously enacted or any conflict with future statutes which may arise because of

legislative oversight. As to the subject of judicial interpretation, the statute is silent and therefore neutral. The rationale of Vermont Yankee Nuclear Power Corp. v. NRDC, supra, has previously been refused application in California. (California Optometric Assn. v. Lackner, supra.) We agree with that refusal.

Furthermore it is not at all clear that the Board complied with the letter of the Act in any event. The trial court found that insofar as the hearing on the sulfates standards was concerned, the notice did not comply with the Act as it was then written. Certainly the procedure followed did not comport with the present requirements of the Act.

In order to demonstrate the soundness of the trial court's conclusion that, assuming a compliance with the statutory mimimum, the overall procedure was arbitrary and unfair, it is necessary to set out in some detail the background of the dispute and the procedure that was followed.

On January 15, 1976, the Board noticed a public hearing for February 20 and 21, 1976, to consider the standard for sulfates and at the conclusion of the hearings adopted the standard earlier noted. The health department's presentation at the hearing contained the statement that it would require three to five years to develop the necessary scientific data for a sulfate regulatory program. This is because of the great variety of sulfates that exist in the environment, not all of which are harmful.

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Hence the evidentiary basis for the Board's action became an 84 page complex staff report which was provided to the interested parties, as the court found, just three days prior to the hearing. All requests for continuances in order to examine and comment on that report were denied.

As distinguished from the hearing on the sulfate standard, which was apparently the first attempt to set a standard for that material, the hearings in 1977 as to the standard for sulfur dioxide were conducted against a background of prior ventures into the field.

In 1969, the standard had been set at .04 parts per million. In 1974, it had been raised to .10 parts per million only to be changed back to .04 parts per million in 1975. That latter action had, however, been enjoined by the Sacramento Superior Court. That injunction apparently prompted the notice for new hearings on the subject in April of 1977.

The Board issued four separate notices of the new hearings in which it indicated that it would consider a number of wide-ranging alternatives from levels lower than the existing .04 parts per million standard to much higher concentration. Board's staff recommended the re-adoption of the .04 parts per million standard. All of the testimony at the hearing focused on that recommendation including expert testimony that implementation of such standard would cost a minimum of 44 billion dollars by the year 2000.

At the close of the hearing, the Board announced that it would keep the record open until June 5, 1977. On June 6, 1977, the Board placed in the record a staff report based on data received from Japan concerning the effect of concentrations of .05 to .09 parts per million of sulfur dioxide in combination with high levels of oxidants -another form of pollution.

The standard adopted was, as noted, the .05 parts per million level in combination with high oxidant level. This standard was based primarily on the Japanese data. All efforts by the interested parties to obtain the right to challenge this belated material were rejected. Needless to say, the final result had never been mentioned in the notices of hearing either in express terms or by way of an informative summary.

While there is no requirement in the law that an administrative agency obtain a staff report or follow the recommendation of such report, it is a matter of common knowledge, borne out by the above described conduct of the Board, that administrative agencies rely heavily on staff reports and that staff recommendations carry great weight.

We are of the opinion that the Board's conduct in the proceeding were contrary to the spirit and purpose of the Act and were arbitrary and capricious.

The entire thrust of the Act as pertains to rule making is that there be a full exposure of the issue involved

At the close of the hearing, the Board announced that it would keep the record open until June 5, 1977. On June 6, 1977, the Board placed in the record a staff report based on data received from Japan concerning the effect of concentrations of .05 to .09 parts per million of sulfur dioxide in combination with high levels of oxidants -another form of pollution.

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and the agency's proposal so that the agency may have the benefit of all relevant evidence. Additionally, the persons to be regulated are to be permitted to respond in a meaningful way to the proposed action and the evidence upon which it is based. Here there was no such opportunity at either hearing.

The trial court's findings that there was a lack of fundamental fairness in the hearings and a failure to comply with minimum <u>statutory</u> requirements are unassailable.

<u>ECONOMIC IMPACT</u>

In adopting the two standards under attack the Board specifically rejected any contention that, in setting ambient air quality standards, the cost of, or the resources available to achieve, compliance be considered. The position of the Board is that its responsibility is to determine the permissible concentration levels of various pollutants in terms of the public health and welfare and that the economic impact of compliance is a consideration for the local or regional districts in adopting "reasonable" strategies in meeting those standards. It argues that the phrase "effect on the economy" as used in Health and Safety Code section 39606, refers only to the effect of <u>pollution</u> on the economy and not to the effect of its regulation.

Health and Safety Code section 39606 provides that the Board shall adopt standards of ambient air quality for each air basin on the basis of a number of considerations. When these

standards are adopted the local districts are mandated to adopt reasonable regulations to achieve and maintain them (Health & Saf. Code, § 40001). The Board is then empowered to review those local regulations for reasonableness and efficacy (Health and Saf. Code, § 41500).

It is evident from an examination of the statutory scheme and the application of common sense that the level at which the ambient air quality standards are set will, in large measure, predetermine at least the minimum level of the cost of compliance. The statutory scheme does not envision "reasonable attempts to achieve compliance" at the local level, instead it mandates compliance by the most reasonable method.

The Board's position that the consideration of the economic impact of achieving and maintaining a particular standard has no place in the adoption of the standard in the first instance is pure sophistry and simply ignores reality. One might ask how can the economic effects of pollution be considered without any reference to the effect on the economy of the cost of eliminating it?

The basic statute (Health & Saf. Code, § 39606), in enumerating the many factors to be considered in adopting ambient air quality standards, includes such things as "irritation to the senses", "aesthetic value" and "interference with visibility," which are, of course, matters detrimentally affected by pollution but are not health related.

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It is a fact of life that in our modern industrialized and urban society an absolute pure environment under the present state of the art, is unattainable. Further, a viable, thriving industry and commerce is the life blood of our economy and thus an ingredient of the public welfare.

While it is true, as Health and Safety Code section 39606 recognizes, that air pollution detrimentally affects the public welfare and the economy in its impact, for example, in agriculture and tourism, it seems to us that it is impossible to promulgate a reasonable standard for ambient air quality, as the Board is required to do, without balancing the benefit of the standard against the cost of its achievement and the level of the resources available for control.

In considering pollution's effect on aesthetics, visibility, minor irritation of the senses or other aspects of "public welfare", the cost of eliminating the undesirable effect certainly must be a significant factor in setting the standard.

We also believe that in the area of health, for reasons which we will point out, the effect of the regulations on the economy must be considered as well. The record before us reveals that the Board, by virtue of its composition, lacks any expertise in the medical field and is operating in an area in which the scientific data is anything but exact or conclusive. Hence the standards here were not set on the basis

of medical evidence which dealt in absolute terms with certain effects upon health.

We have no clear legislative history to guide us in determining the Legislature's intent concerning economic considerations in regulating air quality insofar as it pertains to health considerations. On its face, Health and Safety Code section 39606 appears to us to call for a consideration of the economic impact of the standards themselves as well as the impact of pollution on the economy.

This interpretation is fortified by the fact that the Board is authorized to adopt different standards for each of the various air basins. It seems logical that the effect on the health or well being of human beings of a particular level of pollution would be the same throughout the state. From that it follows that the only significant variable between the various air basins would be the impact on the economy in achieving and maintaining a particular level of air quality.

That the Legislature is concerned with economic impact in the area of regulating air quality, is evidenced by the fact that in Health and Safety Code section 43101 it requires the Board to consider impact on the economy in adopting vehicle emission standards. Further, Government Code section 11346 requires a statement of the effect of all regulations in the form of the legislative council's digest which appears on bills in the Legislature. That form always includes a governmental cost impact statement.

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The very creation of the Board is evidence that the Legislature intended that there be a balancing process in setting the standards. Otherwise the Legislature could have simply set the ambient air standards at zero pollution and mandated the local districts to achieve that level.

Even if we were to assume that the phrase "effect on the economy" as used in the statute meant only the effects of pollution, or if that phrase were deleted from the stature entirely, we would still conclude that consideration of the effect of compliance on the economy is a necessary ingredient of "reasonableness."

Perhaps the strongest support for our conclusion is to be found in a portion of the Board's own brief in attacking another facet of the trial court's ruling. The trial court in several of its conclusions ruled that the Board was not authorized to adopt a standard, based on a margin of safety, more stringent than the scientific evidence would support, and that the Board was required by statute to follow the recommendations of the health department.

The Board on the other hand contends that it has a wide-ranging mandate in protecting public health to adopt safety margins and to be more stringent in setting levels of air quality than those recommended by the health department or suggested by other scientific data.

In support of that position, and in asserting the need

for flexibility, the Board points out that the area is "on the forefront of evolving scientific evidence", that the evidence before the Board consists of "highly technical and <u>disputed</u> scientific evidence," and that all scientific evidence is merely a matter of assessing probabilities and risks. In short, the Board concedes the lack of certainty and provable clinical harm in the scientific evidence.

From this the Board argues for broad discretion on its part and cites with approval the following language from <u>Ethyl Corp.</u> v. <u>Environmental Protection Agcy.</u>, 541 F.2d 1, at pages 24, 25:

"Questions involving the environment are particularly prone to uncertainty. Technological man has altered his world in ways never before experienced or anticipated. The health effects of such alterations are often unknown, sometimes unknowable. While a concerned Congress has passed legislation providing for protection of the public health against gross environmental modifications, the regulators entrusted with the enforcement of such laws have not thereby been endowed with a prescience that removes all doubt from their decision-making. Rather, speculation, conflicts in evidence, and theoretical extrapolation typify their every action. . . .¶ Undoubtedly, certainty is the scientific ideal--to the extent that even science can be certain of its truth. But certainty in the complexities of environmental medicine may be achievable only

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after the fact, when scientists have the opportunity for leisurely and isolated scrutiny of an entire mechanism."

While we agree with the Board that because of the lack of certainty in the area it necessarily must have some flexibility, that same lack of certainty looms large as the very reason why the effects of the standards on the economy must also be considered.

Flexibility does not amount to an unbridled license under which the Board, in its quest for the elusive goal of absolutely pure air, may destroy the economy which is also necessary for our survival.

Thus it behooves the Board to be judicious in its adoption of air quality standards for the reason that the costs of compliance are ultimately borne directly and indirectly by the very public which the Board professes to protect.

THE ROLE OF THE STATE DEPARTMENT OF HEALTH SERVICES

Prior to 1967, the health department had the responsibility for establishing ambient air quality standards. In that year, the Legislature enacted the Mulford Carroll Air Resources Act. The Board was created and given responsibility for establishing ambient air quality standards with the proviso that standards relating to health effects shall be based on recommendations of the health department. (Health & Saf. Code, § 39606(b).)

It seems obvious that this proviso was to insure that the Board, whose membership lacks any medical training or expertise, look to the health department as its primary source of information and expertise.

Board contends that the trial court's findings and conclusions amounted to a holding that the Board rather than merely basing its standards on "recommendations" of the health department was required to adhere to and not deviate from such recommendations. We do not read the trial court's conclusion in that manner.

We agree with the Board that while its standards relating to health must be based on recommendations of the health department, those standards do not have to be simply a rubber stamping of the recommendations. These recommendations, however, must provide the base from which the standard is evolved and constitute the central core of the regulation.

In determining the ultimate issue of whether the Board's regulation is within the scope of its delegated authority, reasonable (California Hotel & Motel Assn. v. Industrial Welfare Com., supra) and supported by substantial evidence, the court must examine the basis for the health department's recommendation and the Board's deviation from those recommendations.

In essence that is exactly what the trial court did. The trial court found that as to the SO^2 standard, the

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essence of the health department input was that there was no demonstrable adverse health effects from a level lower than .10 parts per million [4] and as to the sulphate standard there was no present scientific data upon which to base any standard. The health department as a safeguard based on a complete lack of scientific data, did recommend the adoption of an _interim_ standard of .25 per cubic meters of air in the presence of elevated levels of oxidants.

The trial court then, after an exhaustive examination of the administrative record, found that there was simply insufficient evidence to justify the wide divergence between the material presented by the health department and the standards finally adopted. In essence this was a holding that the Board acted arbitrarily and capriciously.

SCOPE OF REVIEW

Since we are here examining a "legislative" type of regulation purportedly adopted pursuant to a statutory grant of authority, we are not bound by the determination of the trial court, but must make our own determination of whether the record shows a reasonable basis for the Board's determination. (_Lockard_ v. _City of Los Angeles_, 33 Cal.2d 453; _Ralphs Grocery Co_. v. _Reimel_, 69 Cal.2d 172.)

We are persuaded, however, that the trial court's conclusion based on the administrative record was sound, well

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4. The federal standard is .14 parts per million.

supported and correct. The test, we reiterate, is whether the regulation was within the delegated authority, reasonable and adopted pursuant to proper procedures. (Davis, Admin. Law Treatise (2d ed.) Vol. 2, p. 59, § 7.13 (1979).)

As we have indicated, the procedures followed were defective. Beyond that, given the requirement that the statute under which the Board purportedly acted, required that the ambient air quality standards be based on recommendations from the health department, we conclude that the scientific evidence underlying those recommendations and the recommendations themselves were insufficient to forms a basis for the regulations that were adopted.

Such a characterization of the evidence does not involve this court in reweighing the evidence before the Board, but simply exposes the necessity for the Board to adopt ambient air quality standards which bear some rational relationship to the scientific data and the health department's recommendations and to balance the hoped-for benefits against the cost of compliance in attempting to adopt regulations which are worthy of the appellation "reasonable."

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

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