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## Air Pollution in Albuquerque - Bernalillo County

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## COMMENT

### AIR POLLUTION IN ALBUQUERQUE— BERNALILLO COUNTY

Some say the world will end in fire, Robert Frost wrote, some say in ice. Recent surveys suggest, however, that pollution and depletion are also great, and may suffice. Large-scale burning of fossil fuels conceivably could poison humanity out of existence, or ultimately asphyxiate it.<sup>1</sup>

Such dire possibilities are not unrecognized. The Air Management Division of the Albuquerque-Bernalillo County Environmental Health Department published an uneasy conclusion that

Albuquerque has always been proud of its clean, clear air; however, with its projected increase in population, industry, and transportation we may expect to find higher levels of air pollution unless we find and control the contaminating sources.<sup>2</sup>

To anyone who has paused to notice that much of the city is no longer visible from the eastern or western heights most mornings, these words might already have generated some concern. And, if the unnatural brown pall shrouding the city appears discomforting today, consider that the population of Bernalillo County is anticipated to expand threefold by the year 2000.<sup>3</sup> Since local air pollution is approximately 90 percent caused by motor vehicles,<sup>4</sup> and the number of motor vehicles bears a direct relationship to population,<sup>5</sup> the mass of Albuquerque-Bernalillo County's air pollution might also be expected to expand nearly threefold by the year 2000.

Albuquerque-Bernalillo County has little time to waste. The brown pall, about 40 percent of the total local air pollution,<sup>6</sup> is comprised of particulate matter, hydrocarbons, and nitrogen oxides. These substances are primarily responsible for reduced visibility and soiling problems, and some are sufficiently toxic to augment health difficulties. Moreover, they threaten New Mexico's most profitable industry, tourism.<sup>7</sup> Invisible carbon monoxide, comprising nearly 60

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1. Stegner, *Conservation Equals Survival*, Am. Heritage, Dec., 1969, at 14.

2. 1967 Albuquerque-Bernalillo County Annual Atmospheric Emissions Inventory, at 1.

3. Albuquerque-Bernalillo County Air Quality Control Board Res., at 1 (July 29, 1968).

4. Albuquerque News, Jan. 22, 1970, at 4, col. 3. The report was based on an interview with Victor R. Bickel, director of the Albuquerque-Bernalillo County Dep't. of Environmental Health.

5. *id.*

6. 1969 Albuquerque-Bernalillo County Annual Atmospheric Emissions Inventory, at 6-7.

7. New Mexico Lobo, April 14, 1970, at 5, col. 3. Article compiled by members of the U. of New Mexico Earth Day Research Committee.

percent of the total weight of local air pollution,<sup>8</sup> may be an even greater menace. It displaces oxygen from the bloodstream, and even low concentrations produce headaches and slow mental and physical activities.<sup>9</sup> Concentrations of 1000 parts per million parts of air are fatal.<sup>10</sup> Because motor vehicles discharged over 214,000 tons in 1969,<sup>11</sup> a sixty percent increase over the 1967 survey,<sup>12</sup> and motor vehicle use is likely to increase considerably in the future, intolerable carbon monoxide pollution may soon be a priority problem. Mr. Lane Kirkpatrick, Air Management Engineer of the Environmental Health Department, warns that

[W]ith our present equipment and data it would be difficult to prove beyond a reasonable doubt that any *serious* health or adverse effects on vegetation are caused to a large degree by air pollution. . . . However, if preventative measures are not taken now it will not be long before we have general suffering from eye and respiratory irritation, plant damage and soiling problems.<sup>13</sup>

Nationally, motor vehicles are responsible for about 50 percent of the annual air pollution.<sup>14</sup> The local problem is therefore unique, being almost exclusively the result of motor vehicles—fuel combustion products, fuel evaporation, particles from rubber tires, and dust from dirt roads.<sup>15</sup> The peculiarity of the local problem is complicated by unusual topography and meteorological conditions which cause this pollution to accumulate into layers over 300 feet high in low parts of the county from sunset one day to late morning the next. There is a “nocturnal temperature inversion which traps pollution, and a mountain-valley wind effect which reinforces it.”<sup>16</sup> Consequently, any viable program of air pollution abatement for the Albuquerque-Bernalillo County vicinity must be particularly concerned with motor vehicles.

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8. *Supra*, note 6, at 3.

9. New Mexico Lobo, April 14, 1970, at 5, col. 3.

10. Stokinger, *Effects of Air Pollution on Animals*, 1 Air Pollution 282-334 (A. Stern ed. 1962).

11. *Supra*, note 6, at 6.

12. *Supra*, note 6, at 3. The author suggests that part of the increase may be attributed to improved emission factors used in analyzing air samples, but the significance of this is questionable.

13. 32 J. Environmental Health, Sept. 1969.

14. Special Senate Subcomm. on Air and Water Pollution, 88th Cong., 2d Sess., Steps Toward Clean Air 3 (Comm. Print 1964). *See also*, Muskie, *Role of the Fed. Gov't in Air Pollution Control*, 10 Ariz. L. Rev. 19 (1968).

15. *Supra*, note 4. *See also*, note 2. *supra*, at 2. Statistics vary slightly, which may be attributed to minor variations in methods of categorizing pollutants and their causes.

16. Speech by Eldred O. Mox concerning the Parson-Whitmore Co., May, 1969.

This writer submits: (1) that air pollution in Albuquerque-Bernalillo County is unusual, almost wholly caused by motor vehicles and compounded by a peculiar local topography and meteorological conditions; (2) that the Federal Air Quality Act of 1967 which purports to preempt all regulation in this respect may be unsuitable locally; and (3) that local government has both the obligation and the power to oversee implementation of an enlightened program of air pollution abatement.

## I THE AIR QUALITY ACT OF 1967 and the 1968 AMENDMENTS

Arguably, the Air Quality Act of 1967, insofar as it purports to establish satisfactory standards for automobile emission devices, preempts the regulation of pollution caused by motor vehicles. Section 208(a) of the Act prescribes:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines. . . . No State shall require certification, inspection, or any other approval . . . as condition precedent to initial retail sale, titling . . . , or registration of such motor vehicle, motor vehicle engine, or equipment.

No doubt the methods and objectives of this Act are ambitious in light of long-standing public apathy which has permitted some 85 million tons of automobile wastes to be emitted into the air of the United States annually.<sup>17</sup> But are they suitable for Albuquerque-Bernalillo County? This writer submits that the methods and objectives of the Act may be deficient.

Essentially, the Act institutes regulations designed to control the concentration of hydrocarbons and carbon monoxide by setting standards for crankcase emissions and exhaust emissions,<sup>18</sup> as well as control systems and devices.<sup>19</sup> All 1968 and later models are affected.<sup>20</sup> The 1968 amendments, applicable to 1970 models,<sup>21</sup> impose stricter standards and, for the first time, include vehicles of foreign manufacture.<sup>22</sup> Conversely, however, the standards do not

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17. Report by Dr. John Middleton, director, National Center for Air Pollution Control (U.S. Public Health Service), Wash. D.C. (Mar., 1967).

18. 45 C.F.R. § 85.10-85.20 (1968).

19. 45 C.F.R. § 85.12 (1968).

20. *Supra*, note 18.

21. 45 C.F.R. § 85.30, 85.40 (1968).

22. Clean Air Act, 42 U.S.C. § 1857f-2(a)(1) (Supp. 1968).

apply to those manufactured in the United States solely for export and so labeled,<sup>23</sup> suggesting that the U.S. foreign policy unfortunately includes the exportation of pollution problems.

Enforcement of the emission standards is prescribed by means of a certification procedure which hinges on tests conducted by the Surgeon General and pertinent data required of the manufacturer.<sup>24</sup> Manufacture of non-conforming vehicles is prohibited, and enforcement is aided by a provision making illegal a manufacturer's refusal to provide certain information. Also, the removal or making inoperative of any control device prior to its sale and delivery to the ultimate purchaser is made a separate offense.<sup>25</sup> The Act gives district courts of the United States jurisdiction to enjoin these violations and subject violators to a maximum \$1000 fine.<sup>26</sup>

However excellent their intentions, the designers of the Air Quality Act by no means created a panacea for the Albuquerque-Bernalillo County air pollution problems. The Act has serious deficiencies, and it will be unfortunate if state and local governments interpret section 208(a) of the Act to exclude rectifying legislation below the federal level.

A most apparent deficiency of the Act is the limited scope of its operation with regard to motor vehicles. Automobiles constructed prior to 1968 appear to be immune to the exhaust emission controls set forth in the Act for later models. Possibly Congress considered regulation of the earlier models as impracticable, or a heavy burden to impose on pre-Act owners in light of the considerable expense and inconvenience to install emission control devices conforming to government specifications. Whatever the rationale, this gap in the law permits a substantial number of vehicles to escape controls and diminish the effectiveness of the Act.

Another serious deficiency of the Act is its inflexibility in dealing with varying types and intensities of local air pollution caused by motor vehicles alone or in conjunction with other sources. A sensible observation has been that

[T]he severity of a locality's condition is contingent upon the amount and type of pollutants as well as those natural phenomena—topography, wind speed and direction, sunlight, precipitation, temperature and the susceptibility of the population to a particular

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23. Clean Air Act, 42 U.S.C. § 1857f-2(b)(3) (Supp. 1968).

24. 45 C.F.R. § 85.61 (1968).

25. Clean Air Act, 42 U.S.C. § 1857f-4 (Supp. 1967).

26. Clean Air Act, 42 U.S.C. § 1857f-3(a), 4 (Supp. 1967).

pollutant or combination of pollutants,<sup>27</sup> which create a different pollution problem for each unique geographical location.<sup>28</sup>

The Air Quality Act attempts to implement a nationally scaled solution for what may often prove to be a local problem not consistent with national averages. Interestingly enough, some recognition of this possibility exists within the Act itself, which waives preemption in favor of state regulation in California,<sup>29</sup> because that state has

... demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need be more stringent than national standards.<sup>30</sup>

Since Albuquerque-Bernalillo County's air pollution consists almost wholly of motor vehicle emissions and is subject to peculiar topography and meteorological conditions, it remains suspect whether the Air Quality Act, designed to abate automobile pollution at national averages, will beget satisfactory results locally. Quite possibly it will not.

A third deficiency of the Act is that spirited enforcement remains only problematical. While the Secretary of Health, Education, and Welfare has been empowered to set and enforce standards governing the manufacture of new motor vehicles and their engines,<sup>31</sup> if these standards are never enforced "they might as well be written on water."<sup>32</sup>

Enforcement at both national and local levels bears probing. Recent disclosures by Ralph Nader, for instance, suggest that as many as 80 percent of automobiles manufactured in the United States today do not meet the emission control standards set by the Air Quality Act and its amendments.<sup>33</sup> Mr. Nader's accusation might appear borne out by the exceptional increases in motor vehicle pollution in Albuquerque-Bernalillo County since the 1967 survey,

27. U.S. Dep't. of Health, Education and Welfare, *The Effect of Air Pollution* 7 (1967); U.S. Dep't of Health, Education Welfare Press Release No. R43 (Aug. 4, 1967) stated:

[A]ir pollution is not the same from place to place. . . . The major component of New York's problem is sulfur dioxides; while Los Angeles is well known for its photo-chemical smog. Comparing the two kinds of pollution is difficult; they are very different chemically, and their effects differ also. . . . [T]he meteorological and topographical characteristics of a place can have a considerable influence on the seriousness of the air pollution problem.

28. 10 *Ariz. L. Rev.* 99 (1968).

29. Air Quality Act of 1967, 42 U.S.C. § 1857f-6a(b) (Supp. III, 1967).

30. S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967).

31. Air Quality Act of 1967, 42 U.S.C. § 1857f-1 (Supp. Feb., 1968).

32. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1956) (dissenting opinion of Frankfurter, J.).

33. *New York Times*, Mar. 24, 1970, at 26, col. 5.

despite federal law requiring anti-pollution devices on motor vehicles since 1968. The failure to achieve results is disconcerting. Local enforcement of the Act, largely dependent on grants by the Secretary of HEW to appropriate state air pollution control agencies to develop uniform emission device inspection and emission testing programs,<sup>34</sup> remains unfunded and inoperative.

## II THE STATE OF NEW MEXICO

Consideration should be given to the proposition that local government has both the obligation and the power to oversee implementation of an enlightened program of air pollution abatement. Any analysis of local authority to deal with air pollution must begin with what has been accomplished at the state level, for it is the long-standing rule that state law is supreme over inconsistent local legislation.<sup>35</sup>

Despite the New Mexico Legislature's preoccupation with such vital matters as curtailment of bawdy poetry and stimulation of New Mexico movies, the threat of federal intervention contained in the Air Quality Act,<sup>36</sup> absent reasonable state action to set and enforce air quality control standards, prompted the Legislature to pass an Air Quality Control Act in 1967,<sup>37</sup> and subsequent amendments and supplements in 1970.<sup>38</sup> The New Mexico Act creates a state air pollution control agency under the State Health and Social Services Board whose purpose is to implement Title I of the Federal Air Quality Act, relating to air quality control standards.<sup>39</sup> It also designates that "A" class counties and municipalities within "A" class counties must provide for local administration and enforcement of reasonable standards.<sup>40</sup> A supplemental provision, relating to motor vehicle emission control devices within the purview of Title II of the Air Quality Act, specifies that

[N]o person shall drive or move on any street or highway any registered gasoline-fueled motor vehicle unless the factor-installed equipment and devices or their replacements designed to prevent,

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34. Air Quality Act of 1967, 42 U.S.C. § 1857f-6(b) (Supp. III, 1967).

35. *Bowdich v. City of Albuquerque*, 76 N.M. 511 to 514, 416 P.2d 523 to 525 (1966) "The powers of a municipality are derived solely from the state."

36. Air Quality Act of 1967, 42 U.S.C. § 1857d(c)(2)(4) (Supp. III, 1967).

37. N.M. Laws 1970, Ch. 58, at 169-183.

38. *Id.*, at 169.

39. *Id.*, at 170.

40. *Id.*, at 171.

reduce or control exhaust emission or air pollution are in good working order and adjustment.<sup>41</sup>

Furthermore, disengaging an emission device is a petty misdemeanor subject to a fine of up to \$100 and/or six months in jail.<sup>42</sup>

Unfortunately, the New Mexico State Legislature closed none of the gaps in the Federal Air Quality Act while opening some of its own. One of these involves local enforcement. New Mexico has yet to appropriate the matching funds necessary to qualify for federal grants to finance the development of uniform emission device inspection and emission testing programs. Nor have the necessary expenditures been approved to purchase expensive device testing equipment and pay the salaries of additional trained personnel to administer and enforce the anti-pollution measures. Absent this funding, the New Mexico legislation will be meaningless. If the Legislature's relegation of the state air pollution control agency to a secondary level within the State Health and Social Services Board, rather than create a separate air pollution control agency, evidences the Legislature's lack of enthusiasm, then the outlook for adequate funding and enforcement on the state level appears dim.

A second, potentially objectionable feature of the New Mexico legislation is the allowance for variances.<sup>43</sup> The provisions impose subjective criteria for the determination of allowances for variances, supposedly a balancing of economic benefit against environmental injury. Should any potent anti-air pollution measures actually be put into operation, it seems that the generosity with which variances will be permitted to prevent "undue economic burden"<sup>44</sup> could prove a pariah to effective abatement of pollution. And, if the New Mexico Senate's reduction of air pollution fines from the recommended \$5,000 per day to \$1,000 per day<sup>45</sup> evidences undue senatorial sympathy toward polluting industries, then the outlook for effective anti-pollution measures appears even dimmer.

### III

#### ALBUQUERQUE-BERNALILLO COUNTY

Albuquerque-Bernalillo County has both the obligation and the power to oversee implementation of an enlightened program of air pollution abatement. It has the obligation because

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41. N.M. Laws 1970, ch. 59, at 185.

42. New Mexico Citizens for Clean Air & Water Newsletter, No. 3, (Mar., 1970).

43. N.M. Laws 1970, note 37, at 176-178.

44. N.M. Laws 1970, note 37, at 176.

45. Newsletter, *supra*, note 42.



[a]ir pollution is a metropolitan problem. Any city or metropolitan area with a population of 50,000 or more has an air pollution problem. It is local government that has taken the lead in air pollution control, and it is local government that is geared to the kind of activity required to abate air pollution. The local government is the political entity closest to the urban dweller, most cognizant of his problems, and subject to political retaliation if a problem is not solved satisfactorily.<sup>46</sup>

Bereaved of adequate legislative protection from higher levels of government, a threatened citizenry will naturally turn to the more responsive local government for help. The intimacy of local government to the people especially qualifies it to promote rectifying legislation, for

[t]he basic strength of these local programs is their ability to administer closely co-ordinated, day-to-day control over recognized air pollution sources. This kind of local control is based more on active officials who are responsive to local problems and knowledgeable of local conditions than the threat of sanctions imposed by a totally comprehensive ordinance.<sup>47</sup>

This paper has emphasized that air pollution in Albuquerque-Bernalillo County is unique and may not be properly handled by a "totally comprehensive ordinance" such as the Federal Air Quality Act, nor the emasculated state legislation. This, in conjunction with a recognized obligation on the part of local government to act, occasions an examination of the power of the municipality of Albuquerque and the county of Bernalillo to deal with local air pollution.

A primary observation, at least in New Mexico, is that "A" class counties (such as Bernalillo) are endowed with essentially the same powers to enact ordinances as municipalities<sup>48</sup> (such as Albuquerque). For this reason, discussion of local governmental authority necessarily combines Albuquerque and Bernalillo County at first blush.

The political subdivisions of a state derive all power from the state,<sup>49</sup> and under the state supremacy rule, counties and municipalities have commonly been considered to hold only such powers as are: (1) expressly granted; (2) necessarily or fairly implied in, or incident to, the express powers granted; and (3) essential to the

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46. O'Fallon, *Deficiencies in the Air Quality Act*, 33 *Law and Contemporary Problems* 286 (1968).

47. *Symposium: Air Pollution, Local Regulation of Air Pollution*, 1968 Wash. U.L.Q. 234-35 (Spring, 1968).

48. N.M. Stat. Ann. § 15-36-26.

49. *Bowdich v. City of Albuquerque*, 76 N.M. 511, 416 P.2d 523 (1966).

declared objects and purposes of the corporation—not simply convenient, but indispensable.<sup>50</sup> Ordinarily, the specified powers never include authority to legislate against air pollution per se, but this has been “fairly implied” in the generally included powers to regulate health,<sup>51</sup> or eradicate nuisances.<sup>52</sup>

In New Mexico, municipal and class “A” county power to legislate against air pollution has until recently been laid out in the traditional ambiguous manner. The 1911 New Mexico Constitution makes only passing reference to county and municipal corporations, almost ignoring power delineations altogether. In his annotations of the constitution, Whittier presumes that in New Mexico,

[m]unicipalities have only such powers as the legislature may prescribe, and the power to pass ordinances is limited to the objects named by the legislature, all others being deemed excluded, but such powers may be those expressly given or necessarily implied. Grant to a municipality to pass all ordinances not inconsistent with state laws, held legal.<sup>53</sup> (citations omitted)

Albuquerque’s city charter also does not answer the question of what power to pass ordinances exists. It states that Albuquerque

... shall possess all powers granted under the municipal corporation acts and such other powers as are consistent with the constitution of the State of New Mexico.<sup>54</sup>

The municipal corporation acts outline the relevant powers only in terms of traditional phraseology. N.M. Stat. Ann. § 14-17-14(A) provides that municipalities may “[D]efine a nuisance, abate a nuisance and impose penalties upon a person who creates or allows a nuisance to exist”. N.M. Stat. Ann. § 14-16-5 specifies that:

A. A municipality may adopt by ordinance the conditions, provisions, limitations and terms of an:

....  
(2) air pollution code;

Additionally, in the case of *City of Clovis v. Crain*,<sup>55</sup> the New Mexico Supreme Court determined that Clovis had power to assess private individuals for sewage disposal facilities because “[m]unic-

50. Dillon, *Municipal Corporations*, § 55 (1st Ed. 1872).

51. See *Spokane, Wash. Ordinance C2804*, § 2, (1916); See also *supra*, note 47, at 238.

52. *Supra*, note 47, at 238.

53. Whittier, *Annotated Constitution of New Mexico*, at 61 (1st Ed. 1911).

54. Charter for Albuquerque, New Mexico, Art. I (1917, amend. 1919, 1966).

55. 68 N.M. 10, 357 P.2d 667 (1960).

ipalities have authority to do all acts and make regulations necessary for promotion of health or suppression of disease."<sup>56</sup>

Although no New Mexico cases have defined the scope of local governmental units to legislate against air pollution under a "fairly implied" interpretation of the statutes, it seems plausible that the authority should run wherever it does not collide with clearly preempting legislation on higher levels. In *Barber's Super Markets, Inc. v. City of Grants*,<sup>57</sup> the New Mexico Supreme Court upheld an ordinance granting an exclusive franchise to one defendant to collect, remove and dispose of garbage, determining that "[T]he City . . . is the sole judge as to what is best for public health and safety of its inhabitants."<sup>58</sup> This liberal concept of "implied power" is widespread. The New York Court of Appeals stated in *City of Rochester v. Macauley-Fien Milling Co.*<sup>59</sup>

The common council is thus the judge as to what ordinances it will pass for the safety and welfare of the inhabitants of the city and the protection and security of their property, and, unless an ordinance passed by it is wholly arbitrary and unreasonable, it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine. The presumption is in favor of the ordinance.

Absent legislative constraints, it is arguable that the judiciary cannot rightly pass on the scope of governmental authority. The Missouri Supreme Court, deciding the constitutionality of a St. Louis air pollution ordinance in *Ballentine v. Nester*,<sup>60</sup> reiterated the following principle:

The methods, regulations, and restrictions to be imposed to attain, as far as may be, results consistent with the public welfare, are purely of legislative cognizance. The courts have no power to determine the merits of conflicting theories, nor to declare that a particular method of advancing and protecting the public is superior or likely to insure greater safety or better protection than others. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizens.<sup>61</sup>

Albuquerque has unfortunately never ventured to exercise its

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56. *Id.*, at 17, 357 P.2d 667, 671.

57. 80 N.M. 533, 458 P.2d 785 (1969).

58. *Id.*, at 533, 458 P.2d 785, 787.

59. 199 N.Y. 207, 211, 92 N.E. 641 (1910).

60. 350 Mo. 58, 164 S.W. 2d 378 (1942).

61. *Id.*, at 70, 164 S.W. 2d at 382, quoting *Nelson v. City of Minneapolis*, 112 Minn. 16, 18, 127 N.W. 445, 447 (1910).

prerogative to regulate air pollution to any considerable extent in the past. Prevailing clear skies apparently never prompted any more action than Commission Ordinance No. 2218, a copy of the typical rudimentary air pollution ordinance prohibiting emissions of

... soot, cinders, dusts, noxious gases, fumes, vapors, or any other material or materials in such manner as to endanger or be detrimental to the health, comfort, safety, or welfare of any person or the public . . . .<sup>62</sup>

The ordinance designates emissions of a shade darker than "No. 1 of the Ringlemann Chart", with certain exceptions, to be unlawful.<sup>63</sup> Unhappily, this method of determining excessive air pollutants does not respect the cumulative properties of emissions of lesser intensity from a large number of individual sources, nor the threat of pollutants such as carbon monoxide and sulfur dioxide which are invisible to Ringlemann Chart readings. Commission Ordinance No. 2218 is therefore virtually useless to the modern problem of motor vehicle pollution in Albuquerque-Bernalillo County.

The power of Albuquerque-Bernalillo County to deal with local air pollution under the municipal corporation acts has recently been enhanced by the 1967 New Mexico Air Quality Control Act. As previously stated, the Act pointedly transfers responsibility for local administration and enforcement of the Federal Air Quality Act to "A" class counties and their municipalities. In response, the Air Management Division of the Albuquerque-Bernalillo County Environmental Health Department has drawn up a resolution consistent with Title I of the Air Quality Act, setting air quality control standards.<sup>64</sup> The resolution disciplines such categories of air pollution as industrial wastes, refuse disposal, stationary heating, and agricultural frost protection, but explicitly, "... does not include a motor vehicle or motor vehicle engine while used on a public road or highway".<sup>65</sup> Despite the intensity of local motor vehicle air pollution, compounded by deficiencies in the Federal Air Quality Act, the Environmental Health Department has refused to challenge the question of federal preemption under section 208 (a) of the Air Quality Act.

This writer submits, however, that the Environmental Health Department has substantial power to regulate motor vehicle pollution consistent with the Air Quality Act. Within the purview of the

62. Albuquerque, N.M. Air Pollution Control Ordinance No. 2218, § 4 (1962).

63. Albuquerque, N.M. Air Pollution Control Ordinance No. 2218, § 3 (1962). §§ 3(A) and (B) describe the exceptions.

64. Albuquerque News *supra*, note 3, at 1-14.

65. *Id.*, at 7.

Act this power extends to: (1) the development of uniform emission device inspection and emission testing programs for automobiles,<sup>66</sup> and (2) enforcement of Title II of the Air Quality Act within the boundaries of Albuquerque-Bernalillo County.<sup>67</sup> Beyond the purview of the Air Quality Act, yet consistent with it, this authority should also extend to cover at least one deficiency in the Act—supplementary regulation of emission standards for automobiles manufactured prior to 1968. Any constitutional question of federal preemption here is answerable by studying the criteria of preemption set out in *Pennsylvania v. Nelson*:<sup>68</sup>

1. Is the scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for states to supplement it?

2. Does the federal statute touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject?

3. Would enforcement of the state statute present a serious danger of conflict with administration of the federal program?

All these questions, with reference to local control of pollution emanating from used motor vehicles, seem answerable in the negative. In the case of *Florida Lime & Avocado Growers, Inc. v. Paul*,<sup>69</sup> the Supreme Court upheld a California statute which, in effect, excluded from California certain Florida avocados which met federal standards. The Court reasoned that: "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end."<sup>70</sup> The case of *Huron Portland Cement Co. v. Detroit*<sup>71</sup> emphasized that this principle is applicable on the level of local governments. Moreover, the Senate Committee of Public Works has made public its belief that states and their political subdivisions may legislate emission standards applicable to used motor vehicles,<sup>72</sup> attaching a degree of federal sanction to the proposition.

The above cases also reinforce the right of states and their political subdivisions to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles in regard to mat-

66. Air Quality Act of 1967, 42 U.S.C. § 1857d-1 (Supp. III, 1967). See also, *supra*, note 37, at 167.

67. *Id.*

68. 350 U.S. 497, 502, 504-05 (1956).

69. 373 U.S. 132 (1962).

70. *Id.*, at 145.

71. 362 U.S. 440 (1960).

72. S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967).

ters not covered by the Act.<sup>73</sup> Thus, Albuquerque-Bernalillo County is not precluded from implementing policies of air pollution control for motor vehicles more imaginative than simple emission control devices.

Although local authority to deal with air pollution from motor vehicles clearly extends beyond administration of certain Federal Air Quality Act provisions to the supplementary powers mentioned above, this still might not present a complete answer to the problem in Albuquerque-Bernalillo County. This paper has suggested that other deficiencies in the suitability of the Act may exist, notably: (1) high concentrations of carbon monoxide pollutants might necessitate more stringent local requirements; (2) the peculiar topography and meteorological conditions which heighten the local air pollution problem might require special controls; and (3) actual enforcement of federal standards on vehicles sold instate might be too lax to be effective. Does section 208(a) of the Air Quality Act strip the county of the right to self-defense should any of these deficiencies permit unhealthy and intolerable conditions to exist within?

Would a federal statute, designed to protect the entire nation necessarily be upheld when the very nature of its uniformity prevents its equal effect, and thus its equal protection, on persons in all parts of the country? The answer is unclear but the issue is clearly not.<sup>74</sup>

Aristotle stated, "the state exists so that man may live; it continues so that he may live happily."<sup>75</sup> Arguably, the state has the duty to give effect to a citizen's inherent right to protect his person if the latter cannot legally or practically do so himself. Such human rights, as the undeniable right to self-preservation, are contained in the ninth amendment to the United States Constitution, not only as they appeared when it was framed, but also as contemporary conditions might reveal.<sup>76</sup> Thus, although the Air Quality Act contains deficiencies which may threaten certain localities, those without legislative shelter are not without the means of exercising the fundamental right of self-protection by insuring that the purposes of the Act are accomplished for all citizens in need of protection.

Like the right of privacy, the right to affirmative, but reasonable, action to assure one's survival is "older than the Bill of Rights—older than our political parties, older than our school system,"<sup>77</sup> and if

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73. Air Quality Act of 1967, 42 U.S.C. § 1857f-6a(c) (Supp. III, 1967).

74. *Supra*, note 28, at 103.

75. Aristotle, *Politics*, p. 3 (Ellis transl. 1939).

76. Patterson, *The Forgotten Ninth Amendment* 52 (1955).

77. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

this be so, it is one of the essential rights unenumerated but still protected by the ninth amendment.<sup>78</sup>

Therefore, despite federal intention to preempt, Albuquerque-Bernalillo County may have the constitutional sanction of the ninth amendment to protect its citizens against unhealthy and intolerable conditions permitted by inadequate federal and state legislation.

#### IV SUGGESTIONS

While the problem of air pollution in Albuquerque-Bernalillo County is not yet acute, it looms more intense each year. The fact is that the city no longer enjoys the "clean, clear air" of decades past. On December 1, 1969, the county was included for the first time in the National Weather Center "Air Pollution Potential Index."<sup>79</sup> It thus becomes material to consider what ought to be done now to avert the atmospheric disasters that presently plague many of the urban sprawls of the nation. This writer submits the following suggestions:

(1) Bond issues:

- a. to cover salaries of additional trained air management personnel—engineers, administrators, etc;
- b. to purchase air pollution monitoring and emission device testing equipment;
- c. to provide matching funds to qualify for federal grants for "the planning, developing, establishing, improving . . ."<sup>80</sup> or maintaining of programs for air pollution control and of programs for the implementation of air control standards, and for the development of uniform emission device inspection and emission testing programs;<sup>81</sup> and
- d. to pave unpaved roads.<sup>82</sup>

(2) Ordinances:

- a. to *actively* administer and enforce air quality standards at least consistent with federal requirements, including local enforcement of federal emission control device standards;<sup>83</sup> and

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78. *Supra*, note 28, at 105.

79. From an unofficial "Letter of Transmittal" on air pollution compiled by students in a legislation seminar in the School of Law, U. of New Mexico, at 25 (Mar., 25, 1970).

80. Air Quality Act of 1967, 42 U.S.C. § 1857c (Supp. III, 1967).

81. *Supra*, note 66.

82. *Supra*, note 6, at 5 suggests that 70 percent of Albuquerque-Bernalillo County's brown pall could be eliminated by paving.

83. *Supra*, note 6: the 1970 New Mexico air pollution bill provides that violations of auto emission standards will constitute petty misdemeanors, subject to fines of up to \$100. A law recently passed provides that disengaging an emission device shall be a petty misdemeanor subject to a fine of up to \$100 and/or six months in jail.

b. to implement legislation requiring installation of emission control devices meeting federal standards on motor vehicles manufactured prior to 1968.

(3) Considerations:

a. to investigate the feasibility of pursuing more novel policies designed primarily to alleviate traffic congestion, but which incidentally reduce motor vehicle pollution. These include, but are not limited to: (1) zoning and routing to facilitate minimal distance requirements for traffic flow; (2) adoption of mass transit systems; and (3) creation of so-called "super blocks," or malls, to reduce in-city traffic; and

b. to investigate the necessity and propriety of enacting measures inconsistent with section 208(a) of the Air Quality Act to augment the deficiencies in the Act which might threaten the health and well-being of the local population.

Albuquerque-Bernalillo County seems to be waking to face the ugly fact of local air pollution. The Citizens for Clean Air recently adopted a resolution which endorsed the city-county Environmental Health Department's request for additional funds to combat the problems of the area. Part of the resolution consisted of a proposal to finance equipment for effective monitoring and enforcement,<sup>84</sup> costing close to \$50,000. In a special election, Albuquerque-Bernalillo County residents overwhelmingly ratified this proposal,<sup>85</sup> and three remote air pollution monitoring stations will be built. Hopefully, this is only a beginning. So much damage has been done, not only the obvious consequences of air pollution, but subtle injuries yet undetermined which may ultimately generate tremendous ecological imbalances, that reversal of air pollution's mischief will demand perhaps more attention and expense than humanity is willing to give.

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84. Albuquerque Journal, Mar. 19, 1970, § C, at 8, col. 2.

85. Albuquerque Journal, Apr. 8, 1970, § A, at 2, col. 3.